

COMMENTS ON THE PROPOSED AMENDMENTS TO THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT 1981

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Overview

These comments are being submitted in response to the ‘Notice for Public Consultation’ dated 30.06.2022 issued by the Ministry of Environment, Forest and Climate Change (MoEFCC) inviting comments/ suggestions on proposed amendments to the Air (Prevention and Control of Pollution) Act 1981 (Air Act).

The regulatory framework governing air quality in the country needs to be reformed urgently. Significant parts of the Indian population are exposed to air quality that does not meet the National Ambient Air Quality Standards. This crisis of poor air quality is neither urban-centric, nor seasonal, and its impact on public health is staggering. Apart from respiratory and cardiovascular diseases that are commonly associated with air pollution, it is also associated with diabetes, cardiovascular disease, adverse birth outcomes, and ocular conditions, and emerging evidence shows it may lead to other adverse health outcomes like dementia and neurodevelopmental disorders.

Many aspects of the regulatory framework need to be reformed or strengthened to appropriately deal with the nature and scale of the air pollution crisis. One of the key aspects is the ability of the regulatory agencies to enforce the law. Their failure in effectively doing so – evident from the poor quality of air experienced in most parts of the country – is attributable to various factors including institutional constraints, poor monitoring capacity, misalignment of statutory objectives and stated policy goals, and flawed legal design. The proposed amendments are limited to only one factor – the design of the Air Act in terms of punishments for offences.

To the extent the proposed amendments introduce monetary penalties *per se* for certain offences under the Air Act, the amendments are a welcome move. However, in our opinion, the proposed amendments need to be withdrawn and reconsidered for primarily two reasons: *first*, they are legally untenable due to excessive delegation of essential legislative functions; and *second*, the proposed regulatory framework, that will include Adjudicating Officers with the power to impose financial penalties, does not appear to be well-equipped to deal with violation of the law and its impact. Apart from this, there are several errors and inconsistencies in the proposed text which make its implementation problematic.

Our comments are divided into three sections. Section I discusses why the proposed amendments are legally untenable; Section II discusses why the proposed institutional framework will not reduce violations of the law; and section III lists some of the errors and inconsistencies in the text of the proposed amendments.

Section I: Proposed amendments are legally untenable

1. The doctrine of excessive delegation prohibits the legislature from delegating its essential legislative functions to the executive. A catena of judgments of the Supreme Court of India

have laid down tests to assess whether the legislature has excessively delegated its functions or not. The Hon'ble Court has held in *Vasantlal Maganbhai Sanjanwala v State of Bombay* (1961) 1 SCR 341-

“...But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation...”

2. Subsequently, in *Municipal Corporation of Delhi v Birla Cotton, Spinning and Weaving Mills, Delhi* (1968) 3 SCR 251, the Supreme Court held -

“...the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. ... The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble...”

Applying the doctrine of excessive delegation, the proposed amendments are legally untenable and will be struck by a court of law. There are at least two clear instances of excessive delegation of legislative functions in the proposed amendments.

3. ***First, the proposed Section 36A empowering the Central Government to establish an Air Pollution Remediation Fund.*** Penalty amounts paid in pursuance to the orders of Adjudicating Officers must be deposited in this Fund. Section 36A(3) gives unbridled powers to the Central Government to make all decisions in relation to the Remediation Fund – how it shall be administered, the manner in which the money shall be withdrawn, and any other matter connected with the administration of the Fund. There is absolutely no legislative guidance provided in the proposed amendments about how the Central Government should administer the Fund, what are the policy objectives to be achieved, and for what purposes the Fund may be used. The present text of the Air Act, including its preamble, do not provide any guidance on this.
4. In contrast, Chapter II of the Compensatory Afforestation Fund Act 2016 includes specific provisions on the administration and use of the monies received in the Compensatory Afforestation Fund; in particular, the division of the funds between the Central Government and the State Governments, and the purposes for which the amounts may be utilized.

5. ***Second, the delegation of power to the Central Government to determine the penalty amount without any legislative guidance.*** According to the proposed Section 39A, the Central Government may designate the District Magistrate or any other officers as Adjudicating Officers to hold an inquiry to determine the quantum of penalty to be levied in case of certain offences. The provision states that the Central Government shall prescribe the manner in which the penalty amount shall be determined. The proposed text neither includes factors to be considered while determining the penalty amount, nor the statutory and policy objectives that are to be achieved by levying the said penalty. This is clearly excessive delegation of legislative functions and therefore not tenable in law.
6. Unlike the proposed amendments, the Food Safety and Standards Act 2006 in Section 49 prescribes guidelines which the Adjudicating Officer notified under the FSS Act shall consider while adjudicating the quantum of penalty. Similarly, Section 47 of the Information Technology Act 2000 lists factors that the Adjudicating Officers appointed under the IT Act must consider while adjudging the amount of compensation to be awarded.

Section II: New institutional framework will not reduce violations of the law

1. ***Egregious and repeat offenders are not likely to be deterred.*** One of the most significant changes being proposed is the introduction of financial penalties for certain offences. These financial penalties shall be levied by Adjudicating Officers appointed by the Central Government. The covering note briefly refers to the need to remove the fear of imprisonment for simple violations under the existing law. But it appears to have done away the possibility of criminal prosecutions even for egregious acts and repeat offenders. For instance, emissions beyond the prescribed standards (an offence under Section 22 read with Section 37) can have serious environmental and public health consequences, particularly in case of large emitters. If the only adverse consequence these emitters are likely to face are financial penalties, with no threat of criminal prosecution, the deterrence effect of the law is significantly diminished. Further, under the proposed Section 37, increasing amounts of financial penalties may be levied in case the contravention of law continues – first for less than a year [sub-clause (2)], and then beyond a year [sub-clause (3)]. In such cases, the Central Government’s unwillingness to take drastic steps, such as criminal prosecution, and continuing with financial penalties against repeat offenders will send a wrong signal to polluters.
2. ***Adjudicating Officers are unlikely to have the expertise to perform the tasks assigned to them.*** The primary work of the Adjudicating Officer under the proposed amendments will be to assess imminent or actual environmental damage. She will have to determine the impact of impermissible emissions, and also ensure that the amount of penalty levied is equivalent to the damage caused due to the contravention or non-compliance. It is difficult to see how a District Magistrate will have the necessary expertise, time, and resources to undertake these tasks. While she is likely to have experience in dispute resolution, a significant number of offences under the Air Act would require her to understand and probe scientific and technical issues and their social, economic and environmental impacts. Presently, the Central and State Pollution Control Boards (PCBs) with their staff that includes scientists and engineers are performing the task of monitoring and detecting offences under the Air Act, and assessing the damage caused

due to violations. The proposed amendments, while introducing a new institutional layer of Adjudicating Officers with significant decision-making powers, make no reference to the kind of expertise the Officers must (or even may) rely on while exercising these powers. Without the benefit of such expertise, the determination of penalty amounts may not be accurate or sufficient.

3. ***No clarity on how the new institutional layer will function in parallel to the existing framework.*** The new institutional layer of Adjudicating Officers as well as the Remediation Fund and its attendant administration have been introduced in parallel to the existing institutional framework of State Governments and the PCBs. The proposed amendments do not provide any clarity on how the existing powers of the State Governments and the PCBs will be reconciled with those of the Adjudicating Officers. The proposed amendments do not explain the rationale for creating these parallel processes and what would happen in case of a conflict. Three specific examples may be considered in this regard:
 - Although the proposed amendments use the word ‘penalty’, it appears that some part of it is likely to be compensatory in nature. Proposed penalty clauses have a proviso for situations in which the damage caused due to the offence is ‘more than the amount of penalty’. This type of equivalence is in the nature of compensation or restitution of environmental damage. If that is correct, how would that impact the powers of the National Green Tribunal under Section 15 of the NGT Act, and the powers currently exercised by the PCBs (under Section 31A) to award compensation to victims.
 - Presently in case of an alleged offence under the Air Act, the PCBs play a key role in investigating the allegation, issuing appropriate directions (including show cause notices), and when necessary, filing complaints in criminal courts. With Adjudicating Officers also looking into the alleged offences, how would that affect the role of the PCBs?
 - The proposed Section 21A read with Section 53(1)(k) gives extensive powers to the Central Government to issue guidelines with regard to the grant or refusal of consents by PCBs. However, presently the consent management process is mainly guided by the State Governments and PCBs. Section 54(1)(l) and (m) of the Air Act give powers to the State Governments to make rules regarding the consent granting processes.
4. ***No rationale for a new institutional layer.*** The proposed amendments (and the covering note) do not provide a clear rationale for introducing a new institutional layer of Adjudicating Officers, instead of giving similar powers to impose financial penalties to the PCBs and strengthening them appropriately. Why is a District Magistrate better placed to assess damage and determine penalty amounts than the PCBs? Further, there already exists an appellate mechanism in Section 31 of the Act, with a further appeal before the NGT. It is unclear why this process is being overlooked and a new parallel adjudication process being created.
5. ***No clarity on process before the Adjudicating Officers.*** The proposed amendments do not include any provisions on the process that will be followed for cases to be brought before the Adjudicating Officers. Whether the PCBs have to bring alleged violations to the notice of the

Officers, or can citizens approach the Officers directly (or after giving notice to the PCBs as in Section 43) has not been specified. The amendments also propose penalties in case the contravention continues. It is not clear who is responsible for monitoring this – the Adjudicating Officer, the PCBs, or a citizen. Importantly, the proposed text does not prescribe any process – or identify the authority responsible – in case an offender does not comply with the orders of the Adjudicating officer and pay the penalty amount levied. Further, the proposed Section 39A(3) states that the Officer shall give the alleged offender a reasonable opportunity to be heard. However, a similar opportunity is not expressly provided to the complainant. She may be entirely excluded from the process after filing the complaint and not be allowed to present evidence in support of her complaint.

Section III: Errors and inconsistencies in the draft text

1. The proposed Section 21 allows the Central Government to exempt certain categories of industrial plants from the requirement to obtain a consent to establish or operate. While there could be exceptional circumstances in which industrial plants may not require environmental regulatory scrutiny. However, these circumstances need to be statutorily prescribed and should align with the statutory objectives. The objective of the Air Act is preservation of the quality of air and control of air pollution. Therefore, only industrial plants that do not emit pollutants or whose emissions are adequately regulated under any other law can be considered for exemption, and this kind of guidance should be included in the proviso to Section 21. The proposed Section 53(1)(j) provides some guidance but needs to be reconciled with the text of Section 21.
2. The proposed Section 41 deals with cases in which government officers have committed an offence under the Act. In the existing law, the officer is guilty of the same offence (as any other person) and liable to be proceeded against accordingly. However, in the proposed amendment, the penalty amount has now been reduced and capped at rupees two lakhs, and there is no clarity about whether such matters will be dealt with by the Adjudicating Officer or the criminal courts.
3. The proposed Section 39D allows an aggrieved person to approach the National Green Tribunal against an order of an Adjudicating Officer. It should be expressly stated that ‘aggrieved person’ is not limited to the offender, but also the original complainant (or private citizen) who may not be satisfied with the order.
4. Certain inadvertent errors were also noticed in the text which one hopes will be rectified or clarified. For instance, in the proviso to the proposed Section 39C, the text refers to ‘penalty’. It should presumably be a ‘fine’ imposed by a criminal court of competent jurisdiction. Section 38(g) of the existing Air Act is deleted in the proposed text. It should have found place under the proposed Section 39C. Further, Section 36A(2) and Section 36B appear to be repetitive.