Enforcement Provisions of Major Environmental Law Regimes in Nigeria

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Abstract

The world has been witnessing alarming increase in environmental problems, ranging from the depletion of the ozone layer and green-house effect, global climate changes or global warming, causing the melting of article ice, resulting in floods, with acid rain resulting from gas flaring, oil pollution, deforestation, plant and animal extinction and to all other forms of environmental degrading activities of man. Our environment is faced with the twin pressure of population and development, resulting in its deterioration and depletion of the natural resources at an alarming rate. Besides the traditional pollutants, the strain of unchecked effluents and emissions from hazardous industries has caused pollution of the environment and consequent human health hazards. The reckless industrial growth may lead to an over exploitation and destruction of natural resources to such an extent that our future generation may discover that life support system has been damaged beyond repair. Therefore, there is a need for striking a balance between environment and development so that we may have sustainable development[1]*. In recognition of the above challenges, the international community, including Nigeria, has adopted an avalanche of legislation to stem the menace of environmental degradation. Some of the legal regimes are international conventions, while others are laws. In these regimes there are provisions for enforcement of the conventions. This work takes a critical look at two international and three domestic laws put in place to address the above challenges. The effectiveness or otherwise of the enforcement provisions of such conventions and laws would also be the concern of this paper.*

[1] Sengar, D., *Environmental Law*, (New Delhi: Prentice Hall, 2007), p.1

Introduction

Environmental problems in Nigeria are of different kinds and dimension, ranging from erosion, deforestation, water, land and air pollution from oil industries, industrial effects up to dumping of refuse and toxic wastes. These problems are classified as natural, developmental, and socio-economic. In reaction to these different problems, several pieces of legislation have been enacted, to address the challenges that flow there from. These international Conventions include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[1], and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.[2] As their titles indicate, these instruments share the common goal of controlling the movement of hazardous wastes across national borders. They differ in some substantial aspect, however. At the domestic level, so many pieces of legislation have been enacted by the National Assembly. For purposes of this paper, the following laws would be examined; National Environmental Standards and Regulations Enforcement Agency Act,[3] the National Oil Spill Detection and Response Agency Act[4] and the Environmental Impact Assessment Act.[5]

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[1] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (1989), U.N. Doc. UNEP/WG.190/4, UNEP/IG/89 [the Basel Convention has been ratified by 149 States and the European Union]

[2] Bamako Convention on the Ban of the Import Into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes Within Africa (1991) reprinted in 30 I.L.M 775 (1991) [hereinafter Bamako Convention]

[3] This Act enacted in 2007 repealed the Federal Environmental Protection Agency Act (FEPA) which was the first major Law on Environment in Nigeria

[4] As the name suggests this law requires the detection of oil spill and quick response to the spill

[5] Environmental Impact Assessment Act 1999, Cap E12, Laws of the Federation of Nigeria, 2004

Prior to June 1988, Nigeria responded to most environmental problems on an *ad hoc* basis.[6] Although the Nigerian Criminal Code[7] contained some provisions with respect to certain environmental infringements, such as the pollution of water sources, the burial of corpses within a hundred yards of residential home, and the sale, possession or manufacture of matches with white phosphorus, the code lacked any concrete provisions dealing specifically with the ever-increasing pollution caused specifically by hazardous waste.[8] Environmental legislative provisions in existence at the time were made in direct response to problems associated with the newly industrialised economy and the discovery and processing of oil.[9]

The period before 1988 was characterised by certain teeters. Principal among these was the near total lack of public awareness concerning environmental protection and development. Issues as biodiversity, conservation, effluent limitations, pollution abatement and sustainable development of Nigerian's natural resources did not form part of the general public discourse.[10] At the official level, there seemed to show no realisation of the interdependence of environment and development. This was underlined by the absence of a deliberate national policy aimed at protecting the environment while ensuring the conservation and sustainable use of natural resources. The absence of such deliberate policy naturally meant the non-existence of an agency entrusted with the responsibility for the protection and the development of the environment.

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[6] lkhariale, M . "The Koko Incident, the Environment and the Law", in Shyllon, F., ed., *The Law and the Environment in Nigeria*,. (lbadan: Vintage Publishers, 1989), pp. 73-75.

[7] Criminal Code Act, Cap C38 LFN 2004, ss. 245-248

[8] Ogbodo, S. G., "Two Decades After Koko Incident", vol. 15 (2009), *Annual Survey of International & Comparative Law Journal*, p.1

[9] *Ibid*

[10] Ebomhe, S. "Environmental Legislation Changes in Nigeria: What Impact on Foreign investment?" (2010) *George Etomi & Partners*, p. 4

However, this is not the case now, as there are environmental legislation put in place in Nigeria for the protection of the environment as noted above. The task of this paper therefore is to decipher the effectiveness or otherwise of the enforcement provisions of those mentioned above. This paper is discussed in the following segments: International Conventions: Basel and Bamako. Domestic Legislation: NESREA, NOSDRA and EIA Acts. Analysis of the Enforcement Provisions of international conventions and domestic laws will be made as each convention and law is discussed as well as observations made in the process. Challenges to the enforcement of environmental laws in Nigeria will also be the concern of this paper. The paper will conclude and recommendations made.

International Conventions:

As indicated earlier, two international conventions on environmental law will be examined. They are the Basel and Bamako Conventions.

Basel Convention

The Basel Convention is the most significant and influential international agreement relating to trade of hazardous waste.[11] The Basel convention was born from the backdrop that industrial nations in the northern hemisphere were exporting hazardous waste to developing nations in the south that were incapable of effective waste management.[12] In framing the Basel Convention, states parties recognised the need to promote the transfer of technology for the sound management of hazardous wastes and other wastes produced locally, particularly to the developing countries and were determined to protect, by strict control, human health and the

[11]Waugh, T. "Where Do We Go From Here: Legal Controls and Future Strategies Addressing the Transportation of Hazardous Waste Through Interna tional Borders", *11(2000), FORDHAM Environmental Law Journal*, p. 490

[12] Webster-Main, A. "Keeping Africa out of the Global Backyard: A Comparative Study of the Basel and Bamako Convention" vol. 26, No 1. (2000), *Environs,* p.70.

environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes.[13]

For the movement of waste to be deemed transboundary, the wastes must pass through the boundaries of more than two sovereign States. Transboundary movement of waste is defined by the Convention to mean any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another state or to or through an area not under the national jurisdiction of any State. In the said movement at least two States must be involved.[14]

The intendment of the framers of the Convention is overtly deduced from the manner it is couched. The Basel convention therefore, represents a compromise between industrialised and developing nations. The convention only regulates but does not ban the export of hazardous waste. The underlying policy goals of the convention are safe disposal and minimisation of trans-boundary transport of hazardous wastes. The convention provides a general framework for States' behaviour in hazardous waste management.[15] States parties are obliged to conduct the transportation and disposal of hazardous waste in an "environmentally sound manner". They are also required to take "appropriate measures" to reach these goals, but they are left to determine the exact nature and extent of such actions. It is indeed the view of these authors that the provisions of article 4 are ambiguous and subjective. It grants to States wide discretions as to determining what constitute appropriate measures. By so doing, a state could breach the provisions of the law while relying on the provisions of "appropriate measures." Indeed, the provision does not contain absolute obligations.

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[13] Basel Convention on the Control of Transboumdary Movement of Hazardous Wastes and their Disposal, (1989) [Preamble]

[14] Basel Convention, Art. 2(3)

[15] Basel Convention, Art. 4

Although these provisions contain valuable global standards for the protection of the environment against adverse effect of hazardous wastes they are nonetheless beset with ambiguities. Not only do the provisions fail to define "environmentally sound management", but they also leave a number of other equally important provisions to the discretion of the parties. For instance, the provisions are silent with regard to the extent of the generating states' duty to ascertain the adequacy of disposal facilities in the prospective importing states and the allocation of the burden of proof for the permissibility of export.[16]

Fundamentally, the Basel convention allows transboundary, movement of hazardous waste, but requires that it must be carried out in accordance with the Convention's regulatory regime of prior informed consent.[17] Exporters must notify receiving countries of intended hazardous waste shipment.[18] The notification must specify all countries through which the waste will travel.[19] Having received the notification, the receiving nation has a number of options. It may accept the request with stipulated conditions.[20] However, the exporting nations must not ship the waste until it gets consent and a disposal contract that provides for environmentally sound management of the wastes.[21] A state party may not import or export wastes with non-party states unless a separate disposal agreement that satisfies the environmentally sound management

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[16] *Ibid*

[17] *Ibid,* ["parties shall prohibit or shall not permit the export of hazardous waste and other waste if the State of import does not consent in writing to the specific import, in the cases where that State of import has not prohibited the import of such wastes]

[18] Art. 4(2) (f) ["each party shall take the appropriate measures to require that information about a proposed transboundary movement of hazardous waste and other waste be provided to the state concerned, according to Annex VA, to state clearly the effects of the proposed movement on human health and the environment"]

[19] Art 6

[20] Art 6(2)

[21] Art 6 (3)

standard has been established.[22] A violation of any of these provisions requires the exporting state to recover its waste from the receiving country.[23]

The Bamako Convention

The Organisation of African Unity adopted the Bamako Convention in 1991 as a response to the perceived short comings of the Basel Convention.[24] The Convention declares that the hazardous waste trade constituted "a crime against Africa and the African people.[25] African leaders believed that the Basel regulatory regime would merely legitimise a practice they found unacceptable.[26] They were also aware of the risk of damage the transboundary movement of wastes could cause to the health and well being of the African population. They came to the irresistible conclusion that under the Basel Convention, cash-poor states could potentially be lured to ignore the disastrous consequences of the hazardous waste trade in the face of tremendous economic incentives; consequently, reducing Africa to a dumping ground, for hazardous waste from industrialised countries.

The Bamako convention places a complete ban on all hazardous waste import into Africa, including the importation of waste for use in recycling, a frequently used loophole in the Basel Convention. The Bamako Convention also creates a limited ban on the transfer of hazardous waste within and among the African nations.[27] The focus of the Bamako convention is not on export of hazardous wastes from Africa, rather it is meant to halt the imports into the Continent. The Bamako Convention does not restrict African States from exporting hazardous waste to non-

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[22] *Ibid*, Art 6 (5)

[23] Art 8

[24] Shearer, C. R. H. "Comparative Analysis of the Basel and Bamako Convention on Hazardous Wastes", *23(1993) Environmental Law Journal*, pp.141-159

[25] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes, (1991) [Preamble]

[26] Webster-Main *op cit* p. 80

[27] Bamako Convention, *op. cit*. art 4(1)

African countries. Its ban therefore, does not function to limit an African State's choice to export hazardous waste it cannot dispose of properly. Rather, its aim is to protect Africa from becoming a dumping ground for the hazardous waste of an industrialised country.[28]

Pursuant to article 9 of the Bamako Convention, African States have been extremely proactive in creating laws forbidding the import of hazardous wastes. The Ivory Coast has adopted a law that imposes prison terms up to 20 years and fine up to $1.6 million for individuals who import toxic or nuclear waste into the country.[29] Other African nations have even prosecuted government officials involved in the hazardous waste trade. Guinea for instance, arrested at least 13 people after 15,000 tons of incinerator ash from Philadelphia was found in 1988.[30] Nigeria has not only arrested people, but has threatened to execute anyone, including foreigners involved in the dumping of hazardous waste inside its borders.[31]

Like the Basel Convention, the Bamako Convention calls upon parties to negotiate a substantive Protocol on the issue of liability.[32] Unlike the Basel Convention, no such Protocol text exists for the Bamako Convention. Nonetheless, the Bamako Convention, in furtherance of its chief goal of blocking any import of hazardous waste into Africa, creates a regime of unlimited joint

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[28] The OAU Council of Ministers passed a resolution on dumping a nuclear and industrial waste in Africa in 1989. The resolution was drafted in the wake of the hazardous waste dumping in Koko in Nigeria and after 15,000 tons of toxic incinerators ash was found in Guinea in 1988. This Resolution, calling for a ban on dumping, declared that dumping hazardous waste in Africa was a "crime against Africa and African people." Organisation of African Unity: council of ministers resolution in dumping of nuclear and industrial waste in Africa, May 23, 1989. This Resolution served as a framework for the Bamako Convention

[29] Puizon, L. M. "Waste and the Effect on Corporations, *7 (1994)De Paul L.J* , p. 173

[30] *Ibid*

[31] *Ibid*

[32] Bamako Convention, Art. 12

and several liability on the generators of improperly disposed waste. This regime is to be enforced by the implementation of appropriate national legislation.

Though Nigeria is a State Party to both conventions, having not domesticated them, they lack the force of law in Nigeria.[33] This therefore raises a serious environmental question as to the safety of our country, considering the porous nature of our national borders and also considering the fact that the some institutions that have been put in place to perform certain functions, in most cases do so, more in default than in compliance.

Domestic Laws

Prior to 1988, laws on environmental protection were in piecemeal and on ad hoc basis.[34] Thus, apart from the Minerals Act[35] which made provisions in a manner as to prevent environmental pollution, environmental legislation then were products of ad hoc reactions to specific environmental problems are they occurred, for instance, health needs and reflected little by way of preventive policy. However, in 1988, due to the dumping of about 3880 tons of toxic wastes at Koko by an Italian Company.[36] Nigerian government responded by promulgating two Decrees.[37]

Right from the first Constitution of Nigeria of 1922, the first attempt to make ample provision for the environment in Nigeria, is the 1999 Constitution. Fundamentally, s. 20 of the Constitution provides that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild

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[33] See s. 12(1) Constitution of the Federal Republic of Nigeria, 1999 (as amended)

[34] See Water Works Acts, (1915), ss. 245 & 247 of Criminal Code (1916) now in CAP C38 LFN 2004, and s. 13(1) of the Public Health Act 1917

[35] See ss. 46 & 118 of Minerals Acts (1958) now Nigerian Minerals and Mining Act, Cap M17 LFN 2004

[36] Ogbalu, O. "Environmental Regulation in Nigeria", vol. 10, No. 6, (1995) *Oil and Gas Law Review,* p. 256

[37] Harmful Waste (Special Criminal Provisions) Decree, No 43 of 1988, and Federal Environmental Protection Agency (FEPA) Decree No. 58 of 1988

life of Nigeria." As heart-warming as the above provision may appear, it is substantially defective. One defect is the fact that the wordings of the section are very broad. More importantly, the relevant provisions falls under Chapter II of the Constitution, which is non-justiciable; consequently, the provision lacks judicial enforcement.[38] However, in spite of the legislative limitation to the justiciability of Chapter II of the Constitution, reliance could be placed on Article 24 of the African Charter on Human and Peoples' Rights; a regional treaty that has been domesticated by Nigeria. It must be mentioned that presently, the right to a safe environment is analogous to the right to life.

The following shall hereunder be examined: National Environmental Standards and Regulations Enforcement Agency Act[39] 2007, National Oil Spill Detection and Response Agency Act[40] 2006 and the Environmental Impact Assessment Act[41] 1992.

National Environmental Standards and Regulations Enforcement Agency Act 2007

As stated earlier Federal Environmental Protection Agency Decree[42] now Act was promulgated in 1988 after the dumping of toxic wastes at Koko. It was the first major legislation on protection of the environment. It however has been repealed by NESREA Act in 2007. FEPA Act was fraught with many challenges namely: Lack of or weak enforcement of laws and regulations. FEPA gave industries five years moratorium in 1990 for industrial compliance with the installation of pollution abatement facilities which expired in 1994. In spite of this,

[38] Fagbohun, O. "Reappraising the Nigerian Constitution for Environmental Management," vol. 1, No. 1,(2002) *AAU Law Journal,* p.44

[39] Hereinafter referred to as NESREA Act

[40] Hereinafter referred to as NOSDRA Act

[41] Hereinafter referred to as EIA Act

[42] Hereinafter referred to as FEPA Act

compliance rate was put at between 20-40 per cent.[43] Even then the efficiency of many of the pollution abatement facilities was in doubt. Many had broken down, or were grossly inadequate or were operational cosmetic to give a semblance of compliance.[44]

The NESREA Act established an Agency known as the National Environmental Standards and Regulations Enforcement Agency, with perpetual succession and a common seal; it can sue and be sued in its corporate name[45]. Specifically, the Agency has the responsibility for the protection and development of the environment, biodiversity, conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines[46].

The agency is empowered to enforce laws, guidelines, policies and standards on environmental matters[47]; enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation.[48] The inclusion of 'oil and gas' under this sub-section introduces some confusion because there is in Nigeria, an agency that is saddled with the responsibility of regulating that particular sector of the economy. Therefore the phrase 'oil and gas' should be jettisoned to bring it in conformity

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[43] Ajomo, M. A. and Adewale, O. (eds), *Environmental Law and Sustainable Development in Nigeria*, (Lagos: Nigerian Institute of Advance Legal Studies, 1994), pp.1-11

[44] Ladan, M. T. "Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria", (2012) *Law, Environment and Development Journal*, p. 120

[45] NESREA Act, S. 1

[46] *Ibid*, s. 2

[47] *Ibid*, s. 7(a)

[48] Ibid, s. 7(c)

with the entire NESREA Act, particularly, section 7 (g, h, k, and l), so as to give effect to the intendment of the legislature. Again, the Agency is mandated to enforce compliance with policies, regulations, standards, legislation and guidelines on water quality, environmental health and sanitation including pollution abatement.[49] This provision enjoins NESREA to ensure that the policies and guidelines etc on water quality are complied with. This requires the frequent monitoring and checking by the agency. Similarly, NESREA is mandated to enforce compliance with the enforcement of guidelines and legislation on sustainable development with respect to the management of the ecosystem, biodiversity and conservation and development of Nigeria's natural resources.[50] According to Ladan[51], this provision confers on NESREA, powers over a wide range of issues such as guidelines and legislation on the sustainable management of the ecosystem and biodiversity conservation including the Sea Fisheries Act[52] and the Regulations made pursuant to it, the Endangered Species (Control of International Trade and Traffic) Act[53] and the National Park Act.[54]

Apart from the oil and gas sector, the agency has the right to enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages, importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemical and wastes[55]. This particular provision establishes the power of NESREA on the regulation of chemical products and also puts an end to the conflict that hitherto existed between the defunct FEPA and NAFDAC on whose authority it was to regulate chemical products in the 1990s. This particular provision is apposite considering the indiscriminate

[49] Ibid, s. 7(d)
[50] *Ibid*, s. 7 (e)
[51] Ladan, *op. cit*. p. 124
[52] *ibid*
[53] Cap E12, LFN 2004
[54] Cap N3, LFN 2004
[55] NESREA Act, s.7 (f and g)

dumping of toxic wastes at unauthorised destinations and especially the ugly Koko toxic wastes incidence that took place in Nigeria in 1988. It is not just enough to make legislative provisions for it; there is also an important need to monitor closely the compliance with this particular provision, due to the health risk it portends. Also, there is need for environmental protection agencies to take preventive steps to avert environmental harm that would arise from the production, sale and distribution of these very hazardous chemicals. It must be mentioned that pursuant to the powers conferred on NESREA under the Act, it has adopted a total of 24 regulations[56] all on the environment. These regulations cover a wide range of area.

Enforcement Powers of NESREA[57]

NESREA is armed with wide enforcement powers. These include the ability to prohibit the processes and use of equipment or technology that undermine environmental quality,[58] conduct field follow-up compliance with set standards and take procedures prescribed by law against any violator[59], the establishment of mobile courts to expeditiously dispense cases of environmental infringements,[60] and the power to compel public investigations on pollution and the degradation of natural resources.[61] It is pertinent to note that the chief enforcer under this Act is the "Officer" of the

[56] These include National Environmental (Wetlands, River Banks and Lake Shores Regulation, 2009; National Environmental (Watershed, Mountainous, Hilly and Catchment Areas Regulation, 2009; National Environmental (Sanitation and Wastes Control) Regulation, 2009; National Environmental (Access to Genetic Resources and Benefit Sharing) Regulation, 2009; National Environmental (Ozone layer Protection) Regulation , 2009; National Environmental (Soil Erosion and Flood Control) Regulation 2009 and National Environmental (Coastal and Marine Protection) Regulation, 2011

[57] NESREA Act, s. 8

[58] . S. 8 (d),

[59] *Ibid*, s. 8 (e)

[60] . S. 8 (t),

[61] S. 8 (g),

agency. A reasonable interpretation, in the light of the usage of authorised authorities or Officer in other sections of the Act is that in addition to the Agency Official, any Police Officer not below the rank of an Inspector of Police or any Custom Officer can enforce the Act.[62] Therefore, an Officer of the Agency, with a Court Warrant, can enter and search any premises he reasonably believes is being used to contravene environmental standards or legislation.[63] This particular demand of a search warrant is a departure from what was the case under both the FEPA Act[64] and the Harmful Waste (Special Criminal Provisions Etc) Act.[65]

Under the former regimes, Officers of environmental protection agencies could enter any premises or property where they suspected that environmental laws were being infringed without warrant. This has changed drastically. This is in recognition of the right to privacy as enshrined in the Constitution[66] for which a citizen is expected to be secure in his home, correspondence, telephone conversation and telegraphic communications. In addition, it also excludes arbitrary use of powers by officers and men of the regulatory agency. In effecting the search warrant, the Officer is authorized to examine any article, take a sample or specimen, open and examine any container or package, and examine any book, documents or record.[67] The Officer may also seize and detain any article, and can obtain a court order to suspend activities. The officer also has the power to seal and close down premises including land, vehicles, tents, vessels, floating craft or any inland waterway.[68] Obstruction of an Officer under the Act carries a stiff penalty.[69]

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[62] See section 37 of Interpretation Act
[63] S. 30 (i)(a)
[64] FEPA Act, s. 26
[65] Harmful Wastes (Special Criminal Provisions Etc) Act, s. 10
[66] CFRN, S. 37
[67] NESREA Act, S. 30 (I)(b)(e)(d)(2)
[68] . S. 30(1)(g)
[69] S. 31

Any obstruction caused by an individual is punishable by a minimum fine of ₦200,000 or a maximum sentence to one year's imprisonment. There is an additional fine of ₦ 20,000 for each day the offence continues.[70] Obstruction by a corporate body attracts a fine of ₦ 2,000.000, and an additional fine of ₦ 200,000 for each day the offence continues.[71] The requirement of a court warrant under this provision is to guard against arbitrary exercise of its powers by the agency. It could however, lead to delay in the dispensation of justice in favour of the complainant. Furthermore, the requirement of a search warrant also brings the NESREA Act in conformity with the Criminal Procedure Act and Code respectively.[72]

To conclude this segment it is pertinent to state that NESREA Act enjoys the pre-eminence of the flagship legislation on environmental protection in Nigeria. It has no doubt made improvements upon the shortcomings inherent in the FEPA Act. Some of the features it has that were lacking in the FEPA Act include the appointment of a Director-General as the Chief Executive and Accounting Officer,[73] the establishment of the five Directorates headed by a Director[74], the increase of the penalties for obstruction of an officer under the Act[75]. The mandate for the agency to establish offices in the six geopolitical zones of Nigeria is indicative of the realisation by the legislature that the real impact of enforcement under the Act must be extended to both developed and developing areas in the Country.

National Oil Spill Detection and Response Agency Act 2006

The National Oil Spill Detection and Response Agency Act[76] was enacted in 2006[77] as a deliberate and articulate response by the

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[70] *ibid*
[71] *ibid*
[72] Criminal Procedure Act, s. 74 and Criminal Procedure Code, s. 107
[73] NESREA Act, s. 11
[74] *Ibid,* s. 10
[75] *Ibid*, s. 31
[76] Hereinafter referred to as NOSDRA

Federal Government to the persistent environmental degradation and devastation of the coastal ecosystem in the oil producing area of the Niger Delta region in Nigeria.

NOSDRA is established as a corporate body with perpetual succession and common seal, which can sue and be sued in its corporate name.[78] It is essentially mandated to play the lead role in ensuring timely, effective and appropriate response to all oil spills, as well as protect threatened environment and ensure clean-up of all impacted sites to the best practical extent.[79] Apart from the above, the agency is mandated to, among other functions, identify high-risk areas as well as priority areas for protection and clean-up; establish the mechanism to monitor and assist or where expedient direct the response, including the capability to mobilise the necessary and clean-up to the best practical extent of the impacted site; cooperate and provide advisory services, technical support and equipment for purposes of responding to major oil pollution incident in West African sub-region upon request by any neighbouring country, particularly where a part of the Nigerian territory may be threatened.[80] This particular function is a welcomed development given the extent of spread of damage cause by oil spill over and across state boundaries. However, the clause "upon request by any neighbouring country" seems to limit the Agency's quick response mechanism. It is envisaged by the Act that if any oil spillage occurs near Nigerian territory and a part of Nigeria is under a threat, the Agency may not move to action until it is requested to so do by a neighbouring country. This provision seems to defeat the essence of the legislation.

The Agency is further mandated to cooperate with the International Maritime Organisation and other national, regional and international organisations in the promotion and exchange of results of research and development programme relating to the

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[77] Establishment Act No. 15 of 2006

[78] National Oil Spill Detection and Response Agency Act, (2006), s. 1

[79] *Ibid*, s. 5

[80] *Ibid*, s. 5 (b), (c,) and (g)

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, and 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.[81] This provision has universalised the status of the agency with respect to its function of effective control and management of oil spill in Nigeria.

Similarly, the agency is responsible for surveillance and to ensure compliance with all environmental legislation and detection of oil spill in the petroleum sector; receive reports of oil spillage and coordinate oil spill response activities throughout Nigeria; coordinate the implementation of the plan as may be formulated, from time to time, by the Federal Government; and perform such other functions as may be required to achieve the aims and objectives of the agency under the Act. Failure by an oil spiller to report the incidence of oil spill to the agency in writing within 24 hours of the occurrence of such spill, attracts a fine of ₦500,000 for each day of such default. Where the spiller fails to clean –up the impacted site, to all practical extent including remediation, there shall be imposed a penalty of ₦1,000,000.[82] This penalty is too paltry. In the words Senator Abubakar Bukola Saraki[83], "the fine is not deterrent enough for such offence that has the potential to cause degradation of the environment and inflict long lasting damage to the health of the people living in the community."[84] Part of the reason for the civil unrest by members of the communities in the Niger Delta where oil is explored has been that flared gas portends a high risk to both human, plants, aquatic and other animals' lives. They are often exposed to very severe skin

[81] Ibid, s.5 (i) and (j)

[82] Ibid, s. 6 (2) and(3)

[83] Former Chairman Senate Committee on Environment, now President of the Senate of the Federal Republic of Nigeria

[84] Sirmire, M., "Threshold of Fresh Oil Spill Management Era" Wednesday 17 September, 2014, *Daily Independent*, p. 26

cancerous diseases, the sources of their food and water supply in most cases are poisoned, aquatic lives are lost and so many other severe consequences such as fire outbreak, which would lead to the loss of lives and property. The unrest is often predicated on the grounds that these multinational companies make billions of naira from exploring the natural resources in their area, yet the health implication of such activities is often not considered. Therefore, the fine of ₦1,000,000 for failure to clean-up would readily be paid by the companies, than cleaning-up impacted areas to a reasonable extent.

Under the Act[85] the agency is assigned some special functions to inter alia, ensure the coordination and implementation of the plan within Nigeria including within 200 nautical miles from the baseline from which the breath of territorial waters of Nigeria is measured; undertake surveillance, reporting, alerting and other response activities as they relate to oil spillages, and to strengthen the national capacity and regional action to prevent, control, combat and mitigate marine pollution.[86]

A National Control Response Centre is established under s. 18 of the Act to act as a report processing and response coordinating centre for all oil spillage incidents in Nigeria; receive all reports of oil spillage from the Zonal Offices and Control Units of the Agency and to 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 coordinating required in plan activation. To consolidate the above, the government has undertaken a very important responsibility with respect to oil spillage under s. 19. It provides that whenever a major or disastrous oil spillage occurs, the federal government shall, in collaboration with other agencies, co-opt, undertake and supervise the effective implementation of all that is contained in the second schedule to the Act. That is to cooperate with an oil spiller in the determination of appropriate measures to prevent

[85] NOSDRA Act, s. 7
[86] *Ibid*. s. 7 (a, b, and d)

excessive damage to the environment and the communities; expeditiously consider any proposal made for response efforts by the oil spiller; mobilise internal resources and also assist to obtain any outside human and financial resources that may be required to combat any oil spillage, and to assist in the assessment of damage caused by an oil spillage.[87] This onerous responsibility undertaken by the federal government is quite apposite and it is in recognition of the extensive danger that would naturally accompany any oil spillage. This is quite commendable. Oil spillage is a major disaster and its control and management is regarded a national emergency whenever it occurs. It is therefore the responsibility of government to provide effective capacity building mechanism for oil spill management by acquiring basic oil spill response assets, equipment, and provision of trained personnel for spill control and management. NOSDRA as it is presently constituted under the enabling law, lacks capacity to effectively achieve it set objectives. This is because the scope of the agency as an independent agency is limited, since it is an appendage to the Federal Ministry of Environment. Again, pursuant to s. 25 of the Act, the Minister for Environment may give the Governing Board or Director-General such directives of a general nature or relating generally to matters of policy with regard to the exercise of its or his function as he may consider necessary. This particular provision gives the Minister a wide discretion which is subject to abuse. Under the Act, the Minister so appointed may not as is often the case, be an expert in the management of oil spillage, yet the Act goes ahead to state that either the Governing Board or Director-General must abide by such directive. This raises issues on the professionalism and integrity of the Board and management of the Agency.

Part of the negative effect of such wide discretion may be that the Agency may be Armstrong in the discharge of its duties under the Act, particularly in relation to duties under sections 5 and 6(1), especially where there is no synergy between the Minister and members of the Board. A major lacuna in the NOSDRA Act is

[87] NOSDRA Act, second schedule, para. 3 (a, b, and c)

the conspicuous lack of provision for the protection of victims of oil spillage and pollution in the Niger Delta. This in itself is contrary to the National Oil Spill Contingency Plan for Nigeria which is aimed at ensuring sustainable development. It is apt to note that the agency has failed to live up to this objective as it has failed to make adequate provisions on the payment of compensations to victims of oil spillage.[88] This is more worrisome because membership of the Governing Board does not include members of the bearing communities.[89] The lack of access by members of the oil producing communities to important environmental decision making institutions in Nigeria is a serious omission.

Environmental Impact Assessment Act 1992[90]

Environmental Impact Assessment is a formal process by which a proposed activity with potentially significant environmental, social and economic costs is studied with a view to evaluating its impacts, examining alternative approaches and developing measures to prevent or mitigate the negative impacts.[91] EIA first emerged on the international scene in the 1972 Stockholm Conference as one of those important international and domestic legal techniques for integrating environmental considerations into socio-economic development and decision-making process.[92] The Environmental Impact Assessment Act is the core legislation that governs environmental impact assessment for projects in Nigeria and flows directly from the provisions of Principle 17 of the Rio declarations which provides that "Environmental impact

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[88] Okopido, I. T., *National Oil Spill Contingency Plan for Nigeria*, (Abuja: Federal Ministry of Environment, 2000), p.1

[89] NOSDRA Act, s. 2

[90] Now cap E12 LFN 2004

[91] Ingelson, I. and Nwapi, C. "Environmental Impact Assessment Process for Oil, Gas, and Mining Projects in Nigeria: A Critical Analysis" vol. 10, No. 1, (2014), *LEAD Journal,* p.1

[92] Omaka, A. *Municipal and International Environmental Law*, (Enugu: Kingdom Age Publication, 2012), p.28

assessment as a national instrument shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent authority. Section 1 of the Act, outlines the general objectives of any environment impact assessment.[93]

The Act requires that where the extent, nature or location of a proposed project or activity is such that it is likely to have a significant effect on the environment, an EIA must be undertaken.[94] The Act goes ahead to provide extensively for the minimum content of an environmental impact assessment.[95] The above requirements are necessary because under the schedule to the Act, 19 projects or activities must be preceded by an EIA. These include: agriculture, airport, drainage and irrigation, land reclamation, fisheries, forestry, housing, industry, infrastructure, ports, mining, petroleum, power generation and transmission, quarries, railways, transportation, resort and recreational development, waste treatment and disposal, and water supply. However, above could be dispensed with under certain circumstances.

Generally, an EIA process involves seven stages which are: project proposal, screening, scoping, draft EIA report and review process, final EIA report, decision-making, and project implementation.[96] A cursory look at the Act reveals that ample provisions have been made to mitigate the effects of very serious environmental menace that flow from infrastructural developmental projects in Nigeria. However, experience reveals that infrastructural projects are often carried out without complying with the beautifully worded piece of legislation, the EIA Act. The key defaulters in this exercise are usually the various levels of governments; Federal, State and Local Government. These levels

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[93] Environmental Impact Assessment Act, cap E12, LFN 2004, S. 1,(a-c)

[94] *Ibid*, s. 2(2)

[95] *Ibid*, see generally s. 4 (a-h)

[96] Olokesusi, F. "Legal and Institutional Framework on EIA in Nigeria: An Initial Assessment", *18 (1988), Environmental Impact Assessment Review*, p. 18; see also ss. 6-11 EIA Act

of governments routinely approve projects within the mandatory study list, before any kind of EIA is made. A case in point is the dredging of the Ayetoro Canal whereby the Niger Delta Development Commission had already decided to undertake the project before any EIA.[97] Therefore, most EIA reports are actually 'post mortem' documents contrived to fulfil all righteousness and fence-off resistance from concerned non-governmental organisations and affected host communities.

A significant flaw in the Act is that public involvement in the EIA process is required to begin only at the decision-making stage, after the initial draft of the EIA report has been submitted to the Ministry of Environment.[98] Such public comments are also to be received when considering the mandatory study report. There is no legal requirement for the project proponents to engage the affected public in its own assessment before submitting its reports to the Federal Ministry of Environment. However, at the scoping stage, the Ministry may arrange a public hearing. Again, the terms of reference drawn up by the ministry and the project proponent following the completion of the scoping may both include a public hearing. The participation of the public at this stage depends on the degree of interest in the proposed project, since it is not a binding requirement, but a discretionary exercise.

The opportunity to appeal environmental decision is an important component of an effective EIA process. The effective public inputs to EIAs require the provision of administrative or judicial review procedures in which the adequacy of the environmental review process can be tested.[99] An appeal avenue is necessary to allow adequate public input to the environmental decision, which leads to a better decision and a sense of community ownership of decision. Under the Nigerian EIA system, there is no provision for appealing the decision approving

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[97] Anago, *op. cit*. p. 11

[98] EIA Act, s. 22(3)

[99] Bache, S. "Are Appeals an Indicator of EIA Effectiveness? Ten Years of Theory and Practice in West Africa", 5/3 *(1998), Australian Journal of Environmental Management,* p. 167

an EIA report. The effect of this is that the report of the panel is final irrespective of the fact that the public may have submitted comments to the effect that the panel's report was reached without due process being adopted.

The success of an EIA system does not end with the production of the EIA report, however effective the EIA process.[100] The preparation of an Environmental Management Plan is very essential. An Environmental Management Plan is a detailed plan and schedule of measures necessary to address the potential impacts identified through the EIA. Those measures are to be undertaken during the implementation of the project to either eliminate or reduce the adverse effects of the project. This includes the specific actions needed to implement the measures.[101] It should make clear the costs associated with the implementation of the measures, the complementary measures available should the measures fail to adequately address the adverse effects of the projects, and the institutional arrangements available to implement the measures.[102] The Nigerian EIA Act does not contain this requirement. The implication is that there is no mechanism for implementing the measures necessary to manage the adverse impacts of projects.

A very serious lacuna in the Nigerian EIA Act is that there is no section 12. This is very serious because certain actions are made subject to section 12. For instance, section 8 provides that "The Agency shall not give a decision as to whether a proposed activity should be authorised or undertaken until appropriate period has elapsed to consider comments pursuant to sections 7 and 12 of

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[100] Ogola, P. F. A. "Environmental Impact Assessment General Procedure", (2 -7 November, 2007), Being a Paper presented at Short Course II on Surface Exploration for Geothermal Resources, organised by UNU-GTP and KenGen, Kenya, p. 10 available at www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-05-28.pdf accessed on 23/5/2015

[101] *ibid*

[102] That is Agencies, Bodies or Officers charged with implementing the measures

this Act." It is hereby submitted that there is need to quickly remove this apparent lacuna from the Act through an amendment.

Challenges to the Enforcement of Environmental Laws in Nigeria

Enforcement simply means the application of a set of legal tools both formal and informal, designed to impose legal sanctions or penalties to ensure that a defined set of requirement is complied with. Compliance is, therefore, the ultimate goal of any enforcement program. The question now remains, how far has existing legal framework in matters of environmental protection address, tackle, halt or otherwise abate the problem of environmental pollution in its entire ramification? It is clear that uncontrolled industrial activities pose greater danger to the environment than any other activity.

The problem of Nigeria is the enforcement and implementation of environmental laws. According to a Commentator, "The enforcement of environment laws in Nigeria has been problematic. Apart from the axiom that laws do not operate in a vacuum, the management and regulation of environment, through the enforcement has been beset by a host of problems, and has met with limited success".[103] Given the above background, it is hardly arguable that environmental policies and legislation no matter how beautifully conceived towards the protection of the Nigerian environment will at its best be an exercise in futility and of little significance unless and until they are accompanied by effective means of enforcement and compliance.

A fundamental challenge in the enforcement of environmental laws appears to be a lack of political will on the part of government and subsequently the failure of government to

[103]Obi, C. I. "Political and Social Consideration in the Enforcement of Environmental Law", cited in Ajomo, M. A. and Adewale, O. *Environmental Law and sustainable Development in Nigeria*, (Lagos: NIALS and British Council, 1984), p. 155

enlighten the populace on the existing environmental laws and stringently enforce same. This is also further compounded by the much touted "Nigerian factor" - corruption whereby some polluters, especially those in the corporate category, get away with flagrant breaches of the law. Lack of awareness on environmental issues in Nigeria is also one of the problems in the effective Regulation and Management of environment pollution. Illiteracy and ignorance constitute a great obstacle to the regulation and enforcement of environmental legislation and the remedies available at law. People need to know the consequences of their acts or omissions or that of other persons or institutions on the environment and how it affects their existence.

Conclusion

This paper has examined the enforcement provisions of three major environmental legislation in Nigeria and two international treaties to which Nigeria has ratified. The conclusion reached is that Nigerian government has endeavoured in enacting environmental legislation with enforcement provisions therein having regards to the fact that, the first elaborate legal response to environmental problems came with the Koko incident in 1988. However, there are many loopholes in the laws analysed as well as lack of enforcement and implementation of those laws. Although NESREA Act that replaced FEPA Act has made some improvement in other areas including enforcement provisions, there is need for strict enforcement of these provisions and that of other environmental laws. Furthermore, the penalty provisions of some of these laws are paltry and will scarcely deter offenders. There are other observations made in the course of the analysis of the laws and conventions.

It is in the light of the above, that the following recommendations are hereby made to enhance the success of these efforts- these existing laws, borrowing heavily from trends in developed countries.

1. The laws analysed should be amended in line with the observations made therein for effectiveness.

2. Government at all levels should implement strictly the wordings of environmental legislation in Nigeria.
3. Stiffer penalties should be enshrined in the laws enacted for the protection of the environment.
4. Government should introduce some form of taxation or levy on industries operating in Nigeria which degrades the environment in line with the polluter pays principle.
5. Government should ensure that the provisions of Section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) with regards to domestication of International Treaties/ Convention to which Nigeria is a party and signatory is enforced.
6. There should be enlightenment campaign by the government through electronic and print media for awareness creation to the populace about the existence of environmental laws and the importance of enforcing the provisions thereto and the necessity for protecting the environment by being environmentally friendly
7. Government should exert its political will to ensure that the above recommendations are implemented.

Hopefully, the Nigerian government, the judiciary, the citizens, environmental NGOs, and indeed, all stakeholders will appreciate the importance of these efforts and work in concert for the protection of the environment.