

**PROHIBITION OF GAS FLARING BILL 2009: FROM  
LAMENTATION TO ACTION?, A PRESENTATION AT THE  
FORUM ON GAS FLARING ORGANISED BY SOCIAL ACTION  
AND HER PARTNERS AT BOLTON WHITE HOTELS ON  
30/09/2009.**

Bamidele Aturu Esq

"I am told that gas flaring is the largest contributor of green house gas to the atmosphere in sub-Saharan Africa; and we know the effect."I have been to so many places in the oil-producing areas and you really could pity the communities that live in that place because of the effects that goes on."Not that government has not been able to do anything about it, there has been government policies starting from Decree No. 99 of 1979, which was amended again in 1985."But those decrees which are eventually more like policies have not been backed up by serious legislations. More importantly, I think the government has never been able to develop a strong will to ensure the implementation of these basic policies and the result, of course, is like any other law, the operators take the easiest line of resistance, which is to maybe pay N2, or 1K or whatever and flaring so many feet of gas. More importantly, the penalty for any defaulter is too meagre for anybody to go the hard way of reducing gas flaring. Whatever it is, it is cheaper for the companies or the operators to flare gas and pay the penalty than to stop."<sup>1</sup>

- Senator David Mark, President Senate of Nigeria, 25, November 2008

### ***Introduction***

Gas flaring by oil companies in the Niger Delta constitutes one of the worst forms of environmental degradation. The practice has continued primarily due to the unwillingness on the part of government which acts as both regulator and partner to the oil companies in exploitation of crude oil. The Senate President, Senator David Mark, indirectly acknowledged the compromised position of the government in the lines quoted above. He identified three or so critical issues. First, the so-called laws on gas flaring are more like mere policies and not serious legislations. Second, government lacks the will to implement even the unserious laws; and third, the penalty is too meager making it cheaper for the oil companies or operators to flare gas and pay the meager penalty.

It is against the unacceptable environmental situation and governmental indifference or collusion on it that one must welcome any attempt to prohibit gas flaring in oil exploitation. The passing of the Prohibition of Gas Flaring Bill by the Senate of the Federal Republic of Nigeria on 2<sup>nd</sup> July

---

<sup>1</sup> Sufuyan Ojeifo, Nigeria: Mark-FG Lacks the Will to stop Gas Flaring, Thisday, 25 November, 2008

2009, to the extent that it shows recognition of the need for action to restrain the indiscriminate flaring of gas by the oil companies, deserves some attention.

In this short analysis of the Bill as passed, we attempt an examination of the provisions to see whether or not they would meet the concerns raised by communities and organizations as to the devastating and deleterious effects of mindless flaring of gas in Nigeria.

### ***Penalty for Gas Flaring***

Section 1 prohibits gas flaring, while section 5 criminalises the practice after 31<sup>st</sup> of December, 2010 and imposes on conviction payment of a penalty which shall not be less than the cost of gas in the international market. This provision is extremely ambiguous and may be more permissive of the reckless practice of gas flaring than the current penalty of \$3.50. What precisely is meant by 'the cost of gas'? Is it the cost of one scf or what? Is the defaulter liable to pay the penalty for the cost of the actual gas flared, and if so how would this be determined? This ambiguity makes nonsense of the provision that the penalty payable on the volume of gas flared shall be made public by the Minister and the operator. The problem here is that if the Bill does not offer any meaningful guideline to the Minister as to what is meant by the cost of gas, it is practically impossible for her to determine the penalty. In other words, the penalty is unascertainable as section 5 is worded. The Bill should be reworded to fix the penalty at the cost of the volume of gas flared. In other words, section 5(1)(a)(i) should be reworded as follows:

‘ Any person who flares gas after the 31<sup>st</sup> day of December, 2010 contrary to Section 1(2) of this Act, commits an offence under this Act, and shall be liable to conviction and pay a penalty which shall be equal to the **cost of the volume of gas flared at the international market at the date of flaring**’ (words in bold ours)

But perhaps more objectionable is the requirement that both the Minister and the operator (actually, offender) should publish ‘separately and independently’ the penalty payable on flared gas within a maximum of 60 days of the offence [5(1)c]. This is a strange penology that permits the

offender to determine the scope and extent of her culpability. This concession is difficult to rationalize or justify. It would only have the effect of encouraging the oil companies to continue with untrammled and unrestrained flaring of gas.

Ordinarily, the proposal for forfeiture of concessions in any particular field and revocation of licence would have been warmly welcome but for the original ambiguities alluded to [5(2)(a) and (b)]. There can hardly be any justifiable forfeiture in the certain event that the operators would dispute the volume of gas flared and the penalty payable on it. The section must be reworded if the intention is to discourage gas flaring otherwise it is a recipe for interminable wrangling and litigation. The payment of fifty percent of the penalty to the Local Government Council for community development prescribes by section 5(b) of the Bill is sensible but also cannot be determined precisely based on the ambiguity earlier referred to.

In order to discourage reckless flaring of gas, the penalty should also include forbidding any operator who is guilty on a second occasion from bidding for any future licence to prospect or exploit oil or engage in any government business within a period of 10 years. This would ensure that those who operate and intend to continue to operate in the oil sector in this country would take the prohibition of gas flaring seriously.

### ***Report of Gas Flaring***

Section 4 of the Bill permits individuals, or communities to report gas flaring to the nearest office of the Department of Petroleum Resources. This provision is necessary and justifiable and should assist communities and Civil Society Groups play active role in the enforcement of the provisions of the Bill when it eventually becomes law. However, there seems to be no basis for making failure of such categories of people to report gas flaring an offence. Criminalizing false report is understandable and defensible, but not failure to report. Failure to report gas flare by the operators should however be an offence. The Bill should make it mandatory for the operators to lodge report of gas flaring, and in that case the word 'shall' should be employed instead of the word 'may' used at present in section 4 of the Bill. This is so as the word 'may' used in an enactment is permissive while 'shall' is obligatory. There seems to be no duty on the part of the operators to

report gas flaring in their fields as the section is worded. This must be an omission as the fine for failing to lodge the report is 50% of the volume of gas actually flared. It would be preposterous to impose such fine on members of the community, some of whom are either too bogged down with their existential worries to bother about lodging complaints on gas flaring or ignorant of the deleterious and devastating effects of gas flaring. That fine is suitable to operators and they should be specifically listed in section 4 of the Bill. No punishment should attach to individuals or communities for failing to report gas flaring.

### ***Role of the Minister***

The Minister in charge of petroleum is charged with the exercise of a number of discretionary powers under the Bill. Our experience has shown that it is better to have a system in which more than one person or sector takes decisions. The discretion given to the Minister to grant licences and leases for the production of oil and gas upon satisfaction with the applicant's gas utilization programme should be given to an approving body including the Minister, NEITI and the Minister in charge of the Environment since the aim is to protect the environment and ensure a judicious use of the discretion.

It is not clear how the clause that the Minister shall be answerable to the National Assembly for failure, refusal and or neglect to shut down or implement the penalties on any field, fields or facility would work in practice. Ministers are ordinarily subject to their appointer, that is the President. The National Assembly cannot remove a Minister for non-performance under the Constitution. Yet our constitutional practice, regrettably, shows that the executive does not feel compelled to respect resolutions of the legislature as in some advanced liberal democracies. In the circumstances, it seems preferable for the Bill to contain a clause for periodic report by the Minister to the National Assembly detailing compliance with the provisions of the Bill. That would at least put the issues constantly in the public domain and deter default. The clause would state items that must be included in the report such as the names of the defaulters, the extent and scope of default, penalties paid, number of revocations and forfeitures et cetera.

## **Waivers and Exemptions**

The introduction of tax waivers and exemptions for projects undertaken to support flare out and for projects aimed at producing for the Nigerian market (5 year corporate tax exemption) does not fittingly belong in a prohibition law. It seems too much of a sop to the obstinacy of the oil companies in continuing with gas flaring. It has a tendency to water down the essential prohibition. Those who want to do business of oil and gas production must get it clear that Nigeria is not begging them to engage in the business.

## ***Definition of Operator***

The Bill says ‘operator’ means solely the actual operating partner and not the entire joint ventures. When it is realized that NNPC is the other partner in the joint ventures, the impression is given that we only want to reap the benefits of the joint venture and not the liability. The joint ventures should be made liable and the partners pay penalties in equal measures for violating the law. Indeed any Nigerian official in the joint ventures who participate in the violation of the Bill ought in certain circumstances be made liable for the offence.

## ***Conclusion***

The aim of the Bill is laudable. We hope that if some of the above suggestions are accommodated we may express the hope that we are moving from the era of lamenting indiscriminate flaring of gas to one of action to stop it for good. What is important is that the government should find the will to ensure its full implementation. But as we alluded to earlier, the fact that government operates joint ventures with the oil companies creates a moral burden for it and this largely explains its galling unwillingness to enforce laws on gas flaring. The time has come to begin to examine patriotic alternatives to the joint ventures.