

Environmental Regulatory Framework - Law stated as at 01-Apr-2020

Source - UK Practical Law - Thomson Reuters

1. What are the key pieces of environmental legislation and the key regulatory authorities?

Legislation

In terms of recent developments, it is relevant to note that the environmental regulatory authorities (that is, the Central Pollution Control Board (CPCB) and the State Pollution Control Boards (SPCBs)) have been ordered by the National Green Tribunal (NGT) to strictly enforce and take into account the (previously dormant) Comprehensive Environmental Pollution Index (CEPI). CEPI allocates weightages to various pollutants, ambient pollutant concentrations, receptors (the number of people affected) and additional high-risk elements. The original CEPI assessment was undertaken in 2009, but the CEPI criteria were updated in 2016 and the final report on CEPI was issued in 2018. The NGT in 2019 then directly supervised the enforcement of the CEPI criteria by the regulatory authorities. Industrial clusters are categorised under the CEPI as Polluted Industrial Areas (PIAs), which are each ranked as one of the following:

- A critically polluted area (CPA)
- A severely polluted area (SPA)
- Other polluted areas (OPAs)

The CPCB and SPCBs will now be focused on remediating these CEPI areas and seeking compensation from polluting industries; and any expansion or development of new sites in these areas will be rejected.

The main environmental laws, including under which various key environmental permits (or consents) are being issued in India, include the:

- Water (Prevention and Control of Pollution) Act 1974 (Water Act), which also initially identified the powers, functions and hierarchy of the environmental agencies, the CPCB and the SPCBs.
- Air (Prevention and Control of Pollution) Act 1981 (Air Act).
- Environment (Protection) Act 1986 (EP Act). This umbrella law enables the central government to take measures it deems necessary to protect and improve the environment, and to prevent, control and abate environmental pollution. A wide range of rules and notifications have been adopted under it, such as the:
 - E-Waste (Management) Rules 2016, as amended in 2018 (E-Waste Rules);
 - Bio-Medical Waste Management Rules 2016;
 - Plastic Waste Management Rules 2016;

- Solid Waste Management Rules, 2016;
- Construction and Demolition Waste Management Rules 2016;
- Hazardous and Other Waste (Management and Transboundary Movement) Rules 2016, as amended in 2019 (HW Rules);
- Manufacture, Storage and Import of Hazardous Chemicals Rules 1989 (MSIHC Rules);
- Coastal Regulation Zone Notification 2019; and
- Environment Impact Assessment Notification 2006
- Wild Life (Protection) Act 1972.
- Forest (Conservation) Act 1980.
- Public Liability Insurance Act 1991.
- Biological Diversity Act 2002.
- National Green Tribunal Act 2010.

Regulatory authorities

The key regulatory authorities are the:

- Ministry of Environment, Forests and Climate Change (MoEFCC).
- CPCB.
- SPCBs.
- District Level Authorities (that is, municipal corporations).

2. To what extent do regulators enforce environmental requirements?

There has been an upward trend in terms of regulatory enforcement, which can be explained by various factors. For instance, various states have started to insist on the installation of continuous online emissions/effluent monitoring systems, which gives the State Pollution Control Boards (SPCBs) the necessary and objective information to monitor the compliance of companies in their jurisdiction. Moreover, the state high courts, the Central Supreme Court, and the various benches throughout India of the National Green Tribunal (NGT) closely monitor the implementation and enforcement of environmental laws.

As discussed in *Question 1*, with regard to CEPI industrial clusters, the NGT not only actively supervises whether, and how, the CPCB and SPCBs enforce environmental laws, but quite importantly for companies which are new to India, the NGT also has the power to address environmental issues directly with the relevant polluting company, even merely on the basis of media reports of such activity.

Environmental NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active?

NGOs, think-tanks, and local citizen groups are very active stakeholders in India and readily use the media, the courts and the NGTs to raise their environmental grievances. This is often effective, since the judiciary is generally sympathetic to environmental concerns raised in the public interest. Moreover, the Indian media is also very active and focuses on environmental issues. Interestingly, judges from the NGT, High Court and the Supreme Court even take up environmental cases *suo moto* (that is, on its own motion) based on media coverage of these matters.

Some environmental laws explicitly refer to the rights of citizens in this regard. For instance, the Maharashtra Non-biodegradable Garbage (Control) Act, 2006 empowers a citizen to register the offence against any violators of this Act.

Environmental permits

4. Is there a permitting regime for polluting emissions to land, air and water? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

An integrated permit system is in place to a large extent. For instance, a Consent to Establish (CTE) and subsequent Consent to Operate (CTO) and their renewals under the Water Act and Air Act can typically be obtained by submitting a combined consent application to the relevant SPCB.

The E-Waste (Management) Rules 2016 introduce the Extended Producer Responsibility – Authorisation for Producers, which only requires one centralised and India-wide application with the CPCB instead of with each SPCB.

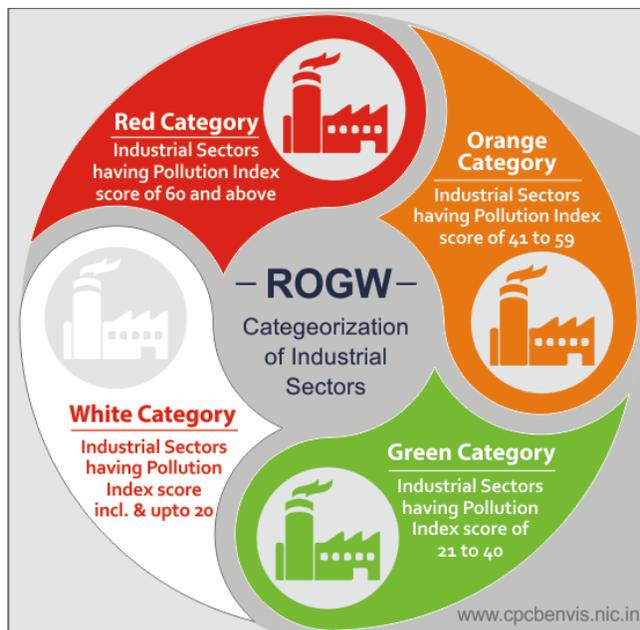
Also, to streamline the environmental permit/consent system, and avoid repetitive and/or conflicting conditions, the CPCB has waived the requirement of having separate CTEs for industrial units which require an Environmental Clearance (EC). In such cases, the EC will be considered equivalent to a CTE and no separate CTE will need to be obtained.

Single/separate permits

Depending on the type of activities undertaken by a company, multiple permits may need to be obtained. The Ministry of Environment, Forests and Climate Change (MoEFCC) adopted a new method (from 2016) of classifying the industries it regulates and introduced a new category of "white industries". These white industries are non-polluting industries that no longer need a CTO or an EC under the Environmental Impact Assessment (EIA) Notification. Instead, they merely need to notify the relevant SPCB.

Whereas the earlier industry categories (red, orange and green) were essentially determined based on the size of industries, this new method is based on a Pollution Index (PI) for emissions (air pollutants), effluents (water pollutants) and hazardous waste generated apart from the consumption of resources. A PI score is allocated to each industrial sector as follows:

- **Red category:** PI score of 60 and above. Table 1 annexed to the notification covers 60 sectors (for example: asbestos, nuclear power plants, shipbreaking, oil and gas extraction, and so on).
- **Orange category:** PI score of 41 to 59. Table 2 lists 83 types of industries (for example: food and food processing, printing ink manufacturing, paint blending and mixing, and pharmaceutical formulations).
- **Green category:** PI score of 21 to 40. Table 3 identifies 63 sectors (for example: saw mills, tyres/rube retreating, polythene and plastic products).
- **White category:** PI score up to 20. Table 4 lists 36 types of industries (for example: solar power generation through solar photovoltaic cells, wind power, and mini hydro-electric power less than 25 megawatts).



5. What is the framework for the environmental permitting regime?

Permits and regulator

The key environmental permits, or consents/authorisations as they are referred to in India, must be obtained from the local State Pollution Control Board (SPCB). Only in certain cases is a consent/permit or environmental clearance (EC) needed at central level, from one or more of the following:

- The CPCB (for example authorisation as a producer under the E-Waste Rules 2016).
- The Ministry of Environment, Forest and Climate Change (for example, EC under EIA Notification, 2006, import/export of hazardous waste under the Hazardous and Other Waste Rules 2016 and so on).
- Central Ground Water Board (for groundwater extraction related permits)
- Petroleum & Explosives Safety Organization (PESO) (permits relating to storage of diesel at sites for generators).

Length of permit

The SPCBs have some discretion in determining the duration of consents, but there are efforts to streamline these periods for the various industry categories in each state.

Typically:

- An initial CTE is valid for one year (for example, during the construction of a site, but depending on the scale of the project this could be longer).
- CTOs under the Water and Air Act vary between three to five years.

Industries are categorised in red, orange, green or white categories, depending on the pollution index score (*see Question 1*):

- White category industries (practically non-polluting industries) do not need to obtain a CTO.
- Green category industries can generally submit a simplified CTO application. Their initial CTO in many states are valid for 15 years.
- Initial CTOs for orange categories are typically ten years, and for red categories one or five years.

Renewal applications are typically granted across industries before 60 to 120 days of expiry of the consent to operate, assuming there have been no severe non-compliance issues. If there is a non-compliance issue, SPCBs can revoke the consent to operate and reissue it only after the non-compliance has been rectified. In such situations,

companies often only obtain a one-year CTO, to ensure close monitoring by the SPCBs and ongoing compliance.

Some states have also adopted an auto-renewal of consents for all categories based on self-certification if certain criteria are met, such as:

- When there is no increase in the overall production capacity and pollution load.
- If there is only a marginal increase (up to 10%) in capital investment.

Some key waste-management laws, such as the E-Waste Rules and the HW Rules, explicitly refer to authorisations being valid for five years.

At the State Levels, there are several authorised bodies that regulate environmental clearances and permissions.

Restrictions on transfer

Consent orders and environmental clearances (obtained under the EIA Notification) are readily transferable, and a straightforward procedure applies:

- The transferor must provide a written no objection to the relevant regulatory authority.
- The transferee must submit an application, with an undertaking that it will comply with all the conditions in the consent order.
- Supporting documents must be provided (explaining the underlying reason of the transfer, change of name, change of management, and so on).

Penalties

Failure to obtain the required consent order will incur penalties. For instance, under the Water Act, any person who breaches the consent application process is punishable with imprisonment for at least 18 months, which can be extended to six years, and a fine.

Any company operating without a consent to establish or operate will immediately receive a closure notice from the relevant SPCB.

Under directions from the NGT, the CPCB recently devised a formula to compute environmental compensation to be levied on the defaulting industry. The formula is based on the anticipated severity of pollution, the duration of the violation (number of days), the scale of the operation and the location (for example, proximity to large habitations).

Moreover, the Supreme Court and the state high courts can and do impose exemplary damages for damage to the environment. For instance, in the Sterlites Industries case (2013), one of the largest copper smelter plants in India was found to be operating

without a valid renewal of its environmental consent to operate. When assessing the company's liability to pay damages (that is, for damage caused to the environment during the 15 years it operated without a valid environmental permit), it reviewed the company's annual report, and determined that 10% of the profit before depreciation, interest and taxes (PBDIT) had to be paid as compensation, which amounted to INR1 billion.

The Water Act, Air Act and EP Act all contain specific provisions for offences committed by companies. Under these Acts, every person who is in charge when an offence is committed, and is responsible to the company for the conduct of its business, is guilty of the offence and liable to be prosecuted and punished accordingly. However, a person is not liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence.

Further, if the offence was committed with the consent or connivance, or is attributable to any neglect by a director, manager, secretary or other officer of the company, the other person is also guilty of the offence, and liable to be prosecuted.

Importantly, the National Green Tribunal Act, 2010 (NGT Act) contains penalty provisions which are considerably higher compared to previously adopted environmental laws. Most likely all existing environmental laws will be amended (at some point) to be aligned with the NGT Act penalty provisions.

More specifically, section 26(1) of the NGT Act states that a person who fails to comply with an order or award or decision of the Tribunal is punishable with imprisonment for a term up to three years, or with a fine up to INR10 crore, or both (one crore is equal to ten million).

If the failure or contravention continues, an additional fine applies up to INR 25,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

Section 26(2) of the NGT Act states that if a company fails to comply with any order or award or decision of the Tribunal, the company is punishable with a fine of up to 25 crore rupees. If the failure or contravention continues, an additional fine applies up to INR100,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

The NGT has jurisdiction over all civil cases where a substantial question relating to the environment is involved, arising out any of the exhaustively enumerated environmental laws specified in Schedule I to the NGT Act (including the EP Act (and the rules

adopted under it), the Water Act, the Air Act, the Forest Act, the EIA Notification Act, and so on) (section 14(1) NGT Act).

Under section 15(1) of the NGT Act, the NGT can order relief, compensation and restitution in the following cases:

- Relief and compensation to the victims of pollution and other environmental damage.
- Restitution for property damaged.
- Restitution of the environment.

Further, the NGT can divide the compensation or relief payable under separate heads specified in Schedule II of the NGT Act, which includes claims:

- Due to harm, damage or destruction to flora, including aquatic flora, crops, vegetables, trees and orchards.
- Including cost or restoration of account of harm or damage to the environment including pollution of soil, air, water, land and ecosystems.

Climate change

6. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and/or the Paris Agreement? How are the requirements under those international agreements implemented or being implemented?

India ratified the UN Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002. As a non-Annex-I country, India did not take part in the flexibility mechanisms for developed countries (emission trading and joint implementation). India has been a leading host country of clean development mechanism (CDM) investments, enabling Annex-I countries to invest in emission-reducing projects in developing countries (thereby earning certified emission reductions).

As part of the COP21 negotiations and in the run-up to the Paris Agreement on Climate Change (December 2015), India submitted its Intended Nationally Determined Contribution (INDC) in October 2015, outlining its post-2020 climate actions. India's INDC includes:

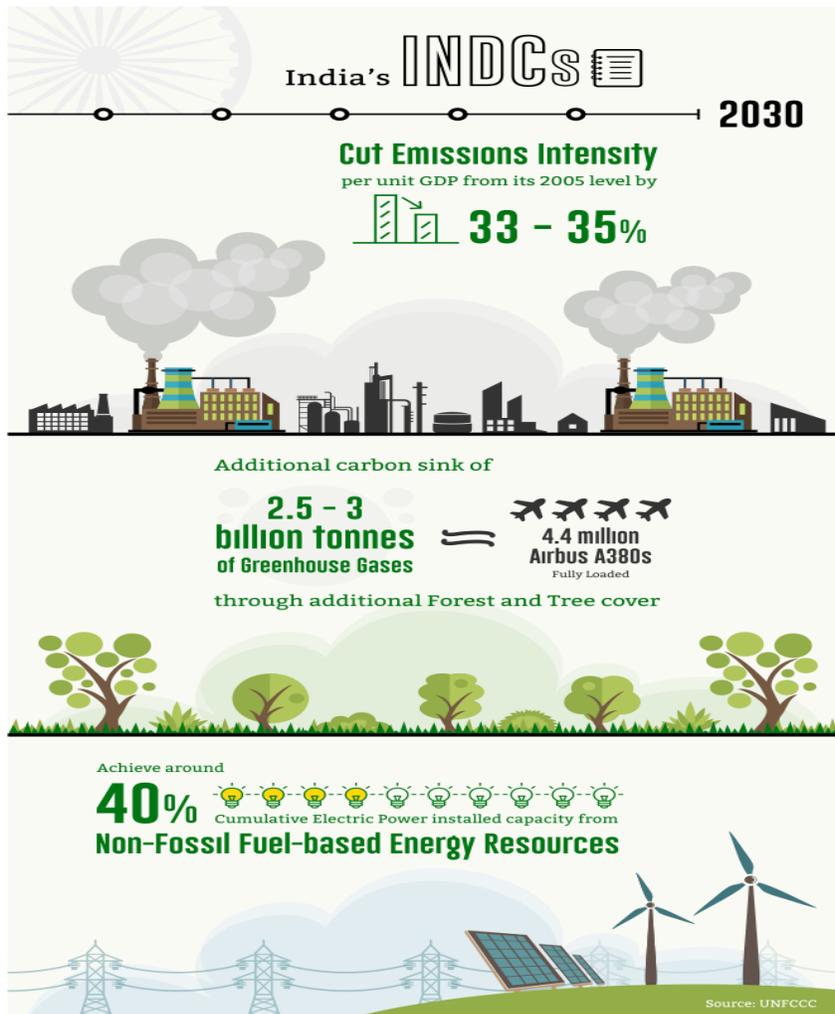
- A reduction in emissions intensity of its GDP by 33% to 35% by 2030, from 2005 levels.
- Creating an additional carbon sink of 2.5 to 3 billion tons of carbon dioxide equivalent, through additional forest and tree cover by 2030.

Since then, India has taken a particularly strong lead on its renewable energy targets. The President of India announced in January 2020 that India aims to have 450GW of renewable energy by 2030, and that the country is already working towards having 175GW of renewable energy by 2022, which includes 100GW of solar energy and 60GW of wind energy.

7. Are there any national targets or legal requirements for reducing greenhouse gas (GHG) emissions? How far are the targets aligned with the 1.5 degree target in the Paris Agreement, if at all? Has a climate emergency been declared? Is there a national strategy on climate change?

Targets

India submitted its Intended Nationally Determined Contributions (INDC) to the UNFCCC on 2 October 2015.

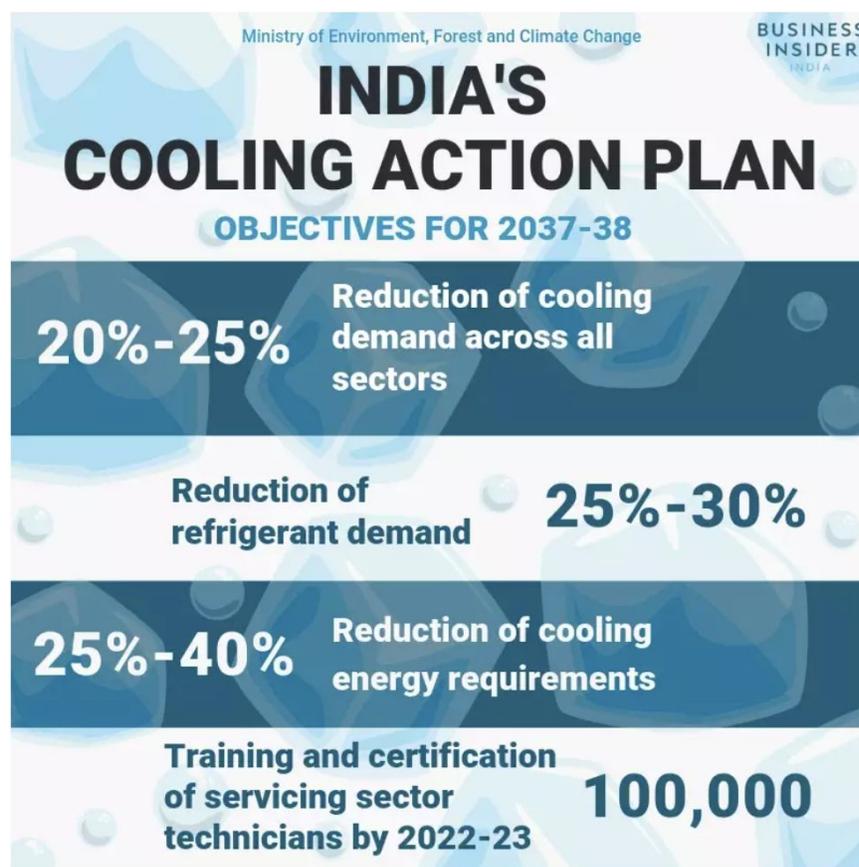


The key targets contained in India's INDCs are:

- To reduce the emissions intensity of its GDP by 33% to 35% by 2030 from the 2005 level.
- To achieve about 40% cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030.
- To create an additional carbon sink of 2.5 to 3 billion tonnes of CO₂ equivalent through additional forest and tree cover by 2030.

National strategy

In March, 2019, India launched the **India Cooling Action Plan (ICAP)**, with numerous references to India's commitment to the Kigali amendment and its long-term approach to refrigerant transition and energy efficiency of air conditioning equipment and the need to phase out HCFCs, while also achieving its climate change and sustainable development goals. The ICAP document provides a good overview of the HCFCs being phased out as part of its Montreal Protocol obligations (*see page 4, HCFC Phase-out Management Plan (HPMP) Stage – I*) and HPMP Stage II (with a focus on HCFC-22).



This builds on the 2008 National Action Plan on Climate Change.

Under the Jawaharlal Nehru National Solar Mission (JNNSM), India decided in June 2015 to increase its solar energy five-fold to reach 100,000MW, by 2022. The target mainly consists of 40GW rooftop and 60GW through large and medium scale grid connected solar power projects. The President of India announced in January 2020 that India aims to achieve 450GW of renewable energy by 2030.

As part of the NMEEE, the Perform, Achieve and Trade (PAT) Mechanism was launched, a new market-based mechanism to promote energy efficiency among energy intensive large industries, by allowing trade in energy saving certificates (ESCerts). The Energy Conservation Act 2001 imposes specific energy consumption reduction targets for 478 designated consumers in the following industrial sectors which can take part in the PAT mechanism, including:

- Thermal power stations.
- Fertiliser.
- Cement.
- Iron and steel.
- Chloralkali.
- Aluminium.
- Textiles.
- Pulp and paper.

ESCerts can be traded among companies to meet their compliance requirements or can be banked for the next cycle of energy savings requirements. The Bureau of Energy Efficiency (BEE) was established to assist in developing policies and strategies to encourage self-regulation and market principles with the primary objective of reducing energy in the Indian economy within the overall framework of the Energy Conservation Act, 2001.

The BEE prepared the Energy Conservation Building Code (ECBC), which was adopted in June 2017 (replacing the earlier 2007 code, in line with India's Nationally Determined Contributions to reducing emissions intensity of its GDP to 35% below 2005 levels by 2030). States can alter the ECBC to their local conditions. The ECBC is voluntary at this stage but is expected to become mandatory and serve as a baseline reference for government agencies.

Further, in 2018, India also adopted the National Electricity Plan, reinforcing the government's commitment to transforming the Indian electricity sector, retaining a core target of 275 gigawatts (GW) of renewable energy by 2027, while India's coal power capacity hitting 238 GW in 2027, 11 GW lower than the 2016 forecast.

11. Do any emissions/carbon trading schemes operate?

See Question 7.

8. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Under the Right to Information Act, 2005 (RTI Act), a citizen can request any government authorities to provide any specific information which they hold, for a nominal fee. There are some exemptions to this otherwise broadly-drafted right to information, such as:

- Personal information of public officers.
- Evidence yet to be presented in a court of law.
- Commercially confidential information, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. For example, if residents filed an RTI petition seeking information about a company's off-site groundwater pollution, the larger public interest would warrant that all information available to the government authority should be shared with the citizens who seek its provision.

Public registers

The concept of public registers for tracking environmental pollution is not yet entrenched in India. EIA draft reports would need to be available to the public living in the vicinity of the proposed project/activity. However, there are increasing efforts by the CPCB and SPCBs to publish such information on their websites, for example:

- Reports of the inspections conducted on the industrial units.
- A list of closure notices issued.
- Directions issued by the CPCB to its subordinates.
- Compliances with court orders.
- Environmental monitoring data.
- Water quality of prominent rivers throughout the country.
- A list of non-complying or non-responsive companies.
- Status of pending and rejected consent and authorisation applications.

The same is true for authorities in charge of environmental clearance applications that require EIAs to be submitted.

Third party procedures

Citizens typically rely on the Right to Information Act 2005 to obtain information from a public authority, and do not need to justify this request. This is a very effective route, and is often used by citizens to obtain information on the status of environmental permits, show cause notices, status of remediation, and so on.

9. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators about environmental performance?

Environmental auditing

Companies must submit an annual environmental statement to the SPCB from which they obtained the relevant consent or authorisation. This is an effective control mechanism for the authorities to assess whether processes and pollution levels comply with conditions specified in the consent orders. The environmental statement must include information on the:

- Industry's operation or process.
- Water and raw material consumption.
- Pollution discharged into the environment (name of pollutants, quantity discharged, concentration, and the percentage of variation from the prescribed standards and the reasons for deviation).
- Details of hazardous waste and solid waste generated (along with the characteristics of the waste).
- Impact of pollution control measures taken on conservation of natural resources, as well as on production costs.
- Any additional measures/investment proposals for environmental protection, including abatement of pollution.



Source: SpringerLink

10. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

The EP Act, the Water Act, and the HW Rules all impose accident reporting obligations. Additionally, annual environmental statements must be submitted by consent holders to the SPCBs.

11. What powers do environmental regulators have to access a company?

SPCB officers have the power to enter and inspect any place, to:

- Examine any plant, record, register, document or other material object.
- Search any place in which he has reason to believe that an offence has or is about to be committed.

The Code of Criminal Procedure 1973 applies, since it applies to searches and seizures under the authority of a warrant.

12. What mandatory GHG, carbon reporting or transparency requirements apply to corporates, including as part of their annual corporate reporting requirements? Is reporting in accordance with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations? Do any voluntary GHG reporting schemes exist?

There are no mandatory GHG reporting obligations, but there are several industry-driven voluntary initiatives, such as the India GHG Reporting initiative launched by:

- The World Resources Institute of India.

- The Confederation of Indian Industry.
- The Energy and Resources Institute (TERI).

13. What corporate governance requirements apply in relation to climate change?

There are no corporate governance requirements pertaining to climate change which are mandatory at the present time. However, a lot of capacity building is taking place in India around the Task Force on Climate-related Financial Disclosures (TCFD) recommendations and several larger (and more global) companies may adopt these in the near future.

Environmental insurance

14. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

The Public Liability Insurance Act 1991 requires an insurance policy to be taken out by owners, users or transporters of hazardous substances, as defined under the EP Act, which exceed the minimum quantity specified in the Public Liability Insurance Act. The public liability policy can be extended to cover pollution risk subject to a no objection certificate from the SPCB.

Under the Public Liability Insurance Act, any one accident (AOA) must represent the paid-up capital of the company, subject to a maximum of INR 50 million. The AOA limit is fixed at maximum INR 150 million. Under the Public Liability Insurance Act, the excess of any award that exceeds the AOA limit is paid by the government through the Environment Relief Fund. The insured must contribute an amount to this fund which is equivalent to the premium paid under the Public Liability Insurance Act Policy.

There is no standard insurance policy issued by all insurance companies but there are various types of insurance cover for environmental damage or liability, as negotiated between the insurance company and the client.

Obtaining insurance

While insurance under the Public Liability Insurance Act is mandatory, others are subject to negotiation and finalisation between the insurance company and those seeking to obtain appropriate insurance.

Environmental taxes

15. What are the main environmental taxes?

At present, there are no direct green taxes or environmental taxes imposed on environmental pollutants, or on goods whose repeated use contributes to pollution. Until recently, a carbon cess was levied on every tonne of coal mined or imported (at INR400 per tonne). A portion of the collected carbon cess was then further disbursed to the National Clean Energy Fund. However, with the newly introduced Goods and Services Tax (GST) regime (rolled out on 1 July 2017) the cess will be used instead for the GST Compensation Fund, meant to compensate state governments for any loss in revenue arising out of the new GST regime.

From 2016, the Supreme Court of India has imposed 1% of ex-showroom price as Environment Compensation Cess on diesel vehicles having an engine capacity greater than 2000 CC in Delhi-NCR. On similar lines, an Environment Compensation Charge (ECC) is also being levied on HGV vehicles entering the National Capital Territory of Delhi.

All project proponent/user agencies must pay a contribution to the Compensatory Afforestation Fund Management and Planning Authority Fund (CAMPA-Fund) when a request is made for diversion or de-notification of forest land for non-forest purposes. The authority can only use the fund for afforestation activities.

Reform

16. Are there any proposals for significant reform of environmental law?

A draft National Action Plan on Chemicals (called "India REACH") has been drafted and will be published shortly for public comments. The final version is expected in 2020.

This National Action Plan on Chemicals will:

- Address the environmentally safe management of chemicals throughout the country.
- Establish a National Chemical Inventory.
- Propose a merger of the Chemical Accidents (Emergency Planning, Preparedness, And Response) Rules, 1996 (CAEPPR rules) and the Manufacture, Storage & Import of Hazardous Chemicals Rules, 1989 (MSIHC rules) to streamline the legislation, resulting in effective implementation and the safer handling of hazardous chemicals throughout the country.

The MoEFCC has developed a National Clean Air Programme which is adopted at central level for strategies for reduction in air pollution levels at both regional and urban scales.

The most awaited environmental reform would be a law addressing soil pollution directly. This would need to be factored in by all companies in their environmental risk analysis as part of any new project, internal environmental management system and environmental due diligence.