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## Oil Pollution Prevention in Nigeria: A Lesson to Learn from Other Jurisdictions

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### **Abstract:**

*In Nigeria just like any other country of the world where oil and gas are produced, there are legislations put in place to control if not prevent the menace of pollution by oil and gas. Despite this, there are problems with the legislations as well as institutions in place in this regard ranging from lack of enforceability of the laws to that of weak institutions to enforce the laws among other things. This article therefore poised to compare the legal and institutional framework for the prevention of oil pollution in a chosen oil and gas jurisdictions. The legal and institutional framework for the prevention and control of oil and gas pollution in these countries were compared with the position in Nigeria. The article therefore analysed the efficacy or otherwise of the extant Nigeria legislations and institutions vis-à-vis that of the jurisdictions under review in respect to the control. At the end it was discovered that the Nigerian oil pollution legislations as well as the institutions are ineffective, lack enforceability and weak and therefore cannot sufficiently withstand the negative impact of oil exploration and production on the environment. The research thus made a case for an effective viable, adequate and comprehensive body of legislation, as well as proactive institutions to deal with the menace of oil and gas pollution in Nigeria.*

**Keywords:** Oil and gas, prevention, Nigeria, oil pollution, environmental

### **1. Introduction**

Pollution is defined a man-made or man-aided alteration of physical, chemical and biological quality of the environment to the extent that it is detrimental to the environment or beyond an acceptable limit<sup>1</sup>. Pollution therefore is a phenomenon that is adverse to man and the environment. This work tends to consider the existing legal and institutional regimes for the prevention and control of oil pollution in Nigeria. Though, this issue is not novel in the area of oil and gas production in Nigeria, but the new approach is the comparison between Nigeria and other jurisdictions in the area of oil pollution control. It is pertinent to say here that the laws and institutions in the selected jurisdictions, as we shall see in this work, are so advanced, effective and adequate that today they have attained a near zero level of pollution.

The first area of comparison is generally the extant legislations. A review of the legislations controlling oil pollution in Nigeria reveals a serious problem or problems therein. These problems can be sum up as being vague, lacking policy direction and enforceability. The vagueness here may be that most of them merely vest discretionary powers to make regulations, which discretion may or may not be exercised.<sup>2</sup>Some others lack enforceability. The legislations are not strong enough to enforce compliance. This is not the case in the United States, Canada, Norway, UK and other jurisdictions under review.

The second area is that of the institutions put in place to enhance the workability of the legislations. In Nigeria, though there are a good number of institutions<sup>3</sup> to enhance the control or prevention of oil pollution, but most of these institutions if not all are mere institutions without any work. In the jurisdictions under review, the institutions are so strong that they have been able to enforce compliance and punish the perpetrators of the heinous offence of oil pollution.

### **2. Comparative Analysis of Legislations in Selected Jurisdictions**

#### *2.1. United States of America*

The legal regime for the control or prevention of oil and gas pollution in the United States is founded in some key laws. These are Oil Pollution Act (OPA) of 1990,<sup>4</sup> the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). 1990<sup>5</sup> and the Federal Water Control Act of 1972 (otherwise known as the Clean Water Act)<sup>6</sup>. In addition

<sup>1</sup> Section 37 NESREA Act, 2007

<sup>2</sup> Section , Petroleum Act, Cap p.10 LFN 2010

<sup>3</sup> Department of Petroleum Resources, NESREA, NOSDREA

<sup>4</sup> 33 U.S.C 2701

<sup>5</sup> 42 U.S.C 9601

<sup>6</sup> 33 U.S.C 1251

to the above Acts is the National Oil and Hazardous substances contingency plan issued by the United States Environmental Protection Agency<sup>7</sup>.

The aim of the Oil Pollution Act<sup>8</sup> is to mitigate and prevent the future oil spills of the coast of the United States of America. And since that time, the volume of oil spilled from tankers into US waters has fallen from an average of 70,000 barrels per year, a decrease of 94 percent<sup>9</sup>. Also, the Oil Pollution Act (OPA) has worked because it provides comprehensive legislative packages that address all of the issues and rigorously and consistently enforced them. Unlike the Petroleum Act in Nigeria, the Oil Pollution Act has the following focus:

- Prevention: The Act provides for the prevention that focuses on crew compliance.
- Preparedness: contingency plans vests response plans and exercises as well as requirement for training and qualifications of qualified individuals and personnel in oil spill response organization.
- Response: coast guard is responsible for ensuring a safe and effective response to all oil spills into the marine environment.
- Liability and compensation: OPA provide a liability and compensation regime that serves as a real deterrent to pollution to those that might potentially spill the oil, namely the vessel owner, as well as providing funds for clean-up and compensation for spills.
- Research and development into response and prevention technique and hardware.

In the area of penalty or liability generally, Section 4301(a) and (c) of OPA has increased the liability of individuals and corporate organisations for failure to report or notify the appropriate agency of a discharge, drastically<sup>10</sup>. The increment ranges from \$10,000 to \$25,000 for an individual and \$500,000 for an organization. Also, the prison term has been increased from 5 years to 15 years. If one compares this with the provision of Section 5(6) of NOSDRA Act, he will realize that the penalty under the NOSDRA Act does not stand to enforce any compliance.<sup>11</sup>

The CERCLA<sup>12</sup> establishes liability for site clean-up, preserves a procedure for identifying and ranking contaminated sites, provides funds for site clean-ups and restore injured natural resources through provisions administered by the natural resource's trustees. Unlike any legislation in Nigeria, CERCLA authorizes the president to clean-up hazardous sites directly or compel clean-up by a responsible party through enforcement actions. Although sections of the Nigerian NOSDRA provide for a report in the event of any spill or its likelihood to the appropriate authority and further provides for penalty for non-report, the CERCLA in addition to this creates strict liability measures which deters potential culprits.<sup>13</sup>

On quantum of fine, Section 309 of Clean Water Act of the United States provides that EPA can issue administrative orders against the violation and seek civil and criminal penalties when necessary. The Act therefore, imposes a fine of \$25,000 per day for violation and in addition the violator may also receive a jail term of one year. For placing another person in imminent danger, death or serious bodily injury, a fine of \$250,000- and 15-years imprisonment for an individual and \$1,000,000 for an organization is imposed. In contrast to this penalty under the Nigerian legislations are so meager that, they may not deter any violator or potential violator. For instance, under Section 7(1) and (2) of the oil in Navigable Waters Act, a fine of N1,000.00 is imposed on anybody who fails to keep record of spills or escape of oil. This is so meager to deter any violator at all.

Another area to compare is that of how to provide funds to offset pollution costs. Section 1012 of Oil Pollution Act (OPA) provides for the uses of the oil pollution funds. This fund in addition to response costs can be used to without appropriation to pay the cost of assessments as well as pay claims for natural resources damage. Furthermore, the Act provides for insurance cover in the events of any spill by the responsible party. Every responsible party has an insurance cover of \$1 billion which is required to offset any cost of spill.

Akin to the above is the fact that, the OPA has established a strong framework to prevent oil spills from accruing at all and if in the event that it happens adequate and appropriate response has been made for victim compensation. Besides, those responsible for the pollution are also held accountable for the cost of the clean-up. In Nigeria, this exhaustive provision has not been provided for in any of the legislations on oil pollution prevention are control.

Another lacuna in the Nigerian laws is the exclusion of the states in the area of pollution control. This may be so because petroleum is in the exclusive legislative list therefore, states cannot legislate on it. In contrast, under Section 1018 of the Clean Water Act of the United States of America the states may impose additional liability (including unlimited liability) funding mechanism, requirements for removal sections and fines for penalties on responsible parties. Section 1019 of CWA provides that states have authority to enforce liability on the navigable water of the states. OPA provides that states have access to federal funds up to \$250,000 (per incident) for immediate removal, mitigation or prevention of a discharge. In Nigeria, state laws are not very effective to tackle problems of oil pollution in the oil producing areas. In

<sup>7</sup> This is used for the restoration, National Resources Damage Assessment and Restoration programme, Laws, Regulation and Authorising Statutes at <http://restoration.doc.gov/laws.html> accessed on 2<sup>nd</sup> May, 2019

<sup>8</sup> 1990

<sup>9</sup> OCIMF

<sup>10</sup> Section 4301(a & c), OPA

<sup>11</sup> For details of comparison see Section 5(6) NOSDRA

<sup>12</sup> The CERCLA is also known as the "Superfund". It makes provisions for the clean-up of sites contaminated by spills and hazardous substances. It provides liability for clean-up procedures and protect humans and the environment. The Act empowers the president to clean-up hazardous substances directly or through a responsible party by enforcement action.

<sup>13</sup> Strict liability here means that the government need not show any fault or negligence on the part of the responsible party, unlike in Nigeria where most of the matters are based on negligence

Rivers, Bayelsa, Delta and Akwalbom States for instance, where there are state Environmental Laws, the laws are so vague and lack enforceability. To this extent, they can hardly hold any responsible party liable.

Under the institutions are the followings:

One the United States Environmental Protection Agency (EPA), the United States contingency programme for oil pollution monitor, prevention and central is effectively anchored by this Agency. The EPA is saddled with the responsibilities of preparing and responding to oil spills. It has a robust programme administered via its headquarters and region. EPA has two principal elements on spill preparedness which are developing and coordinating contingency plan and conducting oil spill prevention and response training.

The Agency is rich with facilities and well trained local, regional and national contingency plan personnel that would assist response personnel in their efforts to contain and clean-up any spill by providing information that the response team would need before, during and after an oil spill occurrence. In contrast no institution in the area of oil pollution control or prevention or even general environmental pollution control in Nigeria is proactive in this. Looking at the following institutions such as NOSDRA, NESREA, DPR etc., there is no effective handling of environmental issues like United States EPA.

## 2.2. Canada

Canada has a largely privatized oil industry and is one of the best countries in terms of prevention and control of oil and gas pollution. In many years of oil exploration and exploitation in Canada, very few incidents of spill have been reported. Most of the oil spill incidents are isolated. One of such incidents was that which occurred when a construction company accidentally punctured a pipeline in Barnaby, British, Columbia and certain quantity of oil escaped shooting plumes of 20 metres<sup>14</sup>. Both the operators and the civil society in Canada are environmentally friendly. In Canada, there is a comprehensive regional oil spill control measure complemented by oil spill response procedures manual.

One of the legislations for the control of oil pollution in Canada is the Canada Environmental Protection Act. This statute deals specifically with pollution prevention specifically. Section 56(1) of this legislation provides that the minister will at any time publish in the Canadian Gazette and in any other manner that the minister considers appropriate a notice requiring any person or class of persons to prepare and implement a pollution prevention plan. The implication of this is that the statute is focused on pollution prevention.

Section 201 and 205 of the Act provides that any person who is or is in charge of polluting substance is mandated to take reasonable measures to prevent and / or clean-up a spill if it occurs. Specifically, Section 203 provides for recovery of costs and expenses incurred by government during clean-up. The implication is that whoever is responsible for pollution will clean-up or pay the cost of clean-up by the government.

The Canada Oil and Gas Operation Act is aimed at promoting the protection of environment, safety of humans and conservation of oil and gas resources.<sup>15</sup> Under its Section 14, certain regulations are prescribed as measures necessary for the prevention of pollution of water and air which results from exploration and drilling or the act of sabotage, transportation and distribution of oil and gas.

The Transport of Dangerous Goods Act, provides in its section 14 that the carrier of dangerous goods must be financially responsible and also provide evidence of such financial responsibility. This means that in the event of any spill or other disaster the responsible party will be able to offset the cost. In all the above, there is no oil and gas pollution prevention / control legislation in Nigeria that has provisions as such. And even where there is enforcement of such is a problem.

In the area of institutions, Canada has in place modern infrastructure and well-trained personnel meant to swiftly respond to oil pollution situation. The Environmental Protection Branch (EPB) of Environment. Canada is a federal government agency responsible for ensuring that appropriate reporting, surveillance and response mechanism are in place to deal effectively with pollution problems.

The Regional Environmental Emergencies Team (REET) which manage the REET Atlantic Region contingency plan is another body which coordinator and complements the efforts of the government and industry in response to environmental emergencies and give advice too.<sup>16</sup>

This is unlike the situation in Nigeria where even the extant legislations in the oil and gas sector do not concern or little with the issue of pollution. While gas flaring is banned in Canada, the reverse is the case in Nigeria where the Associated Gas Re-injection Act and its Regulations permit gas flaring.<sup>17</sup> In Nigeria, there are no adequate infrastructures for the control and prevention of oil pollution and gas flaring. Also, the institutional capacity for the administration of the extant laws is weak. In Canada, responsibilities for environmental protection are complementary and clearly defined. There are no overlaps in functions or conflict between the agencies that will work to sustain the environmental protection efforts. This is the reverse in Nigeria where for instance the Directorate of Petroleum Resources (DPR), National Environmental Standards Regulation and Enforcement Agency (NESREA) and National Oil Spill Detection and Response Agency (NOSDRA) are struggling for roles and contradicting various efforts. The powers of the minister to publish in the official gazette in any manner under the provision of Section 56(1) of the EPA requesting anyone to implement pollution prevention plan is not expressly provided for under the Petroleum Act or any other legislation in Nigeria.

<sup>14</sup> www.canada Barnaby Oil Spill Update Verdena 19 Human Rights [http://versenac19, wordpress.com/200/07125wwwf.canada Burnaby Oil, spill update](http://versenac19.wordpress.com/200/07125wwwf.canada Burnaby Oil, spill update) accessed on 3<sup>rd</sup> May, 2019

<sup>15</sup> Nigerian Associated Gas Re-injection Act 1979, compared

<sup>16</sup> <http://www.bing.com.search.canada.env.pollution> (accessed on 5<sup>th</sup> May, 2019)

<sup>17</sup> Section 1 of the Associated Gas Re-injection Contingency Flaring Regulations, 1984

It is pertinent to say here further that in Canada, every spill which affects an appreciable area of land, water and air can lead to prosecution under the Canadian Environmental Protection Act, Migration Birds Convention Act, the Fisheries Act and or the Canadian Shipping Act. Apart from fines, a polluter is also compelled to foot the costs of remedial. In Nigeria, most of the spills go unpunished as operators quickly avail themselves of the avalanche of available defences.

In a nutshell, one can say that Canada has a detailed and substantial legal framework for the control of oil and gas pollution. It is an environment friendly developed country and does not permit the exploration and exploitation of oil and gas resources at the expense of the natural environment and biodiversity. This is unlike Nigeria where pipelines, crisscross the mangrove swamp forests and regularly spill oil into such forests wiping out a large expanse of the forest without anybody batting an eyelid.

### 2.3. Norway

In Norway, the oil spill contingency plans are divided into three bodies which exercise regulatory control. The Norwegian Petroleum Directorate (NPD) is one of such. This body exercises supervisory control of petroleum activities on the Norwegian continental shelf and Spitsbergen. The NDP functions as an advisor to the Ministry of Petroleum and Energy. It is also responsible for providing participants in the petroleum industry with guidance and information. The second is the Norwegian Pollution Control Authority (NPCA). This body which reports to the Ministry of Environment has a primary responsibility for oil pollution response and regulating the discharge into the sea of oil and chemicals from drilling and production activities. The NPCA has a coordinating role in relation to the energy in regard to collecting CO<sub>2</sub>tax.<sup>18</sup> The third is the Norwegian Coastal Administration (NCA). The NCA is the agency responsible for safeguarding the coastline, including ensuring preparedness in cases of acute pollution.

Under the pollution, Control Act, the national system is divided into private, municipal and governmental contingency areas with specific responsibilities. All contingency plans and organizations are standardized and coordinated so that in event of major nation emergency, the national contingency system will work as a single integrated response organization.

In Norway, the 430 municipalities are divided into 34 inter-municipal preparedness areas, such with their own approved contingency plan. Local authorities are responsible for minor spills within their domain, and which are not covered by the polluter's private contingency arrangement. The NCA provides for major incidents not covered by or beyond the capabilities of municipal and private contingency plans by providing equipment, materials, vessels and personnel including expert advisers. In the event of a major spill, government may call upon the industry for additional support. The NCA is responsible for the national training centers for oil pollution control and national test centre for oil spill response technology.<sup>19</sup>

In terms of equipment, Norway has extensive range of equipment held by national and local government agencies and the oil industry. Full scale exercises are carried out from time to time to some which involves the discharge of oil under moderate to rough conditions in order to test equipment and the level of preparedness.<sup>20</sup>

In Nigeria, the above situations are yet to be achieved. Since 1988, when FEPA came on board to 2006 when NOSDRA came, and 2007 when NESREA came to replace FEPA, Nigeria has not been able to achieve any appreciable level of preparedness not to talk of well handling of oil pollution control activities. To bring this point home NESREA has been criticized in some quarters for its lack of effectiveness.<sup>21</sup>

### 3. Conclusion and Recommendations

This work examined the legal and institutional framework for the control / prevention of oil and gas pollution in some selected jurisdictions. A comparative approach was adopted in analyzing three countries selected because of their effective and robust oil pollution laws and institutions.

Flowing from this evaluation therefore, it is suggested that, there is the necessity of an effective legal and institutional framework to ensure best practices in the oil field and a proper co-ordination of efforts in the event of an oil spill or gas leakage. The government should clearly define the commitment to environmental protection issues. This is necessary in order to strengthen the regulatory framework by proving the will to function effectively. An overhaul and review of the laws and institutions will remove the clog from the statutes whose ambiguities have given rise to an inter-governmental and inter-institutional conflict in the discharge of their regulatory responsibilities.

It is suggested that we adopt the legislations in other jurisdictions as the result of which review should be all inclusive to give the stakeholders the opportunity to make inputs so that the regulatory regime would incorporate the legitimate expectation of the parties with a view to reflecting the wishes of the host communities.

It is further recommended that the institutions be overhauled and given more powers as well as adequate funds for the performance of their duties. DPR for instance, should be made an independent body from NNPC. This will make it perform its duties without fear or favour. The directorate should be provided with efficient staff, equipment and enough funds to enable it avoid any manner of compromise.<sup>22</sup> More functions should be added to those of NESREA inclusive of oil

<sup>18</sup> <http://www.bing.search.htm> (Accessed on 3<sup>rd</sup> May, 2019)

<sup>19</sup> Ibid

<sup>20</sup> Olarenwaju Fagbohun, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review*, Lagos, Odade Publishers, 2010, p. 448

<sup>21</sup> See D.K. Derri & E. Ahila, "A Critical Examination of the National Environmental Standards and Regulations and Enforcement Agency (NESREA) Act, 2007, Law and Petroleum Industry in Nigeria: Current Challenges. Essays in Honour of Justice Kate Abiri (ed) Festus Emiri and Gwong Deinduomo, Lagos: Malthouse Press Ltd., 2009, p.2

<sup>22</sup> Compare this with the United States Environmental Protection Agency (EPA), Canadian Environmental Protection Board (EPB) above. Here these institutions are independent and also effective in discharging their duties

pollution related ones. NOSDRA on the other hand should be up and doing in discharging its duties especially in contingency plan.

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- ii. Section 4301(a & c), OPA For details of comparison see Section 5(6) NOSDRA he CERCLA is also known as the "Superfund". It makes provisions for the clean-up of sites contaminated by spills and hazardous substances. It provides liability for clean-up procedures and protect humans and the environment. The Act empowers the president to clean-up hazardous substances directly or through a responsible party by enforcement action.
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