

Appendix C Checklist for Decommissioning in Legal Framework

The legal framework consists of the combination of the laws, regulations and contracts that govern operations and interactions in the petroleum sector. While these can be held within sector-specific instruments, that is, a petroleum exploration and production act, regulations and petroleum agreements, it is generally the case that there are many aspects that could also be covered under other non-sector specific legislation, for example, environmental laws, health and safety laws, tax laws and labour, local content laws and regulations.

The mechanism by which petroleum rights are held can be through a licence or a petroleum agreement (whether a concession, production sharing contract, risk service contract etc). Within this document, 'licence' (and 'licensee') is used as the reference for the rights holder; but the term can be read as either agreement or contract/contractor, as it applies to a particular jurisdiction.

A robust legal framework should address decommissioning across the entire lifecycle of an oil and gas project. The checklist below is intended to be used as a guide for ensuring that the key aspects related to decommissioning are adequately addressed in these instruments.

General

- Is there a clear definition of decommissioning?
 - Does it enable distinction to be made between mothballing and temporary shut-ins versus permanent termination of activities?
 - Is the definition consistent with international best practice?
 - Does it use language that is consistent with understanding environmental impact in the appropriate national / regional policy / regulation?

Please note: There is no singular international definition for 'decommissioning'. Older legislation often refers to 'abandonment', which is only one aspect of decommissioning. Clarity should be given to treatment of the full range of decommissioning activities, as described in Section 2.2. The definition adopted would have to take into account the definition of the other lifecycle stages (for example, exploration, development, production).

- Is there a requirement that decommissioning must be carried out according to an approved decommissioning plan? And timeframe?
- Is there a duty for all operators to decommission in a safe and prudent manner, in line with international best practice?

Please note that other terminologies such as 'good oilfield practice' could also be used in this context. It is important that the definition is sufficiently comprehensive, includes principles (for example, prudence, safety) and allows for evolving practice and technology.

- Does failure to fulfil decommissioning obligations attract penalties, depending on the circumstances?

In some jurisdictions, imposition of criminal penalties is viewed as reflective of the high level of public interest involved, and the potential health and safety and environmental risks that are associated. See recent New Zealand legislation.

- Are the circumstances under which an operator is released from its decommissioning obligations clear? In such event,
 - Is the treatment of funding decommissioning activity and clearly established?
 - Is the responsibility party for the residual liability clear?
- Are the government's obligations under international and regional laws, treaties, conventions etc. passed through to the industry?
- Is there consistency and coherence with other national laws and regional policy? For example:

- Environmental laws: environmental and social impact assessments, environmental permitting, waste management laws, anti-dumping, etc?
- Bankruptcy laws: is decommissioning given priority prior to any creditor claims being drawn on the company's assets? *(Please refer to Section 3.8, the Alberta case for context.)*
- Does the legal framework provide the minister/regulator with powers to request information as it relates to the administration of the Act? This will apply to all aspects of decommissioning over a project's lifecycle.

Licensing regime and approval processes

The legal framework should ensure that decommissioning is a key consideration across a project's lifecycle and the broader approach to the development of the sector. It should thus feature as part of the criteria being considered across all key approval and decision points of a project.

- Is a decommissioning plan required for approval of a field development plan/plan of development?
 - Does it include estimated economic limit and year for cessation of production (COP)?
 - Does it include estimated costs?
- Are all oil and gas assets covered by a decommissioning plan and requirements for a financial assurance mechanism?

Depending on the permitting regime in place, associated infrastructure (for example, pipelines, onshore processing facility) may not be included in a field development plan/plan of development and may be subject to separate licensing requirements. All related assets and infrastructure should have a similar robust legal framework. In addition, depending on the integration of facilities and regulations for third party access, not all assets may require decommissioning at the same time.

- Is the regulator's or ministerial *prior* approval required for any transfers and assignments? This includes direct or indirect change of control (for example, transactions involving share purchases of companies holding petroleum rights).

This is a feature of all modern legislation and would enable the review and assurance that decommissioning is adequately addressed. This includes due diligence on the transferee, as well as the current standing of decommissioning plan and the status of the financial assurance mechanism.

- Are the duties on termination or transfers of a petroleum licence/agreement clear?
- Is there a requirement for the operator to conduct decommissioning operations as per the approved decommissioning plan?
- Given the multifaceted nature of decommissioning, does approval of a decommissioning plan require consultation with other relevant agencies, such as a Department of Environment?
- Is there an approval process and requirements for temporary suspension or mothballing of assets?
 - Are there accompanying effective regulatory monitoring and enforcement measures in place?
 - Is there a maximum time /period after which assets must be permanently plugged, abandoned and decommissioned?
- Is there clear process around declaration of cessation of production?
- Is there a clear and explicit process and approval for decommissioning of oil and gas assets, including:
 - permanent plugging and abandonment of wells?
 - platforms and other facilities?
 - shared infrastructure and land?

Establishing requirements according to regulations provides the government with a reasonable approach to develop technical regulations to guide these activities in the future.

- Is there a clear obligation to perform decommissioning activities prior to relinquishment or termination of contract/licence? In the case of termination, what security is in place (bonds and guarantees, for example).

Adequate financial assurance

A financial mechanism should be put in place to ensure that sufficient money is available to fully fund all decommissioning activities and to avoid the taxpayer footing the bill. There are different approaches, each with advantages and disadvantages, which are summarised in Appendix A. Careful consideration should be given to the type of risk profile the assurance mechanism represents. Please note that the financial assurance mechanism should be independent of the economic performance of the asset. Any measure which links funding to the success or failure of the asset would substantially increase the risks of inadequate funding, especially in the event of a fall in prices, production or bankruptcy. These mechanisms must also be reviewed and updated regularly, as rising costs may render them obsolete.

- Is there a requirement for a financial assurance mechanism to ensure that decommissioning costs are fully funded?
- Is it clear how financial contributions are deductible for production sharing and/or tax purposes? Is it based on a cash or accrual basis?
- Is there a requirement for operators to develop credible, auditable estimates of decommissioning costs?
- Are preliminary decommissioning estimates of costs and timing of cessation of production included as part of the requirements for project approvals – in field development plans or the plan of development?
- Is there a process for reviewing and updating the estimated cost and timing of decommissioning, to ensure that the liability is adequately funded? If so, is it clear what level of detail is required and the timeframe for providing updates?

Ensuring that there is a credible estimate of the decommissioning costs and timing for cessation of production are critical requirements to minimise risks of funding the liability. The regulator should ensure that decommissioning forms part of the annual reporting by the operator. This reporting requirement should recognise that there are likely to be very little changes during the early phase of a project.

- Is there a mechanism to evaluate the sufficiency of the financial assurance (the quality of the cost estimate)? Is there a mechanism to have a third party audit?
- Are qualified/approved institutions in place to secure, hold, manage, report on and administer the financial assurance?
- Is there a clear framework, including criteria, for the release of the financial assurance after completion of activities?
- Is decommissioning funding assessed **prior** to granting any changes in ownership, control or transfer/assignment of rights?
 - Have the funding requirements of the transferor been satisfactorily met?
 - Is the treatment of any tax credits clear between the transferor and transferee?
 - Has due diligence been undertaken on the transferee to ensure a) there is not a high risk of bankruptcy, and b) it can meet the financial obligations to satisfactorily execute decommissioning activities at the end of the asset's life?
- Is there clarity on treatment of decommissioning liability in the event of bankruptcy?

Achieving appropriate protections to the government on the matter of oil and gas companies' insolvency, requires alignment of the legal provisions on decommissioning with the country's bankruptcy and insolvency laws. For example:

- Are decommissioning obligations treated as a debt owed to the government?
- Does the legal framework establish this debt as a priority over the claims of other creditors?
- Is there legal protection to ensure that funds set aside for meeting decommissioning obligations are not available to the general body of creditors of the insolvent company?
- Is there effective monitoring of the decommissioning liabilities and the financial security?

A company's financial position can change, and it is important for the regulator to ensure there is ongoing effective monitoring to understand the current or emerging risks with a particular company, as well as the industry as a whole, and also to understand what precautionary actions are warranted to safeguard the country's interests.

Decommissioning fund

Where a cash trust fund is established, the legal framework should address the following key issues.

- Are the rules governing the establishment of the decommissioning fund in line with best practice, to minimise corruption and ensure independent, prudent management by competent persons?
 - Is the fund ring-fenced and established for the sole purpose of funding decommissioning activities?
 - Is the management of the fund performed by a committee/board that includes representation by the owner of the petroleum rights (e.g., the operator)?
 - Is there transparency in the selection process and composition of the committee/board?
 - Is there a transparent, robust process, including predetermined selection criteria and due diligence, for the fund's investment manager/financial institution?
 - Is there a process for ongoing monitoring/an oversight mechanism for the fund manager and replacement in the event of certain circumstances?
 - What level of fees are being charged and how are they treated?
 - Is it clear what investment strategy and allocation across investment classes are permissible?
 - Is there regular reporting, at a minimum on an annual basis, on fund investment strategy, portfolio of assets and performance etc.?
- Is the basis for deposits to the fund by companies clear?
 - Are contributions based on volumes produced? Or a fixed fee?
 - Is the frequency of deposits clear? Are they quarterly or annually?
 - How is the adequacy of contributions relative to the estimated decommissioning costs assessed?
 - How often is this done? Is there a requirement for the operator to indicate if there are material changes that will impact funding contributions?
- Is the tax treatment related to the fund clear?
 - Are contributions to the fund deductible for production sharing and/or tax purposes?
 - Is the tax treatment of income earned held by the fund clear?
 - If there is a surplus, at the end of decommissioning, is it clear how it will be treated for tax purposes?

- Is the process for withdrawals from the fund clear?
- If there is a surplus in the fund after all decommissioning activities are completed, is it clear on how it will be treated? Will it be returned to contributors or held by the state?
- If the fund is in deficit, is the timing and mechanism for dealing with the shortfall clear?

Decommissioning plan

The incorporation of a 'decommissioning plan', which can be updated during the asset's lifecycle, provides an ongoing mechanism for engagement for the regulator and a basis for reflection of the latest view of critical factors and risks. Given the long duration of the production phase, it is to be expected that the preliminary view of decommissioning at the development phase may not necessarily be the same as during the decommissioning phase. Changes may arise from detailed planning or incorporation of new information, research, best practice and technology, as more experience is garnered in different operating environments.

- Is a decommissioning plan required for approval of a field development plan/plan of development?
- Is there a robust process in place for ongoing review of the decommissioning plan over the project's lifecycle? There should be early discussions between the operator and the regulator to ensure that the decommissioning process is well understood by both parties, as that would allow the operator to develop a realistic decommissioning plan, including a delivery timescale.
- Are the contents of a decommissioning plan clearly outlined? For example, does it include:
 - A decommissioning strategy?
 - An economic limit/year of cessation of production?
 - Decommissioning costs?
 - An environmental management planning framework?
 - A project plan and risks?
 - Arrangements for ongoing monitoring, required after decommissioning activities have been completed?
- Is it clear what the government's policy is for the treatment of each type of asset to inform the operators' decommissioning plan and strategy? That is, for wells, pipelines, platforms, processing facilities, other associated infrastructure (e.g. storage, loading)?
 - Are there any distinctions for onshore versus offshore?
 - Pipelines?
- Are there measures that the government can take if the decommissioning plan is deemed to be unsatisfactory?
- Is there a requirement to update the decommissioning plan for any material change that will impact decommissioning?
- Is there a clear, transparent and efficient process for the approval of the decommissioning plan?

Social issues

- Is there a mechanism to ensure that closure planning will be aligned with local and national development goals?
- Is there a mechanism for the regulator to ensure that stakeholders are identified and involved? Does it include a meaningful consultation process?
- Is there a mechanism for timely sharing of information with stakeholders?
- Is an assessment of the social impacts of decommissioning required?

- Is there a requirement for a stakeholder engagement plan?
- Does it specifically address vulnerable groups, such as women and indigenous peoples?
- Is there a requirement for a transition strategy to be put in place for local economies and workers, to support the period from operations to decommissioning?
- Are opportunities for the use of local employment and firms considered in the decommissioning plan?

The government should consider whether local capacity exists and, if not, how to begin to build such capacity.

Environmental issues

- Is an assessment of the environmental impacts of decommissioning required?
 - Is there a requirement for an environmental baseline?
 - Is the requirement and timing for scoping exercises clear?
 - Is there a consultation process with stakeholders?
 - Does it include a non-technical summary, including a brief explanation of the main findings and clear, concise conclusions?
- Is there an environmental management planning framework for decommissioning? (Included as part of the decommissioning plan).
- Is there a requirement to evaluate the impact of climate change and commitments towards decarbonisation on the decommissioning strategy and residual risks? For example, type and frequency of monitoring for in-situ infrastructure, potential for movement in hurricanes etc.
 - Does this consider that history may not reflect the variability and intensity of future events?
- Is it clear what environmental permits/approvals are required for decommissioning activities?
- Are there provisions for ongoing monitoring after decommissioning activities are completed? Is there a mechanism to communicate results from such monitoring to relevant government agencies?

Structures left in place will require ongoing review, to ensure that there is no leakage and/or potential threat to other users of the area – for example, those engaged in fishing.

Technical issues

- Is there a clear classification for wells? For example, shut-in, suspended or inactive, abandoned?
- Are there clear technical requirements for each well classification? Are there guidelines for temporary suspension and permanent abandonment of wells?
- Is it clear the maximum time period that a well can be suspended or inactive before it must be permanently plugged and abandoned? (This is to avoid 'orphan' wells.)
- Is it clear the maximum time period that a facility/installation can be suspended, "mothballed" or inactive before it must be decommissioned? (This is to avoid 'orphan' facilities, pipelines, sites.)
- Are there specifications for dealing with drilling cuttings? And on disposal of other materials?
- When decommissioning is deferred, are there specifications for suitably maintaining facilities? For example:
 - What maintenance is required?
 - Is there ongoing monitoring and inspection by the regulator?
 - In the event that there are integrity issues, what are the recourse measures?

Liabilities

- Is there joint and several liability for all petroleum operations, including financial obligations, penalties, incidents, decommissioning etc?
- Does the legal framework establish strict liability towards the government for any loss or damage caused, in connection with the decommissioning of the facility or other implementation of the decommissioning plan?
- Is it clear who bears responsibility for residual liabilities?

The government may want to consider provisions for retention of security (potentially for a limited period) after decommissioning activities are completed.

Reporting requirements

- Is there a requirement to provide the regulator and other stakeholders with updates on any significant modifications to the decommissioning plan? For example, changes to estimated costs, reserves, cessation of production.
- Does the legal framework provide for regular receipt of information in a timely manner (to enable agencies sufficient time to consider and act)?
- Is there a standard reporting template for collection of the information?

This would provide clarity to operating companies on what is needed and when. The government, in recognition of limited resourcing, should seek to leverage technology and standardisation to increase efficiency and reduce the administrative burden, so that more time can be spent on analysing the information (versus collecting data).

- Is there a requirement for accurate records to be kept on operational issues, which would be required for decommissioning planning and selection of optimal solution. For example, details on drilling materials, location and ongoing environmental monitoring?

These should be safeguarded and considered in transfers and assignments, especially in instances of changes in operatorship. Such records are vital for adequate understanding of what is to be decommissioned and the potential threats to the public and environment during decommissioning operations.

- Is there a requirement for a decommissioning report (also referred to as a 'close out report') to be submitted to the minister/regulator after decommissioning activities are completed?
- Are the contents of the decommissioning (close out) report specified?
- Is there a certificate of completion provided to operators if the minister/regulator is satisfied with the decommissioning (close out) report?
- Is there a provision for penalties for failure to report or keep accurate records?