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# New regulatory drafts for the Hydrocarbons Industry

Mexico City

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On August 27 and 30, the Ministry of Agrarian, Territorial and Urban Development (*Secretaría de Desarrollo Agrario, Territorial y Urbano*, “**SEDATU**”) set out several drafts aimed at regulating the negotiation of land rights in the hydrocarbons sector (the “**New Regulations**”). The drafts are available for public consultation at the official website of the National Commission of Regulatory Improvement (*Comisión Nacional de Mejora Regulatoria*, “**CONAMER**” per its acronym in Spanish).

The New Regulations interplay with one another with a twofold purpose: on the one hand, to complete regulation on land use and occupation pending since the 2013 Energy Reform; and on the other, to reform pre-existing regulations on the subject matter.

Interested parties may comment on the drafts. It is important to note that the regulatory improvement procedure must be cleared by SEDATU prior to publishing the New Regulations in the Official Gazette of the Federation (“**DOF**” per its acronym in Spanish). These regulations will only come into effect once they are published in the DOF.



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## The New Drafts of Regulations

SEDATU, the ministry of the Federal Public Administration tasked with the issuance and enforcement on regulation for the acquisition of surface rights in agrarian matters under the Hydrocarbons Law, set out drafts of regulation which were published on CONAMER's website for public consultation. These drafts deal with the following matters:

- (i) the Resolution containing the Commencement of Negotiations Notice Form for the Land Use and Occupation of the Hydrocarbons and Electricity Industries;
- (ii) the Amendment of the Guidelines that Regulate the Mediation Process on Land Use and Occupation of the Hydrocarbons Industry; and
- (iii) the Guidelines Regulating the Procedure for the Creation of Legal Easements under Administrative Proceedings.

These new drafts will be under public consultation allowing stakeholders to provide comments thereof for regulatory improvement purposes. Nevertheless, it is important to note that the drafts are to be understood together under the context of the 2013 Energy Reform, for they are part of the same procedure of land use and occupation in the hydrocarbons industry (the "**Land Use and Occupation Procedure**").

The Land Use and Occupation Procedure is quite relevant because, pursuant to the Hydrocarbons Law, the activities related to the hydrocarbons industry (*i.e.*, surface reconnaissance, exploration and extraction of hydrocarbons, as well as construction and operation of pipelines) is a matter of public utility. This, in terms of the Constitutional framework, allows the State to create, among others, legal easements over private property or to obtain use and occupation rights to undertake such activities.

For clarity purposes, the New Regulations will be analyzed in their corresponding chronological relevance within the Land Use and Occupation Procedure.

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## Resolution Announcing the Commencement of Negotiations Notice Form for Land Use and Occupation in the Hydrocarbons and Electricity Industry (the "Form of Notice").

Pursuant to the Hydrocarbons Law, prior to the State's intervention in the process to acquire rights over the land, the party interested in developing a hydrocarbons project must negotiate with the landowners the rights to use or occupy the relevant piece of land. To that end, the interested party must (i) express its interest in writing to said landowners, and (ii) give notice to SEDATU the beginning of negotiations, through the Form of Notice, within a



15-day term. Once the notice has been filed, the parties have up to 180 days to reach an agreement. Otherwise, the State will be entitled to participate as a mediator.

This new draft of Resolution *per se* does not introduce new regulation, both rather provides the Form of Notice to file before SEDATU for projects begun in both the Hydrocarbons and Electricity industries.

The reason behind this new draft of Resolution is that the former Form of Notice, published in the DOF in 2017<sup>1</sup> only addressed the hydrocarbons sector. Thus, this new Form of Notice (i) replaces the former Form of Notice and (ii) encompasses both industries within its scope of application.

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### **Amendment of the Guidelines that Regulate the Mediation Process on the Land Use and Occupation of the Hydrocarbons Industry (the “Guidelines”).**

This second Resolution is a consequence of the pandemic caused by the COVID-19 virus (the “**Pandemic**”) and, therefore, is aimed at amending the Guidelines accordingly.

Whereas the Form of Notice finds its part in the negotiation between private parties, the Guidelines regulate the involvement and participation of the State as a mediator between the involved parties upon the termination of the aforementioned 180 day-term. Once this occurs, any party can request a mediation procedure to SEDATU. In accordance with the Guidelines, the mediation process shall have a term of 120 days, without **the possibility of extending it**. Thus, the Pandemic evidenced a legal void within the Guidelines, namely: it fails to provide the possibility of extending the term in those extraordinary cases where the 120 day-time period is not enough for reasons not attributable to parties’ disagreement.

In this regard, a paragraph is added to the Guidelines, which provides for the possibility of extending such term by up to 90 days, in the following three cases:

“I. Due to an act of God or force majeure causing the physical impossibility of one or more of the parties involved and/or making the negotiation materially difficult;

II. When the number of persons involved is greater than three, making the negotiation process more difficult, more onerous or unbalanced in the consideration offered; and

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<sup>1</sup> [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5495710&fecha=31/08/2017](http://www.dof.gob.mx/nota_detalle.php?codigo=5495710&fecha=31/08/2017)



III. Due to its complexity, in terms of uses and customs; the type of geography of the territory; the time and means to travel to the point of negotiation; and due to the territorial impact study of the projects to be developed."

While the rationale behind this amendment is understandable, it is important to note that article 106 of the Hydrocarbons Law only provides a 120-day term, so the extension introduced by the Amendment may be challenged by the parties with interest if they consider that such administrative regulation goes beyond the provisions set forth in the Hydrocarbons Law.

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### **Guidelines Regulating the Procedure for the Creation of Legal Easements under Administrative Proceedings (the “Easement Guidelines”).**

Lastly, the Easement Guidelines provide for the cases where no agreement is reached after concluding both the negotiation *inter-pares* and the State’s mediation.

If the parties fail to reach an agreement within a 30 days term despite the State’s intervention, the Ministry of Energy (and not the private parties) has the right to request SEDATU the beginning of the process to create a mandatory easement under administrative proceedings.

In general terms, the Easement Guidelines provide for (i) the content and scope of the right of easement<sup>2</sup>; (ii) the elements to calculate the monetary compensation for the legal easement; and (iii) other procedural aspects to the creation of the legal easement. Nonetheless, one particular aspect worth pointing out is that the parties are allowed to keep on negotiating and reach a deal until the legal easement is created.

Finally, it is important to note that the Easement Guidelines is a new piece of legislation introduced in the hydrocarbons industry which, together with the Form of Notice and the Guidelines, complement the legal framework on the Land Use and Occupation Procedure.

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<sup>2</sup> Hydrocarbons Law, Art. 109.- The legal hydrocarbon easement will include the right of transit of persons; the right of transport, conduction and storage of construction materials, vehicles, machinery and goods of all kinds; the construction, installation or maintenance of infrastructure for the performance of works necessary for the proper development and surveillance of the activities set forth in a Contract or Allocation, as well as all those necessary for such purpose. In any case, the legal hydrocarbon easement may not exceed the term of the relevant Contract or Assignment.



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To obtain additional information regarding the content of this document please contact our Energy and Natural Resources team in Mexico City.

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