THE APPLICATION OF THE ENVIRONMENTAL IMPACT ASSESSMENT ACT ON PETROLEUM PROJECTS IN NIGERIA: AN ANALYSIS

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Abstract

The Constitution of the Federal Republic of Nigeria 1999, as amended, provides via Section 20, seemingly, salient obligations on environmental protection. Consequently, the Environmental Impact Assessment Act (1992), the Petroleum Act (1969) and the Petroleum Industry Act (2021), constitute the Legal Framework on the application of the EIA on petroleum projects. The landmark legislation (E.I.A.) makes it mandatory for petroleum projects to undergo the EIA processs, however, eenvironmental degradation and public health impairments arising from petroleum projects whose approvals were purportedly obtained under the EIA Act are an index of the failings of the implementation of the EIA legislation and regulators. These problems have given rise to violent agitations in the oil- bearing communities in Nigeria, in asserting their rights to a healthy and unpolluted environment. The article is thus an analysis of the applicability and implementation of the Environmental Impact Assessment Act on petroleum projects in Nigeria, it advocates for compelling compliance and enforcement via review and restructuring of the legislation and regulators respectively.

Keywords: *Applicability, EIA, Implementation, Petroleum, Projects*

1.0 Introduction

The Environmental Impact Assessment practice is said to have originated in the United States of America (USA) with the passage of the National Environmental Policy Act of 1969 (NEPA) in January 1970.[1]The EIA was the first significant piece of environmental legislation enacted in the United States and the most comprehensive EIA law in the world, establishing a countrywide system for environmental protection.[2] The objective of EIA is not to force decision-makers to adopt the least environmentally damaging alternative, it is rather to make explicit the environmental impact of the development, so that the environment is considered in decision-making.[3]

EIA practice arose from the need to adequately manage the negative effects of development proposals for environmental protection, resulting in a variety of national and international strategies that include environmental and development policies, laws, regulations, and guidelines, as well as the use of environmental management tools, processes, practices and techniques.[4] Prior to the establishment of mandatory EIA in Nigeria, environmental assessments were a pitiful facsimile of the original EA idea.[5]Despite the existence of environmental regulations and government departments, promoters of

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[1] 'National Environmental Policy Act' https://www.gsa.gov/real-estate/environmental- programs/national-environmental-policy-act, accessed 20 September 2017.

[2] W Sheate, 'Introduction to Environmental Impact Assessment', Overview of EIA legislation https://www.soas.ac.ukaccessed 20 September 2017.

[3] *Ibid*

[4] *Ibid*.

[5] N Echefu and E Akpofure, 'Environmental impact assessment in Nigeria: regulatory background and Procedural Framework,' (UNEP EIA Training Resource Manual, 2007)www.iaia.org/pdf/case-studies/EIANigeria.pdfaccessed 20 September 2017.

socio-economic development projects determine the assessment process, with International Oil Companies (IOCs) frequently dictating how government environmental regulatory institutions and departments evaluate their project proposals.[6]

Complementarily, it has been argued that the implementation of the EIA Act is unrealistic and impracticable to meet the requirements to compel compliance to it as[7] in Nigeria, these assessments are primarily governed by the Environmental Impact Assessment Act 1992. Under this law, an environmental impact assessment is required for development projects that are likely to have significant adverse effects on the environment. However, it is arguable that the assessments are carried out. Developments that are clearly detrimental to the environment still take place. Land reclamation, for instance, frequently happens without an assessment of its impacts. This has led to the loss of wetlands in many parts of Nigeria. Consequently, the effectiveness, availability, impact and process of environmental assessments in Nigeria have been called to question. The Environmental Impact Assessment Act prohibits private persons and public bodies from undertaking or authorizing projects without consideration of their effects on the environment. In practice, however, it is common for development projects to commence without an environmental impact assessment. And even where an assessment is carried out, there may still be violations of the provisions relating to the right to information and participation.

The public access to information through the public registry is arguably lacking as most host communities and stakeholders are unaware of proposed activities, and this has been the trend since the enactment of the EIA Act in 1992. An independent team of experts from Nigeria, the United Kingdom and the United States concluded that the Niger Delta is one of the world's most severely petroleum impacted ecosystems.[8] Additionally, in a comprehensive assessment of the effects of gas flaring in Nigeria in 1996, Oluwole *et al.,* state that the levels of concentration of volatile oxides of carbon, nitrogen, sulphur oxide and total particulates exceeded levels allowed by the Environmental Protection Agency.[9]

The dredging of the lower River Niger [10]is a case in point. The environmental impact assessment of this project was undertaken during the course of the work. And some members of affected communities were neither consulted nor provided with the assessment report. Perhaps one reason for non-compliance with the law lies in its enforcement provision. The prescribed monetary penalty is grossly inadequate. Offending individuals are liable to a fine of 100,000 naira (about US$238). Firms or corporations can be fined between 50,000 naira (about $119) and one million naira (about $2,384). Not only are the

6 *Ibid*.

7 Synda Obaji, 'Environmental Impact Assessments Don't work in Nigeria: here's why' <Environmental impact assessments don't work in Nigeria: here's why (theconversation.com)> accessed 20th October, 2022.

8 'Report on Niger Delta Natural Resource Damage Assessment and Restoration Project of the Federal Ministry of Environment; Nigerian Conservation Foundation; WWF UK and CEESP-IUCN Commission on Environmental, Economic, and Social Policy', (31 May 2006) 4, available at http://cmsdata.iucn.org/downloads/niger_deltanatural_resource_damage_assessment_and_restorationaccessed 27 February 2020.

9 A Ingelson and C Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis,' [2014]10 (1) *Law Environment and Development Journal,* 35..

10 Maxwell Kadiri, 'Access to information on the Dredging of the lower River Niger' <Access to information on the dredging of the lower Niger River - Vanguard News (vanguardngr.com)> accessed 20th October, 2022.

penalties too low to compel compliance, but they are also hardly ever imposed on offenders. The research argues that it is insufficient for the legislation to list the factors to be considered and the conditions to be fulfilled before a decision on a proposed activity is reached. A lot more than these basic requirements are needed. The rights of those affected by development projects need to be recognized.

Another instance of the EIA deficiency is elucidated in the case of *Oronto Douglas v. Shell Development Company of Nigeria Limited & 4 Ors*,[11] a decision of the Lagos Division of the Court of Appeal, between the Plaintiff/Appellant (Oronto Douglas) and the Defendant/Respondents (The Shell Petroleum Development Company of Nigeria Limited, the Nigerian National Petroleum Corporation (NNPC), Nigeria LNG ltd., Mobil Producing (Nig.) Unlimited and the Attorney General of the Federation. In this case the Respondents were jointly engaged in the production of Liquefied Natural Gas (LNG), in the course of the Nigeria LNG (NLNG) project, without EIA certification, as stipulated by the EIA Decree – petroleum resources development projects constitute mandatory study activities. The plaintiff though not an indigene of any of NLNG's pipeline communities which are directly adversely impacted by the NLNG project, filed a writ of summons and sought for an injunction to restrain the Defendant/Respondents from executing the NLNG project until they carry out EIA, as stipulated by the EIA Decree. The trial court struck out the Appellants claim on grounds of improper procedure and the lack *locus standi*. The Plaintiff/Appellant appealed, the Court of Appeal, in allowing the Appeal ordering a retrial *de novo* at the FHC, Lagos, held *inter alia* that the decision of the trial court was not supported by any material before it, as the court decided that the Appellant did not sustain any injury and thus lacked *locus standi* to sustain an action only on the basis of a motion on notice of preliminary objection that was not accompanied by an affidavit in support.

As a result of gas flaring and oil spills, the Niger-Delta area has been exposed to several environmental risks, such as smoke, polluted water, and land degradation, with severe consequences. Without EIA, crude is discovered and extracted in the region. These environmental hazards are indicative of the EIA Act's ineffectiveness as a tool for environmental protection in Nigeria's oil and gas industry. Until its requirements are converted into an effective instrument for environmental protection, the EIA currently looks insufficient.[12] When pollution arises as a result of deficient EIA practices and procedures, the inability to sue, often known as locus standi, poses a hurdle for victims who seek redress in court. In *Jonah Gbemrev Shell Petroleum Development Company*& 2 *Others*,[13] the prayers upheld by the court included Shell Petroleum Development Company's continued flaring of gas in Iwhrekan Community and failure to conduct an EIA, thus violating the people's right to life and dignity under the CFRN, 1999 Constitution and the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983. The Shell Petroleum Development Company's flaring of gas poisons and pollutes the environment, leading to the production of carbon dioxide, the principal greenhouse gas among others. So far, neither the oil corporations nor the government have cooperated with the existing court judgment, resulting in the continuation of gas flaring and the absence of EIA with petty fines. The United Nations Environment Programme (UNEP) reveals the nature and extent of oil contamination in Ogoniland, via the Environmental Assessment of Ogoniland, which covered contaminated land,

[11] (1992) 2 NWLR, pp. 466-467.
[12] (1992) 2 NWLR, pp. 466-467.
[13] (Unreported, Suit no. FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005).

groundwater, surface water, sediment, vegetation, air pollution, public health, industry practices and institutional issues. The UNEP EIA Ogoni report revealed that oil contamination in Ogoniland is widespread and severely impacting many components of the environment, even though the oil industry is no longer active in Ogoniland, the Ogoni people live with this pollution every day. Thus, EIAs were not conducted optimally in the region.[14] According to the Environmental Assessment report of the United Nations Environment Programme (UNEP) on Ogoniland, the cumulative effects of environmental deterioration create substantial environmental stress in Ogoniland.[15] In addition, around 1.8 billion cubic feet of gas is flared each day, releasing approximately 45.8 billion kW of heat into the environment. On this premise, UNEP advised that EIAs be conducted in the impacted regions.[16] Nonetheless, it is regrettable that, since the initiation of the Ogoni cleanup a few years ago, no concerted efforts have been undertaken in compliance with the UNEP report. The Ogoni cleanup has been taken over by events, and the Ogoni environment remains contaminated.

Although the PIA provides for environmental management via section 102, which states that a licensee or lessee who engages in upstream or midstream operations is required to submit for approval an environmental management plan in respect of projects which require EIA to the Commission, Nigerian Upstream Petroleum Regulatory commission (NUPRC) or Authority, (NMDPRA) Nigerian Midstream & Downstream Petroleum Regulatory Authority, within one year or six months of the effective date or after the grant of the applicable license or lease,[17]yet the issues of impropriety in EIA practice and procedures remain unabated. The UNEP environmental assessment on Ogoniland is a testament to the EIA deficiencies of overlapping authorities and responsibilities between ministries and the lack of resources within key agencies resulting in grave consequences for environmental management and enforcement.[18]

There is no gainsaying the fact that the increase in the number of respiratory infection cases in Port Harcourt, Rivers State, is because of: the soot (particulate matter consisting largely of amorphous carbon) from artisanal refining (subsistent distillation of crude petroleum to produce usable products)[19] at various locations in the state, and gas flared at Petrochemical Plants. It is obvious from the foregoing that the various environmental laws and standards are not being complied with, however defaulters are seldom brought to book.

It is one thing is to enact a law and another to implement and compel compliance to such law. Hence, it is imperative to determine whether the alleged EIA Act has been embraced with compliance or it has just been a legislative sham. Contrary to the foresight of the legislative parliament of Nigeria, empirical field work research in 2002[20] shows that in the southwest of Nigeria, specifically Lagos metropolis, of

[14] UNEP, 'Environmental Assessment of Ogoniland report-UN Environment Programme'. 2011 www.unep.org accessed 26 June 2021.
[15] *Ibid*
[16] *Ibid*
[17] PIA 2021, s 102.
[18] UNEP_OEA, 'Environmental Assessment of Ogoniland' 2011 http://www.unep.org accessed 20 September2017.
[19] M M Goodnews & Steve A. Wordu, 'Analysis of Trend and Emergent Factors of Artisanal Refining In the Niger Delta Region of Nigeria.' [2019] 7 (1) *International Journal of Innovative Human Ecology & Nature Studies*, 43-55.
[20] Ogunba Olusegun, *'EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings'* [2004] Department of Estate Management, Obafemi Awolowo University, Ile-Ife, Nigeria, 643 at 650.

over 6 million people, the study adopted an interview approach to data collection on the three EIA systems.

As for EIAs conducted under the Petroleum Act, interviews focused on 10 registered EIA consultant firms as well as an officer of the statutory receiving authority—the Department of Petroleum Resources at the time, while interviews for EIAs conducted under EIA Act likewise focused on 10 registered consultant firms as well as an officer of the Federal Environmental Protection Agency in the Ministry of Environment and Physical Planning (the statutory receiving authority).[21]

To obtain some degree of academic perspective, three members of the academia involved in teaching/research of EIAs were interviewed in the Faculties of Science, Agriculture and Environmental Management, respectively, of a major Nigerian University (Obafemi Awolowo University at Ile-Ife).[22] The 46 respondents replied to questions designed to assess current practice and shortcomings of EIA practice under the three EIA systems using indicators identified in the review of literature. The responses, which were averaged, are elaborated and discussed as follows; the degree of public participation in EIA decision-making varied between the different EIA systems. Public participation is enshrined in the legislated EIA procedure of the defunct FEPA and DPR systems but is noticeably absent from the town planners' legislation. Albeit under the FEPA and DPR systems, (now taken over by the FME, via the parastatal enterprise of NOSDRA, NUPRC, and NMDPRA respectively, actual practice of EIA has not yet evolved into substantial public participation, particularly in rural areas, where most of the populace are uneducated and therefore unaware of EIA provisions. The case is similar in the urban areas, as most of the populace are unaware of their rights of objection to environmentally unfriendly prospective projects in the 21-day public displays of draft EIAs. The 21-day public display is in itself a legal impediment to public participation. It is suggested that this is probably due to the method with which EIA legislations were jump-started in 1992, without a concurrent educative build-up and engagement of the citizenry.

Presently, it appears that much needs to be done to empower the public through educating them on their rights and stimulating their participation and engagement on EIA. The agencies created via the PIA, (NUPRC & NMDPRA), as well as the Federal Ministry of Environment (FME) have specified scoping as a mandatory stage in their respective procedural guidelines. Under the guidelines of these agencies, it is specified that a team (comprising of personnel in the proponent organization, other stakeholders and regulators) should usually carry out scoping in practice, however, stakeholders are not always present. Post decision, implementation monitoring, and audit provisions in the respective procedural guidelines (EGAS, 1999), though these are non-binding regulations, ought to be binding on project promoters and stakeholders. A post approval implementation monitoring, and audit is expedient for environmental protection and sustainable development.

Public sector EIA enforcement is abysmal, arguably, due to; overlapping functions and duties of government agencies, regulatory capture of the regulatory agencies, being dominated by the minor

[21] *Ibid*
[22] Ogunba (n 20)

commercial or political interests they regulate rather than by the major public interest. It appears that project proponents have consequently continued to refuse the application and implementation of EIAs for their projects, even when significant environmental impacts are apparent. There are indications that the procedural guidelines of the Commission and Authority require examination of alternatives to the project in the EIA process and report, but in practice, consultants rarely identify any alternatives. Examination of alternatives is considered desirable, but is hardly ever included by consultants in EIAs. The agencies (Commission and Authority) insist on the use of qualified multidisciplinary consultant firms, however, in practice this insistence is ignored.[23]

About the use of experienced EIA consultants, responses indicate that the Commission and the Authority make use of a short-listed number of local rather than foreign consultants. Officials of these agencies and regulators do not rate some of these consultants as being very experienced. This position validates the views of[24] those who complain that some of these consultants perform poorly, but that there is nevertheless a continuing preference for them. The FME, alongside the NUPRC & NMDPRA systems have provided technical guidance on the content of Environmental Statements in the form of procedural guides (that is, EGASPIN, 1991,1999), but no comprehensive best practice technical guides similar to the UK DoE (1994) have yet been provided.

The possession of analytical capabilities for fieldwork, laboratory testing, and research is lacking. It appears that consultant firms operating under the FME with their multi-disciplinary professionals make use of laboratory testing and research capabilities such as facilities of nearby universities, though these are sometimes considered inadequate. Most EIA consultant firms are aware of quantitative methods of data processing or predictive modeling but do not employ them. Modeling tools were not employed in impact assessment methodologies. The preparation of EIAs in Nigeria, particularly the identification of negative and positive impacts and their comparison, is invariably qualitative rather than quantitative.

Further, there is arguably an increase in the multiplicity of designated authorities for the approval of EIAs in the country. It is arguable that there are considerable areas of overlap between the EIA systems. Prospective permit seekers strive to satisfy these bodies with the attendant problems, especially costs and time of executing reports for two or more of the controlling authorities. Sometimes, permit seekers simply ignore one of the agencies. Some agencies are rendered redundant as permit seekers go to obtain approval from the competing ministries.

The Environmental Impact Assessment Act appears to have some flawed legal drafting. An important instance cited is where the Act allows the President, in Section 14, to exclude projects from Environmental Impact Assessment where in his opinion the environmental effects of the projects are likely to be minimal. The expertise of the President in determining the effect on the environment is questionable, as is the same section of the Act that allows projects to be excluded from Environmental Impact Assessment in cases of ‘‘national emergency’’.[25] The drafting of sections relating to EIA has

[23] Ogunba (n 19) 643–660.
[24] C.N. Ifeadi, I.I. Orbima, *‘Critical Review of the Implementation of Environmental Impact Assessment in the Nigerian Petroleum Industry’*. (Mimeograph 1996) 1 –26.
[25] Ingelson (n 9).

also been criticized as being brief and vague, and as not describing powers of enforcement for the competent authority.

The multiplicity in the grant of powers between the Minister of Petroleum Resources and the NUPRC can cause administrative conflict and an overlap of functions.[26] Consequently, it is essential that precise roles be assigned to both the Minister and the Commission to discourage conflict.[27]

Apparently, the procedural guidelines have not been given wide circulation to enable the public and stakeholders to be cognizant of the processes and procedures involved in EIA in Nigeria. Consequently, a lot of affected stakeholders do not know of their rights to public hearings on proposed projects nor of their rights to object to proposed developments that could affect the sustainability of their health and livelihood. Some respondents believe that FEPA and the DPR are much too centralized and are consequently under excessive pressure to handle the huge numbers of EIA applications nationwide.[28]

Section 39 of the EIA Act makes it mandatory for the Federal Ministry of Environment to publish the reports of the independent review panel in any way the Ministry considers suitable and should advise the public about the availability of the report. Also, section 25 of the EIA Act provides that: "(1) After receiving a mandatory study report in respect of a project, the Agency shall, in any manner it considers appropriate, publish in a notice setting out the following information – (a) the date on which the mandatory study report shall be available to the public; (b) the place at which copies of the report may be obtained; and (c)the deadline and address for filing comments on the conclusions and recommendations of the report; and, (2) Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations of the mandatory study report."[29] It appears that the public displays rarely take place. There are instances where the copies of the EIA draft reports are only distributed at the public hearing session meaning that the host communities of the projects are often deprived the rights to be informed. It is inappropriate to present EIA draft reports to the stakeholders on the day and time of the public hearing in the sense that, it is practically impossible for the persons to read and properly comprehend the contents of the draft reports and be able to respond and contribute to the deliberations. This is a violation of Section 25 and section 29 of the Act. The host communities have the rights to fair hearing which often are denied through reckless and willful misconduct of the project proponents.

Primarily, access to information about projects is key. The Environmental Impact Assessment Act requires that information provided as part of the environmental impact assessment process is made available to the public. But this does not ensure that the public is effectively informed about the assessment. For instance, environmental information is often written in technical language, requiring expert interpretation. Sadly, no arrangements are made for information to be shared in special formats such as large print and Braille. This means people don't have substantive access to information.

[26] B.S. Kpea-ue, A.P. Lilly-Tariah, and B.T. Amiesimaka, 'Comparative Analysis of Petroleum Licencing Under the Nigerian Petroleum Industry Act 2021 and the UK' *African Journal of International Energy and Environmental Law*, Vol.6 No.1 [2022] pp 229-242.
[27] *Ibid.*
[28] Ingelson (n 9)
[29] EIA Act Cap E12 LFN 2004.

Secondly, public participation in decision-making leaves a lot to be desired. The act provides that the public has a right to participate in the making of environmental decisions, however the procedure for participation is not prescribed. In practice, public participation takes the form of an information dissemination and data gathering activity. It does not function as a process through which the public can influence decision-making, thus defeating the aim of public participation. In addition, opportunities for public participation are often made available belatedly in the process, when key decisions on the size, location and type of project have already been taken. Involving the public at a late stage of the project may only amount to public relations. This can be used to justify already made decisions or avert conflict, but not to give due consideration to the public input. It is suggested that Nigeria's Environmental Impact Assessment Act is problematic as it does not guarantee access to justice. The EIA act does not make provision for an administrative review of the regulatory agency's decisions. Aggrieved members of the public can only seek redress in the courts. But this is expensive and time consuming. Litigation can sometimes provide inadequate remedies too.[30]

2.0 Conclusion/Recommendations

The foregoing analysis indicates that Nigeria's EIA procedure for petroleum development appears to be hypocritical. EIAs are conducted to provide the impression that the environmental effects of petroleum projects are anticipated, properly studied, and mitigated as the case may be, however, the reverse seems to be the case. Public engagement in the EIA process is rarely permitted, and not statutorily protected, but communities' growing awareness of the need to conserve the environment has prompted an increase in public involvement. Where hypocrisy is not present, the EIA process is beset with substantial obstacles that hinder its efficacy.

The article suggests that the practice and methods of EIA for petroleum developments in Nigeria do not promote procedural environmental justice. Environmentally significant decisions are made in part and secrecy. The preceding analysis of the various statutes, and the framework for the EIA process for petroleum projects, coupled with the entire environmental regulatory process in general, reveals that many of the statutes are inconsistent with their intentions, particularly as they pertain to the performance of functions. The EIA legal framework for petroleum projects in Nigeria must urge for current laws to be reviewed, and restructured in line with best practice, and enforced to their maximum extent.

[30] Kadiri (n 10).