

The International Comparative Legal Guide to:

# Environment Law 2007

A practical insight to cross-border Environment Law



Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer, with contributions from:

Abreu Advogados  
 Advokatfirmaet Haavind Vislie AS  
 Aluko & Oyebode  
 Attorneys at law Foigt & partners / Regija Borenus  
 Baker & McKenzie  
 Basham, Ringe y Correa, S.C.  
 Bonn Schmitt Steichen  
 Bowman Gilfillan  
 Castrén & Snellman Attorneys Ltd.  
 Clayton Utz  
 CMS Zagreb  
 DEDÁK & Partners  
 DLA Nordic  
 Ecofys UK Ltd.  
 Estudio Ferrero Abogados  
 Foley & Lardner LLP

Ganado & Associates  
 Golder Associates  
 Havel & Holásek, Attorneys-at-Law  
 Huglo Lepage & Associés Conseil  
 Kim & Chang  
 Kinanis - Pyrgou + Co.  
 Lambadarios Law Offices  
 Liepa, Skopina /BORENIUS  
 M.V. Kini & Co.  
 Macias Gómez & Asociados  
 Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga  
 Mayer, Brown, Rowe & Maw LLP  
 McCann FitzGerald  
 Nishimura & Partners  
 Pachiú & Associates  
 Pekin & Pekin

Pepeliaev, Goltsblat & Partners  
 Pestalozzi Lachenal Patry  
 Raidla & Partners  
 Rajah & Tann  
 Rattagan Macchiavello Arocena & Peña Robirosa  
 Selih & Partners  
 Semple Fraser LLP  
 Slaughter and May  
 Soltysinski Kawecki & Szlezak  
 Squire, Sanders & Dempsey S.C.  
 Steptoe & Johnson LLP  
 Stibbe  
 University College London  
 Vinge  
 Willms & Shier Environmental Lawyers LLP  
 Ziv Lev Law Offices

# Nigeria

Oghogho Makinde



Temitayo Adegoke



## Aluko & Oyebode

### 1 Environmental Policy and its Enforcement

#### 1.1 What is the basis of environmental policy in Nigeria and which agencies/bodies administer and enforce environmental law?

The basis of environmental policy in Nigeria is contained in the 1999 Constitution of the Federal Republic of Nigeria. Pursuant to section 20 of the Constitution, the State is empowered to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. In addition to this, section 2 of the Environmental Impact Assessment Act of 1992 (EIA Act) provides that the public or private sector of the economy shall not undertake or embark on or authorise projects or activities without prior consideration of the effect on the environment.

The Federal Government of Nigeria has promulgated various laws and Regulations to safeguard the Nigerian environment. These include:

1. Federal Environmental Protection Agency Act of 1988 (FEPA Act). The following Regulations were made pursuant to the FEPA Act:
  - (i) National Environmental Protection (Effluent Limitation) Regulations:
    - i. National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations; and
    - ii. National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations.
2. Environmental Impact Assessment Act of 1992 (EIA Act).
3. Harmful Wastes (Special Criminal Provisions etc.) Act of 1988 (Harmful Wastes Act).

The Federal Ministry of Environment (FME) administers and enforces environmental laws in Nigeria. It took over this function in 1999 from the Federal Environmental Protection Agency (FEPA), which was created under the FEPA Act. FEPA was absorbed and its functions taken over by the FME in 1999.

The Federal Ministry of Environment has published several guidelines for the administration of the FEPA and EIA Acts and procedures for evaluating environmental impact assessment reports (EIA Reports).

Other regulatory agencies with oversight over specific industries have also issued guidelines to regulate the impact of such industries on the environment such as the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002, published by the Department of Petroleum Resources (DPR).

However, pursuant to the FEPA Act, each State and local

government in the country may set up its own environmental protection body for the protection and improvement of the environment within the State. Each State is also empowered to make laws to protect the environment within its jurisdiction. All the States have environmental agencies and State laws; e.g. Abuja, the Federal Capital Territory has issued the Abuja Environmental Protection Board (Solid Waste Control/Environmental Monitoring) Regulations 2005 (“the Abuja Environmental Protection Board Regulations”) which principally governs solid waste control in Abuja. In Lagos State, the Lagos State Environmental Protection Agency Law, was enacted to establish the Lagos State Environmental Protection Agency (LASEPA). LASEPA’s functions include monitoring and controlling the disposal of waste in Lagos State and advising the State Government on all environmental management policies. Lagos State has also enacted the Environmental Pollution Control Law, to provide for the control of pollution and protection of the environment from abuse due to poor waste management. Akwa Ibom State, has enacted the Environmental Protection and Waste Management Agency Law, which established the Environmental Protection and Waste Management Agency. This Agency is charged with responsibilities which include identifying and proffering solutions to environmental protection problems in Akwa Ibom, and monitoring and enforcing environmental protection standards and regulations.

#### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The EIA Act was promulgated principally to enable the prior consideration of environmental impact assessment of public or private projects. Any person planning a project/activity which may have an impact on the environment is statutorily required to prepare an EIA Report, and the Report must set out the potential impact of the activity on the environment and plans for preventing/mitigating the same, as well as clean up plans. All such Reports must be approved by the FME. Attached to the EIA Act is a schedule of activities and industries for which environmental impact assessments are mandatory. These include Agriculture, Airport, Drainage and Irrigation, Land Reclamation, Fisheries, Forestry, Housing, Industry, Infrastructure, Ports, Mining, Petroleum, Power Generation and Transmission, Quarries, Railways, Transportation, Resort and Recreational Development, Waste Treatment and Disposal, and Water Supply.

Any person who fails to comply with the provisions of the EIA Act commits an offence and is liable on conviction, in the case of an individual, to a fine or to a term of imprisonment for up to five years; and fines are also imposed on guilty firms or corporations.

Furthermore, the FEPA Act empowers the FME to require the production for examination of any licence or permit granted to any person, to enter and search any land or building, and to arrest any person whom they have reason to believe has violated any environmental regulation.

The approach of regulatory agencies is the prevention of environmental damages, the regulation of potentially harmful activities and the punishment of wilful harmful damage whenever this occurs. The environmental agencies also adopt the approach of engaging individuals and communities at risk of potential environmental damage in dialogue. The EIA approval process adopted by the FME involves a system of public hearings during the EIA evaluation process and interested members of the public are invited to such hearings.

The respective State environmental agencies in Nigeria, e.g. the Lagos State Environmental Protection Agency (LASEPA), also take the same approach.

### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Public authorities are statutorily required to inform the public of environment-related issues. The FEPA Act requires FEPA to collect and make available through publications and other appropriate means, and in cooperation with public or private organisations, information pertaining to pollution and environmental protection regulations.

The EIA Act provides for the maintenance of a Public Registry for the purpose of facilitating public access to records relating to environmental assessments. The Lagos State Environmental Pollution Control Law requires the Ministry of Environment and Physical Planning to educate the general public on the types of disposal methods acceptable by the State Government for domestic and Industrial wastes. In addition under the LASEPA law, LASEPA is required to carry out public enlightenment exercises and educate the public on methods of environmental sanitation and management.

The FME also issues guidelines from time to time for environmental impact assessments for different industries and it also has publications which inform the public of the prohibition of environmental pollution. Furthermore, members of the public and persons requiring clarifications on environmental issues can visit the offices of the FME or the relevant State environmental agency for environment-related information.

As stated in question 1.2 above public hearings to which interested members of the public are invited is a key part of the approval process for EIA reports by the relevant agencies.

## 2 Environmental Permits

### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

The different pieces of legislation on the protection of the environment contain provisions for the issuance of environmental permits. Such permits are required for all potentially environmentally sensitive activities and are typically granted by the FME and the relevant State agencies. Specific legislation on permits include the Radioactive Waste Management Regulations

2006 which provides that any person generating or managing radioactive waste must apply for and obtain a permit from the Nigerian Nuclear Regulatory Authority; the FEPA Act and the regulations made thereunder.

The *National Environment Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations* made pursuant to the FEPA Act provide that a permit will be required:

- (i) for storage, treatment and transportation of harmful toxic waste within Nigeria;
- (ii) where effluents with constituents beyond permissible limits will be discharged into public drains, rivers, lakes, sea, or as an underground injection;
- (iii) when oil in any form shall be discharged into public drains, rivers, lakes, sea, or as an underground injection; and
- (iv) for an industry or a facility with a new point source of pollution or a new process line with a new point source. Such an industry or facility shall apply to the agency for a discharge permit.

Some permits are industry specific; e.g. in the oil and gas industry, the Directorate of Petroleum Resources (DPR) also regulates environment issues, and operators in the industry are required to obtain the necessary permits.

The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002, published by the DPR provides that the Director of Petroleum Resources shall issue permits for all aspects of oil-related effluent discharges from point sources (gaseous, liquid and solid), and oil-related project development.

The EGASPIN also provides that environmental permits shall be issued for existing and new sources of effluent emission. All projects in the oil and gas industry must be issued with the requisite environmental permits, and failure to procure the same may lead to penalties.

Relevant state permits are also required i.e. pursuant to the Abuja Environmental Protection Board Act (Solid Waste Control /environmental Monitoring Regulations 2005), all sponsors of major development projects in Abuja must submit to the Abuja Environmental Protection Board (“the Board”) details of the project i.e. its nature and scope, the site and area of the project, the activities to be carried out and any other relevant information. Upon submission, the sponsor is issued an Impact Clearance Permit by the Board. In Lagos State, the LASEPA law requires any person manufacturing or storing chemicals, lubricants, petroleum products, cement and other material used in building, radioactive materials, or gases in residential or commercial areas to obtain a permit.

The permits are typically not transferable as they are project specific. Where such permits are however transferable the consent of the regulator will be required prior to any such transfer.

### 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Any entity or individual affected by a decision of an environmental regulator has a right of appeal under the relevant laws and regulations. The EGASPIN which is applicable in the oil and gas industry provides that an aggrieved party shall be free to seek remedy at courts/tribunals. The FEPA Act allows an aggrieved person to bring an action in the Federal High Court against the FME for any act done in pursuance or execution of any environmental law or of any public duties.

### 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Nigerian law makes it mandatory for EIAs and environmental audits to be carried out by polluting industries. The practice is that an EIA report must be prepared in respect of all major projects and approved by the FME and the environmental agency of the State in Nigeria in which the project is located. In addition, for oil and gas projects, the requisite environmental permit must be granted by the DPR.

Some activities have been classified as mandatory study activities under the EIA Act. They include Agriculture, Airport, Drainage and Irrigation, Land Reclamation, Fisheries, Forestry, Housing, Industry, Infrastructure, Ports, Mining, Petroleum, Power Generation and Transmission, Quarries, Railways, Transportation, Resort and Recreational Development, Waste Treatment and Disposal, and Water Supply. The effect of this is that no Federal, State or Local Government or any of their agencies shall exercise any power or perform any duty or functions that would permit the project to be carried out in whole or in part until the FME has approved the EIA for such a project.

Other legislation which requires EIAs is the Abuja Environmental Protection Board Act, which empowers the Board to request an EIA for a development project and the sponsor must submit reports to the Board from time to time. The Akwa Ibom State Environmental Protection and Waste Management Agency Act (EPWMA) empowers the Agency to conduct pre and post EIAs of projects and make recommendations for corrective measures.

The EGASPIN sets out a list of activities in the oil and gas sector that require environmental assessment. They include all seismic operations; oil and gas field developments onshore, nearshore, offshore and deepshore; hydrocarbon processing facilities; construction of waste treatment; and/or disposal facilities.

After project completion, regular environmental audits must also be carried out. The FME requires an environmental audit to be carried out every 2-3 years. The DPR also carries out regular environmental audits of oil and gas installations, stations, depots, etc.

### 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Environmental regulators have wide ranging powers in the event of violation of environmental permits and environmental laws in general. The FEPA Act gives authorised officers of the FME powers to:

- i. require to be produced, then examine and take copies of any licence or permit, certificate or document required under the Act or regulations made thereunder;
- ii. enter and search any land, building, vehicle, tent, vessel, floating craft or any inland water;
- iii. cause to be arrested any person whom they have reason to believe has committed an offence against the Act or any regulations made thereunder; and
- iv. seize any item or substance which they have reason to believe has been used in the commission of such offence or in respect of which the offence has been committed.

The LASEPA Law also contains similar provisions authorising officers to search and seize offending items and to arrest offenders. Some examples of offences under the LASEPA Law include the discharge of raw untreated human waste into any public drain, gorge, or any land in the State, and the discharge of any form of oil,

grease, spent oil including trade waste brought about in the course of manufacturing into any public drain, water-course, water gorge and road verge.

Similar provisions are contained in the Akwa Ibom State EPWMA Act. The EPWMA Act empowers inspectors to inspect premises and take samples of waste generated on premises. The EPWMA Act also provides that any person who commits an offence under the Act shall be arraigned before the Environmental Sanitation Court. The Environmental Sanitation Court was established pursuant to the EPWMA Act to try offending individuals or organisations. Offences under the EPWMA Act include burying or dumping expired drugs or chemicals without a permit, using gamalin 20 or any herbicide, insecticide or other chemicals to kill fishes or any other aquatic life in rivers, lakes and streams.

Section 11 of the Harmful Wastes Act empowers the Minister charged with responsibility for works and housing to seal up an area or site used or being used for the purpose of depositing or dumping harmful waste.

Pursuant to section 37 of the Petroleum (Drilling and Production) Regulations 1969 (Drilling Regulations) the holder of an Oil Mining Lease (OML) or an Oil Prospecting License (OPL) is required to prevent the escape of petroleum into any water, well, spring, stream river, lake reservoir, estuary or harbour. The Drilling Regulations further authorises inspectors to examine the premises of the holder of the OML or OPL to ensure that such persons comply with the Drilling Regulations. Any person who fails to comply with the provisions of the Drilling Regulations may be prosecuted in court.

The DPR also has powers to seal up premises, seize offending substances, impose fines and require the clean up of environmental damage. Violators risk fines and in certain cases, a shutdown of the polluting/offending facility until there is compliance.

## 3 Waste

### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The relevant legislation defines “waste” and refers to categories of waste. The LASEPA Law defines waste to include “industrial, solid, liquid, gaseous gases containing substances such as sulphur dioxide, oxides or nitrogen, hydrogen-sulphide, carbon-monoxide, ammonia, chlorine, smoke and metallic dusts and particles, oil organic vapours, corrosive, reagent, flammable liquid solid, poison, poly-chloringhed hiphenlys, dyncyanide, methyl-melamine, ethylacetate, toxic substance, cement waste etc.”. Under the Harmful Waste Act, “harmful waste” is defined “to mean any injurious, poisonous, toxic or waste-emitting radioactive substance if the waste is in such quantity, whether with any other consignment of the same or of different substance, as to subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health; and the fact that the harmful waste is placed in a container shall not by itself be taken to exclude any risk which might be expected to arise from the harmful waste”.

Certain categories of waste involve additional duties and controls. Poisonous, toxic or radioactive waste is treated differently from household or industrial waste or effluents that are non-toxic in nature. Under the Nigerian Radioactive Waste Management Regulations 2006 radioactive waste which does not qualify for discharge or release to the environment shall be disposed of in a near surface repository to be established by the government and licensed by the Nigerian Nuclear Regulatory Authority. In addition to this, radioactive waste must be categorised and kept in suitable

containers with visible labels indicating the nature of waste generated, the date of waste generation, the waste category and other relevant information. The more dangerous or hazardous the waste is, the higher the level of control needed for its storage, disposal and treatment.

### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The laws allow the storage or disposal of waste on site subject to the issuance of relevant permits. Regulation 10 of the *National Environment Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations* made pursuant to the FEPA Act provides that no person shall engage in the storage, treatment or transportation of harmful toxic waste without a permit issued by FEPA. Where harmful toxic waste is produced on-site, it may only be stored or disposed on-site where a permit has been issued to the producer of such waste.

Where it is environmentally safe to do so, solid waste may be stored or disposed of on-site, subject to the issuance of the requisite permit - Regulation 16 of the *National Environment Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations*.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Producers of waste may retain residual liability, particularly where a transferee or person engaged to dispose of the same absconds. If the regulator is able to trace the waste back to the producer, it would be liable for the clean up.

The FEPA Act provides that the collection, treatment, transportation and final disposal of waste shall be the responsibility of the industry or facility generating the waste.

Regulation 11 of the *National Environment Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations* provides that the collection, treatment, transportation and **final disposal of waste** shall be the responsibility of the industry or facility generating the waste. The ultimate responsibility lies with the producer, as under Nigerian law, the “polluter pays” principle applies.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The law places the responsibility for the take-back or recovery of waste on the waste producer.

The Nigerian Radioactive Waste Management Regulations 2006 provides that the primary responsibility for the safe management of radioactive waste lies with the waste generator and the waste generator shall take all necessary actions to ensure the safety of radioactive waste unless the responsibility has been transferred to another person or organisation approved by the Nigerian Nuclear Regulatory Authority. The Regulations further provide that the waste generator shall be responsible for collection, characterisation and temporary storage of radioactive waste arising from his activities and discharge of exempt waste.

EGASPIN provides that as much as possible, all the reusable components of hazardous wastes should be recovered by using the best practicable technology currently available. The *National Environmental Protection (Management of Solid and Hazardous*

*Wastes) Regulations* made pursuant to the FEPA Act provide that waste should be recovered at the point of generation, where practicable.

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

The FEPA Act provides that a person who breaches the provisions of the Act commits an offence and shall on conviction be liable to a fine, or imprisonment, or both. The FEPA Act also provides that where there has been a discharge of any hazardous substance in violation of environmental laws/permits, the person responsible for the discharge will bear the liability of the costs of removal and clean up.

The Harmful Wastes Act provides that any person found guilty of purchasing, selling, importing, transporting, depositing or storing harmful waste shall on conviction be sentenced to imprisonment for life.

A typical defence is that the act (e.g. discharge of hazardous substance into the air, or upon the land and the waters of Nigeria or at the shorelines) was done within the permissible limit or was authorised under any law in force in Nigeria.

Another defence under the law is that the breach of the environmental law or any permit given thereunder was caused solely by a natural disaster or an act of war or sabotage and as such, the owner or occupier of the facility would seek to avoid liability on this ground.

Ignorance of a breach of environmental law is typically not a defence to an environmental offence. Section 25(9) of the Environmental Pollution Control Law of Lagos State provides that it shall not be a defence for the owner of any land on which waste is buried or dumped to state that the offence was committed without his knowledge.

### 4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

An operator would typically not be liable for a polluting activity which is within the limits of any environmental permit granted to it, provided that such activity is strictly in compliance with the terms and conditions of the relevant permit.

The EPWMA Act provides that no person is allowed to discharge into any public drain, water course, or roads verge any form of oil, grease, spent oil brought about in the course of manufacturing or other type of business without the written permission of the Agency. The operator will be liable for any discharge outside the limit of the permit which is renewable annually.

### 4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Directors and officers may in certain circumstances attract personal liability for environmental wrongdoing. Under the FEPA Act, directors and officers of a company who were in charge of or responsible to the company for the conduct of the business of the company at the time the environmental wrongdoing was committed

shall be deemed to be guilty of an offence and shall be liable to be prosecuted and punished, usually by payment of a fine or imprisonment.

The EPWMA Act specifically provides that where an offence is committed with the consent or connivance of or attributed to any neglect or omission on the part of the director, manager, secretary or other similar officer of the company such person shall be liable on conviction to a maximum of five years imprisonment without an option of a fine.

The only defence open to such directors and officers is that the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of such offence.

Directors and officers are typically able to obtain the necessary indemnifications from the company with regard to liabilities arising in the course of business, including environmental pollution. It is also possible for companies to take out insurances protecting their officers, employees and directors from potential personal liability arising in the course of operations.

Under the provisions of the Companies and Allied Matters Act of 1990 (CAMA), an officer may be indemnified in respect of anything done or omitted to be done in the course of the company's operations, if there is a subsisting provision (whether contained in the articles of the company or in any contract with the company) to this effect.

#### 4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

There are different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other. A shareholder of a company would typically not be personally liable for environmental damage or other liabilities of a company, under the principle of limited liability. A shareholder is liable to the extent of his shareholding in the company, unless he is proved to have been aware of the environmental breach and is involved in the offending acts. Thus, a shareholder who has purchased shares in a company that may have environmental liabilities arising from its operations would not be personally liable for any environmental damage arising from the company's operations. Nigerian law places liability on the directors and officers of a company for environmental damage created by the company. The definition of officers of a company under CAMA does not include shareholders of the company.

An asset purchase, on the other hand, makes the purchaser an owner who may be held liable for any environmental liability. Under Nigerian law, environmental liability is based on the owner/occupier principle. Thus, the owner/occupier of premises where a polluting activity takes place is liable for the damage and will have the responsibility of cleaning up such pollution as well as paying any fines imposed. Such owner/occupier can only avoid liability if he is able to prove that the polluting activity took place prior to the asset purchase, in which case the actual producer of the waste will be liable, if he can be located.

#### 4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Lenders are typically not liable for environmental wrongdoing and/or remediation costs as they usually insert appropriate protective provisions in the relevant financing documents.

Lenders may become liable for environmental wrongdoing and/or

remediation costs where such lenders have exercised any step-in rights pursuant to the financing documents, and when they are in effective occupation of the polluting facility. Such lenders may be held liable for any environmental wrongdoing and/or remediation costs under the principle of occupier's/owner's liability. We are not aware of any instance where a lender is liable for environmental wrongdoing and/or remediation costs.

## 5 Contaminated Land

### 5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The approach to contamination of soil or groundwater is that the polluter pays the costs of clean up and may also be liable to fines or imprisonment. The person responsible for the contamination will be required to restore the soil and groundwater to appropriate safety levels.

The FEPA Act provides that any person who discharges hazardous substances into the air, upon the land or waters of Nigeria shall upon conviction be subject to a fine and/or imprisonment for a term not exceeding 10 years. If this offence is committed by a company, the company shall on conviction be liable to a fine. The FEPA Act also provides that unless the owner or operator of any vessel or onshore or offshore facility from which the hazardous substance is discharged can show that the discharge was caused by a natural disaster or an act of war or sabotage, the owner or occupier shall be subject to the cost of removal and restoration or compensation as the case may be.

The Akwa Ibom EPWMA Act provides that any person who allows toxic waste to be dumped in any land or water commits an offence and shall be liable on conviction to a maximum term of five years imprisonment. EGASPIN provides as follows:

- The Licensee/Lessee who is responsible for the generation of the waste shall be liable for any contamination associated with such waste.
- Such Licensee/Lessee shall bear all the costs associated with the investigation, remediation and monitoring, even when the same are conducted at the discretion of the Director, Petroleum Resources.
- Adequate compensation shall be paid appropriately by such Licensee/Lessee to the relevant community and landowners, in consultation with the local government(s) and the Director, Petroleum Resources

Under the Harmful Waste Act, where any damage (e.g. contamination of land or groundwater) is due to harmful waste, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage.

### 5.2 How is liability allocated where more than one person is responsible for the contamination?

Under the Harmful Waste Act, each of the persons responsible shall be deemed to have committed a crime. The liability of each such offender is several.

### 5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Regulators may require additional steps to be taken with regard to

an agreed programme of environmental remediation i.e. pursuant to an environmental audit and it is subsequently determined that additional action is required.

Third parties may also challenge an agreed programme of environmental remediation. Such interested third parties may file claims in the Court challenging any arrangements they perceive to be inadequate to restore the contaminated land.

**5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?**

A polluter can contractually transfer pollution liability to a purchaser. If the contract between the polluter and the purchaser says that all liability is transferred upon completion and no exceptions are made for contamination, a purchaser will be liable and will have no right of recourse to the previous owner. Nigerian law recognises the principle of 'buyer beware' and potential purchasers are deemed to have conducted proper due diligence prior to concluding asset purchase.

There is no general legal duty to disclose prior environmental pollution on any land or facility to a purchaser and a buyer who did not enquire about possible pollution during a due diligence exercise prior to purchase will be deemed to have liability for pollution whenever discovered unless indemnity for pollution was given by the previous owner. Lack of knowledge is no excuse.

However, a person may have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, the contamination, and the agreement between the parties did not fully transfer such obligations.

**5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?**

Under the law, the government has the authority to obtain monetary damages from a polluter for aesthetic harm to public assets. The FEPA Act requires a polluter to pay for the costs of removal of any such pollution, including any costs which may be incurred by any government body or agency in the restoration or replacement of damaged or destroyed natural resources.

The EPWMA Act requires a polluter to pay compensation to affected persons and the State for environmental damage caused by the offender.

## 6 Powers of Regulators

**6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?**

Nigerian environmental regulators have statutory powers to require the production of documents, take samples, conduct site inspection etc. in the course of carrying out their functions of preventing or investigating environmental damage.

The FEPA Act empowers the FME to require the production for examination of any licence or permit granted to any person, to enter and search any land or building to take samples, conduct site inspections, interview employees and to arrest any offender. Under

the Akwa Ibom EPWMA Act, Environmental Protection and Waste Management Inspectors are empowered to inspect environmental standards on premises during reasonable hours between 6:00 am and 6:00 pm. Similar provisions are contained in the LASEPA law.

## 7 Reporting / Disclosure Obligations

**7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?**

The law generally obligates anyone who discovers pollution on any site to report the same to the authorities.

Where pollution is found on a site or is discovered to be migrating off-site, there is a legal obligation to disclose this to an environmental regulator and to potentially affected third parties. Section 22(2)(a) of the FEPA Act provides that where there has been a discharge into the environment, the responsible party shall immediately give notice of the discharge to the FME and to any other relevant agencies.

The rule in *Rylands v. Fletcher* imposes liability for any damage that may be caused by pollution that has migrated to the site of a third party. The rule in *Rylands v. Fletcher* requires that the person who for his own purposes brings on his lands and collects and keeps there anything likely to cause damage if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape to the third party's property.

**7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?**

Nigerian law does not impose a general obligation to investigate land for contamination or any person save for the statutory obligations of the relevant regulators. Such an obligation however arises for a project which meets the requirements of environmental laws and requires an EIA. For such a project to be undertaken, the EIA report must cover results of land/soil investigations on the suitability of the site for the proposed project and examine the determined potential impact of the project.

Upon discovery of contamination and reporting of the same, the EIA Report would typically provide an action plan for mitigating the effects of the potential contamination.

**7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?**

There is no legal requirement on a seller to disclose environmental problems to a prospective purchaser. Under Nigerian law, the common law principle of 'buyer beware' is applicable, and the duty is on a purchaser to take all reasonable steps to protect itself by carrying out adequate due diligence prior to an asset purchase. However, a purchaser has a right to enquire about and obtain details of assets to be purchased. If such an enquiry is made, the seller has an obligation to provide full disclosure to the best of its knowledge. Failure to do so may lead to an action for fraudulent misrepresentation if his disclosures are subsequently found to be incorrect. A potential purchaser may engage experts to carry out environmental investigations and to request necessary indemnifications in the event that he suspects prior environmental pollution.

The same principle applies in mergers or takeover transactions. The potential purchaser must undertake necessary due diligence investigations in order to uncover any prior environmental pollution and make necessary enquiries on possible environmental damage from past activities.

## 8 General

- 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?**

It is possible to use an environmental indemnity to limit exposure for actual or potential environmentally-related liabilities. Parties may agree in their contractual arrangements on appropriate indemnifications for losses arising from prior pollution. This is very common in lending transactions where lenders seek to avoid liability for existing conditions on a project site which is being financed by them.

Making a payment to another person under an indemnity to cover losses incurred as a result of environmental damage would typically discharge the indemnifier's liability to the person indemnified unless further or additional pollution is uncovered. The indemnifier's potential liability is not discharged completely if further damage is discovered.

- 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?**

Companies typically do not reflect environmental liabilities on their balance sheets, as they are required to take out necessary insurance for all potential business risks. However where the potential environmental liability is immense, the details of the liability may be reflected on the accountant's notes which form part of the company's financial statement.

In Nigeria, a company may voluntarily be dissolved or wound up under the provisions of CAMA. CAMA however provides that the property of a company shall on its winding up be applied in satisfaction of its liabilities. Therefore, dissolution of a company cannot be a means of escaping environmental liabilities, as the property of such a company will be used to pay its liabilities. However an insolvent company may in certain circumstances be able to escape liability for environmental damage where its assets upon liquidation are insufficient to cover the cost of remediation. Shareholders, directors and officers may be personally liable for such damage if they were aware of the activities which caused the damage.

- 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?**

The principle of limited liability protects a shareholder from being held liable for the acts of the company. A shareholder will only be held liable for breaches of environmental law and/or pollution caused by the company to the extent that the shareholder is in charge of or was for the conduct of the company's business. Under Nigerian Law, there is no presumption that a subsidiary

(even a wholly-owned subsidiary) acts as the agent of its parent company. A subsidiary is a separate legal entity from its parent company. Its acts are not acts of the parent company and the parent company is not responsible for its acts or defaults, in the absence of specific provisions to that effect in a contract between them. Therefore, a parent company cannot be sued for pollution caused by a foreign subsidiary merely because it is a shareholder in the subsidiary. Such a parent must have been involved in management and/or been aware of the pollution activities.

- 8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?**

Nigerian law contains provisions to protect whistle-blowers who report or testify in environmental violation matters. Section 37 of the EIA Act provides that where specific, direct and substantial harm would be caused to a witness by the disclosure of evidence at a Review Panel, the hearing by the Review Panel shall not be in public; and where the Review Panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substantial harm to a witness, the evidence, documents or other things shall be privileged and shall not, without the authorisation of the witness, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things.

- 8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?**

We confirm that Nigerian law recognises class action by a group or a community of people for pursuing environmental claims. Such actions are fairly common in the oil and gas industry where communities claim damages and clean up for pollution of their lands, waters and general environment. In a recent case which involved Shell Petroleum Development Company the inhabitants of the community close to a major oil spillage filed a group action against Shell seeking damages of up to N60,000,000.00. The community won in the lower courts and the appellate court upheld the decision but reduced the damages awarded.

Nigerian courts have awarded special and general damages in actions for damages arising from environmental pollution. Such damages have been for the loss of fishing rights, pollution of drinking water, damage and hazards from pollution of the environment, general inconvenience, and miscellaneous losses.

The courts typically do not award exemplary damages in the claims brought before them. Exemplary damages may be awarded only in the following three circumstances:

- i. where the plaintiff has suffered oppressive, arbitrary or unconstitutional action by a servant of the government;
- ii. where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- iii. where statute so provides.

## 9 Emissions Trading and Climate Change

- 9.1 What emissions trading schemes are in operation in Nigeria and how is the emissions trading market developing there?**

There are no emissions trading schemes currently operational in Nigeria.

## 10 Asbestos

### 10.1 Is Nigeria likely to follow the experience of the US in terms of asbestos litigation?

There are no specific regulations at this time on the use of and likely effects of asbestos use locally. No such litigation proceedings have been brought to the courts at this time, to the best of our knowledge. Owing to prevalent use of asbestos for construction purposes in the past, such litigation may arise in future.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

There is no specific legislation in Nigeria regulating the duties of owners/occupiers of premises in relation to asbestos on site; however, to the extent that such asbestos constitutes an environmental hazard, such an owner/occupier will have to comply with the different environmental legislation and regulations on storage, treatment and disposal of potentially harmful material.



**Oghogho Makinde**

Aluko & Oyebo  
35, Moloney Street  
Lagos  
Nigeria

Tel: +234 1 260 0080 4  
Fax: +234 1 263 2249  
Email: oghogho.makinde@aluko-oyebo.net  
URL: www.alukooyebo.com

Oghogho attended the University of Benin, Benin City; she was admitted to the Nigerian Bar in 1989 and she obtained an LL.M from the University of Lagos in 1999. She joined the Firm of Aluko & Oyebo in 2000 and was admitted into the Partnership in 2003. She is a member of the Nigerian Bar Association and the International Bar Association. Oghogho is a core member of the Firm's Energy and Natural Resources, Corporate Law, and Banking and Finance teams, and heads the Business Advisory Unit of the Firm. She has over the years acquired extensive experience in project finance and corporate practice, and documentation for project finance including the financing of oil and gas operations, due diligence, insurance and complex commercial transactions. Oghogho also advises on environmental law, legal and regulatory compliance, issues in project finance in the oil and gas, infrastructure and other industries. She is currently advising on a N21 Billion Lagos Infrastructure Project for the design construction, rehabilitation of toll roads and bridges in Lagos State under a Public Private Partnership arrangement between the State Government and a group of private investors.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Nigeria?

Different types of environmental insurances are available for different sectors of the economy. A number of insurance companies in Nigeria provide cover for environmental claims under their 'all liability policy', which is a comprehensive insurance cover for all manner of liability. Environmental liability insurance plays a big role in Nigeria as lenders will typically not lend to any major project without the necessary insurances in place, especially environmental insurance for the project, health and safety insurance, etc. Although most insurance for environmental risks in the oil and gas sector is taken out offshore, Nigerian insurers are increasingly participating in the sector.

### 11.2 What is the environmental insurance claims experience in Nigeria?

Due to the large size of insurance claims and the huge sums involved, most of the environmental insurances for large projects are taken out with insurance companies offshore. Under the Insurance Act of 2004, the consent of the Commissioner for Insurance is required for such offshore insurance. Nigerian insurers are increasingly participating in the sector and the Government is encouraging this trend.



**Temitayo Adegoke**

Aluko & Oyebo  
35 Moloney Street  
Lagos  
Nigeria

Tel: +234 1 260 0080 4  
Fax: +234 1 263 2249  
Email: temitayo.adeoke@aluko-oyebo.net  
URL: www.alukooyebo.com

Temitayo Adegoke attended the University of Lagos; she was admitted to the Nigerian Bar in 2002 and she obtained an LL.M from King's College University of London in 2004. She is a member of the Nigerian Bar Association and the Chartered Institute of Arbitrators United Kingdom (Nigeria branch). She is an Associate of the Firm and one of the core members of the environmental law unit. Temitayo advises clients on environmental law as well as compliance issues under environmental regulations. She is also a member of the Firm's Corporate and Commercial Law, Business Advisory, Taxation and Energy and Natural Resources Units.

## ALUKO & OYEBODE

ALUKO & OYEBODE is one of the largest integrated law firms in Nigeria, providing a comprehensive range of specialist legal services to a highly diversified clientele, and is consistently described 'as a major commercial law firm involved in significant transactions'. Established in 1993, the Firm has seven Partners and a full complement of highly qualified professional and support staff.

**CORE AREAS OF SPECIALISATION:** Corporate & Commercial Practice, Company Law, Banking and Finance, Litigation and Arbitration, Environmental Law, Mergers and Acquisitions, Energy and Natural Resources, Project/Infrastructure Finance, Taxation, Telecommunications, Privatisation, Corporate Finance, Insolvency, Intellectual Property, Labour and Employment, Admiralty and Maritime Law.

**Lagos, Nigeria Office:** 35, Moloney Street, P.O. Box 2293 (Marina) Lagos

**Port Harcourt, Nigeria Office:** Plot 66, Ordinance Road, Trans Amadi Industrial Layout, Port-Harcourt Rivers State

**Abuja, Nigeria Office:** 43 Usuma Road, Maitama Abuja

**London Representative Office:** 9, Masons Yard, Duke Street St. James's, London SW1Y 6BU.