



## BRIEFER

### Environmental Protection in the Petroleum Industry Bill: Strong or Weak?

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#### Summary of Observations

- Oil industry operations are stratified into upstream and downstream petroleum sectors, administered by the Nigerian Upstream Regulatory Commission (The Commission) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (The Authority) respectively.
- The Commission and The Authority bear responsibility to ensure strict implementation of environmental policies, laws and regulations for upstream and downstream petroleum operations respectively. In doing this, they will adopt both penal and corrective measures to enhance industry compliance to environmental regulations not limited to suspension, modification and revocation of licenses, compensation, penalties and fines for violators.
- Some of the expansive regulatory powers for environmental matters in the petroleum industry vested on the Commission and Authority overlaps with the statutory responsibilities of the Oil and Gas Division of the Federal Ministry of Environment (FMOE). This means that the overlapping regulatory powers between enforcement agencies persist which could offer polluters the advantage of cherry-picking which regulator to obey.

- Gas flaring is not expressly prohibited. Gas flaring will be condoned in certain circumstances such as where it is required for facility start-up, or for strategic operational reasons, including testing. Absent a specified limit to the scope of operational reasons, this could be exploited to harm the environment, increasing communities' vulnerability to health hazards.
- With regard to the Environmental Remediation Fund, the Commission or Authority doubles as the Fund manager and the facilitator of investigation and remediation of sites that pose risks to human health and the environment. Consistent with the bill's objective to create efficient governing institutions with clear and separate roles, the management of the remediation fund should be vested in the National Oil Spill Detection and Remediation Agency (NOSDRA) that is already charged with the mandate to carry out remediation of oil-impacted sites.
- The procedure and mechanism individuals and communities can use to access compensation for environmental damage is unclear. Environmental regulations and mechanisms remain relevant and effective when they can provide meaningful opportunities (including online) for the public to make contributions, while delivering the necessary level of protection to all stakeholders.
- The PIB obligates operators, called settlers, to create a Host Communities Development Trust. The utilization of this fund will take into consideration the host community needs from a social, environmental, and economic perspective. The institutional arrangements proposed for the administration of the host community trust is heavily-flawed, disempowering and perpetuates power asymmetries between locals and multinationals.

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# INTRODUCTION

The Petroleum Industry Bill (PIB) 2020, a proposed law seeking to introduce far-reaching industry reforms in the Nigerian oil and gas sector contains provisions aimed at protecting the environment against the adverse impact of oil and gas operations—like seismic activities, drilling, mining, equipment failure, human error—which can cause damage to public and private property, indigenous communities and their livelihoods. Consistent with the bill's reform agenda, it will amalgamate and repeal 16 extant oil and gas legislations and remedy some of their notable shortcomings such as duplicative regulation, weak enforcement of standards, overlapping regulatory powers, hostility between operators and host communities etc. Against this backdrop, this briefer gauges the adequacy of the new PIB provisions to respond to the gaps in extant environmental regulations and deliver the bill's intended policy objectives. This briefer builds on the organisation's [PIB RESOURCE HANDBOOK](#) published in 2013, which exhaustively examined the provisions of the 2012 version of the PIB relating to environmental protection and community participation.

## FRAMEWORKS AND MECHANISMS FOR ENVIRONMENTAL PROTECTION IN THE OIL AND GAS INDUSTRY

According to an expert, there are about 3,920 oil spill sites in the Niger Delta which require about \$520.893B for adequate clean-up operations.<sup>2</sup> Tebidaba Community, Bayelsa State, with a total of 10 contaminated sites, needing an estimated \$10.5B for remediation, has the worst oil contaminated sites in the Niger Delta region of Nigeria. Environmental damage associated with mineral extraction has prompted the enactment of a plethora of federal legislations designed to protect the people and their environs from the negative impacts of petroleum operations. A classic example is the 1988 incident which occurred in the small fishing village of Koko in southern Nigeria involving the dumping of 18,000 drums of hazardous waste by the Italian government and an Italian company.

Similarly, Sections 1 and 2 of the Environmental Impact Assessment (EIA) Act of 1992 CAP E12, Laws of the Federation of Nigeria (LFN) 2004

requires proposed development projects, including petroleum prospecting and mining operations to be assessed for the risks they pose to the environment, and put in place measures for prevention, control and mitigation of identified impacts. The assessment could lead to the denial of permission on grounds of environmental safety. Powers and responsibilities under this Act hitherto vested in the Federal Environmental Protection Agency (FEPA) are now subsumed under the regulatory functions of the Federal Ministry of Environment (FMOE). The FMOE, formed in 1999, now comprises the old FEPA and other departments in other ministries charged with environmental regulation. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) also require operators embarking on petroleum projects to conduct and produce EIA reports on their proposed activities for the Department of Petroleum Resources' (DPR) approval. Through its agencies and parastatals, the FMOE monitors the effect of petroleum industry operations on the environment.

Some of the FMOE's parastatals for enforcing environmental regulations include the National Oil Spill Detection and Response Agency (NOSDRA) and National Environmental Standards and Regulations Enforcement Agency (NESREA).

Currently, the Federal Ministry of Petroleum Resources, headed by the Minister of Petroleum, has primary responsibility for supervising and directing the affairs of the petroleum industry. The Minister issues directives and makes regulations for the industry pursuant to the extant Petroleum Act and such other legislations. Under the ministry, the day-to-day activities in the industry are monitored by the DPR in line with the obligations espoused in various statutes like the Harmful Waste (Special Criminal Provisions) Act [1988 No. 42; Petroleum Act CAP P10 Laws of the Federation of Nigeria (LFN) 2004; Environmental Impact Assessment (EIA) Act of 1992 CAP E12, LFN 2004; Federal Environmental Protection Agency Act [1999 No. 14.] now repealed by the NESREA Establishment Act 2007; Oil Pipelines Act Cap O7, LFN 2004; Oil in Navigable Waters Act CAP O6, LFN 2004 etc. Ultimately, the Department of Petroleum Resources (DPR) is responsible for enforcing environmental regulations and ensuring that upstream and downstream operations in the industry conform to national and international standards.

<sup>2</sup> Professor Hillary Inyang, Duke Professor of Environmental Engineering and Science, Paper Presentation made at the World Environment Day Forum in Lagos, June 3, 2016.

Despite the maze of environmental regulations and enforcement mechanisms detailed above, implementation gaps remain, with indigenous communities being the visible brunt bearers. Some notable shortfalls include the weak enforcement of regulatory standards, ineffective/insufficient sanctions, overlapping regulatory functions, conflicting legislations, all of which combine to fuel tensions between operators and their host communities.

It is on this premise that the legal provisions, institutional frameworks, enforcement mechanisms and resources put in place in the latest version of PIB 2020 are being examined to check the extent they address existing regulatory gaps.

## ENFORCEMENT OF ENVIRONMENTAL PROTECTION IN THE PIB 2020

Oil industry operations are stratified into upstream and downstream petroleum sectors, administered by the Nigerian Upstream Regulatory Commission (The Commission)<sup>3</sup> and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (The Authority)<sup>4</sup> respectively. Upstream operation regulated by The Commission encompasses activities entered into for the purpose of finding and developing petroleum up to the production and transportation of petroleum from the area of production to the fiscal sales point or transfer to the downstream sector. On the other hand, downstream operations, to be regulated by The Authority, include the construction and operation of gas processing facilities, oil and gas transportation, natural gas transmission, natural gas transmission, product pipelines, tank farms and stations for the distribution, marketing and retailing of petroleum products, oil refining and so on.

One of core objectives of The Commission is to promote healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally acceptable and sustainable manner, as well as ensure strict implementation of environmental policies, laws and regulations for upstream petroleum operations. (Section 6). The Commission is saddled with several regulatory functions which include establishing, monitoring, regulating and enforcing health, safety and environmental standards relating to upstream petroleum operations. The wide scope of regulatory powers vested on The Commission elevates the entity to a primary regulator for the enforcement of environmental standards in the upstream sector.

The Commission adopts both penal and corrective measures to enhance industry compliance to environmental regulations. Penal measures include the revocation of licences and leases granted to licensees who flout applicable regulations. For instance, the Minister based on the written recommendation of the Commission may revoke a petroleum prospecting licence, petroleum exploration licence or petroleum mining lease where the licensee has failed to comply with its environmental obligations required by applicable law. (Section 96). On the other hand, corrective enforcement measures The Commission may require of operators include the payment of fair and adequate compensation to the persons or communities directly affected by damage or injury to their property, land or venerated objects in the course of petroleum operations. (Section 101 (3)).

As with the upstream regulator, The Authority will be responsible for the technical and commercial regulation of midstream and downstream petroleum operations. Among other objectives, The Authority will promote healthy, safe, efficient and effective conduct of midstream and downstream petroleum operations in an environmentally acceptable and sustainable manner and also ensure strict implementation of environmental policies, laws and regulations for midstream and downstream petroleum operations.<sup>5</sup> Consistent with these objectives, The Authority has responsibility to establish, monitor, regulate and enforce technical, health, environmental and safety measures relating to midstream and downstream petroleum operations. (Section 32(b)). It can also adopt penal approaches such as suspension or revocation of licences and permits for midstream and downstream petroleum operations or imposing penalties in respect of breaches of environmental regulations issued by the Authority. Just like The Commission, The Authority can resort to corrective measures to increase regulatory performance such as the modification of licences and permits for midstream and downstream petroleum operations. (See S. 33).

We make two observations based on the above arrangements for the enforcement for environmental regulations in the PIB 2020. First, the establishment of two major regulators for upstream and downstream industry operations departs from the previous designation of a sole industry regulator advanced in the previous legislative proposals, especially the Petroleum Industry Governance Bill, which was extracted from the parent Petroleum Industry Bill of 2012. Defending the proposal for the creation of multiple regulatory bodies in 2012, the ex-petroleum minister Diezani Allison Madueke

<sup>3</sup> Section 4 of the PIB

<sup>4</sup> Section 29 of the PIB

<sup>5</sup> Section 31 (c) of the PIB

## ENVIRONMENTAL PROTECTION PROVISIONS IN THE PIB

explained that an unwieldy, mammoth entity that oversees the entire industry is not a mode of efficiency but a disaggregated regulatory system would enable speedy response to variety of issues that may arise from time to time. The need to ensure that the different sub-sectors are effectively covered and better regulated makes the establishment of several agencies imperative.<sup>6</sup>

Secondly, the expansive regulatory powers for environmental matters in the petroleum industry vested on The Commission and Authority overlap with the statutory responsibilities of the Oil and Gas Division of the FMOE. In its website, FMOE affirms that it carries out review of environmental compliance monitoring reports submitted by operators in the oil and gas industry, monitors upstream and downstream operations including implementation of Federal Government's gas flare down policy, gas gathering processing and utilization projects as well as the monitoring and certification of facilities decommissioning and oil wells closure.<sup>7</sup> Likewise, section 232 (11) of the PIB empowers the Commission or Authority to ensure current and expired licensees or lessees carry out any remaining or unfulfilled decommissioning and abandonment obligations. The Commission will also ensure lessees' compliance with domestic gas delivery obligations, including the elimination of natural gas flaring and venting.<sup>8</sup> Not only that, various states of the federation have ministries of environment exercising statutory oversight on the environmental problems arising from petroleum industry operations. While the 2020 version of the PIB is silent on the regulatory overlap between the two regulatory bodies and the FMOE, it is important to recall that the rested Petroleum Industry Governance Bill (PIGB) resolved this tension in favour of the then proposed regulatory body, the Nigerian Petroleum Regulatory Commission (NPRC). With this silence, the longstanding overlapping regulatory powers between enforcement agencies persist which could offer polluters the advantage of cherry-picking which regulator to obey.

### RECOMMENDATIONS:

A new regulatory regime determined to depart from the era of institutional overlap and duplicity should feature strong guidelines for ensuring policy coherence, robust inter-agency coordination and clearly separate the responsibilities of various agencies with a mandate for environmental protection.

**Varying conditions applicable to different licenses:** Protecting the environment is one of the cardinal principles of the PIB 2020. Numerous sections of the PIB set out varying conditions applicable to different licenses such as crude oil refining license, bulk storage license, bulk petroleum liquids storage license, petroleum liquids transportation pipeline license, wholesale petroleum liquids supply licence etc. See sections 186, 188, 189, 192, and 200. The ultimate aim of having a variety of outlined measures is to ensure licensing activities are conducted safely, reliably and in an environmentally friendly manner in compliance with any law in force and any health and safety-related regulations. The breach of stipulated conditions of other existing or subsequent subsidiary legislations invites sanction.

Beyond licensing, the scope of the bill extends to the activities of crude oil refiners and petroleum product distributors whose activities have broad implications for the environment. (Sections 184 and 202). The Bill also contemplates that gas-licensed activities, including gas processing license, bulk gas storage licenses, gas transportation pipeline licenses, gas retailers and gas distributors, will be conducted in a manner compliant with environmental regulatory provisions. (See sections 130, 131, 133, 134, 137, 147 and 151 respectively).

**Compensation for acquisition of land and for damage to protected and venerated objects:** A condition precedent for the grant of a licenses or permits is the compliance with the provisions of the Land Use Act Cap L5 Laws of the Federation of Nigeria 2004 in respect of compensation for acquisition of land for midstream and downstream petroleum operations. The state governor, as the trustee of all lands in the state, retains the discretionary power on whether to grant a certificate of occupancy in respect of the land. (S. 115)

Licensees and lessees are prohibited from entering or occupying areas earmarked for public purposes or held to be sacred, or privately owned or legally occupied land. The question as to whether the area is sacred or not shall be decided by the customary court of the area. The prohibition extends to injury or destruction of any tree or object which is of commercial value, or the object of veneration to the people resident within the Licence or Lease area. Any damage or destruction of any building or property; or to the surface of the land will attract compensation payable to the person in lawful occupation of the land or area. While the Bill requires operators to compensate for damage to

<sup>6</sup> Spaces for Change, Minister's Power not too Much, (Report of Senate Public Hearing Proceedings) Posted July 2013: Accessed via <https://spacesforchange.org/pib-ministers-powers-not-too-much-diezani-allison-madueke/>

<sup>7</sup> Functions of Oil and Gas Division, Federal Ministry of Environment. Please see <https://ead.gov.ng/functions-of-oil-and-gas-division/>

<sup>8</sup> Section 7 (3)iv) of the PIB

sacred sites, commercial trees, individual or community property, it does not clarify the procedure or mechanism through which affected persons and communities can seek compensation or for ensuring that the legitimate concerns of those affected by environmental damage are addressed.

**Environmental Management Plan (EMP):** Another provision of particular significance is the requirement by for an Environmental Management Plan (EMP) to be in place between six months to one year after a license is granted in respect of upstream and midstream petroleum operations. (S.102) This plan applies to projects which require environmental impact assessment and is required to be submitted to the Commission or Authority, as the case may be. The use of chemicals in upstream operations is also outlawed except with the approval of the Commission.

**The Environmental Remediation Fund** is a laudable feature of the PIB and particularly responds to the growing clamour by environmentally-degraded communities for the clean-up of their polluted lands and water sources in the Niger Delta. As a condition for the grant of a licence or lease and prior to the approval of the environmental management plan, all licensees or oil companies are required to pay the prescribed financial contribution to an Environmental Remediation Fund for the rehabilitation or management of negative environmental impacts with respect to the license or lease. Financial contributions payable into the Fund depends on the size of the petroleum operations and the level of environmental risk that may exist. The Commission or Authority will apply the Fund towards the rehabilitation, remediation or management of negative environmental impacts only when the licensed operator lacks the capacity, or is unable to undertake the rehabilitation or management of any negative impact on the environment effectively.

If passed into law, the fund will enable regulators mobilize the resources much needed to clean up polluted communities, create employment for restive youths and for addressing any future damage caused to the host community. Obligating operators to pay prescribed fees into the Fund as a condition precedent for the granting of a prospecting license or lease and approval of the EMPs operates as a disincentive for oil companies to carry out activities that are harmful to the environment and the local economy.<sup>9</sup> Drawing up environmental plans and the setting

up of a remediation fund also form part of measures to enhance compliance with good oilfield practices as well as health, safety and environmental (HSE) standards.

**Prohibition of flaring or venting of natural gas** is a welcome development in the PIB. Violators will pay a penalty prescribed pursuant to the Flare Gas (Prevention of Waste and Pollution) Regulations. The fines paid for gas flaring are not subject to tax deduction (S. 104(3)). On the flip side, gas flaring will be condoned in the case of an emergency; or pursuant to an exemption granted by the Commission; or as an acceptable safety practice under established regulations. The Commission or the Authority may grant a permit to a Licensee or Lessee to allow the flaring of natural gas for a specific period only where it is required for facility start-up; or for strategic operational reasons, including testing. Absent a specified limit to the scope of operational reasons, this provision could be exploited to harm the environment, increasing communities' vulnerability to health hazards.

**Host Communities Development Trust:** The PIB also provides for the creation of a Host Communities Development Trust. The oil operators, described as settlers, are obligated to incorporate a trust for the benefit of the host communities, and shall make an annual contribution to the host Community Development Trust Fund of an amount equal to 2.5% of its actual operating expenditure. The utilization of this fund will take into consideration the host community needs from a social, environmental, and economic perspective. The bill's major design flaw is the non-inclusive arrangements proposed for the administration of the Host Community Development Trust. The planned framework for delivering community development trusts is neither empowering nor beneficial to oil producing communities. It not only relegates host and impacted communities to the role of mere spectators in the management of the trusts, but also overlooks the existing community structures, the traditional institutions, including cultural and statutory organizations that have historically been responsible for undertaking community development in the host communities.<sup>10</sup>

**Abandonment, decommissioning and disposal:** What happens when onshore and offshore installations cease operations, or have become obsolete and production contracts with multinational and indigenous oil companies expire? The decommissioning programme aims to restore the disused site to as far as possible to its original condition. Harmful wastes and toxic

<sup>9</sup> Victoria Ibezim-Ohaeri: PIB Resource Handbook: An Analysis of Petroleum Industry Bill's (PIB's) Provisions on Community Participation & the Environment; Accessed via <https://spacesforchange.org/download/pib-resource-handbook/>

<sup>10</sup> SPACES FOR CHANGE: Memorandum Submitted to the House of Representatives' Adhoc Committee on the Petroleum Industry Bills, accessed via <https://spacesforchange.org/memorandum-submitted-to-the-house-of-representatives-adhoc-committee-on-the-petroleum-industry-bills/>

or noxious substances including those of a radioactive nature are often found in deactivated installations. Fixed structures left on decommissioned platforms ultimately corrode, with the potential to pollute the environment and adversely affect aquatic life and the ecosystem.<sup>11</sup> Prior to any decommissioning and abandonment, all lessees or licensees, are therefore required to submit to the Commission or Authority, a programme setting out their decommissioning program that aligns with good international petroleum industry practices and environmental development (S. 232).

Approval is granted only after all relevant environmental, technical and commercial regulations or standards are met. Licenses may be recalled where an operator does not comply with the above guidelines. All operators are required to set up and manage an abandonment fund and the Commission or Authority retains the right to access and use such funds if the operator fails to fulfill his obligations. The provisions set out in S. 233 work to ensure the environment is left in a safe, healthy and habitable state upon decommissioning of any executed project.

#### **Sanctions and penalties for environmental damage:**

The Commission or Authority are empowered to impose sanctions and penalties assessed against any person for contravening environmental and other regulations. (S.231). Penalized lessees or licensees have the right to make representations to the Authority or Commission in respect of whether or not a penalty should be as

essed and the amount of the penalty. The most potent weapon the upstream and downstream regulatory bodies deploy to enforce regulatory policy principles is the suspension and revocation of licences and leases where the holder has failed to comply with environmental obligations as required by law or the provisions of the licence or permit.

## **RECOMMENDATIONS:**

The procedure and mechanism individuals and communities can use to access compensation for environmental damage is unclear. Environmental regulations and mechanisms remain relevant and effective when they can provide meaningful opportunities (including online) for the public to make contributions, while delivering the necessary level of protection to all stakeholders.

In preparing the EMPs, operators are not required to consult and seek feedback from local residents and landowners living within the proximity of oil exploration and production activities who bear the brunt of environmental pollution and degradation. Many of these groups depend on the environment

for subsistence through agriculture or fishing and are therefore particularly vulnerable to the impacts of environmental damage. Operators are also not required by to build awareness of the EMPs and invite feedback. Communities need to understand the contents of the EMPs of various operators working in their communities, and how to use those standards to demand protection against environmental hazards.

With regard to the environmental remediation fund, the Commission or Authority doubles as the Fund manager and the facilitator of investigation, remedial planning and remediation of sites that pose a risk to human health and the environment. Consistent with the bill's objective of create efficient and effective governing institutions, with clear and separate roles for the petroleum industry (section 2), the management of the remediation fund should be vested in the National Oil Spill Detection and Remediation Agency (NOSDRA) already charged with the mandate to oversee the remediation of oil-impacted sites. This will not only guarantee the NOSDRA's regulatory independence and effectiveness, but also inject more clarity in institutional obligations and regulatory functionality in the oil industry.

Finally, non-governmental organizations (NGOs) and other independent watchdogs should be allowed to have access to the decommissioning programmes submitted by operators. This is necessary to sensitize communities about the location and status of decommissioned structures and increase their capacities to understand the potential risks from the environmental, social, economic perspectives and to introduce mitigation measures. It is important for NGOs and CBOs to increase their capacity to monitor these processes and to ensure that the decommissioning of offshore installations and pipelines is carried out in accordance with the requirements of national legislation and with Nigeria's international obligations especially as set out by the International Maritime Organization.

<sup>11</sup> Victoria Ibezim-Ohaeri: *ibid.*

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