

Examining the Punishment Measure of the National Environmental Quality Act B.E. 2535 for Air Pollution

Aratchaporn Watcharapanich^{*}

ABSTRACT

This article aims to find out the appropriate Punishment Measure through studying the Clean Air Act 1990 of the United States. However, the researcher found that there is still no any specific Law for controlling on Air Pollution in Thailand. Even though there is the National Environmental Quality Act B.E.2535 that related to Air Pollution, the Act still have the practical problem because there is no authority to enforce seriously the Act and almost factories still release amount of Air Pollution. Agriculturists always burn the forest. Further, Air Pollution also comes from engine vehicles. So, it is difficult to control Air Pollution in Thailand. If Thailand still has no attention to this problem, there will be many problems from Pollution that may threat both human and environment in the future. When having damage from Air Pollution, no one is liable because no laws remedy injured party about Air Pollution.

Thus, the researcher recommends some appropriate Punishment Measures concerning Air Pollution. Thai laws should adopt the general concept of the Clean Air Act from U.S. laws and adjust this concept to suit for Thailand. The law should be revised to harsher punishment to make offender fear to do any activities. Additionally, Sections 96 and 97 of the National Environmental Quality Act should be revised that agencies have power to promulgate regulations by providing process of conducting offender and injured party, and economic methods in assessing the value of damaged resources.

^{*} This article is compiled from the Independent Study paper, “Examining the Punishment Measure of the National Environmental Quality Act B.E.2535 for Air Pollution,” submitted in partial fulfillment for the Degree of Master of Laws (Business Law Program) Graduate School of Law, Assumption University, 2020.

Introduction

Air Pollution remains as the major public health concern where it is released from the industrial processes with the poisons that impact on health. World Health Organisation presents the unhealthy levels of Air Pollutants inhaled by 4 million people during some period of the year.¹ There could be the long term serious effects from the pollutants, for instance as a cause of cancer through in low levels. In most Air toxics, it is unknown about the safety levels where some can accumulate in the body with the repetitive exposures.

Thai government has lengthy identified on Air Pollution problem with the application of various standards on Air Quality and emission in the large part that is comparable to those major countries.² By the way, the basic law for the country on Environmental Quality Standards is the National Environmental Quality Act that being established in 1992.³

Discharge models have been set by Thailand for both point and mobile sources. Mobile source emanations control is under the management of the Pollution Control Department. This administrative body applies the Euro emission principles for automobiles since 1998.⁴ New light-duty vehicles in Thailand shall comply on the standards of Euro 4 emissions 2012. These mobile sources regulations are supplementary to the public campaigns for public transportation adopting based on the alternative fuels such as electricity and Natural Gas not gas and oil. Meanwhile, in 2018 the standard had been issued by the Pollution Control Department on small passenger vehicles discharging in which being shifted to adopt the Natural Gas that have become the large Air Pollution contributor.⁵

¹ World Health Organization, “More countries taking action,” (2019) Journal of Health, at <https://www.who.int/news-room/detail>, (last visited 21 July 2019).

² Pollution Control Department, “Action Plan for the Controlling of Air Pollution in Thailand,” (2018) Natural Resources Report.

³ Ibid.

⁴ Pollution Control Department, “Development of Environmental and Emission Standards of Volatile Organic Compounds in Thailand,” (2007) Natural Resources Journal, p.3.

⁵ Pollution Control Department, “Assessment of Long-range Transport Contribution in Thailand,” (2018) Earth and Environmental Science, p.151.

In Thailand biomass burning is the significant Air Pollution contributor, this includes the open burning of residue crop, forest fires where both come from the human activities. The National Plan for Open Burning Control in 2003 and the National Fire and Haze Control Plan of Action in 2013 have been selected by Thai authorities to control on the Air Pollution from biomass burning in correspond with the regional framework signed in 2002, the ASEAN Agreement on Trans-boundary Haze Pollution.⁶ The control measures are determined by the strategies on the forest burning and the agricultural residues. The aim for this arrangement is no greater than 48,000 ha/year of forest area burning by 2030 with the zero crop residues burning in the whole nation. In 2017 for instance, there was the effort by Thai authority to exercise on the haze issue moderation plan via the prohibition of burning in Northern part of Thailand. Moreover, in the cases of severe haze and smoke situation, there is the right for the provincial senator to limit the open burning under the Public Disaster Prevention and Mitigation Act structure.

In the recent development, Bangkok has faced with the serious scenes of Air Pollution from PM_{2.5} since January 2019.⁷ The National Environment Board in light of the crisis had called for the plan deliberation to make effect the models of Euro 5 emission within the next five years and to bring down also PM_{2.5} from 50 µg/m³ to 35 µg/m³ as focused by the daily Ambient Air Quality Standard in the upcoming three to five years and lower to 25 µg/m³ afterward which is the guideline by WHO for the next 10 to 20 years.⁸

Punishment Measure of Air Pollution in Thailand still weak because of noncompliance and insignificant punishments for noncompliance, regulated businesses in Thailand have little incentive to follow the Environmental Laws. A related issue is that some infringements of the Act are not enforceable or punishable. As the result, Punishment Measures cannot control or regulate lawbreakers while the United States have already enacted the Clean Air Act and regulated many industries to comply.

⁶ Ibid.

⁷ Pollution Control Department, "Pollution Prevention Policy in Thailand," (2019) at https://www.pcd.go.th/info_serv/policy.detail.html, (last visited 21 July 2019).

⁸ World Health Organization, "More countries taking action," (2019) Journal of Health, at <https://www.who.int/news-room/detail>, (last visited 21 July 2019).

Consequently, the researcher would like to examine the Punishment Measure of the National Environmental Quality Act B.E.2535 through legal study of the Clean Air Act 1990 to find out the appropriate Punishment Measure.

Research results

Punishment Measure

1. Principle of Liability⁹

According to the Polluter Pays Principle, the polluter is liable for producing pollution and responsible for costs of damage to environment, and costs of accidental pollution. The main target of this rule is to shift the physical and financial responsibility regarding to environmental impacts from the government to the generators of waste which are the producers that include manufacturers, shippers, merchants and retailers, and consumers of the product.¹⁰

Under section 91 defines that any owner or possessor of the point source of contamination, who illegally discharges waste into the central waste disposal facility of the public service, shall be liable to pay as a daily penalty 4 time as much the measure of daily expenses for the normal operation of his on-site facility for wastewater treatment throughout the duration of such unlawful release and shall also be obligated to pay damages if such unlawful release has caused any damage or defection to the central waste disposal facility of the public service.¹¹ The section relates to the Pollution Pays Principle.

2. Civil Liability

Under Section 80 of the Act states that “the owner or possessor of the point source of contamination, to have his own facility for treatment of polluted air, equipment or instrument for control of the discharge of polluted air or other toxins or the wastewater treatment or waste disposal facility, shall have the duty to collect statistics and data indicating the daily functioning of the said facility or equipment and instrument,

⁹ Rao P., International Environmental Law and Economics (Blackwell Publishers 2002), p.225.

¹⁰ Anton Nahman, “Extended Producer Responsibility,” (2016) Environmental and Resources Economics Group, p.5.

¹¹The National Environmental Quality Act B.E.2535, Section 91.

and make detailed notes thereof to be kept as recorded evidence at the site of that point source of contamination, and shall submit report summarizing the functioning results of the facility, equipment to the local official of the locality where such point source is situated at least once a month.”¹²

The possessor or the owner of the pollution point sources who possesses the facilities for polluted air treatment or the polluted air or other pollutants releasing control equipment shall responsible to collect the data and statistics presenting of daily functions and note for the details to record as the evidence at the point source of contamination site. It also requires them to submit the summarizing monthly report of facility and equipment work results to the situated point source. The statistics and data collection should also come with note and reports in reference to the specified format, standards and rules, from the ministerial regulation.¹³

For the pollution control, the officials are authorised to access to the site, building and place in the factories or the pollution point source that belong to the person in order to conduct the inspection on the working process of Air Pollution, polluted air or other toxics control and to make analysis on the statistics, data and notes made on the mentioned functions of facility, tool and equipment if it is sensible to suspicion that the act is not complied.¹⁴

Under Section 96 of the Act states that “If leakage or contamination caused by or originated from any point source of pollution is the cause of death, bodily harm or health injury of any person or has caused damage in any manner to the property of any private person or of the State, the owner or possessor of such point source shall be liable to pay compensation or damages therefore, regardless of whether such leakage or contamination is the result of a willful or negligent act of the owner or possessor thereof, except in case it can be proved that such pollution leakage or contamination is the result of: (1) Force majeure or war; (2) An act done in compliance with the order of the Government; (3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly liable for the leakage or pollution.”¹⁵

¹² The National Environmental Quality Act B.E.2535, Section 80.

¹³ Ibid.

¹⁴ Sunee Mallikamarl, The Study of the Pollution Related Health Damage Compensation in Thailand (Chulalongkorn University 2005), p.125.

¹⁵ The National Environmental Quality Act B.E.2535, Section 96.

The contamination as originated from any pollution point sources are the cause of any person bodily harmful, health injury and death and it can cause the personal or state property damages in various ways. Thus, the possessor and the owner of the point source must be liable for the costs of damages and compensation without regard to the contamination that comes from such the ignorance or willful acts of the owner or possessor, except for the case that can prove that pollution is an outcome from the war or Force majeure; an act to comply to the authorities; the act or omission of the person who remains with damage and injury, or of any directly or indirectly third party who responsible for the pollution.¹⁶

In addition, the damages and compensation shall be the liable of the point source of contamination owner or possessor. This means all the actual incurred expenses from the pollution clean-up service from the government as risen from such the pollution incident.¹⁷

3. Criminal Penalty

The penal provisions under the National Environmental Quality Act B.E.2535 shall be punished by imprisonment or fine. Section 98 imposes that any person who breaks the order issued by authority shall be punished by imprisonment not exceeding a year or fine not exceeding one hundred thousand Bath. If the offender is a person, both types of penalties can be applied. On the other hand, juristic person shall be punished only by fine. In terms of chiefs of juristic person shall be punished by the same penalties likes a person.¹⁸

Any Monitoring Control Operator or Service Contractor having the duty to make reports to the authority, who intentionally show false information shall be punished by imprisonment not exceeding a year or fine not exceeding one hundred thousand Baht, or both.¹⁹

¹⁶ Prachoom Chomchai, Environmental Governance: Thai perspective (Thammasart University 2000), p.8.

¹⁷ Ministry of Natural Resources and Environment, “Public participation in Environmental Impact Assessment,” (2014) National Article Vol. 6.

¹⁸ The National Environmental Quality Act B.E.2535, Section 98.

¹⁹ Section 107.

Additionally, any person who refuses to follow orders of the officer shall be punished by imprisonment not exceeding a month or fine not exceeding ten thousand Baht, or both.²⁰

Under the Act, “the official is empowered to issue a written order directing the owner or possessor of the point source of contamination which is not a factory to pay penalties. If the point source of contamination is a factory, the authority under the law on industrial plant shall be notified to order the owner or possessor of such factory to pay the penalties and, the authority under the law on industrial plants shall be deemed to be the authority under this Act. If, however, official fails to issue the order within a sensible time, the authority shall then have the ability to issue the order directing the owner or possessor of such factory to pay the penalties.”²¹

Besides, any owner or possessor of the point source of contamination, who withholds from using his on-site facilities or equipment for the control of Air Pollution, and illegally discharges into the environment outside the limits of the site of the point source of contamination, shall be obligated to pay as a daily penalty four time as much the measure of daily costs throughout the duration or such illegal discharge.²² It is hoped that the regulation will enforce effectively but many industries cover toxic substance. Apart from prevention, people should close monitoring and public participation.²³

Determination of Criminal Penalty in order to imprison is not exceeding a month, or not exceeding one hundred thousand Bath by fine.

Conclusion

The Punishment Measures of the National Environmental Quality Act B.E.2535 still have the practical problem because there is no authority to enforce seriously the Act and lawbreakers are punished with minimal penalties. However, there are reasons why order and control Air Pollution do not work in Thailand. Firstly, following the United States model, the Environmental Regulations in Thailand specify terms of imprisonment and fines for resistance or infringements. The enforcement of regulations is primarily

²⁰ The National Environmental Quality Act B.E.2535, Section 108.

²¹ Section 82.

²² Section 92.

²³ Prachoom Chomchai, Environmental Governance: Thai perspective (Thammasart University 2000), p.8.

depending on the working of the legal system. However, Courts are used if last resort failed, that means they are rarely used. Any owner or possessor knows that they are not likely to be punished for violation. So, regulations have no chance of working.

A second reason is that it is practically impossible to monitor many strewed small-scale operations, which produce little contamination but are considered for the large of contamination in the country. Therefore, even when legitimate frameworks are set up, it remains simple for non-compliance by small and medium-scale operations to happen.

A third reason for the unsuitability of control regulations for Thailand is that the mismatch between high costs of monitoring and low budgetary. Environmental regulations in developed country presume a level of devolution of authority and taxation to local government, which expands the capacity and reduces the cost of monitoring and enforcement.

Last but not least reason is that fines are set at levels that are too low to prevent violators. Since the understanding of violators in Thailand is quite low, the fines should very high so that the certainty-equivalent fine exceeds the benefits from the violation. Not only are fines set too low to start with, but the regulations remain unchanged in many terms for years. Violators can pay the stipulated fine and might bribe to the enforcement agent.

The United States has Law concerning Air Pollution that is covered by the Clean Air Act. For Civil Enforcement of the Act, the Environmental Protection Agency has the ability that start with a Civil action for a permanent or temporary command, or to assess and recover a Civil Penalty of not more than \$25,000 daily for each violation, or both, according to the Clean Air Act 1990, Section 7413(b).

On the contrary, under Section 90-92 of the National Environmental Quality Act B.E.2535 provide insignificant sanctions approximately four times the daily costs of operations. With such insignificant punishments, regulated facilities in Thailand hardly follow Environmental Laws. A following issue is that some infringements of the Act are not enforceable or punishable. Thailand should follow these models that include fine and imprisonment. Strong punishment, offenders afraid to the Law in the country and identify that if the person is a repeat offender, he shall be multiplied of both the fine and imprisonment likes the United States.

Recommendations

As a first measure, officers could improve strict enforcement with current Environmental Laws and focusing on violators. For example, Pollution Control Department and Department of Industrial Works should separate in practices to prosecute against violators. Department of Industrial Works also should have power to revoke the permits and close down manufacturing that are repeat offenders, or ignore orders. Pollution Control Department should make clear enforcements under Section 82 of the Act in cases where Department of Industrial Works as the essential department fails to work against factories that violate the discharges limits.²⁴Besides, Pollution Control Department should become the authority for enforcement the Act under section 96.

²⁴ The National Environmental Quality Act B.E.2535, Section 82 states that In order to perform his functions under this Act, the pollution control official is empowered as follows:

(1) To enter into the building, place and site of the factory or point source of pollution or the site of wastewater treatment or waste disposal facility which belongs to any person, between the sun rise and sun set or during the working hours, to inspect the functioning process of wastewater treatment or waste disposal facility, air pollution control system or equipment and other instrument for the control of polluted air or other pollutants, as well as to well as to examine the notes, statistics or data on the functioning of the said facility, equipment and instrument, or when there is a reasonable suspicion that there is a non-compliance with this Act;

(2) To issue an order in writing directing the owner or possessor, the Monitoring Control Operator, or the licensed Service Contractor rendering the services of wastewater treatment or waste disposal, to correct, change, improve or repair the air pollution control, wastewater treatment or waste disposal facility or other equipment and instrument for the control of polluted air or other pollutants. If, however, the point source of pollution is a factory, the official under the law on industrial plants shall be notified to take action within his power and duty. If such official fails to do so, the pollution control official shall have the power to take action in accordance with this Act;

(3) To issue a written order directing the owner or possessor of the point source of pollution which is not a factory to pay penalties. If the point source of pollution is a factory, the official under the law on industrial plant shall be notified to order the owner or possessor of such factory to pay the penalties and, in doing so, such official

However, it is essential to effective enforcement by imposing both departments work together. For instant, section 13(11) of the Act,²⁵ the National Environment Board could determine measures to encourage interagency cooperation and coordination such as developing joint policies for compliance monitoring and enforcement, exchanging and sharing data about enforcement.²⁶

To address on environmental authority, fundamental legal amendment is to establish the authority under one ministry for enforcement of Environmental Law. Thailand could also improve National Policies to more effectively regulate.

To prevent violators, Thailand should also consider Criminal Law about environment with significant sanctions for violators who intent to break the law likes in terms of section 96 of the Act,²⁷ should be amended to (a) grant representative agencies

under the law on industrial plants shall be deemed to be the pollution control official under this Act. If, however, such official fails to issue the penalty order within a reasonable time, the pollution control official shall then have the power to issue the order directing the owner or possessor of such factory to pay the penalties;

(4) To issue a written order directing the Service Contractor licensed to render the services of wastewater treatment or waste disposal to stop or shut down his services, or revoking his license in case such Service Contractor violates or does not comply with this Act, or any ministerial regulation, local ordinance, rule, notification or condition issued or stipulated by virtue of this Act, or does not comply with the order of the pollution control official issued by virtue of this Act;

(5) To issue a written order suspending the Monitoring Control Operator in case such Monitoring Control Operator violates or does not comply with this Act, or any ministerial regulation, local ordinance, rule, notification, or condition issued or stipulated by virtue of this Act, or does not comply with the order of the pollution control official issued by virtue of this Act.

²⁵ The National Environmental Quality Act B.E.2535, Section 13 states that

(11)To specify measures for the strengthening and fostering co-operation and co-ordination among government, agencies, state enterprises, and the private sector in matters concerning the promotion and conservation of environmental quality;

²⁶ Markus Karcher, “Air Pollution management in Thailand,” (2011) *Industrial Journal*, p.37

²⁷ The National Environmental Quality Act B.E.2535, Section 96 states that

like Pollution Control Department full lawful authority against lawbreakers and they can appeal both Civil and Criminal penalties, and (b) include damages caused by pollution exposure or contamination in the future.

In terms of citizen suits, the National Environmental Quality Act should follow the Clean Air Act of the United States that citizen are given right to suit by themselves whether they will be injured people and should enact Environmental Law likes the Clean Air Act with citizen suits principle.

Lastly, Criminal Penalties for violators of the law should be increased that is to increase the size of fines and imprisonment to those who will commit crimes fear to do it. There are many countries amended their Law on penalty such as the United States, Australia, and etc. to effective enforcement. Increased the maximum penalty and imposed in the Clean Air Act such as the Environmental Offences and Penalties Act enforce fine for defendant not exceeding \$ 1 million and imprisonment not exceeding 7 years or both.²⁸

If leakage or contamination caused by or originated from any point source of pollution is the cause of death, bodily harm or health injury of any person or has caused damage in any manner to the property of any private person or of the State, the owner or possessor of such point source shall be liable to pay compensation or damages therefor, regardless of whether such leakage or contamination is the result of a willful or negligent act of the owner or possessor thereof, except in case it can be proved that such pollution leakage or contamination is the result of:

- (1) Force majeure or war;
- (2) An act done in compliance with the order of the Government or State authorities;
- (3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the leakage or contamination.

The compensation or damages to which the owner or possessor of the point source of pollution shall be liable according to the foregoing first paragraph shall mean to include all the expenses actually incurred by the government service for the clean-up of pollution arisen from such incident of leakage or contamination.

²⁸ Scott Holladay, "Clean Air Act: How do we know?," (2017) New York Journal, p.4.