

# THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK OF ENVIRONMENTAL PROTECTION IN THE OIL AND GAS SECTOR IN NIGERIA – A REVIEW\*

## Abstract

*This article shall present a detailed and critical review of the legislative and institutional framework of environmental protection and pollution control in the oil and gas sector in Nigeria; it shall conclude with some recommendations for a better, more efficient and effective environmental protection and pollution control regime in the sector.*

## Introduction

The oil and gas sector is a tertiary producer of environmental hazards hence, the special treatment which ought to be given to it in environmental protection regime in every country on the face of the globe. The environmental hazards may be in the form of greenhouse gases, poisonous and carcinogenic chemicals produced as a result of gas flaring and other activities in the sector; or through the destruction of the fauna, flora, clean water, soil and the environment generally through oil spills and other oil drilling and handling activities; or even through exhaust fumes<sup>1</sup> released into the environment by the final consumers of the product of the sector or by its mere unprotected presence. Oil and gas from its cradle to its grave, though very essential to the modern man, is indeed a highly hazardous substance and a carton of troubles to the environment hence the need to take special care of environmental protection in that sector.

Now the question is, what is the situation of such protection regime, if any exists in Nigeria? For instance, if the catastrophic oil spill that occurred in the United States' Gulf Coast from April 20, 2010<sup>2</sup> which caught the United States unawares and nearly overwhelmed her in spite of her top notch emergency preparedness and strict environmental protection regime; and for which America eventually sued SHELL BP for 20 million Dollars<sup>3</sup> were to happen in Nigeria, how would Nigeria have contained the situation? Are there in existence in Nigeria adequate legislative and institutional framework capable of addressing such incident? Secondly, is there any protection regime in Nigeria given the scenario that several times burst oil pipelines have stayed for days gushing out oil without any intervention from any quarters, with people fetching petroleum products like water from it, until the spilled petroleum product is ignited into a roaring inferno?<sup>4</sup> Such have happened on a number of occasions in

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<sup>1</sup> Municipal pollution by exhaust fumes and air quality control generally is within the jurisdiction of NESREA, the State and Local Government and therefore is outside the scope of this work

<sup>2</sup> <http://www.gulfspill.com>. retrieved on 05/02/11

<sup>3</sup> [http://news.yahoo.com/s/ap/us\\_gulf\\_oil\\_spill\\_bp\\_moving\\_on](http://news.yahoo.com/s/ap/us_gulf_oil_spill_bp_moving_on); accessed 18/04/11

<sup>4</sup> See **Daily Independent Newspaper** (Lagos), February 2, where it was reported that the Awori area of Abule Egba, Lagos was thrown into confusion when a pipeline explosion rocked the area killing hundreds of people with many others seriously injured. According to All African News Agency, Nigeria has recorded 3203 Oil Spills in the last four years in the Niger Delta region; See All Africa New Agency, 12 August 2010 – <http://allafrica.com>; retrieved on 05/02/11; **The Guardian** (UK), May 30th, 2010, reported that <http://www.corpwatch.org/article.php?id=15592>.

Nigeria. The cause of the leak, whether through poor maintenance, sabotage, tank failure, rupture of pipelines, tanker accident, oil well blowout, human error or criminal bunkering is immaterial. Accordingly, this article will review the legislative and institutional framework of environmental protection in the oil and gas sector in Nigeria, and will proffer recommendations to perceived inadequacies therein. It must be stated though that, claims and recovery of compensations, damages and other sundry costs for environmental pollution from oil and gas companies through the court, which by implications compel or engender environmental responsibility in the sector (as no company loves to spend on compensation and damages), and therefore is a veritable route of environmental protection in the Sector is however not dwelt on in this work. However, to have a better view of this topic, we have to first of all understand the meaning of the term environmental protection.

### **Definition of “Environmental Protection”**

A review of the authorities available to the present writer could not reveal a definition of the term “environmental protection”. Accordingly and as is the practice in such circumstance we are going to seek to arrive at a definition of the term by defining the two constituting words namely – “environmental” and “protection”.

### **Definition of “Environmental”**

The word environment of which environmental is the adjective has been defined in many ways by various authorities: Chambers Concise Dictionary,<sup>5</sup> defined environment as “surroundings, external conditions influencing development or growth of people, animals or plants; living or working conditions.”

Similar definitions given by other authorities are as follows,

1. “External surroundings, environmental factors are conditions influencing an individual from without.”<sup>6</sup> This definition is from the point of view of man, the individual and the medical sciences and therefore parochial.
2. External conditions and surroundings, especially those that affect the quality of life of plants, animals and human beings.”<sup>7</sup>
3. Environment refers to the components of the Earth and includes: lands, water and air, including all layers of the atmosphere; all organic and inorganic matter and living organism; the social, economic, recreational, cultural, spiritual, aesthetic conditions and factors that influence the life of human and communities; and a part or combination of these things referred to above and the interrelationships between two or more of them.<sup>8</sup>

<sup>5</sup> Catherine Schwarz et al (ed), **Chambers Concise Dictionary**, 1999 Chambers Harrap Publishers Ltd, Edinburgh, at pg 344

<sup>6</sup> Nancy Roper, **Churchill Livingstone’s Pocket Medical Dictionary**, 13th Edition, 1978 Longman Group Limited, Edinburgh, pg 108

<sup>7</sup> Queen’s English, **Dictionary & Thesaurus of the English Language**, 2002 Geddes & Grosset, New Lanark, ML II 9DJ, at pg 111

<sup>8</sup> M.S. Aibor & J.O. Olorunda, **A Technical Handbook of Environmental Health in the 21st Century**, 2006 His Mercy Publishers, Akure, Nigeria, at pg 357

4. “All the external factors affecting an organism. These factors may be other living organisms (biotic factors) or non living variables (abiotic factors), such as temperature, rainfall, day length, wind, and ocean Currents.<sup>9</sup>
5. The NESREA Act in its interpretation section<sup>10</sup> defined Environment to include water, air, land and all plants and human beings or animals living therein and the interrelationships which exist among these or any of them.

A more detailed and extensive definition which may serve our purpose in this presentation very well and make for its better understanding is the one given in Rau and Wooten (eds)<sup>11</sup> that Environment is the whole complex of physical, social, cultural, economic and aesthetic factors which affect individuals and communities and ultimately determine their form, character, relationship and survival. Most importantly they went further to categorize and detail the dimensions of the environment into four-namely:

- (a) The physical environment (natural and constructed) which includes: land and climate, vegetation, wildlife, the surrounding land uses and the physical character of an area, infrastructure/public services, air, noise and water pollutions.
- (b) The social environment which includes community facilities and services and the character of community facilities and services and the character of communities.
- (c) The aesthetic environment – scenic areas, vistas, views including architectural character of building.
- (d) The economic environment which includes employment, land ownership pattern and land values.

Thus bringing out and laying down the macrocosm of the meaning of environment and by extension environmental. And we can see that what is lacking in one definition may be available in another.

### **Definition of “Protection”**

According to the authors of Law Dictionary,<sup>12</sup> Protect (Protection), as it is listed therein, means to preserve in safety, to keep intact; to take care of and to keep safe..... “Protection” is any measure which attempts to preserve that which already exists. For instance, trade protection attempts to preserve domestic industry through the imposition of tariffs and custom duties on imported goods.

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<sup>9</sup> Zimmerman, Michael, “Environment”. Microsoft ® Encarta ® 2009 (DVD). Redmond, WA: Microsoft Corporation 2008.

<sup>10</sup> Section 37, National Environmental Standards and Regulations Enforcement Agency (Establishment) Act CAP 164, LFN 2007 (hereinafter referred to as the Act or NESREA Act)

<sup>11</sup> John G. Rau & David C. Wooten (eds), 1980, “Environmental Impact Analysis Handbook”, cited by Olomola O.A. in “Nigeria’s Environmental Laws – A critical Review of Main Principles, Policy and Practice” in O.A. Osunbor et al (ed) **Environmental Law and Policy**, 1998 Law Centre, Faculty of Law, Lagos State University Publication, at pg 11.

<sup>12</sup> Steven H. Gifis, **Law Dictionary**, 5th Edition, 2003 Barron’s Educational Series, Inc, New York, at p. 407

In the Dictionary and Thesaurus of the English Language, Protection is defined as “the act of protecting; the condition of being protected; something that protects; shelter; defence, patronage, etc.”<sup>13</sup> It went on to define protection as “to defend from danger or harm; to guard; to maintain the status and integrity of, especially through financial guarantee; to foster or shield from infringement or restriction; etc.”<sup>14</sup>

Thus to arrive at a definition of the term “environmental protection” therefore will require a synthesis of the definitions of “environment” and that of “protection” as presented above. Accordingly and by so doing one can vividly understand the meaning of the term “environmental protection”. And in this treatise we are concerned with environmental protection as it relates to the oil and gas sector in Nigeria.

However, one can also deduce the meaning of “environmental protection” from the definition of Environmental Protection Agency as found in the Black’s Law Dictionary for example. That great reference book defined Environmental Protection Agency as an independent federal agency in the executive branch responsible for setting pollution – control standards in the areas of air, water, solid waste, pesticides, radiation, and toxic materials; enforcing laws enacted to protect the environment; and co-ordinating the antipollution efforts of state and local government.<sup>15</sup>

Accordingly if one removes the phrase “an independent federal agency in the executive branch responsible for...” from the above definition of Environmental Protection Agency one would have a valid and working definition of Environmental Protection left, namely “...setting pollution – control standards in the areas of air, water, solid waste, pesticides, radiation, and toxic materials; enforcing laws enacted to protect the environment; and co-ordinating the antipollution efforts of state and local governments.” Herein as aforementioned we are concerned with environmental protection in the oil and gas sector.

Thus, by virtue of the definitions above, one can identify the principal legislations and institutions responsible for Environmental Protection in the oil and gas sector in Nigeria.

### **Introduction to Institutions and Legislations of Environmental Protection in the Sector**

The oil and gas sector is the sector comprised of concerns engaged in production (or drilling), storage, treatment, refining, transportation, and distribution and sale of oil and gas. Oil and gas here includes crude oil or petroleum, its various refined products like gasoline, naphta, kerosene, lubricants, distillate fuel oils, etc.<sup>16</sup>

<sup>13</sup> Queen’s English, **Dictionary & Thesaurus of the English Language**; 2002 Geddes and Grosset, New Lanark, ML II KDJ at pg 262.

<sup>14</sup> *Ibid* at 262; **Chambers Concise Dictionary**, *op. cit* has similar definition see pg. 851

<sup>15</sup> Bryan A. Garner, et al (ed), **Black’s Law Dictionary**, 9th Edition, 2009 Thomson Renters, St Paul, MN. 55123, at pg 614, see also Steven H. Gifis, **Law Dictionary**, 5th Edition, 2003 Barron’s Educational Services, Inc, New York, at pg. 172

<sup>16</sup> Doscher Todd M. “Petroleum” Microsoft® 2009 (DVD) Redmond, WA: Microsoft Corporation, 2008; Section 1(2) Oil in Navigable Waters Act (ONWA) CAP 06 LFN, 2004 listed Oil to include crude oil, fuel, lubricating oil, heavy diesel oil etc; Section 15 Petroleum Act CAP P 10, LFN 2004 defined petroleum products to include motor spirit, gas oil, diesel oil, automotive gas oil, fuel oil, aviation fuel, kerosene, liquefied petroleum gas and any lubrication oil or grease or other lubricants.

On reviewing the oil and gas sector and the Nigerian statutes, it would be gathered that the following Agencies are involved in environmental protection in the sector. The agencies are the National Oil Spill Detection and Response Agency,<sup>17</sup> the Nigerian Maritime Administrative and Safety Agency,<sup>18</sup> Nigerian National Petroleum Corporation,<sup>19</sup> Nigerian Ports Authority,<sup>20</sup> Nigerian Security and Civil Defence Corps<sup>21</sup> and the Federal Ministry of Transport. Apart from the concomitant and establishing legislations for these Agencies, other legislations germane to environmental protection in the oil and gas sector include the Petroleum Act,<sup>22</sup> Oil in Navigable Waters Act<sup>23</sup>, Merchant Shipping Act,<sup>24</sup> Nigerian Meteorological (Establishment, etc.) Act,<sup>25</sup> and Associated Gas Re-Injection Act.<sup>26</sup>

However, it might be pertinent to point out that apart from the aforementioned particular agencies that every agency of the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.<sup>27</sup> That is the provision of the Constitution of the Federal Republic of Nigeria which is the supreme law of Nigeria and the basis of all legislations therein. Accordingly all organs of government are to conform to, observe and apply the provisions of the Fundamental Objectives and Directive Principles of State Policy<sup>28</sup> which includes the aforementioned environmental objectives. Therefore, every organ and agency of government ought to (shall) pursue the environmental objectives of State policy which includes environmental protection in the oil and gas sector. This is even more so because the right to a healthy (and unpolluted) environment is nowadays classified by International law and conventions as third generation human rights;<sup>29</sup> and environmental sustainability and sustainable development is the Seventh Goal of the Millennium Development Goals (MDGs).

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<sup>17</sup> Hereinafter referred to as NOSDRA; See Section 5, 6 & 7 National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act, CAP 157 LFN 2006; NOSDRA is a parastatal of the Federal Ministry of Environment, under the supervision and direction of the Minister thereto.

<sup>18</sup> Hereinafter referred to as NIMASA; See Section 22(I)(h), (1), 22(2)(a), 23(9)(b), 33 & 45 of the Nigerian Maritime Administration and Safety Agency Act, CAP N161 LFN, 2004; NIMASA is a parastatal of the Federal Ministry of Transport and is under the Supervision and direction of the Minister thereto.

<sup>19</sup> Hereinafter referred to as NNPC; see sections 5(1)(d) & (e) Nigerian National Petroleum Corporation Act, CAP N123 LFN, 2004; NNPC is a parastatal of the Federal Ministry of Petroleum Resources and is under the supervision and direction of the Minister thereto.

<sup>20</sup> Hereinafter referred to as the NPA; see Section 7(i), Nigerian Ports Authority Act, CAP. N126 LFN 2004; NPA is a parastatal of the Federal Ministry of Transport and is under the supervision and direction of the Minister thereto.

<sup>21</sup> Hereinafter referred to as NSCDC; See Section 3(1)(f)(ii) of the Nigerian Security and Civil Defence Corps Act CAP N146 LFN, 2007; NSCDC is an Agency of the Federal Ministry of Internal Affairs and is under the supervision and direction of the Minister thereto.

<sup>22</sup> CAP P10 LFN, 2004

<sup>23</sup> (ONWA) CAP 06 LFN, 2004

<sup>24</sup> CAP M11, LFN, 2004

<sup>25</sup> CAP N152 LFN, 2004

<sup>26</sup> CAP A25 LFN, 2004

<sup>27</sup> Section 20, CFRN 1999, i.e. Environmental Objectives.

<sup>28</sup> Section 13, CFRN 1999

<sup>29</sup> Ani, Comfort Chinyere, "The Rudiments of Human Rights", (2010) 1 *Unizik J.I.L.J.*, P. 88 @ 117 -120

## **Legislative and Institutional Framework for Environmental Protection in Oil and Gas Sector in Nigeria**

Under this heading the writer will examine the principal statutes in Nigeria dealing with environmental protection in the oil and gas sector with a view to reviewing their provisions and the *modus operandi* of environmental protection through these laws.

### **1. National Oil Spill Detection and Response Agency (Establishment) Act<sup>30</sup>**

This is a specialized and principal legislation on environmental protection in the oil and gas sector in Nigeria. It established the National Oil Spill Detection and Response Agency with responsibility for preparedness, detection and response to all oil spillages in Nigeria.<sup>31</sup> It also established the advisory, monitoring, evaluating, mediating and co-ordinating arm of NOSDRA known as the National Control and Response Centre (NCRC)<sup>32</sup>

It must be pointed out that the constitution of the Governing Board of the Agency<sup>33</sup> and the operational *modus* of the Agency in the event of major or disastrous oil spill<sup>34</sup> takes into account the multi-sectoral demand of environmental protection in the oil and gas sector. Accordingly, the NOSDRA Act provides that the objectives of NOSDRA shall be to co-ordinate and implement the National Oil Spill Contingency Plan for Nigeria.<sup>35</sup>

The National Oil Spill Contingency Plan<sup>36</sup> as may be formulated (or revised) from time to time, by the Federal Government which coordination and implementation shall be the objective of NOSDRA include:

- (a) Safe, timely, effective and appropriate response to major or disastrous oil pollution;
- (b) Identify high-risk areas as well as priority areas for protection and clean-up;
- (c) Establish the mechanism to monitor and assist or where expedient direct the response, including the capability to mobilizing the necessary resources to save

<sup>30</sup> Cap N157, LFN, 2006

<sup>31</sup> Section 1, NOSDRA (Establishment) Act, CAP N157, LFN 2006

<sup>32</sup> Section 18, *ibid*.

<sup>33</sup> Section 2(1) &(2); established the Governing Board and equally listed the composition of the Board; one might observe that of all the relevant stakeholders delineated in the Second Schedule, the Ministries of Health and that of Science and Technology have no representation on the Board.

<sup>34</sup> Section 19(1)&(2); Section Schedule to the NOSDRA Act: provides the functions of all the Ministries or Agencies which NOSDRA shall co-opt and collaborate with in the event of any major or disastrous oil spill (i.e. for major Tier 2 or Tier 3 oil spill). NB: In Nigeria Oil Spill is classified into 3 tiers, Tier 1 – Oil Spill of less than or equal to 7 tonnes (i.e. 50 barrels); Tier 2 – Oil spill greater than 7 tonnes but less than 700 tonnes (5000 barrels); Tier 3 oil spills greater than 700 tonnes; strategic response to each tier varies in the Plan, i.e. National Oil Spill Contingency Plan.

<sup>35</sup> Section 5 of the NOSDRA Act; This is subsequently referred to as the Plan; the complete document can be down loaded from the NOSDRA website; [http://www.nosdra.org/tech\\_info.html](http://www.nosdra.org/tech_info.html), retrieved 30/01/11

<sup>36</sup> Section 5(a-n), *ibid*; this and the provisions of Second Schedule to the NOSDRA Act constitute principal parts of the National Oil Spill Contingency Plan as published on the NOSDRA website – The Plan is mandatory for all parties to the International Convention on Oil Pollution Preparedness and Response Cooperation (OPRC) to which Nigeria is a signatory. It was prepared for the Presidency by the Sub-Committee on Oil Spill Response of the National Action Co-ordinating Committee of the Forum for Cleaning-up of the Niger Delta in December 2000.

- lives, protect threatened environment, and clean up to the best practical extent, the impacted site
- (d) Maximize the effective use of the available facilities and resources of corporate bodies, their international connections and oil spill co-operatives, that is Clean Nigeria Associates<sup>37</sup> in implementing appropriate spill response;
  - (e) Ensure funding and appropriate and sufficient pre-positioned pollution combating equipment and materials, as well as functional communication network system required for effective response to major oil pollution;
  - (f) Provide a programme of activation, training and drill exercise to ensure readiness to oil pollution preparedness and response and the management and operational personnel;
  - (g) Co-operate and provide advisory services, technical support and equipment for purposes of responding to major oil pollution incident in the West African sub-region upon request by any neighbouring country, particularly where a part of the Nigerian territory may be threatened;
  - (h) provide support for Research and Development (R&D) in the local development of methods, materials and equipment for oil spill detection and response;
  - (i) cooperate with the International Maritime Organization and other national, regional and international organizations in the promotion and exchange of results of research and development programme relating to the enhancement of the State of the art of the oil pollution preparedness and response, including technologies, techniques for surveillance, containment, recovery, disposal and clean up to the best practical extent;
  - (j) establish agreements with neighbouring countries regarding the rapid movement of equipment, personnel and supplies into and out of the countries for emergency oil spill response activities;
  - (k) determine and preposition vital combat equipment at most strategic areas for rapid response;
  - (l) establish procedures by which the Nigerian Customs Service and the Nigerian Immigration Services shall ensure rapid importation of extra support response equipment and personnel;
  - (m) develop and implement an appropriate audit system for the entire plan.
  - (n) carry out such other activities as are necessary or expedient for the full discharge of its functions and the execution of the Plan under this Act.

Inasmuch as the functions of NOSDRA are partially embedded in the gamut of its objectives as espoused above, the NOSDRA Act for the avoidance of doubt, went on to specify and detail the functions of NOSDRA in Section 6<sup>38</sup> as follows,

“The Agency shall be responsible for surveillance and ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum

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<sup>37</sup> CNA – is formed by Oil producing companies to assist member companies in handling oil spill cases that an individual company is unable to combat – i.e. Tier 2; they are also involved in Tier 3 response.

<sup>38</sup> Section 6(1)(a-e), NOSDRA Act

sector;<sup>39</sup> receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria; co-ordinate the implementation of the Plan as may be formulated, from time to time, by the Federal Government; co-ordinate the implementation of the Plan for the removal of hazardous substance as may be issued by the Federal Government;<sup>40</sup> perform such other functions as may be required to achieve the aims and objectives of the Agency under this Act or any Plan as may be formulated by the Federal Government pursuant to this Act.”<sup>41</sup>

Furthermore, the so-called special functions of the NOSDRA which are also for the attainment of the objectives are delineated in Section 7 as follows; The Agency shall – (a) ensure the coordination and implementation of the plan within Nigeria including within 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured; (b) undertake surveillance, reporting, alerting and other response activities as they relate to oil spillages; (c) encourage regional cooperation among member states of West African sub-region and in the Gulf of Guinea for combating oil spillage and pollution in our contiguous waters; (d) strengthen the national capacity and regional action to prevent, control, combat and mitigate marine pollution; (e) promote technical cooperation between Nigeria and member states of the West African sub-region; (f) facilitate – (i) the arrival and utilization in and departure from Nigeria of ships, aircrafts and other modes of transport engaged in responding to oil pollution incidents or transporting personnel,

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<sup>39</sup> Hence, the exclusion of oil and gas sector from the purview of the jurisdiction of National Environmental Standards and Regulations Enforcement Agency (NESREA) by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, CAP N164 LFN 2007 – save as provided in Section 7(c) thereto, relating to enforcement of compliance with the provisions of international instruments on environmental protection in the sector. However how can the work of NOSDRA and NESREA be mutually exclusive when both are parastatals of the same Ministry (Environment) and are both working in the same Sector (environmental protection); Can't one benefit from the experience of the other in its own sphere of specialization? Moreover, where NOSDRA can co-opt and collaborate with other Ministries and Agencies in the performance of its function under Section 7(g)(ii) for instance? Furthermore, the provision of this paragraph 6(a) means that the operation of NOSDRA is not limited to NOSDRA Act alone but to every existing environmental legislation in the Petroleum Sector. This poses no small a problem, given the winner takes all tendency of civil servants, even where they are not able to cover the field.

<sup>40</sup> It therefore follows as aforementioned that NOSDRA is equally responsible for hazardous substances which include radioactive substances and wastes at least with regard to coordinating their removal. C/F Sections 34, 27 & 7(c) NESREA Act; and Regulations 44-53, 66d, 78-93, 102-104 of the National Environmental Sanitation and Waste Control Regulations 2009 which empower NESREA to control Hazardous wastes.

<sup>41</sup> It is very clear from the functions of NOSDRA and that of NCRC (Sections 18 & 19) that some of the functions of NOSDRA is statutorily to be performed by NCRC. Although section 18(3) makes NCRC boss subservient and responsible to the Director General of NOSDRA, yet it is a paradox as to why the NCRC a unit of NOSDRA had to be created by statute given the likelihood of personality or role clash ensuing between the two statutory bodies? With every due respect to the legislature, the NCRC should have been left as a unit or Department of NOSDRA like other Departments or Units and ought not to have been entrenched in the statute that created its parent body, NOSDRA.



cargo, materials, and equipment required to deal with such an incident; and (ii) the expeditious movement into, through and out of Nigeria of personnel, cargoes, materials and equipment; (g)(i) The National Control and Response Centre shall for the purposes of a Tier 3 Oil Spill response, undertake such functions as specified under Section 19 of this Act;<sup>42</sup> (ii) the Director-General shall have power to co-opt all the Government Ministries and Agencies mentioned under the Second Schedule to this Act, in the Management of a Tier 3 or a major Tier 2 Oil Spill.

As aforementioned, Section 18<sup>43</sup> established the National Control and Response Centre (NCRC) as a subsidiary of NOSDRA to act as a report processing and response co-ordinating centre for all oil spill incidents in Nigeria; receive all reports of oil spillages from the Zonal offices and units of the Agency; and serve as the command and control centre for compliance monitoring of all existing legislation on environmental control, surveillance for oil spill detection and monitoring and co-ordinating responses required in Plan activation.<sup>44</sup>

Under the sub-title: “Federal Government Intervention”, the NOSDRA Act at Section 19 provides the duties of the NCRC in the event of a major or disastrous oil spill.<sup>45</sup> By the words of that Section, these functions are ordinarily to be performed by NOSDRA save in the event of major or disastrous oil spillage where the NCRC shall perform same. The functions are as follows<sup>46</sup>:

- i. In collaboration with other Agencies co-opt, undertake and supervise, all those provisions as set out in the Second Schedule to the NOSDRA Act.
- ii. Assess the extent of damage to the ecology by matching conditions following the spill against what existed before (reference baseline data and Environmental Sensitivity Index maps.)
- iii. Undertake a post spill impact assessment to determine the extent and intensity of damage and long term effects;
- iv. Advise the Federal and State Governments on possible effects on the health of the people and ensure that appropriate remedial action is taken for the restoration and compensation of the environment.
- v. Assist in mediating between the affected communities and the oil spiller.
- vi. Monitor the response effort during an emergency, with a view to ensuring full compliance with existing legislation on such matters;
- vii. Assess any damage caused by an oil spillage.
- viii. Expeditiously process and grant approval for any request made to it by an oil spiller for the use of approved dispersant or the application of any other technology considered vital in ameliorating the effect of an oil spill.

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<sup>42</sup> Note that the Act erroneously referred to Section 20 in its letters whereas the functions are actually provided for in Section 19. However, it appears as if the NCRC can only assume the functions of the Agency as provided in Section 19 for the purposes of Tier 3 Oil Spill response so as to enable the Agency co-ordinate and supervise the activities of all the co-opted and collaborating ministries and Agencies including the Centre (NCRC). Generally, therefore, the functions stipulated in Section 19 are ordinarily that of the Agency.

<sup>43</sup> NOSDRA Act, CAP N157 LFN, 2006.

<sup>44</sup> Section 18(1) (a-c), *ibid.*

<sup>45</sup> i.e. Tier 3 Spills – see Section 7(g)(i), *Ibid.*

<sup>46</sup> Section 19 (1)(a-j), *Ibid.*

- ix. Advise and guide the response efforts as to ensure the protection of highly sensitive areas, habitats and the salvation of endangered or threatened wild life.
- x. Monitor the clean-up operations to ensure full rehabilitation of the area.

The NOSDRA Act went on to provide that; the Agency shall act as the lead Agency for all matters relating to oil spills response management and liaise with the other Agencies for the implementation of the Plan, as contained in the Second Schedule;<sup>47</sup> cooperate with an oil spiller in the determination of appropriate measures to prevent excessive damage to the environment and the communities; expeditiously consider any proposal made for response effort by the oil spiller; mobilize internal resources and also assist to obtain any outside human and financial resources that may be required to combat any oil spill; and assist in the assessment of damage caused by an oil spillage.<sup>48</sup> It should be noted that it is not apparent in the Act and all the functions of NOSDRA therein that NOSDRA is in anyway directly involved with clean-up or remediation of oil spill sites.

The Ministries and Agencies which the Agency shall co-opt and collaborate with in the event of a major oil spill apart from her parent Ministry, the Federal Ministry of Environment are Nigerian Institute of Oceanography and Marine Research; the Federal Ministries of Works; Health, Transport; Information; Water Resources, Agriculture and Rural Development; Communication, Aviation (NIMET); Science and Technology and Defence; the National Emergency Management Agency; the Oil producers Trade Section (OPTS) of the Lagos Chambers of Commerce; the Nigerian Police Force, State and Local Governments (involved); Non-Governmental Organizations, (NGOs) etc.<sup>49</sup>

### **Other Highlights of the National Oil Spill Contingency Plan**

The Plan is a national system for responding promptly and effectively to all oil pollution incidents occurring in Nigeria. It presents a consensus opinion through the participation of all relevant stakeholders (local and international) in its preparation. It is for use by all operators in the Oil and Gas sector of Nigeria including all organizations involved in exploration, exploitation, production, transportation,

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<sup>47</sup> The Second Schedule laid down the functions or duties of every stakeholder Ministry or Agency (Public or private) that will be co-opted and involved in the event of a major or disastrous oil spill. Section 19(2), *ibid.* C/F this power granted NOSDRA in S. 19(2) is vested on the Federal Ministry of Petroleum Resources in the Plan – the National Oil Spill Contingency Plan at paragraph 8.2. As the Act is superior to the Plan, the provision of the Act supersedes

<sup>48</sup> Section 19(3), *ibid.*; it is a wonder though why the need for Section 19(3) when all it contains in paragraphs a-d thereto are already provided one way or the other at times even more forcefully in Section 19(1)(a-j)? However, this issue of repetition of functions is observed through out the entire legislation.

<sup>49</sup> See Second Schedule to the NOSDRA Act; it also listed their various functions as aforesaid. See also Section 19(4), *ibid.* However, one may observe that the NOSDRA Act did not stipulate how NOSDRA would elicit the cooperation and action of these Ministries and Agencies nor any penalty for non cooperation provided in the law. N.B.: Some Ministries and Agencies given duties in the Plan as published on the NOSDRA website are not listed nor assigned duties in the NOSDRA Act. They are the Federal Ministries of Petroleum Resources, Foreign Affairs, NNPC, NPA and NMA (now NIMASA). On the other hand, the Federal Ministry of Science and Technology is listed and granted duties in the Act but is not even mentioned in the Plan.

handling and storage of petroleum products in response to Tiers 1, 2 and 3 oil spills,<sup>50</sup> As aforesaid, it also empowers NOSDRA to co-opt the aforementioned vital Ministries and Agencies (public and private) to combat serious oil spills;<sup>51</sup> it furthermore provides the functions of such ministries and agencies during such event. However, the Plan emphasized severally that high priority management should be given to preventive strategies to avoid spillages so that there would be no need to activate the Plan.

Apart from the functions assigned the Ministry of Defence (Army, Navy and Air force) in the Plan which is summarized in the Second Schedule,<sup>52</sup> there are two special commands of the Armed Forces established under the plan saddled with very vital functions with respect to Tier 3 oil spill response and environmental protection in the oil sector in general that is worth mentioning here. These commands are Marine Oil Spill Operations Command (MOSOC) and the Airborne Oil Spill Operations Command (AOSOC).

The MOSOC with headquarters in Port Harcourt and diverse operational bases nationwide will be required, as directed to undertake the following functions:

- i. Command, control, co-ordination and implementation of oil spill responses Operations
- ii. Surveillance and Monitoring of Nigerian Waters to ensure compliance with National Environmental Legislation.
- iii. Enforcement of National Environmental Legislation.
- iv. The training and exercising of Marine Oil Spill Operations Command personnel and assets both in-house and in conjunction with other related units to maintain and continually develop response capabilities.
- v. Other special marine activities to utilize fully, the commands marine assets and skills.<sup>53</sup>

The AOSOC equally with headquarters in Port Harcourt and diverse operational bases will be required, as directed, to undertake the following functions:

- i. Command, control, co-ordination and implementation of oil spill response operations.
- ii. Aerial application of approved oil dispersants.
- iii. Aerial surveillance and monitoring activities to ensure compliance with National Environmental Legislation
- iv. Enforcement of Nigerian Environmental Legislation
- v. Remote Sensing Operations for the Collection and Monitoring of key environmental parameters.
- vi. The training and exercising of Airborne oil spill operations command personnel and assets both in house and in conjunction with the Marine Oil Spill

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<sup>50</sup> Foreword to the National Oil Spill Contingency Plan, pg. 8

<sup>51</sup> Act stipulates in Section 7(g)(ii) that the Plan could be activated for major Tier 2 and Tier 3 oil spills while the Plan provides that co-option should be for Tier 3 oil spills only.

<sup>52</sup> NOSDRA Act, CAP N157, LFN, 2006; See also paragraphs 8.10, 8.11 & 8.12 of the Plan @ pp 44-45.

<sup>53</sup> The National Oil Spill Contingency Plan, 2000, Paragraph 14.4 at pg. 90.

- Operations Command to maintain and continually develop response capabilities; and
- vii. Other special airborne activities to fully utilize the command's airborne assets and skills.<sup>54</sup>

Accordingly, apart from the general functions of the Army, Navy and Airforce in the event of Tier 3 oil spill as stipulated in the Plan, these aforementioned special commands have special functions as stipulated above.

However, to guide all agencies in the event of an oil spill and response, the Plan formulated and laid down a response philosophy.<sup>55</sup> Accordingly, it provided that the primary objective (or response philosophy) of a response action in an oil spill incident is to prevent/or minimize adverse health and safety, environmental, commercial, or social impact by the oil spill; and to (i) ensure the safety of response personnel and the public (ii) secure the source of the spillage; if the spill is continuing or threatens to continue (iii) maximize oil recovery at the spill source to the extent practicable (iv) contain the spill to the extent practicable, to minimize the area impacted by oil (v) forecast spill movement and give priority to protecting environmentally, commercially or socially sensitive areas. (vi) minimize the overall adverse impacts of the spill and spill mitigation and restorative activities (vii) minimize environmentally induced conflict between industries and communities (viii) ensure a balanced decision is made as to when clean-up operation should cease.<sup>56</sup>

According to the Plan every effort shall be made to recover the spilled oil as much as possible; and it shall be the responsibility of the Federal Ministry of Environment to ensure the appropriate treatment and safe disposal of waste oil and oily debris in an environmentally sound manner;<sup>57</sup> and all compensation claims shall be referred to them.<sup>58</sup>

As per cost and funding as provided in the Plan, costs incurred in a spill combat (that is actual cleaning up of and remediation of the spill site) shall be recovered from the spiller in accordance with the "Polluter Pays Principle"; and for the operational logistics (with regard to ancillary matters) towards the implementation of Plan (Tier 3) oil spill combat, all relevant Ministries/Agencies directly concerned e.g. Ministry of Defence shall participate in the funding arrangement.<sup>59</sup> For the avoidance of doubt such function, that could be carried out and funded by co-opted ministries and agencies in the event of major oil spill include setting up medical outposts and mobilization of medical personnel and drugs, etc (by the Ministry of Health); provision of barges and storage for recovered oil, etc (by the NPA); Construction of structures for the settlement of victims and access road to scene of

<sup>54</sup> *Ibid*, paragraph 14.5 at pg. 92. NB: The MOSOC and AOSOC combined are similar to the US Coast Guard; which play very vital role in pollution control in the United States of America – see Austin P. Oilney et al, "Oil Pollution Act" in **Environmental Law Handbook**, 18th Ed., Thomas F.P. Sullivan (Ed), 2005 Government Institute, Maryland United States, pp 357 -358.

<sup>55</sup> The National Oil Spill Contingency Plan, 2000, paragraph 16.0 at pg. 103

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*, paragraph 20.0 at pp. 119-120

<sup>58</sup> *Ibid*, paragraph 24.0, at pg. 124

<sup>59</sup> *Ibid*, paragraph 25.0 at pg. 124.

incident, etc (by Federal Ministry of Works & Housing); provision of boreholes for water supply, (by Federal Ministry of Water Resources and Rural Development); etc.

A “comma” in the foregoing funding regime is the idea that Ministries and Agencies should fund their involvement or participation in activities to control Tier 3 combat. Knowing the bureaucratic bottlenecks prevalent in such entities and the ever present lack of fund syndrome, such idea may not work in an emergency. Accordingly it is our view that funding for such event should come centrally from a common and readily available and accessible fund.

Comparatively for example, in the United States, the funding regime is far better, more defined and very pragmatic. There the

Oil Pollution Act of 1990 created a 1 billion dollar supplemental compensation fund for oil spills and details procedures for obtaining access to it. The fund was established by imposing a five-cent per barrel tax on the receipt of imported crude oil and petroleum products. The combined effect is to place the burden of paying clean up costs and damages in the first instance on the owner or operator of the vessel or facility that is the source of the spill. If the costs and damages exceed the limit of liability for the vessel or facility, the 1 billion dollar Oil Spill Liability Trust Fund (“Fund” or OSLTF) pays the balance, effectively placing the secondary responsibility to pay for oil spill clean-up and damages (ultimately) on the receivers of crude oil or petroleum products. The OSLTF is also available to pay for clean-up and damages when the spiller has a valid defence or cannot be identified.<sup>60</sup>

Thus, the United States fund system is definitely better than the Nigerian System<sup>61</sup> and such a regime ought to be replicated and emulated by Nigeria.

### **Penalties**

The penalty provided in the NOSDRA Act is only against the oil spiller and from the language of the section, it appears the only oil spiller in view is the corporate or oil producing company or tanker owner and not the individual who for example perforates an oil pipeline to siphon petroleum products and eventually left it open thereby causing oil spillage.

It provides that an oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five hundred thousand naira for each day of failure to report the occurrence. The failure to clean up the impacted site, to all practical extent including remediation, shall also attract a fine of one million naira.<sup>62</sup>

<sup>60</sup> Austin P. Oilney, et al, *op.cit* at p. 359

<sup>61</sup> For example an attempt by the Nigerian legislature to establish such fund is puerile and indeterminate – see Sections 30 and 121, Nigerian Minerals and Mining Act, CAP N162, 2007

<sup>62</sup> Section 6(2) &(3) NOSDRA Act CAP N157, LFN, 2006.

The foregoing is about the only penalty provided in the NOSDRA Act with regard to environmental pollution in relation to oil spillage. As aforesaid it appears this penalty is not meant to include the individual spiller or does it mean that such an individual will equally report, clean up and remediate the impacted site if apprehended? Or if a criminal perforates an oil pipeline causing an oil spill and escapes, will the oil pipeline owner be responsible for the oil spill, considering that he didn't cause the spill on the one hand and the tortuous responsibility (strict liability) for the escape of a dangerous thing in his custody and ownership of same on the other.<sup>63</sup> This in as much as the individual criminal will be punished if apprehended, but his punishment would be different and may not include to remedy the site of spillage but to put him to death or behind bars.<sup>64</sup> However, the oil pipeline owner would be responsible for any such spillage and would be accountable for the spill where the statutory exceptions are excluded. Hence, in **Shell Petroleum Development Company (Nig) Ltd. v. HRH Chief GB Tiebo VII & Ors**,<sup>65</sup> the plaintiffs sued shell for negligence under the rule in **Rylands v. Fletcher** for oil spillage. The learned trial judge held that negligence was established against the defendant under the Rule in **Rylands v. Fletcher** and entered judgment in favour of the Plaintiff. The judgement was upheld on appeal by the Court of Appeal. Also, in **Shell Petroleum Dev. Coy Nig. Ltd v. Chief Otoko & Ors**<sup>66</sup> which was similar to **TIEBO VII Case** but was upturned on Appeal based on other grounds. The trial court while giving judgement for the plaintiff held that "it is noteworthy that the Rule in **Rylands v. Fletcher** which is alternatively pleaded by the plaintiffs in this case applies to the circumstances of this case. The crude oil which passed through the pipelines could not naturally had been there. The defendant gathered the crude oil into pipes and it was a substance which was dangerous and likely to escape. It was not a natural user of the land but was brought in there by the act of the defendant. Since therefore, it has happened and caused damages the defendant is liable for the consequences of its act. In the circumstances of this case, the Rule in **Rylands v. Fletcher** applies and there was no third party act which caused the escape of the oil." Inasmuch these cases were not brought under the NOSDRA Act but they show that the oil pipeline owner, etc is responsible and accountable for oil spillages from his facility and operations. In the United States of America, the Oil Pollution Act of 1990 also imposes strict liability for a comprehensive list of damages from an oil spill into

<sup>63</sup> **Rylands v. Fletcher** (1866) LR 1 EX. 265, See also **Ogiale v. Shell BP Nig. Ltd** (1997) 1 NWLR (Pt. 48) 148. Apart from the strict liability rule, the oil company is statutorily liable to pay compensation generally for damages arising from pollution from its facilities and operations, only exceptions being if the pollution is due to the default of the person suffering damage or an account of malicious act of a third person – see Sections 11(5)(a),(b) &(c) of the Oil Pipelines Act, CAP 07, LFN, 2004; See also Paragraph 37 of the First Schedule to the Petroleum Act CAP P10 LFN, 2004 which makes the holder of an oil exploration license liable to pay fair and adequate compensation. See J. FININE FEKUMO, "The Problem of Jurisdiction in Compensation for Environmental Pollution and Degradation in Nigeria (Oil and Gas): A Fundamental Rights Enforcement Alternative – being a paper presented at the Nigerian Bar Association 2004 Annual Delegates Conference at Abuja; pp 8-11 & 17-23.

<sup>64</sup> See Section 2, Petroleum Production and Distribution (Anti-Sabotage) Act, CAP P12, LFN 2004

<sup>65</sup> (1996) 4 NWLR 659

<sup>66</sup> (1990) 6 NWLR (Pt 159) 693; see also **Abel & 2 Ors v. Shell Petroleum Development Coy. Nig. Ltd** (2001) 6 NSCQR 542 or (2001) 11 NWLR (Pt. 723) 168.

the water from vessels and facilities, including natural resources damages.<sup>67</sup> This makes it easier for claimants against oil spillers or polluters. However, NOSDRA is for oil spill disaster control, clean-up of oil spillages and removal of hazardous substances in Nigeria.<sup>68</sup>

## 2. Nigerian Maritime Administration and Safety Agency (NIMASA)<sup>69</sup>

With regard to environmental protection in the oil and gas sector, the provisions of the NIMASA Act granted NIMASA jurisdiction thereto as it provides, *inter alia*, that the objectives of the Agency shall be to regulate and promote maritime safety, security, marine pollution and maritime labour.<sup>70</sup> Thus in pursuit of this objective the Act provides that the Agency shall *inter alia*; establish maritime training and safety standards;<sup>71</sup> provide directions and ensure compliance with vessel security measures;<sup>72</sup> carry out air and coastal surveillance;<sup>73</sup> control and prevent marine pollutions;<sup>74</sup> inspect ships for the purposes of maritime safety, maritime security, maritime labour and prevention of pollution;<sup>75</sup> generally to perform any other duty for ensuring maritime safety and security or do all matters incidental thereto.<sup>76</sup>

The jurisdiction of NIMASA in environmental protection in oil and gas sector therefore stems from two points provided in the objectives of the Agency. First of all, oil spill is inimical to maritime safety<sup>77</sup> and secondly, it is *marine pollution*. Therefore, to achieve the objective of regulating and promoting *maritime safety, security, marine pollution* and maritime labour, the Agency ought to get involved in environmental protection in oil and gas sector. This it can do through some of its functions already delineated in the last paragraph.<sup>78</sup> It may also make regulations with regard to pollution.<sup>79</sup> It is submitted that such regulations may include directives as to safety measures in oil tankers and oil drilling in the maritime zone.<sup>80</sup>

<sup>67</sup> Austin P. Oilney, et al, *op. cit* at pg. 358; In India their Supreme Court had moved a step further to develop the absolute liability principle, allowing no exceptions, to apply to any enterprise enjoyed in hazardous or inherently dangerous activity. See **MC Mehta v. Union of India** (1987) (1) SCC 395

<sup>68</sup> Inasmuch as a National Plan for oil spill had been put in place, similar plans for gas and hazardous substances ought to be formulated too. For example, a date to ban gas flaring in Nigeria has remained a mirage as the date is shifted every year inspite of the deleterious effect of gas flaring to the environment; and today Nigeria is rated as the Nation with highest incident of gas flaring in the world.

<sup>69</sup> Act CAP N161 LFN, 2007.

<sup>70</sup> Section 1 (ii), NIMASA Act, CAP N161 LFN 2007

<sup>71</sup> Section 22(1)(d), *ibid*.

<sup>72</sup> Section 22(1)(g), *ibid*.

<sup>73</sup> Section 22(1)(h), *ibid*.

<sup>74</sup> Section 22(1)(i), *ibid*.

<sup>75</sup> Section 22(1)(2)(a), *ibid*.

<sup>76</sup> Section 22(2)(f), *ibid*.

<sup>77</sup> Section 23(g)(b), *ibid*.

<sup>78</sup> Section 22(1)(d),(g),(h)(i); 2(a) & (f); *ibid*.

<sup>79</sup> Section 44, *ibid*; and by virtue of Section 45(6)(a); *ibid* – the Agency shall make regulations prescribing detailed requirements on packaging, marking, labeling, documentation, stowage, quantity limitations and exceptions for preventing or minimizing pollution of the marine environment, in conformity with the International Maritime Dangerous Goods (IMDG) Code.

<sup>80</sup> C/F Section 5, Oil in Navigable Waters Act (ONWA) CAP 06 LFN, 2004

Furthermore the Agency under the NIMASA Act is equally granted sundry powers with regard to environmental protection in the oil sector which include; to receive and consider any report of the commission of an offence;<sup>81</sup> to stop enter, board, inspect and search a vessel or aircraft and to detain any vessel or aircraft within the Nigerian maritime zone;<sup>82</sup> investigate offences;<sup>83</sup> arrest offenders;<sup>84</sup> to make determination imposing charges and specifying the persons by whom, and the times which such charges are payable; the charge or levy may include *inter alia* a fee in respect of a matter referred to in regulations or orders made under all federal legislations on marine pollution, maritime labour, marine safety and maritime security<sup>85</sup>. Accordingly, the NIMASA Act granted NIMASA powers to intervene generally in marine pollution in the maritime zone of Nigeria. However, considering the provisions of the NOSDRA Act and the establishment of NOSDRA and the fact that the NIMASA Act came after the NOSDRA Act, it is not clear whether all these functions are performed by NOSDRA or NIMASA given the doctrine of repeal by implication?

It is the constitutional rule of interpretation that, where a latter provision or statute is inconsistent with an earlier provision of a statute, the legal presumption is that the latter has modified or amended the earlier provision or statute.<sup>86</sup> This is known as the doctrine of “repeal by implication”. Hence in **Chairman Moro Local Government v. Lawal**,<sup>87</sup> the Court said, “Generally a statute is definite as to what it repeals by its enactment; and a schedule may recite the existing law repealed. The Courts in the performance of their functions as interpreters of the law usually lean against implying the repeal of law by implication. However, where the provisions of the two Acts are plainly repugnant, one to the other provision, and demand inconsistent conclusion that effect cannot be given to both at the same time, a repeal of the earlier provision of the law by implication is inevitable.” It is the opinion of this writer that some of the contents of the NIMASA Act with regard to its function vis-à-vis the provisions of NOSDRA Act and the functions of NOSDRA are in conflict evidencing the carelessness of the legislature. However, in Nigeria most of the laws are dormant if not dead letters that are not enforced, or enforced at whims and caprices of the authority responsible otherwise an amendment or review of these two laws (and most of the laws discussed in this article for that matter) by the legislature is necessary to remedy and reconcile the conflicts and duplication of functions. Thus, there is no way it can be said that the NIMASA Act of 2007 is meant to repeal by implication any part of the NOSDRA Act of 2006, because NOSDRA established by

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<sup>81</sup> Section 23(5)(a), *ibid*.

<sup>82</sup> Section 23(5)(b), *ibid*.

<sup>83</sup> Section 23(5)(d), *ibid*.

<sup>84</sup> Section 23(5)(h), *ibid*.

<sup>85</sup> Section 26(i) & (2)(c)(iii); Section 56, *ibid*, provides punishment for evasion or attempts to evade or neglect or omission to pay any levy, charge or fee payable to the Agency.

<sup>86</sup> See **N.P.A.S.F. v. FASEL Services Ltd** (2002) FWLR (Pt 97) 719 at 73b; **Abacha v. Fawehinmi (2000)** FWLR (Pt 4) 533 at 600; **Chorlton v. Tonge Overseas** (1871) LR 7 C.P. 178; **Dr Forster’s Case** (1914) 11 Rep 56b at 63a and **Chairman Moro Local Government v. Lawal** (2008) All FWLR (Pt 440) 684 at 727.

<sup>87</sup> *Supra*



the NODRA Act is a specialized Agency established for environmental protection in the petroleum sector specifically.

The NIMASA Act has provided several offences and punishments in relation to pollution offences ranging from ₦800,000.00 to ₦1,000,000.00.<sup>88</sup>

### 3. Nigerian National Petroleum Corporation (NNPC) Act<sup>89</sup>

By virtue of its statutory duties as provided, *inter alia*, in the Act and with regard to the production, refining, treating, processing, handling, purchasing, marketing, storage and transportation of petroleum and petroleum products,<sup>90</sup> Nigerian National Petroleum Corporation (NNPC) is involved in environmental protection in the oil and gas sector. Inasmuch as their involvement might be incidental yet as a major player and in order to avoid oil spillages and the attendant weighty consequences, they ought to be involved at least with regard to their own operations.

The Corporation is particularly charged with the duty of providing and operating pipelines, tanker-ships or other facilities for the carriage or conveyance of crude oil, natural gas and their products and derivatives, water and any other liquids or other commodities related to the corporation's operations; and constructing, equipping and maintaining tank farms and other facilities for the handling and treatment of petroleum and its products and derivatives.<sup>91</sup> Accordingly, apart from the criminal liability for oil spillages in relation to their facilities, they are tortuously liable for any spillages, discharges, escape or leakage from their facilities.<sup>92</sup> They ought to take due care and diligence thereof to avoid such liability, hence their involvement in environmental protection in the sector.

Furthermore, the National Oil Spill Contingency Plan<sup>93</sup> listed NNPC as one of the Agencies to be mandatorily co-opted and engaged by NOSDRA in the event of Tier 3 oil spill, saddling it therein with the following functions:

- i. to cooperate with the oil spiller in determining appropriate measures to prevent excessive damage.
- ii. to promptly refer the proposal made to her for the response effort to the Federal Ministry of Environment.
- iii. to mobilize their internal resources and also assist in obtaining any outside resources that may be required to combat the spill.
- iv. to assist in the assessment of damage caused.<sup>94</sup>

These functions were imposed on the NNPC because by equity participation in oil operations with her joint venture partners, the NNPC absorbs a good proportion of

<sup>88</sup> See Sections 56 & 58, *ibid*.

<sup>89</sup> Nigerian National Petroleum Corporation (NNPC), Act, CAP N123, LFN 2004

<sup>90</sup> Section 5(1)(a-e), *ibid*.

<sup>91</sup> Section 5(1)(d& e), *ibid*.

<sup>92</sup> **Ryland v. Fletcher** (*Supra*)

<sup>93</sup> For Nigeria, prepared for the Presidency by the Sub-Committee on Oil Spill Response of the National Action Coordinating Committee of the Forum for Cleaning-up the Niger Delta, December, 2000 – <http://www.nosdra.org/techinfo.html>, retrieved on 30/01/11.

<sup>94</sup> See paragraph 8.3, *ibid*.

the expenditure incurred by her operating partners including compensations and claims arising from damage caused by oil spill disasters.<sup>95</sup>

#### **4. Nigerian Ports Authority (NPA) Act<sup>96</sup>**

By virtue of the provisions of the Nigerian Ports Authority Act, the functions of the Nigerian Ports Authority shall be, *inter alia*, to control pollution arising from oil or any other substances from ships using the ports limits or their approaches.<sup>97</sup>

It is equally provided that during loading or discharging, any leakage of oil developing in the shore piping system shall be reported immediately to the Chief Fire Officer. If the leakage is of such a character that in the opinion of the Chief Fire Officer it constitutes a hazard, the loading or discharge shall be suspended until repairs have been effected.<sup>98</sup>

It further went on to provide that in the event of any spillage of oil on the wharf, immediate action shall be taken by the person on shore who is loading or discharging oil to recover the oil and to prevent its escape onto the harbour waters; and the harbour master and the Chief Fire Officer shall be notified immediately any spillage takes place.<sup>99</sup> The penalty for contravention of any of the Regulations is provided<sup>100</sup> though so paltry, showing the passivity exhibited in the review of our laws by the legislature, as out dated penalties are retained *ad nauseam*. Accordingly therefore, the NPA under these provisions are legitimately involved in environmental protection in the petroleum sector.

Furthermore, the National Oil Spill Contingency Plan included the NPA in the Agencies to be co-opted and mandatorily engaged by NOSDRA in the event of major or disastrous oil spill, wherein it shall in conjunction with NIMASA perform the following functions: (1) mobilize all nearby port facilities to assist in the response effort (2) provide barges and storage for recovered oil (3) facilitate berthing for vessels involved in the spill combat and (4) provide advice on the navigability of shipping lanes, creeks and other inland waterways.<sup>101</sup>

#### **5. Nigerian Security and Civil Defence Corps (NSCDC) Act<sup>102</sup>**

With regard to the functions of the corps relating to environmental protection in the oil and gas sector, the Act provides as follows; the corps shall *inter alia*, have power to arrest with or without a warrant, detain, investigate and institute legal

<sup>95</sup> *Ibid.*

<sup>96</sup> Nigerian Ports Authority (NPA) Act, CAP N126, LFN 2004.

<sup>97</sup> Section 7(i), *ibid.*

<sup>98</sup> Regulation 17, Nigerian Ports Authority Petroleum Wharf (Apapa) Bye-Laws, a subsidiary legislation to the NPA Act CAP N126, LFN 2004.

<sup>99</sup> Regulation 18, *ibid.*, see also Regulations 43& 74, Nigerian Ports Authority (Port) Regulations, a subsidiary legislation to the NPA Act CAP N126, LFN 2004 – which expressly prohibits the discharge or escape from a ship or a place on land of oil or any dangerous or offensive liquid into the waters of a port; see also Section 3(3) of the ONWA– which authorizes the harbour Authority to appoint a place and conditions within its jurisdiction where the ballast water of vessels in which cargo of dangerous petroleum has been carried may be discharged legitimately and without constituting an offence.

<sup>100</sup> Regulations 34; Nigerian Ports Authority Petroleum Wharf (Apapa) Bye-laws, *op.cit.*

<sup>101</sup> Paragraph 8.7 of the Plan; at pg. 43 see also Paragraph 4 of the Second Schedule to the NOSDRA Act.

<sup>102</sup> Nigerian Security and Civil Defence Corps (NSCDC) Act CAP N146, LFN, 2007.

proceedings by or in the name of the Attorney-General of the Federation in accordance with the provisions of the Constitution of the Federal Republic of Nigeria against any person who is reasonably suspected to have committed an offence under this Act or is involved in any chemical poisoning or oil spillage, nuclear waste poisoning; and power transmission lines, or oil pipelines, etc vandalization.<sup>103</sup> Oil spillage and oil pipelines vandalization monitoring were probably included as functions of NSCDC due to incessant vandalization of oil pipelines by illegal bunkerers and militants due to the resource control uprising in the Niger Delta Region of Nigeria. Other Security Agencies like the Police, the Armed forces, the State Security Services and even the local vigilantes can equally in the course of their routine duties police oil pipelines and other oil facilities against vandalization and other offences. Accordingly the Police for example, can come under the provisions of the Criminal Code Act<sup>104</sup> at Section 245 and 247(a) to hold and prosecute any polluter of water or air including a player in the oil and gas sector.

For clarity the said sections provide as follows: (1) Section 245; “Any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir or place, so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanor, and is liable to imprisonment for six months. (2) Section 247(a) provides as follows, “Any person who vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along a public way; is guilty of a misdemeanor, and is liable to imprisonment for six months”. However it appears that the only culprits that could be contemplated here would be natural persons as the punishment thereto cannot yet be meted out on the corporate offender.

## **6. Petroleum Act<sup>105</sup>**

Under this Act, the Minister and Ministry of Petroleum Resources have a role in environmental protection in the oil and gas sector. Accordingly, under this statute, the Minister of Petroleum Resources may make regulations providing generally for matters relating to licences and leases granted under this Act and operations carried out thereunder including the prevention of pollution of water courses and atmosphere.<sup>106</sup>

Furthermore, the said Minister of Petroleum Resources may also make regulations:

- i. Regulating the importation, handling, storage and distribution of petroleum, petroleum products and other flammable oils and liquids, and in particular (without prejudice to the generality of the foregoing) – defining dangerous petroleum and dangerous petroleum products, prescribing anchorages for ships carrying dangerous petroleum or

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<sup>103</sup> Section 3(1)(f)(ii) &(vi), *ibid.*

<sup>104</sup> CAP C38 LFN, 2004; see for example, Sections 7(h) & (i), 13 and 131 of Public Health Law, Laws of Anambra State, 2006 under which the State and Local Government officials can also be involved in environmental protection in the oil and gas sector, abating any incidence as a public health nuisance under the law.

<sup>105</sup> Petroleum Act, CAP P10 LFN, 2004

<sup>106</sup> Section 9(1)(b)(iii), *ibid.*

- dangerous petroleum products as cargo and requiring those ships to proceed to and remain at those anchorages;<sup>107</sup>
- ii. Regulating the loading, unloading, transport within a port, landing, transshipment and shipment of petroleum and petroleum products;<sup>108</sup> and
  - iii. Prescribing conditions and restrictions to be imposed upon vessels arriving at a port after having carried petroleum, petroleum products, dangerous petroleum or dangerous petroleum products.<sup>109</sup>

It may be pertinent to point out that the present regulations made pursuant to section 9 by the Minister of Petroleum Resources made elaborate provisions for the transportation, handling, storage, etc of all petroleum products.<sup>110</sup> Thus, strict compliance to the Act and its regulations may engender safe handling of petroleum and its products and thereby prevent pollution of water courses and the atmosphere. The said regulation however, did not make direct and explicit provisions on the prevention (and impacted sites remediation) of pollution of water courses and the atmosphere.<sup>111</sup>

Furthermore, with regard to environmental protection in relation to oil pipelines, the Minister of Petroleum may by regulation prescribe (*inter alia*) – measures in respect of public safety, the avoidance of interference with works of public utility in, over and under any land and the prevention of pollution of any land or water; such matters relating to the construction, maintenance and operation of oil pipelines as the minister considers it necessary or appropriate to prescribe.<sup>112</sup>

## 7. Oil in Navigable Waters (ONWA) Act<sup>113</sup>

This statute as aforementioned domesticated in Nigeria, the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 as amended in 1962 and made provisions for such prevention in the navigable waters of Nigeria;<sup>114</sup> and is therefore a principal statute of Environmental protection in Nigeria. However,

<sup>107</sup> Section 9(1)(e)(iii), *ibid*.

<sup>108</sup> Section 9(1)(e)(iv), *ibid*.

<sup>109</sup> Section 9(1)(e)(vi), *ibid*.

<sup>110</sup> Petroleum Regulations, *ibid*. See particularly Regulations 72-87; which regulate transportation of Petroleum by tank vehicles on Federal trunk roads and other roads in the FCT, Abuja; see also Regulation 25, Petroleum Drilling and Production Regulations; which for prevention of pollution provides that “the licensee or lessee shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluid or substances which might contaminate water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it,” and Regulation 37, *ibid* which provides for the maintenance of apparatus and conduct of operations in the Sector.

<sup>111</sup> However, ONWA which domesticated International Convention for the Prevention of Pollution of Sea by Oil 1954 to 1962 made detailed, provisions for the prevention of pollution of water courses and the sea.

<sup>112</sup> Section 33(c) & (d), Oil Pipelines Act, CAP 07 LFN, 2004; see also Oil and Pipelines Regulations made pursuant thereto which provides for the design; construction; inspection inclusive of environmental protection guidelines, etc for oil and gas pipelines.

<sup>113</sup> Oil in Navigable Waters Act, (ONWA), CAP 06, LFN, 2004

<sup>114</sup> See the long title to the Act, *ibid*.

the Act is also to be operated or regulated and enforced by the Minister and Ministry of Transport who may appoint inspectors to report to him and for the purposes of enforcement of the Act.<sup>115</sup>

In a nutshell, the Act provides *inter alia* as follows:

- i. It prohibits the discharge of crude oil, fuel, lubricating oil, heavy diesel oil and any mixture containing not less than 100 parts of oil, etc into prohibited seas areas by Nigerian ships otherwise the owner or master of the ship shall be guilty of an offence subject to the provisions of the Act.<sup>116</sup>
- ii. It designates prohibited areas<sup>117</sup> of the sea and empowers the Minister of Transport to designate by Order other areas, outside the prohibited areas of the sea and Nigerian territorial waters, as prohibited areas for the purpose of protecting the coast and territorial waters of Nigeria from pollution by oil;<sup>118</sup> and to vary or exclude any prohibited area as such.<sup>119</sup>
- iii. The Oil in Navigable Waters Act makes the owner or master of the vessel, the occupier of a place on land or the person in charge of the apparatus used for transferring oil from or to a vessel guilty of an offence, if any oil or mixture containing oil is discharged into the whole of the sea within the seaward limits of the territorial waters of Nigeria, and all other waters (including in land waters) which are within those limits and are navigable by sea going ships.<sup>120</sup>

However, Section 3 (3)<sup>121</sup> provides *inter alia* the singular exception with regard to the discharge of dangerous petroleum only, wherein it authorizes “the harbour authority to appoint a place within its jurisdiction where the ballast water of vessels in which a cargo of dangerous petroleum has been carried may be discharged into the waters of the harbour, at such times, and subject to such conditions as the authority may determine...” Accordingly, by this exception, the ballast water of vessels in which dangerous petroleum had been carried (which might have a mixture of oil) can be discharged legally into the waters of the harbour under this subsection.

It is apparent that ONWA is concerned with territorial waters of Nigeria. Considering the nature of oil pollution, a question that may arise is what of the near sea outside the territorial waters of Nigeria or those oil terminal outside the prohibited sea areas and designated prohibited sea areas; how would such navigable waters be protected from oil pollution? These questions were answered adequately by the Oil Terminal Dues Act;<sup>122</sup> which at Section 6 thereto makes the provisions of section 3 of

<sup>115</sup> Section 55(3) and 11, *ibid.* However, the Act empowers every surveyor of ships to be taken as having been so appointed by the Minister. However, NOSDRA Act under Section 6(1) empowers NOSDRA to be responsible for surveillance and ensure compliance with all existing environmental legislation and detection of oil spills in the petroleum sector.

<sup>116</sup> Section 1, ONWA, CAP 06 LFN, 2004.

<sup>117</sup> Section 2(1) & (2), *ibid.*

<sup>118</sup> Section 2(3), *ibid.*

<sup>119</sup> Section 2(4), *ibid.*

<sup>120</sup> Section 3, *ibid.*; it appears Section 1 applies to only Nigerian ships whereas Section 3 applies to all ships plying Nigeria waters.

<sup>121</sup> *Ibid.*

<sup>122</sup> CAP 08 LFN, 2004

the ONWA applicable in any area within which any oil terminal is situated (even) if it is situated outside the limits of the territorial waters of Nigeria.

Therefore, any discharge, escape, etc from a pipeline, tank, apparatus or vessel or as a result of any operation for evacuating oil, etc from any such oil terminal is an offence and the owner thereto is guilty of an offence under section 3 of the ONWA and is punishable as provided in section 6 thereto.

Thus, ONWA is directly applicable to prohibited areas (within Nigerian territorial waters) and designated prohibited areas (outside Nigerian territorial waters); and is indirectly applicable through the Oil Terminal Dues Act<sup>123</sup> in any area within which any “Nigerian” oil terminal is situated even if outside the territorial waters of Nigeria. Thus, the whole field of Navigable waters of Nigeria is covered between the two laws; the question however lies in how effective and efficient is the monitoring and enforcement with regard to these laws vis-à-vis oil pollution incidents?

### **Special Defences**

Apart from the exception already mentioned above, the Act provides several special defences for offenders of the provisions of Sections 1 and 3.<sup>124</sup> The special defences are as follows:

- i. That oil or mixture of oil 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.<sup>125</sup>
- ii. That the oil or mixture escaped in consequence of damage to the vessel, and that as soon as practicable after the damage occurred all reasonable steps were taken to prevent or (if it could not be prevented) for stopping or reducing, the escape of oil or mixture.<sup>126</sup>
- iii. That the oil or mixture escaped by reason of leakage, that the leakage was not due to any want of reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it.<sup>127</sup>
- iv. That the escape of the oil or mixture from a place on land or from apparatus used for transferring oil from or to a vessel was not due to any want of reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it.<sup>128</sup>
- v. With regard to discharge or escape from a place on land that:
  - (a) the discharge was caused by the act of a person who was in that place without the permission (express or implied) of the occupier.<sup>129</sup>
  - (b) the oil was contained in an effluent produced by operations for the refining of oil;
  - (c) that it was not reasonably practicable to dispose of the effluent otherwise than by discharging it into waters of Nigeria.

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<sup>123</sup> *Ibid.*

<sup>124</sup> Of the ONWA CAP 06, LFN 2004

<sup>125</sup> Section 4(1), *ibid.*

<sup>126</sup> Section 4(2)(a), *ibid.*

<sup>127</sup> Section 4(2)(b), *ibid.*

<sup>128</sup> Section 4(3), *ibid.*

<sup>129</sup> Section 4(4), *ibid.*

- (d) all reasonable practicable steps had been taken for eliminating oil from the effluent.<sup>130</sup>
- vi. Finally, a discharge will not constitute an offence where it is in exercise of any power conferred by statute (e.g. Sections 368 & 382 of the Merchant Shipping Act – which relate to the removal of wrecks by the Receiver of Wreck); etc, unless it is shown that the person or authority failed to take such steps (if any) as were reasonable in the circumstances for preventing, stopping or reducing the discharge.<sup>131</sup>

However, it must be noted that these special defences are not cast in marble. Just as shown in the last and sixth defence, they are all rebuttable that is to say, for instance with regard to the first special defence if the Court is satisfied that the discharge was not for any of the reasons or purposes stated therein the defence will collapse, and the accused will be found guilty and convicted.

Furthermore, inasmuch as these special defences expose the delicate environment to hazards and pollution which the Convention and the Act sought to prevent, what aggravates the sordid state of affairs is the ludicrously low penalties which range from ₦20 to ₦2,000 in the Act which will not serve as a deterrent to any one let alone the wealthy multinationals involved in the oil sector and shipping. These fines provided against offences in the Act are, to say the least, antiquated and insufficient. Although found in the Laws of the Federation, 2004 but to regard them as punishments of this millennium is a fallacy. Apparently, they must be penalties that were imposed when the Act was first enacted in the 1960s and were just carried over to 2004 due to the laxity and laziness of the legislature, they were not beefed up or raised as to be contemporaneous to the realities of this millennium. Accordingly, even if an offender is convicted he will laugh off the penalties/punishment, thereby exposing our environment to more danger if left alone to this law.<sup>132</sup> These penalties should therefore be reviewed upwards so as to give the law greater bite, and to bring it in tune with contemporary realities. Another latent impediment and defect worthy of note herein, with regard to punishment or prosecution is that every prosecution under the Act is with the consent of the Attorney General of the Federation.<sup>133</sup> Accordingly, the Attorney General a political appointee might withhold such approval based on political or other consideration or exigency thereby defeating the purpose of the Act. Secondly going for his approval before every prosecution will lead to delay and justice delayed is justice denied moreso in oil and gas sector where delay in judicial settlement of cases has, by far, grave consequences for human/health and national security.<sup>134</sup> It is therefore submitted that this requirement is unnecessary and should be removed as the Attorney General's constitutional enshrined oversight power is enough avenue for his intervention where necessary. Moreover, the environment is the

<sup>130</sup> Section 4(5)(a), (b) & (c), *ibid.*

<sup>131</sup> Section 4(6), *ibid.*

<sup>132</sup> It is however, heartening that the newer legislations like the NOSDRA & NIMASA Acts have stiffer and more contemporary penalties against offenders.

<sup>133</sup> Section 12, ONWA CAP 06 LFN, 2004

<sup>134</sup> See Adegoroye, Adegoke, "Keynote Address" delivered at the opening Ceremony of the International Conference on Environmental Law and Policy held at the Law Centre, Lagos State University – see the bound volume of the Report and Papers at pg. 452

heritage of everyman and not just that of the Minister or his appointed Inspector alone and all hands ought to be on deck to protect it. Hence, it is my considered opinion that provisions should be made in these laws for the individual or community to participate in environmental protection and control through actions in Court.

### **Other Control Regimes under the Oil in Navigable Waters Act**

There are other avenues through which the Ministry of Transport under the Act is involved in environmental protection in the oil and gas sector. These avenues are as follows:

- i. The Minister of Transport is empowered to make regulations for Nigerian ships to be fitted with such equipment and to comply with such other requirement for preventing or reducing discharges of oil and mixtures containing oil into the sea.<sup>135</sup>
- ii. The Minister of Transport is empowered to make regulations requiring Nigerian ships, to keep records of any legitimate or allowed discharge, escape, leakage and ballasting or other such operations of oil or a mixture containing oil from such ships.<sup>136</sup>
- iii. The Act also empowers every harbour authority by itself or through an agent to provide facilities (that is oil reception facilities) for enabling vessels using the harbour to discharge or deposit oil residues, at reasonable charges and conditions.<sup>137</sup>  
It is under this duty to provide oil reception facilities that the harbour authority may commit an offence where it fails to comply with directives of the Minister of Transport to either make an existing oil reception facility adequate or provide, or arrange for the provision of such oil reception facilities as the Minister may specify in a directive and within the period specified therein.<sup>138</sup>
- iv. It restricts transfer of oil at night unless on requisite notice to the harbour master or in his absence the harbour authority.<sup>139</sup>
- v. It makes it an offence for the owner or master of the vessel or occupier of any place on land not to report any allowed or legitimate discharge, escape, or leakage of oil into the waters of a harbour in Nigeria to the harbour master or in his absence the harbour authority.<sup>140</sup>

It might be pertinent to point out that this Act makes no provisions for the clean up or funding of such clean-up in both legitimate and illegitimate spillages whether discharge, escape or leakages. Inasmuch as other legislations on the issue might take care of it, it would have been apposite to provide therein that the 'Polluter Pays Principle' shall apply to both legitimate and illegitimate spillages under the Act.

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<sup>135</sup> Section 5(1) &(2), ONWA, CAP 06, LFN, 2004

<sup>136</sup> Section 7(1)(a), (b) & (c), *ibid.*

<sup>137</sup> Section 8(1),(2),(3) & (4), *ibid.*

<sup>138</sup> Section 8(5) & (8), *ibid.*

<sup>139</sup> Section 9, *ibid.*

<sup>140</sup> Section 10, *ibid.*



## 8. Merchant Shipping Act<sup>141</sup>

This Act grounds the major stake of the Ministry of Transport in environmental protection in the Petroleum sector especially with regard to the marine environment. The extant Laws of the Federation through Section 336 of the Merchant Shipping Act<sup>142</sup> domesticated many International Maritime Conventions and Agreements for the Prevention of pollution from ship, etc. In fact, it tied their applicability in Nigeria with the commencement of the Merchant Shipping Act.<sup>143</sup> These International Conventions and Agreement made applicable in Nigeria are as follows:<sup>144</sup>

- (1) International Convention for the Prevention of Pollution from Ships, 1973/1978 and the Annexure thereto;
- (2) Convention relating to Intervention on the High Seas in cases of Threatened Oil Pollution Casualties, 1969.
- (3) International Convention on Prevention of Marine Pollution by Dumping of Wastes and other Matters, 1972
- (4) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990
- (5) International Convention on Civil Liability for Oil Pollution Damage 1992
- (6) Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 Protocol thereto.
- (7) Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and its Protocol of 1992;
- (8) Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal, 1989.

It also therein made applicable other international agreements and conventions to which Nigeria is a party that are not mentioned in the Act but which relates to the prevention, reduction or control of pollution of the sea or other waters by matters from ships, and civil liability and compensation for pollution damage from ships.<sup>145</sup>

As for the Minister of Transport, the Act imposed on him the responsibility to prevent the pollution of marine environment from ships, subject however to the provisions of the Act and any other law or convention for the time being in force relating to the prevention of pollution from ships,<sup>146</sup> and to make further regulations giving effect to the provisions of the International Conventions and Agreements mentioned in the Act.<sup>147</sup>

Finally, with regard to environmental protection, it equally granted the Minister of Transport powers to make Order for the purpose of giving effect to any

<sup>141</sup> Merchant Shipping Act, CAP M11, LFN,2004.

<sup>142</sup> *Ibid*, The attention of the reader is drawn to the fact that the majority of the laws on environmental control especially in the marine environment is tied to the Minister and Ministry of Transport or its parastatals- NIMASA Act, NPA Act, ONWA Act and Merchant Shipping Act; and not to the Ministry of Environment.

<sup>143</sup> Section 336(1), *ibid*.

<sup>144</sup> Section 336(1)(a-h), *ibid*.

<sup>145</sup> Section 336(1)(i), *ibid*.

<sup>146</sup> Section 336(2), *ibid*.

<sup>147</sup> Section 336(3), *ibid*, see also Section 336(4)(a), *ibid*.

provision of the United Nations Convention on the Law of the Sea 1982 for the protection and preservation of the Marine environment from pollution by matter from ships.<sup>148</sup>

It may be proper to point out that offences under this head attract a fine of not less than five hundred thousand naira or a term of imprisonment of not less than two years or both.<sup>149</sup> The punishment here though inadequate is sterner than what obtains in some of the legislations already discussed like the Oil in Navigable Waters Act (ONWA) or Nigerian Ports Authority Act.

### **9. Nigerian Meteorological Agency (NMA) (Establishment, etc) Act<sup>150</sup>**

Equally of strategic importance in environmental protection in the oil and gas sector is the Nigerian Meteorological Agency,<sup>151</sup> a parastatal of the Federal Ministry of Aviation.

Accordingly, of the deluge of functions that the Agency is saddled with by Section 7 of the Act;<sup>152</sup> with regard to environmental protection and ancillary matters in the oil and gas sector, it provides that the Agency shall;<sup>153</sup>

1. Issue weather forecasts for the safe operation of the aircrafts, ocean going vessels and oil rigs.
2. Provide weather services in marine, environmental pollution and biometeorology for climatic and human health activities
3. Profer advice to the Federal and State Governments on Siesmological activities
4. Monitor metrological components of environmental pollution and ozone concentration.

It went further to provide that “without prejudice to the functions in subsection (1) of the section (the foregoing inclusive), the Agency shall prescribe the climatic requirement for all sectoral activities including aviation, defence, finance, agriculture, construction, works, environment, industries, natural disaster and relief management, water resources, power and steel, transport, science and technology.”<sup>154</sup>

From the foregoing provisions therefore, as the Agency shall prescribe climatic requirements for diverse sectoral activities inclusive of environment, natural disaster and relief management e.g. Tier 3 Oil Spill Combat and remediation – which is a consummate disaster, the agency is therefore, involved in environmental protection in the oil and gas sector.

The Agency’s involvement and relevance as a strategic player in the sector is made obvious by the duties mandatorily vested on its parent ministry, the Federal Ministry of Aviation by the National Oil Spill contingency Plan<sup>155</sup> and in the Second

<sup>148</sup> Section 337, *ibid.*

<sup>149</sup> Section 336(6), *ibid.*

<sup>150</sup> CAP N152 LFN, 2004

<sup>151</sup> Established by Section 1, Nigerian Meteorological Agency (Establishment, etc) Act CAP N152 LFN, 2004

<sup>152</sup> *Ibid.*

<sup>153</sup> Section 7(1) (c) &, (f), (h) & (o) *ibid*

<sup>154</sup> Section 7(2); *ibid.*

<sup>155</sup> See paragraph 8.14, National Oil Spill Contingency Plan at pp 45-46

Schedule to the NOSDRA Act<sup>156</sup> during a major Tier 2 and Tier 3 Oil Spill combat and remediation which are definitely to be performed by the Agency, namely:

- (1) provide regularly, data on the prevailing weather conditions and;
- (2) make predictions on weather changes.

### **Environmental Protection in the Gas Sub-Sector**

It is very clear from the legislations and institutions discussed so far in this work that they are generally concerned only with the oil sub-sector and that the gas sub-sector was almost not mentioned nor the challenges therefrom addressed.

However, as aforesaid, environmental protection in the gas sub-sector is germane to environmental sustainability and sustainable development as gas flaring has remained a global concern in general and a national concern in particular as Nigeria has not given it the attention it deserves and demands.<sup>157</sup> This is because apart from the environmental concern, gas flaring is a consummate wastage, the gas so flared is in very high demand for domestic and industrial uses both locally and internationally.

The National remedy to the environmental challenges from the gas sub-sector is generally in the form of gas re-injection,<sup>158</sup> hence the Associated Gas Re-injection Act<sup>159</sup> which came into operation in 1979 to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plan for implementation of gas re-injection.<sup>160</sup>

As would be seen shortly from the provisions of the Associated Gas Re-injection Act, the aim of the Act is to eliminate gas flaring through re-injection and viable utilization of all produced associated gas.

Accordingly, Section 1<sup>161</sup> provides as follows, “Notwithstanding the provisions of regulation 43 of the Petroleum (Drilling and Production) Regulation made under the Petroleum Act, CAP P10,<sup>162</sup> every company producing oil and gas in

<sup>156</sup> See paragraph 8, Second Schedule to the NOSDRA Act, CAP N157, LFN, 2006

<sup>157</sup> The magnitude of gas flaring in Nigeria, which is ranked as the highest gas flaring nation in the world, could be glimpsed from the fact that Shell Petroleum Dev. Company (SPDC) the biggest oil producing company in Nigeria, responsible for the exploitation of not less than 75 percent of oil and gas in Niger Delta nay Nigeria admits to flaring not less than 50 percent of the gas that comes out with oil in their operations— **Sunday Vanguard**, February 13, 2011 at pp 9 & 51

<sup>158</sup> Gas Re-injection is the re-injection of natural gas into an underground reservoir, typically one already containing both natural gas and crude oil, in order to increase the pressure within the reservoir and thus induce the flow of crude oil or else sequester gas that cannot be exported. This is not to be confused with gas lift, where gas is injected into the annulus of the well rather than the reservoir. After the crude has been pumped out, the natural gas is once again recovered – WIKIPEDIA, the free Encyclopedia. Retrieved on 18/02/2011

<sup>159</sup> CAP A25 LFN 2004; See also the subsidiary legislation made thereto, namely Associated Gas Re-injection (continued flaring of gas) Regulations.

<sup>160</sup> See the long title, *ibid*

<sup>161</sup> Associated Gas Re-injection Act CAP A25 LFN, 2004.

<sup>162</sup> The said regulation makes it mandatory for every licensee or lessee of oil field, not later than five years after the commencement of production from the relevant area to submit to the Minister any feasibility study, programme or proposals that he may have for the utilization of any natural gas, whether associated with oil or not, which has been discovered in the relevant area. The provisions of the Associated Gas Re-injection Act CAP A25 LFN, 2004 apparently concretized the indeterminate nature of the regulation as it makes the submission of gas programmes mandatory at least with regard to associated gas.

Nigeria shall not later than 1st April, 1980 submit to the Minister, a preliminary programme for – (a) schemes for the viable utilization of all associated gas produced from a field or groups of fields, (b) project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project.”

The Act stepped it up from preliminary programme to detailed programme by providing in Section 2<sup>163</sup> as follows (1) Not later than 1st October, 1980, every company producing oil and gas in Nigeria shall submit to the Minister detailed programmes and plans for either – (a) the implementation of programmes relating to the re-injection of all produced associated gas; or (b) schemes for the viable utilization of all produced associated gas (2) the fact that some of the gas produced in association with oil has been earmarked for some alternative utilization shall not exempt compliance with Section 1 of this Act and Subsection (1) of this Section. Accordingly, the Submission of the preliminary gas programme and detailed gas programme (with regard to associated gas only) to the Minister by the oil and gas producers are mandatory stipulation of this statute.

Taking it a step further, the Act went on to prohibit gas flaring in Section 3 with effect from 1st January, 1984 as follows; (1) subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1<sup>st</sup> January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.

(2) 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 issue a certificate in that respect to a company engaged in the production of oil or gas – (a) specifying such terms and conditions as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or (b) permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the minister may from time to time prescribe for every 28.317 standard cubic metre (SCM) of gas flared; provided that, any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil. Accordingly the penalty and fine for gas flaring which ought to be punishment is treated and collected like ordinary tax by the Federal government of Nigeria to the detriment of the environment.<sup>164</sup>

The apparent intention probably being that between 1980 and 1984 that detailed re-injection and utilization programmes must have been in place throughout the sector thus making for isolated associated gas flaring which could be controlled by the Minister, but this is not to be the case.

Furthermore, by the provisions of Subsection (1) and Subsection (2) above it appears that apart from the Certification by the Minister that could authorize associated gas flaring under Section 3(2), the minister could also under section 3(1) permit gas flaring in writing. This evidences the levity with which the government and the legislature of Nigeria view and treat gas flaring which had been stopped or

<sup>163</sup> Associated Gas Re-injection Act CAP A25 LFN, 2004.

<sup>164</sup> See Section 2 and paragraph 11 of the First Schedule to the Federal Inland Revenue Service (Establishment) Act CAP F36 LFN, 2007. The year 2014 is the present deadline for stopping gas flaring in Nigeria.

reduced to the barest minimum in most part of the world, particularly in those nations which are homes to most of the multinational companies that are operating and flaring gas in Nigeria.<sup>165</sup> This assertion is further borne out by the fact that the deadline of 1984 is 27 years ago and gas is still being flared in virtually all oil fields in Nigeria and even by NNPC. The time frame for the prohibition or stoppage is shifted *ad nauseum* every year, even in this 2011, the legislature is still posturing, pretending to be working on it and/or addressing the issue, but it is all motion and no movement. Thus, there is no gainsaying that the present date of 2014 is another mirage. The scenario brings to the fore the unpatriotism, selfishness, corruption and conspiracy against the Nation nay the world and the environment by the government and the legislature of Nigeria and the oil companies.<sup>166</sup>

Accordingly, the entire provisions of the Associated Gas Re-injection Act and the penal provisions in Section 4<sup>167</sup> thereto in particular have been just mere dead letters in the statute book of Nigeria. For the avoidance of doubt Section 4 provides as follows; (1) where any person commits an offence under section 3 of this Act, the person concerned shall forfeit the concessions granted to him in the particular field or fields in relation to which the offence was committed. (2) In addition to the penalty specified in subsection (1) of this section, the Minister may order the withholding of all or part of any entitlement of any offending person towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field in accordance with good oil-field practice.

Thus, the fact that gas flaring is still being carried on with impunity in oil fields throughout the Niger Delta today evidences the futility of this law and lack of seriousness of the government in environmental protection in the sector. This is because it is clear that the penalty prescribed in Section 4 of the Act has not been meted out on any oil company as they are still producing and flaring on the one hand or it may mean that the Minister grants the certification to flare without much ado and that the payment charged oil companies for gas flaring is not substantial enough as to serve as a deterrent to the other.<sup>168</sup> Moreover the tax incentives to the gas industry, which include tax free periods, capital allowances, tax free dividends, tax deductible interest on loans<sup>169</sup> and the provision of the VAT Act<sup>170</sup> which exempted plant, machinery and equipment purchased for utilization of gas in the down-stream operations from VAT, might have been enough to cushion or even eliminate any adverse financial effect of the penalty for gas flaring.

However, it may be pertinent before concluding to also discuss some of the provisions of the subsidiary legislation to the Act namely; Associated Gas Re-

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<sup>165</sup> For example, Netherlands the home of Shell Petroleum Development Company (SPDC)

<sup>166</sup> This is even more glaringly worrisome when viewed in the light of the recent revelation of Wikileaks on the operation of the oil companies in Nigeria vis-à-vis their influence and spy ring in government.

<sup>167</sup> Associated Gas Re-injection Act, CAP A25 LFN, 2004

<sup>168</sup> See Report of the Special Committee on the Review of Petroleum Products Supply and Distributions, October 2000 at p.77, where it said inter alia, "it is cheaper for the companies to pay penalty for flaring."

<sup>169</sup> See Section 39 Companies Income Tax Act (CITA) Cap C21, LFN 2004 and amended in 2009

<sup>170</sup> See paragraph 8 Part I of the First Schedule to the Value Added Tax Act Cap VI LFN, 2004

injection (Continued Flaring of Gas) Regulations<sup>171</sup> which are patently environmental unfriendly, which will go a step further to show lack of seriousness of the government of Nigeria to combat and stop gas flaring.

Regulation 1(a) –(e) of the aforementioned Regulation provides conditions subject to which the Minister may issue certificate for the continued flaring of gas after the deadline;<sup>172</sup> namely

- (1) *Where more than 75 percent of the produced gas is effectively utilized or conserved.*<sup>173</sup>

Comment: This means that the certificate impliedly authorizes the flaring of 25 percent of produced gas, irremediably into the environment. However SPDC admitted that it flares not less than 50 percent of the gas they produce in Nigeria and they exploit 75 percent of the oil and gas in the Niger Delta.<sup>174</sup> So one can imagine the magnitude of gas flaring that is being carried out in Nigeria. And if it is true that SPDC flares not less than 50 percent of the gas they produce what then is the essence of the legislation and government in Nigeria?

- (2) *Where the produced gas contains more than fifteen percent impurities, such as NO<sub>2</sub>, H<sub>2</sub>S, CO<sub>2</sub> etc, which render the gas unsuitable for industrial purposes.*<sup>175</sup>

Comment: Then the minister could grant the company certificate to flare such impure gas one hundred percent. And as it is trite that matter can neither be created nor destroyed the magnitude of damage to the environment by the flaring of this impure gas is even greater than the ordinary. It could therefore, be validly implied that the purpose of this law, the regulation and the certification is not environmental control or concern at all but economic purposes. As what they are concerned about is that since the gas is not good for any industrial purpose it should be flared 100 percent, regardless of the environmental implication of such flaring namely; green house gas production, ozone layer depletion, acid rain, etc.

- (3) *Where an on-going utilization programme is interrupted by equipment failure. Provided that, such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months.*<sup>176</sup>

Comments: It is not clear how certification to flare gas under this head would be granted following the equipment failure. Would production be stopped immediately the equipment fail and application for certification to start-flaring obtained before re-commencement of production and flaring; if the certification is granted?; or would they continue production and flaring while waiting for certification? If the last approach is the position, it then means that that certification is mandatory as the minister must willy nilly grant it in circumstance, as they have already commenced flaring following the

<sup>171</sup> Subsidiary Legislation to the Associated Gas Re-injection Act, CAP A25 LFN, 2004

<sup>172</sup> The deadline here is 1st January 1984

<sup>173</sup> Regulation 1(a), Associated Gas Re-injection (continued flaring of Gas) Regulations

<sup>174</sup> **Sunday Vanguard Newspaper**, 13th February, 2011, Vol. 6 No. 411 at pg 9, & 51, so who is fooling who?

<sup>175</sup> Regulation 1(b), Associated Gas Re-injection (continued flaring of Gas) Regulations.

<sup>176</sup> Regulation 1(c), *ibid.*

equipment failure. In that case it ought not be called certification but a defence for gas flaring. The proviso of in frequency notwithstanding, it is a view from that provision that there is no concern for the environment and the consequences of gas flaring, as 100 percent gas flaring is allowed if an utilization programme is interrupted by equipment failure. This is because if the environment is the concern then under no circumstance will gas flaring be allowed. Thus, what could have been the course of action following equipment failure would be to stop production until the equipment failure is repaired. It is submitted that for environmental sustainability and sustainable development oil production should not be a do or die affair and to the detriment of our environment and life on earth. Stoppage of production will also serve the purpose of gingering the oil company to remedy the equipment failure with every dispatch so as not to lose much more, thereby.

- (4) *Where the ratio of the volume of gas produced per day to distance of the oil field from the nearest gas line or possible utilization point is less than 50,000 SCF/km. Provided that the gas-to-oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in that field.*<sup>177</sup>
- (5) *Where the Minister in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the condition specified in these Regulations.*<sup>178</sup>

Comments: The allowances made and the free hand granted in the last two regulations could have been negligible deserving no comment in an ideal situation where avoidable gas flaring has been eliminated 100 percent but not in the circumstances prevailing presently in Nigeria, where gas flaring is the norm and not the exception as in most western countries. Thus, the last two regulations are bad as it considers only the economic advantage or implications and scarified environmental consideration totally, thereby aggravating environmental impact of gas flaring in the short and long run.

### **Conclusion and Recommendations**

The provisions of Nigerian statutes on environmental protection in the oil sub-sector are really copious, wide and highly encompassing in theory. This shows that the Nigerian government and legislature is environmental conscious and friendly at least in theory. However, enforceability and the practical reality on ground in the sub-sector is another matter. Secondly, the defences and exception allowed in most of the laws watered down the laws to the extent that every offender can conveniently escape liability, leading in this fault are the ONWA and the Associated Gas Re-injection Act. However, inasmuch as the National Oil Spill Contingency Plan have provided for a synergy of all relevant stakeholders in the event of a disastrous oil spill, nevertheless there is every need to harmonize the provisions of all these laws with regard to their provisions on environmental protection and pollution since they emanate from the same legislature and are for the same purpose – that is environmental protection and

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<sup>177</sup> Regulation 1(d), *ibid.*

<sup>178</sup> Regulation 1(e), *ibid.*

control of pollution; and moreover where Nigeria now has in place a Ministry and a Minister responsible for Environment and its Agency, NOSDRA.

Therefore, it may be pertinent to point out that the argument made for repeal by implication earlier in this article with regard to NIMASA Act will equally apply and even more forcefully to the ONWA and Merchant Shipping Act vis-va-vis the duties granted the Ministry and Minister of Transport in those Acts and the provisions of the NOSDRA Act. This is because NOSDRA Act at Section 6(a) granted NOSDRA the responsibility, *inter alia*, to ensure compliance with all existing environmental legislations in the Petroleum Sector; and there is no gainsaying that it is the Minister and Ministry of Environment that is responsible for the environment generally and not the Ministry of Transport. To that extent therefore, the Ministry and Minister of Transport cannot validly perform those functions and duties assigned to them on environmental protection and pollution control under those laws. They ought to be performed by the Minister, Ministry of Environment and their Agency NOSDRA. Furthermore, worthy of attention is the provision of NESREA Act<sup>179</sup> which at Section 7(c) granted NESREA (another parastatal of the Ministry of Environment) powers to enforce compliance with the provisions of International agreements, protocols, conventions and treaties on environment generally including that of the oil and gas sector. Thus, apparently removing the jurisdiction from the Ministry of Transport as granted to it under the Merchant Shipping Act. However, given the provisions of the other paragraphs of the same Section 7 of the NESREA Act which expressly excluded oil and gas sector from the jurisdiction of NESREA<sup>180</sup> and the aforementioned provision of the NOSDRA Act that granted NOSDRA special jurisdiction over all environmental legislations in the petroleum sector, serious doubt is cast as to whether NESREA is indeed responsible for the enforcement of these international instruments with regard to the petroleum sector in Nigeria. Our view though is that the ultimate jurisdiction with regard to environmental matters generally and in the oil and gas sector in particular, no doubt lies with the Federal Ministry of Environment and NOSDRA is the particular Agency responsible because NOSDRA is a special Agency specifically established for the oil and gas sector. Since Nigeria now has in place a Ministry of Environment and such strategic parastatals like NOSDRA and NESREA there is therefore, the need to streamline and harmonize all these legislations on environmental protection and pollution control.

On the other hand however, both the provisions of the same statutes with regard to, the gas sub-sector and the practical reality thereto leaves much more to be desired.

## **Recommendations**

**(1) Harmonization of Environmental Protection and Pollution Laws.** The provisions of Petroleum Act, NNPC Act, NPA Act, NIMASA, ONWA and the Merchant Shipping Act should be harmonized with the provisions of the NOSDRA

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<sup>179</sup> National Environmental Standards and Regulations Enforcement Agency (Establishment) Act CAP N164 LFN, 2007

<sup>180</sup> See for example, paragraphs 7(g), (h), (j), (k) and (l), *ibid.*



Act, since the NOSDRA Act and NOSDRA are the *numero uno* with regard to environmental protection in the oil and gas sector generally.<sup>181</sup>

For example, the various laws at their different sections compel the oil spiller (spill, discharge, escape or leakage) to report such incident to NOSDRA by the NOSDRA Act;<sup>182</sup> to the Chief Fire Officer on the one hand and to the Chief Fire Officer or the harbour master on the other hand by the NPA Act;<sup>183</sup> to NIMASA by the NIMASA Act,<sup>184</sup> or to the Harbour Authority by the ONWA,<sup>185</sup> etc. All those laws with their concomitant penalties await a single individual for the same incident. One pertinent question is, will the punishment prescribed in the other laws still lie on the individual if he had reported to only one of the Agencies and failed to report to others? That is to say if a person had reported a spill to say the Harbour Authority under the ONWA will he still be liable for not reporting to NOSDRA or vice versa. Conversely if a person is tried and acquitted or convicted by a court of competent jurisdiction for not reporting to say for example, the Harbour Authority can he equally be prosecuted by NOSDRA and the other Agencies for not reporting to them? The answer is definitely in the negative as the person can successfully make a plea of *autre fois convict* or *autre fois acquit* as the case maybe, as he had been tried and either convicted or acquitted of the same offence though under a different law.<sup>186</sup> Hence the need to harmonize the laws as it breeds confusion and duplicity in the sector in their present state. For example, nothing prevents all the laws from providing in their respective sections that reporting of oil spill should be made to NOSDRA?

A further example of the need for a harmonization of the laws, is the provision of the Petroleum Act that empowers the Minister of Petroleum Resources to prescribe anchorages for ships, etc to regulate loading, unloading and transportation within a Port of dangerous petroleum, etc.<sup>187</sup> Now the question is, will such anchorage for dangerous petroleum be different from “oil reception facilities” or “dangerous petroleum ballasting area” already established in the Ports under ONWA<sup>188</sup> by the Ministry of Transport? Secondly, will these anchorage prescribed by the Minister of Petroleum be in the same Ports owned and managed by the NPA and the Ministry of Transport or in different Ports? The point is that it might be tidier to localize through the law the anchorage, the oil reception Facility and the ballasting area in an area in every Port, this will *inter alia*, make it more convenient for all enforcement agencies and stakeholders, and streamline operations of even the concerned Ministries in the Port.

The third example is the NIMASA Act that empowers NIMASA to control and prevent marine pollution; and to impose charges, levy or fee payable under all federal

<sup>181</sup> Section 6(a), NOSDRA Act, CAP N157 LFN, 2006

<sup>182</sup> Section 6(2) & (3), *ibid.*

<sup>183</sup> See Regulations 17 & 18 of the Nigerian Ports Authority Petroleum Wharf (Apapa) Bye-laws, *op.cit.*

<sup>184</sup> Section 23(5)(a) NIMASA Act, CAP N161 LFN, 2007

<sup>185</sup> Section 10, ONWA, CAP 06 LFN, 2004

<sup>186</sup> See Section 223, Criminal Procedure Code; Section 181, Criminal Procedure Act & Section 36(9) CFRN, 1999; See also **The State v. Muna Madu & Another** (1976) NNLR 155; **C/F Nafiu Rabi v. The State** (1981) 2 NCLR, 293; see also **North Carolina v. Pearce** 395 U.S. 711 (1969).

<sup>187</sup> See Section 9(1)(e)(iii), Petroleum Act CAP P10 LFN, 2004.

<sup>188</sup> See Section 8(1),(2), (3) & (4) & Section 3(3) respectively of ONWA , CAP 06 LFN, 2004

legislation on marine pollution, etc as opposed to the provision of the NOSDRA Act that NOSDRA is responsible for all existing environmental legislation in the petroleum sector.

Accordingly, there is the need to harmonize these laws to streamline and reconcile these issues.

**(2) Ultimate Responsibility for clean-up and remediation of impacted sites should be vested in NOSDRA:** From the provisions of section 6 of the NOSDRA Act,<sup>189</sup> it is apparent that the function of the Agency borders generally on surveillance and co-ordination of response to oil spillages and clean-up thereto. This could equally be seen from the objectives as enunciated in the Plan and in Section 5.<sup>190</sup> Thus, the Act impliedly vest ultimate responsibility for clean-up and remediation of oil spill impacted sites on NOSDRA, though first of all on the oil spiller failure of which shall attract a fine of one million naira payable by the spiller to NOSDRA<sup>191</sup>. However, this is where he is caught or known. However, even if he pays the fine by virtue of the “Polluter Pays Principle” enunciated in the Plan, NOSDRA will equally recover the cost of clean-up and remediation of the impacted site from such oil spiller.<sup>192</sup> Thus the Act, it appears is clear on who bears responsibility for clean-up and remediation; in these circumstances, but the question is, how practicable is this regime.

Furthermore, it is equally clear and evident that the functions of some of the Ministries and Agencies co-opted by NOSDRA in the event of a major tier 2 and tier 3 oil spill as listed in the Second Schedule to the NOSDRA Act involves clean-up or remediation whereas others are to be involved in ancillary essential duties to be funded by them individually. Accordingly, clean-up and remediation primarily remains the responsibility of the oil-spiller but their efforts are to be augmented by these entities or on complete failure (or inability) be done by them with cost recovered from the spiller.<sup>193</sup>

It is however the opinion of this writer that the NOSDRA Act should be amended to provide in clearer terms and vest on NOSDRA the ultimate responsibility for clean-up of oil spill and remediation of the impacted site although at the expense of the oil spiller where he is identifiable. This will remedy the likely inadequacy of the one million naira fine payable by the oil spiller on failure to clean-up and remediate; and will equally remedy the inability, failure or refusal of the oil-spiller to clean-up

<sup>189</sup> NOSDRA Act, CAP N157 LFN, 2006

<sup>190</sup> *Ibid.*

<sup>191</sup> See Section 6(2) & (3), *Ibid.*

<sup>192</sup> However, in the **Shell Petroleum Development Company Limited v. Councillor F.B. Farah** (1995) 3 NWL R (Pt 382) 148(a) - The Community recovered damages including cost for rehabilitation of the land polluted due to a blow out from the oil well of the oil company. Thus, the law ought to empower communities and citizens in general expressly and not by the circuitous route of common law or tort, to claim against polluter oil companies and to compel them to remediate their pollutions.

<sup>193</sup> See an analysis of the issue and the clear position under the repealed FEPA Act in M.A. Ikhariale, “A Constitutional Imperative on the Environment: A programme of Action for Nigeria” in O.A. Osunbor et al (ed) **Environmental Law and Policy**, 1998 Law Centre, Faculty of Law, Lagos State University Publication, at p. 60

and remedy the impacted site or location,<sup>194</sup> it will also take care of the rogue or unknown or unidentified oil spiller.

**(3) Mandatory and Compellable Duty of NOSDRA:** It is equally our view that this duty of clean-up and remediation should be made mandatory upon NOSDRA and compellable through action in the Court by concerned citizen(s) or community.<sup>195</sup> This will make NOSDRA to sit up and take their surveillance and engagement of the oil spiller seriously because if they let them get through their fingers then they will bear the whole brunt.

**(4) Co-opted Ministries and Agencies to be Compellable:** A way or means by which the ministries and Agencies to be co-opted by NOSDRA in the event of a disastrous oil spill could be compelled by NOSDRA to act and come out with every dispatch and as is necessary should be fashioned and included in the Act.

**(5) Central Funding Regime for Spillage:** A corollary to the foregoing (2, 3 & 4 above) is that a fund similar to the United States OSLTF<sup>196</sup> should be created into which all operators in the oil and gas sector should make compulsory contribution for use in clean-up and remediation in the event of oil spillage.<sup>197</sup> Funding of the activities of all Ministries and Agencies in the event of a disastrous oil spill should be made from such fund. As an incentive to oil companies, it should be designed in such a way that the oil companies without incident of spillages over a specified period of time, say 2 to 3 years, will have a refund with some interest. Thus when such a fund is in place, ministries or Agencies will not have any reason not to participate when called upon to do so and if any fails, punishment would then be meted out on them. Secondly, all manner of spillages can comfortably be tackled by NOSDRA from such a fund.

**(6) Publicity and Sanitization Complain:** Intensive publicity and sensitization campaign of all operators in the oil and gas sector, the general public and all relevant stakeholders including judicial officers on the hazards of the oil and gas sector to the environment and the available legislative and institutional framework in the sector is highly recommended. This is because ignorance is a deadly disease and an informed

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<sup>194</sup> Such is the cause of Action presently at Federal High Court Asaba between NOSDRA and PPMC; the PPMC failed to pay the one million naira fine over the J.S. Amazing Oil spill incident in Warri on June 6, 2009 and also refused to clean up the impacted site, Whereof NOSDRA commenced the action against them – see **Daily Independent** (Lagos), 15 Nov. 2010.

<sup>195</sup> To this end, punishment of heavy fines could be imposed on NOSDRA for any failure to perform. A good example of such punishment on a government Agency is found in Section 8(5) & (8) of the ONWA CAP 06, LFN 2004 – against any harbour Authority for failure to provide “oil reception facility” as directed by the Minister. In fact, compelling NOSDRA to action should be allowed every Nigerian because a deleterious and unsustainable environment due to the ills of the oil and gas sector will affect everyone.

<sup>196</sup> Refer to p.62 above for fuller discussion of OSLTF

<sup>197</sup> See for example Section 121, Nigerian Minerals and Mining Act CAP N162, which established the Environmental Protection and Rehabilitation fund into which every holder of mineral title shall make contributions for the purpose of guaranteeing the environmental obligations of holders of mineral titles, etc. See also Section 30 thereto.

polity will join hands in addressing the problems of the Sector and entrenching a better environmental protection in the sector.

**(7) NESREA should not be excluded from Oil and Gas Sector:** This review of the environmental protection in the oil and gas sector has clearly shown that the mandate of NOSDRA thereto is not that sacrosanct as it had been shown that other agencies are also legitimately involved therein. Therefore, it is our recommendation that as the Agency responsible for National Environmental Standards which includes standards for air, water, etc, NESREA should be involved in environmental protection in the oil and gas sector. In fact, in our opinion NESREA should be more relevant in that sector which is a purely Federal matter than say in Municipal waste or noise management which the state and the local governments can conveniently handle if adequately empowered. Accordingly, the NOSDRA Act and the NESREA Act should be amended so as to provide and empower NESREA to play its role in the oil and gas sector.

**(8) Determinate or Definite and Enforceable Plan for Prohibition of Gas Flaring:** Apart from oil spillages the government should equally formulate an enforceable and determinate plan for the gas subsector especially with regard to gas flaring<sup>198</sup> in the oil and gas sector. Not the present stance of shifting forward the date of the ban on gas flaring every year. Therefore, inasmuch as the intent and purpose of the Associated Gas Reinjection Act<sup>199</sup> is laudable, it is the recommendation here that the Act should be reviewed expeditiously to give the Act bite and fangs in place of its present toothless bite of today.<sup>200</sup> Accordingly, the following particular issues should be included or addressed in the new Act: (i) A definite near date should be determined and stated in the Act on which every gas flaring should be outlawed and effectively stopped in Nigeria, even if it means stopping oil production by the defaulting oil company and as provided in the Act.<sup>201</sup>

- (i) In the interim and even thereafter, a prohibitive fine regime should be created against gas flaring. Such prohibitive fine should be so high as to make it highly uneconomical or unprofitable and therefore inadvisable to flare gas thereby compelling the oil companies to comply with the schemes, projects and deadline, thus making our environment safer and more sustainable.
- (ii) For the avoidance of doubt, the payment of fines for gas flaring should therein be made absolute and without any exception whatsoever, that is to say neither certification nor any defence will exempt any oil company from the fines, once they engage in gas flaring they must pay the penalty per SCM.

**(9) National Plan for other Hazardous Substances/ Wastes:** Equally a National plan for the clean-up of other hazardous substances/wastes should equally be

<sup>198</sup> Blowouts and geothermal steam phenomena should also be addressed therein.

<sup>199</sup> CAP A25 LFN, 2004

<sup>200</sup> The National Assembly should expedite action on the Bill before it and save our environment and the world.

<sup>201</sup> Section 4, *ibid*; presently 2014 is the date, which is under 3 years away. It remains to see how feasible and realistic that date is given the realities in the sector.

formulated and carried alongside the National Oil Spill Contingency Plan; as a stitch in time saves nine. This is because the provisions of Regulations 44-53 of the (National Environmental Sanitation and Waste Control) Regulations, 2009 made under the NESREA Act, 2007 and the Harmful Waste (Special Criminal Provisions, etc) Act, although both are on hazardous waste are not enough to deal with acute and urgent incidents like the Koko case in Delta State in 1987 or the recent tsunami triggered incident in Japan or the Chernobyl disaster in former USSR, etc<sup>202</sup>

**(10) Oil Pollution should be made Statutory Absolute Liability Offence:** As it obtains in India, pollution in the oil and gas sector should be made a statutory absolute liability offence in Nigeria. This will make it easier for victims of oil pollution to recover damages and compel clean-up and remediation by the polluter and on the other hand make the oil companies more careful, responsible and environmental conscious and cautious. Accordingly, the multitude of defences, exceptions and allowances availed oil and gas sector polluter in the statutes should be reviewed and removed so as to make a polluter responsible and liable for all its actions, inactions and negligence.

Furthermore, as a third generation human right which is germane to attainment of even the fundamental rights and the very continued existence of life on earth, our Courts should be proactive on matters of environmental protection and pollution control. Like the United States Courts, they should make it possible for any Nigerian including conservationists, and environmental protection bodies and civil society organizations to successfully sue oil companies and even regulatory government agencies on environmental protection and pollution matters. This is because one man's environment is everybody's environment and what affects one's environment affects everybody's environment.

**(11) Combination of the Two Commands into One:** The MOSOC and AOSOC should be combined into one force similar to the U.S. Coast Guard, removed from the Ministry of Defence and brought under the Ministry of Environment. This will enable a more effective and efficient control and command. For example, in the U.S, because of the vital place of the Coast Guard in oil pollution control, the Homeland Security Act 2002 removed the Coast Guard from the Transportation Department and placed it in the new Department of Homeland Security.<sup>203</sup>

**(12) Renewable Energy Option:** For sustainable environment and development, Nigeria should equally join the race for renewable energy because apart from the hazards attributed to oil and gas, the end of oil and gas age is fast approaching and Nigeria should not be left behind. Giving the Nigerian factor, another alternative nuclear energy may not present a wise choice or alternative for a nation that finds it very difficult to manage hydro-electric power and oil refineries as it may well destroy

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<sup>202</sup> Section 28 of the NESREA Act CAP N164 LFN, 2007 even empowered the Minister to make such plan or regulation. See also Section 29 of the same Act.

<sup>203</sup> Austin P. Oilney, et al, *op.cit.*, at 357

the world with ineptitude at her nuclear plants. Alternatives like solar energy and other types of renewable energy are better and safer options for Nigeria.

**(13) Movement of all Federal Government units on Pollution Control to Federal Ministry of Environment:** All Federal government units directly concerned with environmental protection in the oil and gas sector should be brought from the various ministries, parastatals or authorities where they are presently domiciled and transferred to the Ministry of Environment. For the avoidance of doubt what is advocated here is that those units in NIMASA, NPA, NNPC and Ministry of Transport (and not those concerned with ancillary matters thereto like NIMET and NSCDC) should be transferred to the Ministry of Environment so as to eliminate confusion and dissipation of energy and resources and promote concerted action and engagement in the sector. Furthermore, the laws of the Merchant Shipping Act and ONWA that saddled the Ministry and Minister of Transport with critical functions with regard to environmental protection should be equally reviewed and such functions transferred to the Ministry and Minister of Environment by law.

Finally, NOSDRA especially, and other relevant stakeholders should brace up and sit-up to the challenges in environmental protection in the oil and gas sector. The laws enacted for the same are legion and generally apposite but enforcement thereto leaves much to be desired. For example, in the suit filed by SERAP<sup>204</sup> against the Federal Government, Nigerian National Petroleum Corporation and six multinational Oil producing companies before the ECOWAS Community Court of Justice on 28th July, 2009 one of their grounds for the action against the government is failure to enforce laws and regulations to protect the environment and prevent pollution.<sup>205</sup>

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<sup>204</sup> SERAP – means Socio-Economic Rights and Accountability Project: A Coalition of 10 Nigerian Civil Society Groups.

<sup>205</sup> ECW/CCJ/APP/08/09; The said ECOWAS Court has ruled in ECW/CCJ/APP/07/10 that it has jurisdiction to hear the suit save as it pertains to the six multinationals oil companies because they are not parties to the ECOWAS treaty. The six multinationals are Chevron Oil Nig. PLC, Shell Petroleum Development Company (SPDC), Elf Petroleum Nig Ltd, Exxon Mobil Corp, Agip Nig. PLC and Total Nig. PLC.