Note on the Nigerian Petroleum Industry Bill in relation to the environment

Stakeholder Democracy Network
Facilitating Community Empowerment

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The specific references to environmental protection in the Nigerian Petroleum Industry Bill (PIB), come in Sections 198-205 relating to "Environmental Quality Management", gas flaring, consultation with other ministries, financial contributions for remediation and abandonment, decommissioning and disposal. Section 231-232 deals with pipeline safety and Sections 275-281 deal with gas flaring specifically, while Sections 289-298 deals with Health, Safety and the Environment in general terms.

Section 198, subsection (1) states that in the course of upstream operations, no person shall injure or destroy a tree which is of commercial value, or the object of veneration to the people resident in the are of the lease or license. If they do so (2), they are required to pay fair compensation to those directly affected.

This seems remarkably specific. If it was actually carried into effect, it might have a considerable impact on the speed of future development onshore. If applied retrospectively, the consequences might be expensive.

Section 200 (1) requires that every licensee or lessee engaged in upstream petroleum operations shall, within one year of the PIB coming into force, or within three months after having granted a license or lease, submit an environmental management plan to the new Upstream Petroleum Inspectorate – expected to replace the Department of Petroleum Resources (DPR) – for approval.

This environmental management plan (EMP) must include the operator's environmental policy, objectives and targets and contain a commitment to comply with relevant laws, regulations, guidelines and standards.

The EMP must establish (a) "initial baseline information and a program for collecting further baseline information concerning the affected environment to determine protection and remedial measures and environmental management objectives";

And (b) investigate, assess and evaluate the impact of the licensee's or lessee's proposed exploration and production activities on:

(i) The environment;

(ii) The socio-economic conditions of any person who might be directly affected by the upstream petroleum operations;

Further, the new operator is required to (c) "develop an environmental awareness plan describing the manner in which the applicant intends to inform his employees of any environmental risks which may result from their work and the manner in which the risks may be dealt with in order to avoid pollution or degradation of the environment;"

And (d) describe the manner in which the licensee or lessee intends to:

(i) "modify, remedy, control or stop any action or activity or process which causes pollution or environmental degradation;

(ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and

(iii) comply with any prescribed waste management standards or practices"

Section 200 (4) then goes on to describe the conditions in which the EMP is approved by the Inspectorate.

The EMP must comply with subsection 1 of section 200, as above, which is a curious demand, since subsection 1 effectively requires the operator to submit an EMP in the first place. However, approval also depends on whether "the applicant has the capacity, or has the provided for the capacity to rehabilitate and manage negative impacts on the environment".

In the process of approval, the Inspectorate shall consider the comments of the Federal or State Ministries of the Environment (5) and it can call for additional information from the licensee or lessee and may direct that "the EMP in question may be adjusted in such ways as the Inspectorate may require (6).

Equally, the Inspectorate may "at any time" after approval of the EMP and after consultation with the operator concerned, "request an amendment of the EMP" (7). It also forbids the use of chemicals in upstream operations, unless the Inspectorate grants the applicable permits (8).

In this regard, the PIB follows a similar route to British environmental regulatory requirements, where a comprehensive Oil Pollution Emergency Plan (OPEP) is required. It also follows current US practice were both an Environmental Impact Statement (EIS) and Safety and Environmental Management System (SEMS) are needed.

However it has to be noticed that both jurisdictions also include an assessment of the future operator's environmental awareness and capabilities, prior to awarding a license, not just prior to specific drilling and production. The PIB does not include such scrutiny. Clearly only time will tell as to how the new Inspectorate uses these powers and how detailed any EMP will need to be.

What is also not included is the ability of the Inspectorate to halt operations if the operator does not follow the agreed EMP. In this regard it differs from both UK and US regulation. However, in Section 195 subsection (g) states that if "in the opinion of the Inspectorate" a lessee or licensee "is not implementing its environment management plan in accordance with good oil field practice" there are grounds for revocation of the license or lease.

Section 201 explains the penalties for gas flaring:

(1) "The lessee shall pay such gas flaring penalties as the Minister may determine from time to time

(2) The lessee shall install such measurement equipment as ordered by the Inspectorate to "properly measure the amount of gas being flared."

To call subsection (1) vague would be no exaggeration. Frankly, if Nigeria is ever to get to grips with gas flaring, this is inadequate. It leads straight back to past legislation, where the government repeatedly banned gas flaring by particular dates, which went past without much reduction, with the operators subsequently fined, but deducting these fines from taxes.

The central fact is that as Nigeria is a gas-prone oil province, with considerable quantities of associated gas being produced with the oil. If flaring is stopped, without an adequate market for the gas elsewhere, then

oil production will fall. In essence, the whole question of gas flaring remains a huge dilemma for the government and a better approach would be to establish a formal plan to develop a gas market and the necessary infrastructure to electrify the delta with gas-fired – probably small scale – generation.

Meanwhile, to introduce a penalty system that is so arbitrary, that it might depend upon what the Minister had for breakfast on a particular morning, is a wasted opportunity and a disincentive to investment. Gas flaring is dealt with more specifically in Sections

However Subsection 2 is to be welcomed. At minimum it will finally actually establish precisely how much gas is being wasted, allowing a better fix on what to do with it.

Section 202 requires consultation with Federal, State Ministries and any relevant bodies in the area of the lease over the EMP. These other bodies are allowed 30 days to respond.

Nothing wrong with this, although if past relations between the DPR and the Environment Ministry and NOSDRA are anything to go by, it may not be strong enough.

Section 203 outlines the financial contributions to be made for the remediation of environmental damage.

Subsection (1) makes a condition of a license or lease that they should pay a prescribed financial contribution to an environmental remediation fund to be established by the Inspectorate "in accordance with guidelines as may be issued by the Inspectorate from time to time, for the rehabilitation or management of negative environmental impacts with respect to the license or lease." This is a condition of the lease or license and made prior to the approval of the EMP.

Subsection (2) requires the Inspectorate to determine the amount of financial contribution, relating it to the size of the operations and the level of environmental risk, that level of risk being determined by the Inspectorate.

To reinforce this, Subsection (3) says that if the license or leaseholder fails to rehabilitate or manage the necessary rehabilitation, the Inspectorate can – having notified the operator – spend all or part of the fund to rehabilitate the negative environmental impact in question.

Subsections (4) and (5) require that the leaseholder or license holder to assess its environmental liabilities and if necessary increase their financial contribution to the fund, but if the Inspectorate is not satisfied that this increase is not enough, it can appoint an independent assessor to determine what that contribution should be. The leaseholder or license holder is then obliged to pay not only the determined financial contribution, but also the fees of the assessor.

It is good that this is a condition of the license, but there is a slight contradiction between in the requirement to pay it prior to the approval of the EMP, since the EMP is designed to define the environmental risk and thus the potential cost or any remediation. It might be better to keep the EMP and the fund contribution in tandem.

What also seems vague is precisely when the fund comes into operation. As it is drafted, it seems that the new fund is not an overall single 'superfund' where the money collected from the entire industry can clean up any major environmental damage, but rather an individual compartmentalized one, where the funds collected from a single operator are to be used purely on remediation of land within the single lease concerned.

Equally, while the idea that the Inspectorate can order the money to be used for such an individual case on a single lease, if the operator fails to do it, is good, it would appear that operators who pay to remediate the land are effectively paying twice, eg when the fund paid by the operator is not used, the operator pays for the remediation and pays the equivalent into the fund as well. Good operators are thus penalized by contributing to the fund, yet paying for the clean up themselves.

The system of updating the risk is clearly necessary, as is the system for dispute resolution. As production operations progress with more wells and infrastructure, the risks clearly increase.

The bill goes on to legislate on abandonment, decommissioning and disposal in Section 204. The rules here apply to both on and offshore structures, including wells, installations, structures, utilities and pipelines in according to good oil field practice, in accordance with the regulations, presumably laid down by the new Inspectorate and implemented by them. Offshore structures are to be removed under International Maritime Guidelines (1).

Nor can decommissioning or abandonment take place without the permission of the Inspectorate (2). In line with this, the operator must produce a plan for all decommissioning and abandonment proposed, so as to establish that it is in line with good oil field practice (3). The Inspectorate must acknowledge any such plans and approve them by written notice (4).

Such a plan has to be pretty comprehensive and include a program setting out:

(a) An estimate of the cost
(b) Details of the measures proposed
(c) Clear descriptions of the methods to be employed
(d) Steps taken to ensure that the maintenance of any structure partly dismantled and remaining in position and health, safety and environmental acceptability of any such structures. (5)

Subsection (6) requires consultations with interested parties and other relevant public authorities, except in the case of well abandonment. The Inspectorate cannot approve such decommissioning or abandonment unless all relevant environmental, technical and commercial regulations and standards are met (7).

Subsection (8) outlines in some detail the process of decommissioning and abandonment, noting that

(a) Considerations and recommendations have to take into account individual circumstances
(b) The potential for re-use of the facilities are taken into account, including any future hydrocarbon developments
(c) All feasible options for decommissioning are made and comparisons drawn

(d) The removal of any structure is to be done in a way that guarantees sustainable environmental management

(e) Any recommendation to leave a structure in place is made in the light of any future deterioration and its possible future effect on the environment.

Subsection (9) allows the Inspectorate to recall any licensee or lessee to fulfill its decommissioning and abandonment obligations, when the license of lease has expired.

The PIB also requires that the Inspectorate will ensure that a list of all petroleum installations, structures and pipelines, both on and off shore Nigeria shall be publically available or accessible to the public, with an account of their current status (10).

The Inspectorate shall also require that a lessee sets up and manages an abandonment fund and make it available to the Inspectorate in case the lessee fails to carry out its obligations (11).

This section is reinforced by another in Section 205, which obligates the Minister on the advice of the Inspectorate to issue regulations on abandonment and decommissioning to which the oil industry is to be bound (1). In the absence of these regulations at the commencement of production, the Inspectorate will issue directives regarding abandonment and decommissioning of installations, within the leasing area or the license (2).

All this seems eminently sensible. Given the way decommissioning has previously been carried out, for the Inspectorate to have more control is clearly valuable. So is the need for companies to retain finance for the abandonment process is pretty much de rigor in other jurisdictions.

The 1989 IMO guidelines on decommissioning require the complete removal of all structures weighing less than 4,000 tonnes when located in water depths of 100 m or less. Those in deeper waters can be partially removed, leaving a minimum 55 m of clear water for the safety of navigation.

Section 231, dealing with the duties of a transport pipeline owner's license requires under subsection (1) (c) that the owner shuts down its transportation

systems in emergencies. Section 232 requires that an owner conduct operations with "due regard to the environment" and "must comply with requirements for environmental protection, management and restoration under this Act and any applicable law."

This must surely demand that pipeline owners shut down as soon as they realize that a spill has occurred.

Sections 275 to 283 are much more specific about gas flaring. First of all, natural gas shall not be flared or vented after a date to be prescribed by the Minister – the flare-out date – on any production facility, block or field, onshore or offshore or processing plant, unless granted a permit.

Section 276 (1) goes on to demand that oil and gas operators with flared gas resources shall within six months of the date the bill comes into force categorize all their flared gas resources – daily flare quantity, reserves, location, composition – and submit this data along with a gas utilization plan to the Inspectorate for the gas they intend to utilize before the flare out date. Subsection (2) says that the Inspectorate must approve these categorizations and plans and make them publically available on the Inspectorate's website.

Section 277, however allows the Minister to grant exemptions with a permit to flare of "not more than 100 days", or a much longer period in such cases as "start up, equipment failure, shut down, safety flaring or due to inability of Gas customers to take off gas". Subsection (3) says that anybody flaring gas without such a permit shall pay a fine, not less than the value of the gas flared.

Meanwhile under Section 278, the license will not be granted either on or offshore, if there is no plan to utilize or re-inject the gas is produced and satisfies the Minister. This plan must be in line with the National Gas Master Plan, the Domestic Supply Obligation and national policies as may be made by the Government.

The bill goes on to detail that the metering of flared gas will be specified by the Inspectorate and must be installed on every facility that flares or vents gas within three months of the effective date.

Significantly, Section 280 outlines what happens after the flare-out date, which

a worth noting in full:

(1) After the flare-out date, any person, group of persons or community may lodge a documented report of gas flaring or venting with the nearest office of the Inspectorate.

(2) The Inspectorate shall appoint an officer to receive and record reports of gas flaring or venting.

(3) An officer appointed pursuant to subsection (2) of this section who receives a report of gas flaring or venting shall within forty-eight hours of receipt of such report, inspect the facility where gas is allegedly being flared, verify the authenticity of the report to determine the cause of the gas flaring, the date when the gas flaring commenced and the volumes of gas flared or vented from the facility each day.

(4) The officer shall submit a report of the verification exercise to the Inspectorate within seven days of his visit to the facility from which gas is being flared or vented.

(5) Where the Inspectorate determines that the report of gas flaring is authentic and that the flared gas does not fall within any of the exceptions specified in section 277 of this Act, it may at its discretion, impose the fine specified in subsection (3) of section 277 in respect of the volumes of gas flared or vented from that facility or issue a shut down order mandating the shut-down of the facility in question or both.

(6) On receipt of a shut down order, the operator of the facility shall comply with the order within forty-eight hours from the time of receipt of the shut down order.

Under Section 281, any one caught flaring gas after the flare-out date will pay a fine not less than the value of the gas. The penalty for flaring gas before that date will be the aggregate gas price. If the gas is being used by a third party and flared, penalties will only be paid at the end of the "approved project schedule or the flare-out date, whichever is longer". Penalties will be on the third party, not the originator of the gas.

Those flaring are to be made public by the Inspectorate along with the volumes and the penalties within 60 days. Falsification of a flare report or neglect to

submit such a report is punishable with three months imprisonment, or the option of a fine of not less than the value of 50% of volume of gas flared or vented.

Section 282 requires that the Minister make regulations as to the manner in which this is to be carried out and, notably, subsection (c):

> The terms and conditions for reviewing where the Minister deems fit in the national interest, without jeopardizing the health, safety and the environment of any affected community, a shut down order for the purpose of re-opening a field, group of fields or facility shut down pursuant to the provisions of this Act.

Furthermore, subjection (2) requires that the Inspectorate shall ensure that gas flared or vented be fully documented with information on the site, including the longitude, latitude, local government area and ward, daily volume and gas reserves within 90 days of the effective date. Meanwhile, the operators will be required to submit plans for gas utilization or reinjection within the same time frame. Under subsection (3) the Inspectorate is tasked with the job of keeping a data base of all unplanned flares and vents and make it public. Any unplanned flares are to be considered free for third party bidders.

All this, if carried out, is extremely valuable. It requires operators to submit plans for gas utilization and not ignore the flaring, which should help start a process where companies are forced to think of alternatives. Equally the provision of public scrutiny and a date base have to be welcomed.

However, we have been here before with various previous "due dates" and "flare-out" dates passed and gone before, with little appreciable differences.

Section 289 attempts to deal with the argument between the old DPR and the Ministry of the Environment:

(1) "Without prejudice to the overall responsibility of the Federal Ministry of Environment for the environment of Nigeria, the Inspectorate and the (Downstream Petroleum Regulatory) Agency shall have responsibility in their respective areas over all aspects of health, safety and environmental matters in respect of the petroleum industry."

(2) The Inspectorate and Agency in their respective areas shall at all times ensure the enforcement of other environmental laws, regulations, guidelines and directives issued by the Federal Ministry of Environment and other relevant Government Agencies.

(3) For the avoidance of doubt the Inspectorate and Agency in their respective areas shall, in consultation with the Ministry of Environment, make regulations and issue directives specifically relating to environmental aspect of the petroleum industry.

Well at least this makes things pretty clear that the Inspectorate and Agency are the leaders

Sections 290-298 contain general provisions regarding overall environmental practice and exhortations:

290: Every company engaged in activities requiring a license, lease or permit in the upstream and downstream sectors of the petroleum industry in Nigeria, shall comply with all environmental health and safety laws, regulations, guidelines or directives as may be issued by the Federal Ministry of Environment, the Minister, the Inspectorate or the Agency, as the case may be.

291: Every company engaged in activities requiring a licence, lease or permit in the upstream and downstream petroleum industry in Nigeria shall conduct its operations in accordance with internationally acceptable principles of sustainable development which includes the necessity to ensure that the constitutional rights of present and future generations to a healthy environment is protected.

Every company engaged in activities requiring a licence, lease or permit in the upstream and downstream sectors of the petroleum industry shall:

(a) Support a precautionary approach to environmental challenges;

(b) Encourage the development and use of environmentally friendly technologies for exploration and development in Nigeria.

(c) Comply with the relevant requirements of environmental guidelines and standards approved for the petroleum industry in Nigeria.

Section 293 looks at the duty to restore the environment:

(1) Any person engaged in activities requiring a licence, lease or permit in the upstream and downstream petroleum industry shall:

(a) Manage all environmental impacts in accordance with the licensee or lessee's environmental management plan or programme, as approved by the Agency.

(b) As far as it is reasonably practicable, rehabilitate the environment affected by exploration and production operations, whenever environmental impacts occur as a result of licensees and lessees operations:

(i) To its natural or pre-existing state before the operations or activities as a result of which the environmental impact occurred; or

(ii) To a state that is in conformity with generally accepted principles of sustainable development;

(2) Subject to subsection (1) of this section, the licensee or lessee shall not be liable for, or under an obligation, to rehabilitate where the act adversely affecting the environment has occurred as a result of sabotage of petroleum facilities, which also includes tampering with the integrity of any petroleum pipeline and storage systems.

(3) Where there is a dispute as to the cause of an act that has resulted in harm to the environment, the licensee, lessee or any affected person or persons shall refer the matter to the Agency for a determination and the determination of the Agency shall be final.

(4) Where the act referred to in subsection (3) of this section is found to have occurred as a result of sabotage, costs of restoration and remediation shall be borne by the local government and the State governments within which the act occurred.

From the Effective Date, the Agency shall undertake an annual comprehensive review of the impact of development programmes and practices by petroleum companies in all sectors of the industry since the inception of the petroleum industry in order to identify potential areas of conflict or areas that may lead to possible unrest in the areas of operation.

Section 295 is a demand to utilize good oil field practices, while Section 296 reinforces the compensation regime. 297 continues the drive towards greater transparency, while 298 reinforces the potential for penalties:

"Every licensee, lessee and contractor engaged in petroleum operations in the petroleum industry shall utilize good oil field practices in the course of their operations within the country."

> (1) The holder of a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease shall, in addition to any liability for compensation to which the holder may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of the surface of the land or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands, in accordance with written guidelines issued by the Agency.
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> (2) The rates of compensation contained in the guidelines referred to in subsection (1) of this section shall be arrived at through a consultative process and the Agency shall update the guidelines issued annually to reflect rates of inflation and any other relevant factors.

Every year, all licensees, lessees and contractors and service companies in the upstream petroleum industry shall publish the criteria used for the location of community development projects and other social investment initiatives within their respective areas of operation.

Any person or company who violates the provisions of this Part is liable to sanctions, including payment of fines as prescribed by the Inspectorate and the Agency in consultation with the Minister.

All this certainly reinforces the point about care of the environment and cannot really be faulted. Clearly, as drafted, both the new Inspectorate and the new Agency should have the power to discipline the industry. Clearly a great deal will depend on who is chosen to lead these Federal agencies.

Overall, probably the most important part of the bill lies in its commitment to openness and public information with the data it proposes to collect, presuming that this commitment remains in the bill as it becomes law. Also, highly significant is the requirement to deal with flaring. Given that this

legislation poses a considerable challenge to the industry to use the gas or re-inject it. What is a little puzzling, is how the environment and notably gas-flaring is spread around in different sections, rather than concentrated in a section of its own.