

**BEFORE THE HON'BLE NATIONAL GREEN  
TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI**

(Under Section 18 read with Section 14 of the National Green  
Tribunal Act, 2010)

**ORIGINAL APPLICATION NO. 436 OF 2023**

**IN THE MATTER OF :**

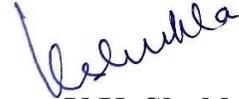
Association of Fly Ash Products Manufacturers (AFAPM)  
... Applicant

Versus

Ministry of Environment, Forest & Climate Change & Anr.  
... Respondents

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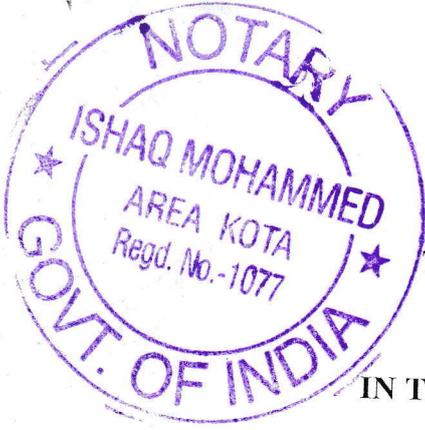
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Place: New Delhi

Date: 27.11.2023



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ORIGINAL APPLICATION NO. 436 OF 2023

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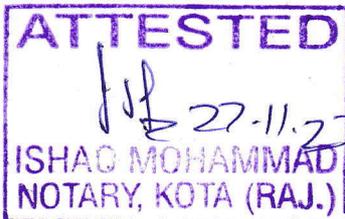
**REJOINDER AFFIDAVIT TO THE REPLY FILED BY  
RESPONDENT NO.2**

I, Rajendra Singh S/o Late Ramnarayan Singh, aged about 58 years R/o 7C 13, Mahaveer Nagar Extension, Kota (Rajasthan)-324009, do hereby solemnly affirm and states as under;

1. That I am the founder member of the applicant association and as such is well conversant with the facts and circumstances of the present case and is competent to swear this present affidavit.

**PARA WISE REPLY**

2. That the contents of Para 1 to 5 do not call for any comment being matter of record/ formal in nature.
3. That the contents of Para 6 as state are wrong hence denied. The averments made in para under reply has nothing to do with the mandatory obligation on the part of the coal and lignite based thermal power plant for utilization of Ash in environmentally sound manner as stipulated in the **Ash Utilization Notification of 2021**.



It is needless to mention here that the Ash Utilization Notification is issued under the relevant provisions of **Environment (Protection) Act of 1986**. Therefore, TPPs are duty bound to respect the stipulation of the mandate of law and act accordingly, **when there is legacy fly ash of 1670.602 Million Metric Tons laying dumped on 31<sup>st</sup> December, 2021 in unutilized manner in ash ponds.**

Such a huge quantity of legacy ash is lying unutilized **apart from the addition with current deposition of Ash in different ash dyke lagoons**. It is underlined here that still the TPPs are depositing the Ash in the form of water slurry in Ash Pond taking the benefit of relaxation given under **the sub-paragraph A(4) and A(6) of Ash Utilization Notification, 2021.**

At the same time, the coal and lignite based thermal power stations are obligated under the mandate stipulated in sub-paragraph A(7) for the disposal of ash in environmentally sound manner for the realization of the level of hundred percent utilization of Ash for the purposeful utilization of Ash for which the thermal power plants are held responsible.

Utilities must take their own techno-economic and commercial decisions in running their power plant in viable manner taking measures conducive to their development with rationalization of electricity tariff keeping in view all the necessary expenses coming in the way of electricity generation and managing all the expenses efficiently including the expenses on making





the hazardous and other waste environmentally benign for the sustainability of the fly ash management system in terms of the mandatory provisions of the **Ash Utilization Notification of 2021**.

It is true that the setting up of Thermal Power Plant is a de-licensed activity as per **the Electricity Act of 2003**. However, it is also true that **the National Electricity Policy** notified under the relevant section of **the Electricity Act, 2003** reiterates under its paragraph 5.10.4 that "*Suitable steps would also be taken so that utilization of fly ash is ensured as per the environmental guidelines*".

It is needless to mention that the environmental guidelines shall be issued exercising the power conferred under the relevant provision of **the EP Act of 1986, Air (Prevention and Control of Pollution) Act of 1981 and Water (Prevention and Control of Pollution) Act of 1974** by the appropriate authority and Ministry whose directives are binding upon all the law-abiding citizens and institutions including the TPPs.

4. That in reply to the contents of para reply 7 & 8, it is submitted that Ministry of Power, Govt. of India has no regulatory power to issue any separate and parallel guidelines in the shape of the advisory and other directives to the TPPs for regulating the disposal of Ash, because the Ash is waste material not the by-product as classified in Schedule VI tagged with Basel No. A2060 and B2050 of the Hazardous Substance Management Rules of 2016.



A handwritten signature in blue ink, possibly reading "A. Kota".

Therefore, the environmental guidelines for regulating the safe and scientific disposal of Hazardous and other waste in environmentally sound manner shall only be issued under the EP Act of 1986, Air (Prevention and Control of Pollution) Act of 1981 and Water (Prevention and Control of Pollution) Act of 1974 by the appropriate authority and Ministry.

Therefore, the Central Government in the Ministry of Environment, Forest and Climate Change had issued the Ash Utilization Notification of 1999 in the light of the order passed on 28.07.1999 by the Hon'ble Delhi High Court in the matter of C.W. No. 2145/1999. The said order is quoted as follows;

*“Respondents is directed to see that the final notification is published within a period of two weeks from today.*

*Such directions are being given because it is necessary to protect the environment conserve the top soil and prevent the dumping and disposal of fly ash produced by coal and lignite based thermal plants on land and landfills. This will also make use of the fly ash.”*

In this connection, it is statutorily binding upon the TPPs to remain abide by the provisions of Ash Utilization Notification of 2021 issued in supersession of the Ash Utilization Notification of year 1999 for ensuring the disposal of ASH in the environmentally sound manner.





The disposal of ASH in the environmentally sound manner shall be ensured in prescribed area of activities in the light of the mandate stipulated in **sub-paragraph A(2)** and in addition to the stipulation of mandate under the subsequent **sub-paragraphs of first proviso of sub-paragraph B(1), B(3), B(6) and B(8) of Ash Utilization Notification of 2021.**

Therefore, to meet the obligation of the disposal of ash in aforesaid environmentally sound manner, there is stipulation for procedure to be adopted mandatorily for supply of Ash to the persons or the agencies **who are liable to utilize ash** under the provision of **sub-paragraph D(1) by serving the written notice upon such persons and agencies offering for sale or transport or both.**

Because as stipulated in the **sub-paragraph A(10) of Ash Utilization Notification of 2021**, it is the statutory obligation of hundred percent utilization Ash on the part of the coal and lignite based thermal power plant and shall be treated as **change in law wherever the utilization is applicable.** It is needless to mention that applicable area of activities where the utilization of ash shall be ensured is already stipulated in the form of mandate over the TPPs in above aforesaid provision of **paragraph (A) and paragraph (B) of Ash Utilization Notification of 2021.**

On the other hand, the definition of utilization of Hazardous and other waste is already explained in **rule 3(37) of HSM Rule of 2016** wherein it stated that

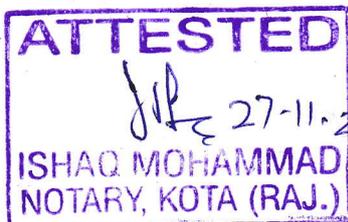


*“utilization” means use of hazardous or other waste as a resource;*

Even though there is no any specific provision in Ash Utilization Notification 2021 for the disposal of Ash through auction to monetize the sale of Ash, the **Ministry of power (MoP)** has issued the **advisory dated 22.02.2022** prescribing therein neither the step-wise procedure to ensure 100% utilization of ash within the timelines prescribed by MoEF&CC in its notification nor any step-wise procedure for taking the promotional measures thereby the utilization of Ash could be augmented for the stipulated purposes.

Whereas, Ministry of power (MoP) has issued the advisory dated 22.02.2022 prescribing undoubtedly therein the step-wise procedure to realize the monetary benefit with the primarily objective to monetize the sale of Ash through auction ignoring **the environmental guidelines** as prescribed in different provision of **Ash Utilization Notification of 2021**.

It is pertinent to mention here that the TPPs has failed to realize the objective of hundred utilization of fly ash in the light of the previous of **notification of 1999** and in the light of the prescribed timeline fixed by its **amendment in the year of 2016**. The timeline for hundred percent utilization of ash was fixed on **31<sup>st</sup> December, 2017** through the **amendment notification of the year 2016 of fly ash utilization notification 1999**.



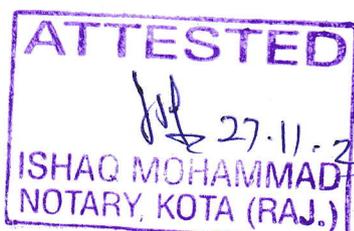


However, the data submitted by the TPPs on which basis CEA shows the gradual increase in utilization of ash cannot be relied unless the third-party statutory audit submits the report of utilization of Ash by the TPPs in the compliance of **the provision E(5) of the Ash Utilization Notification of 2021.**

This advisory is nothing but only the exercise of discretionary power given to the TPPs **under the third proviso of sub-paragraph B(1) of the Ash Utilization Notification of 2021** to charge the ash cost as per the mutually agreed terms in case the TPPs is able to dispose the Ash through other means at the cost of environment **ignoring the mandatory provisions of Ash Utilization Notification.**

It is stated in **paragraph 5.2 of the Advisory dated 22.02.2022** that *“if after bidding/auction some quantities of ash still remains un-utilized, then only, as one of the options, it could be considered to given free of cost on first come first serve basis, if the user agency is willing to bear the transportation cost.”*

Whereas, Thermal power plants at the zero ground is practically working in contravention of stipulation made in **paragraph 5.2 of the above advisory of MoP** and prefer throwing the Ash in the shape of water slurry in Ash Pond in case after bidding/auction some quantities of ash still remains undisposed and parallely TPPs keep themselves engaged in continuing the ongoing process of auction of Ash repeatedly in the same financial year.



TPPs prefer to throw the ash in ash pond through water slurry but not providing the Ash to Bricks Manufacturers for the disposal of ash in environmentally sound manner for purposeful utilization.

It is clear from the stipulation made in **paragraph 5.2, 5.3, and 5.4 of the Advisory of MoP** that auction of ash to monetize the sale is termed as “**utilization**”, whereas the disposal of ash through auction to monetize the sale is not termed as “**utilization**” in **serial no. (i) to (x) of sub-paragraph (2) of paragraph (A) and in the first provision of sub-paragraph B(1), B(3), B(6), and B(8) in Ash Utilization Notification of 2021** for disposal of Ash in environmentally sound manner.

Thus, terming the auction of ash to monetize the sale as utilization of ash by **the Advisory of MoP** is against the mandate of **Ash Utilization Notification of 2021**. It seems very lucrative on paper stating that the monetary gain realized from the sale of Ash through auction will give least burden on the electricity consumers by providing the cheaper power compensating the necessary expenses incurred upon in the process of electricity generation.

But it is not said anywhere how much precious money is spent on disposal of ash in pond in the form of water slurry and over the management of Ash Pond system. TPPs and its regulatory Ministry that governs the generation, transmission, distribution, trading and





use of electricity has failed to acknowledge the monetary losses occurred in disposing the ash in ash pond in the shape of water slurry that can not be offset from the monetary gain from the sale of ash through auction in addition to the damage of environment.

If the **Ash** is interpreted as a valuable commodity and therefore auction is inevitable for generating cheaper power keeping in view the interest of end consumer in the light of reiteration of same in the **Advisory dated 22-02-2023 of Ministry of Power**, then whether the continuous and uninterrupted disposal of ash (valuable commodity) in ash pond in the form of water slurry could be termed as rational activity from commercial point of view.

Till date the TPPs and its regulatory ministry of electricity generation, transmission, distribution and trading has not published any report that how much the unit cost of electricity is reduced and accordingly consumers are provided cheaper electricity of such value through the realization of monetary value keeping the monetization of sale of ash through auction since the publication of **first advisory dated 22<sup>nd</sup> September, 2021**.

The process of auction of Ash has been continuing since then except the period in between **06-12-2022 to 28-02-2022** meanwhile the process of auction was interrupted due to strong view taken by the **Hon'ble NGT in the light of its order dated 18-01-2022** passed in the matter of O.A. 164 of 2018 during the



hearing of Amaravati matter listed on 07.12.2022 and 15.12.2022.

Therefore, the contention made in **paragraph 07 of the counter reply by respondent no.02** is complete eyewash and is pretending oblivious of the responsibility that is statutorily binding upon TPPs for the disposal of ash in environmentally sound manner in prescribed area of activities for purposeful utilization.

5. That in reply to the para 09 of counter affidavit it is submitted that the Power Plants were not asked to take appropriate steps to ensure the maximum utilization of Ash to comply with applicable notification of MoEF&CC. On the contrary, the Power Plants are mandated through the provisions for statutory compliance of making hundred percent purposeful utilization of ash in prescribed area of activities stipulated in **serial number (i) to (x) of sub-paragraph A(2) of Paragraph (A)** in addition to **the first proviso of sub-paragraph B(1), B(3), B(6) and B(8) of paragraph (B)**.

The Power Plants are mandated for ensuring the availability of Ash to the persons or agencies who are liable to utilize ash in accordance with **the mandatory provision of sub-paragraph D(1)** by serving the written notice upon such person and agencies offering for sale or transport or both. The bona-fide persons and agencies who are liable to utilize ash who are indulge in purposeful activities as stipulated in **serial number (i) to (x) of sub-paragraph A(2) of Paragraph (A)** in





addition to the first proviso of sub-paragraph B(1), B(3), B(6) and B(8) of paragraph (B). In this way the TPPs are statutorily obligated for ensuring the disposal of ash in environmentally sound manner in compliance to the stipulation made in sub-paragraph A(7).

6. That in reply to the para no.10 of the counter affidavit, it is submitted that the **paragraph 05 of the advisory of MoP dated 22.02.2022** to provide Ash to prospective user agencies for supply of Ash is not as per the provision of **MoEF&CC Notification dated 31.12.2021**.

Whereas, **MoEF&CC Notification dated 31-12-2021** mandated the TPPs to provide Ash to the persons and agencies who are liable to utilize Ash as per the procedure laid-down in **sub-paragraph D(1) of MoEF&CC Notification dated 31.12.2021** by serving the written notices to such persons or agencies offering for sale or transport or both.

Neither the stipulation from **sub-paragraph (5.1) to (5.7) of Paragraph (5) of advisory** are part of the provision of the MoEF&CC Notification nor have been framed in accordance with the stipulation of **mandatory provision of sub-paragraph D(1) said notification** where the procedure for supply of Ash has been already laid-down that does not necessitate the requirement for issuance of **the Advisory of MoP dated 22-02-2022 in supersession of first Advisory of 22-09-2021** to provide Ash to prospective user agencies. It is needless to mention here that the present



advisory is the true replica of the advisory dated 22-09-2021 with one minor variation.

7. That in reply to the para 11 to 14 of the counter affidavit, it is submitted that the **Civil Appeals (Dy. Nos. 5195 & 5196 of 2023)** filed by the **respondent no.02** before the **Hon'ble Supreme Court** challenging **Hon'ble NGT's orders dated 18.01.2022 and 25.08.2022** respectively imposing stay on this **Advisory of MoP dated 22.02.2022** on the grounds that the Hon'ble Tribunal while passing the impugned order completely ignored that **the Schedule I of the National Green Tribunal Act of 2010** which define **the ambit of Tribunal's Jurisdiction** that don't bring **the Electricity Act of 2003**.

Further it is submitted by the **respondent no.02** before the **Hon'ble Supreme Court of India** challenging **Hon'ble NGT's** impugned orders on the ground that the Hon'ble Tribunal ignored that under **the National Electricity Policy** prepared under **section 3 of Electricity Act of 2003**, the appellant which is **respondent no.02** in present matter being the nodal Ministry is empowered for all possible development, deployment of technologies, utilization and productive use of fly ash. Accordingly, as **Electricity Act, 2003** don't fall within **Schedule I of the National Green Tribunal Act of 2010**, same could not have been examined.

Whereas, the **National Electricity Policy** prepared under **section 3 of Electricity Act of 2003** has



*[Handwritten signature]*



stipulated under its paragraph 5.10.4 that *“Suitable steps would also be taken so that utilization of fly ash is ensured as per the environmental guidelines”*. And the power to issue the environmental guidelines for utilization of Ash because being the waste material and threat to environment that originates during the coal burning process of electricity generation from power plant is rests with the appropriate authority and Ministry who has power to issue the environmental guidelines for protection of environment **under the EP Act of 1986, Air (Prevention and Control of Pollution) Act of 1981 and Water (Prevention and Control of Pollution) Act of 1974.**

And, accordingly **Hon’ble NGT** is empowered to examine the matter comes under the aforesaid **EP Act of 1986, Air Act of 1981 and Water Act of 1974** in **Schedule I of the National Green Tribunal Act of 2010.**

A waste material that is threat to the environment and its utilization for disposal in environmentally sound manner is to be governed by the environmental guidelines issued under the regulatory framework of **the EP Act of 1986, Air (Prevention and Control of Pollution) Act of 1981 and Water (Prevention and Control of Pollution) Act of 1974** and not to be governed by **the Electricity Act, 2003**. Whereas the **Electricity Act 2003** is for regulating generation, transmission, distribution, energy conservation, and for optimal utilization of resources used for making



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Electricity and rationalization of tariff considering all the expenses comes in the way of generation of electricity as well the expenditure comes in way of implementing the environmentally benign policy that is issued as per the environmental guidelines.

It is pertinent to mention here that the **respondent no.02** in present case never raised before Hon'ble NGT while adjudicating and hearing the matter with respect to the impugned orders respectively that the Hon'ble NGT has no jurisdiction to interfere and to examine the matter. The **respondent no. 02 that is appellant in Civil Appeals (Dy. Nos. 5195 &5196 of 2023 )** before the **Hon'ble Supreme Court challenging Hon'ble NGT's orders dated 18.01.2022 and 25.08.2022** has raised suddenly before the Hon'ble Supreme Court that as **Electricity Act 2003 don't fall within Schedule I of the National Green Tribunal Act of 2010**, same could not have been examined by the **Hon'ble NGT (P.B.)** and same was never before raised while the matter was being decided by **the Hon'ble NGT.**

8. That the contents of Para 15 as stated do not call for any comment being matter of record.



  
 DEPONENT  
 (Rajendra Singh)



### VERIFICATION

I, the deponent above named do hereby verify that the contents of this affidavit are true and correct to the best of my knowledge derived from the records and nothing relevant has been concealed therefrom. Verified at Kota, Rajasthan on this \_\_\_\_\_ day of November, 2023.

  
 DÉPONENT  
 (Rajendra Singh)

  
 IDENTIFIED BY

मनीष  
 मनीष सो बजरोज लाज  
 किं टेली हउस मार्ग,  
 फिलाह नगद, जोखेडा  
 कोटा (राज०)  
 डा० ५७४७-२५१-३१०५

**ATTESTED**  
  
 ISHAQ MOHAMMAD  
 NOTARY, KOTA (RAJ.)

27-11-23

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VK Shukla &lt;vkslawoffices@gmail.com&gt;

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**OA No. 436 of 2023 Association of Fly Ash Products Manufacturers Vs. Ministry of Environment, Forest & Climate Change**

1 message

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**VK Shukla** <vkslawoffices@gmail.com>  
To: secy-moef@nic.in, secy-power@nic.in

Mon, Nov 27, 2023 at 7:39 PM

Sir(s)

PFA copy of rejoinder to the reply/ counter affidavit filed by respondent No.1&amp;2 in the above said matter.

Regards

**V.K. SHUKLA****Advocate, Supreme Court of India****Madhav & Associates, B-69, LGF | Lajpat Nagar-1 |****New Delhi-110024 | Telefax: 011-45558066****E-mail: [vkslawoffices@gmail.com](mailto:vkslawoffices@gmail.com) | Mob.: +91 8800131234****CONFIDENTIALITY NOTE**

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**2 attachments****Rejoinder MoEF final 27.11.2023.pdf**  
13061K**Rejoinder MoP final 27.11.2023.pdf**  
8722K