

19 June 2021

Mr. Naresh Pal Gangwar
Joint Secretary, HSM Division,
Ministry of Environment, Forest and Climate Change,
Indira Paryavaran Bhawan, Jor Bagh Road,
New Delhi – 110003
E-mail id: jsnpg.mefcc@gov.in; moefcc-coalash@gov.in

Subject: Comments on draft flyash notification, 2021 with an emphasis on the need to reassess the approach, design and content of the flyash related regulations

This is with reference to the Draft Notification for flyash utilisation issued by the Ministry of Environment Forests and Climate Change (MoEFCC) through a gazette notification G.S.R. 285(E) dated 22.4.2021. This Notification is to replace all previous notifications and amendments issued by the ministry since 1999, including the changes prescribed in 2003, 2009 and 2016 notification and its subsequent amendments dealing with flyash utilisation. We appreciate that this notification has acknowledged flyash related illegalities as a legacy issue and introduced a new system of penalties. These were serious gaps in the regulatory regime for managing flyash so far. **However, we strongly believe that the approach, design and content of the flyash related regulations need to be reassessed as first level measures to address the flyash problem in India.** Our suggestions below are based on understanding two decades of flyash regulation in India and a decade long field research project to understand the enforcement challenges for regulating flyash.

We would like to present five points for your consideration:

- 1. Need to upstream the flyash regulation by addressing the problem of flyash generation*
- 2. Need to recognise flyash management as a public health issue*
- 3. Need to address the shortfalls of the regulatory framework for flyash utilisation*
- 4. Need to recognise and address the institutional failure to monitor and restrain legal noncompliance*
- 5. Need to develop a comprehensive and robust mechanism of fines and penalties to act as a deterrence*

- 1. NEED TO UPSTREAM THE FLYASH REGULATION BY ADDRESSING THE PROBLEM OF FLYASH GENERATION:** For the last two decades the regulations dealing with flyash have been only focused on the disposal of ash. The intermediary processes of coal washing were introduced to minimise the generation of ash when burnt for power generation. However, all consent procedures including those related to pollution control and environment clearance rely on the power producer's disclosure of the amount of ash that will be generated, which is at best an estimation. At no given point has there been an environmental audit or assessment of whether these figures are a truthful representation of the actual generation of ash from burning coal. As a result, all measures for managing and mitigating impacts of flyash acknowledge the failed record of flyash utilisation but without questioning whether the estimations provided at the time of regulatory approvals were valid. This is also important because all the environment management infrastructure

like ash dykes or disposal sites or the number of brick making units is assessed for environmental viability based on these. If the estimation of the amount of flyash generated is incorrect, no amount of mitigation measures will be adequate to accommodate the excess and unaccounted ash produced. Therefore, upstreaming the process of regulating flyash with open environmental audits and review of disclosures is critical for any meaningful and legally tenable solution to address the shortfalls and impacts of flyash.

2. **NEED TO RECOGNISE FLYASH MANAGEMENT AS A PUBLIC HEALTH ISSUE:** There is scientific evidence and legal admission of the public health consequences of flyash mis-utilisation. The National Green Tribunal (NGT)'s order dated 27.1.2020 in Original Application No.117/2014 records that *“this Tribunal has noticed repeated and continuous defaults by the TPPs resulting in damage to the environment and public health.”* Yet there are no proactive measures either by state governments or central governments to officially recognise the non-utilisation of flyash and/or flyash ash related accidents as a public health problem. Flyash misutilisation leads to both physical harm and long-term socio-economic impacts. Flyash misutilisation has so far been approached only with techno-legal mitigation measures, and at best, through one-time compensations for affected families. It is critical to take policy measures to link flyash utilisation with steps being taken by the government to prevent diseases and deaths and provide health services. The environmental regulation that emerges from this approach of flyash as a health risk has the potential to identify remedies to address legacy impact and prevent future legal breaches.
3. **NEED TO ADDRESS THE SHORTFALLS OF THE REGULATORY FRAMEWORK FOR FLYASH UTILISATION:** Any regulation which is being proposed to address the flyash related impacts needs to be based on *assessing the gaps, addressing the efficacy of existing measures and restrain the footprint of impacts.* Unfortunately, the draft 2021 notification does not take these into account.
 - The draft notification needs to take into account non-compliance induced breaches of ash dykes and ponds and present preventive and restitutive measures for the same. These are issues of legal non-compliance but they have also had serious impacts such as contamination of farmlands, common use areas, water bodies and air, for years.
 - The notification proposes eleven utilisation and management measures for the current and prospective generation of flyash by TPPs. However, this is not based on an analysis of the failures and limitation of any of the measures proposed. For example, field research and a large body of litigation has shown that filling up low lying areas relocates a flyash dump and in turn interferes with the prevailing use rights of these areas.
 - The measures proposed in the draft also extend the flyash disposal/utilisation to 300 kilometres, with no limitation on inter-state movement. Our research across different states shows that this impedes fixing accountability on regulatory institutions and generators of flyash. There are no inter-state grievance redressal mechanisms to regulate and monitor the movement of flyash across large geographical boundaries. This includes greenfield areas where there is no existing footprint of these impacts on waterbodies, agricultural field or common areas.
 - The existence of “Legacy” Ash that has been identified in this notification is critical. However, there is practically no immediacy or urgency in the regulatory action proposed for it. On the contrary a ten-year time frame has been provided (starting mid 2022) to generators of flyash. This eases the legal burden of compliance but allows for illegal dumps of overloaded ash dykes to continue to operate despite proven risks of accidents, fires and repeated instances of contamination.
4. **NEED TO RECOGNISE AND ADDRESS THE INSTITUTIONAL FAILURE TO MONITOR AND RESTRAIN LEGAL NONCOMPLIANCE:** It is important to recognise that the problem of flyash utilisation exists despite the system of approval/consent conditions and a mandatory protocol for disposal and management. This is as much the limitation of the institutional mechanism to monitor and enforce compliance as much as a failure of the generators of flyash. Any regulation needs to be reflexive

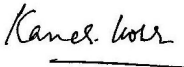
in its approach, and not reinforce a regulatory system that has not managed to adequately reign in the impacts of flyash and non-compliance with law. The present notification continues with a centralised system of monitoring through the composition/functions of the three review committees or by handing over management of fines to the CPCB. Such a centralised framework to reign in the illegalities and impacts flyash has not worked in the last two decades. There is a need for a new and more participatory approach which can be based on delegated responsibilities to authorities closest to the point of impact/utilisation, both for monitoring and where remediation of impacts is required.

5. NEED TO DEVELOP A COMPREHENSIVE AND ROBUST MECHANISM OF FINES AND PENALTIES TO ACT AS A DETERRENCE: This is the first time that a flyash utilisation notification has introduced an elaborate mechanism of fines. However, these need to be reviewed in the light of the four points above. The proposed mechanism needs to build systems to deter and prevent:

- Willful and knowing negligence in accumulation and mismanagement of flyash dumps, dykes, pipelines and ponds that result in breaches and noncompliance induced disasters. Unfortunately, these instances have become regular occurrences in several parts of the country known as energy hubs or centres of coal washing stations.
- Non compliance of the deadline for thermal power plants for achieving flyash utilisation. This needs to take into account the past track record of these violations and the reasons for non adherence with law and prevailing flyash utilisation guidelines.
- Condonation of violations allowing for delays in payment of paying the fines while continuing to violate flyash utilisation guidelines.
- Continued non-remediation and lack of clean-up of areas contaminated due to flyash dumps or breaches, despite funds being collected by the pollution control boards.

We do hope that the ministry will take the above suggestions into account and undertake an exercise that goes beyond extending time frames for compliance and expanding the geographical area where flyash can be disposed of.

Thanking you,



Kanchi Kohli
Senior Researcher



Manju Menon
Senior Fellow

CC:

1. Shri Sujit Kumar Bajpayee, Joint Secretary (Coal Mining, Thermal Power): sujit.baju@gov.in
2. Dr. Y.P. Singh, Director, MoEFCC and Member Secretary, EAC Thermal Power: yogendra78@nic.in
3. Shri Lalit Bakolia, Director, MoEFCC and Member Secretary, EAC Coal Mining: lk.bakolia@nic.in