

## **Ensuring Public Participation In Environmental Impact Assessment Of Development Projects In The Niger Delta Region Of Nigeria: A Veritable Tool For Sustainable Development**

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### **Abstract**

*The sustainable development paradigm is a contemporary necessity for any meaningful development programme. The concept raises critical and germane questions on how the earth's natural resources can be utilized in the present without limiting the future's capability to benefit from these same resources. There is the need for the present generation to play active roles in the management of the earth's resources to achieve optimal benefits and have a stock to satisfy future generations. The Environmental Impact Assessment (EIA) process is one of the environmental management tools that ensure that only sustainable projects are developed and those local communities to be affected and other interested parties participate in the process. This paper analyses public participation provisions in EIA legislation in Nigeria with particular attention on its effects on the oil-rich but restive Niger Delta region. The paper highlights legal provisions on public participation in the EIA process in some other developing countries as a basis of comparison to reveal that the lack of active public participation in legislation is not peculiar to Nigeria but common to many developing countries. The paper concludes by suggesting the need to amend legislations to promote active participation in the EIA process as this will benefit all stakeholders in the industry. The Transnational Oil Corporations will be better supervised by local communities; especially with the existing absence of adequate global and national control and environmental protection will be more efficient. Finally, the restiveness in the Delta region will be nipped in the bud where the communities participate in preliminary activities to exploration.*

**Key Words:** sustainable-development, environment, people-participation, Niger-Delta, development, legislation.

### **Introduction**

The concept of sustainable development raises critical and germane questions on how the earth's natural resources can be utilized in the present without limiting the future's capability to benefit from these same resources. The present generation must play active roles in the management of the earth's resources to achieve optimal benefits and have a stock to satisfy future generations. Obviously, the sustainable development of projects and other development goals are the only means by which these projects can be beneficial to both the present and future generations. An important tool that may be employed to achieve this is the Environmental Impact Assessment (EIA) procedure. A fundamental part of a meaningful and successful EIA is the active participation of the public in the EIA process. This is most important in resource-rich developing regions

where the public are impoverished and usually marginalised socio-politically. The governments in these areas more often than not, act in concert with foreign multinationals to exploit the resources without any meaningful form of public participation (PP) in the exploration and exploitation processes and the sharing of accruing benefits. This is particularly worrisome because there can not be true development without active participation of the people/communities involved. More so, this is tantamount to a denial of human rights; particularly their environmental human rights (EHR) and the right to development. This paper analyses PP in the EIA process in some developing countries in general and that of Nigeria in particular as it affects the oil-rich Niger Delta region that has become a hotbed of violence. The indigenes have resorted to extra-legal means of getting their desired attention to participate in the development process. The responses from the Federal Government and their joint-venture partners (major oil-multinationals) have often led to violent clashes resulting in kidnaps, maiming and deaths of indigenes, security personnel and oil workers alike. All these have culminated in compounding the already tense socio-political atmosphere in the region.

This paper suggests that the active participation of the public in upstream oil sector development activities will help to improve the relationship between the industry's stakeholders, reduce hostilities and resolve conflicts. Only then, can there be true sustainable development of the industry, the region in particular and the Nigerian federation in general. This first section of this paper defines conceptual terms - sustainable development, EIA and EHR. The situation in the Niger Delta region is also briefly discussed. The second section highlights the development of EIA practices in Nigeria and analyses public participation (PP) provisions in EIA legislation. PP provisions in EIA provisions of other developing countries are highlighted in the third section of this paper. The fourth section presents conclusions and recommendations.

### **The Concept of Sustainable Development**

Before the idea of sustainable development (SD) is espoused, it is important to note what the term 'development' itself means. The term has undergone various stages of definition dependent mainly on world economic era (Ako, 2002). When defining contemporary development, one can not avoid concern with social and political issues and must focus on goals, ideals and ends as well as economic means. Following this suggestion, economic development is said to occur when per capita income has been rising in addition to improvements in the distribution of income, a greater population having gained more access to schools, hospitals, means of communication and transportation over time, and the techniques of production and the quality of life in general have improved (Ako, 2003). Contemporary development signifies a qualitative rather than quantitative growth in the standard of living. Sustainable development can logically be implied to mean the improvement of present qualitative standards of living within certain 'sustainable limits'. The Brundtland Commission in its report; *Our Common Future* gave a simple definition to the term as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

It has become established that there is a link between SD and the environment. This link was brought to the fore by series of meetings and reports during the 1970s and 1980s.<sup>1</sup>

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<sup>1</sup> The United Nations Conference on the Human environment (1972); Cocoyoc Declaration (1974); The 1980 World Conservation Strategy, prepared by the International Union for the Conservation of Nature along with the UN

In 1992, the Earth Summit held in Rio de Janeiro reiterated the relationship and declared that in order to attain sustainable development, environmental protection should constitute an integral part of the development process. The World Summit on Sustainable Development held in South Africa in 2002 reaffirmed sustainable development as a central element of the international agenda by emphasizing the important linkages between human rights, poverty, the environment and the use of natural resources.

### **Environmental and Human Rights Concerns Arising from Development**

The first part of this section highlights how development affects the environment. This is the major reason for the development of the EIA process as an environmental management tool. The second part discusses the effect development has on the human rights of people especially those in proximity to the 'developmental' operation. The issue of public participation in the EIA procedures came in recognition of that these affected people were stakeholders in the environment and should be a part of the decision-making processes around them.

#### ***Environment and Development***

Environmental concerns arising from development became a major issue beginning with the Industrial Revolution era. This period; the second half of the 18th century, witnessed the discovery of fossil fuels such as coal, petroleum and natural gas as energy sources. They soon replaced wood that was the main source of heat energy and now account for about about 90 per cent of the commercial energy, or energy that is sold to the public, used throughout the world, with hydroelectric power and nuclear energy supplying most of the rest.

The extraction of these finite fossil fuels is a major cause of environmental concern in most countries where they are found. This is more so where they are mined in developing countries where either environmental standards are not so stringent or the authorities are incapacitated from carrying out their functions due to legal and logistic inadequacies. The OK Tedi case in Papua New Guinea for instance, arose from damage done to the environment by effluent discharges from copper and gold mines into the OK Tedi River, located in Papua New Guinea's remote, mountainous rainforests. The lawsuit addressed the resulting environmental damage, including widespread deforestation, the destruction of the local waterways, and the loss of wildlife habitats (Kirsch, 2002). Though the danger of development to the environment is not limited to the exploration and exploitation of mineral resources, it is by far the greatest cause of the environmental hazards that the earth is currently facing. On a global scale, air pollution probably represents the greatest problem of all, with greenhouse gases (such as carbon dioxide) resulting in global warming and synthetic chlorine compounds (chlorofluorocarbons) depleting the stratospheric ozone layer.

#### ***Environment and Human Rights***

The link between the environment, development and human rights can best be observed from the activities of corporations that exploit mineral resources in developing countries. This is not to suggest that these human rights violations are limited to these regions but rather that the experiences there best highlight the link. This is basically because most developing countries that are rich in natural resources rely on it as the main source of income and development. In Nigeria for instance, crude oil from the

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Environment Program and the World Wildlife Fund; the UN-sponsored Brundtland Commission (1987) which paved the way for the Earth Summit of 1992.

Niger Delta region accounts for about 98 percent of exports, over 80 percent of government's annual revenue and 70 percent of budgetary expenditure earns about US\$ 20 million daily for the Federal Government. There often tends to be a conflict in the policies and laws that regulate the ownership and benefits that accrue to the stakeholders from the resources and those that guarantee rights to the indigenes and residents of resource-rich regions. Freeport McMoRan's devastation of the Amungme and Kamoro people in Papua is perhaps one of the best known cases of environmental injustice perpetrated by a multinational extractive industry. In Nigeria, oil companies have been accused of turning a blind eye at crude attempts of using violence to suppress dissent from indigenous populations since they benefit from such actions. More insight will be given in the following section.

Interestingly, the World Summit for Social Development held in Copenhagen in 1995 noted that sustainable development is not possible unless human rights are protected for all. The recognition given to the 'new' right to development and the right to environment (environmental human rights) now raise genuine concerns at the relationship between development and human rights issues. The right to development stipulates that the individual should be at the forefront of development plans and have the right to participate and enjoy benefits that accrue from the development process. The right to environment includes the right to a clean and safe environment as the most basic one. It includes substantive rights, which include the right to safe drinking water, clean air, and safe food. The second area is the right to act to protect the environment. The third includes the right to information, access to justice, and to participate in environmental decision-making.

### ***The Niger Delta Situation***

The activities of the oil industry generally are detrimental to the environment as they cause contamination of water bodies with oil and other solid wastes, acid rain, accumulation of carbon dioxide and other negative health impacts. More than four decades of oil exploration and production activities have left the Niger Delta region environment severely degraded in what Ken Saro-Wiwa described as "ecological warfare" against the region's environment.<sup>2</sup> According to Ashton Jones (1998), the huge income from oil notwithstanding, its exploitation is equally fraught with monumental adverse environmental impact on the Niger Delta. The human ecosystems, the author regrettably concludes, have been damaged, creating health and deprivation problems due to the corrupt and careless nature of the industry which clearly does not operate to the standards which are exacted elsewhere in the world. Environmental sustenance is one of the imperatives of the contemporary sustainable development paradigm and as such environmental concerns in the Niger Delta are beginning to gain grounds. Attention is now given to the traditional environmental problems such as land and marine pollution, air pollution, soil and water contamination and health hazards in planning. Other issues that emerge from the natural resource industry including socio-economic issues, cultural impacts, indigenous people, and human rights issues are being recognized as being pertinent under the sustainable development concept (Gao, 2000). These issues are no less important than the traditional issues and information and prior consideration are a pre-condition to industry processes.

In Nigeria's Niger-Delta region, oil prospecting activities and the consequential environmental degradation and human rights issues have become an albatross in the way of the sustainable development of the upstream oil sector. First, because it hosts the

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<sup>2</sup> Ken Saro-Wiwa, "My Story," text of a statement to the Civil Disturbances Tribunal, reprinted in *Ogoni Trials and Travails* (Lagos: Civil Liberties Organization, 1996) p. 42-3.

bulk of Nigeria's hydrocarbon reserves, it suffers arguably, one of the highest levels of pollution in the world done to its entire ecosystem. For instance, Nigeria flares some 2.2 billion scf of associated gas everyday<sup>3</sup> and "is the world's biggest flarer of gas in absolute and proportionate terms" (Environmental Rights Action, 2005: 13). Though the Federal Government has set different dates beginning from 1969<sup>4</sup> to end flaring of gas, it still goes on without a feasible end in sight. In recent times, there have continued to be uncertainties on the date the government intends to put a stop to flares. In August 2000, the year 2003 was set by the government but in November 2003, the Nigerian government informed the United Nations that gas flaring in Nigeria would end by 2010. The year 2008 is also publicized as the 'flares out' date (ERA: 14). Though the Federal Government set the year 2004 as the target date to end flaring, it continues legally in Nigeria till date. The attitude of Oil Companies tends to show that preference for the logic of market-driven economics that it is cheaper to flare gas by paying the fines rather than providing the necessary infrastructure required to 're-inject'. Obviously, little value in monetary terms or otherwise is placed on environmental and health problems suffered as a result of flaring gas. Other than the unceasing menace of gas flaring, other forms of environmental abuse and degradation continue to threaten the survival of the people of the Niger Delta. The high occurrence of oil spillages caused mainly by corrosion and leakage from old pipelines, flooding, erosion and salt water incursion have added to the ugly toll on the social and economic lives of the people of the Niger Delta. Further, the *modus operandi* of these companies operating in Nigeria has been touted as being below acceptable international standards and has contributed to a pandemic loss of biodiversity and ecological destabilization and substantial reduction in aquatic resources. Invariably, agriculture and fishing which are the traditional economic activities of the region have become unbeneficial ventures.

Secondly is the human rights angle in natural resource exploitation. This perspective was brought into the limelight by the activities of the late Ken Saro-Wiwa led Movement for the Survival of the Ogoni People (MOSOP). The organization opposed the continued despoiling of the Niger Delta environment and human rights violations that occurred in the region. The oil multinationals continue to deny any form of complicity in the human rights violations that occur in the region. Paradoxically, the death of Ken Saro-Wiwa and eight other Ogoni activists have been linked to the MOSOP's opposition to the continued despoiling of the Delta environment and human rights violations. America's Supreme Court has announced that it will allow a civil action to proceed in New York, in which the relatives will claim Shell aided and abetted the writer's torture and death in Nigeria in 1995. The suit alleges that Royal Dutch Petroleum Company and Sister Company Shell Transport and Trading Company fabricated evidence to support murder charges (UK Independent, 2001). Nigeria's security forces are also indicted in the human rights abuses that continue to plague the area. The Nigerian Police has been indicted severally of shooting on sight alleged members of youth movements in the Niger Delta region accused of plundering oil, vandalizing facilities, or obstructing oil production. Special military task forces; the most notorious being the Rivers State Internal Security Task Force (RSISTF) were drafted in to the region to 'maintain peace and order'. Tales of wanton destruction, rape, maiming, illegal detention and torture and killings abound from the activities of these security agencies under military dictatorships and have continued even if somewhat

<sup>3</sup> Basil Omiyi, Shell Nigeria Corporate Strategy for Ending Gas Flaring', presented at a seminar in Norway, June 18-19, 2001. Available online at <http://www-static.shell.com/static/nigeria/downloads/pdfs/corprstratendflare.pdf>.

<sup>4</sup> In 1969 Nigeria enacted the Petroleum (Drilling and Production) Regulation 42 which required oil companies to set up facilities to use "Associated Gas" from their operation within five years of the commencement of production.

under abated conditions.<sup>5</sup> Non-Governmental Organizations (NGOs) estimate that there were about 1,000 violent deaths in the Niger Delta region in 2003. Though the influence of intra and inter-communal conflicts were recognized as a contributory influence on the figures, deaths as a result of excessive force by security agents also contributed to this high figure. In January 2004, an attack on the Ohoror-Uwheru community in Delta State by the Joint task force killed residents and raped up to 50 women and girls.<sup>6</sup>

### **Environmental Impact Assessment**

Environmental Impact Assessment has been defined as a planning tool with its main purpose being: "to give the environment its due place in the decision making process by clearly evaluating the environmental consequences of a proposed activity before action is taken. The concept has ramifications in the long run for almost all development activity because sustainable development depends on protecting the natural resources which is the foundation for further development" (Gilpin, 1995). The EIA procedure has also been described as "one of the strongest trends in global mining" (Kiss and Shelton, 2000).

UNEP describes EIA as a tool used to identify the environmental, social and economic impacts of a project prior to decision-making. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers. By using EIA both environmental and economic benefits can be achieved, such as reduced cost and time of project implementation and design, avoided treatment/clean-up costs and impacts of laws and regulations. According to UNEP, key elements of an EIA are (a) Scoping: identify key issues and concerns of interested parties; (b) Screening: decide whether an EIA is required based on information collected; (c) Identifying and evaluating alternatives: list alternative sites and techniques and the impacts of each; (d) Mitigating measures dealing with uncertainty: review proposed action to prevent or minimize the potential adverse effects of the project; and (e) Issuing environmental statements: report the findings of the EIA (UNEP).

### **PP in EIA**

Initially, EIA was largely technical and aimed at making predictions/judgements about the economic/environmental feasibility of a project in a community or locality rather than planning (Shahpar, 2002). Gradually, EIA specialists realised that the local people were an important factor in the decision-making process with regards to both development projects and the environment. This is in itself an important factor in the sustainable development paradigm. The Brundtland Commission in its report mentioned the role of public participation in sustainable development thus: "Progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for

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<sup>5</sup> Human Rights Watch, *The Destruction of Odi and Rape in Choba*, Background Briefing Paper, December 1999, and *Update on Human Rights Violations in the Niger Delta*, Background Briefing Paper, December 2000. see also, Human Rights Watch, *The Niger Delta: No Democratic Dividend*, vol. 14, No 17(A) – October 2002.

<sup>6</sup> Daily Independent, 'Group seeks justice in Niger Delta, condemns govt's use of force', [www.dailyindependentng.com/](http://www.dailyindependentng.com/) visited on 17 February 2004.

those whose health or environment has been or may be seriously affected.” In other words an important aspect of the EIA process is to satisfy the public’s ‘right to know’ by providing them information on their environment. The import of this is that public participation should form a central element in the EIA process. This is however, by no means the only purpose of public participation. According to a research finding (Delli Priscolli, 1997), the core purposes of public participation include:

- People should have a say in decisions about actions which affect their lives.
- Public participation includes the promise that the public’s contribution will influence the decision.
- The public participation process communicates the interests and meets the process needs of all participants.
- The public participation process seeks out and facilitates the involvement of those potentially affected.
- The public participation process involves participants in defining how they participate.
- The public participation process communicates to participants how their input was, or was not, used.
- The public participation process provides participants with the information they need to participate in a meaningful way.

Without going into detail, it is suffice to note that the key merits of public participation include the provision of information about "the state of the resource," enabling individuals to better calculate the costs and benefits of particular resource decisions (Johnson, 1997). Secondly, ‘consulted’ individuals are more likely to sustain common property resources because of the resultant belief that they have a "stake" in the resource. There are however, limitations to the positive effects of public participation as observed by Brett (1996). In the first instance, it may slow down the process of project initiation or perhaps halt a viable project based on public sentiments rather than environmental considerations.

Generally, the method that people participation is formally laid down in a system and how it is carried out in practice has a great relevance on the EIA system as it works (Lund, 1990). Three levels of people participation have been identified (Stærdahl et al., 2003) –

- (I) Legitimatising Participation – here, the sole purpose of the participatory process is to legitimate the process. The participation in this case really has no influence on the content of the assessment.
- (II) Instrumental Participation – the public is utilized as a forum to gain information to improve the quality of the assessment report. Public opinion on prioritization of problems and benefits are however disregarded.
- (III) Democratic Participation – the views and the priorities of the public are taken into account in the decision- making process.

The following stages of public involvement in the EIA process were identified by Shahpar (2002):

1. *Early Consultation*: identification of key people or organizations and informal consultation, relevant information gathering.
2. *Initial Planning*: determining the process of consultation, identifying decision points and different steps.
3. *Developing The Public Involvement Action Plan*: selection of consultation process, identification of means of communication
4. *Implementation*: implementation, monitoring the process and results evaluation

5. *Post Decision Follow-Up*: keeping the public informed after the final decision has been made.

The above procedure is likely to be effective where the public is well educated and the institutional capacity is strong. However, in many developing countries, this is not the case. Most of the PP provisions in EIA legislations in these jurisdictions do not mandate PP and the provisions are slack thus giving project proponents the leeway to sidetrack PP. The situation is compounded by the high level of poverty and illiteracy. It is however, these prevalent conditions that compound the strong need to ensure that the public participate in the EIA process in these areas. However, due to the dire economic situation these indigenes are in, they are more concerned about economic survival than mid or long-term effects of these economic activities on their environment. The promise of job creation opportunities for the communities is the magic-wand project proponents' wave in their faces without informing them of the adverse social and environmental effects.

It should be noted at this juncture that PP is intended to be meaningful and is legally enforceable (Shelton, 2004). PP has been enforced in South Africa in Save the Vaal v The Director of Mineral Development Gauteng Region [Case No. 97021011 (1997)]. The High Court of South Africa in Witwatersrand Local Division set aside a mining authorization on the basis that the applicant had a right to be heard before the agency took a decision to grant the license. Also, if public comments are unjustifiably disregarded in the final decision, there may be a cause of action to challenge the validity of the decision. (See generally Leatch v. National Parks and Wildlife Service and Shoalhaven City Council 81 LGERA 270 (1993); Save Pune Citizen's Committee v. Pune Cantonment Board High Court of Bombay, Writ Petition No. 2733 of 1986; Kajing TUBFK and ORS v. Ekran BHD and others High Court of Kuala Lumpur, 19 June 1996; and, S C Amerasinghe and three others v. the Attorney General and three others S.C. (Spl) No. 6/92. Supreme Court of Sri Lanka).

The following section will highlight PP processes in EIA legislations from some developing countries to show the level of importance that is accorded to PP in the EIA process.

### **People Participation Provisions in EIA Legislations of Developing Countries**

In Thailand, people participation in EIA processes is not institutionalized. The government's position on this issue is that public interest is taken into consideration through the inclusion of Non-Governmental Organizations (NGOs) on the National Environmental Board (NEB). The Board has the responsibility to review the environmental assessment for public sector projects. NGO representatives may also be invited to Ad-Hoc Experts Committee that reviews environmental assessment requirements for private sector projects. There are rights and duties that are provided for expressly in the Enhancement and Conservation of the National Environmental Quality Act (NEQA). Section 6 of the Act grants rights and duties to individuals "for the purpose of people participation in the enhancement and conservation of the national environmental quality". These include the right to be informed and obtain information and data from the government on "matters concerning the enhancement and conservation of the national environmental quality, except where the information or data involves officially classified material, such as recent intelligence pertaining to national security, or secrets pertaining rights to privacy, property rights, or the rights in trade or business which are duly protected by law". Also, individuals have the right to be compensated by the state in case of damage or injury from pollution; petition or lodge a

complaint against polluters where violation is witnessed and to co-operate with and assist government officials in the performance of the duties relating to the enhancement and conservation of the national environmental quality.

Section 8 permits NGOs and Non-Profit Organizations or judicial persons directly engaged in activities concerning environmental protection or conservation “without the objective to be involved in politics” to register with the Ministry of Science Technology and Environment. When registered, they are allowed to:

- (i) organize volunteers to assist in implementing conservation laws;
- (ii) mount public relations and environmental education campaigns;
- (iii) initiate environmental protection and conservation projects;
- (iv) conduct environmental protection and conservation research; and,
- (v) provide legal aid to victims of pollution.

Section 8 provides adequate people participation opportunities and these provisions are utilized by communities (Yap, 1994).

In India, the Ministry of Environment and Forests introduced the EIA law through a gazette notification passed on 27 January 1994. Under the law, "environmental clearance" has to be obtained for certain types of projects. The law contained provisions for public hearing but have been weakened over the years through several amendments. In the past eight years for instance, the main EIA notification has been amended seven times. For instance, the 1994 notification made it mandatory for the Impact Assessment Agency (IAA), i.e. the Ministry of Environment and Forests to consult a Committee of Experts before granting environmental clearance to a particular project. In its present amended form the notification states that the IAA *may* consult the Committee of experts if deemed necessary. The 1994 notification made it mandatory for half-yearly compliance reports prepared by the project authorities to be made publicly available. The notification now leaves it to the discretion of the IAA to make complaint reports publicly available, "subject to public interest". Also, a recent amendment to the EIA requirements that was notified on 13 June 2002 exempts pipeline projects from preparation of EIA reports. This has further weakened the process of environmental clearance and violates the basic premise of authority granted by the Environment Protection Act, 1986. Clearly, recent amendments are resulting in the dilution of the law on environmental impact assessments especially with regards to public participation. The EIA process is now merely viewed by industries as a formality in the environmental clearance procedures (Dubey, 2002).

In Malaysia, EIA became compulsory in 1986 through insertion of S.34 (A) in the Malaysian Environmental Quality Act. Under Malaysian EIA regulations, public participation is limited and mainly at the behest of the project developer. According to the EIA handbook, public participation is essential in preliminary assessment process, but its mode is left to the project proponent. The terms of reference of detailed EIA is required to be displayed for public comment. In the detailed study, public participation is recommended but this is also done at the behest of the project proponent. After the review panel receives the detailed study, it puts up a public notice as “it considers appropriate”, stating the nature and the location of the project and where the copies of the report can be obtained and the cost of each copy. The public then has the chance to forward comments in writing within 45days.

South Africa’s voluntary EIA requirements became mandatory in 1997 by the EIA Regulations (RSA, 1997). People participation is mandatory but the regulation does not state explicitly the process it should take (RSA, 1997: 7). The guideline document from the Department of Environmental Affairs and Tourism (DEAT) 1988 states that people

participation should take place during scoping and review of full environmental report. However, due to the imprecision of law, the degree of people participation varies from project to project.

### **EIA in Nigeria**

Nigeria's historical background on the protection of the environment can be traced to the outcome of the Stockholm Conference of 1972. The Federal Government influenced by the outcomes of the conference established a Division of Urban Development and Environment within the Federal Ministry of Economic Development in 1975. This unit transformed into the Division of Environmental Planning and Protection Division (EPDD) and was moved to the Federal Ministry of Works and Housing. After the illegal dumping of toxic wastes in Koko, in the former Bendel State, in 1987, the Federal Government promulgated the Harmful (Toxic) Wastes Criminal Provision Decree No. 42 of 1988. The Federal Environmental Protection Agency (FEPA) was created shortly after in 1988. The Agency was charged with responsibilities for the protection and development of the environment, and biodiversity conservation and sustainable development of Nigeria's natural resources. Other responsibilities include the preparation of a comprehensive national policy, including procedures for environmental impact assessment for, amongst others, all development projects. The EIA Decree 86 of 1992 (Cap. 86 of 1992) placed the Agency as the principal regulator of the environment. In responding to its responsibilities particularly under the EIA Decree, FEPA has published various sectoral EIA procedures together with EIA procedural guidelines in 1995. The agency was moved to the Presidency and later was merged with other relevant departments to form the Federal Ministry of Environment.

The Federal Ministry of Environment is generally responsible for the supervision of all EIAs in Nigeria. In the petroleum sector, the Department of Petroleum Resources (DPR) is the principal regulator and it has its EIA procedures published in its Environmental Guidelines and Standards (EGASPIN) 1991, which it recently updated in 2002. All companies in the oil industry are expected to carry out an EIA for all their projects in compliance with the government's programme that attempts to protect, restore and/or clean up the environment to an acceptable level. Government must also properly plan for and monitor new installations or projects to prevent degradation of the environment. It is trite to note that the EGASPIN specifies that 'the issuance of this guideline in no way absolves the operator or licensee from complying with other legislations both operating and new' (Part VIII, Article 1.5 EGASPIN). In essence, the oil industry is to comply with both the EGASPIN of the DPR as well as the provisions of the EIA Act.

Under the EIA Act, EIAs are mandatory for projects that are likely to have a negative impact on the environment. Schedule 12 of the Act lists three categories of projects in this regards. Category 3 activities have beneficial impacts on the environment. For Category 2 activities (unless located within an Environmentally Sensitive Area; ESA) full EIA is not mandatory, while Category 1 which includes petroleum activities require full and mandatory EIA.

#### ***PP under the Nigerian EIA Act***

The EIA Act has several provisions that provide for people participation. S. 7 of the Act provides that before the Agency gives a decision on an activity for which an environmental assessment has been produced, the Agency 'shall give opportunity to government agencies, members of the public, experts in any relevant discipline and

interested groups to make comment on environmental impact assessment of the activity'. The agency is to give a decision only after the time allotted to public comments have elapsed. The decision of the Agency on the effect of an EIA must be in writing and must be made available to any interested person or group. If no interested person or group requests for the report, the Agency is required to publish its decision in a manner by which members of the public or persons interested in the activity shall be notified. The Council may determine an appropriate method in which the decision of the Agency shall be published so as to reach interested persons or groups, in particular the originators or persons interested in the activity subject of the decision. (S. 9).

Where an EIA is mandatory under the Act, the public is expected to be notified following the guidelines in S. 25. It states:

*(1) After receiving a mandatory study report in respect of a project, the Agency shall, in any manner it considers appropriate, publish in a notice setting out the following information*

*(a) the date on which the mandatory study report shall be available to the public;*

*(b) the place(s) at which copies of the report may be obtained; and*

*(c) the deadline and address for filing comments on the conclusions and recommendations of the report.*

*(2) Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations of the mandatory study report.*

Where the project is referred to a review panel, the panel shall, in accordance with the provisions of this Decree and its terms of reference –

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public; and,

(b) hold hearing in a manner that offers the public an opportunity to participate in the assessment.

The review panel's report to be submitted to the Council and the Agency should contain a summary of any comments received from the public. (S. 37). On receiving a report submitted by a mediator or a review panel, the Agency shall make the report available to the public in any manner the Council considers appropriate and shall advise the public that the report is available. (S. 39).

The DPR's EGASPIN provides that the EIA process should be used in all facets of the oil industry's operations. However, Part VIII titled 'Standardization of Environmental Abatement Procedures' which lists the EIA process does not mention public participation anywhere in the regulations. The inference drawn from reference from Part VIII, Article 1.5 of the EGASPIN regulations mentioned above is that the provisions of the EIA Act should be adhered to.

## **An Analysis of PP in EIA Provisions**

### *An Overview and Historical Perspectives*

Under the Nigerian EIA Act, it is not stipulated that public opinion should form a part of the report to be approved by the agency. Rather the Act stipulates that before the Agency takes a decision, the public will be given an opportunity to make comments. It is unlikely that a typical local Nigerian community will understand an EIA report with its technicalities and be able to make useful criticism that will improve the quality of the report. There will be active PP where the Act ensures local input in the EIA report itself

rather than comments on the report. It should be noted here that S. 8 of the Act stipulates that the time allotted to entertain public comments pursuant to Ss. 7 and 12 must elapse before the Agency reaches a decision on the report. However, the Act does not have an effective S. 12 as there are no provisions contained therein.

The decision of the Agency on the report is to be published in writing and made available to any interested group or person. In the unlikely event that a local community shows interest in the EIA process at this level, a published report made available to it is not likely to make much sense. While the agency is expected to have a written report, PP is better encouraged if the contents of the report are available to the public in a more understandable form. This may take the form of publishing in the native language or translating key elements of the report to the local dialect and the message passed in traditional forms to raise awareness on the project and its expected effects on the community. These traditional forms may take the form of the usual village-square meetings or age-grade meetings or even passing information via the town crier. Though these forms may be argued as not modern, they are effective and capable of ensuring the active participation of populations likely to be most affected by the intended project. The decision of the Agency on the effect of an EIA must be in writing of and made available to any interested person or group. If no interested person or group requests for the report, the Agency is required to publish its decision in a manner by which members of the public or persons interested in the activity shall be notified. The Council may determine an appropriate method in which the decision of the Agency shall be published so as to reach interested persons or groups, in particular the originators or persons interested in the activity subject of the decision. Perhaps this is the intention of S. 9 of the Act that provides that the Council may determine an 'appropriate method' in which the decision of the Agency shall be published so as to reach interested persons or groups, in particular the originators or persons interested in the activity subject of the decision. It is expected that in interpreting S. 25(1) of the Act, the above suggestion be followed as the wordings of the provision are similar to those in S. 9.

On the face of it, the provisions regarding PP where the project is referred to a review panel seem to be participatory. This is because the Act explicitly provides that the input of the public during the review process is expected to have an impact on the outcome of the review. However, as pointed out earlier, PP at this stage is late and its purpose is more to legitimise the EIA process.

#### *Recent Developments in PP in Nigeria*

Although PP provisions and implementation in EIA is not as firm as it should be, neither is enforcement properly implemented, recent developments indicate that this situation may not persist for much longer. Primarily, the awareness levels in many of the indigent communities has greatly increased such that the people not only demonstrate greater awareness of their expected roles in the EIA process, they also ensure that they are actively involved at various stages of the EIA process. This notwithstanding, it has been reported that in several cases, oil companies have often failed to reveal all relevant information to the community, which is a precondition for prior informed consent (Amnesty International, 2004:3). In this sub-section, recent developments in the Nigerian PP process are succinctly discussed:

##### a. PP during EIA Scoping

Although, there is no specific regulation calling for the participation of local communities in the EIA process during scoping, the Federal Ministry of Environment (FMEnv) uses its discretion to determine projects where PP during scoping is necessary.

The procedure for this participation is not rigid or clearly defined but varies from project to project. Typically however, such decisions are based on the magnitude and sensitivity of the project in question. For instance, in 1999, a proposal by the now defunct Petroleum (Special) Trust Fund; PTF to dredge the lower river Niger from Warri, Delta State to Baro, Niger State, towards navigation improvement called for an EIA. In view of the fact that the project spans a total of 582km and crosses 5 states, including the volatile Niger Delta, it was deemed important and sensitive, for which reason, wide consultations, were held at the scoping stage. These consultations were in the form of “round-table” discussions. Various stakeholders, including communities and NGOs were required to make inputs into the scope and terms of reference for the EIA. All of these inputs were taken into due cognizance in arriving at the final Terms of Reference (TOR) and Scope of Work for the EIA. Similarly, during the preparatory stages to the West African Gas Pipeline (WAGP) EIA, public inputs were sought into the scope and coverage of the project. This did not of course exclude PP in subsequent stages of these projects. On the contrary however, projects such as EIA for a Petroleum Products Tankfarm in Lagos were undertaken without any PP in the scoping.

#### b. PP During EIA Report Review

This aspect of PP is very widespread and the generally accepted norm in Nigeria. Until recently, comments from communities and the public at large, were taken more on face value than in real terms. Therefore, they often had little or no bearing on the final outcome of the EIA. However, recently, communities, especially in the Niger Delta, have realised the fact that they need to be more proactive in enforcing their rights. As such, even the most undeveloped communities have adopted the method of hiring an environmental consultant to review reports for them. For instance, in 1998, when Mobil Producing Nigeria Ltd. recorded large volume oil spills from its Idoho offshore platform, several of the coastal communities hired consultants to undertake the review of spill evaluation reports prepared by Mobil, and to date, a number of litigation cases are still subsisting in various courts of law across the country. Similarly, in 2004, there was a case where communities made representation to the public hearing of an EIA report, and debunked the claims of the EIA consultant to have held consultations with them. This has led to the stalling of the project for which the EIA was prepared.

In summary, although regulations are not firm with regards to PP in the EIA process, the general outlook is that this situation may not persist for much longer, as most communities are “wising up” and taking up the gauntlet of championing the process of protecting their environment, for sustainable development.

## CONCLUSION

There are different levels of PP in EIA legislation. In Thailand, the provisions on PP are ample to enable the public play active roles in the EIA process. However, in India, the EIA process has been weakened and is seen as a mere formality. In Malaysia, though public participation is essential in preliminary assessment process, its mode is left to the project proponent. PP in practical terms is thus weakened. A similar position obtains in South Africa where PP though is mandatory; the process is subject to abuse by project proponents because the legislation is inexplicit in the process it should take. However, the South African judiciary has made positive contributions by affirming the rights of the public to participate in the process of EIA for it to be valid. In Nigeria where the focus of this paper is on, PP is not statutorily mandatory during the initial assessment procedure when participation is most crucial. There is more emphasis on participation during the review or Post Decision Follow-Up process. This notwithstanding, there is

yet to emerge a legal decision that posits that public participation is legally enforceable in Nigeria. In Oronto Douglas v. Shell Petroleum Development Company Limited<sup>7</sup> for instance, the plaintiff alleged that the mandatory provisions of the EIA Act had not been complied with by the Liquefied Natural Gas whose project was about to be commissioned. He sought an action seeking declaratory and injunctive relief that the first to fourth defendants can not lawfully commission or carry out or operate their project at Bonny without complying strictly with the provisions of the Act which mandates that for such intending projects, an EIA must be carried out. The plaintiff also sought to restrain the Defendants from carrying out or commissioning their project until an EIA was carried out with public participation by those to be affected. The Court struck out the suit on the ground *inter alia* that the Plaintiff had no standing to institute the suit. It should be noted that in other jurisdictions, the right to public participation has been judicially enforced. Judicial decisions have shown that where public comments are unjustifiably disregarded in the final decision of an environmental impact assessment, there may be a cause of action to challenge the validity of the decision.<sup>8</sup> It is anticipated with optimism that when future instances of lapses in EIA pre-conditions come before the judiciary, it will rise to the occasion like other developing countries have.

The provisions of the legislation on PP highlighted in this paper with the exception of Thailand, is 'legitimising participation'. The adoption of this approach not only affects the quality of the EIA but also deprives the affected communities/peoples' of their right to participate; which is fundamental aspect in the right to development. The right to information is also denied and this culminates in the abuse of several other human rights including the right to a healthy environment, right to life etc. For instance, in the Delta region of Nigeria where serious environmental damage has occurred, the local communities are not fully integrated in the EIA processes. They are however aware of the dangers of the impact of the Oil Industry on their lives from experience. Their opposition to environmental damage is apparent and sometimes manifests in militant opposition. Since the activities in the Delta region are money-spinning ventures for the Federal Government and multinationals, opposition to these projects are met with vehemence and repressive actions which further aggravates the incidences of violence and human rights violations.

Integrating the public actively in the EIA process will pre-empt constant disagreements and ensuing violence. The EIA process can be used to raise awareness of the communities on the adverse effects the Oil Industry's activities are likely to have on them and the plans to alleviate them of these effects. Through a peaceful medium of interaction, viable options can be discussed and the best suited to each community adopted. This arrangement can not lay claims to be innovative as a similar procedure obtained before the promulgation of the Land Use Decree of 1978. In the pre-1978 era before communities were divested of landholding and ownership vested in the government, intending oil prospecting firms liaised with the family/communities that owned land that their operations would disturb and agreements were reached on rates and benefits that would accrue to them. Then, though effects of oil prospecting and exploitation were the same as they are now, social disorder was not the norm as there

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<sup>7</sup> Suit No FHC /2C S/573.

<sup>8</sup> See also; Leatch v. National Parks and Wildlife Service and Shoalhaven City Council 81 LGERA 270 (1993); Save Pune Citizen's Committee v. Pune Cantonment Board High Court of Bombay, Writ Petition No. 2733 of 1986; Kajing TUBFK and Others v. Ekran BHD and Others, High Court of Kuala Lumpur, 19 June 1996; and, S C Amerasinghe and Three Others v. the Attorney General and Three Others S.C. (Spl) No. 6/92. Supreme Court of Sri Lanka.

were channels of communication open to both parties. Active and democratic participation in the EIA process can be effected to relive this era.

National laws, especially in developing countries are incapable of monitoring the activities of multinationals. In Nigeria, the government and its agencies have shown that they are incapable of actively monitoring and supervising the Oil Industry so the affected communities should be empowered to play a role in safe-guarding their environment. The inclusion of people participation clauses in EIA and placing adequate machinery to ensure adherence to the process, can form the basis of regulating the activities of these oil multinationals. In this regards, the EIA law in Nigeria should be amended to contain provisions similar to S. 8 of Thailand's Enhancement and Conservation of the National Environmental Quality Act (NEQA).

Agreements reached during EIA studies should be contained in the report and should carry the weight of the contractual agreements to bind companies. In essence, alternative investment targets from the proceeds of finite natural resources and environmental sustaining programs promised during EIAs should not be left as 'unenforceable promises'. This is more so now than ever where responsibility of corporate institutions is moving from 'corporate social responsibility' to 'corporate accountability'.

Finally, though EIA is compulsory in any activity that is likely to affect the environment adversely, issues that arise in the natural resource sector necessitate public participation more than any. Public participation in this regard must be active and not peripheral as most EIA regulations in developing countries provide. Public participation is the privilege of citizens who are direct casualties of the adverse effects of natural resource exploitation. These citizens are more sensitive to the changes of the environmental quality than any other therefore; the establishment of effective public participation mechanism can improve attaining sustainable development goals. Indeed, organised individual rather than official supervision of oil companies will yield better results.

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