



COUNTRY REPORT: NIGERIA **Legal Developments, 2009-2011**

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Introduction

Under the general powers conferred on the Minister, Federal Ministry of Environment (FMoEN), by section 34 of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (2007)*, thirteen Regulations were signed into law on 28 April 2011 and published in the *Federal Republic of Nigeria Official Gazette (Abuja)* on 9 May 2011. These are additional to an earlier set of eleven Regulations made by the same Minister, which were signed into law on 30 September 2009 and published in the *Federal Republic of Nigeria Official Gazette* between 2-20 October 2009. This Country Report briefly presents a general overview of recent legal and policy initiatives facilitated by the National Environmental Standards and Regulations Enforcement Agency (NESREA).

The Nigerian Context

The Federal Republic of Nigeria is located in the West African Sub-Region. It is bordered by the North Atlantic Ocean to the south, Benin Republic to the west and Cameroon to the east. Nigeria comprises of 910,770 sq km land area and 13,000 sq km water area. Under the *National Environmental (Coastal and Marine Area Protection) Regulations (2011)*, 'the coastal zone stretches within 500 meters of high tide line on the landward side'. The country is richly endowed with natural resources, including biological, physical, mineral and energy resources. Its climate varies from

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equatorial in the south, tropical in the middle belt and arid in the north. The terrain is varied with rugged hills, undulating slopes, gullies, water-logged areas (wetlands/Fadamas), flat and undulating land surfaces. The major natural resources include forests, crude oil, natural gas, solid minerals (such as bitumen, tin, limestone, columbite, iron ore and coal) and fisheries. Major industries are petroleum, agro-processing and manufacturing, agriculture, iron and steel processing, plastics, pharmaceuticals and textiles. Agriculture and petroleum stand out as mainstay of the nation's economy. Since the 1970s, oil has been the lead revenue earner bringing with it environmentally destructive industrial activities.

The critical environmental problems the country faces are: waste management; sanitation (especially in city centers and periphery-urban slums); environmental degradation (including desertification, flood, erosion and deforestation); oil and gas pollution; loss of biodiversity; environmental data management; the lack of enforcement of environmental laws; and climate change consequences.

Nigeria came into existence in 1914 with the amalgamation of the Southern and Northern Protectorates by the British Colonial Administration. It was not until 1988 that serious attention was given to the protection of the nation's environment. The country's environmental paradigm shift was prompted by the 1987 illegal dumping of toxic wastes at the Koko Port, situated in the south of the country. The *Federal Environmental Protection Agency Act (1988) (FEPA Act)* established the Federal Environmental Agency (FEPA) with responsibility for monitoring and enforcing environmental protection measures. In 1999, the Federal Ministry of Environment was created to boost commitment to environmental protection. The creation of a Federal Ministry of Environment, with an expanded mandate and a direct voice in the Federal Cabinet, is expected to mark a turning point in environmental management. Section 20 of the *Constitution of the Federal Republic of Nigeria*, expresses that: 'The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. It was hoped that this constitutional expression would enable the nation's environmental management vision, '[t]o ensure a cleaner and healthier environment for Nigerians'. It is however questionable whether this provision in the non-justiciable Chapter II of the *Constitution* can promote the interest of the environment and the people.

The National Oil Spill Detection and Response Agency (NOSDRA) is charged with responsibility for the implementation of the *National Oil Spill Contingency Plan*. The National Environmental Standards and Regulations Enforcement Agency (NESREA) has responsibility for the enforcement of standards, regulations and all national laws and international agreements and treaties on environment to which Nigeria is signatory. NESREA takes the driving seat as the 'Chief Environmental Enforcement Agency of the Federal Government'. Its stated mission is '[to] inspire personal and collective responsibility in building an environmentally conscious society for the achievement of sustainable development in Nigeria'. Some State governments have established ministries of environment in addition to the State Environmental Protection Agency.

The *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (2007)* superseded the *FEPA Act (1988)*. Section 8(k) of the statute mandates NESREA to present for the Minister's approval proposals for guidelines, regulations and standards on environment matters (excluding the oil and gas sector), such as: atmospheric protection; air quality; ozone depleting substances; noise control; effluent limitations; water quality; waste management and environmental sanitation; erosion and flood control; coastal zone management; dams and reservoirs; watersheds; deforestation and bush burning; other forms of pollution and sanitation, and the control of hazardous substances and removal control methods. Section 34(c) empowers the Minister to make regulations 'generally for the purposes of carrying out or giving full effect to the functions of the Agency' under the Act.

2009/2011 Environmental Regulations

Exercising the above powers accorded to it under *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (2007)*, NESREA published the following broad array of sectoral regulations in 2009:

- *National Environmental (Wetlands, River Banks and Lake Shores Protection) Regulations;*
- *National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations;*
- *National Environmental (Sanitation and Wastes Control) Regulations;*

- *National Environmental (Permitting and Licensing System) Regulations;*
- *National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations;*
- *National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations;*
- *National Environmental (Ozone Layer Protection) Regulations;*
- *National Environmental (Food, Beverages and Tobacco Sector) Regulations;*
- *National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations;*
- *National Environmental (Noise Standards and Control) Regulations; and*
- *National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations.*

In May 2011, the following additional thirteen regulations were published:

- *National Environmental (Protection of Endangered Species in International Trade) Regulations;*
- *National Environmental (Soil Erosion and Flood Control) Regulations;*
- *National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations;*
- *National Environmental (Desertification Control and Drought Mitigation) Regulations;*
- *National Environmental (Surface and Groundwater Quality Control) Regulations;*
- *National Environmental (Coastal and Marine Area Protection) Regulations;*
- *National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations;*
- *National Environmental (Electrical/Electronic Sector) Regulations;*
- *National Regulations (Non-Metallic Minerals Manufacturing Industries Sector) Regulations;*
- *National Environmental (Construction Sector) Regulations;*
- *National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations;*
- *National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries Sector) Regulations; and*

- *National Environmental (Domestic and Industrial Plastic, Rubber and Foam Sector) Regulations.*

Inherent in these Regulations are salient areas of synergy and features relevant for regulating the environment. Some points of synergy include: the adoption of licensing and permit system; the inclusion of the polluter pays principle; the use of environmental management plans; the introduction of effluent pollution abatement measures; the use of monthly discharge monitoring report; the recognition of environmental auditing; obligations to embrace best practices; and the implementation of stiffer fines, punishment and sentencing; and capacity building initiatives.

Domesticating Multilateral Environmental Agreements

Section 12(1) of the *Constitution* provides that, 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. The recent regulations are significant responses to need for the country to domesticate some of the critical multilateral environmental agreements (MEAs) to which Nigeria is a party. The following are some of the major international and regional environmental treaties that Nigeria has ratified or acceded to:

- *Convention on Wetlands of International Importance Especially as Waterfowl Habitat;*
- *Africa-Eurasia Migratory Water Birds Agreement;*
- *Convention on Migratory Species;*
- *Convention to Regulate International Trade in Endangered Species of Flora and Fauna (CITES);*
- *Abidjan Convention on Marine and Coastal Environment;*
- *United Nations Convention on the Law of the Sea;*
- *Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal;*
- *Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement of Hazardous Wastes within Africa;*
- *Vienna Convention for the Protection of the Ozone Layer;*
- *Montreal Protocol on Substances that Deplete the Ozone Layer;*

- *United Nations Framework Convention on Climate Change;*
- *Kyoto Protocol;*
- *Convention on Biological Diversity;*
- *Bio-Safety Protocol;*
- *Stockholm Convention on Persistent Organic Pollutants;* and
- *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.*

Scrutiny of the recent twenty-four national environmental regulations shows that international treaties largely set the tone for the new laws. Nigeria has taken a bold step with the recent environmental regulations, filling the historic regulatory gap in the country's environmental management system.

Route of Subsidiary Legislation

In the future, this large volume of regulations will largely define the country's environmental legal instruments. A strategy of subsidiary legislation through regulation under the principal statute is informed by the comparative advantage inherent in the process of 'subsidiary legislation' law-making, namely, avoiding the delay/long process of passage of bills through the national legislature. The new regulations reveal clearly that there is now more cohesion and coherence in the country's environmental regulation. This is a welcome development, and the barely four-year old NESREA is determined to prove that it is up to the task and is unequivocal about the protection of the nation's environment. Nigeria now has stringent environmental protection laws and regulations to control human and corporate business activities adversely impacting on the environment.

NESREA and Inter-Agency Cooperation

Much of the success of NESREA will however depend on inter-agency cooperation. At the Murtala Muhammed International Airport (Lagos) on 18 April 2011, a woman who attempted to smuggle a rare turtle out of the country was arrested by officials of the Nigeria Quarantine Service. The seized turtle was transferred to the Oyo State National Park in Ibadan. The spirit of cooperation and collaboration amongst members of the Inter-Governmental Agencies, including the Nigeria Customs, Immigration, Nigeria Quarantine Service, NESREA and others, to halt trading in

endangered species, has increased. NESREA observed that public awareness and training programmes put in place have contributed to the new vigilance by staff members of the Inter-Agency committee on *CITES* at the nation's borders, the airports and seaports. The trade suspension placed on Nigeria under *CITES* was lifted in August 2011. The new spirit of collaboration has ushered in a reinvigorated era of *CITES* implementation. Efforts for effective *CITES* enforcement and the new stringent laws and regulations through the *National Environmental (Protection of Endangered Species in International Trade) Regulations* (2011) influenced the lifting of trade suspension imposed on Nigeria by the *CITES* Standing Committee.

'Oil and Gas' Exclusions from NESREA's Mandate

The 2009/2011 environmental regulations deal with challenges ranging across wetlands, river banks and lake shores protection; watershed, mountainous, hilly and catchment areas; sanitation and wastes control; permitting and licensing systems; access to genetic resources and benefit sharing; mining and processing of coal, ores and industrial minerals; ozone layer protection; food, beverages and tobacco sector; textile, wearing apparel, leather and footwear industry; noise standards and control; chemical, pharmaceutical, soap and detergent manufacturing industries; protection of endangered species in international trade; soil erosion and flood control; control of bush, forest fire and open burning; desertification control and drought mitigation; surface and groundwater quality control; coastal and marine area protection; control of vehicular emissions from petrol and diesel engines; electrical/electronic sector; non-metallic minerals manufacturing industries sector; construction sector; standards for telecommunications and broadcast facilities; base metals, iron and steel manufacturing/recycling industries sector; and the domestic and industrial plastic, rubber and foam sector.

However, this coverage raises vital issues. What is the scope of the regulated community under the new regulations? Who is 'in' and who is 'out'? What is the rationale behind the exclusion of any particular industrial sector from governance by the nation's chief environmental enforcement agency, NESREA?

Oil and gas operations are expressly excluded from NESREA's regulatory mandate. Section 8(k) of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* states that the NESREA shall make proposals for new or

amended guidelines, regulations and standards on the environment, other than in the oil and gas sector. The functions of the Agency specified under the Act are exclusive of 'the oil and gas sector'.⁴⁶⁷ The power of the Agency is also restricted concerning the oil and gas sector.⁴⁶⁸ This exclusion will fuel criticism in the wake of the new Regulations released by NESREA, particularly because these are relatively stringent. One is bound to wonder why the oil and gas sector which is critical to the nation's economy, but is notoriously environmentally destructive, will be governed by 'softer' laws, regulations and the supervision of the Department of Petroleum Resources (DPR) with limited oversight of oil spills by NOSDRA, an arm of the Federal Ministry of Environment.

There is accordingly a need to review the environmental governance provisions that exclude the oil and gas sector from the purview of NESREA. Existing laws such as the *Petroleum Act (2004)*, *Oil Pipelines Act (2004)* and *Petroleum (Drilling and Production) Regulations (1969)*, which control activities of the petroleum companies, should ideally be inferior to NESREA's broader environmental laws and regulations. Moreover, on a strict interpretation of the law, DPR's powers are subordinate to NESREA, which operates under a law that states 'an act to provide for the establishment of the National Environmental Standards and Regulations Enforcement Agency charged with responsibility for the protection and development of the environment in Nigeria and for related matters', effectively becoming the nation's Environment Ombudsman and Chief Environmental Enforcement Agency.

Implications for the 2011 UNEP Environmental Assessment of Ogoniland

On 14 August 2011, the United Nations Environment Programme (UNEP) submitted its *Environmental Assessment of Ogoniland* (the Report) to the Federal Government of Nigeria (FGN). UNEP had carried out an independent study of an area of 1,000 square kilometers in Ogoniland Rivers State, the site of oil industry operations for over 60 years. Ogoniland not only evokes sad memories of the judicial murder of environmental activist, Ken Saro Wiwa and nine others, but also sad recollections of large scale environmental pollution, ecosystems destruction and systematic human rights abuses.

⁴⁶⁷ Section 7(g),(h),(j) and (k).

⁴⁶⁸ Section 8(g),(l),(m) and (n).

The UNEP project surveyed 122 km of pipeline rights of way and visited oil spill sites, oil wells and other oil-related facilities in Ogoniland, including decommissioned and abandoned facilities, based on information provided by: the Government Regulators; Shell Petroleum Development Company (Nigeria) Ltd (SPDC); and communities living in and around Ogoniland. The UNEP's field observations and scientific investigation found that oil contamination in Ogoniland is widespread and severely impacting many components of the environment. Although the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity and the Ogoni people (and the Niger Delta generally) live with this pollution every day. The Report concludes that 'the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate' and that 'industry best practices and SPDC's own procedures have not been applied, creating public safety issues'.

The Report identified eight emergency measures, from a duty of care point of view, which warrant immediate action:

- Ensure that drinking water wells where hydrocarbons were detected are marked and people are informed of the danger;
- Provide adequate sources of drinking water to those households whose drinking water supply is impacted;
- People in Nsisioken Ogale who have been consuming water with benzene over 900 times the WHO guideline are recorded on a medical registry and their health status assessed and followed up;
- Initiate survey of all drinking water wells around those wells where hydrocarbons were observed and arrange measures (1-3 above) as appropriate based on the results;
- Post signs around all sites identified as having contamination exceeding intervention values warning people not to fish, swim or bathe in these;
- Inform all families whose rainwater samples tested positive for hydrocarbons and advise them not to consume the water; and
- Mount a public awareness campaign to warn individuals who are undertaking artisanal refining that such activity are damaging their health.

It noted that environmental restoration of Ogoniland 'could prove to be the world's most wide-ranging and long term oil clean-up exercise ever undertaken if contaminated drinking water, land, creeks and important ecosystems such as

mangroves are to be brought back to full productive health'. It estimates that this restoration process could take up to 30 years and that it will cost \$1 billion (USD) in the first 5 years. The Report further found that overlapping authorities and responsibilities between ministries and a lack of resources within key agencies, has implications for environmental management on-the-ground, including enforcement.

The oil and gas sector must be brought within Nigeria's holistic environment and regulatory framework. It does not make sense or promote effective environmental governance to exclude the oil and gas sector from the NESREA regulatory regime. There are inextricable linkages between the diverse sectors within the nation's environment. If the comprehensive Report is read in tandem with the totality of the newly released environmental regulations and against the backdrop of NESREA's surveillance, monitoring, inspection, and enforcement roles, it is obvious that this exclusion has contributed largely to the operational style of the oil and gas sector.

Conclusion

A great deal of attention and detail has gone into the drafting of the country's latest multiple environmental protection regulations. The NESREA has brought to fruition the long awaited comprehensive legal instruments of a world-class standard, providing greater potential for the protection of the environment and enhancement of the goals of sustainable development in the country. Nigeria's environmental values expressed through the *National Policy on Environment* have been resoundingly articulated in the recent regulations. However, it is imperative that the activities of the regulated community and the authorities towards achieving the stipulated goals be congruent with the country's long-term environmental values.