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COMMENTS ON THE PROPOSED AMENDMENTS TO ENVIRONMENTAL LAWS

Submission to
The Ministry of Environment, Forest & Climate Change
Government of India

COMMENTS ON THE PROPOSED AMENDMENTS TO

WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974
AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981
ENVIRONMENT (PROTECTION) ACT, 1986
PUBLIC LIABILITY INSURANCE ACT, 1991

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Cover Image: Ruins of Buxa Fort, Buxa Tiger Reserve, West Bengal (Photo: Debadityo Sinha)

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Executive Summary

The Ministry of Environment, Forest and Climate Change issued notices for public consultation on the proposed amendments to the Water (Prevention and Control of Pollution) Act, 1974 (**"Water Act"**) and the Air (Prevention and Control of Pollution) Act 1981 (**"Air Act"**), the Public Liability Insurance Act 1991 (**"PLI"**) and Environment (Protection) Act 1986 (**"EPA"**). Comments to the proposed changes were sought till 21st July 2022. In the interest of time, Vidhi chose to give joint comments on those proposed key changes which are, in principle, common to all four legislations.

The proposed amendments seek to replace imprisonment with higher penalties for the majority of the violations presently considered as offences under these laws. It has been proposed to appoint 'Adjudicating Officers' under each of the Acts to determine the quantum of penalties. Additionally, the proposed amendments empower the Central Government to establish Environmental (Protection) Fund under EPA (Section 17A), the Water Pollution Remediation Fund under Water Act (Section 45D), and Air Pollution Remediation Fund under the Air Act (Section 36A). The penalties imposed in case of contraventions under any of these Acts shall be credited to above mentioned funds.

The proposed amendments have been drafted in order to weed out the fear of imprisonment for simple violations. Even with this objective in mind, our analysis indicates that several provisions need to be strengthened to eliminate ambiguity, streamline processes and ensure that the enforcement mechanism under the Acts is robust enough to ensure compliance to environmental standards and safeguards. We also think that there are a number of neglected aspects of environment protection which may be addressed through amending the four Acts comprehensively.

1. Rationalizing the quantum of penalty

The quantum of penalty being proposed in each of the Acts is too low to effectively deter violations, especially where the profit from the violation outweighs the amount of the penalty. We also find that the considerations stipulated for calculating the penalties are not entirely relevant or exhaustive. We therefore propose a three-tiered model of factors that must be assessed for arriving at the final penalty amount to be imposed - (i) Fixed/based penalty; (ii) Removal of unlawful gains derived by committing the offence, and (iii) Damage to the environment.

2. Criminal liability for grave violations

We submit that while imprisonment is not ideal for simple violations, it is imperative that it should mandatorily be retained as punishment for grave environmental violations. We suggest that the laws must prescribe for the gravity of the offence to be decided based on the levels of moral culpability, risk of harm, actual harm, extent of harm, violations and various other facts and circumstances involved in each case. To substantiate our submission, we provide clear examples on different offences which may attract criminal liability.

3. Fair and rigorous adjudication process

We assert that the proposal to appoint different Adjudicating Officers under each of the Act (be it a Joint Secretary under the EPA or a District Magistrate under the other three legislations) is deeply problematic. Bureaucratisation of the adjudicatory process has proven to be inefficient in the past, especially in matters such as environmental disputes which involve complex technicalities and important questions of public rights.

We therefore propose a more diverse and independent adjudicatory body having two arms -

- **State Level Adjudicating Authority** comprising Chairman- SPCB, Director General of Police, Regional Officer of the MoEFCC, and a Judicial Officer.
- **District/Division Level Adjudicating Authority** comprising Chief Conservator of Forest or Divisional Forest Officer, Inspector General of Police or Superintendent of Police, and a Judicial Officer.

4. Streamlining jurisdictions with the National Green Tribunal

Under the proposed amendments an appeal from the order of the adjudicating officer lies before the NGT. Given the wide jurisdiction of NGT over all civil cases involving substantial questions related to the environment, the powers of the adjudicating officer may overlap with the original jurisdiction of the NGT under Section 14 and Section 15 of the NGT Act.

5. Streamlining penalties between EPA, Air Act and Water Act

Most of the environmental violations are transdisciplinary in nature. Often a violation under the Air Act and the Water Act will also invoke provisions under the EPA. This may complicate the adjudicatory process and delay timely intervention. We therefore suggest that penalties should be imposed in a stage-wise manner depending on the gravity of the offence.

6. Tackling special violations

Continuing and repeat violations signal that the punishment under the law is not deterrent enough. We therefore suggest that these violations should be punishable with higher penalties, temporary injunctions, revocation of permits, barring from public procurement or even imprisonment, as may be required. For non-payment of penalty, we suggest that the adjudicating authority should be given the power to attach movable and immovable property, bank accounts and suspension or cancellation of permissions granted under environmental laws.

7. Appeal

Protectionist legislations like the Consumer Protection Act, 2019 and the Real Estate (Regulation and Development) Act, 2016 mandate a non-waivable deposit of a part of the penalty amount as a precondition to filing an appeal. This should also be mandated under the four legislations to offer a security and deter frivolous appeals.

8. Streamlining the Environmental Relief Fund

The Environment Relief Fund (**"ERF"**) has been established under the PLIA and as per a past study, has a corpus of Rs. 810 crores lying unutilised. We suggest that instead of establishing separate environmental funds under the EPA, Water and Air Acts, the scope of the ERF should be expanded, and its administration should be improved. In addition to providing relief to the victims, it should also be utilised for the protection and restoration of the environment. This is in line with the proposal under sub-section (9) of Section 7 of PLIA to allocate monies from the ERF for restoration of damage caused to the environment. Additionally, a State-Level ERF should be established from a contribution to the ERF to enable expansion of state capacity to efficiently implement and enforce the environmental laws. For proper distribution, management and utilisation of this fund, a model similar to The Compensatory Afforestation Fund Act, 2016 may be followed.

I. Introduction

Although there is no universally agreed definition of an 'environmental crime', it is used to collectively describe illegal activities that harm the environment and are aimed at benefitting individuals, groups or companies from the exploitation of, damage to, trade or theft of natural resources, including serious crimes and transnational organised crimes.[1] Environmental crimes are the fourth largest of all crimes in the world, after drug trafficking, counterfeit crimes, and human trafficking.[2] One of the major reasons for committing environmental crimes is the opportunity of earning high profits and low probability of getting caught and convicted.[3]

Environmental crimes not only have an immediate and direct effect on natural resources through pollution or destruction of natural resources, but also have a deeper and cascading effect on the ecosystem as a whole by changing land use patterns, depriving communities of their livelihood and right to clean air and water, destroying wildlife habitats and corridors, and largely making irreparable and irreversible changes to the landscape. On several occasions environmental crimes have led to loss of life of human beings and wild animals.[4] Unlike other crimes, environmental crimes, apart from direct damage to environment and human lives, have long lasting impacts to and costs for future generations. There are also linkages of environmental crimes with other white-collar crimes and terrorism.[5]

There is a global understanding towards the need to recognise environmental crimes as a serious threat to peace and sustainable development and strengthen the environmental rule of law at all levels. This includes implementing dissuasive penalties, substantial sanctions and punishments to address the growing concern of environmental crimes worldwide.[6]

In India, courts have used the 'Principle of Absolute Liability' in determining compensation for victims of environmental damage. This principle, which was first used by the Supreme Court of India in the Oleum Gas Leak case,[7] is now relied upon by all Indian courts in cases of industrial disasters. The Principle of Absolute Liability is used in granting compensation to victims once the environmental damage is established. This is applied irrespective of the fact that owners

[1] United Nations Environment Programme. *The rise of environmental crime: A growing threat to natural resources peace, development and security*. (2016) <https://wedocs.unep.org/20.500.11822/7662.>accessed 20 July 2022

[2] Ibid

[3] United Nations Environment Programme. *The environmental crime crisis: threats to sustainable development from illegal exploitation and trade in wildlife and forest resources.* (2014) <https://wedocs.unep.org/20.500.11822/9120> accessed 20 July 2022

[4] *Bonani Kakkar v. Oil India Limited & Ors.*, [2021] OA No. 43/2020(EZ)

[5] n1

[6] Ibid

[7] *M.C. Mehta and Another v. Union of India and Other*, [1986] CW Petition No. 26 of 1986

may have all statutory permissions required and may have taken all preventive measures. However, the Principle of Absolute Liability is generally used by courts for adequately compensating the damage caused and does not penalise 'wilful' or 'deliberate' non-compliance of law.

Further, environmental offences under the Air (Prevention and Control of Pollution) Act, 1981, Water (Prevention and Control of Pollution) Act, 1974 and Environment (Protection) Act, 1986 have been on the rise. Cumulatively, the National Crime Records Bureau reports that in 2018, 103 crimes were recorded under these three Acts. This number shot up to 647 in 2019 and a whopping 1581 in 2020.[8] However, these figures may just be the tip of the iceberg given the fact that environmental violations are usually under-reported.[9]

It is very important for the legislation to provide teeth to punish contraventions of environmental law and also make it enough of a deterrent for wilful offenders. This can be done through higher but reasonable penalties, and criminal imprisonment in exceptional circumstances.

It is in this context that the Vidhi Centre for Legal Policy is submitting comments to the proposed amendments to the Environment (Protection) Act, 1986 ("**EPA**"), Public Liability Insurance Act, 1991 ("**PLIA**"), Air (Prevention and Control of Pollution) Act, 1981 ("**Air Act**") and Water (Prevention and Control of Pollution) Act, 1974 ("**Water Act**") which were released by the Ministry of Environment, Forest and Climate Change ("**MoEFCC"**) on 1st July 2022 on its website. As stated on the official notice of public consultation, the proposed amendments have been put forth with a view to decriminalise the legislations and "*weed out fear of imprisonment for simple violations*." In the interest of time, we have chosen to give joint comments on those proposed key changes which are, in principle, common to all the four legislations.

[8] National Crime Records Bureau, *Crime in India 2020: Statistics Volume I*. (2020) <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>page 39, accessed 20 July 2022

[9] Shibani Ghosh, 'The Environment' in Devesh Kapur and Madhav Khosla (eds), *Regulation In India: Design, Capacity, Performance* (Hart Bloomsbury 2019)

II. Rationalizing the Quantum of Penalty

A. Issues with the proposed penalty

Under the proposed amendments pertaining to Sections 14A, 14B, 15 and 15A of the EPA, a penalty is prescribed in the range of Rs. 5 Lakhs to Rs. 5 Crores for contravention of Sections 7-11 or any other provisions of the Act. The proposed provision also mentions that where the amount of the damage caused due to such contravention or non-compliance by that person is more than the amount of penalty, such person shall be liable to pay the penalty equal to the amount of the damage caused. There is also a penalty of Rs. 1 Lakh- 50 Lakh per day for such contraventions or non-compliances which are continuing in nature. For such provisions where no penalty is prescribed under the Act, the penalty for continuous contravention is prescribed to be Rs 50,000 - 5 Lakh per day of contravention. However, for contravention of any provisions of the Act by companies, the penalty is in the range of Rs 5 Lakh-5 Crores.

In principle, the proposed amendments to the Air Act, Water Act and PLIA are on the same lines as the proposed changes to the EPA. The only difference is perhaps the quantum of penalty being proposed. A summary of the proposed penalties is provided below.

Table 1: Summary of proposed penalties

S.No.	Offence	Air Act	Water Act	EPA	PLIA
1.	Primary offence against the Act. Eg: Discharge in excess of standards, contravening directions of Board or relevant Authority or failure to take PLI	1L – 1Cr (Section 37) *	1L – 1Cr (Section 41) *	5L-5Cr (Section 14A (1)) *	Equal to or twice the premium amount (Section 14)
2.	Continuation of offence under S.No .1	5L – 5Cr	Up to 2Cr	1L per day, may extend to 50 L (Section 14A (2))	Up to the amount of annual premium
3.	Continuation of offence under S.No 1 beyond 1 year	Up to 5Cr	Up to 5Cr - -		
4	Repeat conviction of offence under S.No.1	-	2 - 7 years imprisonment + fine	-	(Removed from Section 14)
5.	Intervening/Disrupting the work of the Board. Eg: Failure to share information, refusing entry, hiding information	1L-50L, (Section 38) *	1L-50L, (Section 42) *	5L-5Cr (Section 14B (1)) *	Up to 1L per non-compliance. And 5L-50L for failure to obey directions

					(Section 15)
6.	Continuation of offence under S.No 5	Upto 1L per day (Section 38(2))	1L per day (Section 42)	1L per day, may extend to 50 L (Section 14B (2))	Upto 10L for each month
7.	Where no penalty prescribed	1L-50L (Section 39) *	1L-50L (Section 45A) *	5L-5Cr (Section 15(1)) *	-
8.	Continuation of offence under S.No 7	Upto 1L per day	Upto 1L per day	50,000 per day, may extend to 5L per day	-
9.	Failure to pay penalty	Maximum 3 years imprisonment OR twice the penalty OR Both (Section 39B)	Maximum 3 years imprisonment OR twice the penalty OR Both (Section 45 G)	Maximum 3 years imprisonment OR 10 Cr OR Both (Section 15F)	1 year imprisonment AND/OR 5L (Section 17A)
* *Imprisonment proposed to be removed*					

Even though the note appended to proposed amendments mentions that imprisonment is sought to be removed for simpler violations, there is no clear indication in the proposed amendments about which are the violations that may be considered 'simple'. Neither the proposed amendment provides any comprehensive guiding factors for determining the penalty.

Following are some of our concerns and suggestions.

1. Penalty too low

The penalties proposed is entirely inadequate and may not have the necessary deterrent effect, especially for industries with deep pockets, where profits earned from non-compliance outweigh the cost of non-compliance. Given the poor monitoring and policing capacity of the MoEFCC and State Pollution Control Boards (**"SPCB"**), it may lead to the approach of continuing violation until the violator is caught. It is an accepted principle that higher penalties, stronger monitoring and increased probability of getting caught are three elements that are critical for a penal provision to have a deterrent effect.[10] For the penalties to be deterrent it must be high enough to outweigh the non-compliance benefits. When there are two possible contraventions to the law with similar economic benefits, the one which is much less likely to be detected than the other requires a larger penalty in order to provide the same degree of deterrence.[11]

[10] Mark A. Cohen, 'Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement' (2000) 30 Envtl L Rep News & Analysis 10245

[11] Organisation for Economic Co-operation and Development, *Determination And Application*

Thus, it is very important that penalty must be prescribed in a reasonable and proportionate manner without compromising the intention of punishment for contraventions which have serious consequences. The penalty amount must trigger 'deterrence' and mandatorily include a component of 'removal of gain derived' by committing the offence.

It must be noted that the penalties proposed under the Air Act, Water Act and EPA are also grossly lowballed when compared to other white-collar crimes. For instance, under the *Insolvency and Bankruptcy Code, 2016 ("IBC")*, the fine for contravention of the Code extends to three times the value of loss or three times the amount of unlawful gains made on account of such contraventions, whichever is higher. Similarly, in the *Securities and Exchange Board of India Act, 1992* ("*SEBI Act*"), contravention of the provisions of the Act attracts penalty between Rupees 10 Lakh, which may extend to Rupees 25 Crores or three times the amount of profits made from such failure, whichever is higher.[12]

2. Insufficient considerations to decide quantum of penalty

The newly inserted Section 15(C) of the EPA in the proposed amendment outlines the way the penalty will be determined by the proposed Adjudicating Officer. The proposed Section 15(4) of the EPA outlines the following factors to adjudicate the quantum of the penalties:

> *(a) the population and the area impacted or affected by such contravention;*
>
> *(b) the frequency and duration of such contravention;*
>
> *(c) the vulnerability of the class of persons likely to be adversely affected by such contravention;*
>
> *(d) the amount of loss caused or likely to cause to any person, as a result of the contravention if any; and*
>
> *(f) any other relevant factor.*

It is submitted that the term 'environment' is defined broadly under the EPA and 'includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.' Thus, the scope of environmental damages extends beyond the limits of human populations.

Costs incurred on assessment of damage, clean-up of pollutants, restoration of ecosystem, offsetting biodiversity loss and direct compensation to victims of the damage, and fine for violating law must be accounted for separately while determining any penalty or compensation for environmental damage. As assessing the damage to ecosystem and biodiversity is sometimes a very complex exercise, it is nearly impossible to arrive with certainty at the actual

Of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries. (2009)
< https://www.oecd.org/env/outreach/42356640.pdf>accessed 20 July 2022

[12] Securities and Exchange Board of India Act, 1992, s 15(g), (h)

damage caused in long term. Thus, it is very important that the law at least provides detailed guiding factors for identification of wrongs and their categorisation to assist the regulator in arriving at a fair and reasonable penalty to be imposed. The penalty imposed must be greater than the damage caused to have a deterring effect, include unlawful gains derived from the violation, and account for the cost to offset the environmental damage.

In this regard, we propose a three-level guiding model for prescribing penalties as discussed in following sections. These can also be applied to assess the quantum of penalty under the Air Act and Water Act.

B. Model for imposing adequate penalties

Adequate Penalty = Fixed/Base Penalty + Unlawful Gains + Environmental Damage

Fixed Penalty

As prescribed by law

Unlawful Gains

i) Net profits earned
ii) Avoided/ Deferred cost
iii) Competitive advantage

Environmental Damage

i) Cost incurred on investigation
ii) Cost to offset the ecosystem & biodiversity Loss
iii) Compensation for human losses
iv) Other aggravating factors

Level 1. Fixed penalties for violation of the laws

Presently, there is no provision in the EPA or the other environmental laws for imposing 'fixed penalty' for small violations related to non-compliance which are rectifiable and do not lead to environmental damage. For e.g., non-installation of water saving taps in a building project when the Environmental Clearance conditions so mandate; failure to monitor equipment in a given timeframe; failure to submit environmental statements by the deadline etc. Such violations can be treated as '**Level 1**' and may be compounded by such fixed penalties as may be prescribed.

However, for more serious activities such as illegal industrial establishments without necessary permissions or violation of environmental norms leading to environmental harm, must be treated as **Level 2** and **Level 3** violations. In such cases, the penalty amount must also include the various costs associated with the violation as well as a possibility to face imprisonment depending on the moral culpability.

Level 2. Disgorgement or removal of unlawful gain derived

When the penalty amount is lower than the economic benefit derived from non-compliance, it encourages the violator to wait and delay taking appropriate measures until the regulator takes cognizance. Thus, it is extremely important to remove any economic benefit derived by the person or company by committing the violation. This is one of the primary components[13] while imposing penalty in environmental offences worldwide.[14] For instance, in South Africa, there is a provision to mandate the payment of the monetary value of any advantage that is actually or likely to be gained by the violation in addition to any other punishment that may be imposed under the law[15].

The concept of disgorging an amount equivalent to unlawful gain and aversion of loss by contravention of the legislation is also provided in Indian laws such as the SEBI Act[16] and the IBC.[17]

In the judgment of *Common Cause v. Union of India*,[18] the Supreme Court of India while dealing with the issue of illegal mining of iron and manganese ores in Odisha observed:

> *"In our opinion, there can be no compromise on the quantum of compensation that should be recovered from any defaulting lessee – it should be 100%. If there has been illegal mining, the defaulting lessee must bear the consequences of the illegality and not be benefited by pocketing 70% of the illegally mined ore. It simply does not stand to reason why the State should be compelled to forego what is its due from the exploitation of a natural resource and on the contrary be a party in filling the coffers of defaulting lessees in an ill gotten manner."*[19]

Therefore, it is important to include 100% of the unlawful gains derived from the violation within the penalty amount. Some of the major benefits accrued from unlawful gains and averted loss can be accounted under the following heads:

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[13] Mark A. Cohen, 'Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes' (1992) 82 J Crim L & Criminology 1054

[14] UK Sentencing Council, *'Environmental Offences Definitive Guideline'* (July 2014) < https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf>accessed 22 July 2022

[15] National Environmental Management Act 107 of 1998, s 34(3)

[16] Securities and Exchange Board of India Act, 1992, s 11(B), 28A

[17] The Insolvency and Bankruptcy Code, 2016, s 187, 220

[18] *Common Cause v. Union of India* [2017], WP (C) No. 194 of 2014

[19] Ibid, *para 153*

i. Net profits earned

This will include 100% of monetary gains of the project proponent for the entire duration of non-compliance. The same can be assessed by verifying balance sheets and tax liability of the project proponent and comparing it with the date of first occurrence of the violation till the entire duration of the violation committed.

ii. Avoided/Deferred cost

This will include the cost saved by not spending resources to prevent the environmental damage as well as any other gain achieved through the non-compliance. Some of the components to estimate the avoided costs are failure to install/operate/maintain equipment or making change to the process required to meet pollution norms; conducting necessary testing to demonstrate compliance, improper storage/ treatment of waste, expenses for obtaining permissions etc.

iii. Competitive advantage

The violators of environmental laws gain significantly more profit than their competitors due to the lower production costs, benefits of entering the market before their competitors, extra production by operating at higher capacity etc.

Level 3. Compensation for environmental damage

i. Cost incurred on investigation

Wherever the offence amounts to environmental harm, a separate Environment Impact Assessment (EIA) and Social Impact Assessment (SIA) must be undertaken independently by the authorities. In some cases, the authorities do not have the capacity to properly assess the damages and have to rely on external experts. Once the environmental damage is established, all such costs incurred by the authorities must be added separately to the penalty amount.

ii. Cost to clean up

This includes the one-time cost to clean up the contaminants and pollutants from the environment. For e.g., in case of an oil spill, the initial cost of removing the oil from seawater or coastal areas must be recovered from the responsible party. This cost is separate from the penalty from non-compliance, compensation for victims, and the compensation required to restore the ecosystem.

iii. Cost to offset the ecosystem & biodiversity loss

These include the total cost for restoring the losses to ecosystem and other living beings affected by the same. In most of the cases, environmental damages are very complex, and it is not easy to assess them properly. In such cases, an initial cost may be imposed based on assessment by an expert committee and nature of the site (for e.g., if the location is near ecologically sensitive area, the cost will be higher) and a percentage of the profit from the company's future earnings may be allotted towards restoration of the ecosystem until it completely offsets the loss to biodiversity and wildlife habitat.

iv. Compensation for human losses

This includes compensation for any injury or loss to human life, property and livestock affected by the environmental damage. This component must also include a mandatory SIA when large number of people are affected.

v. Other aggravating factors

The penalty must also consider other aggravating factors such as knowledge or intent of the violator, falsification of records and submissions to authorities, repeat or continuous offences, pervasiveness of non-compliance and show cause notices issued by the authorities, etc.

A summary of possible guiding factors while determining penalty for violation of environmental law and causing environmental damage is provided below. This is just an indicative list and actual guiding factors may include more indicators.

Table 2: Suggested guiding factors for determining penalty

Levels of Culpability	Violation	History of Violation	Disclosure of the violation	Impact of the violation	Extent of harm	Affected	Reversibility of harm
Reckless	Without a permit	Repeat	Third party complaint	Wide (beyond 1 km)	Death	Human Population	Environmental damage- Irreversible
Knowledge	In Violation of permit	Continuous	Cognisance by regulator	Regional (within 1 km of the site)	Adverse effect	Ecosystem (e.g., forest, wetlands, river, designated wildlife reserves etc)	Environmental damage- Repairable
Intent	Submission of false information to regulator	First time	Voluntary	Localised (within the site)	Physical Injury	Protected Wildlife Species	Violation- can be rectified
Negligence	Obstruction of authorised government officer from inspection/ search				Risk of Harm	Air and Water Quality with no immediate harm to human or wildlife	
	Incomplete or Non-maintenance of environmental information					Livestock	

Black- Level 1 violation- Fixed Penalty should suffice
Orange- Level 2 violation- Fixed penalty + Removal of unlawful gain derived
Red- Level 3 violation- Fixed penalty + Removal of unlawful gains derived + compensation for environmental damage

Each Guiding factors should be treated independent to others.

III. Criminal Liability for Grave Violations

As with any other crime, imprisonment is not the ideal punishment for all environmental offences. However, blanket removal of imprisonment from EPA and major offences under PLIA, Air Act and Water Act, as proposed through the amendment,[20] (refer Table 2) might give a sense of impunity to the offenders and may not provide enough deterrence, especially for big corporates involved in high profit industrial activities. In fact, when the Environment Protection Bill, 1986 was introduced in Parliament, one of the arguments provided was as follows:

> "*The proposed legislation provides for stiff penalties. Penalty for contravention of provisions of the Act and the rules, orders or directions thereunder will be imprisonment for a term which may extend to five years- this is the teeth which we are going to provide—or fine, which may extent to rupees one lakh or both; and with additional fine of rupees 5000 every day if violation continues after conviction. if the offence continues beyond a period of one year from the date of conviction, it will be punishable with imprisonment up to seven years. Private complaints will be cognisable after 60 days notice is given to designated authorities. The jurisdiction of civil courts is barred in matters falling within the purview of the proposed legislation.*"[21]

Thus, removing the provision for imprisonment from environmental laws will be defeating the original intent for protection and improvement of environment as mentioned in the preamble of the EPA. In fact, this may be regressive. Depending on moral culpability and conduct of the suspect there must be a provision of imprisonment for serious violations in the EPA, PLIA, Air Act and Water Act. However, instances where criminal imprisonment can be invoked under these laws must be clearly prescribed based on the **levels of moral culpability**, **risk of harm**, **actual harm**, **extent of harm**, **violations** and various other facts and circumstances of the case as suggested in Table 2.

Cases where environmental damage is a result of wilful act or omission with the intent or knowledge, or recklessness of the violator must be treated as separate from the environmental damages resulting from 'negligent' and 'no fault' instances. The extent of risk and actual harm caused can be another deciding factor in combination of the moral culpability or intention to establish the need to initiate criminal proceedings for environmental offence.

[20] Environment Protection Act, s 10(2), (3), 15(1), (2)

[21] Loksabha Debate, Fifth Session (1986) Eighth Series, No. 48

Some examples of determining civil and criminal liability are discussed below:

Example I: Statutory Non-Compliance + Environmental Damage

A company sets up an industry without obtaining necessary permissions under the EPA or Air Act or Water Act. It discharges effluents in a river which leads to death of fishes and birds. This must be treated as an environmental crime caused by deliberate breach of law and endangering public. In this case, not only should the company be held liable to pay the penalty for violating law and compensation for causing the damage, but it must also be liable to pay all the monetary benefits gained from such unlawful activity. Depending on the facts and circumstances of the case, a provision must be there to initiate criminal proceedings against the owner or the director who was in charge at the time of the commission of the offence.

Example II: Statutory Non-Compliance + Environmental Risk

A company sets up an industry after obtaining necessary permissions under EPA or Air Act or Water Act but violates a condition of the permission. The violation is not sufficient to reach the threshold to adversely affect the environment around it. In such a case, there is a risk of harm involved, but there has been no established damage to environment. In such cases, removal of gains from that unlawful activity and a fixed penalty should comprise the penalty to be imposed. Criminal proceeding may or may not be initiated based on the moral culpability. However, other kinds of additional sanctions may be imposed which may include a suspension of permissions, moratorium from public procurements, sponsoring community service, etc.

Example III: Operational Non-Compliance + Environmental Risk/ Damage

A company sets up an industry with all statutory permissions but fails to meet the conditions imposed during operation. In such case, there might be a deliberate or negligent conduct which can be only ascertained through proper investigation. Depending on whether the non-compliance was within the knowledge of the company and the degree of risk or harm to the environment will decide whether to initiate criminal proceedings against the company.

Some of the indicated list of offences where there must be provision for imprisonment are as follows:

i. Obstruction of government officer from inspection/ search/ collection of samples etc
ii. Non-compliance or violation of environmental law which leads to loss of human lives
iii. Non-compliance or violation of environmental law which leads to loss of wild animals protected under Wildlife Protection Act, 1972
iv. Providing false, misleading information to the regulator while obtaining permissions under EPA, Water Act and Air Act
v. Tampering or altering pollution control and monitoring system

IV. Fair and Rigorous Adjudication Process

Under the proposed amendments, section 15C is proposed to be inserted under Section 15 of the EPA. Under this section, the Central Government, for the purposes of determining the penalties under this Act may appoint an officer not below the rank of Joint Secretary to the Government of India or a Secretary to the State Government to be the adjudicating officer, to hold an inquiry in the manner, as may be prescribed, and to impose the penalty. The Central Government can appoint as many adjudicating officers as may be required.

Similarly, under the proposed amendments, section 45B, section 39A and section 15A is inserted to the Water Act, Air Act and PLIA respectively. Similar to the insertion in the EP Act, the Central Government, for the purposes of determining the penalties under this Act may appoint the District Magistrate having jurisdiction over the area to be Adjudicating Officer, to hold an inquiry in the manner prescribed, and to impose penalty. Again, the Central Government can appoint as many adjudicating officers as may be required.

The proposed amendments seek to shift the adjudication process from courts to the executive office of the proposed adjudicating officer. Administrative adjudication in general is regarded to be speedier and less resource intensive[22] than court-led judicial processes. However, the bureaucratisation of the adjudicating process does not increase efficiency by default. Additionally, environmental matters are inherently complicated by virtue of being interdisciplinary and polycentric. In that context a bureaucrat or a body of them would not be a robust and competent enough adjudicating body for dealing with environmental matters. The executive-led adjudication process, unlike judicial action through courts, is not required to adhere to strict procedural rules or obligated to provide reasoned orders.[23]

Assigning adjudicating powers for environmental cases to District Magistrate (as proposed under Air Act/ Water Act/PLIA) or Joint Secretary (as proposed under EPA) may not be appropriate as they are not well-versed with the adjudicating process and the realities of the environmental wrongs committed. In case of PLIA, the Collector already awards relief to victims and an adjudicating officer is a parallel office with overlapping powers. Further District Magistrate and Joint Secretaries are overburdened with administrative responsibilities, and also lack proper expertise and capacity to undertake detailed and robust adjudicating process in technically complex environmental cases. For instance, a Forest Officer who has the knowledge and expertise may play a role in the adjudicating process to introduce expert evidence to assess damage to biodiversity and ecosystem. Similarly, officers in the SPCBs will

[22] Law Commission of India, Report No.272 *Assessment of Statutory Frameworks of Tribunals in India*, (October, 2017) <https://lawcommissionofindia.nic.in/reports/Report272.pdf>accessed 20 July 2022

[23] *Administrative Adjudication*, <https://old.amu.ac.in/emp/studym/100003464.pdf>accessed 20 July 2022

be skilled and trained to identify violations and establishing environmental damages. However, the adjudicating process should only be with an independent body as discussed below.

In order to make the adjudicating body and the adjudicating process more robust and independent, it should contain two arms- State Level Adjudicating Authority for major offences involving environmental harm, and a Divisional Level Adjudicating Authority.

The State Level Adjudicating Authority ("**SLA**") may be constituted with the Chairman- SPCB, Director General of Police, Regional Officer of the MoEFCC, and a Judicial Officer.

The District/ Division Level Adjudicating Authority ("**DLA**") may be constituted of Chief Conservator of Forest or Divisional Forest Officer, Inspector General of Police or Superintendent of Police, and a Judicial Officer.

These Adjudicating Authorities are to operate at three levels, as described earlier in this document (refer Table 2).

- Level 1 would include instances which do not enquire into the question of environmental harm, here the DLA will be empowered to impose fixed penalty for violations relating to non-compliance.
- Level 2 deals with removal of unlawful gain derived. An independent expert committee shall be set up by the SLA on recommendation of DLA to undertake the technical and extensive exercise of calculating profits earned and/or costs avoided.
- Level 3 would enquire into the instances where environmental damage has occurred, an independent expert committee shall be set up by the SLA to undertake the technical and extensive exercise of calculating environmental damage.

Doing so will positively affect the efficiency and the competency of the adjudicating authority by adding to the capacity of dealing with technicalities of law and environment.

Another aspect which is missing from the proposed amendment is the adjudicating body's duty of giving reasoned orders. In that context also, a body with a Judicial Officer will add to the authority's capacity of giving reasoned orders. Additionally, the orders shall be made available in the public domain to facilitate discussion and enhance public participation.

V. Streamlining Jurisdictions with National Green Tribunal

Presently all matters related to relief, compensation and restitution related to victims of pollution and other environmental damage goes to National Green Tribunal (**"NGT"**) established under the NGT Act, 2010.[24] The compensation awarded by NGT is in addition to the relief payable under the PLIA. [25]

The NGT allows for such applications to be filed within 5 years from the date on which the cause for such compensation or relief first arose.[26] The Schedule II of the NGT Act provides for the head under which compensation or relief for damages can be claimed.

The proposed amendments to the EPA, PLI, Water Act and Air Act provided that appeals from the order of adjudicating authority may be made before the NGT. The proposed amendments to the EPA, PLIA, Water Act and Air Act provide that appeals from the order of adjudicating offers may be made before the NGT. However, it must be understood that the appellate jurisdiction of the NGT is prescribed under Section 16 of the NGT Act, while the applications for relief, compensation and restitution are filed under Section 15. Further the NGT has wide jurisdiction over all civil cases involving substantial question related to the environment. [27]

In such case, the proposal of creating an adjudicating officer to determine penalties for environmental damage may overlap with the original jurisdiction of the NGT under Section 14 and Section 15 of the NGT Act. This is bound to create confusion due to overlapping of jurisdictions. Thus, it is very important to clarify or streamline the functions of the proposed adjudicating authorities under the EPA, Water Act and Air Act with the powers of the NGT under Section 14 and 15 of the NGT Act.

[24] The National Green Tribunal Act, 2010, s 15

[25] The National Green Tribunal Act, 2010, s 15(2)

[26] The National Green Tribunal Act, 2010, s 15(3)

[27] The National Green Tribunal Act, 2010, s 15

VI. Streamlining Penalties between EPA, Air Act and Water Act

Most of the environmental violations are transdisciplinary in nature and the impact is much beyond the actual legal violation. In several cases, there is a possibility that a violation under the Air Act and the Water Act will also invoke provisions under the EPA (or its delegated legislations). In such cases, having multiple penal regimes and regulators may complicate the adjudicating process and delay timely intervention. Thus, it is necessary that the penalties are imposed in a stage-wise manner depending on the gravity of the offence.

Following are some suggestions to streamline the adjudicating process:

1. The DLA (as suggested) should be the first level of imposing penalty for Level 1 offences. They can impose 'fixed penalty' as prescribed under the Acts.
2. Depending on the case, they will be required to escalate the case as 'Level 2' to the Adjudicating Authority under the EPA after verifying any prima facie violation of EPA (and delegated laws under it) and whether there is any environmental harm.
3. The SLA (as suggested) will be required to respond in a time-bound manner to verify the escalation for Level 2. If there is violation of any law prescribed under EPA and environmental harm, penal proceedings for Levels 2 or 3 may be initiated.
4. For cases which include Level 2 and Level 3 offences involving environmental harm, it must be clarified that the final amount of penalty will be decided by the SLA constituted under EPA to avoid overlapping of jurisdictions.

VII. Tackling Special Violations

A. Continuing offences

A continuing offence may often pose a greater risk than an offence that is corrected in time. The proposed insertions of sections 14A (2) and 14B (2) under the EPA prescribe a penalty for continuing violations at Rupees 1 lakh per day to a maximum of Rupees 50 lakh. Similarly, the substituted Section 15(2) of EPA prescribes a penalty of Rupees 50,000 per day to Rupees five lakh rupees.

Under the proposed Section 41 of the Water Act, the penalty for a continuing offence may extend up to Rs. 2 crores, and under Section 37 of Air Act this penalty may be between Rs 5 lakhs to 5 crores. Under Section 14 of PLIA too, it is proposed that a continuing offence is penalised with a sum equal to or twice the amount of the premium. (Refer Table 1)

We suggest that in each of these provisions, the original provisions should be retained wherein an imprisonment was prescribed for cases where the violation or the contravention continues beyond a period of 1 year.

In addition, the Adjudicating Authority should have power to issue injunctions in the form of temporary restraining orders in order to stop the continuing offence. The power to issue injunctions is particularly important because a continuing environmental offence can lead to irreparable environmental damage. Further, the penalty imposed must incorporate unlawful gains derived from the violation as discussed previously for Level 2.

B. Repeat offences

A repeat offence by a person or a company is indicative that the penalty imposed in the first instance did not have an adequate deterring effect. Therefore, repeat offences warrant a higher penalty and stricter action to effectively deter the offender and prevent another instance of the offence. In 2009, a report by Organisation for Economic Co-operation and Development (**"OECD"**) in the context of Eastern Europe, Caucasus and Central Asia had suggested that 'the adjustment of the fine's gravity component should be up to 25% thereof for the first repeated violation and up to 50% for further repeated similar violations.'[28] Additionally, the companies which are convicted of an environmental offence should be barred

[28] n11

from participating in public procurement. A provision to this effect has proved to successfully deter companies from violating environmental norms in Zambia.[29]

Therefore, we suggest that for Repeat Offences, the penalty amount should be 125% of the first penalty for the first repeated violation, and 150% and 200% for second and third repeat violations. There should be a provision for revoking permissions granted under environmental laws after three repeat offences. Additionally, the companies which are convicted of an environmental offence should be barred from participating in public procurement.

Further, just as the provision for imprisonment for repeat violations has been retained in the Water Act, similar provisions should be introduced to the EPA and Air Act. In PLIA too, the provision for repeat offences should be reinstated under Section 14.

C. Non-payment of penalty

The proposed amendment to EPA inserts section 15F. Under this section, failure to pay penalty or additional penalty under section 14A, 14B, 15, 15A and 15B would be an offence. Any person who fails to pay the penalty or additional penalty shall be liable for imprisonment which may extend to 3 years or with fine which may extend up to 10 crore rupees or with both.

Similarly, the proposed amendment inserts sections 45G and 39B to the Water Act and Air Act, respectively. Under these sections where a person fails to pay penalty or additional penalty imposed upon him under the provisions of the concerned Act, he shall be punishable with imprisonment for a term which may extend up to 3 years, or with fine which may extend to twice the amount of penalty imposed or with both. Under the proposed section 17A in PLIA, failure to pay penalty is punishable with 1 year of imprisonment and/or a fine of Rs. 5 lakhs.

While this is an important provision, it is insufficient and falls short on doing enough for recovery on the non-payment of penalty or additional penalty. Various legislations provide for measures that go beyond imprisonment and fine on non-payment of penalty. For example:

- Under Section 28A of the **SEBI Act**, on the failure of non-payment of penalties imposed, recovery officer is empowered to (a) attach and sell a person's movable property; (b) attach a person's bank accounts; (c) attach and sell person's immovable property; (d) arrest the person and detain in prison; (e) appoint a receiver for the management of the person's movable and immovable properties. In doing so the recovery officer is empowered to seek the assistance of the local district administration while exercising these powers.

[29] United Nations Environment Programme, *Enforcement of Environmental Law: Good Practices from Africa, Central Asia, ASEAN Countries and China.* (2014) <https://wedocs.unep.org/bitstream/handle/20.500.11822/9968/enforcement-environmental-laws.pdf?sequence=1&isAllowed=y>accessed 20 July 2022

- Under the **Real Estate (Regulation and Development) Act, 2016** (**"RERA"**), Section 40 provides for the power of recovery in case of non-payment of penalty. Under Section 40, if a promoter or an allottee or a real estate agent, fails to pay any interest or penalty or compensation imposed on him by the adjudicating officer or the Regulatory Authority or the Appellate Authority, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

We strongly suggest that for non-payment of penalty, similar recovery provisions should be inserted in environmental laws. The power to attach movable and immovable property, bank accounts, and appointing a receiver for the management of a person's movable and immovable properties will make the enforcement mechanism more robust and deter repeat offenders. Further, there should be provision for suspension or cancellation of permissions granted under environmental laws.

VIII. Appeal

The proposed section 15D of EPA, section 39D of Air Act, section 45C of the Water Act and section 15B of PLIA provide that any person aggrieved by the order of the adjudicating officer can file an appeal with the National Green Tribunal within 60 days.

As a good practice, increasingly a number of protectionist legislations mandate a non-waivable deposit of a part of the penalty amount as a precondition to the appeal. Following are some of the legislations which mandate deposit of a portion of penalty amount for appeal.

- Section 51 of the **Consumer Protection Act, 2019** specifically imposes a pre-condition that any person filing an appeal before the National Commission must deposit 50% of the amount s/he is required to pay under the order of the State Consumer Disputes Redressal Commission.

- Section 43(5) of **RERA** mandates that no appeal shall be heard by the Real Estate Appellate Tribunal against the order of an adjudicating officer unless the promoter first deposits at least 30% of the penalty amount, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

- Section 19 of the **Micro, Small and Medium Enterprises Development Act, 2006** imposes a pre-condition that 75% of the penalty amount should be deposited by the appellant.

We argue that a similar protection should be afforded under the EPA, PLIA, Water Act and Air Act. Given the fact that environmental offences often have irreversible and cumulative impact on environment, once a determination of penalty is made by the adjudicating authority the deposit requirement at the appeal stage should be mandatory in nature and non-waivable. As protectionist legislations, this kind of a provision ensures that there is sufficient security from the offender to meet the financial obligations of the order of the adjudicating officer. It also deters against frivolous appeals.

IX. Streamlining Environmental Relief Fund

A new section 17A under EPA proposes to establish an Environmental (Protection) Fund. The penalty paid by the contravener under Section 14A, 14B, 15A and 15B, or otherwise, is to be deposited in the Fund. Important aspects of regulation, administration, management and utilisation of the Fund have not been spelled out under the proposed amendments. Instead, under Section 17(3) it is simply stipulated that the Central Government may prescribe how these aspects are to be governed. Similarly, Water Pollution Remediation Fund and Air Pollution Remediation Funds are proposed to be established under the Water and Air Act respectively.

The PLIA, already establishes the Environment Relief Fund ("**ERF**") under Section 7A. Every person or industry dealing with any hazardous substances is mandated to subscribe to an insurance and also deposit equal premium in the Fund. The Act also clearly stipulates how the Fund is to be administered. Further, under Section 24 of the National Green Tribunal Act, 2010, the compensation or relief awarded by the NGT is also deposited in the Fund. The money from the Fund is intended to provide immediate relief to the people affected by accidents involving hazardous substances or the disbursement of compensation as awarded by the NGT.

In our previous study, we found that the ERF had been set up in 2008 and United India Insurance Company Limited has been officially appointed as the Fund Manager.[30] Therefore, there is already a mechanism in place to administer an environmental fund.

Our previous study also found out that a sum of Rupees 810 crore was lying unutilised in the ERF till 2019.[31] The study also outlined several issues and challenges in managing the Fund. Since the Fund has been established, there was hardly any disbursal to compensate for environmental damages. There were also concerns regarding proper management of the compensation awarded by the NGT in the ERF. Based on this past experience, we submit that establishing the Environmental (Protection) Fund in and of itself will not guarantee that the penalty amount is being collected and used for the protection of environment.

Instead, we submit, that the EPA, Water Act and Air Act should be revised to expand the scope of the ERF from simply giving relief to the victims to also being used for the protection and restoration of the environment. This becomes even more important in view of the proposed insertion of sub-section (9) of Section 7 of PLIA wherein the Central Government has been

[30] Debadityo Sinha, *The Management of Environment Relief Fund* (Vidhi Centre for Legal Policy 2020) <https://vidhilegalpolicy.in/research/tracking-funds-to-provide-relief-to-victims-of-environmental-hazards/ >accessed 20 July 2022

[31] Ibid

empowered to allocate monies from the ERF for restoration of damage caused to the environment. In the event that these four Funds are established separately, there is bound to be an overlap in their purpose and functioning. There will be no clarity about which fund should the penalty be deposited in and who decided on its utilisation. It is thus absolutely critical for these provisions to be streamlined into one Fund, which in this case should be the ERF (for logistical ease).

Rather than setting up newer Funds, the emphasis should be on strengthening the existing mechanisms and ensuring that the corpus collected is actually utilised for the purpose for which it was created. The contributions received under various Acts must be maintained under separate account within the ERF.

It is submitted that, at the very least, the Parent Act should clearly specify the objective of establishing the Fund and the purposes for which the money deposited therein shall be used. It is also important to ensure that the funds help State Governments to utilise the money to improve capacity and efficiency of the bodies like SPCB, Forest Department etc. which are understaffed and lack proper resources to efficiently perform their duties. For this, we strongly suggest a State-Level ERF to be established where a fixed share from the parent contribution will be allocated to States. For proper distribution, management and utilisation of this fund, a model similar to The Compensatory Afforestation Fund Act, 2016 may be followed.

X. Additional Suggestions

A. Liabilities of personnel of companies in case of civil penalties

Where a company commits an offence under the EPA, Section 16 extends the culpability to every person in charge or responsible for the conduct of the company's business. However, since this provision is limited to 'offences', one may argue that the civil penalty provisions post amendment do not apply to civil penalties now being introduced under the EPA. Therefore, section 16 may be amended to clarify that liability will extend to the person in-charge of the company in case of civil penalties. In addition, the Government recently enacted similar amendments under the SEBI Act, 1992. Under section 27, which provided for offences by companies in the SEBI Act, 1992, the Central Government replaced the word 'offence' with a more generic word 'contravention'.

B. Proposed penalty under section 14 B (2) of EPA

The proposed amendments to the EPA under Section 14B (2) says; where any person continues contravention or non-compliance under sub-section (1), he shall be liable to pay an additional penalty which shall not be less than one lakh rupees for each day during which such contravention or non-compliance continues and may extend to fifty lakh rupees. Section 15(2) has also been amended in a similar manner.

According to the rule of strict interpretation, it could be argued that while the per day penalty is Rs. 1 Lakh in case of continued contravention, it could possibly go up to only 50 Lakh rupees. This provision appears to be introducing a cap to the extent of penalty in case of continued contravention. The proposed amendments to Sections 42 and 38(2) of the Water and Air Acts respectively do not introduce a cap in imposition of additional penalty in case of continued contravention. The above-mentioned sections of the Water and Air Acts provide an additional penalty of 1 Lakh per day during the period the contravention continues.

Therefore, we suggest that the penalty for continuous contraventions under EPA must be clarified as to whether Rs. 50 lakh is the maximum limit for per day of contravention or a cumulative penalty.

C. Amending section 24(2) of the EPA

Section 24(2) of the EPA says, where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act.

This provision may weaken the penalty provisions under the EPA especially in cases where violation of Water Act and Air Act is already established. EPA is the umbrella legislation of the environmental law regime in the country, and it constitutes several important sub-ordinate legislations which deal with EIA, management of hazardous waste, restricting industrial activities in certain regions etc. Any penalty proposed under the Air Act or Water Act may only focus on their limited jurisdiction and not necessarily take into consideration all aspects of the violation given the wider definition of 'environment' provided under EPA. For e.g., discharge of untreated toxic water from an industry will be liable to be penalised under Water Act, but the damage caused to the 'environment' which under EPA includes land, human beings, other living creatures, plants and the inter-relationship between them may be ignored completely.

Therefore, we propose that the said provision must be amended. The EPA being an umbrella legislation and having wider scope of 'environment', for cases involving environmental damages, penalty under EPA must be over-riding or in addition to the other Acts. The issue of overlapping jurisdiction between the Air/Water Act and EPA can be easily addressed by streamlining the Adjudicating Authority as suggested by us in the previous section.

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