

**IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (C.) NO.        OF 2020

[A Writ Petition under Article 32 of the Constitution of India]

**IN THE MATTER OF:**

Atul Gulati

...Petitioner

Versus

1. Union of India  
Ministry of Environment, Forest and Climate Change  
Indira Paryavaran Bhavan, Jorbagh Road  
New Delhi - 110 003  
Through the Secretary  
...Respondent No.1
  
2. Union of India  
Ministry of Finance  
North Block, New Delhi – 110001  
Through the Secretary  
...Respondent No.2
  
3. Union of India  
Ministry of Power  
Shram Shakti Bhawan  
New Delhi – 110001  
Through the Secretary  
...Respondent No. 3
  
4. Union of India  
Ministry of Petroleum and Natural Gas

Shastri Bhavan,  
New Delhi – 110001  
Through the Secretary

...Respondent No. 4

5. Union of India  
Ministry of New and Renewable Energy  
Block-14, CGO Complex, Lodhi Road,  
New Delhi – 110003  
Through the Secretary

...Respondent No. 5

**WRIT PETITION UNDER ARTICLE 32 OF THE**  
**CONSTITUTION OF INDIA FOR SEEKING A DECLARATION**  
**TO DECLARE THAT THE ACTION OF THE RESPONDENTS**  
**TRANSFERRING/USING THE FUNDS COLLECTED**  
**THROUGH THE CLEAN ENERGY CESS FROM 2010 TILL**  
**DATE TOWARDS COMPENSATING STATES UNDER THE**  
**GST OR FOR ANY OTHER PURPOSE EXCEPT AS**  
**PRESCRIBED UNDER THE FINANCE ACT, 2010 AS ILLEGAL,**  
**UNCONSTITUTIONAL AND BEING AGAINST THE**  
**PROVISIONS OF THE FINANCE ACT, 2010 , AND FOR**  
**PASSING OF AN APPROPRIATE WRIT OF MANDAMUS**  
**THEREBY DIRECTING THE RESPONDENTS TO CREDIT THE**  
**FUNDS COLLECTED AS CLEAN ENERGY CESS TO THE**  
**NATIONAL CLEAN ENERGY AND ENVIRONMENT FUND**  
**AND UTILIZE THE SAME FOR THE PURPOSES AS PER LAW**

To

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS LORDSHIP'S  
COMPANION JUSTICES OF THE SUPREME COURT OF INDIA.

THE HUMBLE PETITION  
OF THE PETITIONER  
ABOVE –NAMED

**MOST RESPECTFULLY SHOWETH:**

*AI:* The Petitioner is a citizen of India and is a nature loving,  
public spirited person.

Petitioner has no personal interest in the litigation and the petition is not guided by self-gain or for gain of any other person/body/institution and that there is no motive other than that of public interest in filing the writ petition.

A2: The Petitioner has not approached any Government Authority for

Relief(s) sought in the petition as the relief(s) sought by the Petitioner can only be granted by this Hon'ble Court. There is no such civil, criminal or revenue litigation, involving the petitioner which has or could have a legal nexus with the issue(s) involved in the present PIL.

1. The instant petition has been filed by the Petitioner in public interest against the diversion and misutilization of the funds lying in the National Clean Energy Fund ("NCEF"), which were collected as a cess on coal under the Finance Act, 2010, for clean energy initiatives, to compensate States under the Goods and Services Tax ("GST"). The instant petition also prays that the Respondents may be directed to use the said funds appropriately and proactively on clean energy initiatives, including but not limited to the manner in which recommendations have been made by various committees in this regard. The instant petition also prays for a declaration that section 8 and section 10 of the Goods and Services Tax (Compensation to States) Act, 2017 to the extent it levies & imposes and credits the proceeds of the cess appearing at Sl. No. 3 of the Schedule to the 'Goods and Services Tax Compensation Fund' and directs its usage for the purposes specified in section 8 of the Goods and Services Tax (Compensation to States) Act, 2017, as illegal and unconstitutional and redirect and return the collected amounts towards the NCEF and the funds be used towards its intended purpose(s) including towards funding research and innovative projects in clean energy

technologies, development activities towards promoting clean(er) sources of energy and thus a clean(er) environment to the citizens.

2. At a time when the world and especially the country is grappling with the enormous effect on public health caused by the burning of fossil fuels, it is all the more important that the NCEF collected for the specific purposes for funding research and innovative projects in clean energy technologies and clean environment initiatives be utilized only and specifically for those purposes only.
3. The brief facts leading up to the filing of the instant petition are as under:
4. The Respondents introduced a levy of cess under Chapter VII, Section 83 and 84 of the Finance Act, 2010 (hereinafter “**Green Cess**”), in the following terms:

*“(3) There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Clean Energy Cess, as duty of excise, on goods specified in the Tenth Schedule, being goods produced in India, at the rates set forth in the said Schedule for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy or for any other purpose relating thereto.*

*(4) The proceeds of the cess levied under sub-section (3) shall first be credited to the Consolidated Fund of India and the Central Government may, after due appropriation made by*

*Parliament by law in this behalf, utilise such sums of money of the cess for the purposes specified in sub-section (3), as it may consider necessary.”*

5. A fundamental aspect of this cess was also that the cess so levied and collected shall be for the purposes of the Union only, and the proceeds thereof shall not be distributed among the States. This was specifically provided under section 83(6) of the Finance Act, 2010, which reads as under:

*“(6) The cess leviable under sub-section (3) shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States and the manner of assessment, collection, utilisation and any other matter relating to cess shall be such as may be prescribed by rules.”*

6. Pursuant to the enactment of the Finance Act, 2010, the Clean Energy Cess Rules, 2010 were notified under section 83 and 84 of the Finance Act, 2010 on 22.06.2010.

A true copy of the notification dated 22.06.2010 under Section 83 and 84 of Finance Act, 2010 is **Annexure - P-1 [Page 45 to 53 ]**.

7. It may be highlighted that the statement of objects and reasons of the Act stated that it was based on the ‘polluter pays’ principle. The ‘polluter pays’ principle is a well-entrenched doctrine under Indian Constitutional law. This principle broadly envisages that ‘the cost of preventing and eliminating nuisances must in principle be borne by the polluter’. This principle was for the first time recognized and

applied by this Hon'ble Court in *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212, and has since been an integral part of the environmental jurisprudence in India.

8. At this stage, it is pertinent to refer to a 3 judge bench decision of this Hon'ble Court in *Glanrock Estate Pvt. Ltd. v. State of Tamil Nadu*, (2010) 10 SCC 96, wherein it was held that the polluter pays principle, the precautionary principle, and the principle of inter-generational equity, flow from Article 14 and Article 21 of the Constitution of India, and rather form the very core of these Articles.
9. Following the acceptance of the polluter pays principle, the precautionary principle and the principle of inter-generational equity as grundnorm in India, in the year 2010-11, the Respondents set up the National Clean Energy Fund under the Finance Act, 2010. As submitted above, this fund was set up in due deference to the above noted principles, and especially the polluter pays principle, recognized and evolved by this Hon'ble Court.
10. The objective of this bill was duly reflected in the speech of the then Finance Minister while introducing the creation of this fund. During his budget speech, the then Finance Minister stated on the floor of the Parliament as under:

*“National Clean Energy Fund (NCEF)*

*66. There are many areas of the country where pollution levels have reached alarming proportions. While we must ensure that the principle of "polluter pays" remains the basic guiding criteria for pollution management, we must also give a positive thrust to development of clean energy. I propose to establish a National Clean Energy Fund for funding research and innovative projects in clean energy technologies. I shall outline the mode of funding for this initiative in Part B of my speech."*

...

*"Environment*

*154. Harnessing renewable energy sources to reduce dependence on fossil fuels is now recognised as a credible strategy for combating global warming and climate change. To build the corpus of the National Clean Energy Fund announced earlier, I propose to levy a clean energy cess on coal produced in India at a nominal rate of Rs.50 per tonne. This cess will also apply to imported coal."*

A true copy of the speech of the Finance Minister dated 26.02.2010 at the floor of the house is **Annexure - P-2 [Page 54 to 68]**.

11. At this stage itself, it is pertinent to highlight that the creation of the National Clean Energy Fund was in line with special and specific funds created by various developed and developing countries for promoting clean energy initiatives. Some funds created by countries are as under:

- a. Green Municipal Fund (GMF) of the Federation of Canadian Municipalities (FCM), Canada
- b. California Clean Energy Fund (CalCEF), California, USA
- c. Energy Conservation Promotion Fund (ENCON), Thailand
- d. Clean Energy Finance Corporation (CEFC), Australia.
- e. Malaysian Electricity Supply Industries Trust Account (MESITA), Malaysia

12. It may be noted that some of the funds were also created to ensure that the carbon footprint of the respective country is reduced.

13. Accordingly, the Cabinet Committee on Economic Affairs (CCEA) approved the constitution of a National Clean Energy Fund (“NCEF”) in the public account of India along with the guidelines as well as modalities for approval of projects to be funded from the Fund.

A true copy of the notification issued by Press Information Bureau dated 06.04.2011 is **Annexure - P- 3 [Page 69 to 70 ]**.

14. Thereafter, an Inter-Ministerial Group (IMG) was constituted to approve the projects/schemes eligible for financing under the National Clean Energy Fund, consisting of following members:

- a. Finance Secretary-Chairperson
- b. Secretary (Expenditure)-Member
- c. Secretary (Revenue)-Member

d. Representatives from Ministries of Power, Coal, Chemicals & Fertilizers, Petroleum & Natural Gas, New & Renewable Energy and Environment & Forests.

15. The objective of the National Clean Energy Fund was to be used for funding research and innovative projects in clean energy technologies, including but not limited to solar, wind, gas, tidal, geothermal, Silicon manufacturing, coal gasification, coal bed methane, shale oil, hydrogen fuel etc. Subsequently, the scope of the fund was expanded to include clean environment initiatives as well.

16. At this stage, it may be highlighted that the Fund was designed as a non-lapsable fund under Public Accounts and was levied on Coal, lignite and peat (hereinafter collectively referred to as “Coal”).

17. For the purposes of funding the National Clean Energy and Environment Fund (“Green Cess”), initially a cess of Rs. 50 was levied in Financial Year 2010-11, which was later on increased to Rs. 100 per tonne in FY 2014-2015. In addition to the above, vide the Finance Act (No. 2), 2014, the purpose of the NCEF was expanded to expend the amounts for the purposes of financing and promoting clean environment and energy initiatives, funding research in the area of clean environment or clean energy, or for any other purpose relating thereto.

A true copy of the government notification dated 22.06.2010 reducing the cess to Rs. 50 per tonne from Rs. 100 per tonne as notified in Finance Act, 2010 is **Annexure - P-4 [Page 71 ]**.

A true copy of the government notification dated 11.07.2014 rescinding the earlier notification dated 11.06.2020 is **Annexure - P-5 [Page 72 ]**.

18. In the year 2015, the cess imposed was increased to Rs. 200 per tonne. Thereafter, in the year 2016 vide the Finance Act, 2016, the 'Clean Energy Cess' was replaced by the term 'Clean Environment Cess', and the imposition was increased to Rs. 400 per tonne. The NCEF was also renamed as National Clean Energy and Environment Fund ("NCEEF").

A true copy of the government notification dated 01.03.2015 reducing the cess to Rs. 200 per tonne from Rs. 400 per tonne as notified in Finance Act ,2015 is **Annexure - P-6 [Page 73 ]**.

A true copy of the government notification dated 01.03.2016 rescinding the earlier notification dated 01.03.2015 is **Annexure - P-7 [Page 74 ]**.

19. It may be noted that the Respondents have collected around Rs. 86,000 crores from Green Cess. However, only about 34% of the amount collected as Green Cess was transferred to the NCEEF, despite the objective of the cess being to promote the Clean Energy and Environmental Objectives through the NCEEF. What is even more alarming is that only a paltry 18% of the entire cess collected had been spent. The details of Fund collection and Transferred to NCEEF is as under:

\*Rs. In Crores

<b>Year</b>	<b>Collection Amount</b>	<b>NCEEF</b>	<b>Amounts financed from NCEEF</b>
2010-2011	1,066.46	0	0
2011-2012	2,579.55	1,066.46	220.75
2012-2013	3,053.19	1,500.00	246.43
2013-2014	3,471.98	1,650.00	1,218.78
2014-2015	5,393.46	4,700.00	2,087.99
2015-2016	12,675.60	5,123.09	5,234.80
2016-2017 (RE)	28,500.00	6,902.74	6,902.74
2017-2018 (BE)	29,700.00	8,703.00	—
<b>Total</b>	<b>86,440.21</b>	<b>29,645.29</b>	<b>15,911.49</b>

20. It may be highlighted that the non-utilization of the amount collected as Green Cess, especially for its intended purposes, is in gross violation of the decisions of this Hon'ble Court, as also being violative of the principles enshrined under Articles 14 and 21 of the

Constitution of India. Moreover, despite specific provisions under the Finance Act, 2010 for appropriating the Green Cess as per law and in terms of the provisions of the Finance Act, 2010, only paltry amounts have been transferred and expended from the NCEEF for its intended objective.

21. This inaction on the part of the Respondents, specifically in violation of the Constitutional rights of the Petitioners as well as the public at large, was also subjected to the adverse comments by the office of the Comptroller and Auditor General of India (“CAG”), right from inception till date. The objections raised by the CAG are detailed below.

**Objections in the reports by the Comptroller and Auditor General of India (CAG)**

22. It is pertinent to highlight that time and again the Respondents have tried to divert the funds which were collected for clean energy initiatives. However, despite various reports of the CAG, objecting to the short transfer of funds from the Clean Energy Cess to the NCEF/NCEEF, the Respondents have failed to take any perceptible remedial actions in this regard.

23. In fact, it was suggested by the Respondents in or around the year 2016 that the unspent funds from the NCEF may be transferred back to the Consolidated Fund of India. However, this was specifically objected to by the CAG in its report in 2016, stating that the ‘*revenue collected from Clean Energy Cess are required to be transferred to*

*NCEF and to be spent only on the specific purpose for which it was levied i.e. for funding research and innovative project in clean energy technology.’.*

24. This view of the CAG is in complete consonance with the law laid down by the Constitution Benches of this Hon’ble Court in *India Cement Ltd. & Ors. v. State of Tamil Nadu & Ors.*, (1990) 1 SCC 12 and in *State of West Bengal v. Kesoram Industries*, (2004) 10 SCC 201. It has been held by this Hon’ble Court time and again that ‘cess’ means a tax and is generally used when the levy is for some special administrative expense which the name indicates i.e. cess is a tax which generates revenue which is utilized for a specific purpose.

25. However, despite these scathing observations of the CAG, the Respondents have not taken any action to ensure that the funds are duly transferred to the NCEEF. Rather, the Respondents, in a colourable exercise of power, are now diverting the existing funds collected under section 83/84 of the Finance Act, 2010 and all future funds to compensate States under the GST regime.

26. The relevant year-wise reports of the Comptroller and Auditor General of India (“CAG”) which have time and again highlighted the under-utilization, misutilization and diversion of funds from the National Clean Energy Fund have been annexed with the instant petition. It has, inter-alia, been observed by the CAG in its various reports that:

*“The Ministry’s contention that the objective of transfer to National Clean Energy Fund is linked to the absorption capacity of the line Ministries is not tenable as revenue collected from Clean Energy Cess are required to be transferred to NCEF and to be spent only on the specific purpose for which it was levied i.e. for funding research and innovative project in clean energy technology.*

*The issue was pointed out in CAG’s Report No. 1 of 2013, 2014 and Report No. 50 of 2015 but no perceptible action has been taken.”*

True copy of the report dated 13.08.2013 of the Comptroller and Auditor General of India report no. 1 of 2013 for the year 2011-12 is **Annexure P-8 [Page 75 to 374]**.

True copy of the report dated 25.05.2015 of the Comptroller and Auditor General of India report no. 1 of 2015 for the year 2013-14 is **Annexure P-9 [Page 375 to 684]**.

True copy of the report dated 22.12.2015 of the Comptroller and Auditor General of India report no. 50 of 2015 for the year 2014-15 is **Annexure P-10 [Page 685 to 927]**.

True copy of the report dated 16.12.2016 of the Comptroller and Auditor General of India report no. 34 of 2016 for the year 2015-16 is **Annexure P-11 [Page 928 to 1153]**.

True copy of the report dated 19.12.2017 of the Comptroller and Auditor General of India report no. 44 of 2017 for the year 2016-17 is **Annexure P-12 [Page 1154 to 1422]**.

True copy of the report dated 12.02.2019 of the Comptroller and Auditor General of India report no. 02 of 2019 for the year 2017-18 is **Annexure P-13 [Page 1423 to 1462]**.

27.As highlighted above, despite these adverse comments of the CAG, the Respondents have failed to remedy the situation, and utilize the amounts collected through the cess for its intended purpose.

**NON-UTILIZATION OF THE AMOUNTS COLLECTED AS CESS FOR ITS INTENDED PURPOSES AND DIVERSION FOR COMPENSATING STATES UNDER GST REGIME**

28.As stated above, it has been held by this Hon'ble Court time and again that 'cess' means a tax and is generally used when the levy is for some special administrative expense which the name indicates i.e. cess is a tax which generates revenue which is utilized for a specific purpose.

29.However, the Respondents are of the view that they are unable to channel these amounts to the concerned Ministries and Departments considering the limited absorption/utilisation capacity of the Ministries/ Departments. This is evident from the replies of the Respondents to the CAG.

30.Yet, the failure of the Respondents to identify the needs of the departments as per the existing requirements, and the failure to adhere to recommendations of Parliamentary Standing Committees is

an abdication of the Constitutional responsibilities of the Respondent, and a violation of the Fundamental Rights of the citizens of India under Articles 14 and 21 of the Constitution of India.

31. Further, instead of utilizing the amounts for its intended purposes, the Respondents introduced the Taxation Laws (Amendment) Act, 2017 in terms of which the Finance Act, 2010, Chapter VII (providing for Clean Energy Cess) was repealed and the Goods and Services Tax (Compensation to States) Act, 2017 (“GST Act”) was enacted. In terms of section 8 of the GST Act read with entry 3 of The Schedule, Green Cess was imposed on the supplies of Coal for the purposes of providing compensation to States for loss of revenue arising on account of implementation of GST. Thus, in effect, the Green Cess initially levied for the purpose of utilizing the moneys for Clean Energy and Environment, was diverted to compensate States under the GST Act.

32. It may be highlighted at this stage itself that this action itself is illegal and unconstitutional, being in grave violation of the Fundamental Rights of the Petitioner, as well as the public at large, under Article 14 and 21 of the Constitution of India. The said action is a completely arbitrary action without any justification, especially since:

- a. Requisite amounts have not been transferred to the appropriate fund, as per law, without any reasonable basis and in a completely arbitrary manner; and

- b. The amounts in the Fund are not being spent towards clean and green energies in a completely arbitrary manner, and without any basis in law.

33. Moreover, diversion of the funds for a use not authorized under law is also violative of Article 21 of the Constitution of India since the funds were to be used for the purposes of clean and green energy initiatives for a pollution free and clean environment, which is a fundamental aspect of the right to life guaranteed under the Constitution of India.

34. In *Union of India v. Mohit Minerals Pvt. Ltd.*, AIR 2018 SC 5318, this Hon'ble Court while examining the constitutionality of the impugned provisions had only considered the legislative competence of the Parliament to enact the GST Act. However, the aspect of violations under Article 14 and Article 21, as also the underlying principles of polluter pays and inter-generational equity had not been considered by this Hon'ble Court.

35. The Respondents are also diverting the existing corpus collected from Green Cess for the period 2010 till 2017 i.e. the enactment of the GST Act, for the purposes of compensating the States. Such action on the part of the Respondents is *ex-facie* illegal since the cess can only be used for the purposes that it was collected. Till 2017 when the GST Act had not been enacted (though being unconstitutional), the amounts under the Green Cess were specifically collected for the purposes of NCEF/NCEEF, and as such, must be utilized for such purposes only.

36. The action of the Respondents in diverting the amounts from the Clean Environment Fund to providing compensation to States under the GST regime has been subjected to adverse comments of various Parliamentary Committees as well.
37. The 42<sup>nd</sup> report of the Standing Committee on Energy on the Stressed/Non-Performing Assets in Gas based Power Plants after considering the situation in the country and the flip-flop policies adopted by the Respondents with respect to gas based power plants, was of the opinion that the funds of the NCEEF can be utilized to help stranded gas power plants across the country and to develop the gas based power infrastructure in the country.
38. Reference in this regard may be had to the extracts from the 42<sup>nd</sup> report of the Standing Committee on Energy on the Stressed/Non-Performing Assets in Gas based Power Plants, which reads as under:
- “11. The Committee have come to know that the National Clean Energy Fund (NCEF) was created out of cess on Coal at Rs. 400 per tonne to provide financial support to clean energy initiatives and an Inter Ministerial Group chaired by the Finance Secretary was constituted to approve the project/schemes eligible for financing under NCEF. The Green Cess collected from 2010-11 to 2017-18 amounts to Rs. 86,440.21 crore, out of which only Rs. 29,645.29 crore have actually been transferred to NCEF. Whereas, the amount financed from NCEF for projects is only 15,911.49 crore i.e. only about 19% of the total amount collected as Green Cess.*”

*The Committee feel (sic) that this fund should be used for its intended purpose i.e. to support clean energy initiatives and it should not be diverted to compensate GST losses. Diversion of this fund to unrelated activities reflects poorly on our commitment towards cleaner environment and shows Government's apathy towards clean energy projects. Since it is levied on coal as that is a polluting fuel, so the amount collected should be used to promote cleaner fuel. The Committee, therefore, recommend that financial support should be extended to gas based power projects from NCEF for their sustainability as natural gas is also a clean energy source. The Ministry of Power should pursue this matter with the Ministry of Finance.” (emphasis supplied)*

A true copy of the 42<sup>nd</sup> report of the Standing Committee of Energy dated 04.01.2019 is **Annexure P-14 [Page 1463 to 1527]**.

39. Further, the action of the Respondents in abolishing the Clean Environment Fund and making it a part of the GST Compensation Fund, besides being illegal, has also been condemned by the Performance of the National Action Plan on Climate Change, Committee of Estimates, 30<sup>th</sup> report, headed by Dr. Murli Manohar Joshi. On the aspect of abolition of the fund, and the misutilization of the funds, the said committee has opined as under:

*“Clean Environment Fund and National Adaptation Fund - Financial Achievement*

7. *The Committee note that a corpus called National Clean Energy Fund (NCEF), now known as Clean Environment Fund, was constituted in the Financial Year 2010-11 out of the cess on coal produced/imported (“polluter pays” principle) for the purposes*

*of financing and promoting clean energy initiatives, funding research in the area of clean energy or for any other purpose relating thereto. Subsequently, the scope of the fund was expanded to include clean environment initiatives also. An Inter-Ministerial Group (IMG) chaired by the Finance Secretary approves the projects/schemes eligible for financing under the NCEF. These projects include innovative schemes like Green Energy Corridor for boosting up the transmission sector, Namami Gange, Green India Mission, National Solar Mission (NSM)'s installation of solar photovoltaic (SPV) lights and small capacity lights, installation of SPV water pumping systems, SPV Power Plants, Grid-Connected Rooftop SPV Power Plants, pilot project to assess wind power potential, etc. The Committee note that from 2010-11 to 2017-18, a total of ₹86,440.21 crore was collected as Green Cess out of which only ₹20,942.29 crore could be transferred to the NCEF. During this period, total amount financed from NCEF for projects was ₹15,911.49 crore. The Committee further note that monies from the Fund are allocated to the Ministries of Environment, Forest and Climate Change, New and Renewable Energy and Water Resources, River Development and Ganga Rejuvenation. The Committee are concerned to note that in spite of substantial revenue being generated out of Green Cess, the same is not being allocated to the NCEF and even the low allocation is not being utilised, which indicates poor planning and execution on the part of implementing agencies. The Committee also understand that the Green Cess, along with some other cesses, have been made a part of GST compensation Fund which would be utilised to*

*compensate the States for five years for potential losses on account of GST implementation. After five years, any amount left would be shared on 50 percent basis between the Centre and States. The Committee deplore the way such an important issue pertaining to the existence of the Earth, the only known habitable planet in the Universe, is being handled and strongly recommend for adequate financial resources to NCEF, besides putting in place effective monitoring mechanisms to ensure full utilization of allocated outlay. The Committee also recommend that shortfall on account of the Green Cess being made a part of GST Compensation Fund should be compensated to the NCEEF by the Central Government.”*

A true copy of the 30<sup>th</sup> report on Performance of the National Action Plan on Climate Change, Committee of Estimates dated 13.12.2018 is **Annexure P-15 [Page 1528 to 1716]**.

40. Thus, it is clear that the actions of the Respondents in:

- a. the diversion and misutilization of the cess collected from 2010 till the enactment of the GST Act from clean energy initiatives to compensating States under the Goods and Services Tax (“GST”); and
- b. the action of the Respondents to divert the source of funding for the National Clean Energy Fund to compensating States under GST as per the GST Act;

is completely illegal and unconstitutional.

41. At this stage, it is relevant to briefly highlight the necessity to promote green energy initiatives, even though the benefits are quite obvious. To meet the growing electricity demand, the expansion of the coal-fired thermal power plants (TPPs) and the allocation of coal blocks to feed those TPPs leads to an array of environmental and health impacts. Various studies have found significant impacts from the existing fleet of coal fired TPPs including between 80,000 and 115,000 deaths annually due to exposure linked their particulate emissions in 2011-12.

A true copy of the undated report titled 'Coal Kills - Health Impacts of Air Pollution from India's Coal Power Expansion' is **Annexure P-16 [Page 1717 to 1748]**.

A true copy of the undated report titled 'Coal Kills - An assessment of Death and Disease caused by India's Dirtiest Energy Source' is **Annexure P-17 [Page 1749 to 1767]**.

42. In addition to the above, this Hon'ble Court has been monitoring emissions caused by TPPs in particular, usage of pet coke and vehicular pollution in general and has issued various orders from time to time to *inter-alia*, fix permissible emission limits and mandate industry to adopt various technology, including flue gas desulfurization, to check emissions. In fact, this Hon'ble Court has from time to time, also challenged and questioned the non-utilization and diversion of funds collected by the Respondents, including but not limited to the non-utilization and diversion of the NCEF, *inter-alia*, in the case of MC Mehta vs Union of India W.P. (C) 13029 of 1985 and in other cases.

43. It is no longer in the realm of speculation that TPPs have caused and continue to cause irreversible environment degradation and the need to make policy change to switch to cleaner sources of fuel has become crucial. In these circumstances, non-utilisation of funds collected in the NCEEF and diverting them for purposes for which they were not intended shows a lack of understanding of the imminent effect of climate change. In a paper published by Oxford Economics recently, India has been singled out as following a particularly ruinous trajectory with GDP falling 90% by 2100 if it doesn't improve current policies.

44. As per a report published by Greenpeace in collaboration with Centre for Research on Energy and Clean Air in February 2020, titled *Toxic Air: The Price of Fossil Fuels*, India is one of the three countries, China Mainland and the United States being the other two, which bear the highest costs from fossil fuel air pollution worldwide. The cost of fossil fuel air pollution in India is at an estimated US\$150 billion per year. The report further states that a transition to renewable energy is not only essential, both to prevent catastrophic climate change and to protect our health, but also imminently feasible. Relevant portion from the report is extracted below:

*“Yet while toxic air pollution is a global threat, the solutions are increasingly available and affordable. Moreover, many solutions to fossil fuel air pollution are also the solutions to climate change. Clean transport and renewable energy not only bring significant reductions in toxic pollutants such as PM2.5, NOx and*

*ozone, but also help to keep climate change-causing greenhouse gases out of the atmosphere.....”*

A true copy of the report dated February, 2020 *Toxic Air: The Price of Fossil Fuels*, India is **Annexure P-18 [Page 1768 to 1810]**.

45. This Hon'ble Court, while monitoring the utilisation of various funds created under its orders in cases relating to the environment, has condemned the practice by the Union and State governments to treat such funds as revenue. The diversion of the funds lying in the NCEEF to compensating States under the GST is in the teeth of the order dated 20.07.2018 passed by this Hon'ble Court in T.N. Godavarman vs UOI & Ors., W.P. (C) 202 of 1995 the relevant part of which is extracted below:

*“It appears that absolutely no effort has been made by the Union of India only of the ground that the funds are lying with the State Governments. We need not repeat, but since the amount is huge, the Union of India also has some responsibility in ensuring that funds that are collected as a result of orders of this Court are utilised in a proper manner for the benefit of the people and the environment since all these funds have been collected in orders relating to environment.*

*We make it clear that these funds of more than 91,000 crores cannot be treated as revenue for the Union of India or for the States.”*

46. It is imperative that such efforts and all such funds which are either collected by way of fines by any agency and / or courts including the special funds collected by the states like NPV, CAMPA, DMF etc.

which are collected by the government from various industries to offset its obligations for causing pollution be consolidated and used for common purpose i.e. to ensure a more effective and efficient and possibly uniform policy can be adopted for ensuring a cleaner environment.

47. Thus, the environmental benefits of switching to clean and green energies are multi-fold over the long term, and in consonance with law.

48. In addition to the above reasons, it may be highlighted that the Respondents have made various commitments before international fora to reduce their carbon footprint, and have committed before the international forums that the National Clean Environment Fund would be used to this end. The details of such commitments, and avenues for the use of such funds are detailed below.

### **INDIA'S COMMITMENT TO INTERNATIONAL FORUMS**

#### United Nations Framework Convention on Climate Change (UNFCCC)

49. The Respondents' Intended Nationally Determined Contribution before the UNFCCC clearly specifies that it is utilizing the funds from the Clean Environment Fund for financing clean energy, technologies, and projects related to it. In fact, the commitment of the Respondents before International Forums has been that the Green Cess translates into a carbon tax equivalent, using the emission factor for coal. It is therefore, impermissible for the Respondents to renege

from this commitment, and to divert the funds from the Clean Environment Fund to compensating States from GST.

A true copy of India's Intended Nationally Determined Contribution before the UNFCCC undated is **Annexure P-19 [Page 1811 to 1848]**.

#### Paris Climate Change Commitment

50. While ratifying the Paris Agreement, India made the following declaration:

*“Declaration:*

*‘The Government of India declares its understanding that, as per its national laws; keeping in view its development agenda, particularly the eradication of poverty and provision of basic needs for all its citizens, coupled with its commitment to following the low carbon path to progress, and on the assumption of unencumbered availability of cleaner sources of energy and technologies and financial resources from around the world; and based on a fair and ambitious assessment of global commitment to combating climate change, it is ratifying the Paris Agreement.’”*

51. At present, NCEEF was one of the primary sources of funds to fund the clean energy initiatives in India, and to meet its international commitments. With the enactment of the GST Act and by subsuming the Green Cess within it, there is no specific fund which can meet the international commitments.

Memorandum of Understanding with the United States of America for Promoting Energy Access Through Clean Energy (PEACE)

52. India and the United States of America signed a Memorandum of Understanding (MoU) on Cooperation to Establish the PACE Setter Fund – A fund to support the Promoting Energy Access Through Clean Energy (PEACE) track of the U.S.-India Partnership to Advance Clean Energy (PACE) to accelerate the commercialization of off-grid clean energy through early-stage grant funding grants to develop and test innovative products, systems, and business models. A true copy of the information disseminated by the Press Information Bureau dated 10.07.2015 regarding launch of the PEACE initiative is **Annexure P-20 [Page 1849]**.

53. In terms of the commitment made and the representations of the Government of India, the NCEF also contributes to the above noted PEACE fund. In the absence of funds being available in the NCEF, the Respondents would not be in a position to fulfil their commitments to the PEACE fund.

The updated state of expenditure from NCEEF as available on website of Department of Expenditure, Ministry of Finance, Government of India available at [https://doe.gov.in/sites/default/files/NCEF%20Brief\\_post\\_BE\\_2017-18.pdf](https://doe.gov.in/sites/default/files/NCEF%20Brief_post_BE_2017-18.pdf) undated is **Annexure P-21 [Page 1850 to 1855]**.

54. Thus, even in order to fulfil its international commitments and to act in consonance with Article 51(c) of the Constitution of India, the Respondents are required to use the existing funds in the NCEEF for promoting clean environment objectives, and to continue collecting the Green Cess for the purposes of NCEEF.

55. In addition to the above, the Petitioner is also aggrieved by the inaction of the Respondents to transfer the whole corpus of Green Cess to the NCEEF, and the inaction on the part of the Respondents in spending the NCEEF for its intended purpose i.e. to promote clean energy initiatives.

56. Some of the actions which the Respondents may consider taking for spending the funds in the NCEEF is appended with Annexure 21. However, this is a non-exhaustive list and the Respondents may spend the amount as per law and as per its requirements. Yet, it is the grievance of the Petitioner that since the past experience has shown that the Respondents are unwilling to spend this amount, a mandamus must issue to spend the funds as per law for only Clean Environment objectives.

57. In addition, this Hon'ble Court may also consider appointing a National Regulator in the lines of its judgment in *Lafarge Umiam Mining Pvt. Ltd. vs UOI*, (2011) 7 SCC 338, for appraising clean energy and clean environment initiatives and projects for allocation of funds from the NCEF and such other matters as it deems necessary for the fulfilment of the objectives of the fund.

58. That the petitioner has no adequate or equally efficacious remedy but to approach this Hon'ble Court by way of the present Writ Petition.

59. That the Present petition is made bonafide and in the interest justice concerning the cause of hundreds of citizens of the country.

60. That the annexure filed with the petition are true copies of the respective originals.

61. That the petitioner has not filed any other similar petition seeking relief.

### **PRAYER**

In view of the above, it is most respectfully prayed that this Hon'ble Court in the interest of justice may graciously be pleased to:

- a) Declare that the action of the Respondents transferring/using the funds collected through the Clean Energy Cess from 2010 till date towards compensating States under the GST or for any other purpose except as prescribed under the Finance Act, 2010 as illegal, unconstitutional and being against the provisions of the Finance Act, 2010; and
- b) Pass a writ of mandamus or any other writ, order or direction, directing the Respondents to credit the funds collected as Clean Energy Cess to the National Clean Energy and Environment Fund and utilize the same for the purposes as per law;
- c) Declare section 8 and section 10 of the Goods and Services Tax (Compensation to States) Act, 2017 to the extent it levies & imposes and credits the proceeds of the cess appearing at Sl. No. 3 of the Schedule to the 'Goods and Services Tax Compensation

Fund' and directs its usage for the purposes specified in section 8 of the Goods and Services Tax (Compensation to States) Act, 2017, as illegal and unconstitutional;

- d) Pass a writ or any other order appointing a National Regulator in the lines of this Hon'ble Court's judgment in *Lafarge Umiam Mining Pvt. Ltd. vs UOI*, (2011) 7) SCC 338 or in the alternative form a committee for the purpose of appraising clean energy and clean environment initiatives and projects for allocation of funds from the NCEF and such other matters as this Hon'ble Court may deem necessary for the fulfilment of the objectives of the fund.
- e) Pass a writ of mandamus or any other writ, order or direction, directing the Respondents to credit the funds being collected under entry 3 of The Schedule read with section 8(2) of the Goods and Services Tax (Compensation to States) Act, 2017 to the National Clean Energy and Environment Fund;
- f) Pass a writ of mandamus or any other writ, order or direction, directing the Respondents to spend the funds so credited to the National Clean Energy and Environment Fund for the purposes stated in the 42<sup>nd</sup> report of the Standing Committee on Energy on the Stressed/Non-Performing Assets in Gas based Power Plants and/or appropriate renewable and clean energy development;
- g) Pass such other further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN  
DUTY BOUND SHALL EVER PRAY.

Drawn by-

**Advocate for the Petitioner**

**Ashish Virmani**

Dated: 08.09.2020