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The Draft Environment Laws (Amendments) 2015 Bill intends to impose monetary penalties for environmental damages determined by an adjudicating authority and use the received penalty amounts for improvement of environment.

Essentially, the Bill 1) seeks to deal with an ex-post situation - to mitigate through remedial measures the environmental damage that has already occurred 2) seeks to deliver environment justice with quick administrative efficiency through grading of damage and precise monetary penalties, 3) seeks to, through an intermediary redress mechanism, reduce adjudication by the National Green Tribunal (NGT) and d) does not consider an ex-ante situation to prevent environment damage, especially an imminent threat.

*At the outset we categorically state that we do not accept or agree to the Bill in its current form as we feel it does not provide for the necessary measures required to protect the environment. Our comments therefore may be read only as a response from the public to its contents and not as its acceptance.*

Our comments seek to address four aspects that appear to be the main changes of the Draft Environment Amendment Bill 2015

The aspects that the comments will focus on:

- A. *The Adjudicating Authority.*
- B. *Defining Violations.*
- C. *Penalties for Violations.*
- D. *Others*
  - a) *National Database on Environment*
  - b) *Amendments to NGT Act*
  - c) *Electronic Record/Electronic Form*
  - d) *Preventing Environment Damage*

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## **A. ADJUDICATING AUTHORITY**

**Relevant section(s):** Sub-section clause (a)<sup>1</sup>, Sub-section 14 (D) (1)<sup>2</sup>

### **a. Explanatory Note**

**Objections/Concerns:** The Bill does not give any explanation about the need for an adjudicating authority as an intermediate platform in adjudication. (In terms of structure, the Bill appears to have taken a page out of TSR Committee Report which also suggested setting up of an administrative board with similar characteristics).

Further, the advantages (and disadvantages) of this three-step process of redress (PCB, Adjudicating Authority & NGT) as against the current set-up process is not explained.

In addition, the status of the Adjudicatory Authority is unclear and its position nebulous as it appears to be attached to or part of another Authority. As a result, it appears to be neither a quasi-judicial regulatory body - insulated from government, political or executive interference (like the ERCs) - nor is it a pure administrative authority - leaving it in a grey area of accountability.

### **Submission:**

- i. The word 'Adjudicating Authority' requires greater precision in definition. This being neither an assessing panel nor an enforcement panel and where its powers are merely to determine damage, impose penalty and distribute funds cannot be called an "Authority".

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<sup>1</sup> "adjudicating authority" means an authority appointed under sub-section (1) of section 14D, by the Central Government, or, as the case may be, by the authority duly constituted by the Central Government under sub-section (3) of section 3 including the State Level Environment Impact Assessment Authority or other authority constituted before the commencement of the Environment Laws (Amendment) Act, 2015, to adjudicate and impose penalty relating to violation of provisions of this Act or the rules or the orders or directions made or issued thereunder, in respect of projects or activities or operation or process falling under their respective jurisdictions;"

<sup>2</sup> 14D. (1) In cases where the Central Government or any authority or officer of the Central Government or any authority constituted under sub-section (3) of section 3 is empowered to give or grant clearance, approval, authorisation, permission, registration under this Act or rules made or any direction issued thereunder, the Central Government may, for the purpose of adjudicating under sections 14A and 14C, by notification in the Official Gazette, appoint, on the recommendations of the Selection Committee, an adjudicating authority consisting of at least two members for holding an inquiry in the prescribed manner after giving the person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

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- ii. Its status should be clearly explained and spelt out.
- iii. An explanatory note should be given for better understanding of the necessity to create an adjudicating authority.

### **1. Process of Appointment of Adjudicating Authority**

**Relevant Sections:** 14 G (1)<sup>3</sup>, 14 G (2)<sup>4</sup>, 25(2)(gc)<sup>5</sup>, 14 (H), 14 (I)<sup>6</sup>, 14 (J)<sup>7</sup>

#### **a. Selection Committee:**

**Objections/Concerns:** As separate rules for the Selection Committee are to be formulated, its composition and the procedures to be followed are not prescribed in the Bill.

The absence of rules does not constitute a transparent and accountable process of selection. In recent legislations, the composition of the Selection Committee is set out in primary legislation e.g. in the Electricity Act 2003<sup>8</sup> (Section 78. (1)) Composition of the Selection Committee to appoint Electricity Regulatory Commission officials are spelt out, Consumer Protection Bill (Section 12) gives lists out details of Selection Committee<sup>9</sup> for the appointment of officials of the Central Consumer Protection Authority.

Due to the above problem, there is nothing to indicate that the members of the Selection Committee will have the requisite qualifications and experience to evaluate and recommend names. It does not indicate or ensure that the Selection Committee will be neutral, independent and impartial (for example

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<sup>3</sup> 14G. (1) The Central Government shall, for recommending persons to be appointed as members of the adjudicating authority under this Act, by notification, constitute a Selection Committee.

<sup>4</sup> (2) The composition of the Selection Committee and procedure to be followed by it for recommending the persons to be appointed as members of the adjudicating authority shall be such as may be prescribed.

<sup>5</sup> (gc) the composition of the Selection Committee and procedure to be followed by it under sub-section (2) of section 14G;

<sup>6</sup> Filling up of vacancies: 14-I. If, for any reason other than temporary absence, any vacancy occurs in the office of the adjudicating authority, then, the Central Government or the authority constituted under sub-section (3) of section 3, as the case may be, shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the adjudicating authority from the stage at which the vacancy is filled.

<sup>7</sup> 14J. A member of the adjudicating authority may, by notice in writing addressed to the Central Government or the authority constituted under sub-section (3) of section 3, as the case may be, resign from his office:

<sup>8</sup> Electricity Act 2003, [http://aptel.gov.in/pdf/The%20Electricity%20Act\\_2003.pdf](http://aptel.gov.in/pdf/The%20Electricity%20Act_2003.pdf)

<sup>9</sup> Consumer Protection Bill 2015, <http://consumeraffairs.nic.in/writereaddata/CP%20Bill%202015.pdf>

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“eminent persons” or “members from civil society” or headed by a sitting judge of the Supreme Court of India as in the case of NGT). The role and responsibility of the Central Government in the process is also unclear. In the event of disagreement on the appointment, the manner of resolution should also be laid down in the Bill.

Further, there is a concentration of power in the hands of the Central Government with regard to removal of the members (Section 14 J). Since the Government runs innumerable development projects, especially thermal power plants, that potentially cause pollution, there is always a fear that unfavourable decisions by the Adjudicating Authority – imposing penalties, etc - may result in removal or dismissal. This has the potential to create biased judgments, which is worrisome.

**Submission:**

- i. The Composition of the Selection Committee should be spelt out as per the standard prescribed in the case of Electricity Act 2003, Consumer Protection Bill 2015.
- ii. National Green Tribunal should also be part of the Selection Committee and should have a vital role to play in the selection of members of the Adjudicating Authority.
- iii. In the event of disagreement in either temporary or permanent appointment, National Green Tribunal should have the final say in the matter.
- iv. All decisions regarding the removal, dismissal of the Members of Adjudicating Authority must be made in consultation with National Green Tribunal (NGT).

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## **2. Composition and Qualification of Adjudicating Authority**

**Relevant sections:** 14(D)<sup>10</sup>, 14 F (1)<sup>11</sup>, 14 F (2)<sup>12</sup>,

### **a. Composition & Qualification**

**Objections/Concerns:** The Bill envisions at least two members to be appointed, spells out their qualifications but does not explain the process of decision making in detail.

Having a two member - even number - Adjudicating Authority may cause problems if there is dissent in adjudication between them.

The qualification to be an Adjudicating Authority has been detailed to be either a District level Judge or a senior government official or a government scientist. It is appropriate to note that it seems to follow the same pattern as in the suggestions given in the TSR Committee report. i.e. "...presided over by a retired judge of a High Court and also consisting of two officers of the rank of Secretaries to the Government of India retired or serving."

The exact composition in terms of expertise and their individual make up is not clear. This should be clarified.

Further, there is no mention of the level at which this authority will be set up – at the district level or state level. If it is to be set up at the state level, it is not certain if a District level Judge will have the

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<sup>10</sup>"..., an adjudicating authority consisting of at least two members for holding an inquiry in the prescribed manner after giving the person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty."

<sup>11</sup> 14F. (1) A person shall not be qualified for appointment as a member of the adjudicating authority unless-

(a) he is, or has been, or is qualified to be, a District Judge; or  
(b) he is holding the post not below the rank of Director or equivalent under the Central Government and possessing degree in law and having adequate experience of handling the matters relating to environment or who has exercised any quasi-judicial functions and having adequate experience of handling the matters relating to environment or an officer in the rank of Scientist F in the Ministry or Department of the Central Government dealing with environment; or  
(c) he is an officer holding the post not below the rank of Joint Secretary or equivalent under the State Government and possessing degree in law and having adequate experience of handling the matters relating to environment.

<sup>12</sup> (2) A member of the adjudicating authority shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-years, whichever is earlier.

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seniority and expertise required to deal with critical environmental matters. For example, in the Electricity Act 2003, the State Electricity Regulatory Commission may be headed by Judge of the High Court<sup>13</sup> while District Consumer Grievance Redressal Commission in the Consumer Protection Bill 2015 will be headed by a District Judge.<sup>14</sup> This should be clarified.

There is no mention of selecting members from outside the government who are neutral and give an objective assessment of the situation, especially knowledgeable and veteran members of civil society, experts and academics. This is essential as Government is the largest entity involved in development activity, with a growing number of private sector players. Including members from outside government will provide the required sensitivity in evaluating environmental issues and administering justice which cannot be substituted with “having adequate experience of handling the matters relating to environment”.

As a result, there is no guarantee that the qualifications of the administrative/ technical member will denote impartiality in decision making - which is a given in the judicial system (specifically here pertaining to the NGT).

Again, there is a genuine concern whether the technical members and scientists, having been very much a part of the government administrative setup, will effectively contradict the government decisions and challenge the findings of government departments (state and central pollution control boards) to identify violators and levy penalties or whether they will be another obstacle and delay in getting justice.

**Submission:**

- i. A sitting judge of the High Court should be appointed as a Chairperson of the Adjudicating Authority.
- ii. The proposed ‘at least’ 2 members in the Adjudicating Authority should be expanded to a 5 member Committee with 3 members appointed from outside the government domain to promote neutrality and objectivity in decision making.

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<sup>13</sup> Electricity Act 2003, [http://aptel.gov.in/pdf/The%20Electricity%20Act\\_2003.pdf](http://aptel.gov.in/pdf/The%20Electricity%20Act_2003.pdf)

<sup>14</sup> Consumer Protection Bill 2015

<http://www.prsindia.org/uploads/media/Consumer/Consumer%20Protection%20bill,%202015.pdf>

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## b. Salary

### Relevant Section: 14 H<sup>15</sup>

**Objection/Concerns:** There is no indication of who will pay the salary of members of the Adjudicating Authority – whether it is the agency/Authority that is Adjudicating Authority will be placed in or Central Government. The key is to ensure financial independence of the deemed Authority to perform its functions freely and effectively without fear or repercussions. For example, the Electricity Act 2003 has set up a fund - Central Electricity Regulatory Commission Fund<sup>16</sup> which takes care of the day to day operations, including payment salaries, of the staff and Members of the Commission, thus insulating the Commission from government interference and providing financial autonomy.

**Submission:** The running costs and salaries of the Adjudicating Authority should come out of an independent fund. This independent fund should be funded by a combination of government grants, penalties levied and any other fees that are collected for this purpose.

## 3. Process of Adjudication

### Relevant Sections: 14 D (2)<sup>17</sup> 14 (3)<sup>18</sup>, 14 (D) (4)<sup>19</sup>

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<sup>15</sup> 14H. The salary and allowances payable to, and the other terms and conditions of service including pension, gratuity and other retirement benefits of, the members of the adjudicating authority shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the members of the adjudicating authority shall be varied to their disadvantage after appointment.

<sup>16</sup> Electricity Act 2003 - Establishment of Fund by Central Government

99 (1) There shall be constituted a Fund to be called the Central Electricity Regulatory Commission Fund and there shall be credited thereto- (a) any grants and loans made to the Central Commission by the Central Government under section 98; (b) all fees received by the Central Commission under this Act; (c) all sums received by the Central Commission from such other sources as may be decided upon by the Central Government.

<sup>17</sup> 14 D (2) “While holding an inquiry, the adjudicating authority shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating authority, may be useful for or relevant to the subject- matter of the inquiry and if, on such inquiry, it is satisfied that the person has failed to comply with the provisions of sections 14A or 14C, it may impose such penalty as it thinks fit in accordance with the provisions of any of those sections.”

<sup>18</sup> (3) The procedure for making an application before the adjudicating authority and procedure including fees payable along with the application for adjudicating penalty under this Act shall be such as may be prescribed.

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#### a. Summoning Powers

**Objections/Concerns:** The summoning clause highlights a selective power given to the Adjudicatory Authority. This may lead to cherry picking witnesses wherein it will choose the persons/agencies it wants to summon or interview for passing judgment.

The status of persons having possession of material evidence and facts but are not able to depose before the authority is not considered. This may lead to key stakeholders, such as NGOs and affected local community, prevented from coming forward to give facts and valuable evidence.

Further, the phrase “any person” should clarify that it applies only to those accused of causing damage or also if it include those filing complaints.

**Submission:** Any individual, organization or community affected by the damage or an individual or organization acting on behalf of an individual, organization or community affected by the damage offering to give evidence or produce documents that may be useful for or relevant to the subject-matter of the inquiry must be heard by the Adjudicating Authority.

#### b. Time Period

**Objections/Concerns:** We are of the opinion that an additional six months is an extremely long duration in the avenues of adjudication (including NGT) available for completion of the case. This extended time frame will physically and financially wear out vulnerable individuals and communities and also further damage/destroy the environment. In addition any further delay in the process beyond the given time frame will worsen the situation and especially for those livelihood and daily earnings are affected. It is also likely that this will deter them from taking the matter further to the NGT – which can be construed as denying justice. Further, any disagreement between the two members will contribute to exacerbating the process and damages.

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<sup>19</sup> (4) The application, before the adjudicating authority under this Act shall be disposed of within a period of six months from the date of filing of the application, after providing the parties concerned an opportunity of being heard.

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In addition, the status of the occupier during the time period of adjudication is also not specified. It is necessary that the development activity/process should be stopped during this period to prevent continue harming the community and environment.

**Submission:**

- i. The time period for redressal should be considerably reduced.
- ii. The process of hearing, where vulnerable individuals and community representatives are to be present for hearing, must at best be two continuous sessions.
- iii. The suspension of permit/license to operate the plant or restriction in production/process/activities which will reduce damages must be in place.
- iv. Decision making process of the members when imposing or not imposing penalties should be detailed in the Bill.

**c. Fees**

**Objections/Concerns:** It is unclear as to the procedures to be followed to make applications. Further, if such procedures are cumbersome – caught in red tape - as to deter those affected by the damage to make an application it makes the whole exercise counterproductive.

There is also concern that the fee amount itself may stand as a roadblock for filing of complaints by individuals and local communities. Having no special provisions to enable the common man or local community to access the adjudicating authority in free manner, will also be a barrier to make applications.

**Submission:**

- i. An exemption clause should be added to state that no fees or at best token fees should be charged if an individual, organization or community affected by the damage or an individual or organization acting on behalf of an individual, organization or community affected by the damage makes an application.

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- ii. The word 'simple' should be added before procedure to indicate that filing procedures are not time consuming and will enable timely access to justice.

#### d. Time limiting Appeal

**Relevant Section:** 14 (K)<sup>20</sup>

**Objections/Concerns:** The process of appeal to the NGT has been limited to 90 days. This gives the impression no complaints should be entertained by NGT if complaints are filed beyond the time period. This has the effect of limiting access to judicial system and such limitations are not valid.

Further, the damage can also cause invisible harm as pollution and may tend to stay for an indefinite time period and have a long term implications on the environment and local communities. This aspect should be factored in for appeal.

**Submission:** This section be struck down and replaced with enabling provision to allow people to access NGT at any time.

## 2. VIOLATIONS AND DAMAGE

**Overall Observation:** It is submitted that nature of the damage, reversibility of the damage – by bringing the environment back to its natural state - within a specified time period, or its irreversibility, together with its cost determines whether it is minor violation, non-substantial damage and substantial damage e.g. Brazilian Law<sup>21</sup>, Irish Environment Protection Agency Guidelines<sup>22</sup>

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<sup>20</sup> 14K. Any person aggrieved by an order made by the adjudicating authority under sub-section (5) of section 14D may prefer an appeal, within a period of ninety days from the date of receipt of the order imposing penalty, to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010.

<sup>21</sup> International Business Publication Brazil Ecology, Nature Protection Laws and Regulation Handbook Volume 1 Strategic Information and Basic Laws, International Business Publication, 2015.  
<https://books.google.co.in/books?id=eWbQCQAAQBAJ&pg=PA64&lpg=PA64&dq=%22minor+damage%22+environment&source=bl&ots=QTWqmplIVO8&sig=vl7UkSjNvrF42ttf8xfPQM-f6nI&hl=en&sa=X&ved=0CDkQ6AEwCWovChMI1eXa69XRyAIVxH4aCh2RRwsO#v=onepage&q&f=false>

<sup>22</sup> <https://www.epa.ie/pubs/advice/licensee/Guidance%20to%20licensees.pdf>

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#### **a. Minor Violations and Non-substantial Damage**

**Relevant Section: 2 (eb)<sup>23</sup>, 25 (2) (a)<sup>24</sup>,**

**Objection/Concerns:** The definition of 'Minor Violations' on the environment and on what constitutes such 'violations' should be clarified. Further, the word 'violations' does not seem to fit into the Bill. 'Violation' is an act and 'damage' is the result.

It is understood that the Bill through 25 (2) (a) has prescribed the manner in which 'minor violations' are to be prescribed.

#### **Submission:**

- i. The word 'minor violation' needs to be redefined and reworded to 'minor damage' to have uniformity in definitions and structure with rest of the Bill.
- ii. The minimum definition of non-substantial and manner of determining nature of the damage, reversibility of the damage and time taken to bring the environment back to the natural state should be made within the Bill.

#### **b. Non-substantial Damage**

**Relevant Sections: 25 (2) (aa), 2 (eb)<sup>25</sup>**

**Objections/Concerns:** The definition is unclear as to what constitutes "non-substantial" damage. It is understood that further explanation will be given through Section 25 (2) (aa) through subordinate rules.

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<sup>23</sup> (eb) "minor violation" shall mean and include an act or omission or commission by a person causing damage to environment due to failure of compliance of the provisions of this Act or rules made or order or direction issued there under in the manner as may be prescribed and is not a substantial damage or non-substantial damage to the environment.

<sup>24</sup> "(a) the manner of determining minor violation under clause (eb) of section 2;

<sup>25</sup> (ec) "non-substantial damage" means damage to environment which is neither a minor violation or a substantial damage and shall be determined in the manner as may be prescribed;';

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**Submission:** The minimum definition of non-substantial and manner of determining nature of the damage, reversibility of the damage and time taken to bring it back to the natural state should be made within the Bill.

### c. Substantial Damage

**Relevant Section:** Section 2 (iii)<sup>26</sup>, Section 25 (2) (ab)<sup>27</sup>

**Objection/Concerns:** Under 'substantial damage', the definition only defines 'damage' and does not define 'substantial'.

(A), (B), (C) these refer to the different activities through which damage can occur and does not detail or define 'substantial damage'. These are essentially umbrella conditions that determine minor violation, non-substantial damage, substantial damage.

**Submission:**

- i. 'Substantial damage' should be defined separately.
- ii. The umbrella conditions or culpability should be listed out as a separate section and not be made part of 'substantial damage'.

## 3. PENALTIES AND PUNISHMENT OF VIOLATION OF DAMAGE

### a. Penalties

**Relevant Sections:** 14 (A)<sup>28</sup>

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<sup>26</sup> Amendment to Section 2 (iii)

(i) "substantial damage" means damage to environment whether by release of environment pollutant or environment pollution or handling of hazardous substance or any other substance or otherwise determined in the manner as may be prescribed, by which the environment is affected or likely to be adversely affected by such damage or by its consequences due to

A) direct violation of a specific statutory environmental obligation of the occupier; or

(B) any act or omission of the occupier or negligence on his part (whether by an accident or otherwise); or

(C) carrying out any project or activity or operation or process by the occupier;

<sup>27</sup> (ab) the manner of determining substantial damage under clause (i) of section 2;"

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**Objections/Concerns:** It is submitted that calculation of ‘substantial damage’ through distance alone is not enough and will prove to be a sub optimal method of imposing graded penalties.

The section does not give an explanation as to how these penalty figures were arrived at – especially the methodology of valuation and arriving at 10, 15, and 20 crores respectively and its recurring value for non-payment.

The penalties are rigidly capped in the Amendment. In the later stages, it will prove difficult to change it without a Parliamentary assent.

As a result, it is unclear how these costs were arrived at for evaluating loss of health and livelihood by individuals and communities, assessment of loss of species in surrounding areas and the possibility of extinction of species, without assessment of whether remedial environmental measures are possible and sustainable, etc, is likely to be ineffective and counterproductive.

The section has not taken into account the type of environmental zones – ranging from highly sensitive to sensitive areas – where these occupier(s) may be located. The environmental valuation for these zones will vary vastly. Some of these zones will have irreplaceable value and corresponding monetary value e.g. some highly eco-sensitive zones may be worth Rs. 1000 crores.

The Bill seeks to put a penalty price by placing a boundary on the impact. Such boundaries may also be difficult to define in practice. As a result, the Bill has considered only few forms of pollution where

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<sup>28</sup> 14A (1) “Whoever causes substantial damage to the environment within an area not exceeding five kilometres radial distance from the outer boundary of the project area shall, without prejudice to the provisions of section 15 or any other law for the time being in force, be liable to a penalty which shall not be less than five crore rupees but which may extend to ten crore rupees and in case of continuing damage, with additional penalty which may extend to fifty lakh rupees for every day during which the damage continues.”

(2) Whoever causes substantial damage to the environment beyond the area of five kilometres but within ten kilometres radial distance from the outer boundary of the project area shall, without prejudice to the provisions of section 15 or any other law for the time being in force, be liable to penalty which shall not be less than ten crore rupees but which may extend to fifteen crore rupees and in case of continuing damage, with additional penalty which may extend to seventy five lakh rupees for every day during which the damage continues.

(3) Whoever causes substantial damage to the environment beyond the area of ten kilometres radial distance from the outer boundary of the project area shall, without prejudice to the provisions of section 15 or any other law for the time being in force, be liable to a penalty which shall not be less than fifteen crore rupees but which may extend to twenty crore rupees and in case of continuing damage, with additional penalty which may extend to one crore rupees for every day during which the damage continues.

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boundaries can be placed when assessing environmental damages. The effect of pollution by air and water, pollution dumped into the river can be carried far more than 20 kms.

The sections do not focus on the role and culpability of Clustered industries or 'occupiers'. The definition surrounding clustered industries and their impact are not found in Amendment. The polluted industrial clusters/areas should be further explored in order to define the spatial boundaries as well as the extent of eco-geological damages.

There is no provision to prevent occupier by suspension of permit/license to operate the plant or restriction in production/process/activities until the fine is paid. This will prevent repeat occurrence of the damage.

**Submission:**

- i. Explanatory note on how the level of penalties, including its valuation may be put up.
- ii. Penalties should not be capped but kept variable. This will help varying the penalties according to changing economic circumstances.
- iii. Deterrence should also be balanced with the agency - people/corporations/companies – committing the environmental offence.
- iv. Penalties should be imposed to take away undue benefits accrued as a result of violations – Disgorging benefits.<sup>29</sup>
- v. To prevent small and medium from being heavily penalize. Canadian law of categories and penalties for individual, large revenue corporation, small revenue corporation - may be adopted.<sup>30</sup>

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<sup>29</sup> Canada Parliament, Legislative Summary, Bill C-16 Environmental Enforcement Act, Parliamentary Information and Research Service, 2009

[http://www.ecelaw.ca/index.php?option=com\\_mtree&task=att\\_download&link\\_id=637&cf\\_id=24](http://www.ecelaw.ca/index.php?option=com_mtree&task=att_download&link_id=637&cf_id=24)

<sup>30</sup> Canada Parliament, Legislative Summary, Bill C-16 Environmental Enforcement Act, Parliamentary Information and Research Service, 2009

[http://www.ecelaw.ca/index.php?option=com\\_mtree&task=att\\_download&link\\_id=637&cf\\_id=24](http://www.ecelaw.ca/index.php?option=com_mtree&task=att_download&link_id=637&cf_id=24)

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- vi. Upper limit of the penalty or fine, prescribed in the Bill, should not be a restriction on the NGT to impose additional fine.
- vii. Licence of the violating/culpable firm should be made to work at half the production capacity until the damage is remediated, failing which the firm's licence should be suspended or revoked.

#### **b. Penalties for minor violation.**

**Relevant Section:** 14 B (1)<sup>31</sup>

**1. Objection/Concerns:** The penalty for minor violations does not make a differentiation between small and big firms. As a result, big firm may continue to violate and tend to pay additional penalties. This is especially the case when the profits from these violations are greater than the penalty.

As a result, the main concern in this section is unnecessary harassment of small firms, small and medium industries by enforcement officers.

The modalities of the spot fine are not spelt out in detail.

Further, since the minimum definition of what constitutes a minor violation or damage is not set out, it may not be possible for firms to defend themselves nor can authorities properly adjudicate on the matter. There is likelihood that spot penalty may be used only to harass small industries and occupiers.

#### **Submission:**

- i. Guarantee of immediate hearing to small industries and occupiers (whose business is likely not to withstand closure) – and not the six-month time span given to the Adjudicating Authority – has not been indicated.

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<sup>31</sup> 14B. (1) Every officer or other authority referred to in section 23 may impose penalty on the spot, on any person who causes any minor violation under this Act, which shall not be less than one thousand rupees but which may extend to ten thousand rupees and in case of continuing violation, with an additional penalty which may extend to five thousand rupees for every day during which the violation continues.

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- ii. Division of firms into small revenue, medium revenue corporation and large corporation to enable graded penalty and effective deterrence.
- iii. There should be specific responsibilities and code of conduct developed to prevent officers from harassing small and medium enterprises and individuals.
- iv. Licence of the violating/culpable firm should be made to work at greatly reduced production capacity until the damage is remediated, failing which the firm's licence should be suspended or revoked.

#### **c. Arrear on Land Revenue**

##### **Relevant Section: 14 (B) (2)<sup>32</sup>**

**Objections/Concerns:** This section indicates since the amount is small and the enforcement officer may not be in a position to collect the same, it is suggested that it be collected as a lumpsum amount.

Further, the amount is pegged against the land revenue and is collected as an outstanding amount on the land revenue.

This has the effect of enabling the violator to pay the fine later using simple interest. This has a delaying effect so much so firms can continue to make minor violations until the fine is paid.

There is no provision to prevent occupier by suspension of permit/license to operate the plant or restriction in production/process/activities until the fine is paid.

##### **Submission:**

- i. This section may be an enabling provision for small firms or individual only and not for medium or big firms for which amounts as will stop damage may be imposed.

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<sup>32</sup> (2) Any penalty which a person is liable to pay under sub- section (1) shall be recovered together with simple interest due thereon from the date of failure to pay such penalty till the date of recovery of the penalty, as an arrear of land revenue.

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#### **d. Penalty for Non-Substantial Damage**

**Relevant Section:** 14 C<sup>33</sup>

**Objections/Concerns:** The same concerns as substantial damages apply.

**Submission:** The same submissions given for substantial damages.

#### **e. Factors to be considered**

**Relevant Section:** 14 D (7)<sup>34</sup>

**Objections/Concerns:**

The Section details the tests or parameters that the adjudicating agency will use to determine the quantum of penalty.

It is unclear how the parameters will be tested and the damage valued.

Ninety days is too long a time to make the firm deposit the penalty amount. In essence, over 9 months of time is taken just to finalise verdict and subsequent penalty amount is to be received by the authority.

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<sup>33</sup> 14C. Whoever fails to comply with any provision of this Act or rules made or any order or direction issued thereunder or terms and conditions of the clearance, approval, authorisation, permission, registration made, given or granted to him in pursuance of this Act and the failure does not cause substantial damage or is not a minor violation, be liable to a penalty which shall not be less than one lakh rupees but which may extend to five crore rupees and in case of continuing damage, with additional penalty which may extend to one lakh rupees for every day during which the damage continues.

<sup>34</sup> (7) The penalty imposed on any occupier under sections 14A or 14C shall be paid within a period of ninety days from the date of receipt of the order.

14E. While adjudicating the quantum of penalty under sections 14A or 14C, the adjudicating authority shall have due regard to the following factors, namely:-

- (a) the amount of damage caused to the environment;
- (b) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of damage;
- (c) the repetitive nature of the damage;
- (d) the continuance of default; and
- (e) the extent of injury caused or likely to be caused to the public or other living creatures or plants and micro-organisms or property or public health.

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This essentially takes nearly a year before work of remediation and restoration of the ecosystem can begin. This can call irreparable damages to the environment as a result of pollution.

This time frame is without taking into consideration the time for appealing before the National Green Tribunal.

Further, there is no co-relation to indicate that the level of penalty will be enough to remediate ecosystem. In the case of additional amount required, there is no provision to enable additional fines to be imposed over and above the ceiling amount.

There is no grading based on urgency of work to be carried out e.g. mercury contamination may require immediately cleaning up. This requires immediate disbursement of penalty amount.

The responsibility of the occupier and his role in cleaning up the site, including bearing additional expenses are not spelt out.

**Submission:**

- i. The time for paying the penalty amount must be limited to 30 days.
- ii. A detailed guideline on how damage will be valued to be put in place.
- iii. A section must be added detailing responsibility of the occupier to clean up the environmental damage.
- iv. A section must be added on linking urgency of remediating the damage and immediate disbursement of the penalty amount.

**f. Punishment for causing substantial damage to environment or failure to pay penalty.**

**Relevant Section: 15<sup>35</sup>**

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<sup>35</sup> 15 “Without any prejudice to any penalty imposed by the adjudicating authority under subsection (5) of Section 14 D, whoever causes substantial damage, shall be imprisoned with a term which shall not be less than seven years but may extend to imprisonment for life with fine which shall not be less than ten crore rupees, and in case of continuing damage, with additional fee which may extend to fifty lakh rupees per day during which the damage continues.”

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**Objections/Concerns:** No comments.

**Submission:** It is left to the NGT to interpret and impose penalties and imprisonment.

## **D. OTHER ASPECTS**

### **a. National Database on Environment**

**Relevant Section:** Section 20 A. (2)

**Objection/Concerns:** National Database on Environment also has its origin in the TSR Committee Report (Page 82)“The Fund, referred to in the proposed ELMA, will be primarily ploughed back into the management of the environment – in particular in items like development of database,...”

It is not clear what the national database on environment is supposed to do – its functions, purpose and use. The bill does not make a mention on who will be preparing the contents and updating and managing the database. The time frame by which the database should be made ready is also unclear.

It is also unclear if the database information is to be used as a guideline or if it is to be the determining document in assessment of damage.

In such a situation, without the database, the decisions of the adjudicating authority will be ad-hoc and arbitrary.

**Submission:**

- i. This should be clarified – the phrase “national database: should be defined and its purpose, use and management should be detailed.
- ii. If the database is to be vital factor in determining penalties and environmental damage, then these amendments to the EPA Act should be come into effect after setting up of the database.

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**b. Amendments to NGT Act.**

**Relevant Sections:** 12 (ia)<sup>36</sup>, 16 A<sup>37</sup>

**Objections/Concerns:** 12(a) deals with the appeal process after the occupier has proven guilty of causing environment damage.

Section 16 A relates to “seventy-five per cent of the amount of penalty imposed upon him by the adjudicating authority”. The quantum of deposit should depend on the nature of the offence and the type of person type of person (s) committing the act.

**Submission:**

- i. It is submitted that the ability to pay and incidence of burden must relate to the severity of the damage. Again, deposits graded according to Individual, Small revenue corporation, Medium revenue corporation, Large Revenue Corporation as in the case of Canadian Law.<sup>38</sup>
- ii. For example, in the case of large corporation appeal should be allowed only after 90% of the fees have been deposited

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<sup>36</sup> "(ia) an order made by the adjudicating authority under sub- section (3) of section 14D of the Environment (Protection) Act, 1986;"

<sup>37</sup> 16A. Where an appeal is preferred by any person on whom the amount of penalty has been imposed by an adjudicating authority under the Environment (Protection) Act, 1986, such appeal shall not be entertained by the Tribunal unless such person has deposited with the Tribunal seventy-five per cent of the amount of penalty imposed upon him by the adjudicating authority."

<sup>38</sup> Canada Parliament, Legislative Summary, Bill C-16 Environmental Enforcement Act, Parliamentary Information and Research Service, 2009

[http://www.ecelaw.ca/index.php?option=com\\_mtree&task=att\\_download&link\\_id=637&cf\\_id=24](http://www.ecelaw.ca/index.php?option=com_mtree&task=att_download&link_id=637&cf_id=24)

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### c. Electronic form / electronic record

**Relevant Section:** <sup>39</sup>

Our reading of the Information Technology Act 2000 merely defines the various electronic form and electronic record. <sup>40</sup>

There is no section to indicate the integrity of the electronic record should be maintained. As a result, there is no indication of the actions that will be taken if the occupier willfully interferes or tampers with electronic record or form.

**Submission:** This is an important means to get authentic information to ensure prevention and getting real-time data on environmental damages.

### d. Preventing environmental Damage

**Relevant Section:** Nil

**Objection Concerns:** This Bill deals with ex-post situation wherein environmental damage has taken place. As a result, there is no section to impose penalties in order to prevent environmental damage, especially an imminent threat. It is to be noted that the Environment Protection Act 1986 has adequate provisions and empower authorities to ensure prevention environmental damage. <sup>41</sup> However, this power has not been adequately utilized due to lack to adequate penalizing provisions in the Act.

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<sup>39</sup> 4. In section 11 of the principal Act, after sub-section (4), the following shall be inserted, namely:-  
'(5) Nothing contained in sub-sections (3) and (4) shall apply to any sample taken in electronic form from any equipment installed by the occupier and authenticated by the Central Government or State Government or any officer empowered in this behalf, to be electronic record, in such manner as may be prescribed.

Explanation.- For the purposes of this section, the expressions "electronic form" and "electronic record" shall have the same meanings as assigned to them in clauses (r) and (t) respectively of sub-section (1) of section 2 of the Information Technology Act, 2000.'----- 21 of 2000

<sup>40</sup> Information Technology Act 2000, (r) "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

<sup>41</sup> Environment Protection Act 1986,

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This Bill provides the opportunity provide such a provision to prevent environment damage, which will also help our efforts to combat climate change and positive contribute to our Intended National Development Contribution (INDC) <sup>42</sup>

**Submission:**

- i. It is submitted that penalty measures for causing environment damage may be extended to enforce preventive measures that should be taken by the occupier.
- ii. For example, the UK Law has brought in provision wherein the occupier is expected to prevent an imminent threat to the environment. When failure to comply with preventing environment damage is treated as an offence and will entail penalties and imprisonment as in the ex-post scenario case. <sup>43</sup>

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(1) Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution.

<sup>42</sup> UNFCCC India's Intended National Development Contribution (INDC), 2015

<http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf>

<sup>43</sup> "Preventing environmental damage 13.—(1) An operator of an activity that causes an imminent threat of environmental damage, or an imminent threat of damage which there are reasonable grounds to believe will become environmental damage, must immediately—

(a) take all practicable steps to prevent the damage; and

(b) (unless the threat has been eliminated) notify all relevant details to the enforcing authority appearing to be the appropriate one. The enforcing authority may serve a notice on that operator that—

(a) describes the threat;

(b) specifies the measures required to prevent the damage; and

(c) requires the operator to take those measures, or measures at least equivalent to them, within the period specified in the notice. <http://www.legislation.gov.uk/uksi/2009/153/part/2/made>