The Journal of Sustainable Development Law and Policy

ISSN: 2467-8406 (Print) 2467-8392 (Online) Journal homepage: https://www.ajol.info/index.php/jsdlp

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To cite this article: Millicent Ele (2022). Oil Spills in the Niger Delta-Does the Petroleum Industry Act 2022 Offer Guidance for Solving this Problem?. The Journal of Sustainable Development, Law and Policy, 13:1, 130-161, DOI: 10.4314/jsdlp.v13i1.6

To link to this article: DOI: 10.4314/jsdlp.v13i1.6

Published online: 24 May 2022.

OIL SPILLS IN THE NIGER DELTA – DOES THE PETROLEUM INDUSTRY ACT 2021 OFFER GUIDANCE FOR SOLVING THIS PROBLEM?

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Received: 30 March 2022 **Final version received:** 15 May, 2022

ISSN: 2467-8406 (Print)
2467-8392 (Online)

ABSTRACT

Oil exploration and production in the Niger Delta have resulted in massive oil spills and lasting environmental damage to the region. This article critically examines the legal and regulatory dimensions of this problem. It looks at the general statutory provisions governing oil spills in the Niger Delta to see whether there are gaps and deficiencies in the existing laws and policies which cause or exacerbate oil spills in the region. It further looks at the implementation and enforcement of the laws, particularly the effectiveness or lack thereof of the polluter-pays principle, adequacy of funding for environmental remediation, issues relating to standard setting and ministerial discretion, as well as the issues associated with the security problems in the Niger Delta. The article concurrently reviews relevant sections of the newly enacted Petroleum Industry Act (PIA), 2021 to see whether it offers guidance for solving the endemic problem of oil spills in the Niger Delta. It is concluded that poorly developed laws, and weak institutions that result in weak implementation and enforcement protocols remain largely to blame for the problem of oil spills in the Niger Delta. It also discusses how the PIA can be strengthened to address persisting gaps in the design and implementation of oil spill responses in Nigeria.

Keywords: Oil spill, Niger Delta, Petroleum Industry Act (PIA) 2021, multinational oil companies, polluter-pays principle, oil pipeline sabotage.

1. INTRODUCTION

Oil spills occur frequently in the Niger Delta.[1] As indicated in Table 1 below, in 2021 alone, there were 389 publicly available oil spill records[2] and between 2010 and 2021, there was a yearly average of 897 oil spills in the Niger Delta[3] with a total volume of about 516,009.6 barrels of spilled oil within the same period.[4]Although figures vary,[5]evidently an unacceptable number and volume of oil spills have occurred and are still occurring in the Niger Delta today, which continues to threaten sustainable development in the region and in Nigeria as a whole.[6]

This article examines the causes of the recurrent oil spills in the Niger Delta through a legal analysis of applicable laws, their implementation, and enforcement protocols, and a concurrent appraisal of the relevant provisions of the newly enacted Petroleum Industry Act (PIA), 2021. Improvements in the PIA are highlighted, and gaps, particularly the ones relating to sources of funding for environmental management and remediation are underscored. Suggestions for improvements are made.

The article is presented in four sections. After this introduction, section 2 examines the general statutory provisions on oil spillage in Nigeria. Section 3 discusses the problems of implementation and enforcement of petroleum laws in Nigeria, while section 4 is the concluding section.

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[1] NOSDRA Oil Spill Monitor https://nosdra.oilspillmonitor.ng/ accessed 2 May 2022; Nigerian Oil Spill Monitor https://oilspillmonitor.ng/ accessed 2 May 2022.

[2] TABLE 1.

[3] Ibid.

[4] Ibid. See also Damilola Olawuyi, The Principles of Nigerian Environmental Law (Afe Babalola University Press, 2015) 177-186.

[5] For instance,it was reported that records on file provided by the Department of Petroleum Resources (DPR), Lagos, Nigeria in February 2016, indicated that a total of 773,727 barrels of oil were spilt in Nigeria between 1999 and 2014 alone (15 years) -Dickson E. Omukoro, , Environmental regulations in Nigeria and liability for oil-pollution damage: musings from Norway and the US (Alaska)' (2017) 8 IELR 324-330, 324.

[6] NOSDRA, and Nigerian Oil Spill Monitor (n 1). See Damilola Olawuyi, 'Legal and Sustainable Development Impacts of Major Oil Spills' 92013) 9(1) J. OF SUSTAINABLE DEV. (Columbia University) 1-15.

s/n	Year	Total No. of Spills	Major*	Med*	Minor*	Under 10 Bls	No Category*	Total Volume	No JIV	No Vol
1	2021	389	2	7	249	181	125	23,957.989	33	120
2	2020	459	0	26	325	219	102	23,589.461	35	89
3	2019	743	5	34	480	325	208	41,781.415	70	190
4	2018	701	0	28	486	379	186	27,958.372	104	152
5	2017	595	6	14	380	303	194	34,886.685	73	177
6	2016	685	5	19	488	356	211	42,744.429	129	173
7	2015	921	4	27	582	459	305	47,713.628	159	268
8	2014	1521	8	30	902	713	581	78,890.461	286	540
9	2013	1666	1	29	823	625	823	32,292.157	450	762
10	2012	1135	4	34	698	505	399	41,802.003	179	391
11	2011	1059	2	23	664	456	370	73,132.011	218	359
12	2010	889	3	37	575	399	274	47,261.017	262	261
2010-21		10763	40	308	6652	4920	3778	516,009.628	1998	3482

*The minor spills include spills under 10 barrels. Therefore, the total number of spills is made up of the major, medium, minor spills and spills not categorized.

1. GENERAL STATUTORY PROVISIONS

The major legislation governing the Nigerian petroleum industry is the newly enacted Petroleum Industry Act (PIA) 2021[7] and the surviving regulations and guidelines.[8] Other petroleum laws applicable to the upstream petroleum in Nigeria are the Oil Pipelines Act, 1956,[9] and the National Oil Spill Detection and Response Agency (NOSDRA) Establishment Act, 2006.[10]

The earlier laws require that petroleum operations be conducted in accordance with good oil field practice or the licence to operate would be revoked by the Minister of Petroleum Resources.[11] The PIA 2021 retained this provision by providing that the Minister may revoke a petroleum prospecting licence or petroleum mining lease where the applicable licensee/lessee fails to conduct petroleum operations in accordance with good international petroleum industry practices,[12] or where he fails to comply with environmental obligations required by the applicable law, licence or lease.[13] Despite this provision and its antecedents in Nigeria,[14] there has always been a reluctance in the industry to revoke a licence or lease in view of the strategic importance of petroleum to the Nigerian economy.

The term 'good oil field practice' in the old petroleum laws and regulations[15] in Nigeria appears synonymous with the term 'good international petroleum industry practices' in PIA 2021.

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[7] The PIA signed into law on 16 August 2021, replaced the old Petroleum Act 1969, Cap P10, LFN 2004.

[8] Mineral Oils (Safety) Regulations (1997), Petroleum Regulations 1967, Petroleum (Drilling and Production) Regulations (1969) etc.; Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) (2002).

[9] Oil Pipelines Act, Cap. O7 LFN 2004.

[10] NOSDRA (Est) Act, 2006

[11] Petroleum Act (n 8) s 8(g); s 25(1)(a)(iii) of the First Schedule to the Petroleum Act 1969; Mineral Oils (safety) Regulations (n 9) s 7; the Petroleum (Drilling and Production) Regulations (n 9) ss 25 and 37.

[12] PIA 2021, s. 96(1)(a).

[13] Ibid, s. 96(1)(i).

[14] Note 12.

[15] Ibid

However, while the 1969 Petroleum Act, did not define the term 'good oil field practice,' the Mineral Oils (Safety) Regulations (1962), updated in 1997, considers the requirement satisfied if the petroleum operation conforms with any internationally recognised and accepted system or codes such as the American Petroleum Institute (API) codes or the codes of the Energy Institute, London. These institutes publish internationally recognised codes of good oil field practice, but the codes generally prescribe specifications for oilfield hardware,[16] and do not relate to environmental standards.[17]However, in the light of the massive environmental pollution that comes with oil exploration and production, their effects on human health, the ecosystem, and climate change, 'good oil field practice' must be redefined and interpreted to embody the concept of environmental protection and sustainability. It is wonderful to note that the new PIA 2021, filled this gap.

Under the Act, the term *good international petroleum industry practices* means:

> Those uses and practices that are, at the time in question, generally accepted in the international petroleum industry as being good, safe, economical, environmentally sound, and efficient in petroleum operations and should reflect standards of service and technology that are either state-of-the-art or otherwise appropriate to the operations in question and should be applied using standards in all matters that are no less rigorous than those in use by petroleum companies in global operations.[18]

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[16] Michael A G Bunter , World-wide Standards of Good Oilfield Practice… the Impact of the Blow-out, Deaths and Spills at the BP Macondo Well, the MC 252/1 01, US Gulf of Mexico' (2013) 11(2) OGEL 3.

[17] Ibid

[18] PIA 2021, s. 318

This definition embraced for the first time, the concept of sound environmental practice in the oil and gas industry in Nigeria. Italso indicates that the standard of petroleum operation technology and services accepted in Nigeria must be 'state-of- the-art' and 'no less rigorous than those used by petroleum companies in global operations.' This imports the use of best available technology (BAT) as the requisite standard for petroleum services and operations in Nigeria and it makes the Nigerian standard equivalent to the BAT standard used in Alaska, USA[19] where Shell and the other MNOCs also operate and perform very well.

It is the responsibility of the operator under the Nigerian law, to take all practicable steps and employ internationally accepted standards and practice to prevent oil spills,[20] The API codes provide that pipelines of higher specification should be used in high risk/high consequence areas where pipeline sabotage and vandalism are anticipated or foreseeable.[21] Since high consequence area has been defined to include highly populated and/or very sensitive area with very dynamic ecosystems,[22] it means that most parts of the Niger Delta qualify as *High Consequence Areas* and the MNOCs operating in this region must, therefore, satisfies this API requirements and incorporate high-level safety measures to protect against pipeline sabotage in the Niger Delta.[23]Granted that such sabotage-specific integrity management programmes

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[19] Alaska Statute, AS 46.04.030(e) https://dec.alaska.gov/spar/ppr/contingency plans/bat/> accessed 2 May 2022.

[20] The Petroleum (Drilling and Production) Regulations (n 9) s 37.

[21] API 1160 - Managing system integrity for hazardous liquid pipelines, defined in the US Code of Federal Regulation, Title 49 CFR 195.2.

[22] 49 CFR s. 195.450 (USA)

[23] Richard Steiner, 'Double standard: Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill' (Milieudefensie, November 2010) 28. <https://www.foei.org/wp-content/uploads/2014/01/20101109-rapport-Double-Standard.pdf ; Amnesty international ,Negligence in the Niger Delta: Decoding Shell and Eni's poor records on oil spills' (Amnesty International, 2018) 5, 19.<https://www.amnesty. org/en/documents/afr44/7970/2018/en/ accessed 2 May 2022.

and monitoring may not always protect against the sophistication[24] of oil thieves and vandals now operating in the Niger Delta, they will at least provide another layer of obstacles that will have to be overcome by oil pipeline saboteurs.

API has also developed standards for pipeline leak detection systems, emergency flow reduction devices and automatic shutdowns for reducing or shutting down oil flows in cases of spills.[25] The use of these devices are however, not always implemented and enforced in Nigeria, because spills have been known to continue for days or even weeks without being detected. In the 2005 oil spills near the Oruma community in the Niger Delta, the plaintiffs alleged that the oil spills started from the Shell Petroleum Development Company's (SPDC) underground pipeline on 26 June 2005 but could not be stopped until 7 July 2005, leaking an estimated 400 barrels of oil.[26] As a result, the Hague Appeals Court ordered the Royal Dutch Shell (RDS) and the SPDC) to install a 'state of the art' leak detection system in their pipelines in the Oruma community within one year of the judgment in Oguru v Shell[27] or face a fine of €100,000 (about GBP 87, 004 or US$121,522) for every day they fail to do so once the year is up.[28] This order will make Shell pipelines in Oruma to be of the same standard as those in Alaska, USA where oil spill prevention and response must be

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[24] Sophisticated equipment and ocean-going vessels are now used in oil theft in the Niger Delta.

[25] Computational Pipeline Monitoring, API 1130, 2nd Ed. 2002, codified under the US Code of Federal Regulation, 49 CFR s.195.444 https://law.resource.org/pub/us/cfr/ibr/002/api.1130.2002.pdf accessed 2 May 2022.

[26] Oguru, Efanga and Milieudefensie v RDS & SPDC, ECLI: NL: GHDHA: 2015: 3588, para. 1.1. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI: NL: GHDHA:2015:3588accessed 2 May 2022.

[27] Oguru, Efanga and Milieudefensie v RDS and SPDC, ECLI:NL:GHDHA:2021:132, para. 6.43, on 29 January 2021 https://uitspraken.rechtspraak.nl/inzien document?id=ECLI:NL:GHDHA:2021:132 accessed 2 May 2022.

[28] Ibid.

conducted with the BAT.[29] Also, today, an inbuilt mechanism capable of indicating the exact spot in the pipeline system that has been compromised is in existence.[30] So, an upgrade in the Nigerian oil pipelines will be in line with modern realities and best international oil industry practices. Shell and the other MNOCs operate in other parts of the USA and the UK and when spills occur, they are contained swiftly and cleaned up properly. For instance, in 2011, Shell's quick response in the Gannet Alpha platform oil spill in the UK North Sea is a case in point.[31] Also in the same year, when an Exxon-operated crude oil pipeline ruptured and spilled oil into the Yellowstone River and floodplains of Montana, USA, the company immediately started an extensive clean-up.[32] It is on record that the clean-up of the Gulf after the 2010 massive oil spill by BP was so thoroughly done within 4 months that President Barack Obama was able to have a demonstration swim in the beach waters after the clean-up just to show the waters were safe.[33] Yet, for more than 13 years after the Bodo operational oil spill of 2008 in the Niger delta, Shell is yet to fully clean-up and remediate the environment polluted by the spill.

The Nigerian law requires the licensee/operator to take all practicable precautions to prevent oil spill, and where it occurs

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[29] Alaska Statute, AS 46.04.030(e) (n 20).

[30] Oguru v Shell [2021] (n 28) para. 6.14.

[31] Fiona Harvey, ,Oil spill investigation begins as Shell plugs North Sea leak,' (The Guardian, 22 August 2011) https://www.theguardian.com/environment/2011/aug/22/shell-north-sea-oil-leak> accessed 2 May 2022.

[32] Janet McGurty and Matt Daily ,Exxon Mobil shuts Louisiana oil pipeline after leak' Reuters Business news, 30 April 2012. https://www.reuters.com/article/us-exxon-spill/exxon-mobil-shuts-louisiana-oil-pipeline-after-leak-idusbre83t0k120120430> accessed 2 May 2022.

[33] Suzanne Goldenberg, ,BP oil spill: Barack Obama dives into safety debate with Gulf of Mexico swim' (TheGuardian,15 August 2010. https://www.theguardian.com/environment/2010/aug/15/barack-obama-swim-gulf-florida accessed 2 May 2022.

to immediately control and contain it, irrespective of cause,[34] or even when the source is unknown.[35] This imports strict liability and the licensee/lessee is strictly liable in tort for any oil spill from its facility.[36] A parent company that has been found to control and supervise the activities of its subsidiary, will likewise, be strictly liable for the torts of the subsidiary company. The UK Supreme Court's decision in February 2021 seems to suggest that *de facto* management of part of a subsidiary's activities satisfies this requirement for 'control' by RDS, the parent company, though the subsidiary may still maintain *de jure* control of its activities.[37] Also, a duty of care could be imposed on a defendant/operator, where the defendant created a dangerous situation that could be abused by a third party, resulting in damages to the plaintiff.[38] Under this head, oil exploration and production could be viewed as dangerous activities with likelihood of damage to the pipelines by third parties resulting in oil spills. Based on this, a general duty of care should be imposed on the operator to prevent sabotage of its oil pipeline or oil facility by third parties,[39] or at least minimise its occurrence by improved surveillance, and mitigate harm by installing appropriate leak detection and automatic shutdown devices. This is the Hague Appeal Court's position in its January 2021 decision,[40] and the UK Supreme Court appears to agree.[41] Also, consistent with the common law

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[34] Petroleum (Drilling and Production) Regulations (n 9), s. 25; EGASPIN (n 9) Part VIII B 1.1.1; Lawrence Atsegbua, Vincent Akpotaire and Folarin Dimowo, Environmental Law in Nigeria: Theory and Practice, (2nd edn, Ambik Press 2010) 32.

[35] EGASPIN (n 9) Part VIII B 4.1.

[36] Ryland v. Fletcher, (1866) L.R.1 Ex 265; (1868) L. R. l H. L. 330. The strict liability rule established in this caseis applicable to the petroleum industry because the use of land for petroleum operation is a non-natural use -Umudje v. Shell Petroleum Development Co. of Nigeria Ltd (1975) 11 SC 155.

[37] Okpabi & Others v RDS & Another [2021] UKSC 3, para. 147.

[38] Smith v. Littlewoods Organization Ltd (ibid), per Lord Goff; Akpan and Milieu defensie v RDS plcand SPDC Nig. Ltd, C/09/337050 / HA ZA 09-1580, 30 Jan 2013, paras 4.24.

[39] Bodo v Shell [2014] EWHC 1973 (TCC), para. 93.

[40] Oguru v Shell [2021] (n 28) paras. 6.17-6.25.

[41] Okpabi v Shell [2021] (n 38) para 145

negligence liability, this duty of care imposed on the subsidiary company is extended to the parent company. According to the UK Supreme Court, the general principles which determine whether A (a parent company) owes a duty of care to C (a third party) in respect of the harmful activities of B (a subsidiary company) are neither novel nor controversial[42] but well-established in common law negligence liability.[43] In such cases, a duty of care should be imposed on the defendants without the need to go into the Caparo test analysis.[44]Such imposition of duty of care is generally straightforward where, for instance, the case relates to oil spills due to poor oil pipeline maintenance. In such a case, the court imposes a duty of care on the owners of the pipeline (the parent company and its subsidiary)[45]without going into the Caparo test analysis, and order the installation of leak detection systems.[46] However, when dealing with the health effects of such spills on humans, other species, and the environment in general, although a general duty of care could be imposed on all MNOCs operating in the relevant area, it is difficult to properly quantify damages and apportion liability especially when the spills are from multiple operators, has been in existence for many years, and without reliable spill records.

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[42] Vedanta Resources plc and other v Lungowe and Others [2019] UKSC 20, paras. 49-54.

[43] Ibid, para. 56; Robinson v Chief Constable of West Yorkshire Police, [2018] UKSC 4, para. 26.

[44] Vedanta Resources v Lungowe [2019] (n 43) paras. 49-56. The Caparo test established in Caparo Industries plc v Dickman, (1990) 2 AC 605 was based on the HL ruling in Donoghue v Stevenson (1932)SC (HL) 31. It states that the tort of negligence is committed when the defendant that owes a duty of care, breaches that duty resulting in damage to the plaintiff. The three criteria for determining duty of care were established in the Caparo case as follows: i) the foreseeability of the defendant that the plaintiff would suffer damage; ii) the proximity between the plaintiff and the defendant; iii) whether it is fair, just, and reasonable to assume that a duty of care exists in a specific situation.

[45] Oguru v Shell [2021] (n 28) para. 6.17-6.26.

[46] Ibid, para. 43

Though the above scenario mirrors the situation in the Niger Delta, it is well-established under the tort law, that those who cause foreseeable harm to others through their acts or omissions are held accountable for such acts or omissions.[47]Since damage from sabotage spill is foreseeable, then there exists a general duty of care to prevent or limit it by taking additional and preventive measures, otherwise, the operator would be held liable.[48] In Bodo v Shell,[49] the court suggested that it is the responsibility of the licensee (Shell) to take reasonable steps to adequately protect their facilities, installations and pipelines from sabotage, vandalism and theft or be held liable for damages issuing from such preventable acts. But section 11(5)(c) of the Oil Pipelines Act, seems to absolve the oil companies of this responsibility because it excludes payment of compensation by the licensee when the damage to land is due to the claimant's fault or the malicious acts of a thirty party. This means that claimants cannot be compensated for any injury to land or the environment resulting from spills caused by acts of theft, sabotage, illegal oil bunkering etc.[50] This provision, therefore, affords the licensees the convenience of claiming that the majority of the oil spills in the Niger Delta is due to pipeline sabotage and vandalism[51] even when they could not prove it.[52] In a crowd sourcing research about oil spills in the Niger Delta published by Amnesty International in 2018, it was noted that at least 89 spills may have been wrongly attributed to sabotage

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[47] R.V. Percival, "Liability for Environmental Harm and Emerging Global Environmental Law" (2010) 25 Maryland Journal of International Law 37, 38.

[48] Oguru v Shell [2021] (n 28);Akpan v Shell [2013] (n 39) paras 4.39 and 4.41.

[49] Bodo v Shell [2014] (n 40)

[50] Oil Pipelines Act (n 10), s.11(5)(c).

[51] SPDC (Nig) Ltd v Otoko (1990) 6 NWLR (Part 159) 693.

[52] SPDC Nig Ltd v Chief T Edamkue(2009) 14 NWLR (Pt. 1160) 1; SPDC v Ohaka(2008) 8 C.L.R.N. 94.

or theft by Shell and Eni.[53]For the above reasons, section 11(5)(c) of the Oil Pipelines Act, should be expunged or modified to accommodate relief for the victims of sabotage spills.

But the days of alleging sabotage without adequate proof are over following the Hague Appeals Court ruling in January 2021. Henceforth, where the operator alleges sabotage, he must prove it beyond all reasonable doubt or be held liable for damages including payment of compensation.[54] Additional liabilities with corresponding legal and equitable remedies for the victims of oil spills could also be imposed through actions in common law torts[55] because the application of section 11(5)(c) of the Oil Pipelines Act does not exclude these. Also, the Petroleum Production and Distribution (Anti Sabotage) Act 1975[56] which was enacted in Nigeria to mitigate the negative effects of oil pipeline sabotage, made oil pipeline sabotage, and oil bunkering a criminal offense punishable by death or up to 21 years imprisonment.[57] While the death penalty is not advocated, 21 years of imprisonment is considered high enough to have a deterrent effect. However, this is not the case in the Niger Delta because acts of sabotage and oil theft remain rife in the region. This may partly be because no one has ever been convicted for that offence.[58] There is thus, a clear deficiency in the implementation and enforcement of the laws and so, the next segment will examine this issue as it relates to oil spill control and clean-up in Nigeria.

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[53] Amnesty international ‚Negligence in the Niger Delta' (n 24) 7. In that research, Shell, and Eni's poor record on oil spills in the Niger Delta was made plain by analysing thousands of oil spill documents and photographs made public by the two companies.

[54] Oguru v Shell [2021] (n 28) paras 5.3-5.10.

[55] Ibid, paras. 3.22-3.24. There is ample evidence in support of this e.g., SPDC v Edamkue, (2009) (n 53); SPDC (Nig.) Ltdv Anaro, (2015) 12 NWLR (Pt. 1472) 122; JELR 52884 (SC).

[56] Petroleum Production and Distribution (Anti Sabotage) Act, Cap P12, LFN 2004

[57] Ibid, s.1.

[58] Omukoro, ‚Environmental regulations in Nigeria' (n 5).

2. IMPLEMENTATION AND ENFORCEMENT OF PETROLEUM LAWS IN NIGERIA

A. The Regulators

Before the Petroleum Industry Act (PIA) 2021 was signed into law on 16 August 2021, the two major regulatory bodies in the oil and gas industry in Nigeria were the Department of Petroleum Resources (DPR), which is the technical arm of the Ministry of Petroleum Resources, and the NOSDRA under the Federal Ministry of Environment.

The DPR was statutorily responsible for regulating all petroleum operations in Nigeria. The bulk of its functions relate to compliance monitoring and enforcement of the petroleum laws, regulations, and guidelines in Nigeria.[59] The Minister of Petroleum Resources was the head of the DPR and the chairman of NNPC.[60] There is an inherent conflict of interest in this arrangement because the minister who oversees the regulator, DPR, also heads the oil revenue generating body, the NNPC. This changed with the enactment of the PIA 2021 in August 2021. Under this Act, the Nigerian Upstream Regulatory Commission (the Commission)[61] replaced the DPR, and NNPC was turned into an incorporated company, NNPC Limited,[62] able to generate and manage its cash flow independent of the government. The functions of the Commission are clearly delineated and separate from that of the NNPC Limited, thus, avoiding the institutional overlaps and conflict of interests that were the hallmarks of the old law. Also, any government ministry, agency or department exercising any power or function or taking any action which may impact on the upstream petroleum operations shall consult with the Commission before taking any such action or before issuing any

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[59] Roles of DPR – Upstream <https://www.nuprc.gov.ng/upstream/ accessed 2 May 2022.

[60] Nigeria National Petroleum Corporation (NNPC) Act, Cap N123, LFN 2004 ss. 10 & 11; G Etikerentse, Nigerian Petroleum Law (2nd ed, Dredew Publishers, 2004) 21.

[61] PIA 2021, ss. 4-28.

[62] Ibid, Chapter 1, Part V, ss. 53-65.

regulation, guideline, enforcement order or directive.[63] This provision for consultation was clearly meant to reduce overlaps and conflicts of functions among the relevant government agencies and departments to a minimum and make for harmonious operations.

NOSDRA, established in 2006, is the lead agency responsible for the detection, and response to all oil spillages in Nigeria.[64] It coordinates and implements the National Oil Spill Contingency Plan (NOSCP) for Nigeria, as required under the International Convention on Oil Pollution Preparedness and Response Cooperation, (OPRC).[65] Oil spill detection and response, formally a function of the DPR, was assigned to NOSDRA probably because of the endemic nature of this petroleum pollution in the Niger delta. Other variants of oil and gas pollution, such as gas flaring, drill cuttings, seismic surveys, and effluent discharges from oil refineries etc., are still managed and regulated by the DPR (now the Commission).

The objectives of NOSDRA include ensuring a safe, timely and effective response to major oil spills; establishing the mechanism to monitor and assist or where expedient direct the response and clean-up of the impacted sites to the best practical extent.[66] The agency is equally responsible for surveillance, and detection of oil spills in the petroleum sector and for the enforcement of existing environmental legislation relating to oil spills in the Niger Delta.[67]

B. The Problem of Oil Spills in the Niger Delta – the law, its implementation or enforcement?

Oil pollution in the Niger Delta is an on-going process despite laws and regulations put in place to check it and despite the agencies established for the implementation of these laws. It has

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[63] Ibid, s. 25(1).

[64] NOSDRA Act (n 11) ss. 1 & 5.

[65] Ibid, s 5; OPRC 1990, art 3; Eghosa Osa Ekhator, 'Environmental Protection in the Oil and Gas Industry in Nigeria: The Roles of Governmental Agencies' [2013] IELR 196, 198.

[66] NOSDRA Act (n 11) s.5

[67] Ibid, s. 6

been observed that the laws are not only ineffective[68] but their implementation and enforcement are equally deficient and ineffective.[69] This ineffectiveness in enforcement was largely credited to overlaps and conflicts of interest among regulatory agencies and lack of capacity. The former appears to have been eliminated by the PIA 2021, but the lack of capacity subsists. This has been attributed largely to lack of resources, inadequate finances, and lack of technical knowhow.[70] Because the DPR and NOSDRA lack the resources (both human and material) to do the job effectively and enforce the law, they often rely on the oil company they ought to regulate, for assistance.[71] This is a recipe for regulatory capture,[72] which undermines the supervisory authority of the agencies over the oil industry. As a result, the industry is not held fully accountable for their actions. It is, therefore, not unreasonable to infer that these are partly the reason for the lackadaisical attitude of the oil companies towards oil spill response and clean up in the Niger Delta.

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[68] Akinseye Akinteye, 'Adjudicating the Impact of Oil Spills in Nigeria: The Need for Black Benches in Oil Producing States' (2018) 16(1) OGEL 2

[69] Ibid, 4-5; Barisere Rachel Konne ,Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47(1) Cornell International Law Journal 181, 192;Damilola Olawuyi, The Principles of Nigerian Environmental Law (Rev. edn, Afe Babalola University Press 2015) 32, 207.

[70] Worika, IL., Etemire, U., and Tamuno, PS., ,Oil Politics and the Application of Environmental Laws to the Pollution of the Niger Delta: Current Challenges and Prospects' (2019) 17(1) OGEL 1, 14-15; Akinseye Akinteye (n 69) 5; United Nations Environment Programme (UNEP): Environmental Assessment of Ogoniland (2011) 12 https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf accessed 2 May 2022.

[71] D. E. Omukoro, ,Environmental Degradation in Nigeria: Regulatory Agencies, Conflict of Interest and the use of Unfettered Discretion' (2017) 15(1) OGEL 18-19.See also Damilola Olawuyi and Zibima Tubondenyefa, Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria https://docs.wixstatic.com/ugd/60b422_74da66d41dfa41b2963c73772cffafd1.pdf

[72] Regulatory capture is the process by which the regulatory agencies are dominated by the industries they are charged with regulating with the result that an agency charged with acting in the public interest, instead, acts in ways that benefit the industry it is supposed to be regulating. Olawuyi and Zibima, ibid.

Also, the experience in Nigeria is that penalties in fines are low[73] and as a result, they do not provide enough deterrence or incentive for the oil companies to prevent or mitigate the oil spills as is usually done in the UK,[74] or to clean it up thoroughly when it occurs.[75] Besides, there are not many successful oil pollution litigations in Nigeria as a result of strong defence and opposition by the MNOCs and the onerous evidentiary burden on the litigant to prove that the oil company had been negligent in their operations. This evidentiary burden is often difficult to discharge by the plaintiff.[76] Most cases are thereby, dismissed on technical ground,[77] or inordinately delayed.[78]

Following the Bonga oil spill of about 4.8 thousand tonnes of crude oil in 2011, NOSDRA levied the sum of $3.6 billion on Shell Nigeria Exploration and Production Company (SNEPCo) owned exclusively by RDS.[79] This was pursuant to NOSDRA's powers under the Oil Spill Recovery, Clean-up, Remediation and Damage Assessment Regulations (OSDAR),[80] a NOSDRA regulation made under the authority of section 26 of the NOSDRA Act. Shell contested this fine and refused to pay it.[81]This will not happen in advanced jurisdiction after a spill of that magnitude. The diligence with which Shell handled their Gannet Alpha spill in the UK North Sea, the same year (2011) proves this point. And that was a comparatively smaller spill of about 200 tonnes. Shell quickly stemmed the spill, cleaned it up

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[73] EGASPIN (n 9) Part IX 4.6.2 (a)-(c); NOSDRA Act (n 11) s 6(2)(3).

[74] Oil and Gas UK (OGUK) Environmental Report, 2019, 42 - the industry tries as much as possible to minimize, mitigate or prevent accidental oil and chemical spills by addressing 'the plant, process and people elements.'

[75] Barisere Rachel Konne (n 70) 196; Agbara et al v. Shell Petroleum et al, Suit No: FHC/ASB/CS/231/2001.

[76] Seismograph services (Nig) limited v Kwarbi Ogbeni [1976] 4 SC. 85

[77] Chinda & 5 others v Shell-BP Petroleum Development Company [1974], 2 RSLR 1; Seismograph services limited v Kwarbi Ogbeni (ibid); Ogiale v Shell (1997) 1 NWLR (Part 408) 148.

[78] Agbara et al v. Shell Petroleum et al (n 76). This case which started in 2001 was resolved in 2010, but the judgement debt remains unsettled.

[79] RDS Sustainability Report, 2013, 23.

[80] Federal Republic of Nigeria Official Gazette No 68, Vol. 98, 17 July 2011, ss. 25-27.

[81] Shell Nigeria Exploration and Production Company (SNEPCo) v. NOSDRA, unreported, delivered 24 May 2018.

and paid the applicable fines with apologies. The company even went further than the requirements of the law to conduct a comprehensive review of their North Sea pipeline system and applied the result throughout their UK operations – clearly an attempt to prevent or reduce the chances of reoccurrence.[82]

From the above, the deficiency in the laws as well as ineffective implementation and enforcement are evidently contributory to oil spills in the Niger Delta. Other legal and regulatory issues of concern are the enormous ministerial discretions granted by the laws and regulations, the government inefficiency, and the security problems in the Niger Delta. These are discussed below.

C. Ministerial Discretion

The Nigerian petroleum laws provide the Minister of Petroleum Resources with a lot of discretionary powers for necessary flexibility to discharge his duties. For instance, the regulations are replete with phrases such as 'approved by the Director of Petroleum Resources' or 'acceptable to the Minister of Petroleum Resources.'[83] Additionally, there are provisions empowering the Minister to revoke any oil prospecting licence or oil-mining lease if *in his opinion* the licensee/lessee is not conducting operations in accordance with good oil field practice.[84] These powers made solely dependent on the minister's opinion could be abused.Fortunately, the PIA 2021 has hedged this discretion by providing that the minister can only revoke a licence or lease based on a written recommendation of the Nigerian Upstream Regulatory Commission.[85]

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[82] Adam Barnett, ‚Shell's £22,500 fine for North Sea oil spill slammed as 'paltry' by campaigners' (Independent News 24 November 2015)https://www.independent.co.uk/environment/shells-22500-fine-for-north-sea-oil-spill-slammed-as-paltry-by-campaigners-a6747536.html> accessed 2 May 2022.

[83] Mineral Oils (Safety) Regulations (n 9); Petroleum (Drilling and Production) Regulations (n 9), (made pursuant to the Petroleum Act (n 8) ss. 25, 37, 39-41, 49, 52-54 & 61 etc.

[84] Mineral Oils (safety) Regulations, (ibid); the Petroleum (Drilling and Production) Regulations (ibid) s 37.

[85] PIA 2021, s. 96(1)(a).

Hundreds of spills (big and small) occur in the Niger Delta every year[86] and they are either not cleaned up at all or poorly cleaned up by the oil companies.[87] But there is no evidence of revocation of licence by the minister based on this infraction or on grounds of the consequent environmental damage.[88] This is probably because oil is the mainstay of the Nigerian economy, and its production cannot be stopped as a result. For this reason, the use of these discretionary measures for oil pollution control in the Niger Delta is clearly not effective. In the light of the weak or no enforcement, the MNOCs operating in the Niger Delta virtually ignore the regulations, and sometimes even court orders, to no consequence.[89]Thankfully, the PIA 2021, trimmed the enormous powers of the Minister - assigning most of the powers formally performed by him to the Commission.[90] This is to ensure separation of duties and provide for checks and balances. Also, the Commission (and no longer the Minister) now oversee the strict implementation of environmental policies, laws, regulations, and standards as they relate to oil and gas operations in Nigeria.[91]

D. Standard Setting

The regulatory issue of standard setting and enforcement have been widely discussed by scholars[92] and it is a fundamental basis for performance assessment. The Commission (formally the DPR) is responsible for setting environmental standards and issuing guidelines.[93] It must set and require high standard of operation and environmental practice by the oil companies

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[86] TABLE 1

[87] Nigerian Oil Spill Monitor (n 1); UNEP, Environmental Assessment of Ogoniland (n 71) 150.

[88] Barisere Rachel Konne (n 70) 196.

[89] Gbemre v Shell Petroleum Development Company Nigeria Limited and Others [2005] AHRLR 151 (NgHC 2005); FHC/B/CS/53/05. In this case, the court's order of perpetual injunction to stop further flaring of gas in the applicant's community was ignored by Shell without a subsisting stay of execution, although the case later went on appeal.

[90] PIA 2021, ss. 4-28.

[91] Ibid, s. 6(h)(i).

[92] Robert Baldwin, Martin Cave, and Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice (2nd Ed Oxford University Press, 2014) 2.

[93] PIA 2021, s. 10(d)(f)

similar to what is obtainable in advanced jurisdictions. It must also implement and enforce them properly, otherwise the oil companies cannot be expected to adopt such high standards suo motu.

Using fines and compensations as examples, the NOSDRA Act did not impose significant fines on oil spillers neither did it place an obligation for them to pay compensation to the victims of oil spills.[94] Section 6 of the Act provides that an oil spiller shall report the spill to the agency within 24 hours of the onset of the spill or pay N500,000:00 (about £714) for each day in default.[95] He is also required to clean up and remediate the impacted site, to all practical extent or attract a further fine of one million naira (about £1429).[96] In real terms, these fines are paltry and unlikely to produce a deterrent effect. The English Court of Appeal suggested in R v Thames Water Utilities Ltd[97] that fines must be high enough to have a deterrent effect and could be in millions of pounds for serious environmental offences. The Oil and Gas Authority (OGA) seems to align with this when it provided that the Secretary of State may by regulations extend the limits of financial penalty to five million pounds.[98] In the US, the fine for failing to notify the appropriate Federal agency of a discharge is a maximum of $250,000 for an individual or

$500,000 for an organization or a maximum of five years imprisonment.[99]Civil penalties for each day of violation is

$25,000 or $1,000 per barrel of oil discharged.[100] In view of the above, it is recommends that the fines for environmental violations, and in particular, oil spills in Nigeria be significantly

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[94] Payment of compensation is provided for under the Petroleum Act (n 8), s 37 of the First Schedule; Petroleum (Drilling and Production) Regulation (n 9) s.23; Oil Pipelines Act (n 10), ss. 6(3) & 11(5); and EGASPIN (n 9) Part IX 4.6.2 (b) (c).

[95] NOSDRA Act, (n 11), s. 6(2).

[96] Ibid, s. 6(3).

[97] R v Thames Water Utilities Ltd [2015] EWCA Crim 960

[98] UK Oil and Gas Authority's Financial Penalty Guidance, 2017, s. 14<https://www .ogauthority.co.uk/media/3488/420387-oga-financial-penalty-guidance-28.pdf accessed 2 May 2022.

[99] Oil Pollution Act 1990 (as amended in 2000), s. 4301 (a)(c). Oil Pollution Act Overviewhttps://archive.epa.gov/emergencies/content/lawsregs/web/html/opaover.html accessed 2 May 2022.

[100] Ibid, s. 4301(b).

increased if they must be expected to have a deterrent effect on the oil companies. It is also recommended that the requirement to clean up and remediate the impacted sites to all practical extent be interpreted to involve the use of best available technology (BAT) for the process - equivalent to the standard used in Alaska, USA.[101]

The issue of standard setting also touches on compensation for oil pollution damages and how it is quantified in Nigeria. The NOSDRA Act simply enjoins the agency to ensure that appropriate remedial action is taken for the restoration and *compensation of the environment*.[102] Restoration of the environment is clear, but ‚compensation of the environment' (and not the victims) is ambiguous and so far, no court has had the opportunity to interpret or elucidate this. However, one could argue that since it is now possible to grant a river a legal personality as a living entity with all the corresponding rights, duties and liabilities of a legal person,[103] including the right to sue those who harm it,[104] it could successfully be argued that the environment could equally be recognised as having a legal personality imbued with the rights to be compensated if harmed, and the ability to sue for its compensation. Besides, since the purpose of compensation in tort law is to put the victim/claimant back to the position he would have been in, had the tort not occurred (the baseline condition), for the environment, one would argue in line with the provisions of the EU Environmental Liability Directive, that compensation of the environment would include not only the restoration of the environment to its pre-pollution event condition but also compensating for the ‚interim losses.' This means losses which result from the fact that the damaged environment/natural

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[101] Alaska Statute, AS 46.04.030(e) (n 20).

[102] NOSDRA Act (n 11) s. 19(1)(d).

[103] The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (New Zealand).

[104] Tanasescu, M. „Rights of Nature, Legal Personality, and Indigenous Philosophies" (2020) 9(3) Transnational Environmental Law 429-453; Toni Collins and Shea Esterling ‚Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand" (2019) 20(1) Melbourne journal of international law 1-24.

resources and/or services are not able to perform their ecological functions or provide services to other natural resources or species pending recovery.[105] Such compensation may also be determined by factoring in additional improvements to protect natural habitats and species or water either at the damaged site or at an alternative site until the primary or complementary measures have taken effect.[106] This will compensate for growth in the environment which must have been hindered by the pollution, and thus, ensure that the polluter fully pays for the complete restoration of the environment in line with the polluter-pays principle.

E. Funding for Environmental Management

The Joint Venture (JV) partners fund the JV according to their ownership interest[107]with co-venturers providing their prorated share of funds for business operations and management.[108] The government which owns the majority shares in the oil business must, therefore, contribute its share of funds for oil pollution clean-up and environmental management. Hitherto, the government is not always able to do this, and this inability to meet its cash calls significantly reduces available funds for business management and environmental compliance.[109] This could be part of the reasons for poor oil pipeline maintenance, and the consequent oil spills in the Niger Delta. Shell has been known to insist that if a court-imposed fine and judgement for environmental infraction must be paid, the government must contribute its own share.[110] With the enactment of the PIA 2021,

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[105] Environmental Liability Directive (ELD), EU Directive 2004/35/EC, 2004, Annex II, para. 1(d) and para. 1.1.3.

[106] Ibid

[107] Shell Sustainability Report (2011) 18.

[108] Ibid.

[109] Richard Steiner (n 24) 40-42. A specific example could be seen in the crude oil seepage at Shell's Bonny Oil and Gas Terminal Storage Tank 9 on 25 March 2017. The tank has been out of service and reportedly due for repair for the past 5 years but due to financial constraints, that could not be done. NOSDRA Report of the joint investigation visit of the oil spill incident number 2017-1826306 https://oil spillmonitor.ng/#/61884.2017_1826306 accessed 2 May 2022.

[110] Chief Pere Ajuwa& Others v Shell Petroleum Development Company Nig. Ltd (2011) 18 NWLR (Pt. 1279). In this case, the Federal High Court imposed a judgement of $1.5 billion on Shell. Shell argued that if the payment was due at all,

it is envisaged that the newly formed, self-financing, and commercially driven NNPC Limited will be able to generate enough funds to meet its cash obligations, and thus, satisfy the polluter-pays principle regarding oil pollution in the Niger Delta.

The PIA 2021 specifically provideda mechanism of funding for environmental management and remediation of environmental damage. It mandates the licensee/lessee to 'pay a prescribed financial contribution to an environmental remediation fund established by the Commission' for the rehabilitation or management of negative environmental impacts with respect to the licence or lease.[111] The Act made such financial contribution a condition precedent for the grant of the licence.[112] However, it did not go far enough to provide for sources of additional funding where the available fund is insufficient to meet the environmental remediation costs.[113]In such a case, it is recommended, in line with the UK Petroleum Act 1998, that the parent company of the immediate polluter, all former licensees/lessees, and all persons, companies, and entities associated with[114]the immediate polluter, be held liable to provide the additional funds and resources needed to meet the clean-up and remediation costs, particularly where they have been found to play any role in the management or control of the immediate polluter.[115]

The phrase ‚associated with' has so far not been interpreted by the courts. It is suggested that the courts should interpret it broad enough to include any company that has an equity interest (other than the security for a loan) in the polluter

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the federal government should contribute its prorated portion of the sanction since the government owns the controlling interest in the Joint Venture.

[111] PIA 2021, s. 103

[112] Ibid, s. 103(1)

[113] Millicent N Ele ‚Cleaning up the Oil Spill Mess in the Niger Delta with Insights from the Contaminated Land Regimes in the UK and the US' (2021) 7(1) I.E.L.R. 134.

[114] UK Petroleum Act 1998, s.30.

[115] In Okpabi v RDS, the UK Supreme Court seemed to suggest that the management of part of a subsidiary's activities by the parent company, satisfies this requirement for 'control' - Okpabi v Shell [2021] (n38) para. 147.

company.[116] This will broaden the liability group and ensure that funds are made available for the remediation of the environment. Further insights could also be gained from the Queensland, Australia Chain of Responsibility Act (CoRA) 2016,[117] which imposes responsibility on companies and *related persons/entities* accountable for the environmental harm, to bear the cost of rehabilitating the relevant sites.[118]"Related persons" or "related entities" could include all persons, companies, and entities *associated with* the company that is carrying out the relevant activity i.e., the immediate polluter. These could beholding companies; persons with a "relevant connection" to the immediate polluter; *associated entities*; and persons that have the capacity to influence the extent of the company's environmental compliance. They could also be persons capable of acquiring "significant financial benefit"[119] from the relevant activities of the company.[120]A "relevant connection" may exist where a person is capable of significantly benefiting financially or has received a significant financial benefit from a company's relevant activities; or is (has been) in a "position to influence"[121] the company's conduct in relation to the way in which, or extent to which, the company complies with its obligations under the EPA.[122]

A person in a "position to influence" may be an officer of the company such as a director or a shadow director acting in an

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[116] UK Petroleum Act 1998, ss. 30(1)(e) and 30(2)(c) on the imposition of decommissioning liability.

[117] Environmental Protection (Chain of Responsibility) Amendment Act 2016 (Qld)

[118] Environmental Protection (Chain of Responsibility) Amendment Act 2016, Guidelines on Environmental Protection Order to 'related persons'under Chapter 7, Part 5, Division 2 of the Environmental Protection Act 1994 (hereinafter The Guideline to the Chain of Responsibility Act).

[119] Factors to be considered in determining what amounts to significant financial benefit is provided for under the Guideline to the Chain of Responsibility Act (ibid) para. 4.1.1.

[120] The Guideline to the Chain of Responsibility Act (n 119) para. 1.0.

[121] A person in a "position to influence" may be an officer of the company such as a director or a shadow director acting in an unofficial capacity for the company. The Guideline to the Chain of Responsibility Act, (ibid) para. 4.1.2.

[122] Section 363AB (2)-(4) of the EPA. The Guideline to the Chain of Responsibility Act, (n 119) para. 4. 1.

unofficial capacity for the company.[123]It is submitted that the phrase associated with (or associated entities) should be interpreted in the same way as related entities under the CoRA. This means that like the CoRA, it should simply go where the money has gone and target any person, company or entity who stands to profit from the relevant company's activities, and thereby contributed to the pollution of the environment that needs to be cleaned or remediated.

Targeting corporate executives and holding the directing minds of the corporation personally liable have been found to produce more effective deterrence where the company breaches its environmental duties if such executives are in a position to make or influence corporate decisions on the illegal act.[124]In New South Wales (NSW), Australia, the law provides for the 'special executive liability'[125] which makes it legal, subject to certain exceptions, to prosecute directors and management personnel for corporate infractions irrespective of whether or not the company has been prosecuted or convicted.[126]This was applied in EPA v Foxman Environmental Development Services[127]and underscores the court's willingness to pierce the corporate veil and go after directors and those concerned with the management of a company for environmental offences committed by the company. It is recommended that likewise, company executives should be held personally accountable and prosecuted in Nigeria for the misconducts of the company and any breach of environmental law including oil spills in the Niger Delta in appropriate cases. Although success may not have been guaranteed, at least an attempt should have been made to incorporate this into the PIA 2021. With respect to oil spills and other forms of oil pollution in the Niger Delta, this will have a

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[123] The Guideline to the Chain of Responsibility Act, (ibid) para. 4.1.2.

[124] Queensland Environmental Protection Act 1994 (Qld) Australia, s 493.The EPA 1994 was amended by the Chain of Responsibility Amendment Act (CoRA) 2016 to broaden the circumstances in which an environmental protection order (EPO) can be issued by the Department of Environment and Science (DES).

[125] Protection of the Environment Operations Act (PEOA) 1998 (NSW) s 169.

[126] Ibid, ss. 143(1) and 144(1); The state of Victoria, in Australia has similar provisions with minor difference - Environmental Protection Act 1970 (Vic) s 66B.

[127] EPA v Foxman Environmental Development Services; EPA v Botany Building Recyclers Pty Ltd; EPA v Foxman (No 2), [2016] NSWLEC 120.

big deterrent effect for the executives of Shell and the other MNOCs operating in the Niger delta. It is also in line with the decision of the UK Supreme Court to the effect that the relevant actor is the person behind the company and not the company.[128] Whatever the ultimate interpretation the court may eventually give to the phrase *associated with*, it would make the entities liable for the pollution very broad. Applying this to oil spills will equally broaden the liability group and ensure that the clean-up funds either for freshly spilt or for pre-existing oil spills will be provided for adequately. The PIA 2021 should have gone this extra mile.

F. The Polluter Pays Principle in Nigeria

The polluter-pays principle simply implies that the person(s) or entities that caused the pollution should bear its cost both in terms of clean-up costs and compensation for damages. In Nigeria, this legal principle is not explicitly provided for, in any legislation. Although, the courts generally hold polluters liable for their action under the torts of negligence,[129] nuisance,[130] and the strict liability rule in *Ryland v Fletcher,*[131] they do not necessarily do this as environmental matters involving the polluter pays principle. However, the EGASPIN imposed on the polluter (the spiller), the responsibility to restore and remediate the polluted environment to its original state[132] and this provision would seem to import the notion of the polluter pays principle.

On a general note, the polluter pays principle has not been effectively applied in Nigeria due to weak institutions, poorly funded, poorly staffed, and poorly equipped agencies. It is envisaged that when the principle is properly implemented in Nigeria, it will incentivise the oil companies (polluters and

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[128] VTB Capital plc v Nutritek International Corp, [2013] UKSC 5, [2013] 2 WLR 398 (Lord Neuberger) [142].

[129] S.P.D.C. (Nig.) Ltd. v Tiegbo VII (2005) 9 NWLR (Pt.931) 439(2005) 3-4 S.C 137; Chief Pere Ajuwa& Others v SPDC (n 111); SPDC v.Abel Isaiah and others (2001) 11 NWLR (Pt. 723) 168.

[130] Amos and Ors v Shell BP Petroleum Development Company of Nigeria (1977) 6 S.C. 9.

[131] Ryland v. Fletcher (n 37).

[132] EGASPIN (n 9), Part VIII B, s. 2.11.1; Part IX 4.6.2 (c).

potential polluters) to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.[133]

Section 103 of the PIA 2021 on financial contribution for remediation of environmental damage could be interpreted to cover the polluter-pays principle although as observed under 3(v) - funding for environmental management, it did not go far enough to stipulate what happens where the remediation funds are insufficient to fully pay for the remediation. The analysis and recommendations above for sources of additional funding would equally apply here.

In Nigeria, the laws and regulations provide for payment of fair and adequate compensation to anybody whose property is injuriously affected by oil exploration and production,[134] or to anybody in lawful occupation of the licenced or leased lands.[135] But most compensation paid for oil pollution damage in the Niger Delta are not quantified based on professional and technical assessment of the impacts of the pollution on lives, property and the environment[136] and what amounts to "fair and adequate" is never expressly defined by the laws. As a result, compensation in the Niger delta is usually grossly inadequate when awarded[137] and if it is paid at all. Under the Oil Pipelines Act, compensation is calculated solely as the difference in value of the improvement on the land before the grant of the licence, and the value after the grant, following the damage on the

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[133] ELD (n 106) preamble 2.

[134] PIA 2021, s. 101(1)(c)(ii) & (d) and s. 101(3). Petroleum (Drilling and Production) Regulation (n 9), s.23; Oil Pipelines Act (n 10), ss. 6(3) & 11(5); EGASPIN (n 9) Part IX 4.6.2 (b) (c); Fabian Ajogwu and Oscar Nliam, Petroleum Law and Sustainable Development (Centre for Commercial Law Development, Ceenai Multimedia Ltd., 2014) 141.

[135] Ibid.

[136] Stakeholder Democracy Network (SDN), 'Towards a new compensation process for oil spills in Nigeria' (SDN 1 July 2014) < http://www.stakeholderdemocracy.org/towards-a-new-compensation-process-for-oil-spills-in nigeria/ accessed 2 May 2022.

[137] SPDC Ltd v Chief Tiebo and Others (2005) LPELR 3203 (SC); Olubayo Oluduro 'Oil exploration and ecological damage: The compensation policy in Nigeria' (2012) 32(2) Canadian Journal of Development Studies 164-179.

improvement consequent upon the grant[138] e.g., the damage caused by the oil spill. This is extremely limited and does not include the potential value of the land, damage to the ecosystem and the environment, future earnings, and interim losses as well as damage to objects with cultural values like rivers and forests.[139] Yet, these losses do exist and the injurious effect of oil spills can last for years, if not decades.

While standardised compensation rates for oil spill damages do not exist globally, there are well known indices regularly applied internationally and acknowledged by NOSDRA in determining the level of compensation due to victims of oil spill damages.[140] These include: Damage to property usually calculated in terms of the value of the property before and after the spill or the actual cost of repairing or replacing the property; damage to natural resources calculated with reference to the cost of remediating or replacing the lost or damaged natural resources, including interim losses; compensation for the loss of subsistence use of the natural resources and other associated losses, as well as pure economic losses, such as loss of income, etc.[141] Applying these in the Niger Delta will bring the quantum of compensation in that region at per with what is obtainable internationally, have a deterrent effect, and meet the expectations of the polluter-pays principle.

G. Government Inefficiency and the Security Problems in the Niger Delta

Government inefficiency and lack of political will in implementing and enforcing existing environmental laws contributes to oil pollution in the Niger Delta.[142]Although the

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[138] Oil Pipelines Act (n 10) s. 20(3)

[139] Ako, R., ‚Nigeria's Land Use Act: an anti-thesis to environmental justice' (2009) 53(2) Journal of African law, 289–304.

[140] SDN and NOSDRA, ‚Existing International Legal and Regulatory Frameworks for Oil Spill Compensation – Summary Advice' 16 July 2014<https://www.stakeholderdemocracy.org/wp-content/uploads/2015/04/SUMMARY-ADVICE-International-Best-Practice.pdf accessed 2 May 2022.

[141] Ibid

[142] Engobo Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development, Policies in Developing Countries: A Case Study of the Petrole

oil companies ought to operate in line with 'good international petroleum industry practices'[143] the agencies are weak, and so enforcement is ineffective. As a result, oil companies are relatively relaxed with respect to their obligations on oil spill response and clean-up, and in addressing the impact of spills on the environment,[144] and on the life and health of the people living in the Niger Delta. The affected communities are riled up by this attitude and form militant groups to sabotage oil pipelines and facilities. This generally leads to more oil spills into the environment, loss of revenue both for the government and the oil companies and general security problems in the region.

As part of the solution to oil spills, UNEP recommended that an Environmental Restoration Fund for Ogoniland be set up with USD 1 billion contribution by the oil company and the government.[145]In response to this recommendation, the Nigerian government launched the clean-up Ogoniland programme in June 2016.[146] Although, the agency for the implementation of this clean-up programme - the Hydrocarbon Pollution Remediation Project (HYPREP) has been set up,[147] much has not been done thereafter, and only 1% of the $1 Billion budget is reportedly available.[148] It is now over five years

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um Industry in Nigeria' (2006) 24(4) Journal of Energy & Natural Resources Law 574.

[143] PIA 2021, s. 96(1)(a); the Petroleum (Drilling and Production) Regulations (n 9) s 37.

[144] Amnesty International, 'Shell in Nigeria Briefing: Shell: Own UP, Pay Up and Clean Up' (Amnesty International, 2012) http://www.amnesty.org.uk/sites/default/files/shell_briefing_2012_lores_0.pdf> accessed 2 May 2022.

[145] UNEP, Environmental Assessment of Ogoniland(n 71) 15.

[146] UNEP, ‚Nigeria Launches $1 Billion Ogoniland Clean-up and Restoration Programme' (Europa 2 June 2016) https://europa.eu/capacity4dev/unep/blog /nigeria launches-1-billion-ogoniland-clean-and-restoration-programme accessed 2 May 2022.

[147] HYPREP was established under the Federal Ministry of Environment as published in the Federal Government gazette No. 176, Vol. 103 of December 2016, https://hyprep.gov.ng/ accessed 2 May 2022.

[148] Environmental Rights Action, Amnesty International, Friends of the Earth, ‚Nigerian and International civil society call for clean-up of oil pollution in the Niger Delta to finally begin' (Amnesty International 2 June 2017) <https://www.amnesty.org/en/documents/afr44/6411/2017/en/> accessed 24 March 2022.

after the official launching of the clean-up project and it is yet to fully start.[149]

The PIA introduced the incorporation of Host Communities Development Trusts (‚the Trust')[150] to be funded by contributions from settlors/MNOCs, and donations, gifts, grants, or honoraria made to specific Trust Fund.[151] While this is a fresh and commendable idea, one issue that may arise relates to which community qualifies as 'host community' for purposes of benefiting from the trust. Section 235(3) of the PIA 2021 appears to give the settlor (oil company) the authority to make this determination. It states that 'for settlors operating in shallow water and deep offshore, the littoral communities and any other community determined by the settlors shall be host communities for the purposes of this Act' (emphasis added). This means that the settlors are responsible in part, for determining which community qualifies as host community and thus, could benefit from the Trust. While international law may provide guidance on the interpretation of littoral zones and by extension littoral communities, the PIA did not provide any objective blueprint to guide the settlors' determination of which community could be included as host community. This arguably leaves the determination of the host community to the subjective discretion of the settlor. The danger is that members of any community which feels 'unjustly' disenfranchised from benefiting from the Trust because they have been excluded as host community, may still form militant groups to sabotage the smooth running of petroleum operations in the Niger Delta.

In an additional attempt to discourage oil pipeline sabotage and prevent sabotage spills, the PIA 2021 provides that where an act of vandalism, sabotage or other civil unrest occurs that causes damage to petroleum facilities or disrupts oil production within the host communities, the community shall forfeit its entitlement to the Trust fund to the extent of the amount it would cost to repair the damage that resulted from the

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[149] Ibid.

[150] PIA 2021, s. 235.

[151] Ibid, s. 240.

activity.[152] This provision unjustifiably saddles the host community with the obligation to guard oil pipelines, and denies them their entitlement under the Trust on account of failure to discharge the wrongly imposed duty. This is both unfair and unwarranted because it is not the duty of the host community to monitor and protect the oil pipelines. This duty belongs to the owners of the pipelines and infrastructure *to wit.,* the oil companies.[153] However, since the issue of security is a matter for the state in most countries including Nigeria, protecting the oil infrastructure should be the dual responsibility of the MNOCs and the government. It is also particularly unjust to place this responsibility on the hose community because the community may not know and may not have colluded with the saboteurs.

It has been amply demonstrated in this segment that the implementation and enforcement of oil spill laws in Nigeria are ineffective due to lack of capacity of the agencies, ministerial discretion, and improper standard setting, as well as government inefficiency and the security problems in the Niger Delta.

3. POLICY RECOMMENDATIONS AND CONCLUSION

This article examined the legal and regulatory dimensions of the problem of oil spills in Nigeria. It identifies the lapses in the existing laws and policies, and the weaknesses in their implementation and enforcement. The article further examined the effectiveness of the polluter-pays principle in Nigeria, and the effects of government inefficiency and the security problems in the Niger Delta.

As demonstrated in this article, the regulatory agencies are ill-equipped both in technical and human resources to effectively regulate the oil industry; the polluter-pays principle is not properly and effectively implemented; and government inefficiency and the security problems in the Niger Delta

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[152] Ibid, s. 257(2)(3).

[153] Bodo v Shell [2014] (n 40).

compound rather than help issues. In the end, poorly developed laws, and weak institutions continue to result in weak implementation and enforcement protocols which exacerbates the problem of oil spills in the Niger delta.

The PIA 2021 aims to resolve some of the issues. For instance, it defined good international petroleum industry practice to embrace for the first time, the concept of sound environmental practice in the Nigerian oil and gas industry and made provisions for funding environmental management. It commercialised the NNPC, turning it into an incorporated, limited liability company, the NNPC Limited, thus, eliminating the conflicts of interest between the DPR (now the Commission) and NNPC. The NNPC limited is also self-financing and able to make and manage its funds. It is hoped that the company would henceforth, be able to meet its cash call obligations for business management and environmental compliance and ultimately meet up with the polluter-pays principle in oil pollution matters in the Niger Delta. The PIA equally curtailed the enormous ministerial powers and discretion given to the Minister of Petroleum Resources – assigning most of them to the Commission to ensure separation of duties and provide checks and balances. Therefore, the PIA 2021 made good attempts to improve the management of oil pollution in the Niger Delta, but it did not go far enough in providing for adequate funding for environmental management. In particular, it did not provide for sources of additional funding where the available funds are inadequate to meet the environmental remediation costs.

To fill this gap, a number of reforms are essential. First, it is important to ensure that the parent company of the immediate polluter and all persons, companies, and entities associated with the immediate polluter be held liable to provide the additional funds and resources needed to meet the clean-up and remediation costs, particularly where they have been found to play any role in the management or control of the immediate polluter. This way, the liabilities for funding environmental management will be reasonably and equitably distributed among a broad range of persons, companies and entities associated with the immediate polluter.

Secondly, drawing insight from the UK Petroleum Act, 1998 and the Queensland Australia Chain of Responsibility Act (CoRA) 2016, the phrase associated with should be interpreted to include any person, company or entity that has an equity interest (other than the security for a loan) in the polluter company; could profit significantly from the polluter company's activities or could influence its environmental compliance decisions at the relevant site. In fact, the phrase associated with (or associated entities) should be interpreted in the same way as related entities under the CoRA, making the imposition of liability to 'follow the money' and targets any person, company or entity who stand to profit from the relevant company's activities, and who contributed to the pollution of the environment that needs to be cleaned or remediated. This will broaden the liability group and ensure that the clean-up funds for oil spills will be provided for adequately.

Thirdly, like the special executive liability of the New South Wales, Australia, the Nigerian law should target corporate executives and hold the directing minds of the corporation personally liable where the company breaches its environmental duties if such executives are in a position to make or influence corporate decisions on the illegal act. For effective deterrence, the courts should pierce the corporate veil and go after directors and those concerned with the management of a company for environmental offences committed by the company, including oil spills in the Niger Delta in appropriate cases. Incorporating these provisions into the PIA 2021 would go a long way in providing additional funding for environmental management.