A CRITIQUE OF THE ASSOCIATE GAS REINJECTION ACT

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Associated Gas Re-injection Act

CITATION

An Act to compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plans for implementation of gas re-injection.

COMMENCEMENT [28th September, 1979

Duty to submit preliminary programme for gas re-injection

1. Notwithstanding the provisions of regulation 42 of the Petroleum (Drilling and Production) Regulations made under the Petroleum Act, every company producing oil and gas in Nigeria, shall not later than 1 April, 1980 submit to the Minister a preliminary programme for-

(a) Schemes for the viable utilization of all associated gas produced from a field or groups of fields;

(b) Project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project

Duty to submit detailed plans for implementation of gas re-injection

2. (1) Not later than 1 October, 1980, every company producing oil and gas in Nigeria shall submit to the Minister detailed programmes and plans for either-

(a) The implementation of programmes relating to the re-injection of all produced associated gas; or

(b) Schemes for the viable utilization of all produced associated gas.

(2) The fact that some of the gas produced in association with oil has been earmarked for some alternative utilization shall not exempt compliance with section 1 of this Act and subsection (1) of this section.

Flaring of gas to cease

3. (1) Subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1 January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.

(2) Where the Minister is satisfied after 1 January, 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company engaged in the production of oil or gas-

(a) specifying such terms and conditions, as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields; or

(b) permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard cubic metre (SCM) of gas flared:

Provided that, any payment due under this paragraph shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the Federal Government by companies engaged in the production of oil.

Penalty

4. (1) Where any person commits an offence under section 3 of this Act, the person concerned shall forfeit the concessions granted to him in the particular field or fields in relation to which the offence was committed.

(2) In addition to the penalty specified in subsection (1) of this section, the Minister may order the withholding of all or part of any entitlements of any offending person towards the cost of completion or implementation of a desirable re-injection scheme, or the repair or restoration of any reservoir in the field in accordance with good oil-field practice.

Power to make regulations

5. The Minister may make regulations prescribing anything requiring to be prescribed for the purposes of this Act.

Act to apply in Exclusive Zone

6. The provisions of this Act shall apply to the Exclusive Zone as they apply to land as defined in section 1 of the Petroleum Act.

Interpretation

7. In this Act, unless the context otherwise requires-

"Exclusive Zone" has the same meaning assigned thereto in the Exclusive Economic Zone Act;

"Minister" means the Minister charged with responsibilities for matters relating to Petroleum

Short title

8. This Act may be cited as the Associated Gas Re-injection Act.

1.0 INTRODUCTION

The issue of gas flaring in Nigeria has become a topical one in view of the devastating effect gas flaring has in the socio-economic lives of the people in the affected areas. Historically, it is said that gas flaring is as old as oil production in Nigeria. Oil exploratory activities of oil companies in Nigeria have caused gas flaring resulting in loss of lives and properties in the affected communities where gas is flared.

There is no specific legal framework that prohibits gas flaring in Nigeria in spite of the environmental problems associated with it. The existing law that appears to regulate gas flaring in Nigeria is not effective as it does not completely prohibit gas flaring but only provide monetary penalties for continued flaring of gas by oil companies in Nigeria.

This paper examines the legal framework for gas flaring in Nigeria and further identifies the problems and critics of the Associated Gas Re-injection Act and made recommendations.

2.0 ASSOCIATED GAS RE-INJECTION ACT

Associated gas is the natural gas that emerges from oil wells (during the production process) and it is usually a mixture of methane and other hydrocarbons, such as ethane, butanes and pentanes, amongst others. For many years after the discovery of oil in commercial quantities in Nigeria, most of the associated gas is flared, with its attendant environmental consequences on the health of the people. The law regulating the incidence of gas flaring in Nigeria is the Associated Gas Re-Injection Act (hereinafter AGRA), which was enacted in September 1979. The purpose of this law was to compel oil and gas companies operating in Nigeria to submit their programmes for gas re-for injection and schedule for the implementation of gas re-injection.

The Associated Gas Re-injection Act 1979 (as amended) became the first anti-gas flaring regulatory framework in Nigeria.[1] The primary intent and purpose of the Act was to phase out gas flaring in Nigeria. The Associated Gas Re-injection Act 1979 (as amended) was the statutory response to the environmental impacts of gas flare. In its recital, it is stated to be an Act to compel every company producing oil and gas in Nigeria to submit preliminary programme for gas re-injections and detail plans for implementation of gas re-injection.

[1] Cap 26 LFN 1979

Section 1 of the Act[2] provides ; 'Notwithstanding the provisions of Regulation 42 of the Petroleum (Drilling and Production) Regulations made under the Petroleum Act, every company producing oil and gas in Nigeria, shall not later than 1 April, 1980 submit to the Minister a preliminary programme for:

(a) Schemes for the viable utilization of all associated gas produced from a field or groups of fields;

(b) Project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project'. The Act placed a duty on oil companies to submit detailed programmes and plans for implementation of gas re-injection not later than 1 October, 1980.

The Act also stipulated that no company should flare gas after the 1st day of 1984 without the written permission of the minister .A penalty of forfeiture of concessions and the minister's discretion to order the withholding of all or part of any entitlement of any offender is stipulated.[3]

The penalty under the Associated Gas Re-injection Act was seen as too severe by most stakeholders and hence there was failure to enforce this section. Lack of infrastructures for gas utilization and in ability of the government to contribute its share to the cost of building gas re-injection facilities based on the existing joint venture agreements with oil producing companies led to the failure of the associated Gas Re-injection Act of 1979.

b.) Permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the minister may from time to time prescribe for every 28.317 standard cubic meters (SCM) of gas flared Under the same Act, no company engaged in the production of oil or gas shall, after 1 January, 1984, flare gas produced in association with oil without the permission in writing of the Minister. The Minister is vested with the power to issue certificates to an oil company to continue to flare gas if such a company pays the sum prescribed by the Minister.

[2] AGRA 1979 LFN
[3] M.T,Ladan "overview of energy resources law in Nigeria"(2010) 4 NJIL P 130

3.0 CRITICISM OF THE ACT

Section 1 of the Act states that every firm producing oil and gas in Nigeria must submit to the Minister of Petroleum a preliminary programme encompassing– "(a) schemes for the viable utilisation of all associated gas produced from a field or groups of fields;

(b) project or projects to reinject all gas produced in association with oil but not utilised in an industrial project."

Under Section 2 of the AGRA oil and gas companies were obliged to submit to the Minister plans for gas re-injection by October 1, 1980 and the deadline for the cessation of gas flaring was January 1, 1984. Under Sections 3 and 4 of the AGRA, gas flaring is prohibited except with the consent of the Minister.

Also, under Section 3, any oil and gas company engaging in gas flaring without a certificate by the Minister is engaging in an unlawful activities and such a firm "shall forfeit the concession granted in the particular field."

Section 3 of the Act is very important as it appears to outlaw gas flaring in Nigeria. It states as follows:

1. Subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1st January, 1984 flare gas produced in association with oil without the permission in writing of the minister.

2. Where the minister is satisfied after 1st January, 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect in the production of oil or gas:

a). Specifying such terms and condition, as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields.

Academics have posited from available evidence that, at the end of 1984, no oil and gas Company or multinational firm has complied with the tenets of the aforementioned law. The oil companies argued that the major difficulty inherent in the AGRA was the lack of resources to build or construct re-injection plants within the stipulated timeframe. Thus, the deadline was shifted by a

year and about 55% of oil fields were exempted from participating in gas re-injection plans.[4] It can also be argued that there was a lack of will power on the part of the Nigerian to enforce the provisions of the AGRA due to the negative effects it would have on the nation's economy.[5] Thus, the economic interests of the oil multinational corporations supersede the health and general wellbeing of the government inhabitants of the Niger Delta who are the victims of gas flaring.

The Associated Gas Re-Injection Act has been criticized for not paying attention to very salient issues on gas re-injection. Apart from making provision for a feasibility report by oil companies interested in natural gas production, the Act made no mention anywhere about related penalties for gas flaring. Indirectly, it may not be out of place to conclude that the law does not make gas flaring illegal. This position in itself has been identified as one of the major weaknesses of the said Act.

Practical implementation of the law becomes problematic due to numerous problems, including the huge financial implications in gas re-injection and the lack of infrastructural facility. Accordingly, the deadline to end gas flaring was extended to 1st day of January 1985 resulting into the passage of the Associated Gas Re-injection (continued flaring of gas)Regulation. In January 1985, the Associated Gas Re-injection (Continued Flaring of Gas) Regulations (AGRA Regulation) were promulgated. These regulations are made pursuant to the powers of the Minister in Section 5 of the AGRA (which relates to the powers of the Minister in respect of the conditions wherein an oil company may continue the flaring of gas).

As noted by Oluduro and Oluduro, close to the end of 1984, evidence reveals that no oil company had complied with the provisions of the Associated Gas Re-Injection Act and no evidence indicated that the Minister had insisted that the oil companies complied with it.[6] The reason has been presumably attributed to 'adverse effects it could have on the nation's economy if its enforcement results in a halt to oil production operations. It has further been argued that the situation can be linked to national economic interest because if the gas flares are taken away the

[4] Ekhator, Eghosa Osa (2016) "Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation," *Annual Survey of International & Comparative Law*: Vol. 21: Iss. 1, Article 6.37

[5] M. Kassim-Momodu, *Gas Re-Injection and the Nigerian Oil Industry*, 6/7

[6] F.O Oluduro,and O.Oluduro,`Oil exploration and compliance with international standards:The case of double standards in Niger delta of Nigeria'(2015)37,JLPG P70

life wire of the nation's economy is extinguished and the nation cannot afford it. Rather than ensure the enforcement of the law, the Minister made the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations 1984 which provides for exemptions to the earlier general ban on flaring. Unfortunately, the monetary penalty for continued flaring of gas by oil companies under the Act is grossly inadequate and is preferred by the oil companies as opposed to complying with the phase-out of gas flaring.

Another problem with the Associated Gas Re-Injection Act was its failure to regulate clearly on the party or parties who ought to bear responsibility for gas re-injection costs. Because the law is silent on this, there are uncertainties about what can be referred to as the 'responsibility sharing formula'. Should the responsibility fall on the oil companies or the Nigerian National Petroleum Corporation (NNPC), or the Nigerian government? This is indecisive. Until such a time when this is resolved, the lacuna in this law will continue to lead to many more unresolved dilemmas.[7]

Furthermore, with respect to environmental rights issues, is the failure on the part of the Associated Gas Re-injection Act not to prohibit gas flaring a violation of the fundamental human rights (the right to life as guaranteed in international, regional and national laws[8] and the environmental rights of Nigerian citizens especially those living in the flare locations, most of which are in the Niger Delta Region? The answer is likely in the affirmative because in effect, it is arguable that, presently, there is no law protecting the environment against the impacts of gas flaring except judicial pronouncement that sought to outlaw gas flaring in Nigeria. In the celebrated case of *Gbemre v Shell PDC LTD &ORS* [9] the plaintiff Jonah Gbemre for himself and as representing Iweherekan community in Niger, sought to enforce their fundamental human right against Shell, Nigeria National Petroleum Corporation and the Attorney General of the Federation as defendants. In a declaratory claim, the plaintiffs alleged that the action of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities is a violation of their right to life and dignity under the 1999 constitution and supported by Articles 4,16, 24 of the African Charter on Human and people's rights. In addition, the plaintiff claimed a declaration that the provisions of sections 3(2)[10] a,b of the Associated Gas Re-injection Act and section 1 of

[7] Ibid
[8] Section 33 of the 1999 Constitution of the Federal Republic of Nigeria which states that every person has a right to life, and no one shall be deprived intentionally of his life.
[9] Unreported (Suit No FHC/B/CS/53/05 Federal High Court Benin Judicial Division 14th Nov. 2005
[10] AGRA 1985

the Associated Gas Re- Injection (Continued flaring of gas) Regulations under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicants rights aforesaid. Consequently, the Applicant prayed the court for an order of perpetual injunction restraining the respondents from further gas flaring in their community. In its judgment the Federal High Court held that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil expiration and production activities in the Applicant's community is a gross violation of the applicants' fundamental right to life including healthy environment and dignity of human person as enshrined in the constitution. The court further held that section 3(2)a and (b) of the Associated Gas Re-injection Act and Section 1 of the Associated Gas Re-injection (Continuing Flaring of Gas) Regulation are null and void for being inconsistent with the Applicants' rights to life and dignity of human person as enshrined in the constitution. The court finally made an order restraining the Respondents from further flaring of gas and ordered them to take immediate steps to stop the further flaring of gas in the Applicants' community. It was further ordered by the court that the Attorney General of the Federation should initiate the process for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-injection Act Regulations made thereunder.

Nonetheless, the regulations decided to specify precise sanctions for counties that breached this regulatory requirement. However there were no legal obligations under the regulations for the reduction of gas flaring before and after the submission of the feasibility study for gas utilization, the lapses in the regulation were therefore exploited by oil producing companies. In 1973 a petroleum amendment decree was approved in which associated gas could be taken and used without payments, this decree was meant to encourage harnessing of associated gas as associated gas could be taken without royal payment.

The penalty for not re-injecting associated gas was charged to as low fine in 1984[11] which made gas flaring a much cheaper options for companies to alternatives of marketing of re-injection .An oil company was quoted as stating that it was cheaper for it to flare gas at the cost of $1 million US Dollars cost $56 million US Dollars cost of switching from water to gas injection(flaring and

[11] Section 3(1) of the Gas Re-injection Act 1979

Regulation in Nigeria 2014).Although the fine was increased in 1990 and 1998,the amount remained significantly low compared to cost of alternatives.

According to Kachikwu[12]"the continuous flaring of associated gas, without long term plans for liquefaction and industrial application in an era of dwindling economic returns from crude oil has compelled Government to promulgate the associated gas re-injection act…all this laws are geared towards compelling oil companies, albeit by a penalty scheme to fund local liquefaction and utilization of gas rather than flare them"

After several amendments to the act regarding the gas flaring date the most recent of which is section 3(1) of the Associated Gas Re-injection Amendment Act 2010, which further specifies that gas flaring shall cease in 31st December 2012,the Act also provides that where the minister is satisfied after 1st January 2012 that gas flaring Re-injection is not appropriate or feasible in certain fields he may issue a certificate that such a company can continue to flare gas under certain conditions which the minister may impose.[13]

Furthermore the minister may permit such a company to continue to flare gas, if the company pays certain amount as penalty for every gas flared that is in breached of the probation of this section is visited by sanctions imposed by the minister.[14]

The problem with the above section is that, the Act provides for gas re-injection by companies and at the same time provides for exemptions and fines for continued gas flaring, it is a self defeating legislation, it cannot achieve zero gas flaring regime.[15]

The Nigerian oil and gas legislation on the conservation of the natural resources and prevention of waste regulation rely merely on safe and good oil filled practice as the standard for enforcement. This allows international oil companies to dictate applicable standards in the industries. Another major challenge to the effective regulations is the lack of autonomy and independence of the regulatory agencies.

[12] E.I Kachikwu"Legal issues in oil and gas industry"GRBL,Vol 2,No 9 August 1989 p35,cited by Otubu T,(2001) Gas Flaring and Air pollution law in Nigeria,3 OOULJ
[13] Section 3(2a) of the Act
[14] Section 3(2b) of the act
[15] Otubu T,(2001)Gas and air pollution control law in Nigeria,10 OOULJ,129.

The Associated Gas Re-Injection Act has been criticized for not paying attention to very salient issues on gas re-injection. Apart from making provision for a feasibility report by oil companies interested in natural gas production, the Act made no mention anywhere about related penalties for gas flaring. Indirectly, it may not be out of place to conclude that the law does not make gas flaring illegal. This position in itself has been identified as one of the major weaknesses of the said Act.

In January 1985, the Associated Gas Re-injection (Continued Flaring of Gas) Regulations (AGRA Regulation) were promulgated. These regulations are made pursuant to the powers of the Minister in Section 5 of the AGRA (which relates to the powers of the Minister in respect of the conditions wherein an oil company may continue the flaring of gas). Section 1 [16] of the AGRA Regulation regulates the issuance of certificates authorizing the continuation of gas flaring in particular fields when the following conditions are met:

(a) where more than seventy-five per cent of the produced gas is effectively utilized or conserved;
(b) where the produced gas contains more than fifteen per cent impurities, such as N2, H2S, C02, etc. which render the gas unsuitable for industrial purposes;
(c) where an on-going utilization program is interrupted by equipment failure: Provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
(d) where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM: Provided that the Gas to Oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in that field;
(e) where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.

Thus, it is arguable that gas flaring is allowed under Nigerian law because the Petroleum Minister can legally permit the continuation of gas flaring by oil multinationals if any of the aforementioned

[16] AGRA REGULATION 1985

conditions are met by oil companies. The regulations have emphasized economic benefits rather than ending the scourge of gas flaring in Nigeria. Furthermore, Kassim-Momodu[17] argues that "the effect of these regulations is the possible exemption of over 50% of the oil fields from the provisions of the Act." Also, the fines provided by the law against gas flaring are minimal and the government keeps shifting the gas flaring end date.

The Associated Gas Re-injection Act, which was intended to prohibit gas flaring as a measure for environmental protection as noted earlier, one striking feature of the Act is the permission given to oil companies to continue to flare gas on the payment of minimal fees. The Associated Gas Re-Injection (Amendment) Act[18] introduced a penalty of 2 (two) kobo per 1000 standard cubic feet (SCF) of gas flared at any place. This amount was increased to 50 (fifty) kobo per 1000 standard cubic feet of gas in 1990, and the amount was further increased to 10 (ten) Naira per 1000 standard cubic feet of gas in 1998.The amended law permits oil companies to continue flaring in particular field or fields, subject to payment of such sums as the minister may from time to time prescribe for every 28.317 standard cubic metre (scm) of flared gas[19]. It has been contended that the amount fixed is so small and cannot be a deterrent to oil companies, which are continuing with gas flaring Because of the paltry penalty prescribed by law, oil companies would rather pay such penalties for gas flaring than incur related costs in the re-injection of produced gas.

4.0 Section 3(2) of the AGRA ,also provide that "Where the minister is satisfied after 1st of January 1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field(s) he may issue a certificate in that respect specifying such terms and conditions for the continued flaring of gas in the particular field(s)".

The practical implementation of the above section becomes problematic due to numerous problems, including the huge financial implications in gas re-injection and the lack of infrastructural facility. Accordingly, the deadline to end gas flaring was extended to 1st day of January 1985 resulting into the passage of the Associated Gas Re-injection (continued Flaring of Gas) Re-injection which came into force on 1st

[17] M. Kassim-Momodu, *Gas Re-Injection and the Nigerian Oil Industry*, 6/7 69 (1986/1987).
[18] 39 Amended by Decree No. 7 of 1985
[19] U.Udok,E.Basey "Gas flaring in Nigeria:problems and prospects,2017,GJPLR,Vol 5,No 1,16-28

5.0 CONCLUSION

It is clear that that the law regulating the incidence of gas flaring in Nigeria is the Associated Gas Re-Injection Act (AGRA), which was enacted in September 1979. The purpose of this law was to compel oil and gas companies operating in Nigeria to submit their programmes for gas re- injection and schedule for the implementation of gas re-injection. Section 1 of the Act states that every firm producing oil and gas in Nigeria must submit to the Minister of Petroleum a preliminary programme encompassing– "(a) schemes for the viable utilization of all associated gas produced from al field or groups of fields; (b) project or projects to reinject all gas produced in association with oil but not utilized in an industrial project." Furthermore, under Section 2 of the AGRA oil and gas were obliged to submit to the Minister plans for gas re-injection by October 1, 1980 and the deadline for the cessation of gas flaring was January 1, 1984.

Under Sections 3 and 4 of the AGRA, gas flaring is prohibited except with the consent of the Minister. Also, under Section 3,any oil and gas company engaging in gas flaring without a certificate by the Minister is engaging in unlawful activities and such a firm "shall forfeit the concession granted in the particular field. It is evidence that, at the end of 1984, no oil and gas company or multinational firm has complied with the tenets of the aforementioned law. The oil companies argued that the major difficulty inherent in the AGRA was the lack of resources to build or construct re-injection plants within the stipulated timeframe. Thus, the deadline was shifted by a year and about 55% of oil fields were exempted from participating in gas re-injection plans.

It can also be argued that there was a lack of will power on the part of the Nigerian government to enforce the provisions of the AGRA due to the negative effects it would have on the nation's economy. Thus, the economic interests of the oil multinational corporations supersede the health and general wellbeing of the inhabitants of the Niger Delta who are the victims of gas flaring. The Act prohibits gas flaring and at the same time grants permission for continued flaring of gas by oil companies.

6.0 **RECOMMENDATION**

Firm commitment from the government is required to encourage gas utilization and flaring reduction with petroleum companies through introduction of fiscal incentives. Whilst gas flaring reduction requires substantial investments, flared natural gas can be converted into lucrative investments which will ultimately lead to a safer, conducive and healthier environment compared to the current situation which obtains in Nigeria especially in the Niger- Delta region of the country.

It is however recommended that there must be an amendment or repeal of the 1984 Associated Gas Re-injection (Continued Flaring of Gsas) Regulation whichever is more applicable.