International Journal of Business & Law Research 9(4):153-165, Oct.-Dec., 2021

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Appraisals Of Selected Oil and Gas Laws and Governance in Nigeria

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ABSTRACT

Before 1988, environmental issues did not take the centre stage in Nigeria and most of the environmental laws in place were geared towards meeting certain defined needs occasioned by the changing needs of the economy, industry and expanding urbanization. The Laws at this time were not meant to meet the immediate challenges of health and safety. As a result, this era could be regarded as pre-environmental era.[1]

Keywords: Oil, Gas, Law, Nigeria, Governance

1. INTRODUCTION

In 1988, the dumping of toxic waste in the sleepy town of Koko, in the present Delta State of Nigeria by an Italian company led to public outcry which generated a flurry of legislative activities. In that year, the Federal Government enacted the Federal Environmental Protection Agency (FEPA) Act[2] and the Harmful Wastes (Special Criminal Provisions) Act.[3] Later, in 1992 the Environmental Impact Assessment Act was promulgated.[4]

In the case of oil and gas pollution however, the effort to protect the Nigerian environment against oil pollution and degradation through statutory enactments began during the colonial period when the Oil Pipelines Act of 1956 was passed.[5] The earlier enactments in the oil and gas sector were geared principally towards regulating the exploration and production of oil. The Mineral Oils Ordinance of 1914 was the earliest legislative effort in this direction. This was replaced by the Petroleum Act, of 1969.[6] Several regulations were made pursuant to the Petroleum Act. These include the Petroleum Regulations of 1967, The Petroleum (Drilling and Production) Regulations of 1969, Petroleum (Drilling and Production) Regulations of l973 and the Petroleum (Refining) Regulations of 1974. Other pre-1988 statutes were the Oil in Navigable Waters Act of l968[7] and the Oil in Navigable Waters Regulation, 1968 made pursuant to the Act; and the Associated Gas Re-injection Act of 1979.[8] Oil and Gas Pipeline Regulations were also made in 1995. There are also other notable enactments in the area of environmental protection in the Nigerian oil and gas industry such as the Environmental Guidelines and Standards for the Petroleum Industry, 2002, the National Oil Spill Detection and Response Agency (Establishment) Act, 2006 (NOSDRA), Nigerian Maritime Administration and Safety Agency (NIMASA).

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[1] Environmental era is said to have started with the Stockholm Conference in 1972 when a new awareness on the need to protect the environment in our quest to develop arose and it became more revealing after the publication o*f Our Common Future* by the World Commission on Environment and Development in 1987.

[2] The Act has been repealed by section 36 of the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act, 2007

[3] Retained as Cap H1, Laws of the Federation of Nigeria (LFN), 2004

[4] Retained as Cap E 12, LFN, 2004.

[5] Retained as Cap O7, LFN, 2004.

[6] Petroleum Act Cap P 10, LFN, 2004.

[7] Retained as Cap P 6, LFN, 2004

[8] Retained as Cap A 26, LFN, 2004

2. The Oil Pipelines Act, 1956[9]

The Oil Pipelines Act of 1956 (as amended in 1965) laid down the legal requirements for the establishment and maintenance of pipelines necessary and supplementary to oil field and oil mining and for other purposes ancillary to such pipelines. The Act under section 4(1) provides for the issuance of a permit for the purposes of surveying the route of an oil pipeline for the transport of mineral oil, natural gas and such other products. The purpose of requiring a permit was to ensure best practices in the laying of oil pipelines across the country. To this extent, the Oil Pipelines Act has as part of its goal, the protection of the environment. This was however not expressly stated but can be implied from the provisions of the Act. The holder of a permit is essentially required to take all practical steps to ensure that there is no damage to any land entered upon in the course of laying pipelines for oil and gas transportation. In the event of any damage to land, the holder of such a permit is expected to compensate the owner of such land.[10]

The Act provides for objections to be made by any person whose interest in land may be detrimentally affected by the grant of a license.[11] Where a license has already been granted, the Act enjoins the holder to pay compensation to any person whose land or interest has been injuriously affected or any person suffering damage as a result of the holder's negligence to remedy the damage.[12] The Act further prohibits the alteration of water courses in a navigable waterway or the construction of works in under or over any navigable waterway that might obstruct the free and safe passage of vessels, canoes or other craft by an oil pipeline licensee. A licensee is also prohibited from making any construction in under or over, or depositing materials or altering the flow of water required for domestic, industrial or irrigational use, thereby restricting or reducing the quantity of water available for those purposes, or constructing works or making deposits in any waterways that will cause flooding or erosion without the prior permission in writing of the Minister.[13] There are also further restrictions on venerated lands[14] as well as specific provisions which empowers government officials to have access to the pipelines in order to inspect and ensure that the holder is acting in compliance with the license.[15]

Section 17 (4) of the Act further compels every oil pipeline to comply with the provisions of the Act and other regulations in force that concerns the prevention of pollution of lands and water. One major pitfall of this Act is that it did not make mandatory provisions for the restoration of the environment upon which compensation is to be paid as a result of damage. This is in spite of its copious provisions for the protection of individual interests and concern.[16]

The Act however made commendable provisions for courts to play appropriate roles towards a just assessment of compensation not only for damage done to buildings, economic trees or crops and for disturbance and damage occasioned by a holder's negligence and also for any other loss in value of the land or interest in land.[17] The grant of a license is also deemed to include[18] a condition that the holder shall indemnify the Minister with respect to any claim arising from injury to any person or damage to any public or private property as a result of any act or thing done by the holder of the license which does not violate the license and is deemed regular by the holder of such a license, his agents, servants and workmen, in accordance with the terms of the license.

This implies that any act legitimately done by the holder of a license and which does not violate the license is deemed regular and the holder of such a license shall not be liable in law for any injury arising from such acts. But where injuries inevitably occur, the Minister shall be the proper defendant in any suit to redress such injuries. However, the Minister shall pass the bill of such liability to the license holder at the end of the day if the plaintiff is able to establish his case.

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[9] Retained as Cap 07 LFN 2004
[10] Section 11(5) (a) (h) and (c). Oil Pipelines Act
[11] Section 14 (a) (b) (c), ibid.
[12] Section 15, ibid.
[13] Section 17 (5), Oil Pipelines Act.
[14] Sections 17,20 and 21, ibid
[15] Sections 19, 20 and 28, ibid
[16] Section 17 (5) (c), ibid.
[17] Section 23, ibid.
[18] Section 28 (2), ibid

Another problem with the Act is its provisions in section 21 for the manner in which compensation is to be paid to injured members of the public. It provides that where the interest injuriously affected is that of a local community, the court may order the compensation to be paid to any chief, headman or member of that community or be paid in accordance with a scheme of distribution approved by the court, into a fund administered by a person approved by the court on trust for the applicant for the general, social or educational benefit or advancement of that community or any section thereof.

The above approach does not provide a clear guide on how compensation received will be mandatorily applied to the respective heads under which it was received. The simplistic nature of this provision has led to endless battles among the members of the local communities over what is sometimes known as "missing compensation funds". To start with, most land owners will seldom apply compensation money received to the restoration of the damaged environment due to the prevailing poverty and low standard of living of most Nigerians. Furthermore, the technical nature of restoration is far beyond the skill, knowledge and competence of many land owners.

The Act further complicates the problem of restoration by guaranteeing that payment to any person to whom any compensation shall be paid or the payment into court of any compensation upon a decision of the court effectively discharges the person making such payments from seeing to the application of the funds thereof.[19] The implication is that the recipient has absolute discretion in the application or misapplication of the compensation money received. Thus, where there is for instance a damage to the environment, all that the liable person is required to do is to pay compensation to the land owner. Once this is done, the environment can remain in its damaged form where the land owner neglects to embark on any restoration. It is submitted that this situation is unwholesome in terms of the need to constantly restore and remedy the damage inflicted upon the environment by oil and gas pollution.

The Act provides that upon the expiration or sooner determination of a license, the holder of the license shall make good any harm done to the environment or land by removal of pipeline or ancillary installation.[20] This provision is shallow in that it tends to suggest that the mere removal of pipelines and installations by the license holder upon expiration is sufficient to restore the land upon which the pipeline has been on for so many years. This provision will not go far in assisting environmental restoration. But where the holder is expected to act honestly by going beyond the mere removal of pipelines and installations to restore the environment upon expiration of license, there will still be confusion on what constitutes adequate restoration of the environment after the tenor of a pipeline license. The unfettered discretion on the license holder to restore the environment without a clear provision of the extent of such restoration, makes such holder to be a judge in his own case. This is inconsistent with the maxim "*nemo potest esse sumil acto et judex*" which precludes a man from being a judge in his own case.

The foregoing reason also underscores the weakness in the provision that empowers the Minister to make regulations that will prescribe measures of public safety, the avoidance of interference with public works and utility in, over and under any land and the prevention of pollution of any land or water.[21] Regulations can also be prescribed by the Minister for carrying into effect the purposes and provisions of the Oil Pipelines Act.[22] Such regulations would aim at enabling public inquiry into issues such as the extent of damage upon expiry of a pipeline license. The requirement for the making of such regulations is however at the discretion of the Minister. The consequence is that restoration of the environment is actually given a backseat under the Oil Pipelines Act.

The only major effective anti-pollution thrust of the Act so far is the economic deterrence it occasions on the operators by the provision for compensation of landowners whose interest may have been injured by the activities of a license under the Act. It is important to point out however at this juncture, that even the compensation provision is not fool proof. This is because despite the provision that requires oil companies to begin immediate clean-up operations after a spill incident, by adopting the best available clean up practice and removal methods, and that oil companies should pay

[19] Section 23, Oil Pipelines Act
[20] Section 28 (2), ibid.
[21] Section 23, ibid (n19)
[22] Section 28 (2), ibid.

compensation to any person suffering damage as a result of any breakage of or leakage from the pipeline or any ancillary installation; there are negating exceptions. [23]

For instance, it is a defence under the Act available to the company, if the spill is as a result of the malicious act of a third person.[24] Thus, court-based resolution of pollution dispute involves a determination of whether the pollution was caused by sabotage since proof of sabotage negates compensation. Operators use this provision to escape liability for incidents of environmental pollution and this has worked well for them.[25] In these days where the oil companies now claim that 60 percent of oil spills are caused by sabotage,[26] it becomes difficult to see how a compensation claim can easily succeed. This is unlike the situation in the past when oil companies claimed that 75 percent of their oil spills resulted from corrosion of older pipelines and other human and equipment failure. With the agitation for resource control raging in the Niger-Delta region where most of the oil is produced metamorphosing into violent acts, it is difficult not to attribute most oil spills to sabotage. This has the effect of rendering the compensatory provisions of the Oil Pipelines Act nugatory.

3. The Oil in Navigable Waters Act (ONWA)[27]

Prior to the enactment of this Act, the liability of any person for oil pollution in Nigeria's territorial waters was not covered under any statutory provision.[28] This constituted a negative aspect of Nigerian law on oil pollution. Aside from the absence of statutory provisions, the remedy for an individual affected by damage caused by oil pollution from ships laid at Common law, in nuisance, trespass and/or negligence.[29] However, with the enactment of the Act, it became a statutory offence to discharge any oil from a ship into a part of the sea that is a prohibited area within 50 miles from land.[30]

The Act came into effect in April 1968 as an Act to control and prohibit oil spillage in the navigable waterways of Nigeria. Section 1(1) of the Act makes it an offence for a Nigerian ship[31] to discharge oil or any mixture containing not less than 100 parts of oil into prohibited sea areas.[32] This section applies to crude oil, fuel and lubricating oil, and to heavy diesel oil. This offence can be committed by the owner or master of the ship from which the discharge occurred.

The Act also by virtue of section 3(1), (2) prohibits the discharge of oil into the sea from any vessel or from any place on land or from any apparatus used for transferring oil within the seaward limits of the territorial waters of Nigeria; and all other waters (including inland waters) which are within those limits and are navigable by sea-going ships. If there is any such discharge, the owner or master of the vessel, or occupier of the land or the person in charge of such apparatus used for transferring oil, shall be guilty of an offence. Where a person is charged with an offence under sections 1 and 3 of this Act, it shall be a defence to prove that the oil or oil-mixture in question was discharged for the purpose of securing the safety of any vessel, or of preventing damage to any vessel or cargo, or of saving life.[33]

It is also a defence to prove that the oil or mixture escaped in consequence to damage to the vessel or that the oil escaped by reason of leakage, which leakage was not due to any want of reasonable care.[34]

By virtue of section 5(5) it is an offence for the master of a Nigerian or foreign owned ship which fails to install equipment considered suitable for the reduction or prevention of oil discharges. The equipment concerned are as may be specified by the Federal Ministry of Transport or his assignee.

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[23] P. C. Nwilo and F. H. Olusegun, "Oil Spill in the Niger Della", available at www. oil spill corn. Accessed 15th October, 2017.

[24] Section 11 (5) (c) ibid (n19)

[25] P. C. Nwilo and F. H. Olusegun, (n 23)

[26] Ibid.

[27] Retained as Cap O 6 LFN, 2004

[28] Paul Usoro, *Pollution in Ports: Legal Issues.* A publication of Paul Usoro & Co., Marine and Environmental.

[29] Ibid.

[30] Section 3(1) (a)-(c), Oil in Navigable Waters Act.

[31] Nigerian Ship is defined in section 16(2) of the Act to include: (i) Government ships registered in Nigeria (ii) Government Ship, not so registered, which are held for purposes of the Federal Military Government or of the Government of a State in Nigeria as they apply to other Ships which are registered in Nigeria as Nigerian Ships.

[32] Prohibited Sea areas are listed in the Schedule to the Act. They include all sea areas within 50 miles (80km) from land and outside the territorial waters of Nigeria and other geographical defined Zones of the world.

[33] Section 4 (1), Oil in Navigable Waters Act

[34] Section 4 (2) (a) and (b), *ibid*

Furthermore, it is an offence for failure of the master of a Nigerian ship exceeding gross tonnage of 80 tons not to keep a log or record of oil discharges, oil spills and ballasting activities. And it is also an offence for failure of Nigerian or foreign ship not keeps record of transfer of oil to and from their ships.[35] Making of fraudulent entries in connection with the offences is also an offence.[36] It is also the duty of the Harbour Authority to provide facilities in harbour for the disposal of oil residues. Failure to do this is an offence.[37]

Section 10 of the Act imposes a duty on the owner or master of a ship or the occupier of the place on land from where oil or mixture containing oil is discharged into the waters of Nigerian Harbour in any of the named circumstances to report such, and disclose the cause and source of the discharge to the master in charge of the affected harbour and failure to do so is punishable by fine.

A person found guilty of an offence under this Act shall on conviction by a High Court or on summary conviction by a Court of inferior jurisdiction, be liable to a fine of £1,000.00.[38] And by section 13(1) of the Act, where a fine is imposed on a vessel or owner or master, and such fine is not paid, the court in order to enforce payment may direct that the amount unpaid be levied by distress, or otherwise taken in execution by way of poinding and sale of the vessel, her tackle, furniture and apparel.

4. The Petroleum Act, 1969[39]

The stated aim of this Act is to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of all onshore and offshore revenue derivable from petroleum resources in the Federal Government and for all other matters incidental thereto.[40] This Act confers powers on the Minister of Petroleum Resources to grant licenses and leases for the purposes of exploring, prospecting or working, carrying away and disposing of all petroleum covered by the licenses or leases respectively.[41] The Minister is also empowered to grant licenses for the purposes of establishing refineries in Nigeria.[42] Under the Act, the control of the storage, importation and distribution of petroleum products in Nigeria is strictly under a license to be granted by the Minister.[43] Thus, both the upstream and downstream sectors of the petroleum industry in Nigeria is strictly placed under the control of the Minister by virtue of the provisions of the Petroleum Act.

The Act went on further to confer on the Minister the power of general supervision and inspection to ensure that activities in the sector are conducted in compliance with the Act and any regulation made there under.[44] It provides thus:

The Minister-

a. shall exercise general supervision over all operations carried on under licenses and leases granted under the Act;
b. shall report annually to the Federal Government on the progress of the oil industry in Nigeria;
c. shall have access at all times to the areas covered by oil exploration licenses, oil prospecting licenses and oil mining leases, and to all refineries and installations which are subject to this Act for the purpose of inspecting the operations conducted therein and enforcing the provisions of this Act and any regulations made there under and the conditions of any licenses or leases granted under this Act or under any corresponding law for the time being in force in Nigeria;

[33] Section 4 (1), Oil in Navigable Waters Act
[34] Section 4 (2) (a) and (b), *ibid*
[35] Section 7(1), (3) (b), *ibid*
[36] Section 7 (5) (b), *ibid*
[37] Section 8 (8), *ibid*
[38] Section 6, ibid (n 33)
[39] Retained as Cap P 10 LFN 2004
[40] Section 1, ibid.
[41] Section 2(1) (a-c), ibid
[42] Section 3, ibid
[43] Section 4, ibid
[44] Section 8, ibid

d. may arrest without warrant any person whom he finds committing or whom he reasonably suspects of having committed any offence under this Act or any regulations made there under and shall hand over any person so arrested to a police officer without as little delay as possible;
e. may by notice in writing require the holder of a license or lease granted under this Act or any contractor working for the holder (or any servant or agent of the holder or the contractor) to appear before him at a reasonable time and place to give such information as he may require about the operations being conducted under the license or lease and every person so required to appear shall be legally bound to comply with the notice and give the information;
f. may direct in writing that operations under a license or lease granted under this Act shall be suspended in any areas until arrangements have been made which in his opinion are necessary to prevent danger to life or property;
g. may direct in writing the suspension of any operation which is not being conducted in accordance with good oil field practice; and
h. may direct in writing the suspension of any operation where in his opinion a contravention of this Act or any regulation made there under has been or may have been or is likely to be committed.

By the above provisions, the Minister has an unfettered discretion in law to control, manage and supervise the oil and gas sector in such a way as to ensure freedom from pollution and its devastating effect on the environment.

In exercising the powers granted to the Minister under the Act, the Minister shall have power to make regulations prescribing standards and procedures for the purposes of the Act. [45] Specifically, the Minister may make provisions to ensure that operations are being conducted in accordance with good oil field practice and also direct the suspension of operations until he is satisfied that arrangements have been made to prevent danger to life or property.

The Minister can make regulations for a safe working environment, conservation of petroleum resources, prevention of pollution of water sources and the atmosphere, the making of reports of inquiries into accidents; the keeping and inspection of books, statistics, accounts and plans and measurement of production of crude oil delivered to refineries.

The Act made sufficient efforts to regulate environmental problems of oil pollution as it affects human life and property, it did not say much about environmental restoration following incidents of oil and gas pollution. The Petroleum Act can be said to be very terse on the issue of pollution. Although the Petroleum Act is not an Act specifically devoted to the control of pollution from oil and gas operation.[46] What is certain is that the Minister is empowered under the Act to make regulations for the prevention and control of oil and gas pollution.[47] The Minister has made some Regulations pursuant to the powers granted to him under the Act.[48]

[45] Section 9, ibid (n 39).
[46] Section 9, ibid (n 39)
[47] Specifically under section 9 (1) (b) (iii), ibid
[48] Regulations made under this power are discussed under 4.2 of this chapter, post

5. Associated Gas Re-Injection Act, 1979[49]

This Act was promulgated ostensibly to fill the vacuum created by earlier pieces of legislation. The Act set the limit of October, 1979 to April, 1980 for oil companies to develop capability for utilization of gas produced in association with crude oil and to end gas flaring by 1984, or face fines. The Act provides that no company engaged in the production of oil and gas shall after 1st January, 1984 flare gas produced in association with crude oil without the permission of the Minister in writing. Where the Minister is satisfied after 1st January 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may specify such terms or conditions as he may in his discretion choose to impose, for the continued flaring of gas or the particular field or fields, or permit the company to continue to flare for a fee in such sum as the Minister may from time to time prescribe for every 28.3l7 cubic metre (scm) of gas flared.[50]

In 1984, the Associated Gas Re-injection (Continued Flaring of Gas) Regulation amended the existing legislation to provide for limited exemption for flaring in certain circumstances. This was further strengthened by another amendment in 1985 that fixed[51] a fine of 2 kobo (equivalence of US$0.0009 in 1985) against the oil companies for every 1000 standard (SCF) of gas flared. This fine was too paltry and so did not provide any incentive to induce the companies to stop flaring. In 1998, the government raised the fine to US $11 for every 1000 cubic feet (SCF) of gas flared.

The above legislation was followed by other pieces of legislation, namely; the Associated Gas Re-injection Act of 2004 and the Associated Gas Re-injection (Amendment) Act, 2005 which made it mandatory for all oil producing companies in the country to submit detailed plans for gas utilization. The new amendment Act also prohibited the flaring of associated gas without the permission of the Minister of Petroleum Resources. These measures however failed woefully to deter the oil companies from flaring gas. Most of them preferred to pay the token fines than to embark on the installation of equipment for gas utilization.

There have however been different shifts in date for the ending of gas flaring in Nigeria by the government despite the mandatory provision of the Act to end all flares by 1st January, 1984. This provision appears to be a mere legislative declaration as the date for the ending of flares has been shifted first to 2008, later to 2010 and further to 31st December, 2012. Gas flaring is a major environmental concern in Nigeria. Flaring was initially blamed on lack of technology for harnessing associated gas.[52] After the first oil shock in the 1970's, absence of market for the gas as an alternative source of energy was advanced as the reason for flaring. It is also important to note that the absence of environmental consciousness[53] in Nigeria during the 60's and 70's contributed to the lacklustre position of the companies on the polluting effect of gas flaring on the Nigerian environment. As a matter of fact, it was in the 1980's that the issue of global warming directed people's attention to the dangers posed to the environment by gas flaring.[54]

Apologists of gas flaring have contended that the economics of associated gas utilization cost ten times as much as non-associated gas utilization and re-injection. Thus, the utilization of associated gas or re-injection is more expensive than flaring and as such the companies choose flaring the associated gas. They give the example of Algeria where despite the reduction and almost elimination of the practice, flaring still takes place deep in the deserts where no local markets exists and there is no way to bring the gas to the coast.[55] Shell is said to have threatened to end production in marginal fields where it will be uneconomical to end gas flaring so as to enable it phase out the practice by 2008.[56]

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[49] Retained as Cap A26 LFN 2004

[50] Section 3(2) (a), *Ibid*. see also Regulation 1 of AGRA (Continuous Gas Flaring) Regulations, 1984.

[51] Associated Gas Re-injection (Amendment) Act, 1985.

[52] United Nations (UN), "Harnessing Abundant Gas Resources in Oil Recovery", available at <http//www.zln.org/ecosooc dev/geninfo/afree/volJ3 no2 gas Jn,,i>, accessed 30 January 2018.

[53] R. Kaldamy,."Gas Flares Reduction Initiative and Shell Nigeria", available at htpJ/www.shell.com/home/frarn,jigjgçrja&c/aJCz 98. Accessed 30 January 2018.

[54] ibid.

[55] S. Eze, "Pan Ocean Corporation: Nigerian Gas Flaring and Oil Industry," *Weekly Trust*, 12 August 2015, p. 5.

[56] Shell Nigeria Annual Report, 2005, "People and Environment", www.shell.org.com, accessed 12 February 2016.

According to them, "if gas had not been flared, the oil will not have been produced economically."[57] They argue that an infrastructural gap exists between people who are looking for gas and those that are flaring it. Despite the above arguments, it is submitted that the new status of gas in the global energy debate as well as environmental and social considerations weigh in favour of practicing the economy of gas utilization as against the current practice of flaring it.

The current efforts at the harnessing and utilization of natural gas by the Liquefied Natural Gas (LNG) in Nigeria should be list tracked to ensure the economic utilization of natural and a total stoppage to all forms of flaring activities in line with global objectives. Nigeria currently has about thirteen Gas utilization projects listed below:[58]

1. The Nigeria LNG Limited
2. The Nigeria Gas Company
3. Bonny Non-Associated Gas Plant (BNAG)
4. The West Niger Delta LNG Plant
5. The Brass River Plant
6. Block OPL 218 Plant
7. Osho Condensate LNG
8. Chevron's Escravos Gas to Liquid Projects (BCil'); EPGI, I3PG 2 and EPG3.
9. West African Gas Pipelines Project (WAGPP)
10. Compressed National Gas (CNG)
11. Ok LNG, Ohikola
12. Owel Holdings LNG Project, Imo state
13. Bonny Island Gas and Power Plant.

The government should endeavour to complete and operationalize the above projects and master the courage to compel the multinational oil companies (MOC's) to end gas flaring by 3lst December, 2012 being the latest deadline proposed for bringing an end to gas flaring.

It has been rightly noted[59] that flaring may still be unlawful by virtue of the Associated Gas Re-Injection Act, even where a ministerial permission has been given and fines paid. This would be correct where a ministerial permission is given contrary to the provisions of the Act on a particular field or fields, or where flaring of gas is taking place without the submission by the Company of a detailed programme and plan for gas utilization as required under section 2(1) of the Act or where a Ministerial Certificate of exemption is issued in contravention of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, 1984. This implies that for exemption certificate issued by the Minister to be valid in law, there must be a full disclosure of details and the basis for the exemption. This is in order to open up such exemption certificate to assessment as to whether such a certificate complied with the provisions of the Act and the Regulations made there under.

The greatest problem with Associated Gas Re-Injection Act is lack of enforcement. This arises because both the government and the oil companies are not desirous of bringing an end to gas flaring. This is not unconnected with the Government's unfounded over dependence on oil revenue and Oil producing companies concern for their profits. For instance, it is open knowledge that governments' continuous shifting of the deadline for stoppage of gas flaring is not unconnected with the threat by some oil companies to stop production in any field where it will be uneconomical for them not to flare gas and government on its own does not want to lose the revenue from such fields if such a threatened stoppage occurs. The Government, therefore, have no option than to be agreeing with the oil companies to shift the deadlines. Two extracts exchanged between the British Trade Office in Lagos and the Foreign Office in 1963 and published, point to the insincerity of oil the companies in ending gas flaring.[60] In the first extract, the British Trade Commissioner noted as follows:

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[57] Ibid

[58] G. Malumfashi, "Phase-out of Gas Flaring in Nigeria by 2008: The Prospects of a Multi-Win Project's" *Petroleum Training Journal* (PTJ), Vol. 1 No. 2. p.6.

[59] *Ibid* (n46)

[60] United Kingdom's National Archives, "Nigerian Oil and Natural," at http://www.uk.org/cases/country/Nigeria/cases/country/Nigeria/casccl/documents/ Nigeria/report/section 21 doc 2.2 pdf file DO 177/33, UK.) accessed on 20 September, 2017

> Shell/BP need to continue probably indefinitely to flare off a very large proportion of the associated gas they produce will no doubt give rise to a certain amount of difficulty with the Nigerian politicians, who will probably be among the last people in the world to realize that it is sometimes desirable not to exploit a country's natural resources and who being unable to avoid seeing the many gas flares around the oil fields, will tend to accuse Shell/BP of conspicuous waste of Nigeria's wealth. It will be interesting to see the extent to which the oil companies feel it necessary to meet those uneconomic methods of using gas.

The second extract reads as follows:

> In the long run, Shell/BP is going to have to consider very carefully how it should explain publicly the large out flow of capital that is likely to take place towards the end of the decade. It will no doubt come as something as a shock to Nigerians when they find out the company is remitting large sums of money to Europe. They will have to counter criticism which will very probably be made that the company is exploiting Nigeria by stressing the very large contribution it is making to Nigeria's export earnings.[61]

From the criticisms levelled against the Associated Gas Re-rejection Act, it is clear that the gas flare out target date will continue to be shifted by government until it has obtained the co-operation of the multinational oil companies through joint ventures for gas utilization. It is therefore suggested that the conditions for granting exemptions by the Minister should be made stricter. Similarly, it should not be left to the discretion of the Minister but should be expressly stated as part of the Act. Before any exemption is granted, a public inquiry should be held to ensure public participation.

Government understands its international commitment to end gas flaring but lacks the moral will to implement the policy. It is obvious that the provision for ministerial exemption was smuggled into the Act as leeway for government to continue to delay until it can obtain the agreement of the multinational oil companies to bring gas flaring to an end. This situation further points to the failure of the Joint Venture and concessions kind of agreements to adequately protect the interest of Nigerians in the exploration and exploitation of oil and gas resources in Nigeria. The super profits being carted away by these multinational companies are sufficient to build the infrastructure needed for the harnessing of Nigeria's gas resources, had the Federal Government opted for the service and Technical Assistance Contracts in the oil and gas sector. By the very nature of the JV's the Federal Government cannot really take any unilateral decision concerning the oil industry in Nigeria.

6. Environmental Impact Assessment Act (E.I.A) Act, 1992[62]

The EIA was enacted to set out the general principles, procedure and methods to enable the prior consideration of environmental impact assessment on certain public or private projects. The idea behind the Act is to assess the likely impact of any new industrial or scientific project on the natural environment with respect to pollution, biodiversity, ecosystem balance and/or sustainable development. It is the aim of the Act to ensure that impact of any new project on the nation's environment must be taken into consideration before such a project is allowed to take off.[63] The Act provides that:

> In identifying the environmental impact assessment process under this Act, the relevant significant environmental issues shall be identified and studied before commencing or embarking on any project or activity convened by the provisions in this Act or covered by the Agency or likely to have serious environmental impact on the Nigerian environment.[64]

[61] Ibid (n58)
[62] Cap E12 LFN, 2004
[63] Section 1 EIA Act

The Act is made up of sixty-two sections and three parts. It provides that when a project is described in the mandatory list, no Federal, State or Local Government or any of their authority or Agency shall exercise any power or perform any duty or function that will permit the project to be carried out in whole or in part until the Agency has taken a course of action conducive to its powers under the Act establishing it or has taken a decision or issued an order that the project should be carried out with or without conditions.[65] And when the Agency has given any conditions before the carrying out of the project, the conditions shall be fulfilled before any person or authority shall embark on the project.[66]

The Schedule to the Act contains a mandatory list of nineteen (19) sectors and projects within the sectors for which an environmental impact assessment is compulsory before they can be embarked upon. Item 12 on this mandatory list refer to the oil and gas sector. The projects for which EIA is mandatory in the sector from the list are:

a. oil and gas field development
b. construction of pipelines in excess of 50km in length
c. construction of oil and gas separation, processing, handling and storage facilities
d. construction of oil refineries
e. Construction of product deposits for the storage of petrol, gas or diesel (excluding service stations) which are located within three kilometres of any commercial, industrial or residential area and which have a combined storage capacity of 60,000 barrels or more.

Non-compliance with the EIA requirements for projects listed in the mandatory list is punishable under section 60 of the Act and upon conviction in case of an individual with a fine of One Million Naira or to five years imprisonment, and in case of a firm or corporation to a fine of not less than Fifty Thousand Naira and not more than One Million Naira.

However, the provisions for fine under the Act are a blanket one and weigh more against individuals. This has weakened the deterrent structure of the Act because most offenders and violators are usually firms and corporations. A minimum fine of =N=50,000.00 is paltry for certain kinds of activities in the petroleum sector which contravenes the provisions of the Act. First, it will be better for the Act to distinguish the various kinds of activities in the oil and gas sector so as to attach commensurate punishment for the violation of each. For example, a company which fails to procure an appropriate permit after due environmental impact assessment before engaging in oil field activities such as exploration and production with pollution as possible side effects cannot be said to have committed the same gravity of the offence a person who fails in a similar way before engaging in the construction of a petrol service station. It is submitted that their punishment ought to be different and should be clearly spelt out rather than been made discretionary at the instance of the court.

Item 18 on the list provides for waste treatment and disposal activities as an item on the mandatory list.[67] It provides for environmental impact assessment for any project in respect of toxic and hazardous waste which involves:

i. Construction of recovery plant (off shore);
ii. Construction of waste water treatment plant (off site);
iii. Construction of secure landfill facility; and
iv. Construction of storage facility (off site).

The Act made no provision for the assessment of equipment for the clean-up projects of oil and gas pollution by the Agency. The Environmental Impact Assessment of oil and gas facilities are usually carried out by the Agency[68] in collaboration with the Department of Petroleum Resources (DPR). As has already been pointed out in the previous sub-section, this has oftentimes generated conflicts between the two organs of government. The NESREA Act has however tried without much success to separate the activities of the Agency and that of DPR by accepting certain environmental regulatory activities in the oil and gas sectors from the ambit of the Agency's power.[69]

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[64] Section 3 (1) ibid, (n 62).
[65] Section 12(1) ibid.
[66] Section 12 (2) ibid.
[67] Schedule 1 to the EIA Act
[68] NESREA
[69] Perhaps apathy of the DPR may not be unconnected with provisions of section 7 (g) (h) and (j) of NESREA Act that bars the Agency in activities relating oil and gas sector

The NESREA Act however failed to expressly designate the body that will now be in charge of those activities in the oil and gas sector. The proposed Petroleum Industry Bill has worsened the situation by not making any concrete proposal for environmental regulation in the oil and gas sector. The consequence of this manner of construction of the NESREA Act will mean a total absence of an environmental regulatory framework in the oil and gas sector despite this lacuna, there is NOSDRA. This will leave environmental regulation in the oil and gas sector to government policies dished out by the Federal Ministry of Environment. These policies in themselves are oftentimes inconsistent. Fortunately, enough, the requirement by the EIA for the submission of every project in the oil and gas sector for environmental impact assessment by the Agency before the issuance of the permit was not tampered with in the NESREA Act of 2007.

A major problem with EIA in Nigeria is that most times, the purpose of an assessment is to justify an already conceived project that may have reached an advanced stage of execution. Consequently, the assessment is concerned with remedial measures rather than alternatives to the project. The proper thing is that EIA should come at the conceptual stage of a project rather than at the commencement or in the course of execution.[70] Again, the institutions responsible for environmental impact assessment mostly lack the experience and skill, being relatively new. Most of the information they require to do a proper assessment are not readily available as a result of absence of information sharing and baseline social and economic data.[71] This reduces their efficiency and thus the reliability of their reports.

Finally, EIA's are often done without any consultation and participation by the social groups who are the intended beneficiaries of the proposed project.[72] The result is that since they made no input to the assessment, they often feel alienated by the Reports. The intended target group of a project is in a best position to state the exact likely consequence of the project for their social and economic lives. It is therefore suggested that EIA's should involve a review by the target group, consultation with them and their participations in all the stages of the Environmental Impact Assessment.

7. Hydrocarbons Oil Refineries Act, 2004[73]

The above Act makes provision for the licensing and control of hydrocarbon oils for the purpose of excise and other matters connected therewith.[74] Applications for licenses under the Act are to be made to the Board of Customs and Excise.[75] Although there is no direct provision in the Act for pollution control, since its major concern is the taxing of petroleum refining, it is thought that the Minister in making regulations that are appropriate for the purpose of ensuring the payment of excise duty on hydrocarbon oils refined on a licensed premises should also take environmental factors into consideration. The relevant section provides as follows:

(1) The Minister may make such regulations with regard to the conduct of refineries as appear to the Minister to be appropriate for the purpose of ensuring the payment of excise duty on the hydrocarbon oils

(2) refined on the premises; and, without prejudice to the generality of the foregoing, such regulations may in particular provide for:

a) the inspection by officers of the premises and all activities carried on the premises and the inspection of the metres and other equivalent installations used for the measurement of quantities of refined hydrocarbon oils produced therein;

b) the above notice to be given of any change which is proposed to make in the premises or the use thereof; the regulation of-

i) the production, storage and warehousing of hydrocarbon oils;

ii) the removal of hydrocarbon oil to or from the premises used for their production;

iii) the use and storage of hydrocarbon oils in premises...

[70] C. Wood, *Environment Impact Assessment: A Comparative Review,* (London: Longman Group Limited, 1995) 11

[71] Ibid.

[72] Though contrary to the provisions of section 7 of the EIA Act that requires public participation before any decision is taken by the Agency

[73] Cap H5, LFN, 2004

[74] Regulation 49 ibid.

[75] Regulation 52 ibid.

(3) Every person who acts in contravention of any regulations made under this section shall be guilty of an offence.
(4) Every person who is guilty of an offence under this section shall be liable on conviction to a fine of not less than two hundred naira or more than one thousand naira in respect of any particular offence, or to an imprisonment for a term of two years, or both such fine and such imprisonment, and for the forfeiture or disposal of anything in respect of which the offence is committed.[76]
From the foregoing, it is clear that the Act prohibits the refining of hydrocarbon oils in unlicensed premises but its major pre-occupation is the collection of excise duty from hydrocarbon refining activities. It is however a fallacy of legislation that an act which describes itself as the "Hydrocarbon Oils Refineries Act" does not have a single express provision for pollution control in the refineries bearing in mind that refining activities could be prone to pollution. It is even trite to have provisions for control of oil and gas pollution in any piece of legislation applicable to the oil and gas industry.
Finally, a fine of not less than two hundred Naira and not more than one thousand Naira is too paltry for offences committed under the Act. It is suggested that in including provisions for prevention and control of oil and gas pollution in refineries, the punishment for corporate offenders should be increased to a fine that is not less than =N=10,000,000.00 for every company in addition to a term of imprisonment of not less than five years for directors managers, officers, servants and agents of the company who consented to the offence.
The 'Minister[77] in making regulations for the control of the production, storage and warehousing of hydrocarbon oils as well as that for the removal of hydrocarbon oils to or from premises; should go beyond the narrow confines of securing excise duty, to provide for pollution prevention and environmental restoration measures in case of incidents of pollution occasioned by the activities of hydrocarbon oils refineries. Thus, inclusion of pollution prevention and remediation provisions in this piece of legislation will further strengthen the fight against environmental degradation.

8. National Oil Spill Detection and Response Agency Act, 2006[78]

The Agency was approved by the Federal Executive Council (FEC) in 2003. Its functions among others included the management of National Oil Spill Contingency plan (NOSCP) and the responsibility for detecting and cleaning up oil spills in Nigeria.[79] The establishment of the Agency and the preparation of the National Oil Contingency plan is in compliance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPRC, 90) to which Nigeria is a signatory.
The Agency is established as a body corporate with perpetual succession.[80] The Agency has broad powers under the Act to be responsible for the surveillance of all existing environmental legislations to ensure compliance with them and the detection of oil spills in the petroleum sector.[81] It also has powers to co-ordinate and implement the National Oil Spill Contingency plan formulated from time to time by the Federal Government. The Agency was further granted powers under the Act to coordinate and implement the National Oil Spill Contingency Plan within the Exclusive Economic Zone and encourage regional co-operation among Member States of the West African sub region and in the Gulf of Guinea for combating oil spillage in Nigeria's Contiguous Waters.[82]
The Act further empowers the Agency in collaboration with the Ministries of Health, Transport, Information, Water Resources, Agriculture and Rural Development, Aviation, Science and Technology, Defence, National Emergency Management Authority and the Nigerian Police to enforce the observance of its policies on environmental law in order to assess the extent of damage, provide security, evacuate victims of spill and monitor response efforts.[83]

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[76] Section 28, ibid.(n71)
[77] Section 29, ibid (n 71) defines "Minister as the Minister of Finance.
[78] Act No. 15, 2006
[79] Preamble to the NOSDRA. Act, 2006.
[80] Section 1(2), NOSDRA. Act, 2006
[81] Sections 6, ibid (n 78)
[82] Section 7, ibid
[83]Section 7 (g) (ii), ibid.

The Chairman and other members of the Governing Board of the Agency are to be appointed by the President upon the recommendation of the Minister of Environment.[84] The Agency is expected to maintain a fund for the execution of its functions which shall consist of a take-off grant from the Federal Government, an annual subvention from the consolidated revenue account of the federation, counterpart funding from the states and local Government, loans and grants from national, bilateral and unilateral bodies, and other internally generated revenues. The Agency may also accept gifts for the purpose of fulfilment of its functions.[85]

The Agency has wide powers conferred on the Director-General. These powers and its functions under the Act are sufficiently broad for the effective discharge of its duties. As at January, 2008, the Agency had succeeded in restoring more than 1,150 oil spill sites abandoned without any remediation efforts by oil companies operating in the Niger-Delta. As a result of the Agency's intervention the environment of these spill sites are being restored to their original state with certificates of remediation issued to the affected firms who are expected to pick the bills for the remediation under the polluter pays principle.[86]

Some of the lapses in the Act include the saddling of the Minister with the responsibility of nominating the representatives of the Federal Ministries in the Agency. It is thought that these appointees would be independent if they are nominated by their relevant Ministries and Agencies. Second, there are no statutory representatives of the oil producing states and non-governmental organizations in the Agency's Governing Board. These set of people are significant stakeholders who ought to have a say in the Governing Board of the Agency.

Finally, the Agency is already encountering clashes of functions with the Department of Petroleum Resources. Section 19(2) of NOSDRA Act has however made the Agency the lead Agency for all matters relating to oil spills management in Nigeria. The clash of functions is therefore avoidable as the correct position is for the DPR to retreat to the backstage, whenever the NOSDRA shows up in a clean- up effort. It is accordingly expected that NOSDRA must have the scientific and technical knowhow to be able to effectively execute the functions conferred on it by the Act. The DPR must as much as possible see itself as a helping hand in clean-up functions while concentrating on its role as a facilitator within the oil and gas sector. The Agency must engage in the protection of flora and fauna, establish rehabilitation and rescue facilities, assess injuries to natural resources from oil pollution and develop restoration plans as part of its contingency plan programme.

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[84] Section 2 (4), ibid.

[85] Section 2 (4) ibid

[86] British Broadcasting Corporation (BBC), "Nigeria Oil Spill Detection Agency Discovers 1,150 'Abandoned Sites', *This Day Newspaper*, Lagos 25 Jan. 2008, available at http://www.redorbit.corn/ news/science/I 2311 58..nigeria_spill_detection_Agency_discovery, accessed on 02 February 2017.