

Will remediation ever be enough? The overdue compliance conversation for Nigeria**Cleverline T Brown**

University of the West of England Bristol, United Kingdom

Corresponding Author: **Cleverline T Brown****Abstract**

In Nigeria, it has long been accepted that environmental pollution is an inextricable part of the operations of the petroleum sector. In the event of this pollution, remediation processes are usually activated after negotiation or litigation. It has been found that remediation could not be enough to completely erase the effect of pollution on the human and natural environment. While this is conceded, this article argues that the current situation can be improved. This can be achieved by drawing a line to close the era of environmental pollution due to bad environmental practices and non-compliance with environmental laws and starting a new chapter of effective petroleum sector regulation by

imbibing and practising effective compliance strategies and effectively applying enforcement tools already in practice in Nigeria and other jurisdictions but in a form better suited to the socio-economic and political construct of Nigeria. This article finds that innovative compliance strategies and enforcement tools can be adopted to reduce the need for remediation options either through negotiation or litigation. This is mainly because even with remediation, victims of environmental pollution are not always better off. As such, environmental best practices and effective compliance with environmental law should be encouraged to avoid results that will lead to the need for remediation.

Keywords: Environmental Pollution, Remediation, Compliance, Enforcement**Introduction**

The first version of this article concluded that in most incidents of environmental harm, no form of remediation could be enough to completely reverse the impact of the resulting pollution on the human and natural environment.¹ It promoted the view that rather than rely on remediation to resolve the harm done to the environment, the actions that can lead to such environmental harm should be prevented or not taken at all because the economic gains will in no way remedy the losses that would have been suffered especially if that loss included the loss of human lives.

Environmental pollution

Environmental pollution occurs in diverse ways that affect nearly every aspect of existence. It has been noted that environmental pollution is not just physical in the earth, water, air, fire and space. It is now at the mental and intellectual levels, individual, family, community, social organisational and cosmic levels.² While environmental pollution can occur from different sectors of the economy, this article focuses on the environmental pollution arising out of and in the course of the operations of the petroleum sector in Nigeria.

Before the development of the legal framework for the control of environmental pollution, environmental infractions went on unabated until reprieve came in the form of interventions such as compensation, injunctions and other forms of remediation.³ However, it is contended that rather than take precaution, operators often see the remedies as the excuse to continue their reprehensible actions, which translates to pollution, as long as they can keep funding the remedies. Remediation is not a remedy because most effects of pollution cannot be reversed to status quo ante. Therefore, the valid question still reverberates, 'Will remediation ever be enough?' As noted above, environmental pollution affects every aspect of human existence.⁴ Therefore, this article queries; Where is Nigeria's priority in environmental matters? Is it to protect the human and natural environment in an actual sense or to protect the ability of the environment to continue to produce the natural resources the country needs to continue to fund its economy while growing other vices such as corruption and civil and armed conflicts in its wake and disregarding the health of the human and natural environment?

Over time, acts in furtherance of business or personal agenda that have continually had negative effects on the global environment, have evolved from mere harmless acts to grave environmental infractions that have gradually taken a toll on the

¹ CT Brown, 'Will Remediation Ever Be Enough? The Environmental Pollution Tragedy' (2019) 5(2) International Journal of Law 28.

² SR Bhatt, 'Jain Ethics, Environmental Crises and Remedial Measures', *Jainism for a New World Order* (Springer 2021) 17.

³ H Ijaiya and OT Joseph, 'Rethinking Environmental Law Enforcement in Nigeria' (2014) 5 Beijing Law Review 306, 313.

⁴ BR Adeuti, 'Analysis of Environmental Pollution in Developing Countries' (2020) 65(1) American Scientific Research Journal for Engineering, Technology, and Sciences (ASRJETS) 39, 47.

human and natural environment. The history of environmental pollution shows how far this gradual but steady decline in the health and sustenance of the environment has come and how much further a continuation on this path is likely to take the human and natural environment or what will be left of it.

Types of environmental pollution

Environmental pollution occurs due to natural events such as forest fires, landslides, volcanoes and earthquakes. Ancient cities were characterised by foul smells from debris, human and animal wastes. Environmental pollution has since gone beyond this subsistent level to thrive on a globally industrial scale with the spread of industrialisation and population expansion. In Nigeria environmental pollution occurs in different sectors of the Nigerian economy such as petroleum and other natural resources mining, agriculture, manufacturing, medical, local trades (markets) abattoirs, improper waste disposal methods and poor environmental sanitation. It was noted that environmental sanitation strategies, enforcement strategies and compliance are the most important but neglected environmental issues in Nigeria.⁵ The development of environmental studies and law has increasingly expanded the view on the types of pollution that impacts the human and natural environment. Some of the examples of pollution are air, water and land pollution. Other more content specific types of pollutions are noise, thermal, radioactive, visual, light, dust⁶ and plastic pollution which has continued to gain more prominence in the media and the world in recent times.⁷

Notable instances of environmental pollution

Considering the increased awareness of environmental pollution, there have been records of acts of environmental pollution that have attracted global attention. This section briefly lists some of these occurrences and the consequences as an indication of how far and how destructive the acts of environmental pollution are.

1984 Bhopal Gas Leak in India. Toxic gases leaked from a chemical pesticide plant causing cancer, retarded growth, dizziness and about 15,000 deaths.⁸

1986 Chernobyl nuclear power plant explosion in Ukraine. A nuclear reactor shut down resulting in a fire and explosion causing the instant death of about 50 persons, 4,000 cancer

deaths linked with the extensive spread of radioactive substances.⁹

1989 Exxon Valdez oil spill. Approximately 10.8 million gallons of crude oil covering 11,000 miles of ocean destroying about 250,000 seabirds, 2,800 sea otters, 300 harbour seals, 247 bald eagles and an unidentified number of salmon and herring.¹⁰

2010 British Petroleum (BP) oil spill in the Gulf of Mexico. A Deepwater Horizon oil rig exploded and sank releasing about 60 million barrels of mixed grade oil into the sea killing 11 employees.¹¹ The spill continued for more than four months, poisoning, suffocating and killing over 34,000 birds, 72 dolphins, hundreds of sea turtles and other marine animals.¹²

In Africa, two notable environmental pollution examples stand out. *First* is the environmental pollution incidental to lead and copper poisoning of the major waterways in Zambia due to many years of copper mining by companies reaping major benefits from the operation without taking precaution to pay compensation or mitigate the effect on the environment and human and animal life.¹³ *Second* is the infamous Ogoni oil spill by Shell Petroleum Development Company limited in the southern part of Nigeria, spanning five decades of petroleum exploration and exploitation unabated in the region.¹⁴ Oil spills are quite common in Nigeria and have been known to occur for some reasons such as corrosion of pipelines and tankers, oil production operations, sabotage and inadequate or non-functional production equipment.¹⁵ Other notable oil spill incidents that have caused serious environmental harm in Nigeria include the Escravos spill in 1978 of about 300,000 barrels, SPDC's Forcados Terminal tank failure in 1978 of about 580,000

⁹ M Hatch and others, 'The Chernobyl Disaster: Cancer Following the Accident at the Chernobyl Nuclear Power Plant' (2005) 27 (1) *Epidemiologic Reviews* 56.

¹⁰ MR Lindeberg and others, 'Condition of Persistent Oil on Beaches in Prince Williams Sound: 26 Years after Exxon Valdez Spill' (2018) 147 *Deep-Sea Research Part II* 9.

¹¹ JM Shultz and other, 'The 2010 Deepwater Horizon Oil Spill: The Trauma Signature of an Ecological Disaster' (2015) 42(1) *Journal of Behavioral Health Services and Research* 58, 59.

¹² CME Young, PT Schwing and LJ Cotton, 'Benthic Foraminiferal Morphological Response to the 2010 Deepwater Horizon Oil Spill' (2021) 164 *Marine Micropaleontology* 1, 1; The Ocean Portal Team, 'Gulf Oil Spill' <<https://ocean.si.edu/conservation/pollution/gulf-oil-spill>> accessed 2 February 2019.

¹³ S Das and M Rose, 'Copper Colonialism: British Miner Vedanta KCM and the Copper Loot of Zambia' (2019) <<http://www.foilvedanta.org/wp-content/uploads/FV-Zambia-report1.pdf>> accessed 1 February 2019 21.

¹⁴ AA Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2 (2) *Civil and Environmental Research* 2222.

¹⁵ AOY Raji and TS Abejide, 'Compliance with Oil and Gas Regulations in the Niger Delta Region, Nigeria C. 1960s-2000: An Assessment' (2014) 3(8) *Arabian Journal of Business and Management Review (OMAN Chapter)* 48, 54; SO Adelana and others. 'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas' (2011) 2(6) *American Journal of Scientific and Industrial Research* 834, 835.

⁵ MA Nwachukwu, 'Environmental Sanitation Enforcement and Compliance Best Management Strategies for Nigeria' (Eighth International Conference on Environmental Compliance and Enforcement Cameron May, Cape Town, South Africa, 5 – 11 April 2008) 213, 217.

⁶ Prevalent in China and Korea.

⁷ TA Aragaw and BA Mekonnen, 'Current Plastics Pollution Threats Due to COVID-19 and its Possible Mitigation Techniques: A Waste-to-Energy Conversion via Pyrolysis' (2021) 10(1) *Environmental Systems Research* 1.

⁸ RS Oh, 'The Claims of Bodies: Practices of Citizenship After Bhopal in Survivor Testimony and Indra Sinha's *Animal's People*' AU - Oh, Rebecca S' (2019) 21(1) *Interventions International Journal of Postcolonial Studies* 70, 75.

barrels and Texaco Funiwa-5 blow-out in 1980 of about 400,000 barrels;¹⁶ Abudu pipeline spill in 1982 of about 18,818 barrels; The Jesse Fire Incident which claimed about a thousand lives and the Idoho Oil Spill of January 1998, of about 40,000 barrels.¹⁷

It is imperative to note that in the above examples of some of the most disastrous environmental infractions, some things stand out. *First*, in no case has the remediation or compensation method solved the resultant environmental pollution. At best the measures brought temporary reprieve but could not restore the human and natural environment to the original state.¹⁸ *Second*, the actions causing environmental harm were perpetrated by human actions and sometimes natural causes.¹⁹ *Third*, these acts of environmental pollution have been replicated in many countries albeit on a smaller scale. It is argued that environmental pollution occurs in Nigeria for various reasons, however, more has resulted from poor environmental decisions and non-compliance with environmental laws.

It must also be noted that the forms and timing of interventions practised in developed economies are more advanced than those practised in developing and third-world economies like Nigeria. For instance, most clean up options for crude oil spill on land and sea require mechanical and tedious methods promptly executed with complex machines which may not be available in Nigeria.²⁰ For instance, Regardless of the advanced remediation methods applied in the Exxon Valdez oil spill, only 10% of the approximately 11 million gallons of crude oil that was spilled into the sea and coastline was recovered.²¹ Apart from compensation, injunctions and specific performance, other forms of remediation especially in oil spill instances include oil booms, sorbents, burning *in-situ*, dispensers, skimming, manual labour and technical aid.²² It is argued that due to this lacuna in advanced remediation options in Nigeria, there

is the need for an alternative response to environmental pollution.

Conceptualising compliance and enforcement

The environmental law scholarship on enforcement especially in Nigeria has received a lot of attention.²³ For this reason, this section will concentrate on the concept of compliance. Compliance has been addressed from four different perspectives.²⁴ *First*, citizen compliance with national laws and judicial decisions. This is where citizens voluntarily accept the decisions of regulators and follow the law because they choose to do so. The theory of this type of compliance follows the realisation that it is difficult to gain compliance solely through the threat of the use of force.²⁵ *Second*, compliance by the executives, legislatures or bureaucracies; with laws and national High Court rulings. This is where political officials respect the limits on their behaviour by adhering to the foundations of limited government, democracy and the rule of law.²⁶ It has been noted that even in advanced democracies, the possibility of non-compliance by a branch of government can strongly shape judicial behaviour and courts decisions in politically important cases.²⁷ *Third*, national states' compliance with international law and courts. Under this conception of compliance, it is assumed that states have the general propensity to comply with international law and their obligations thereunder, on the considerations that the laws are effective and serves the interest of the state.²⁸ *Fourth*, compliance with court decisions by subnational public authorities such as State Courts. Here compliance is construed in the light of the response of lower courts to judicial decisions by higher courts such as the Supreme Court especially in the exercise of judicial activism to fill a gap in the law.²⁹

¹⁶ N Ezenwa-Ohaeto, BE Ewulum and E Okaphor, 'An Appraisal of the Impact of the National Oil Spill Detection and Response Agency on Environmental Pollution in Nigeria' (2020) 4 African Journal of Constitutional and Administrative Law 48, 58.

¹⁷ PC Nwilo and OT Badejo, 'Impacts and Management of Oil Spill Pollution Along the Nigerian Coastal Areas', *Administering Marine Spaces: International Issues* (International Federation of Surveyors 2006) 119, 123.

¹⁸ W Sullivan, 'Clean-up Chemical at BP Oil Spill Tied to Health Problems' (2017) <<https://scienceline.org/2017/11/clean-chemical-bp-oil-spill-tied-health-problems/>> accessed 2 February 2019.

¹⁹ SO Adelana and others, 'Environmental Pollution and Remediation: Challenges and Management of Oil Spillage in the Nigerian Coastal Areas' (2011) 2(6) American Journal of Scientific and Industrial Research 834, 844.

²⁰ SJ Varjani, 'Remediation Processes for Petroleum Oil Polluted Soil' (2017) 16 Indian Journal of Biotechnology 157, 157.

²¹ Lindeberg and others (n 10) 9.

²² SA Ismail, 'Exxon Valdez Oil Spill: What We Can Learn to Avoid Second Mistake in Oil Transportation? Environmental Ethics What We Should Do?' (2019) 1(1) ILKKM Journal Medical and Health Sciences 1, 3.

²³ Ijaiya and Joseph (n 3); ED Oruonye and YM Ahmed, 'The Role of Enforcement in Environmental Protection in Nigeria' (2020) 7(1) World Journal of Advanced Research and Reviews 48; MGA Murgan and Hakeem Ijaiya, 'International Principles of Sustainable Development and the Challenges to Environmental Rights Enforcement in Nigeria' (2020) 7(1) Brawijaya Law Journal 82; ZO Edo, 'The Challenges of Effective Environmental Enforcement and Compliance in The Niger Delta Region of Nigeria' (2012) 14(6) Journal of Sustainable Development in Africa 261; A Adegoroye, 'The Challenges of Environmental Enforcement in Africa: The Nigerian experience' (Proceedings of the Third International Conference on Environmental Enforcement Oaxaca, México April 25 1994) 43.

²⁴ D Kapiszewski and MM Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38(4) Law & Soc Inquiry 803, 806.

²⁵ TR, Tyler, 'Enhancing Police Legitimacy' (2004) 593 The Annals of the American Academy of Political and Social Science 84, 85.

²⁶ BR Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91(2) The American Political Science Review 245, 260.

²⁷ Kapiszewski and Taylor (n 24) 803.

²⁸ A Chayes and AH Chayes, 'On Compliance' (1993) 47 International Organization 175, 178.

²⁹ FDS Lima, 'Protecting Political Rights or Interfering in the Political Arena?' (2020) 2(2) Humanities and Rights

To comply or not to comply

Compliance with the law has been motivated by the creation of a credible risk that people will be caught and punished for wrongdoing, i.e., "by manipulating an individual's calculus regarding whether crime pays in the particular instance".³⁰ Winter and May also offer explanations as to what motivates compliance and enforcement.³¹ They noted that compliance does not just occur but is usually motivated by some factors which include calculated,³² normative and social motivations, knowledge of the rules, ability to comply with rules and the capacity to comply with the rules. Peterson et al agree with Winter *et al* on the motivation for compliance.³³ In this debate, however, the fact remains that deterrence still plays a role in the decision to comply or not to comply. It has been opined that other different factors can also influence the decision to comply with or violate environmental laws³⁴ such as market forces, regulatory pressure and personal values and beliefs. In some cases, the decision to comply has been seen as a business decision or overall business strategy. For example, when government policy is formulated to allow the participation of companies that possess certification in certain standards for petroleum sector operations like offshore oil drilling.³⁵ Where such certification is expensive to acquire, only large companies with a solid finance base can achieve such certifications. Such government policy will effectively shut out other financially less fortunate companies from participating in operations requiring such certification standards.³⁶ Compliance can be unintentional and occasioned by technological advancement and innovation adopted in the business model of the regulated entity.³⁷ Regulated entities

can also comply with environmental regulations to appeal to environmentally conscious consumers who are willing to patronise entities who incorporate green practices in their operations.³⁸ Other regulated entities that are more mindful about their reputation, comply with environmental regulations to pre-empt stricter regulations in future and gain a competitive advantage over other regulated entities. Such companies that are mindful of their reputation make compliance decisions when liability threats and pressure mounts from environmental activists and other concerned bodies.³⁹ For example, companies that are involved in the downstream petroleum sector with direct contact with consumers are mindful of the purity of the final petroleum products sold to the consumers.⁴⁰ Animura notes that the response to the threat of liability and pressure to comply is different when the violation is likely to attract extensive media coverage. Therefore, the threat of bad press may deter the regulated entity from violating environmental regulations but may not motivate it to comply.⁴¹

Nigeria's history with compliance.

A look at developed countries shows that compliance with laid down rules whether they be laws, policies or simply values of human interactions, is achieved among others, with strong community pressure on both the operators and the government agencies.⁴² However, in developing countries such as Nigeria, compliance with laid down rules has been a struggle for so many reasons. Non-compliance in petroleum sector operations is more a result of corporate malfeasance than all the other reasons for non-compliance put together and has been the main reason for environmental harm.⁴³ This corporate malfeasance occurs on the part of the regulated entities and the regulators. More often than not, this has been seen to be because there are usually no consequences for these wrong-doings. Compliance with court decisions by public authorities is a prerequisite for rule of law and political stability and creates a positive example for individuals.⁴⁴ It is no news that the disregard for the rule of law has been on the increase in some African countries

Global Network Journal 164, 167; DR Songer and RS Sheehan, 'Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals' (1990) 43(2) *The Western Political Quarterly* 297.

³⁰ TL Meares, 'Norms, legitimacy and law enforcement' (2000) 79(2) *Oregon Law Review* 391, 396.

³¹ SC Winter and PJ May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 (4) *Journal for Policy Analysis and Management* 675.

³² *ibid* at 676, 677, 678, 679, 680.

³³ K Peterson and A Diss-Torrance, 'Motivation for compliance with environmental regulations related to forest health' (2012) 112 *Journal of Environmental Management* 104, 106.

³⁴ K Murphy and others, 'Why People Comply with COVID-19 Social Distancing Restrictions: Self-interest or Duty?' (2020) *Australian & New Zealand Journal of Criminology* 1, 3; B Pavlikova, L Freel and JP van Dijk, 'To Comply or Not to Comply: Roma Approach to Health Laws' (2020) 17(9) *International Journal of Environmental Research and Public Health* 3087, 3090.

³⁵ Oil and gas Pipelines regulations made pursuant to the Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010.

³⁶ Department of Petroleum Resources, *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)* (Department of Petroleum Resources (DPR) Lagos, Nigeria 1991) 313, 3, 44, 61, 71, 110, 120.

³⁷ WE Oates, PR Portney and AM McGartland, 'The Net Benefits of Incentive-Based Regulation: A Case Study of

Environmental Standard Setting' (1989) 79(5) *American Economic Review* 1233.

³⁸ J Wu, 'Environmental Compliance: The Good, the Bad, and the Super Green' (2009) 90(11) *Journal of Environmental Management* 3363, 3364.

³⁹ WRQ Anton, G Deltas and M Khanna, 'Incentives for Environmental Self-Regulation and Implications for Environmental Performance' (2004) 48(1) *Journal Environmental Economics and Management* 632, 636.

⁴⁰ Some of these operators include downstream sector operators involved in the distribution of petroleum products.

⁴¹ TH Arimura, A Hibiki and H Katayama, 'Is a Voluntary Approach an Effective Environmental Policy Instrument? A Case for Environmental Management Systems' (2008) 55(3) *Journal of Environmental Economics and Management* 281, 282.

⁴² CM Leyira, U Ironkwe and A Olagunju, 'Corporate Social Responsibility and Compliance with Regulations in Nigeria' (2011) 1 *International Affairs and Global Strategy* 16, 22.

⁴³ MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) *Law Environment and Development Journal (LEAD)* 118, 120.

⁴⁴ Kapiszewski and Taylor (n 24) 806.

such as Nigeria. It is argued that if court orders are disobeyed, actions or omissions of public authorities cannot be regulated and contributions of the court to policy issues will be compromised.⁴⁵

Remedies to environmental pollution and the attitude of defaulters to environmental pollution remedies.

Remedy is the means by which the violation of a right is prevented, redressed or compensated and environmental litigation is a common vehicle for driving these remedies.⁴⁶ The development of environmental law brought with it the increased awareness of the dangers of environmental pollution and consequently developed a system of mitigating the effects of the acts and effect of environmental pollution. Remedial action in environmental law is intended to bring about or restore long term environmental quality, permanently alleviate pollution to prevent or minimise the risk to the human and natural environment.⁴⁷ Some of the remedies to environmental pollution include compensation, damages, abatement, injunction, revocation, taxes and royalties, damages, restitution, clean up, bioremediation and provision of infrastructure.⁴⁸

Most environmental regulation statutes in Nigeria like the NESREA Act and NOSDRA Act make provisions for administrative fines for environmental law violations. The power of these regulatory bodies to apply administrative fines has been severally contested in the Nigerian courts. In the case of *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)*,⁴⁹ the Court of Appeal affirmed the stripping of NOSDRA's power and authority to unilaterally impose fines for contravention of the offences provisions of the NOSDRA act.⁵⁰ This decision was made while there was a subsisting court decision affirming that regulatory bodies can impose penalties against offenders who contravene the provisions of its laws in the case of *Moses Ediru v Federal Road Safety Commission and 2 Others*.⁵¹ The two decisions were reached by the Court of Appeal and it is the practice and law that the later decision in time remains the law until it is overturned at the Supreme Court or the Court of Appeal overrules itself.⁵²

⁴⁵ Kapiszewski and Taylor (n 24) 803.

⁴⁶ BR Akinbola and TT Onifade, 'Legal and Administrative Remedies in Environmental Law in Nigeria: Reform Proposition' (2013) 1(1) Afe Babalola University Ado-Ekiti Law Journal 320, 324.

⁴⁷ *ibid.*

⁴⁸ KR Sharma, 'Soil Pollution-Variou Causes and Their Remedies' in P Kumar, BR Gurjar and S Tomar (eds), *Environmental Pollution: Biodegradation and Bioremediation* (Stadium Press Limited 2017) 214, 231.

⁴⁹ (2018) Law Pavilion Electronic Law Report-44210 (LPELR (CA))

⁵⁰ S 6 (2) and (3) NOSDRA Act; *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* (2018) Law Pavilion Electronic Law Report-44210 (LPELR (CA)) in paragraph C of page 9 of the judgement.

⁵¹ (2016) 4 NWLR Part 1502, 209

⁵² It is the practice that when there two conflicting decisions on the same subject matter before the Court of Appeal, the Court can elect which one to follow when confronted with a similar case, however, a lower court is bound to follow the decision which is later in time. In this instance the 2018

However, in the case of *Shell Nigeria Exploration and Production Company Limited (Shell) v National Oil Spill Detection and Response Agency (NOSDRA)*⁵³ before a Federal High Court, the Court departed from the decision of the Court of appeal in *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* and held that NOSDRA can impose sanctions without recourse to the Court. It is argued that this is an anomaly as the Federal High Court is a Court that is lower than the Court of Appeal in hierarchy and ought to follow the latest decision of the Court of Appeal on this subject. It is further argued that this position is sending the wrong signal to both the regulatory bodies and the petroleum sector operators about the ability of a regulatory body to enforce compliance in line with its enabling laws without going through the rigours of environmental litigation.⁵⁴ This is because there are now two subsisting and conflicting decisions on the unilateral enforcement powers of regulatory agencies.

Environmental pollution has continued to ravage the human and natural environment but as much as this trend is criticised, those responsible for environmental pollution have not slowed down in their acts of environmental infraction.⁵⁵ A study of the BP oil spill tragedy revealed that BP's conduct before and after the disaster failed to meet even the list demanding ethical standards including its own operational standards.⁵⁶ Nigeria as a country has severally attempted to legislate on gas flaring.⁵⁷ However, it does appear that the companies responsible for flaring the associated gas, found it more convenient to flare the gas and pay the fine rather than comply with the law and reinject it into the earth.⁵⁸ In some cases, while refusing to pay

decision in *NOSDRA v Mobil Producing Nigeria Unlimited (ExxonMobil)* is the later in time and the position of the law.

⁵³ *Shell Nigeria Exploration and Production Company Limited (Shell) v National Oil Spill Detection and Response Agency (NOSDRA)* Unreported. G Ukwuoma, 'Nigeria: Litigation Update - JUNE 2018: Do Administrative Agencies Lack Powers to Impose Fines and Penalties without Recourse to the Courts? Matters Arising: Shell Petroleum Exploration and Production Company Ltd (SHELL) v National Oil Spill Detection and Response Agency (NOSDRA)' (2020) <<https://www.advocaat-law.com/assets/resources/341e36a14b167a82e12df3ff9e6c4e3b.pdf>> accessed 10 July 2020.

⁵⁴ This stance is further confirmed where the judiciary reached two conflicting decisions on the subject matter of the import of s 20 of the Constitution of the Federal Republic of Nigeria in the cases of *Abacha v Fawehinmi No 2* and *Jonah Gbemre v SPDC*.

⁵⁵ This can be seen in the Ogoni land oil spill perpetrated by Shell Petroleum Development Company limited until the UNEP indicted the company in its report and recommended a clean-up of the impacted site.

⁵⁶ MS Schwartz, 'Beyond Petroleum or Bottom-Line Profits Only? An Ethical Analysis of BP and the Gulf Oil Spill' (2020) 125(1) Business and Society Review 71, 79.

⁵⁷ Associated Gas-Reinjection Act Cap A25 Laws of the Federation of Nigeria 2010. The first attempt was in 1979 then 1984, 2003, 2008, 2009, and 2010.

⁵⁸ U Udok and EB Akpan, 'Gas-Flaring in Nigeria: Problems and Prospects' (2017) 5(1) Global Journal of Politics and Law Research 16, 20. Some loopholes in the law and the plan to terminate gas flaring enabled operators of the oil and

compensation and terminate or mitigate the acts of pollution, the defaulting parties prefer to tie up the indigent host communities in ceaseless legal battles that the host communities cannot afford while the assault on the environment persists.⁵⁹ This happened in the case of *Jonah Gbemre v Shell Petroleum Development Ltd.*⁶⁰ From the foregoing, it is argued that the remedies have now become a haven for defaulting parties in environmental pollution cases.

Proceeding with reinventing environmental regulation

Judging from the standpoint of the existing environmental regulatory regime in Nigeria, it is undeniable that there is no quick fix to the environmental exigencies in reality. Therefore, the best way to resolve this impasse is to make cautious and incremental changes by the introduction of novel compliance and enforcement mechanism to address the current regulatory problems in Nigeria. This is because, swift improvements to environmental regulations, rarely deliver the systemic change that the improvements imply.⁶¹ This article promotes the view that *first*, compliance should be emphasised, compliance strategies and mechanisms be improved to encourage compliance and enforcement should be applied only in persistent cases. *Second*, rather than rely on compensation and other forms of remediation for the harm done to the environment, the harmful actions that result in environmental pollution or harm should be prevented or not done at all. This is because the economic gains will in no way alleviate the damage or remedy the losses that would have been suffered from the passage of time especially if that loss includes the loss of human lives and biodiversity extinction.⁶² *Third*, the precautionary principle rule in international environmental law should cascade to national laws so that any interaction with the environment that is likely to cause any form of harm to the environment is severely scrutinised or discontinued.

Fourth, governments through the regulatory agencies should focus on strengthening compliance strategies and mechanisms by investing more in compliance models,

gas sector to continue flaring gas. The excessive reliance on the sector for economic reasons, the low taxes for continuous flaring of gas that did not possess any deterrent effect and the silence of the law on who to bear the cost of gas reinjection.

⁵⁹ *Vedanta Resources PLC and Anor (Appellants) v Lungowe and Ors (Respondents)* [2019] UKSC 20 On appeal from: [2017] EWCA Civ 1528. See also S Varvastian and F Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*' (2020) 9(2) *Transnational Environmental Law* 323; TV Ho, '*Vedanta Resources Plc and Another v Lungowe and Others*' (2020) 114(1) *The American Journal of International Law* 110.

⁶⁰ *Jonah Gbemre v SPDC Ltd & Ors* (2005) 6 *African Human Rights Law Report* 152.

⁶¹ DJ Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance' (1999) 23 *Harvard Environmental Law Review* 441, 442.

⁶² O Yakubu, 'Addressing Environmental Health Problems in Ogoniland Through Implementation of United Nations Environment Program Recommendations: Environmental Management Strategies' (2017) 4(2) *Environments* 28, 47

exhibiting the political will to effectively implement environmental laws and applying inclusive and informed governance approaches. Some of the compliance and enforcement strategies include monitoring and auditing regulated entities, capacity building and training, enforcement cooperation, and analytical work, adopting and adapting other compliance and enforcement strategies tailored to suit the social, economic and political construct of the jurisdiction. *Fifth*, arising from the audit process, comprehensive legislative and policy reviews should follow where necessary to allow for adjustments, to stay abreast with global best practices where necessary as this will improve compliance with environmental regulation and consequently improve environmental protection.

Compliance management in environmental regulation

This article argues that reducing the need for environmental remediation either by negotiation or litigation can be improved by ensuring compliance with environmental regulation *ab initio*. This can be achieved by establishing a compliance management strategy. Environmental regulatory efforts will be meaningless if it does not improve compliance.⁶³ It has been opined that compliance management (which includes compliance measurement or assessment of the effect of different regulatory strategies on regulatory compliance) faces some challenges such as gauging compliance, measuring inspection or monitoring regulatory interactions applied at any time and the ability to predict the outcome of an alternative regulatory strategy.⁶⁴

The typical approach for compliance management is reliance on the regulated entity's report of its compliance behaviour or the inspectors' perception of compliance. However, that has proved unreliable as the tendency to tender reports that favour the regulated entity contrary to the facts, always presented itself. This challenge has confronted regulators and the search for compliance management approaches persists.⁶⁵ The European Union (EU) proposed a solution to its member states to tackle this challenge such as *compliance assurance, compliance promotion, compliance monitoring and assessment, and follow-up and enforcement*.⁶⁶ It is important to note that these examples of compliance management strategies from the EU are not intended to be copied and transplanted into the compliance and enforcement regime in Nigeria but may be adopted and

⁶³ A Iannuzzi Jr, *Industry Self-Regulation and Voluntary Environmental Compliance* (Lewis Publishers 2016) 200, 4.

⁶⁴ PJ May and SC Winter, 'Regulatory Enforcement Styles and Compliance' in C Parker and VL Nielsen (eds), *Explaining Compliance: Business Response to Regulation* (Edward Elgar 2011) 222, 233.

⁶⁵ European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: European Union Actions to Improve Environmental Compliance and Governance' (2018)

<http://ec.europa.eu/environment/legal/pdf/COM_2018_10_F1_COMMUNICATION_FROM_COMMISSION_TO_IN_ST_EN_V8_P1_959219.pdf> accessed 1 September 2018 1.

⁶⁶ In the EU communication however, compliance promotion and compliance monitoring are subsumed in compliance assurance.

modified to suit the environmental regulatory needs of Nigeria.

Compliance assurance - In Nigeria the DPR under the EGASPIN guidelines⁶⁷ requires sector operatives to file annual returns and reports of audit of their operations, health, safety and environment standards and other activities exhibiting compliance with environmental regulatory laws, standards and permits and also requires them to apply to renew these licences, leases and permits when due. This position can be strengthened by adopting the European Commission's actions to ensure compliance assurance like improving transparency and accountability of the regulatory agencies and taking credible follow-up actions to ensure an effective system of financial security for environmental liabilities.⁶⁸

Compliance promotion - Compliance promotion strategies already existing in Nigeria through the DPR⁶⁹ and NESREA Act⁷⁰ through environmental education on sustainable environmental management and the creation of public awareness, can be strengthened by follow-up actions. Such strategies include awareness campaigns and use of guidance documents and online information tools such as frequently-asked-questions (FAQs), follow-up to breaches and liabilities which can include administrative action (e.g. withdrawal of a permit), use of criminal law and action under civil law (remediation after damage from an accident using liability rules) and contractual law (e.g. measures to require compliance with nature conservation contracts).

Compliance monitoring and assessment - Compliance monitoring identifies and characterises duty-holder conduct and detects and assesses any non-compliance, using environmental inspections and other checks. Compliance monitoring includes all the activities to gather information to determine the compliance status of a regulated entity. For example, inspections for permitted activities, surveillance for possible illegal activities, investigations for crimes and audits for systemic weaknesses.⁷¹ The United States EPA employs the compliance mechanism of self-policing otherwise known as the *Audit Policy* which is a 'systematic

and objective reviews of an entity's operations and [environmental] practices focusing on their environmental performance.'⁷² The audit policy confirms compliance with environmental regulations, evaluates environmental management systems effectiveness and or risk assessment from regulated and unregulated materials and practices.⁷³ Proponents of the policy believe it is effective to encourage compliance while opponents consider it detrimental because it removes the apprehension of financial penalty for non-compliance and the incentives for compliance.⁷⁴ Other countries practising the Audit Policy include Norway and Mexico.

The International Network for Environmental Compliance and Enforcement (INECE) has noted that most countries employ traditional environmental regulatory voluntary programmes and non-regulatory voluntary programmes as well as compliance promotions programmes to encourage compliance culture.⁷⁵ This is achieved through education and promotional activities and compliance-incentive activities such as policies and programmes which provide benefits to entities that can achieve certain environmental compliance objectives.⁷⁶ This can be done through training and on-site technical assistance. Financial assistance is also a vital factor in environmental regulations compliance as the cost implication of compliance can be a hindrance to compliance ability. In this case, some international organisations and national development aid agencies provide the needed funds to assist entities to achieve compliance.⁷⁷ Compliance incentives such as auditing policies (as discussed above),⁷⁸ recognition programs and public information all encourage compliance.⁷⁹ This can be seen in the monitoring powers of DPR. NOSDRA also carries the special function of surveillance, reporting and alerting regarding oil spills as provided by the NOSDRA Act.⁸⁰

These activities provide evidence and data for measuring environmental improvements. Compliance monitoring thrives on the principle that *first*, self-awareness and self-monitoring will guide regulated entities to take preventive measures to ensure compliance and *second*, a credible likelihood of detection by regulators is necessary for deterrence.⁸¹ The purpose of compliance assessment is *first*, to check compliance of regulated entities with relevant environmental legal requirements, including with directly applied regulations, conditions in permits or any other legal

⁶⁷ The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) issued in 1991 and revised in 2002, 2016 and 2018. See DS Olawuyi and Z Tubodenyefa, *Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)* (Institute for Oil, Gas, Energy, Environment and Sustainable Development (OGEES Institute), Afe Babalola University, Ado Ekiti, Nigeria MFP-04-014, 2018) 1.

⁶⁸ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Union Environmental Implementation Review: Common Challenges and How to Combine Efforts to Deliver Better Results' (2017) <http://ec.europa.eu/environment/eir/pdf/full_report_en.pdf> accessed 2 September 2018 1, 24.

⁶⁹ Petroleum Act Cap P10 Laws of the Federation of Nigeria 2010, See s 2 (1) (a), (b), (c), (2) and (3). By virtue of the powers of the Minister for petroleum to make regulations

⁷⁰ National Environmental Standards Regulatory and Enforcement Agency (NESREA) Act S 7 (1).

⁷¹ European Commission 2018 (n 68).

⁷² S Stafford, 'Voluntary self-policing and the US Audit Policy' in L Paddock, DL Markell and NS Bryner (eds), *Compliance and Enforcement of International Law* (5th edn, Edward Elgar Publishing 2016) 21.

⁷³ *ibid.*

⁷⁴ *ibid* 22.

⁷⁵ International Network for Environmental Compliance and Enforcement, *Principles of environmental compliance and enforcement handbook* (C Wasserman and J Gerardu eds, International Network for Environmental Compliance and Enforcement 2009) 134, 5.

⁷⁶ *ibid.*

⁷⁷ *Ibid* 37.

⁷⁸ *ibid* 38.

⁷⁹ *ibid* 39.

⁸⁰ National Oil Spill Detection Response Agency (NOSDRA) Act S 7 (b).

⁸¹ Iannuzzi (n 63) 5.

obligations that are applicable. *Second*, to monitor the impact of regulated entities on the environment to determine whether further regulatory effort is required (including more inspections, notices or permit variations) to secure compliance with environmental legal requirements.⁸²

Regulatory agencies and Non-compliance

Non-compliance includes a failure to implement substantive obligations such as reduction of Green House Gases, or a failure to fulfil procedural requirements such as carrying out an environmental impact assessment preparatory to a project or to fulfil institutional obligation such as filing a report with an international organisation. Non-compliance occurs when a regulated entity fails to meet one or more of these obligations.⁸³ Generally, non-compliance occurs for different reasons including lack of institutional, financial or human resources and knowledge of how obligations are construed.⁸⁴

On the part of the regulated entity, however, non-compliance may happen for different reasons such as confusion as to the level of existing intergovernmental relationship, poor understanding of the rules and lack of receptibility and investment, opportunism, criminality and corruption, weak enforcement of environmental laws and lack of awareness of existing environmental laws.⁸⁵ Even when funding is available, local authorities sometimes lack human resources and know-how for compliance. Inadequate knowledge and access to data or unreliable data cause implementation problems in many regulated entities. This is further complicated by weak compliance assurance mechanisms such as enforcement mechanisms and compliance monitoring through effective and proportionate sanctions. Non-compliance raises challenges of implementation, enforcement and conflict resolution.⁸⁶

While it has been noted that regulatory excellence is attainable, where appropriate regulatory strategies are applied by excellent regulators, it is argued that regulatory excellence in itself has no uniform definition.⁸⁷ Therefore, scholars have had to look at the attributes of an excellent regulator to distil the definition of regulatory excellence. For example, Metzenbaum and Vasisht noted that an excellent regulator is an adequately funded regulator that wisely manages its resources and effectively navigates its external

relationships to act even under difficult circumstances to further its mission.⁸⁸

Regulatory agencies especially in Nigeria, appear to be powerless in the face of non-compliance for diverse reasons such as ineffective coordination among local, regional and national authorities, lack of administrative and human resources capacity and insufficient funding.⁸⁹ These prevent the agencies from preparing and implementing investment projects and can be an obstacle to the proper implementation of environmental laws. The realisation that most environmental pollution acts are irreversible and the laws regulating such acts have not successfully catered to the total elimination of inimical operational practices, should underpin the contemporary tilt of environmental studies and environmental law towards a stronger insistence on compliance with environmental regulations and global best practices in any activity that is likely to impact the human and natural environment.

The rapid development that characterised the industrial revolution brought about the awareness of the global impact of environmental pollution. This awareness necessitated the national, regional, international and global quest for a more environmentally friendly existence by the enactment of laws, bilateral and multilateral agreements, conventions which culminated in declarations.⁹⁰ Remedies that were developed along the lines of common law and equity, unfortunately, only helped the polluting parties to persist as long as they met their legal obligations. However, experience has shown that even in the event of a successful negotiation or litigation, obeyed court orders and implemented remedies, the damage to the environment cannot be easily reversed if at all.⁹¹ Consequently, the underlying problems faced by claimants in developing countries like Nigeria remains unresolved.⁹²

Conclusion

While it is conceded that environmental pollution is now a global concern, it is also a fact that the problem is worse in some nations than in others.⁹³ Nothing can be truer than Barry Commoner's assertion that "*Environmental pollution*

⁸² C Theron, *Sustainability in Practice: Managing Compliance with Environmental and Human Rights Law in Organisations Sustainability in Practice* (Institute of Environmental Management and Assessment 2018) 222, 41.

⁸³ T Higdon and D Zaelke, 'The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development' (2006) 3(5) *Journal for European Environmental & Planning Law* 376, 378.

⁸⁴ P Sands and others, *Principles of International Environmental Law* (Third Edition edn, Cambridge University Press 2012) 926, 135.

⁸⁵ PA Ogar and others, 'An Assessment of the Role of Enforcement in Promotion of Compliance to Environmental Standards in Ibadan Metropolis, Oyo State, Nigeria' (2020) 8(7) *Global Scientific Journals* 1741, 1743.

⁸⁶ Sands and others (n 84) 172.

⁸⁷ C Nwapi, 'The Achievement of Regulatory Excellence in the Oil and Gas Industry in Nigeria: The 2017 National Oil and Gas Policy' (2019) *Journal of Energy and Natural Resources Law* 91, 99.

⁸⁸ SH Metzenbaum and G Vasisht, 'What Makes a Regulator Excellent? Mission, Funding, Information, and Judgment' in C Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press 2017) 145, 145.

⁸⁹ AO Noah and others, 'Corporate Environmental Accountability in Nigeria: An Example of Regulatory Failure and Regulatory Capture' (2020) 11(1) *Journal of Accounting in Emerging Economies* 70, 85.

⁹⁰ Some of such declarations are binding and some are not.

⁹¹ Example of this is the Ogoni land clean-up in Nigeria. while the clean-up exercise is yet to commence, the environmental degradation is still on-going because the delay in the commencement of the process further worsens the condition of the polluted sites.

⁹² S Varvastian and F Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*' (2020) 9(2) *Transnational Environmental Law* 323, 345.

⁹³ AO Fayiga, MO Ipinmoroti and T Chirenje, 'Environmental Pollution in Africa' (2018) 20 (1) *Environmental Development and Sustainability* 41, 42.

is an incurable disease; it can only be prevented."⁹⁴ In a developing country such as Nigeria, while the various economic sectors are still developing, the resulting environmental damage has progressed rapidly. However, Nigeria appears to be running behind on environmental compliance and enforcement. The compliance conversation in this article is long overdue in Nigeria and deserves urgent action because when the appropriate compliance actions are taken, it would improve the environmental practices of the operators of the petroleum sector. For instance, operational practices not practised in the operator's home country should not be allowed in its host countries because remediation may never be enough to cure the ills of environmental pollution.

In holding this overdue compliance conversation in Nigeria, petroleum sector operators should also not be left on their own in the drive for compliance, such operators should be encouraged to comply by highlighting alternative compliance strategies and incorporating same into compliance plans. Environmental pollution such as that resulting from petroleum sector activities can be avoided if all stakeholders play their role in understanding the need to respect nature and the environment.⁹⁵ Furthermore, regulations will not work if they are not adequately enforced. Even the best-fashioned regulations are only as good as the enforcement programmes established to implement them.⁹⁶ Therefore, while enforcement is vital, it should not be the immediate response to non-compliance, rather it should be the last resort when the defaulter becomes recalcitrant.

⁹⁴ B Commoner, 'What is yet to be done' (1998) 8(1) *Journal of Environmental and Occupational Health* 75.

⁹⁵ Ismail (n 22) 5.

⁹⁶ A Heyes, 'Implementing Environmental Regulation: Enforcement and Compliance' (2000) 17(2) *Journal of Regulatory Economics* 107, 125.