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Polluter Pays, But Which Polluter? The Attribution Gap in Indian Environmental Liability

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Abstract

In *Vyakti Vikas Kendra India v Manoj Misra* (2026), the Supreme Court of India set aside a decision of the National Green Tribunal holding the organiser of the 2016 World Culture Festival liable for damage to the Yamuna floodplain. The Court held that the polluter pays principle presupposes real damage and a causal link, and that the no-fault rule in section 17(3) of the National Green Tribunal Act 2010 is confined to accidents. This article accepts both holdings but argues that the judgment leaves open how contribution is to be proved where an ecosystem was already degraded and many actors have affected it: the attribution gap. Section 17(2), which permits equitable apportionment of harm that cannot be attributed to a single activity, has been little used, and section 20 makes both precaution and polluter pays rules of decision. Read together, these provisions support a structured inquiry: proof of injury, a candid baseline, a prima facie showing of contribution, a burden of production on the party holding the evidence, a final finding of material contribution on the balance of probabilities, apportionment, and a separate account of the public custodian's share. Section 22, which confines appeals to substantial questions of law, should lead the Supreme Court to correct legal error in the Tribunal's causal reasoning and ordinarily to remit contested science rather than decide it afresh.

Keywords: Polluter Pays Principle; Burden of Proof; Apportionment; Environmental Causation; National Green Tribunal Act 2010; Public Trust Doctrine; Appellate Review

1. Introduction

On 22 August 2026 a bench of the Supreme Court comprising Satish Chandra Sharma and N Kotiswar Singh JJ brought to an end a dispute that had outlived most of the expert reports filed in it. Ten years earlier, the World Culture Festival had been held over three days on the twenty-five hectares of the active Yamuna floodplain, upstream of the DND flyway in Delhi, that the Delhi Development Authority ('DDA') had allotted to the organiser.[2] The National Green Tribunal ('NGT') allowed the event to go ahead only after directing the organiser to deposit ₹5 crore as interim environmental compensation, and in December 2017 held it responsible for restoring the

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[2] *Vyakti Vikas Kendra India v Manoj Misra (Dead)* 2026 INSC 910, 2026 SCC OnLine SC 1694 [25]–[26].

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site.[3] In *Vyakti Vikas Kendra India v Manoj Misra*, the Supreme Court reversed that finding and directed the DDA to refund the deposit.[4]

The decision turns on proof. The polluter pays principle, the Court held, has 'assumed a place of permanence in our environmental jurisprudence', and a polluter 'must be held as absolutely liable for environmental degradation caused by it'.[5] Its application, however, is 'contingent upon various factors and the foremost factor is the causation of real damage', and 'the alleged person must be a "polluter" before it is held as absolutely liable in law'.[6] On the record before it, 'the causal link has not been established by any standard', because the site had been degraded long before the organiser took possession.[7]

Few would quarrel with the proposition that a person cannot be made to pay as a polluter without some reason to think that it polluted. The difficulty lies in what the Court did not have to decide. Before an activity begins, the precautionary principle allows decision-makers to act despite scientific uncertainty and places the onus on the developer to show that a proposal is benign.[8] After harm is established and its author identified, the polluter pays principle makes that author bear the cost of remediation, whether or not it was at fault.[9] What the law lacks is an account of the middle: how a tribunal should decide whether, and to what extent, a particular actor contributed to damage in an ecosystem that was already degraded and that others have also damaged. This article calls that space the attribution gap. If *Vyakti Vikas Kendra* is read as requiring clean proof of an increment of harm caused by one actor, it risks turning historic regulatory neglect into a defence for whoever comes next.

The judgment has already attracted careful comment. V Venkatesan reads it as prescribing a sequence in which the harm, the baseline against which it is measured, the testing of the evidence and the identification of the responsible party all come before remedy. He draws attention to the DDA's failure to document a site it held in trust and to the distinction between restoration and rehabilitation, and touches briefly on section 17(2) of the National Green Tribunal Act 2010 ('NGT Act'), observing that apportionment would still require proof of some contribution by each party.[10] This article builds on that account in five ways. It treats section 17(2) as a doctrine rather than a footnote; separates uncertainty about whether an actor contributed from uncertainty about how much; proposes a burden of production on the party holding the evidence, with a stated standard of proof; divides restoration costs between private actors and the public custodian; and asks how far the

[3] *Manoj Misra v Delhi Development Authority* 2016 SCC OnLine NGT 114 ('*Manoj Misra* (NGT interim order)'); *Manoj Misra v Delhi Development Authority* 2017 SCC OnLine NGT 966 ('*Manoj Misra* (NGT final judgment)').

[4] *Vyakti Vikas Kendra* (n 2) [56].

[5] ibid [52].

[6] ibid [53].

[7] ibid.

[8] *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647 [11].

[9] *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212 [65].

[10] V Venkatesan, 'Proving the Polluter: What the Yamuna Floodplain Verdict Demands of Environmental Liability' (Supreme Court Observer, 27 August 2026) <https://www.scobserver.in/journal/proving-the-polluter-what-the-yamuna-floodplain-verdict-demands-of-environmental-liability/> accessed 5 October 2026.

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Supreme Court may go in reviewing the NGT's causal findings under section 22, and when it should remit rather than decide.

Indian scholarship has traced the rise of public interest environmental litigation and the judicial creation of environmental principles,[11] examined how the NGT uses its expert members,[12] and asked how much a polluter should pay.[13] Others have examined how courts should handle scientific uncertainty.[14] The prior question of how contribution is proved has received less attention. The argument is that the NGT Act supplies the materials for an answer. Section 17(2) provides for the equitable apportionment of damage that cannot be attributed to any single activity.[15] Section 20 requires the NGT, 'while passing any order or decision or award', to apply the polluter pays principle as well as the precautionary principle, so that both are statutory rules of decision rather than judicial glosses.[16] Section 22 confines appeals to the Supreme Court to the grounds specified in section 100 of the Code of Civil Procedure 1908.[17] The judgment refers to neither section 17(2) nor section 22. Together, the three provisions point to a layered approach in which causation remains necessary but exclusive causation does not, uncertainty is allocated rather than ignored, and contested science is decided by the specialist body Parliament created for that purpose.

The method is doctrinal, with limited comparative material and a small search of NGT decisions. Part 2 reconstructs the litigation. Part 3 separates precaution from polluter pays and examines the Court's equation of the latter with absolute liability. Part 4 defines the attribution gap and shows where it bites. Part 5 develops section 17(2). Part 6 sets out a seven-stage test and its standard of proof. Part 7 addresses the public custodian's share, Part 8 turns to section 22 and remand, Part 9 answers objections, and Part 10 concludes.

2. The Yamuna Floodplain Litigation

2.1 From an Interim Order to Final Liability

Manoj Misra applied to the NGT in February 2016, alleging that preparations for the festival violated its 2015 judgment on the rehabilitation of the floodplain.[18] An expert committee reported

[11] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 Journal of Environmental Law 293; Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India: Cases and Materials (3rd edn, OUP 2022); Shibani Ghosh (ed), Indian Environmental Law: Key Concepts and Principles (Orient BlackSwan 2019).

[12] Gitanjali Nain Gill, 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5 Transnational Environmental Law 175; Gitanjali Nain Gill, Environmental Justice in India: The National Green Tribunal (Routledge 2017).

[13] Sroyon Mukherjee, 'How Much Should the Polluter Pay? Indian Courts and the Valuation of Environmental Damage' (2023) 35 Journal of Environmental Law 331.

[14] Elizabeth Fisher, Risk Regulation and Administrative Constitutionalism (Hart Publishing 2007).

[15] National Green Tribunal Act 2010, s 17(2).

[16] ibid s 20.

[17] ibid s 22; Code of Civil Procedure 1908, s 100.

[18] *Vyakti Vikas Kendra* (n 2) [2]; *Manoj Misra v Union of India* 2015 SCC OnLine NGT 840.

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within three days that repairing the damage would cost ₹100 to 120 crore.[19] On 9 March 2016 the NGT recorded that the floodplain had been drastically tampered with, allowed the event to proceed, and directed the organiser to pay ₹5 crore and to undertake to bear the cost of restoration; it later clarified that the order was interim.[20] In 2017 a committee of government officials found the allotted site covered with grass, partly under water and free of debris, but the NGT treated that committee as having exceeded its mandate.[21] Its final judgment held that the organiser had failed to discharge the burden of showing that it took due precautions or caused no damage, and fixed liability on the principle of no fault.[22]

2.2 What the Supreme Court Decided

The Supreme Court's analysis has four strands. The first concerns the interim order, which the NGT had treated as settled, not because it was final, but because the organiser had complied with it instead of challenging it.[23] 'The findings in an interim order are interim for a reason', the Court observed: they 'are not based on full analysis of facts and evidence'.[24] The NGT had in effect placed the burden of disproof on a party against whom only a provisional view had been formed.

The second concerns the baseline. The first expert report rested on a visual inspection and did not say that the floodplain had been in a better state before preparations began.[25] Yet a monitoring report in the earlier Yamuna proceedings had recorded in October 2015 that the floodplain remained damaged, and the organiser had written to the DDA in December 2015 about construction debris already on the site.[26] The September 2015 satellite image on which the experts relied was 'not a reliable document', and the committee itself later conceded that the pre-event ecological status could not be assessed.[27] The 'whole basis of the lis before the Tribunal was the causation of damage by the appellant and not mere existence of damage on the floodplain'.[28]

The third concerns remedy. Restoration brings an area back to its original state, however poor that state was; rehabilitation aims at full ecological functionality, and on a public floodplain is a task for the State under the public trust doctrine.[29] By charging the organiser for a biodiversity park that had never existed on the site, the NGT had turned a compensation proceeding into one for the fresh development of the floodplain.[30]

The fourth concerns liability. Section 17(3), which requires the NGT to apply 'the principle of no fault', operates only 'in case of an accident', which the Court read as referring to hazards such

[19] *Vyakti Vikas Kendra* (n 2) [3], [27].
[20] ibid [3]–[4]; *Manoj Misra* (NGT interim order) (n 3).
[21] *Vyakti Vikas Kendra* (n 2) [49]–[50].
[22] ibid [51]; *Manoj Misra* (NGT final judgment) (n 3).
[23] *Vyakti Vikas Kendra* (n 2) [33].
[24] ibid [34].
[25] ibid [29].
[26] ibid [26], [30]–[31].
[27] ibid [41]–[44].
[28] ibid [29].
[29] ibid [46]–[47].
[30] ibid [48].

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as a gas leak.[31] A festival was not an accident. That did not displace the polluter pays principle, of which section 17 is 'merely a legislative manifestation', but the principle required real damage and a causal link.[32] The Court added that the DDA's permission to hold the event on an active floodplain was 'not consistent with the precautionary principle and doctrine of public trust', while declining to rule on it.[33]

Read in this way, the decision is narrower than it may first appear. It does not require direct evidence of causation, and it leaves precaution untouched as a rule for decisions under uncertainty. Several of its holdings are right. Section 17(3) cannot be stretched to cover every adverse impact; a provisional view formed on a three-day report cannot fix liability after nearly two years of further evidence; and a private party should not fund the improvement of a public ecosystem beyond the harm attributed to it. What the judgment does not supply is a standard for proving contribution where an ecosystem was already damaged and the causes are many. Its holding that the link was not shown 'by any standard' invites the question of which standard would have sufficed.

3. Precaution, Polluter Pays and the Place of Causation

3.1 Two Principles, Two Moments

It is tempting to set *Vyakti Vikas Kendra* against *Vellore Citizens' Welfare Forum* and conclude that the Court has moved the burden of proof back from the developer to the public. That misunderstands what each principle does. In *Vellore* the Court accepted precaution and polluter pays as part of Indian law, and described the former as placing the 'onus of proof' on the developer to show that its action is environmentally benign.[34] *Nayudu* explained why: where science cannot settle whether an activity is harmful, ordinary rules of proof would require those defending the existing environment to prove a negative, so the party seeking to change the status quo must show the absence of a 'reasonable ecological or medical concern'.[35]

Both statements concern a decision about the future: whether to permit, condition or stop an activity whose consequences are uncertain. The polluter pays principle answers a different question, asked after the event, about who should bear the cost of harm that has occurred. In *Indian Council for Enviro-Legal Action* the cost of remedying the damage caused by the chemical units at Bichhri, including the restoration of soil and groundwater, lay on the units themselves.[36] The principle allocates cost. It assumes an answer to the question of who caused the harm; it does not supply one.

The distinction should not be overstated. Section 20 applies precaution to compensatory orders as well, and the Supreme Court has treated environmental compensation as serving preventive as well

[31] ibid [52]; National Green Tribunal Act 2010, s 17(3).

[32] *Vyakti Vikas Kendra* (n 2) [52]–[53].

[33] ibid [54]–[55].

[34] Vellore Citizens' Welfare Forum (n 8) [11].

[35] *AP Pollution Control Board v Prof MV Nayudu (Retd)* (1999) 2 SCC 718 [37], [39].

[36] *Indian Council for Enviro-Legal Action* (n 9) [65].

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as remedial ends.[37] Precaution therefore remains relevant after the event, but it cannot dispense with the need to identify a polluter. What it can do, as Part 6 argues, is shape the allocation of residual uncertainty once a threshold connection between actor and harm has been shown.

3.2 Strict as to Fault, Not Empty as to Identity

Indian law has long separated fault from causation. In *MC Mehta v Union of India* the Court held that an enterprise engaged in a hazardous or inherently dangerous activity is absolutely liable for harm resulting from it, without the exceptions recognised in *Rylands v Fletcher*.[38] The strictness went to the defences available once the link between enterprise and harm had been made, not to whether the link could be presumed. *Deepak Nitrite Ltd v State of Gujarat* makes the point directly. The Court disapproved directions requiring industrial units to pay compensation fixed by reference to turnover, holding that non-compliance with norms did not by itself establish damage, and that compensation 'must have some broad correlation not only with the magnitude and capacity of the enterprise but also with the harm caused by it'.[39] When *Vyakti Vikas Kendra* says that 'if this link is established, no excuse matters', it restates the absolute character of liability once causation is proved; when it says that the principle 'cannot be invoked unless the degradation is attributable to the alleged person', it restates the antecedent need for causation.[40] To that extent the judgment is a reminder rather than a departure.

3.3 Absolute Liability and the Polluter Pays Principle

There is, however, a difficulty the judgment does not examine. It treats polluter pays and absolute liability as one. The two have different origins and do different work. Absolute liability was fashioned in *MC Mehta* for hazardous enterprises whose risks are concentrated, foreseeable and sometimes catastrophic, and it strips away the defences that would otherwise let such an enterprise escape.[41] Polluter pays is a rule for allocating the cost of pollution and its remediation, and entered Indian law in *Vellore* as an element of sustainable development, without any limitation to hazardous industry.[42]

The NGT Act complicates the picture. Section 17(1) and (2) cover damage caused by 'an accident or the adverse impact of an activity or operation or process', while section 17(3) applies the principle of no-fault only 'in case of an accident'.[43] A reader may infer that Parliament, having made no-fault liability explicit only for accidents, left fault relevant to adverse impacts. That is why the meaning of 'accident' mattered so much in the Yamuna appeal. The inference should be resisted. Section 17(3) tells the NGT what to do in the one setting where the *MC Mehta* rule obviously

[37] *Mantri Techzone (P) Ltd v Forward Foundation* (2019) 18 SCC 494 [43]; *Alembic Pharmaceuticals Ltd v Rohit Prajapati* (2020) 17 SCC 157 [39].

[38] *MC Mehta v Union of India* (1987) 1 SCC 395 [31]–[32]; *Rylands v Fletcher* (1868) LR 3 HL 330.

[39] *Deepak Nitrite Ltd v State of Gujarat* (2004) 6 SCC 402 [6].

[40] *Vyakti Vikas Kendra* (n 2) [53].

[41] *MC Mehta* (n 38) [31]–[32].

[42] *Vellore Citizens' Welfare Forum* (n 8) [12].

[43] National Green Tribunal Act 2010, s 17(1)–(3).

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applies; it does not repeal the polluter pays principle elsewhere. Section 20 makes that principle a rule of decision in every order, and the Supreme Court itself held that, although section 17(3) was inapplicable, the polluter remained absolutely liable once causation was shown.[44] The better reading is that, outside accidents, permission, reasonable care or lack of intent does not excuse a person shown to have caused environmental damage, but that nothing in the statute allows causal responsibility to be assumed or says how harm is to be divided among several contributors. Running polluter pays and absolute liability together also invites the inference that causation must be proved with special strictness. Strictness about defences and ordinary rigour about causation can sit side by side.

3.4 'Causal Link' Is Not 'Direct Evidence'

It is easy to read the judgment as demanding direct proof that the defendant caused the damage. The language does not bear that weight. The Court spoke of a 'causal link' and did not say what kind of evidence could establish one. Indian law already accepts that ecological harm need not always be proved directly. In its 2004 Aravalli mining judgment the Supreme Court held that the precautionary principle permits harm to be prevented on reasonable suspicion, and a three-judge bench restated that holding in 2022: 'it is not always necessary that there should be direct evidence of harm to the environment'.[45] That was preventive reasoning and cannot be carried over wholesale into compensation, but it shows that Indian courts have never equated scientific proof with direct observation.

4. The Attribution Gap

4.1 Defining the Gap

The attribution gap is the distance between proof that an ecosystem has been degraded and proof that a particular actor caused a legally relevant part of that degradation. It is widest where five conditions coincide, and the Yamuna record shows each of them. First, the system was damaged before the impugned activity: the NGT's own monitoring had recorded a degraded floodplain in 2015.[46] Secondly, many hands had contributed over time, including whoever left construction debris on the site before it was allotted.[47] Thirdly, the harm alleged, the destruction of reeds, grasses and natural vegetation, leaves no chemical signature pointing to its source.[48] Fourthly, no reliable record of the earlier condition existed.[49] Fifthly, the information that might have filled the gap lay with the organiser and the DDA rather than with the applicant.

[44] National Green Tribunal Act 2010, s 20; *Vyakti Vikas Kendra* (n 2) [52]–[53].

[45] *MC Mehta v Union of India* (2004) 12 SCC 118, as restated in *TN Godavarman Thirumulpad v Union of India* (2022) 9 SCC 306 [18].

[46] *Vyakti Vikas Kendra* (n 2) [30].

[47] ibid [26], [31].

[48] ibid [23].

[49] ibid [41]–[42].

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4.2 The Baseline Paradox

From these conditions arises a baseline paradox. Liability for incremental harm requires a comparison between the site with and without the defendant's intervention. The worse and the less documented the earlier condition, the harder that comparison becomes, and the more likely it is that the defendant escapes. Taken to its limit, a strict demand for proof of increment gives the most neglected ecosystems the least protection, and turns the failure of public authorities to monitor them into a subsidy for later users. It is difficult to believe that Parliament intended this when it made the polluter pays principle a rule of decision in every order.[50]

The answer is not to presume liability whenever a degraded site has been used, but to treat the baseline as a question of evidence to be answered as well as the material allows. The EU Environmental Liability Directive offers a useful model. It defines the baseline condition as the condition that would have existed at the time of the damage had the damage not occurred, estimated on the best information available.[51] That is a counterfactual, not a photograph, and a tribunal can construct it from historical records, comparable sites and expert evidence while stating its uncertainty. A degraded baseline is evidence. It may reduce, and sometimes eliminate, the harm attributable to a later actor, as on the Yamuna record. It is not an immunity.

4.3 Where the Gap Bites

On its own record, the Yamuna case is not one in which the gap produced injustice: the Court had affirmative evidence of prior degradation and an official report that found little change after the event. The gap matters in the next case. Suppose that in 2028, while the DDA is carrying out the rehabilitation ordered in 2015, a contractor levels two hectares of a reed bed that has begun to recover, compacts it with heavy vehicles, and uses it for months as a storage yard. Assume, as is common, that no survey or image of the site was made between 2015 and the contractor's arrival. Photographs taken afterwards show bare ground, as do those from 2015. The site is also crossed by a track, used by others for dumping, and flooded each monsoon. If liability requires a measured increment against the last documented baseline, the contractor will probably escape, although it has set back a recovery that public money was paying for and the only records of what it did are its own.

Bellandur Lake in Bengaluru shows the same structure on a larger scale. The NGT found that the lake was polluted by untreated sewage and effluents from residential, commercial and industrial buildings, by dumped solid waste, and by construction debris used to build a road within the lake.[52] It directed the State to place ₹500 crore in escrow for an action plan, required interim compensation of ₹50 crore from the State and ₹25 crore from the municipal corporation, and left those authorities to recover the amounts from polluters and erring officers.[53] The State pollution control board did identify private polluters and fined them about ₹270 crore, although much of that

[50] National Green Tribunal Act 2010, s 20.

[51] European Parliament and Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, art 2(14).

[52] *D Kupendra Reddy v State of Karnataka* OA No 125/2017 (NGT, 6 December 2018) [1], [16].

[53] ibid [26].

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remains uncollected.[54] The distinction matters. A penalty for breaching consent conditions requires no attribution of harm. Compensation for restoring the lake does, and that is where the gap bites: no single discharger caused the lake's condition, and no baseline isolates its share. Without a method of attribution, restoration costs default to the State, while the private contributors whose discharges are the physical cause answer only for regulatory breaches.

4.4 Recovery Trajectories and Interim Losses

The hypothetical also tests the Court's definition of restoration as a return to the 'original state, regardless of how optimum the original state was'.[55] The most natural reading of 'original state' is the state immediately before the actor intervened. That state includes the recovering reed bed, so the definition does not itself let the contractor escape. The real difficulties lie elsewhere. The first is evidential: there is no record of the reed bed before the contractor arrived. Stages (ii) to (iv) of the test in Part 6 address this, by allowing the baseline to be reconstructed and requiring the contractor to produce what it knows. The second is that the harm does not end with the loss of the existing reeds. Had the contractor not intervened, the reed bed would have continued to grow, and until it recovers the public loses the services it would have provided.

The Directive has a name for this. It treats as interim losses those resulting from the fact that damaged natural resources or services cannot perform their ecological functions until primary remediation has taken effect, and requires compensatory remediation to make them good.[56] Venkatesan similarly questions whether the Court's backward-looking definition fits current restoration practice.[57] Indian law can take the same step without disturbing the Court's central concern. Where recovery was actually under way when the actor intervened, as a matter of observable fact rather than paper directions, the remedy may include the cost of the recovery lost. The actor still pays only for what it set back, not for the whole gap between a degraded floodplain and an ideal one. Whether section 15 extends to interim losses has not been decided, and the point is offered as a matter of construction.

5. Section 17(2) and Cumulative Harm

5.1 The Text

Discussion of section 17 has focused almost entirely on subsection (3). Subsection (2) applies where damage 'cannot be attributed to any single activity or operation or process but is the combined or resultant effect of several such activities, operations and processes', and permits the NGT to

[54] 'KSPCB's Rs 270 Cr Fine on Bellandur Polluters Remains Largely Uncollected' Deccan Herald (Bengaluru, 16 October 2023) <https://www.deccanherald.com/india/karnataka/bengaluru/kspcb-s-rs-270-cr-fine-on-bellandur-polluters-remains-largely-uncollected-2729424> accessed 5 October 2026.

[55] *Vyakti Vikas Kendra* (n 2) [46].

[56] Directive 2004/35/EC (n 51) annex II, para 1(c)–(d).

[57] Venkatesan (n 10).

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'apportion the liability for relief or compensation amongst those responsible for such activities, operations and processes on an equitable basis'.[58] Three features matter. First, the inability to attribute harm to a single source is not a reason to deny liability; it is the condition that triggers apportionment. Secondly, liability is apportioned 'amongst those responsible', so a person who cannot be shown to belong to the responsible class is outside its reach, consistently with *Vyakti Vikas Kendra*. Thirdly, the standard of allocation is equity, not arithmetic.

Read with section 20, which makes polluter pays a rule of decision, a construction of section 17 that leaves cumulative harm uncompensated whenever exclusive attribution fails would run against the NGT Act's own instruction. The Supreme Court has read the remedial provisions broadly. It has described section 15(1)(c), read with section 20, as 'an entire island of power and jurisdiction',[59] and has relied on section 17(2) to illustrate the breadth of the NGT's compensatory power, describing the NGT Act as beneficial legislation whose powers are not to be read narrowly.[60]

5.2 The Provision in Practice

The provision appears to have been little used. Three searches of the NGT orders and judgments available on Indian Kanoon, most of them unreported, returned five distinct decisions.[61] In four, liability was not apportioned. The 2023 Western Zone judgment is the clearest: the NGT recorded failings by several regulators in a fatal reactor explosion but addressed liability only to the unit, without considering section 17(2). The exception is a 2026 order in a dispute over illegal limestone mining in Gujarat. There the NGT relied on section 17(2) to refuse to delete a purchaser of limestone from the proceedings, holding that whether end-users had promoted illegal mining had to be assessed, and directed the purchasers to disclose the sources of their limestone by affidavit.[62] That order deferred apportionment, but it shows the provision working as this article suggests it should: identifying a class of possible contributors and requiring those who hold the evidence to produce it.

The searches have limits. Indian Kanoon does not carry every NGT order, and a fuller study using SCC OnLine and the NGT's own database is needed. What they do show is that, in the material searched, section 17(2) has been invoked once and applied to a final apportionment never.

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[58] National Green Tribunal Act 2010, s 17(2).

[59] *Mantri Techzone* (n 37) [43].

[60] *Director General (Road Development), National Highways Authority of India v Aam Aadmi Lokmanch* 2020 SCC OnLine SC 572 [37], [42].

[61] Searches of Indian Kanoon <https://indiankanoon.org>, limited to NGT decisions, conducted 5 October 2026: (1) the phrase 'combined or resultant effect' (four results); (2) '17(2)' with 'apportion' and 'liability' (none); (3) 'equitable basis' with 'apportion' and 'section 17' (six results, including the four already found and two copies of one 2026 order). The five decisions are *Dr PS Vetriselvam v Government of Tamil Nadu* OA No 181/2015 (SZ) (NGT, 29 January 2021) (effect of State reservoirs on downstream farmland; no apportionment); *Sayyed Mohammed Sabir Usman v Member Secretary, CPCB* OA No 19/2020 (WZ) (NGT, 31 March 2023) (reactor explosion; s 17 reproduced; unit alone held liable); *News Item in India Today v Shabir Ali* OA No 438/2023 (NGT, 22 April 2025) (firecracker explosion; s 17 reproduced; single respondent); *Lakshmi v State of Uttar Pradesh* OA No 612/2024 (NGT, 6 August 2025) (reactor explosion; claimants left to the employees' compensation forum); and *Sayyed Mohammed Sabir Usman v Union of India* IA No 125/2023 (WZ) in OA No 101/2019 (WZ) (NGT, 6 February 2026) (illegal limestone mining; s 17(2) invoked; apportionment deferred).

[62] *Sayyed Mohammed Sabir Usman v Union of India* (n 61) [12], [25], [27].

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5.3 Entitlement, Quantum and Contribution

The importance of section 17(2) lies in a distinction the Yamuna proceedings blurred. Uncertainty about whether an actor contributed at all goes to entitlement, and must be resolved to the standard of proof set out in Part 6. Uncertainty about how much it contributed goes to quantum, and may be handled through apportionment, ranges of estimate and conservative remedial design. When the two are collapsed, doubt about the size of a contribution becomes a reason to deny that any was made, and a defendant who can show that others were also at work escapes altogether.

Contribution needs a test. Richard Wright's NESS analysis treats a condition as a cause if it was a necessary element of a set of antecedent conditions sufficient for the result.[63] It was designed for multiple sufficient causes, where the but-for test fails because removing any one contributor would not have prevented the harm. A discharge into a lake that would have been polluted anyway is still a cause if it was a necessary part of a sufficient set of discharges. NESS identifies contributing causes but sets no threshold of size. A further filter is therefore needed, and English law supplies it: the contribution must be more than negligible.[64] Contribution under section 17(2) should mean both. The quantum question begins where this one ends. Mukherjee's critique of the inconsistent methods by which Indian courts value environmental damage is a critique of the second stage, and it presupposes that the first has been answered.[65] The two lines of Supreme Court authority on turnover fit the same division. *Deepak Nitrite* disapproved compensation based on turnover where damage had not been established. *Rhythm County* held that turnover or project cost may be 'a relevant and permissible factor' in fixing the amount, provided compensation bears 'a broad and rational correlation' with the harm caused.[66] Read together, they suggest that turnover may set the amount but cannot substitute for proof of contribution.

5.4 Comparative Support

Other systems that insist on causation have reached similar conclusions. Cumulative ecological damage resembles the English cases on material contribution to harm more than those on material increase in risk. In *Bonnington Castings Ltd v Wardlaw* the employer was liable because the dust for which it was responsible had made a material contribution to the worker's disease, even though other dust had also contributed.[67] *Bailey* applied the same reasoning where negligent and non-negligent causes combined.[68] *Fairchild* is different: it allowed recovery where science could not show which of several exposures had caused mesothelioma, and concerns an evidential gap over the identity of the

[63] Richard W Wright, 'Causation in Tort Law' (1985) 73 California Law Review 1735, 1774.

[64] *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052 [46].

[65] Mukherjee (n 13).

[66] *M/s Rhythm County v Principal Secretary* 2026 INSC 102 [31], [46]; *Deepak Nitrite* (n 39) [6].

[67] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL) 621.

[68] *Bailey* (n 64) [46].

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cause.[69] Its sequel is nonetheless useful on apportionment, since *Barker v Corus* divided liability according to each defendant's contribution to the risk.[70]

United States law on contaminated sites points the same way, with an important difference. Under the federal Superfund statute liability is joint and several by default, and apportionment is available only where the defendant shows a reasonable basis for dividing the harm. In *Burlington Northern & Santa Fe Railway Co v United States* the Supreme Court upheld an apportionment resting on rough estimates of land area, duration and volume.[71] The joint and several default exists so that the shares of insolvent or untraceable parties do not fall on the public. Part 7 returns to that trade-off.

EU law offers a third model. The Environmental Liability Directive applies to diffuse pollution only 'where it is possible to establish a causal link between the damage and the activities of individual operators'.[72] In *ERG* the Court of Justice nevertheless held that national law may allow the competent authority to presume such a link where it has 'plausible evidence capable of justifying its presumption', such as the proximity of the operator's installation and a correlation between the pollutants found and the substances the operator used, provided the authority first investigates the origin of the pollution and the operator can rebut the presumption.[73]

None of these authorities binds an Indian court, and the analogy between individual injury and ecological damage is imperfect. They show that a requirement of causation is compatible with proof by inference, rebuttable presumption and reasoned allocation. The Indian position is in one respect stronger, because the power to apportion is statutory.

6. A Structured Test for Causal Uncertainty

6.1 The Seven Stages

The preceding Parts suggest a sequence of questions that the NGT should ask and that an appellate court can check.

(i) Injury. The applicant must establish that environmental damage within sections 15 and 17 has occurred. Preventive relief may come earlier, but compensation and restoration require injury.

(ii) Baseline. The NGT must identify the best defensible account of the condition of the site before the impugned activity, including any recovery actually under way, explain its sources, and state the limits of that account. A degraded baseline reduces what can be attributed; it does not by itself preclude attribution.

(iii) Prima facie nexus. The applicant must adduce evidence, direct or circumstantial, which, if unanswered, would support a finding that the actor's activity contributed to the injury.

[69] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 [2].

[70] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572 (Lord Hoffmann). For mesothelioma, the result was reversed by the Compensation Act 2006, s 3.

[71] *Burlington Northern & Santa Fe Railway Co v United States* 556 US 599, 613–15 (2009).

[72] Directive 2004/35/EC (n 51) art 4(5).

[73] Case C-378/08 *Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico* [2010] ECR I-1919, paras 56–58, 64–65.

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Relevant indicators include temporal fit, spatial correspondence with the actor's footprint, consistency between the harm and the known effects of the activity, and its scale.

(iv) Production burden. Once that threshold is crossed, the actor must produce the evidence within its control that bears on its contribution, such as site plans, records of machinery and materials, instructions to contractors, and its own photographs and monitoring data. Section 109 of the Bharatiya Sakshya Adhiniyam 2023 places the burden of proving a fact especially within a person's knowledge on that person, and illustration (g) to section 119 allows a court to presume that evidence which could be and is not produced would be unfavourable to the person who withholds it.[74] The NGT is not bound by these rules but is guided by natural justice,[75] and a rule requiring the party with the records to produce them is fair. The rule now in section 109 does not relieve the party bearing the burden of its initial burden; it is confined to facts that would be impossible or disproportionately difficult for that party to establish.[76]

(v) Alternative causes. The NGT must address the other contributors that the evidence identifies, and explain whether and to what extent they displace the inference against the actor.

(vi) Apportionment. Where several responsible activities have contributed and exclusive attribution is impossible, liability may be apportioned under section 17(2). Each party included must have been found to contribute on the standard below.

(vii) Remedy and public share. Restoration, including any interim losses, should track the harm attributed or apportioned and be kept separate from rehabilitation of the wider system. Where a public authority's permission or custodial failure contributed, its own obligations should be identified rather than shifted onto the private party.

6.2 The Standard of Proof

The test turns on the relationship between stages (iii) and (iv), so the standard must be stated precisely. The threshold at stage (iii) is a prima facie case: evidence that, if unanswered, would support a finding of contribution. Meeting it does not establish liability; it triggers the actor's burden of production. The final finding is then made on the whole record on the ordinary civil standard. The NGT must be satisfied on the balance of probabilities that the actor's activity was a NESS cause of the injury and that its contribution was more than negligible.

Three consequences follow. First, the balance of probabilities attaches to the fact of contribution, not to its size, which is fixed at stage (vi) on an equitable estimate. Secondly, an adverse inference from the actor's failure to produce evidence operates only after stage (iii) is met. It may strengthen a prima facie case but cannot create one; otherwise the structure would collapse into a reversed burden. Thirdly, the prima facie threshold is deliberately higher than the 'plausible evidence' that suffices in *ERG* to found a presumption.[77] The comparison shows that a presumption

[74] Bharatiya Sakshya Adhiniyam 2023, ss 109, 119 illus (g) (formerly Indian Evidence Act 1872, ss 106, 114 illus (g)).

[75] National Green Tribunal Act 2010, s 19(1), (3).

[76] *Shambhu Nath Mehra v State of Ajmer* AIR 1956 SC 404 [11].

[77] *ERG* (n 73) paras 57–58.

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on lesser evidence is compatible with a causation requirement, but a threshold set by reference to what would support a finding fits more naturally with Indian civil proof.

6.3 Why the Test Is Not a Reversal of the Burden

The applicant must do real work at the first three stages before anything shifts, which answers the due process concern at the heart of *Vyakti Vikas Kendra*, and the shift at stage (iv) is a burden of production tied to the actor's control of evidence. Applied to the Yamuna facts, the test may well have produced the same result: the evidence of prior degradation was strong, the NGT had refused to revisit its interim findings, and the only pre-event image was unreliable. Applied to the contractor in Part 4, it would very likely not. Timing, footprint and mechanism all point to the contractor, the records of what it did are in its hands, and the recovering reed bed is part of the baseline. The test earns its place in future cases of that kind.

7. Polluter and Permitter: The Public Custodian's Share

The DDA was responsible for the floodplain, had been directed in 2015 to rehabilitate it, and permitted the festival in a manner the Supreme Court found inconsistent with precaution and the public trust.[78] Yet the Court treated the permission as outside the appeal, required the DDA to refund the deposit, and left its duties where the 2015 judgment had placed them, even though the DDA said it had already spent ₹8.03 crore restoring the allotted area.[79] There is no settled method for dividing restoration costs between an actor that caused physical harm and an authority whose permission or neglect made that harm possible or worse. The NGT has, however, imposed environmental compensation on State governments for failures in waste management,[80] has contemplated recovery from 'erring officers',[81] and the Supreme Court has stressed the State's duty to safeguard, maintain and restore water bodies.[82] Nothing in section 17(2) confines 'those responsible' to private persons.

Three heads of cost can be distinguished. The first is the cost of reversing harm attributable to the private actor, which falls on that actor. The second is the cost of harm attributable to the authority's breach of its regulatory or custodial duties, which should fall on the authority and may be apportioned with the first under section 17(2). The third is the cost of rehabilitating a system degraded by historic causes that no identified party has been shown to have caused, which remains a public obligation. Keeping these heads apart would have avoided the NGT's error over the biodiversity park, and would have made clear that the DDA's failures carried consequences of their own.

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[78] *Vyakti Vikas Kendra* (n 2) [54].

[79] ibid [21], [55]–[56].

[80] *In re Compliance of Municipal Solid Waste Management Rules 2016* OA No 606/2018 (NGT, 1 September 2022) (West Bengal).

[81] *D Kupendra Reddy* (n 52) [26].

[82] *Vellore District Environment Monitoring Committee v District Collector, Vellore District* 2025 INSC 131 [64].

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Two further points are offered as matters of construction and proposal, not settled law. First, section 17(2) is best read as imposing several rather than joint liability. Apportioning liability 'amongst those responsible … on an equitable basis' contemplates a share for each, and nothing in the provision makes one contributor answerable for another's share. Secondly, several liability carries the cost that the United States avoids through its joint and several default: the shares of contributors who cannot be identified or reached are left unrecovered.[83] The Indian answer should not be to make the contributor before the NGT pay for everyone. Where the custodian's failure to monitor or police a protected site allowed untraced contributors to operate, there is a principled case for allocating this orphan share to the custodian, whose own breach is the reason it cannot be recovered from anyone else. Where no such failure is shown, the residue falls within the third head.

8. Who Decides the Science? Section 22 and Specialist Deference

8.1 The Statutory Limit

Parliament created the NGT as a specialist body of judicial and expert members,[84] and allowed an appeal to the Supreme Court only 'on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908', that is, on a substantial question of law.[85] The Supreme Court has upheld that design, describing the NGT as 'a sui generis institution established for the enforcement of environmental rights emanating from Article 21 of the Constitution' and confirming that the appeal lies only on section 100 grounds.[86] Section 100(4) and (5) also require the appellate court to formulate the substantial question of law and hear the appeal on it.[87] It may be answered that section 22 borrows only the grounds of section 100, not its procedure. Even so, a court confined to substantial questions of law can identify them only by stating them, and formulating them at the outset is the natural way to keep the appeal within its statutory limits.

The limit is not an immunity. A finding of fact raises a substantial question of law where the court below ignored material evidence or acted on no evidence, drew wrong inferences from proved facts by applying the law erroneously, or wrongly cast the burden of proof.[88] In *Hanuman Laxman Aroskar v Union of India*, an appeal under section 22, the Court set aside the NGT's decision upholding an environmental clearance because the appraisal had overlooked material deficiencies that the NGT ought to have scrutinised.[89] By that measure, several defects identified in *Vyakti Vikas Kendra* qualified: the treatment of an interim view as conclusive, the failure to consider contemporaneous evidence of degradation, the rejection of the officials' report without engaging

[83] *Burlington Northern* (n 71) 613–15.

[84] National Green Tribunal Act 2010, ss 4–5.

[85] ibid s 22.

[86] *Madhya Pradesh High Court Advocates Bar Association v Union of India* 2022 SCC OnLine SC 639 [9], [24]–[26], [38], citing *Municipal Corporation of Greater Mumbai v Ankita Sinha* (2022) 13 SCC 401.

[87] Code of Civil Procedure 1908, s 100(4)–(5).

[88] *Hero Vinoth v Seshammal* (2006) 5 SCC 545 [24].

[89] *Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401.

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with its contents, and the misapplication of section 17(3). The first and the last involved a wrong allocation of the burden of proof.

8.2 Review and Re-evaluation

The judgment does not refer to section 22 or formulate any substantial question of law. Much of its reasoning nonetheless goes beyond identifying legal error. It assesses the reliability of a satellite image, compares successive expert reports, and concludes that 'the material on record actually goes on to prove that damage, if any, cannot be attributed to the appellant'.[90] Those are appellate findings of fact. They may well have been correct, and expertise does not protect poor method. But the question is who corrects poor method. A practice of reweighing the scientific record whenever the Supreme Court disagrees with the NGT would erode the structure Parliament created and invite appeals that are, in substance, disagreements about science.[91]

Three kinds of case should therefore be kept apart. Where the NGT has applied the correct standard and the dispute concerns the weight of competing expert views, the Supreme Court should defer. Where the NGT's fact-finding is legally defective, the Court should intervene. And where it intervenes, it should ask whether the record permits only one lawful answer.

8.3 The Case for Remand

That last question is often overlooked. If the NGT applied the wrong burden or ignored relevant material, its conclusion is vitiated, but the opposite conclusion does not follow. The natural course is to set the finding aside and remit the matter for reconsideration under the correct standard. The Code of Civil Procedure contemplates remand where an appellate court reverses a decision and a fresh determination is necessary,[92] and in *Hanuman Laxman Aroskar* the Court suspended the clearance and directed the Expert Appraisal Committee to revisit its recommendations rather than appraising the project itself.[93]

Outright reversal is justified where the record admits only one lawful conclusion, or where the applicant has had a full opportunity and produced nothing that could meet the threshold. *Vyakti Vikas Kendra* may well have been such a case: the dispute was a decade old, the DDA had since restored the allotted area, and the strongest evidence of prior damage came from the NGT's own proceedings. The criticism is not that the Court chose the wrong remedy, but that the choice between reversal and remand should be made expressly and by reference to section 22, so that future appeals are decided by a stated standard rather than by the appellate court's own view of the science.

9. Objections and Limits

[90] *Vyakti Vikas Kendra* (n 2) [53].

[91] On the role of the NGT's expert members, see Gill (n 12).

[92] Code of Civil Procedure 1908, O XLI rr 23, 23A.

[93] *Hanuman Laxman Aroskar* (n 89).

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Five objections deserve a response.

The first is that precaution governs decisions about the future and cannot shift burdens in compensation proceedings. The objection has force, which is why the test does not use precaution to relieve the applicant of proving injury and a prima facie nexus. Precaution operates only after that threshold is crossed, and only to require the actor to produce evidence it controls. Nothing in section 20 confines it to prospective decisions.

The second is that section 17(2) presupposes that every responsible party has been identified. It requires responsibility to be shown for each party charged, not that every contributor be before the NGT. A party found to contribute may be held liable for its equitable share even if others cannot be traced, and Part 7 has suggested how the residue might be handled.

The third is that a calibrated burden will expose lawful activities to heavy liability. A permission is not a shield, as the criticism of the DDA shows, but neither is it evidence of harm. The threshold, the opportunity to rebut, apportionment and proportionality of remedy guard against overreach. In *Alembic Pharmaceuticals* the Court, having held ex post facto environmental clearances unlawful, declined to order closure and imposed compensation instead.[94]

The fourth is that the Supreme Court, armed with Article 142 of the Constitution, may do complete justice without regard to the limits of section 22. Article 142 is not a licence to disregard the statutory scheme under which a cause arrives. A Constitution Bench has recently reaffirmed that the power does not authorise the Court to ignore the substantive rights of litigants.[95] The question, in any event, is not whether the Court can decide contested science but whether it should, and Article 142 supports a remand to a body with expert members as readily as a reversal.

The fifth is that a seven-stage test sits uneasily with the NGT's freedom from the Code of Civil Procedure and its statutory aim of disposing of applications within six months.[96] The test is a structure of reasoning, not a set of additional hearings. Each stage is a question the NGT must already answer if its order is to be reasoned, and stating the questions in order is more likely to shorten proceedings, by directing evidence to what is in dispute and reducing the risk of reversal years later.

10. Conclusion

Vyakti Vikas Kendra is right to insist that a person must be shown to be a polluter before it is made to pay as one, and right about section 17(3), interim findings and the difference between restoration and rehabilitation. Its limitation is that it states the requirement of causation without saying how causation is to be proved where the environment was already damaged and many hands have been at work. If that silence is filled by a demand for direct proof of increment, the law will offer the least protection where protection is most needed.

The NGT Act provides a better path. Causation is necessary, but exclusive causation is not, and section 17(2) says as much. Contribution should be found on the balance of probabilities, and

[94] *Alembic Pharmaceuticals* (n 37) [23], [39].

[95] *High Court Bar Association, Allahabad v State of Uttar Pradesh* 2024 INSC 150 [21]–[22].

[96] National Green Tribunal Act 2010, ss 18(3), 19(1).

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uncertainty about its extent handled by apportionment rather than treated as uncertainty about whether there was a contribution at all. Once injury and a prima facie nexus are shown, the actor that holds the evidence should be required to produce it. A public custodian whose permission or neglect contributed to the harm should bear its own share. And when the Supreme Court finds that the NGT has reasoned wrongly about causation, it should identify the error of law and, where the science remains open to dispute, return the question to the forum Parliament designed to answer it. None of this requires the Supreme Court to retreat from what it said in August 2026. It requires the next court, faced with a degraded river and a defendant who points to everyone else, to read that decision as a rule about proof of responsibility, and not as a rule that places the most damaged ecosystems beyond the reach of the polluter pays principle.

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