A ROADMAP FOR THE EFFECTIVE ENFORCEMENT OF ENVIRONMENTAL LAWS IN NIGERIA

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This article examines the menace of environmental degradation in the Niger Delta region of Nigeria, despite there being myriad environmental laws in place. Four main problems underlie the continuing degradation: Nigeria’s environmental legislation is both defective and poorly administered, economic benefits are prioritized over environmental protection, national accounts and economic policies do not properly recognise environmental costs, and citizens’ roles in environmental protection are limited.

This article argues that good governance is a prerequisite for achieving the paradigm shift necessary for Nigeria to establish and maintain a sustainable development path. Environmental legislation also needs to be reformed and better enforced; courts, citizens and non-government organisations (NGOs) need to be empowered; and national accounts need to be ‘greened’.

Background

A benchmark year for environmental protection in Nigeria is often seen as 1988 because of the domestic and international reaction to the hazardous and illicit storage of several tons of highly toxic Italian waste in the Nigerian port city of Koko, and the articulation of the concept of sustainable development in the 1987 Brundtland Report.1 Prior to 1988 Nigeria experienced widespread deforestation, the contamination of the country’s air and water resources, displacement of cultural minorities, and the rapid extinction of various species of flora and fauna. Applicable legislation such as the Land Use Act,2 the Oil Pipelines Act,3 the Exclusive Economic Zone Act4 and even the Constitution,5 had been largely ineffective in relation to protecting the environment.

After 1988, the combined impact of the Koko incident and the emergence of the concept of sustainable development inspired law makers in Nigeria to enact laws to protect the environment, including the Federal Environmental Protection Agency Act 1988,6 the Harmful Waste (Special Criminal provisions) Act 1992,7 and the Environmental Impact Assessment Act 1992.8 The enactment of these laws brought hope to the general citizenry of Nigeria and especially those who live in areas where the environment is vulnerable to degradation, such as the Niger Delta region. This legislation has proven to be ineffective due to poor enforcement however. To check this trend of poor enforcement, reforms are proposed in the areas of governance, enforcement and national economic accounting.

Good governance reforms

‘Governance’ is the process of decision making, and the process by which decisions are implemented.9 ‘Good governance’ is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive,

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2 Cap. L5 Laws of the Federation of Nigeria, 2004
3 Cap. O7 Laws of the Federation of Nigeria, 2004
4 Cap. E17 Laws of the Federation of Nigeria, 2004
5 Cap. C20 Laws of the Federation of Nigeria, 2004
6 Now repealed by s 36 of the National Environmental Standards Regulations Enforcement Agency Act 2007 (hereinafter known as the NESREA Act)
7 Cap. H1 Laws of the Federation of Nigeria, 2004
8 Cap. E12 Laws of the Federation of Nigeria, 2004
9 See AH Hasnaut, Governance: South Asian Perspectives (2001), 1.
and follows the rule of law. The Commission on Human Rights has linked good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights. Thus, good governance will symbolize a paradigm shift for some governments. Good governance may be difficult to achieve, but to ensure sustainable human development, actions must be taken to work towards this ideal with the aim of making it a reality. Good governance is a prerequisite to strengthening the enforcement of environmental law because it has at its core, citizen participation and transparency, which helps to curb corruption and prevent the securing of private gains from unlawful activity.

Corruption has been a significant hindrance to the effective enforcement of environmental law in Nigeria. Corruption has caused the police, government officials and judges to overlook environmental law violations. Corruption can lead to the design and implementation of environmentally damaging practices to enrich individuals. Environmental corruption also means trafficking in wildlife, hazardous waste, and natural resources, often through bribery during the granting of permits or conducting inspections. Besides being rooted in the lack of transparency and accountability, corruption is commonly nurtured by weak institutions, low salaries, a high level of bureaucracy, and low professionalism. It touches all levels of management. In view of this, an effective remedy will be to enact civil service laws that will be backed up by criminal sanctions.

For Nigeria’s efforts to be effective in the long-term, more attention should be focused on helping people to understand that engaging in corrupt practices violates a deeper sense of right versus wrong. No amount of legislation or proposed legislation will render effective results in combating corruption if most of the government officials refuse to remediate their behavior. As such, initiatives need to be aimed at addressing cultural ideas that perpetuate corrupt practices. This Ocheje has referred to as ‘restructuring the social environment of Nigeria’. It is also summarized in Kivutha’s view on the cultural nature of corruption:

The structure of the dwelling conditions the life of the occupants, but the occupants can change the structure if they wish. If the structure begins to leak and all the occupants resign themselves to it, blaming it on the structure, the structure will continue to leak. In this case the explanation still lies with the occupants who do not wish to repair the structure. Something non-human cannot be held responsible for something human.

Enforcement reforms

No program of environmental regulation is better than its enforcement system.

The National Environmental Standards and Regulations Enforcement Agency (NESREA) is the Nigerian statutory authority primarily responsible for enforcing environmental laws in Nigeria. The National Environmental Standards Regulations Enforcement Agency Act 2007 (NESREA Act) defines the mandate and powers of the agency in the context of government

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13 Several countries have adopted codes of conduct, for example Armenia, Moldova and Russia. The Georgian Inspectorate for environmental protection developed an internal code of professional ethics. Besides standard rules of conduct, this code addresses inspectors’ conduct during on-site visits.
policies for the protection of public health and the environment, and sustainable development.\textsuperscript{17} The legislation clearly defines the goals, responsibilities, powers, and functions of the Agency,\textsuperscript{18} but does not define its relationship with other governmental bodies with environmental responsibilities. Enforcement is done either by the courts or through civil, criminal and administrative sanctions. The NESREA administers Nigeria's administrative enforcement process through tests and studies, compliance orders, penalties, and seizure powers.\textsuperscript{19}

A major problem with the agency is its lack of autonomy to develop and implement its compliance and enforcement program free from political intervention or external pressure related to economic development or other government or private sector priorities. The chairman of the Governing Council of the Agency is appointed by the President on the commendation of the minister.\textsuperscript{20} The method of appointment of the permanent secretary and the Director General of the agency is not provided for. Agency funding is very much tied to the Federal Government.\textsuperscript{21} Another major problem of the Agency is that many of the staff employed by the agency to carry out technical roles are not trained.

With such a level of dependence and lack of autonomy, and indifference to specialization, it is doubtful whether the NESREA can effectively perform its role as the chief enforcer of environmental laws in Nigeria.

To improve environmental governance in Nigeria, the NESREA Act should be amended to define the goals, responsibilities, powers, and functions of the NESREA and its relationship with other governmental bodies with environmental responsibilities, including health and safety, natural resources management, agriculture, energy, transportation, land use planning, economic development, and criminal investigation and customs. A lack of cooperation and coordination among governmental agencies can result in competition for jurisdiction and budget. Possible inter-agency cooperation mechanisms can include inter-agency agreements and governmental decrees that establish clear coordination procedures, and multi-agency committees or task forces. Sharing information among national and local agencies can also be an effective strategy for understanding inter-linked responsibilities, and facilitating coordinated decision-making.

The full range of powers and responsibilities should include standard setting, permitting, monitoring and inspection, investigation, and enforcement actions. Since these powers and functions are interconnected, incomplete mandates as it exists under the Act currently can seriously limit the agency’s capacity to ensure compliance. At the national level, the NESREA should build and strengthen the capacity of sub-national units, and provide necessary oversight, implementation support and coordination. NESREA should also provide policy guidance, train staff, report results, and establish appropriate funding and reporting mechanisms. It should also allocate resources in proportion to delegated responsibilities and capabilities.

The NESREA needs to develop clear strategies and implementation plans that address program priorities, mindful of human and institutional capacity. When setting priorities, it should ensure maximum impact or optimal deterrent effect by addressing key challenges, and advancing new or innovative approaches within existing program constraints. Both preventive and punitive tools should be developed, including command-and-control and incentives-based measures. Strategic planning should be based on up-to-date information on the composition and conduct of the regulated community, and agency human and institutional constraints, as well as focus on efforts to control pollution from priority sources, which might include small-and medium-sized enterprise, and even the Federal Government.

The implementation of environmental legislation in Nigeria has been impeded because of the very general nature of provisions in legislation, and the lack of adequate penalties. Environmental regulations are fragmented, and several statutes with sometimes conflicting provisions can regulate the same prohibited acts. Nigeria’s highly complex prosecution and civil enforcement processes also hinder enforcement. It is with a view to removing these obstacles that a unified environmental criminal code and a consolidated Act on national environmental policy would be beneficial.

\begin{itemize}
  \item \textsuperscript{17} s 2
  \item \textsuperscript{18} ss 7–9
  \item \textsuperscript{19} see ss 7–9 and 30 of the NESREA Act
  \item \textsuperscript{20} s 3(a)
  \item \textsuperscript{21} s 13(2)(a)
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As environmental protection activities progress, it is imperative to amend existing laws to enhance their operability. For example, environmental quality may be improved if environmental standards better identify, regulate and monitor for enforcement purposes those pollutants and emissions that affect soils, as those affect public health through food consumption. In addition, pollutants such as promethium, nitrogen oxide, ozone, carbon dioxide and various heavy metals need to be monitored as key pollutants. In-depth scientific research on the impact of environmental pollution on health is also needed, to provide a basis for formulating policy development. Quantitative research on pollution can also help lay the foundation for designing and introducing economic policies designed to minimise pollution.

‘Crimtorts’, or fault-based punitive damages, could also be used more often to eliminate the defendant’s gain from harming the environment, provided the standard of proof is higher than in civil cases. In such cases the defendant’s conduct should be seen as an offence against society as well as the person, with the damages payable split between the individual and the state according to assessed levels of culpability and harm, with factors such as the defendant’s turnover, profitability and liquidity taken into account. The individual should be compensated as far as the law would allow with the remainder given to the state for environmental remediation.

Public participation

Public participation is critical to the enforcement of environmental law. Many countries have implemented principle 10 of the Rio Declaration, and more recently some have implemented the Aarhus Convention by enacting legislation that provides for public participation. Indonesia’s Environmental Management Act 1997 for example, provides that every person has the right to environmental information which is related to environmental management roles, and every person has the right to play a role in the scheme of environmental management in accordance with applicable laws and regulations.

Citizen participation is an important supplement to government enforcement efforts. Citizen enforcement plays a valuable role in promoting environmental compliance, spurring agency enforcement efforts and providing an important deterrent to non compliance when government agencies fail to act because of a lack of resources or political will. According to Casey-Lefkowitz et al:

Citizens know the country’s land and natural attributes more intimately than a government ever will; their number makes them more pervasive than the largest government agency; and seeing citizens as part of the enforcement team helps shield an agency from isolation and builds broad-based popular support for what can be controversial enforcement actions.

This is why the federal environmental and civil rights statutes should be amended to ensure citizen access to the courts for environmental violations. Following principle 10 of the Rio Declaration and Article 1 of the Aarhus Convention, the right to public participation is complete only when it contains a right to information, a right to participate in decision making processes and a right to institute an action when there is a violation of the law.

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23 Adopting the criteria used by the Center for Corporate Accountability of England in its response to the Consultation of the Sentencing Advisory Panel, November 1999


NELR articles

A citizen can enforce environmental law through a private prosecution or claim personal damages as a result of the defendant’s harmful activity. In view of this there should be an effective public complaint process. This would allow a person to file a complaint with the state regarding activities that are causing environmental harm or ecological imbalance. The responsible agency ought to look into the matter and provide a response within a relatively short period of time. Failure to do so would justify the complainant’s recourse to judicial proceedings.

Nigerian legislation should encourage public and environmental NGO participation. Public participation, particularly for NGOs, plays a crucial role in the implementation of and compliance with environmental laws. Governments often prefer to not disclose information concerning compliance with environmental laws. Such information, however, is often essential for successful monitoring. As a result, NGOs often put pressure on governments, directly or indirectly, to release compliance information. Additionally, NGOs mobilize public opinion, influence the political agenda, and communicate with other NGOs world-wide.

Capacity building

The Nigerian government should encourage the development of environmental NGOs and foster professional and orderly public participation. As Casey-Lefkowitz and others argue:

developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make these countries’ environmental protection goals a reality.

If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper. Raising the awareness of the public on their right to a clean and healthy environment and their legal standing (including in the context of class actions) is very likely to contribute significantly to reducing environmental degradation.

Public awareness of environmental issues can very well be achieved in the rural areas of Nigeria where a majority of the indigenes lack basic education by translating environmental laws and policies into local languages. This would help local communities to incorporate environmental law principles into their policies, plans and activities.

Strengthening human and institutional capacity in environmental compliance and enforcement requires a comprehensive personnel management and support system that not only strengthens employee capabilities, but also provides incentives for improved performance and commitment to environmental protection. Capacity building should include hands-on technical skills, management, and leadership training. On the institutional side, the NESREA also needs this, and to dedicate resources to secure the necessary resources such as equipment, laboratories, and information management systems.

Compliance monitoring and inspection

Compliance monitoring and inspection are essential for effective environmental governance. Environmental agencies should monitor compliance and conduct inspections in accordance with standard procedures that reduce risks to public health and the environment.

27 s 34B South African National Environmental Management Act 1998 permits a court which imposes a fine for an environmental offence to order that a portion of a fine imposed by the court (not to exceed one quarter thereof) be paid to the person whose evidence led to the conviction of who assisted in bringing the offender to justice. This provision is potentially lucrative for anyone with the necessary expertise and resources, but it is possible that such a law could produce environmental law bounty-hunters.

28 This is a typical example of ‘crimtorts’

29 S Casey-Lefkowitz et al, note 26 above, 2

30 Basic education is primary school education.

31 In Uganda, Green Watch, an environmental rights advocacy NGO works with local governments to develop, formulate and translate environmental laws into local languages.
In the Nigerian context, the NESREA should develop a compliance monitoring program that enables both detection and correction of violations, and supports enforcement actions. It should monitor compliance via information developed from facility inspections, self-monitoring, and citizen complaints. To ensure effectiveness, uniformity, and fairness the NESREA should develop and adopt standardized monitoring and inspection procedures and practices and manage the resulting information in computerized data management systems.

Given that monitoring and inspection is resource intensive, the NESREA should develop innovative approaches for improving efficiencies, such as multi-media inspections, community monitoring, and mobilizing trained and certified third-party inspectors.

The NESREA should require the regulated community to self-monitor, self-report and keep records on their environmental performance as this can be an effective, fair, and efficient means for the NESREA to monitor compliance. By requiring the regulated community to measure and report their performance, the NESREA could shift some of the burden for compliance monitoring to the regulated community. Self-monitoring can also lead to prompt responses by the government and regulated sources to situations involving non-compliance. Through sanctions defined in regulations or permit requirements for false reporting or non-reporting, an enforcement agency can ensure the accuracy of the reports and their usefulness as a management tool.

Major pollution sources like the Niger Delta region should be subject to environmental permitting on a case-by-case basis that promotes pollution prevention rather than end-of-pipe control as a fundamental principle. In contrast, small- and medium-sized enterprises should be subject to a simplified regulatory regime, since these sources pose a lower environmental risk, and case-by-case permitting imposes a disproportionately heavy administrative and financial burden on sources and regulators.

Permit conditions should be unambiguous and enforceable, and should be based on statutory requirements and technical guidance developed in cooperation with all stakeholders. Permit conditions should be made accessible to the public.

Reforming judicial mechanisms

Apart from adjudicating on environmental matters arising from civil and criminal law generally, the courts play a subordinate (supervisory) role to the NESREA. However, where the courts are not environmentally minded in their analyses of the cases brought before them, the enforcement of environmental law in Nigeria leaves much to be desired.

Again, to ensure fair hearing of prosecuted cases, to promote enforcement, deter environmental violations and ensure compliance, Nigeria’s judges could benefit from capacity building support. Nigeria’s judges need to be equipped with enhanced knowledge of the complex legislative and regulatory framework for environmental protection, as well as legal concepts such as strict liability, standing, class actions, and environmental principles such as sustainable development, the precautionary principle, and intergenerational equity.32 Borrowing the words of Justice Puno, Nigerian Judges are urged ‘to equip themselves with a commanding armor [sic] of the emerging substantive body of environmental law, especially considering the depth and breadth of contemporary environmental issues’33. They should be creative and shed their fears even when they find themselves in some of the unfenced spaces of our environmental law.

Standing

Further liberalization of the law of standing could also benefit the environment. When an action is brought under Nigerian

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32 Knowledge of this principle will go a long way in addressing the problem of prioritizing economic benefits over environmental protection. The police and other prosecutor also need training on how to investigate environmental law violation
33 Through the International and Area Studies Teaching Programme (IASTP) Environmental Law and Enforcement training, both in Indonesia and Australia, approximately 1 000 Indonesian judges have been equipped with enhanced knowledge of environmental law principles.
case law, especially in negligence and nuisance cases, an individual directly affected by the environmentally harmful act, or if the individual is bringing the action in a representative capacity, (s)he must prove harm that has accrued to him or her, over and above that suffered by the other whom (s)he represents. This is despite the fact that in Nigeria, the courts are moving away from a strict interpretation of *locus standi* or ‘standing to sue’ to a liberal interpretation.\(^{35}\)

A better approach would be to recognise a constitutional right empowering every person to institute an action for harm or potential harm against the environment, as has occurred in Ghana and Gambia.\(^{36}\)

**Economic reforms**

Other reforms that are desirable in Nigeria include complementing economic performance assessments (traditionally recorded as Gross Domestic Product (GDP))\(^{37}\) with analyses of integrated environmental and economic accounting (SEEA) data. This would better account for the consumption of man-made capital, the input of natural resources and resulting environmental costs.\(^{38}\) Namibia began work on resource accounts in 1994, addressing such questions as whether the government had been able to capture rents from the minerals and fisheries sectors, how to allocate scarce water supplies and how rangeland degradation affects the value of livestock.\(^{39}\) The Philippines began work on environmental accounts in 1990, providing government agencies and researchers with a rich array of data for policymaking and analysis.\(^{40}\) Mexico, another developing country, began its Green GDP program in 1990.\(^{41}\) As much as a similar method of environmental accounting is recommended for Nigeria, the complicated nature of the project cannot be ignored.

Nigeria may experience difficulty adjusting its traditional GDP to include resource and environmental costs in economic activities because of the lack of consensus of accounting methods and the complicated calculation of mineral, water and forestry resources. Nonetheless, environmental degradation needs to be quantified to reflect green GDP figures.\(^{42}\) Successful experiences from developed and developing countries show that it is not impossible to green the GDP, though it may take time to work systematically.

The lack of consensus about the various methods of environmental accounting has prompted the revision of the SEEA by the ‘London Group’,\(^{43}\) comprised primarily of national income accountants and statisticians from the Organization for Economic Co-operation and Development (OECD) countries. The group work will be an important step toward consensus on accounting methods even though the process may be long.

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\(^{42}\) ‘Green GDP’ simply means an adjustment of the traditional GDP by deducting resource and environmental costs.

\(^{43}\) The London Group on Environmental Accounting is a city group created in 1993 to allow practitioners to share their experience of developing and implementing environmental accounts linked to the economic accounts of the System of National Accounts. It convened its first meeting in March 1994 in London, England. The name derives from the city of its first meeting.
Conclusions

The best environmental standards in the world will be ineffective if they are not complied with or effectively enforced. Compliance and enforcement ensure good environmental governance and respect for the rule of law. They equally determine the compatibility of environmental standards with practical realities and provide a yardstick for assessing whether the standards should be maintained, amended or repealed.

Standards and environmental impact assessments require strong political will, important legislative changes, effective stakeholder cooperation, and substantial human and technical resources. Furthermore, reforms of instruments of direct regulation can be successful only if they are integrated and strike an appropriate balance between what is desirable from an environmental point of view and what is feasible from a technical and economic standpoint.

The institutions charged with the responsibility of enforcing environmental law in Nigeria are the NESREA and the courts. Where these institutions fall short of minimum standards then the objectives for enacting laws to protect the environment may never be met. Presently, reforms for the NESREA and the courts are imperative in view of the challenges to these institutions discussed above.

In designing its enforcement responses, the NESREA should adopt the full range of response mechanisms that include informal approaches (site visits, warnings and notices of violation), and formal approaches that include civil, administrative or judicial enforcement (revocation of permits, facilities closure, liens and monetary penalties), or criminal enforcement (fines and imprisonment). Responses should achieve a range of objectives: obtain information on violator conduct, return violators to compliance, impose sanctions, eliminate economic benefits of non-compliance, correct or redress environmental harm, and publicize results.

Nigeria should also begin to make attempts to green her GDP, with the realization that an emphasis on natural resources and the environment in green GDP does not diminish the importance of economic development. What it speaks to is reasonable economic development on the premise of resource and environmental protection.44

In the final analysis, the prevention of environmental harm requires far more than governmental action. NGOs, independently or in partnership with government, can operate to improve the environmental performance of individuals and businesses. While environmental harm may not be eliminated completely, its overall incidence and impact will be much less.