

LAW & ENVIRONMENT

Nigeria's new Environmental Enforcement Agency Act, 2007: Back to square one

I FEEL great making a debut on this page. It is hoped that, on regular basis, we would be able to share views on issues relating to the protection of our environment. For this week, our focus is the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 ("the Act") which has a commencement date of July 30, 2007. The Act provides for the establishment of the National Environmental Standards and Regulations Enforcement Agency ("the Agency") charged with responsibility for the protection and development of the environment in Nigeria, and for related matters. The Act which has a total of 38 sections, structured under 6 parts repealed the Federal Environmental Protection Agency Act of 1988 ("FEPA Act").

In the context of legal development, the Act is not so much of a momentous piece of legislation, rather, it is a belated response of the law to what was at a time a revolutionary change in the structure of environmental enforcement and regulation in Nigeria. It was pursuant to FEPA Act that the Federal Environmental Protection Agency ("the FEPA Agency") was established. Consequently, when the FEPA Agency was scrapped in 1999 and the Ministry of Environment assumed its functions, expectations were high that FEPA Act would be reviewed to reflect the new development and that in the course of such a review, provisions that were inarticulate in FEPA Act would become articulate in a succeeding legislation. For 8 years the na-

tion waited until the Act came into being in July, 2007.

The fundamental question is in what principal respects can it be said that the law has been changed? For a thorough understanding of those new things that would have to be learnt as against those that would have to be forgotten, it is apposite that we do an appraisal of the salient provisions of the Act.

Section 1 (2) (b) and (c) in a way similar to the practice under FEPA Act established the Agency to oversee enforcement of environmental standards, regulations, rules, laws, policies and guidelines as a body corporate with powers to sue and be sued in its name. As was the case with the FEPA Agency under FEPA Act, the newly established Agency also has a Governing Council. As opposed to 11 members which the former Governing Council had, the new Council consists of 12 members. No longer is the Secretary to the Government of the Federation of Nigeria the Chairman. The Chairman is now to be appointed by the President on the recommendation of the Minister. Other members are to be appointed by the Minister of Environment, and where applicable, on the recommendation of the body they represent. Although not expressly stated as was the case under FEPA Act, it is expected that the Minister in appointing the 3 members to represent public interest will have regard to the desirability of appointing persons who have experience of matters relevant to the functions of the Agency.

The principal objective of the

Agency as laid down in Section 2 is responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general. Clear from this provision is that the Agency shall be guided by the objective of achieving sustainability. This however is not absolute as it is made subject to other provisions of the Act. The implication of this qualification is that in the face of other provisions placing the Agency under a duty to have regard to particular considerations, such provisions will overrule the principal objective. Since the Act did not define sustainable development, the guide to definition remains to be found in such documents as the 1987 Brundtland Report.

As against the position under FEPA Act, the functions of the Agency and those of its Governing Council are now distinct. However, unlike the traditional approach when a Governing Council is structured largely as the policy-making body and the Agency its operating organ, the present Council is strictly responsible for the appointment, promotion and discipline of staff and only advise with regard to financial, operational and administrative matters. The Minister can, however, direct the Council to carry out other activities.

The Director-General of the Agency is to be appointed by the President on the recommendation of the Minister. He shall hold office for a term of 4 years renewable for another 4 years and no more. The fund of the Agency has been enlarged, and so also the areas in which the Agency can make regulations and set specifications and standards. In this regard, aside of traditional duties such as air quality, ozone protection, noise, water quality effluent limitations

and discharge of hazardous substances, there has now been added environmental sanitation, land resources and watershed quality.

The powers of Agency inspectors to enter premises for purpose of inspection and seizure have been retained, so also the powers of the Minister to prescribe regulations regarding removal method, financial responsibility of spillers, notice and reporting requirements.

The functions of the Agency as highlighted under Section 7, so also its powers to conduct public investigations on pollution and degradation of natural resources excepted investigations on oil spillage and excluded environmental regulations and standards in the oil and gas sector. The Agency's cooperation with other Government Agencies similarly excluded oil and gas related ones. The immediate conclusion from this is that it is aimed at allowing the Department of Petroleum Resources (DPR) to remain the only organ to have oversight of regulations in the oil and gas sector, and thus avoid jurisdictional overlap and conflict of duties. The problem with this conclusion, however, is that other provisions like sections 3 and 7(c) are indicative of some roles for the Agency in the oil and gas sector.

He confusion likely to be engendered by the conflicting interpretations to which the Act is subject certainly harbours potentially detrimental consequences for enforcement in the event of pollution caused by oil. If the Act is interpreted as not applicable to the oil and gas sector, the wider implication would be that its enlargement of 'court' to now include 'State High Court' will not extend to environmental matters in relation to oil and gas as this will still be governed by Section 251 (1)(n) of the 1999 Constitution. This will pose a serious problem



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for access to environmental justice.

Command and control regulation using the criminal law to enforce compliance still forms an intrinsic part of the new law. It is however, an irony that under Section 27 (2) and (3) the fine to which a natural person is liable is on the same footing as that of a corporate body.

Pre-action notice as construed under Nigerian law with its multitude of problems for environmental matters is still a part of the new law, while nothing by way of innovative reforms has been introduced to aid the involvement of ordinary citizens or public interest groups in the protection of the environment. Happily, the limitation of 12 months for commencement of Suit against the Agency or any of its employees which hitherto was a part of FEPA Act has now been discarded.

In conclusion, while it can be said that the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 is new, it is regrettably a long way from expectations. If Nigeria is to have a satisfactory partnership of requisite complementary roles in the protection of her environment, then, it must start to rethink the law.

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I WELCOME you to our law and equity column. In this column, we shall always try to proffer legal solutions and answers to problems and challenges that confront our readers.

You are advised to react to the issues raised on this page, and ask questions concerning any of your problems by sending mails or sms messages to me. The counsel shall as much as possible, try to give you the best available legal opinions in law and in equity at all times. Whereas I do not intend or desire to undertake the functions of your counsel, I shall endeavor

to offer you the best available legal or equitable first aid to solve your problems pending the intervention of your counsel. We shall not charge fees or consideration for the advice given on this page. It is all *pro bono*-services and strictly for your benefit as a reader of *The Nation* newspaper.

We also expect your reasoned, objective and constructive criticisms to the debates or issues raised in this column. Together, we all shall inform, educate and use the instrumentality of the law to resolve those problems that confront us in the pursuit of our various endeavours because, equity will not allow a wrong to lie without a remedy. "U bi jusibi remedium" wherever there is a right, there is a remedy.

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