

Environment

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1. General principles and governmental authorities

Until the enactment of Constitutional Amendment 9 of 9 November 1995 (EC 9/95) and Law 9,478 of 6 August 1997 (the Petroleum Law), oil and gas exploitation, production, importation and refinement in Brazil remained a strict monopoly of the federal government.

EC 9/95 relaxed the federal government monopoly over oil and natural gas industries that was set out in Article 177 of the 1988 Constitution, and authorised the union to contract oil and gas activities to state or private companies. The amendment also established the legal conditions to be observed in these contracts. These were enacted two years later and became known as the Petroleum Law.

The Petroleum Law sets out the conditions for exploiting and transporting oil, its by-products and natural gas. It contains provisions concerning the national energy policy and activities related to the oil monopoly, and establishes further regulations to these. With regard to environmental protection, Article 1, IV of the law states that “national policies on the rational use of energy sources will pursue the following objectives: ... IV – environmental protection and energy conservation”.

The Petroleum Law also created two official entities dedicated to energy policy and regulation. These are the National Council on Energy Policy (CNPE) and the National Petroleum, Natural Gas and Biofuels Agency (ANP).

Article 8, IX of the Petroleum Law also states that:

[The] ANP’s main activity will be the regulation, contracting and inspection of the economic activities inherent to the petroleum industry, it being incumbent on ANP: ... IX – to ensure compliance with good conservation practices and the rational use of oil, its byproducts and natural gas and environmental protection.

As per Article 44, the ANP is also entitled to establish contractual obligations with contractors regarding environmental protection:

The contract will establish that the concessionaire will be required to: I) – take, in all its operations, the necessary actions for conservation of the reservoirs and the other natural resources, for the safety of persons and equipment and for environmental protection.

The Brazilian Constitution includes a special chapter on environmental protection, which provides that all individuals have the right to an ecologically balanced environment. Among the many constitutional principles that relate to the environmental protection, the following should be highlighted in reference to the upstream oil and gas industry:

- the precaution/prevention principle (Article 225, §1, IV), which considers it

a crime not to undertake precautionary measures established by the authorities, as per Article 54 of Law 9,605/98, and Article 225, §1, V; and

- the polluter pays/damage repair principle (Article 225, §§2 and 3), which empowers the federal, state and municipal governments, as well as the government of the federal district, to defend and protect the environment and to take any necessary steps to protect against damage to Brazilian fauna and flora.

An entire system is dedicated to the enforcement of environmental laws in Brazil. The Brazilian Environmental System (SISNAMA) comprises:

- the Brazilian Environmental Council (CONAMA), which is the senior regulatory, advisory and decision-making agency;
- the Ministry of the Environment, which is charged with the coordination supervision and control of the Brazilian Environmental Policy; and
- the Brazilian Environmental and Renewable Natural Resources Institute (IBAMA), which is the executive agency.

SISNAMA also comprises other federal agencies, public foundations engaged in environmental protection and entities that fall under both state and municipal jurisdictions (eg, state and municipal offices and state and municipal environmental agencies).

2. Oil and gas regulation

2.1 Criteria for location

Like mining, oil and gas exploration and production are less flexible with respect to location than other industries. Indeed, exploration and production depends on the local availability of oil and gas.

According to Resolution 8, issued by the CNPE on 21 July 2003, environmental restrictions allow some areas to be excluded from exploration and production bidding. The decision to protect certain areas from exploitation will be based on joint recommendation prepared by the ANP, IBAMA and state environmental agencies.

This prior assessment does not exclude the specific environmental licensing of the activity. This involves a detailed analysis of the impact on the environment and the local community, as well as the imposition of mitigation and compensatory measures determined by the Environmental Agency.

2.2 Permits for exploration and production activities

Companies engaged in potentially polluting activities are subject to environmental licensing procedures. The general criteria for environmental licensing is defined and regulated by CONAMA's Resolution 237 of 19 December 1997, which establishes that the public authority may issue the following licenses: LP – previous license; LI – installation license; and LO – operation license. CONAMA's Resolution 237/97 also establishes that environmental licensing must be performed at only one level of

environmental authority, ie, by federal, state or municipal environmental agency.

Supplementary Law 140 of 8 December 2011 also foresees criteria for the environmental licensing procedures. As a rule, state agencies deal with environmental licensing. However, in case the licensed activity results in local impact to the environment, the licensing procedure may be taken before the municipal agencies. Moreover, if the activity is located or performed in two states or more, in the territorial sea, in the exclusive economic zone or in the continental shelf, among other cases, the licensing procedure will be taken before IBAMA, the federal agency.

Decree 8,437 of 22 April 2015 regulates Supplementary Law 140/2011 and establishes the activities that shall be licensed by IBAMA, which include exploration and production of oil, natural gas and other fluid hydrocarbons in the following scenarios (Article 3, VI):

- exploration and evaluation of deposits, including the seismic acquisition activities, piston core, well drilling and long-term testing when performed in the marine environment and land-sea transition zone (offshore);
- production, including drilling activities of wells, implementation of production and distribution systems, when performed in the marine environment and land-sea transition zone (offshore); and
- production, from unconventional resource of oil and natural gas in the marine environment and land-sea transition zone (offshore) or land (onshore), including drilling activities of wells, hydraulic fracturing and implementation of production and distribution systems.

CONAMA's Resolution 23 of 7 December 1994 prescribes the environmental licenses that must be obtained by enterprises engaging in the exploration and extraction of liquid fuels and natural gas, as follows:

- *Preliminary Drilling License (Licença Prévia de Perfuração – LPper)*, which authorises the drilling activity, after the presentation of an Environmental Control Report (Relatório de Controle Ambiental – RCA) of the activities and the delimitation of the area of the site;
- *Preliminary Production License for Survey (Licença de Produção para Pesquisa – LPpro)*, which authorises production to assess the economic feasibility of the reserve, after the presentation of an Environmental Feasibility Study (Estudo de Viabilidade Ambiental – EVA);
- *Installation License (Licença de Instalação – LI)*, which authorises the installation of units and systems for production and transportation, after the approval of Environmental Impact Assessment (Estudo de Impacto Ambiental – EIA) or Environmental Assessment Report (Relatório de Avaliação Ambiental – RAA); and
- *Operation License (Licença de Operação – LO)*, which authorises the operation of drilling activities, after the approval of Environmental Control Project (Projeto de Controle Ambiental – PCA).

CONAMA's Resolution 23/1994 additionally provides that, in case the activities

for exploration and production are located near indigenous areas, the entrepreneur shall consult the official indigenous agency, which will provide the guidelines for the development of the intended activities. Likewise, Ordinance 60 issued by the Ministries of the Environment, Justice, Education and Culture on 24 March 2015 establishes the administrative procedures that govern the action of the National Indigenous Agency (FUNAI), the Palmares Cultural Foundation (FCP), the National Historic and Artistic Heritage Institute (IPHAN) and the Ministry of Health in environmental licensing procedures held by IBAMA in case of possible intervention in indigenous and quilombo areas, in safeguarded cultural property and in malaria risk areas.

Ordinance 422 issued by the Ministry of the Environment on 26 October 2011 outlines the procedure for the environmental licensing of oil and gas exploration and production at sea and in contiguous zones.

The ordinance divides the environmental licensing procedure into three parts:

- the licensing of seismic research, which aims to establish the conditions, restrictions and measures for environmental control with which the entrepreneur is obliged to comply;
- the licensing of well drilling, for obtaining an operation license for drilling activities; and
- licensing for:
 - the construction of units and systems for the production and pipeline transportation of the fuels;
 - the exploration of the oil and gas wells; and
 - long-term test attainment, with the aim of obtaining data and information regarding reservoirs over more than 72 hours.

Although there is a consolidated legal framework regarding the exploration and extraction of conventional gas, the exploration of unconventional gas by fracking is still a new theme in Brazil. ANP's Resolution 21 of 10 April 2014 provides for the management of environmental risks of this type of activity, establishing:

- requirements to perform fracking activities in unconventional reservoirs (including applicable environmental licensing);
- ANP prior approval; and
- concerns with water use and disposal of effluents (authorisation for use of hydro resources required), seismic occurrences (either natural or induced) and chemicals injected during the fracking activities.

The legality and conditions for exploration of non-conventional gas have already been ruled by the Brazilian court, which, in a specific case, decided to suspend the activities until certain environmental and technical studies were carried out.¹

The licensing procedure can be completed by either the owner or the operator. The party that applies for the license from IBAMA assumes responsibility for the

1 Injunction granted by the Federal Court of State of Piauí, in the public civil action No. 5610-46.2013.4.01., filed by the Federal Public Prosecutor Office against the ANP and others.

activity and will be considered primarily responsible by the administration. However, it will have a right of recourse against those parties who actually give rise to any irregularity.

This is an extract from the chapter 'Environment' by Fernanda Bortolini, Maria Christina M Gueorguiev and Werner Grau Neto in Brazilian Upstream Oil and Gas, Second Edition, published by Globe Law and Business.

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