



The Nigerian oil spill compensation regime: a framework for change





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SDN supports those affected by the extractives industry and weak governance. We work with communities and engage with governments, companies and other stakeholders to ensure the promotion and protection of human rights, including the right to a healthy environment. Our work currently focuses on the Niger Delta.

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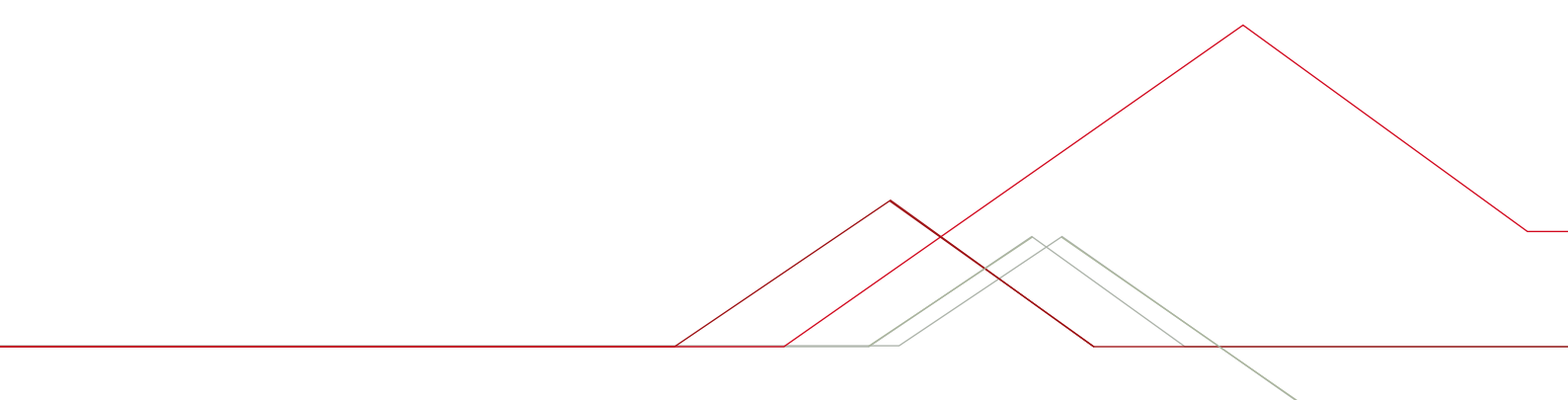
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Summary

This report outlines key actions that would contribute to making the oil spill compensation system in Nigeria fairer and more transparent for all.

It is based on analysis of the challenges with the compensation system identified in the SDN research report *The Nigerian oil spill compensation system: obstacles and opportunities*. This document summarises the challenges identified in that research, under a number of broad headings. It then suggests policy changes and stakeholder actions that could help improve the system.

Where possible, suggested policy changes and stakeholder actions aim to target work that will make a practical difference on the ground without the need for legislative change, which is fraught with political complexity. Nonetheless, the compensation system is ultimately premised on the notion that Nigerians have the right in law to receive redress if their lives are affected by oil spills. As such, we also make some recommendations for which legislative changes ought to be pursued.

Our research makes clear there are many barriers to the effective operation of the compensation system; change will not happen overnight. Part of the reason for this is how informal many of the processes involved in oil spill evaluation are. Many of the changes we propose are therefore related to standardising procedures and making information on these more widely available in the public domain. This would help ensure that all involved have a clearer understanding of appropriate procedures to follow. Making it harder to deviate from common practice—and demonstrating that it is possible to standardise this—is a key first step to signalling the potential for broader change. Further challenges are also linked to the artisanal oil industry, which involves the local refining of oil, siphoned from pipelines, into fuel for the black market. A large number of spills in the Niger Delta can be attributed to this activity, which is a major complication for the compensation system.

Note that although the technical and logistical changes we identify would be positive developments, to a large degree they depend upon the willingness of those in positions of political and other power to bring them about. Having an robust compensation system, adequately enforced, would be an incentive for companies to avoid spills. But the present system means it is relatively easy to avoid paying compensation at all—and that local stakeholders such as village chiefs are able to monopolise this when it is awarded. On the agenda for those seeking to bring about change in the compensation system must therefore be how to alter the incentives for present stakeholders such that they support change in the first place.

The legal and policy context

Challenges

The overarching context in which the oil spill compensation system in Nigeria (mal)functions is legislative confusion. Multiple and overlapping sets of guidance on how compensation requirements are identified, determined, and delivered means the system is notoriously complicated in procedural terms. A particular problem is the absence of a single set of compensation rates for different losses. This means the total economic value (TEV) of losses is rarely calculated in the same way.

Key issues include:

- The multiple and competing sources of legal authority governing environmental and oil spill issues in Nigeria.
- The absence of a harmonised set of compensation rates.
- Challenges in convincing courts of damage classifications, in particular the distinction between special and general damages.
- Gaps in Nigerian jurisprudence, which sometimes lead to a reliance on case law from elsewhere, notably England. This may not adequately address the issues at hand.
- The absence of an effective ‘polluter pays’ principle throughout the oil exploration and production chain.
- Regulatory overlap among the different agencies responsible for investigating oil spills.

The need for the principal environmental regulator, the National Oil Spill Detection and Response Agency, to have greater statutory powers to remedy and resolve oil spill compensation issues.

Opportunities

Our recommendations are for relevant stakeholders to work together to:

Publish valuation framework(s). Government bodies, oil companies, civil society and other organisations involved in oil spill compensation should publish their valuation framework(s). Doing so would enable detailed assessment of the discrepancies between industry and other compensation rates. This is the first step to agreeing what may constitute fair compensation for an oil spill, without which compensation claims will always likely end up in court for resolution. It would also be a helpful signal demonstrating commitment to transparency, in a sector characterised by distrust.

Establish an independent commission to review and harmonise these rates. Based on this assessment, the government could pass a short piece of legislation that merely specified that where a compensation claim is provided for in other legislation, it is to be assessed with reference to the harmonised rates. This would prevent complex legislative procedures, but still represent a step to overcoming compensation rate confusion.

Consider how the ‘polluter pays’ principle might inform the development of future legislation on oil spills. This is international best practice. There are two main ways in which this could be implemented. First, the government could institute an industry-wide environmental tax to be levied on each barrel of oil produced - for example, two US cents. This would be an almost negligible cost for producers, but assuming production of two million barrels of crude per day, would still generate 15 million US dollars that could then be hypothecated towards oil spill compensation procedures. This could include funding an independent, non-court-based dispute resolution mechanism to be used across the region NOSDRA staff say they are already using alternative dispute resolution mechanisms to address community-company relations: formalising and expanding their role would be a strong first step.

Second, companies could be ascribed total responsibility for spill prevention and clean-up relating to all their pipelines and oil-conveying assets. This would be based on regulation: passing a properly enforceable law that makes asset owners responsible for any oil leaking from those assets. This would be a complex process, and impact on the way in which the Joint Investigation Visit (JIV)—the formal oil spill assessment procedure in Nigeria—and related processes are carried out. But the fact these are so contentious in the first place demonstrates the need for change. This proposal would be challenging in the Niger Delta—where companies might reasonably say they cannot prevent criminal activity—but this should not mean the idea is dismissed outright.

Research and provide a reference income for a given type of land on an indefinite basis. This would inform the challenge of how to deal with the conceptual problem of compensation as a one-off versus a recurring payment. A current research project at Rivers State University is working on this, and further support should be given to this and other researchers working on related topics.

Ensure all future legislation includes provisions for compensation to include income forgone, not only historic value lost. Based on the development of reference incomes and standardised compensation rates, all future legislative texts should ensure that as a principle they provide for compensation to be awarded for the period until an area damaged by an oil spill is fully restored and remediated (not as a time-limited payment).

Local and national political processes

Challenges

Social and political relationships play a major role in how oil spill assessments are carried out, and how compensation is awarded and disbursed, if at all. This is true for both specific investigations, and broader political inertia which has prevented progress on oil industry legislation at a national level.

Specific political issues include:

- The slow-moving pace of national political processes, which are blocking much-needed legislative reform that would provide the key environmental regulator, NOSDRA, with greater powers to oversee oil spill compensation issues.
- The nature of the process by which assessors who may have links to oil companies are sometimes alleged to be appointed to compensation cases.
- The perception among some that the challenges in oil spill compensation are so complex they can never be solved, and hence the situation whereby a reluctance to try and implement solutions if they do not solve everything means that nothing at all happens.
- The disbursement of compensation awards by traditional leadership structures, in which (frequently) male community elders are in the strongest position to decide a given community's approach to a compensation claim.
- The general complexity of political and legal change related to oil industry issues, given Nigeria's dependence on oil as a source of revenue.
- Oil spill compensation as a cottage industry where small problems that could be solved quickly are allowed to deteriorate to form larger claims.

Opportunities

Our recommendations are for relevant stakeholders to work together to:

Pass the NOSDRA Amendment Bill. At the national level, politicians in the Nigerian National Assembly have the power to initiate and pass new legislation which could address many of the problems outlined in the Nigerian oil spill compensation system: obstacles and opportunities. They must proceed without delay in working with the President to pass the NOSDRA Amendment Bill. This much-needed Bill aims to ensure the National Oil Spill Detection and Response Agency (NOSDRA) can oversee processes to address oil spills more effectively.

Organise a series of engagements with the newly-constituted committees in the Nigerian National Assembly. Committees on oil issues and the environment have recently been formed, and have the entire

legislative period ahead of them. Not all members will be aware of the environmental challenges in the Niger Delta. Now is the time to sensitise them on the importance of meaningful reform on oil spill compensation issues, not least given the intention of promoting the expansion of the Nigerian oil industry. Identifying key members within the committees who can act as champions will be important. Federal and State lawmakers engaged as part of this research indicated their interest in supporting change.

Develop and publish a set of guidelines for local communities on how to respond to an oil spill and support the compensation process. These would not need to be legally enforced, but they would help support NOSDRA as the principal agency intended to supervise the work of oil spill assessment overall. The guidelines would explain the process and make clear the roles of relevant agencies and organisations. Doing so would help prevent the exploitation of a lack of awareness of who has the right to represent a community, by, for example, unscrupulous claims agents—as well as by community members themselves. Civil society could play a major role in this work, which should target key local leadership groups: Paramount Rulers, Community Development Clusters, and youth and women’s leaders.

Technical and operational issues

Challenges

The process of actually assessing an oil spill site is logistically and technically complicated. Transport, security and community entry arrangements can require careful organisation. The technical process of assessing a spill requires detailed knowledge of land valuation and loss estimation techniques, and should only be carried out by an appropriately qualified professional. It should also be based on a thorough understanding of the situation pre-spill. Specific challenges related to these topics include:

- Logistical and other difficulties in accessing oil spill sites, such as the need to negotiate access to communities via local groups, and to liaise with military and police checkpoints.
- Deficiencies in the technical methods used to assess oil spill impacts and the resources available to conduct these. One example given was that the lack of transport available in rural or riverine areas can mean that a spill assessment only extends to the (land) area immediately around the source of the spill, and not the impact on communities downstream.
- The deficiencies in the JIV process. These include the imperfect methods used to assess the size and impact of an oil spill, as well as the overarching challenge of establishing whether the cause of a spill is operational error or sabotage.
- The fact that not all key operational and other protocols are available in the public domain, and hence the potential for confusion and disagreement over methods applicable in investigations.
- The danger that ongoing major clean-up projects (such as HYPREP) may involve poorly-benchmarked compensation rates which act as a precedent for future cases.
- The difficulty in disbursing compensation itself, given practical issues such as the need to open bank accounts for some, and political ones such as demands by community leaders that money be distributed by them, and hence the potential for the system to be abused.

Opportunities

Our recommendations are for relevant stakeholders to work together to:

Encourage NOSDRA to establish regulations on compensation mechanisms. The NOSDRA Act empowers the Agency to make regulations that support its objectives. On all the issues outlined in this research, NOSDRA can demonstrate leadership by specifying key processes as a first step to the development of a harmonised compensation system. It should initiate change by at minimum describing compensation negotiation procedures—based on the alternative dispute resolution mechanisms it says it has used successfully—which could help resolve the challenges related to overlapping policy guidance.

Mandate the disclosure of potential conflicts of interest by any person appointed to a role in an oil spill compensation assessment. This would be one step towards preventing and mitigating potential abuse of the compensation system. If a mandatory system is not feasible in the first instance, a voluntary system could also be considered. This would in theory incentivise disclosure by all those wishing to be seen as a trusted party.

Develop guidance to support professional but non-qualified expertise to assist in compensation processes. Oil spill compensation assessments should only be carried out by properly qualified professional valuers. As noted in the Nigerian oil spill compensation regime: obstacles and opportunities, this generally means assessors appointed by the Ministry of Land, Housing and Urban Development. But for various reasons, this may not be feasible. In discussion with the Ministry, it might be worth pursuing the development of criteria and an accreditation process for other professionals with relevant expertise—such as soil scientists—who could be provided with training and guidance, under the supervision of the Ministry, to carry out some aspects of compensation or baseline surveys. These would be subject to review, but might help plug the capacity gap without undermining the authority of the relevant civil service department.

Related, consideration should be given to how NOSDRA might be able to support communities who cannot afford to pay for professional assessments. A key responsibility of the compensation system, and by extension NOSDRA, should be to strengthen the ability of victims to bring forward their claim, and to tell the polluter what they have lost, not the other way round.

Fund baseline land value surveys as part of oil licencing arrangements. Ideally, the government would fund a one-off survey of all land and other productive assets in host communities. This would then act as the pre-spill benchmark for compensation claim assessments, the lack of which is an obstacle to calculating compensation. However, this is not likely to be feasible in the short term. But the government could include the cost of doing so as an administrative fee charged to the acquirer whenever an oil exploration or production licence is bought by a new owner, with provisions for these to then be carried out on a regular basis. The surveys themselves would need to be carried out by an independent body. An alternative would be to ensure they are carried out as part of the permitting process for new developments, which should involve an environmental survey.

Over time, this would mean that all oil-producing areas in Nigeria were fully mapped for the purpose of establishing benchmark compensation values. This information could then be put in the public domain upon completion, alongside the harmonised rates also called for in this document. Together, this would put local communities in a much stronger position to understand the value of their land and what they might reasonably be entitled to claim in the event of an oil spill.

It should be mentioned that identifying host communities may be controversial, and should be handled with care. However, what is worse is having no agreed-upon definition of what constitutes a host community. This causes problems in other aspects of the oil industry in the Niger Delta.

Note that one way to fund an all-Niger Delta survey would be to levy a one-off tax based on the next rise in the oil reference price. This would be justifiable on the grounds of the polluter-pays principle: in other words, incorporating the cost of preventing and addressing oil pollution in the operating cost of the industry itself.

Develop a community self-assessment toolkit. Related to the major problem of baseline surveys, local communities could be supported to conduct their own basic assessments of their land and property. One way to do this would be to identify host communities at risk of oil spills (for example, based on data from NOSDRA's Oil Spill Monitor), and conduct training on basic principles and methods of valuation. These need not be perfect, but if general information on the nature and value of a community's land could be published in advance of an oil spill, it would provide some documentary evidence on which post-spill loss determinations could be based, without relying on oral testimony. This would help reduce the potential for dispute. Careful thought would need to be given the organisation of this process, so that values were not inflated. One option might be to use this process to support the integration of local communities into the baseline survey system outlined above.

Review all existing compensation values in the Land Use Act with reference to market forces. This is a practical step the Nigerian Ministry of Lands, Housing and Urban Development could take immediately. It could then issue revised versions of these, increased by at least the rate of inflation since the publication of the original values in 1978, and instruct staff in practise to use these values as the baseline for their assessments, or at least calculate a version that includes them for comparison. Pending a full review and harmonisation of compensation rates, this change would help ensure that communities understand what in principle would be a fairer deal when their land or property is damaged. Ideally, these rates would be revised according to inflation and other market forces at appropriate intervals - for example, every five years, or when the value of the Naira has changed by more than 10% from reference rates, and remained that way for more than 12 months.

Ensure that all spill assessments include an assessment of damage at least the first human settlement downstream of a spill site. One of the problems with oil spill assessments is that they frequently focus solely on the area immediately identifiable as being impacted by visual observation of the oil spill site. However, by the time a JIV or other assessment is carried out, oil may have dispersed significantly beyond the immediate area. For logistical and financial reasons, it may not be possible to conduct a full investigation elsewhere as part of the visit, but guidance should be provided to assessors to identify at least the next closest community to an oil spill and make contact with relevant persons to identify if any oil spill damage has been observed. This

would then provide the justification for the allocation of further responses to continue the investigation. The JIV process should also be reviewed to ensure that this happens as a standard procedure.

Develop guidance for oil spill assessors on community engagement. The State Ministry of Lands, and other relevant departments whose functions include conducting assessments of oil spill damage, should issue guidance on the process to be used by any relevant stakeholder organising a community visit. This would include information on, for example, meeting with traditional leaders to explain the purpose of a visit and providing a timeline for action. This would help reduce mistrust and speed up the process of organising community access.

Access to justice and dispute resolution procedures

Challenges

- The lack of a comprehensive system of, and funding for, baseline surveys in host communities. Ideally these would include an inventory of economic assets, infrastructure, and livelihoods, to act as a benchmark for establishing income forgone assessments. The lack of such benchmarks is a major contributing factor to the complexity of almost all other aspects of the compensation system.
- A lack of awareness and understanding among community members of their rights relating to pursuing oil spill compensation, and hence their susceptibility to the alleged ‘divide-and-rule’ tactics of oil companies. Some of these reportedly seek to bypass formal processes and pay compensation monies directly to individual members of communities, with the expectation that they will then seek to oppose joint community legal action, and hence make a successful claim less likely.
- The lack of capacity (such as a lack of judges) and hence case burden on the legal system itself in oil-producing states, in particular Rivers.
- A lack of financial capacity to support extended casework (such as the costs of transporting clients to court), given that reimbursements for costs may take several years.
- The lack of a comprehensive system of, and funding for, baseline surveys in host communities. Ideally these would include an inventory of economic assets, infrastructure, and livelihoods, to act as a benchmark for establishing income forgone assessments. The lack of such benchmarks is a major contributing factor to the complexity of almost all other aspects of the compensation system.
- The lack of community financial resources, and hence their inability to pursue the extended legal action commonly required to see a compensation case through to conclusion.
- The challenge of securing corporate accountability in Nigeria, and hence the pursuit of some high-profile cases in foreign jurisdictions, which is not a viable strategy for most cases.

Opportunities

Our recommendations are for relevant stakeholders to work together to:

Develop a compensation claim information portal. This would include some of the information discussed in this research, organised by (for example) oil block or local government area. The information could include:

- Annotated versions of the original text of legislation and other policy documents related to oil spill compensation, highlighting key passages.
- A database of historic and ongoing oil spill compensation claims.
- A summary of all present compensation rates and values.
- Guidance for communities on how to support oil spill assessments and take part in the compensation process.
- Details of any baseline or other land value surveys completed.

This portal would provide host communities, oil companies and relevant government departments with a hub for all relevant information on oil spill compensation issues. This would be a significant aid to overcoming the case-by-case nature on which many claims are currently decided. This can put local communities at a disadvantage, as they do not have access to reference information which would provide them with an understanding of how the process works, how to negotiate a claim with an oil company or other party, and what precedents have been set for spills which have taken place in similar circumstances elsewhere. It would also allow communities and others to report cases of malpractice. This work would build on the commitment to transparency shown by NOSDRA in the development of its pollution-mapping tools, the Oil Spill Monitor (nosdra.gasflaretracker.ng) and Gas Flare Tracker (nosdra.gasflaretracker.ng).

Note that careful consideration would need to be given as to whether to launch such a portal only for future oil spills—potentially under an overhauled compensation system—or to include details of historic incidents.

Hypothecate a proportion of expected future oil revenues for investment into alternative dispute resolution procedures. The intended expansion of the Nigerian oil industry may bring further oil spills to court, in a system which is already incapable of dealing with existing compensation claims. A clear focus should be put on identifying and establishing a more robust system for non court-based dispute resolution. At present, local communities must often try to negotiate directly with oil companies—often via dubious intermediaries such as claim agents, for which there is no clear process—or pursue extended court cases. This is highly unsatisfactory. The government should investigate and report on the potential for alternative dispute resolution mechanisms, which do not require recourse to formal legal procedures, to address at least minor spills.

Investigate how the burden on the court system, in particular the appellate system, can be reduced. In an ideal world, most compensation cases would not need to go through the courts. For some spills, particularly

major ones, this may be unavoidable. But it should not then take years for these to be resolved. The government should examine how the burden can be reduced. For example, the Nigerian Ministry of Justice, in particular the President of the Nigerian Appellate system, should consider issuing guidance to lower courts of appeal that would encourage them to transfer cases to neighbouring states. This would help reduce the caseload for the appellate system, in particular in Rivers State. Legal opinions vary as to whether this would be feasible, but at minimum the different options for reducing legal congestion based on procedural changes should be explored. Ideally, this would also include establishing a special court dedicated to overseeing oil spill issues. However, this would require constitutional change, and so must ultimately be initiated by legislators.

Ensure HYPREP sets a strong precedent. The substantive activity of the Hydrocarbon Pollution Remediation Project (HYPREP), a major initiative to clean up historical oil pollution in the Ogoniland area of Rivers State, started work in 2019. The opportunity to use this flagship project to support the development of a fair precedent for how oil spill compensation issues are dealt with must not be missed. This relates to both the development of fair compensation rates, but also transparent and robust procedures for assessing and evaluating damage. HYPREP has a substantial budget, and a portion of this could be allocated to ensuring that a strong precedent and reference point is set for future compensation practice in Nigeria.

Conduct a joint mapping and engagement exercise with host communities. Civil society organisations with relevant environmental expertise should coordinate and conduct a joint mapping exercise. This should identify all host communities with which they have existing links, and gaps where key host communities are not covered. On the basis of this, they could then initiate a community engagement programme to link these communities with relevant expertise - such as lawyers - in case they should suffer an oil spill. Ideally this would be linked to the compensation portal also recommended in this document.

This work would help build social and political relationships between community leaders and civil society, and to ensure that the joint capacity of civil society in the Niger Delta is used to reach and engage as many host communities as possible in the geographical areas where they operate.

Next steps

SDN will follow up on this work as part of its broader efforts to minimise the negative impact of the oil and gas industry in Nigeria, and ensure its benefits are fairly distributed. We look forward to engaging with all those who wish to support this.

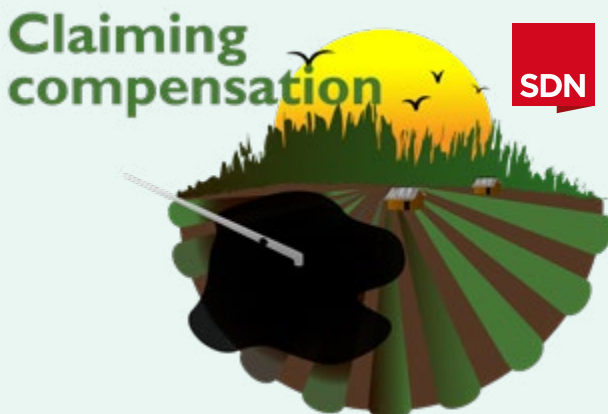
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