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ISSUES OF IMPOSING ADMINISTRATIVE SANCTIONS IN THE FORM OF TURNOVER-BASED FINES ON POWER INDUSTRY ENTITIES FOR FAILURE TO MEET QUOTAS FOR POLLUTANT EMISSIONS INTO THE ATMOSPHERE

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Abstract. Currently, there is an increased focus on reducing the negative impact on the environment in the Russian Federation. In order to implement the Clean Air Federal Project, Federal Law No. 195-FZ dated July 26, 2019, established an experiment with quotas for emissions of pollutants into the atmosphere. Due to the current lack of liability for failures to achieve or untimely achievement of the established emission quotas, the Russian Ministry of Natural Resources has drafted a federal law establishing, among other things, administrative liability for failure to achieve pollutant quotas. However, the author believes that the punishment in the form of a "turnover-based" fine stipulated by the draft law has a number of shortcomings. The author believes that without updating the current laws, the application of the rule in question will not achieve the main objectives of the federal project. Moreover, it can lead to negative consequences not only for business, but also for the environment in general. In her study, the author examines the main issues of applying "turnover-based" fines for failure to achieve quotas using the example of fuel and energy companies and proposes ways to bridge the identified gaps.

Keywords: pollutant emissions into the atmosphere, emission quotas, administrative liability.

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ПРОБЛЕМЫ ПРИВЛЕЧЕНИЯ СУБЪЕКТОВ ЭНЕРГЕТИКИ К АДМИНИСТРАТИВНОЙ ОТВЕТСТВЕННОСТИ В ФОРМЕ "ОБОРОТНЫХ" ШТРАФОВ ЗА НЕДОСТИЖЕНИЕ КВОТ ВЫБРОСОВ ЗАГРЯЗНЯЮЩИХ ВЕЩЕСТВ В АТМОСФЕРНЫЙ ВОЗДУХ

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Аннотация. В настоящее время в Российской Федерации повышенное внимание уделяется вопросам снижения негативного воздействия на окружающую среду. В целях реализации Федерального проекта "Чистый воздух" Федеральным законом от 26.07.2019 № 195-ФЗ было закреплено

проведение эксперимента по квотированию выбросов загрязняющих веществ в атмосферный воздух. В связи с отсутствием в настоящее время ответственности за недостижение или несвоевременное достижение установленных квот выбросов Минприроды России был подготовлен проект федерального закона, закрепляющего, в том числе, административную ответственность за недостижение квот загрязняющих веществ. Между тем, по мнению автора, предусмотренное законопроектом наказание в виде "оборотного" штрафа, имеет ряд недостатков. Автор полагает, что без доработки действующего законодательства применение рассматриваемой нормы не позволит достичь основных целей федерального проекта, и, кроме того, может привести к негативным последствиям не только для бизнеса, но и экологии в целом. В своем исследовании автор рассматривает основные проблемы применения "оборотных" штрафов за недостижение квот на примере организаций ТЭК, а также предлагает пути решения выявленных пробелов.

Ключевые слова: выбросы загрязняющих веществ в атмосферный воздух, квоты выбросов, административная ответственность.

Для цитирования: Голубь Н.В. Проблемы привлечения субъектов энергетики к административной ответственности в форме "оборотных" штрафов за недостижение квот выбросов загрязняющих веществ в атмосферный воздух // Правовой энергетический форум. 2023. № 4. С. 69–76. DOI: 10.61525/S231243500029320-0

The emergence of new legal relations inevitably entails changes in public enforcement due to the need to create effective interaction that makes it possible to control the implementation of the adopted regulations by parties to such legal relations. Certain acts such as failure to comply with mandatory law provisions become classified as illegal, and, as a result, are criminalized by the legislator. The doctrine states that the criminalization and decriminalization processes are constant and function as the state's reaction to certain activities of legal actors [1].

In the field of public relations, including those regulated by environmental law [2], the main methods of ensuring that parties to legal relations fulfill their obligations include state supervision and an effective system of sanctions, including administrative ones, for failure to fulfill established obligations or violation of certain statutory prohibitions.

Currently, there is an increased focus on reducing the negative impact on the environment in the Russian Federation [3, 4]. Federal Law No. 195-FZ dated July 26, 2019, on Conducting an Experiment on Pollutant Emission Quotas and Introducing Amendments to Certain Laws and Regulations of the Russian Federation in Terms of Reducing Air Pollution [5] (hereinafter referred to as Law No. 195-FZ) established the conduct of an experiment with quotas for emissions of pollutants (except for radioactive substances) into the atmosphere based on consolidated calculations of atmospheric air pollution (hereinafter referred to as the experiment, quota experiment) in the regions specified by the law.

The purpose of the experiment is to reduce the level of atmospheric air pollution during the planned period from January 1, 2020, to December 31, 2026 [6]. Emission control activities aimed at achieving the above goal in accordance with Law No. 195-FZ imply the approval of comprehensive action plans to reduce emissions of pollutants into the air, as well as the establishment of emission quotas for priority pollutants based on consolidated calculations.

Today, we can already see the positive trends caused by the experiment, and the results obtained meet the objectives of the Clean Air Federal Project. This is particularly true for fuel and energy entities. For example, from 2018 to 2023 year to date, the implementation of action plans for the technical re-equipment of boiler units with replacement of electric precipitators, as well as the modernization of cooling towers by TGC-11, JSC, reduced the total volume of emissions of priority pollutants by 8.4 thousand tons, representing 46% of the total reduction required under the quota experiment.

Meanwhile, despite the positive results in reducing emissions of priority pollutants into the atmosphere, the adoption of Law No. 195-FZ and its clarifying bylaws inevitably added new ones to the existing administrative offenses. This is due, among other things, to the fact that there are currently no specific rules establishing liability for violation of obligations in the field of quotas for emission of priority pollutants into the atmosphere. One could hardly disagree that, due to the nature of the quota experiment, other "environmental" administrative offenses, such as those provided for in Art. 8.21 (Violation of Atmospheric Air

Protection Rules) of the Code of Administrative Offenses of the Russian Federation (hereinafter referred to as the Code of Administrative Offenses), do not cover failure to fulfill their obligations by the experiment participants.

To bridge this gap and establish liability for failure to achieve emission quotas, in accordance with clause 3, subclause c, of the List of Instructions of the President of the Russian Federation, the Ministry of Natural Resources and Environment of the Russian Federation drafted the Federal Law on Amendments to the Code of Administrative Offenses of the Russian Federation Regarding Liability for Violation of Laws on the Experiment on Quotas for Pollutant Emissions into the Atmosphere (drafted by the Ministry of Natural Resources of Russia, draft law ID 02/04/07-21/00117556 [8]) based on the results of the meeting with members of the Government on December 25, 2021, No. Пр-2519 [7].

This draft law introduces a number of special offenses related to the quota experiment into the Code of Administrative Offenses, including the criminalization of failure to achieve the established quotas for emissions of priority pollutants into the atmosphere. If the required emission reduction values are not achieved, the experiment participant will be subject to administrative sanctions in the form of a fine which, for legal entities, is based on the total amount of revenue from the sale of all goods (works, services) and amounts to 5% to 10% of the total revenue for the previous year (but not less than RUB 4,000,000).

It should be noted that the draft Federal Law in question and its approach to determining the amount of fines have faced criticism from the onset [9–12]. For example, representatives of the Russian Union of Industrialists and Entrepreneurs note that the introduction of "turnover-based" fines for violating quotas can have negative consequences for the environment in general, and for individual experiment participants in particular, and even undermine the financial standing and normal business of companies [13].

Indeed, it seems that the fines provided for by draft law ID 02/04/07-21/00117556 calculated based on the amount of the offender's revenue, or the so-called "turnover-based" fines [14], are a rather controversial mechanism of influencing "quota-bound" organizations.

First of all, I would like to dwell upon the current practice of applying "turnover-based" fines. An analysis of the provisions of the Code of Administrative Offenses [15] allows one to conclude that, as a rule, punishment in the form of this type of fines is applied for offenses of several categories: violation of a number of mandatory requirements for information resources (for example, Art. 13.41, 13.49, 19.7.7, 19.7.10-3 of the Code of Administrative Offenses), failure to comply with antitrust laws (Art. 14.32, 14.33 of the Code of Administrative Offenses), violation of the requirements for certain business activities (Art. 14.4.2, 14.17, 14.39, 14.43.1 of the Code of Administrative Offenses). All of these categories share a common feature: these acts are either directly aimed at profit-making or contribute to the generation of income, and are mostly active in nature. Thus, the use of turnover-based fine is typical in situations where, as a result of committing an offense, the offender receives certain material resources.

Returning to the experiment participants, it is worth paying attention to the fact that failure to achieve or untimely achievement of emission quotas does not always depend on the owner of the facility causing negative environmental impact, nor can it generate profit for them.

There is a number of objective circumstances that may prevent an entity from achieving the necessary reduction in pollutant emissions in due time. For instance, for fuel and energy companies, one of the main problems is the need to carry out large-scale activities that require huge financial and technological investments under sanctions pressure. The limitation of foreign supplies inevitably has forced "quota-bound" companies to adjust their action plans to achieve the established quotas. As a result, processes aimed at planned technological re-equipment, modernization and repair of the facilities were inevitably slowed down or even became impossible without developing new breakthrough technologies.

At the same time, it should be noted that paragraph 5 of Decree of the Government of the Russian Federation No. 86 dated January 30, 2021, on Approval of the Rules for Repair and Decommissioning of Electric Power Facilities establishes that involvement of the equipment of fuel and energy facilities in the modernization project selection mechanism imposes a prohibition on decommissioning of such facilities or generating equipment of such facilities for 25 years from the date of the commencement of power supply to the wholesale energy and power market [16]. Thus, complete modernization of such facilities where it is necessary to replace the generating equipment of a combined heat and power production plant does not

seem possible over a long period of time, far beyond the time of the quota experiment.

Moreover, throughout the entire experiment period, fuel and energy entities, such as generating and heat supply companies, are obliged to ensure uninterrupted production of thermal and electrical power and its delivery to the end consumer, including the population [17]. Therefore, due to increased social responsibility, such organizations are forced to make decisions to prevent their production volumes from decreasing so as not to undermine the energy security of a particular region.

The author believes that in certain situations, such as the introduction of the above-mentioned sanctions, it can be very difficult for a "quota-bound" entity to timely fulfill the obligation to uninterruptedly supply consumers with resources and generate the necessary capacities while achieving the established emission quotas at the same time. As a result, a responsible company may encounter difficulties and fail to achieve established pollutant emission quotas in due time, without receiving any profit or other benefits.

In addition, when considering the possibility of applying turnover-based fines in the amount provided for by the draft law, it must be noted that not all participants in the experiment have a sufficient level of marginality of their facilities to ensure their full functioning after giving away 10% of the total revenue for the previous year, and for some, even a 5% fine can make continuing their business activities unfeasible. Moreover, it seems that the revenue of a legal entity is not directly related to the offense, the scope of measures taken to reduce emissions, or the degree to which the established quotas have been achieved.

The author believes that the established range of fines (the difference between the minimum and maximum fine is only 5% of the total revenue) does not allow sufficient differentiation of the degree of responsibility of the experiment participants. Thus, all other things being equal, a company that has a larger revenue will bear greater liability even if a minimum fine is imposed than another company that produces the same amount of emissions, but at the same time has a significantly smaller revenue.

Another situation is also possible where, considering the high cost of the final product, a "quota-bound" company that has multi-billion-dollar revenue and slightly exceeds the numerical values of the established quotas will suffer higher financial losses than a company that has much lower income and major deviations from the established emission quotas.

Thus, an emission quota can be established for one or two sources of emissions that make up the quota-bound entity, for one priority pollutant, or for tens or hundreds of sources for all priority pollutants established in a given territory (for example, there are 10 of them in Omsk Region). Moreover, state and local authorities (such as utilities, including boiler houses of centralized heating systems, transport, social infrastructure facilities, etc.) can also be the owners of the quota-bound facilities.

Thus, this approach to establishing punishment raises the question of its fairness and commensurability to the committed act, the level of its social danger. The specific fine amount will be determined based on a court order, making the court deal with the important question of correlating the percentage of fulfillment of the obligation to meet quotas and the percentage of revenue to be seized.

As a result, collecting an excessively large fine will not only have a negative impact on the financial standing of a "quota-bound" company, but can also make it impossible for it to continue its normal business in the future, which may undermine energy security and significantly decrease the quality of life of the population, resulting in an economic decline and impeding the development of separate economy sectors. Among other things, these consequences may extend to future investments in the environment protection, also due to the impossibility of continuing expensive activities, as well as forced economizing due to the need to modernize or replace other generating equipment that does not directly affect emissions into the atmosphere, but ensures reliability and uninterrupted operation of a fuel and energy facility.

Meanwhile, speaking of the need to rework the draft law in question, we believe that we cannot ignore the fact that the above wording does not offer answers to all the questions that arise, both for participants of the experiment and potential "offenders", and for other law enforcement officials, including the court and regulators. As stated above, judicial discretion is essential when determining the fine amount; meanwhile, the absence of any clarification in the draft law or special regulations can give rise to many difficulties in the application of the regulations in question.

One of these problems is the lack of a mechanism for determining the amount of the turnover-based fine and its dependence on the degree to which a business entity fails to achieve emission quotas. This gap can lead to great difficulties when considering cases of holding "quota-bound" organizations

administratively liable for failure to achieve emission quotas. Although the court is guided by its inner conviction, in order to make a decision it must be guided by the current laws and the case file materials, analyze a lot of evidence, in particular, special documents relating to the technical and environmental aspects of the issue, and conclude what punishment is suitable for a particular entity taking into account all the circumstances of the case. Meanwhile, we believe that the lack of regulations on the methods for calculating indicators of the degree of achievement of quotas can significantly delay such litigation and lead to situations where, other things being equal, experiment participants will encounter significantly different liability the amount of which for special "homogeneous" parties to legal relations will be qualified without criteria established at the regulatory level.

This gap, in turn, also deprives the potential "offender" of the opportunity to correctly assess all the risks and calculate the percentage of achieving quotas and its impact on the amount of the turnover-based fine, since different approaches may be applied to such calculations depending on the region and the specific judge. The lack of a unified imperative method makes the processes of imposing administrative sanctions in such cases nontransparent and, as a result, creates increased corruption risks.

In addition, the wording in the draft law as a whole does not allow for taking into account the degree of achievement of established quotas and does not address the issue of the impact of untimely achievement of quotas on the fine amount.

In accordance with Law No. 195-FZ, emission quotas are established for each individual facility causing negative environmental impact on the basis of consolidated calculations as prescribed by the Rules for Establishing Quotas on Pollutant Emissions (Except for Radioactive Substances) into Atmosphere [18] (hereinafter referred to as Quota Regulation No. 814).

According to Quota Regulation No. 814, the exact quota values are established based on the degree of impact of a specific facility causing negative environmental impact on exceeding air quality standards for each priority pollutant at each quota point. As a result, depending on the degree of the impact, the following types of quotas are established: for those affecting exposure indicators at quota points, based on the determined acceptable concentration contributions; for those that do not affect them, the quota is set based on the need to reduce the total volume of emissions in a specific experiment area by no less than 20% of the total volume of emissions in 2017.

At the same time, one must keep in mind that an experiment participant can own several quota-bound facilities, for example, a generating company that has several combined heat and power production plants and boiler houses. For each such facility, different quotas for pollutant emissions are established based on the degree of their contribution to exceeding sanitary indicators. Quotas can be determined for a set of emission sources of a "quota-bound" facility or separately for each emission source the impact of which is established based on the consolidated calculations for each priority pollutant.

In view of the above, we believe that we can conclude that establishing quotas for emissions of priority pollutants into the atmosphere is a complicated process, which in turn makes determining the degree to which these quotas have been achieved quite difficult. It seems that without special knowledge and a detailed formula for calculating the extent to which entities fail to achieve the established emission quotas, it is almost impossible to correctly determine such value and, therefore, establish the turnover-based fine amount.

At the same time, in order to decide whether an entity should be subject to administrative liability for failure to achieve emission quotas, in our opinion, one must first answer the following questions:

— Has the failure to achieve quotas been proven?

— What percentage of the total quota has been achieved?

— For which priority pollutants was the quota not achieved?

— For which emission sources or quota-bound facilities in general was the non-achievement established?

— How does the failure to achieve quotas (in definite percentage terms) affect the achievement/non-achievement of the Clean Air Federal Project indicators, etc.?

Thus, the correctness of the court decision and the fairness of the punishment largely depend on the correct calculation of this value.

In our opinion, another difficulty in implementing the draft law is the lack of a uniform approach to achieving the established emission quotas, and, consequently, the lack of a uniform approach to assessing the due care of an experiment participant in carrying out the necessary activities. Reducing the negative

impact on the environment and achieving the goals of the Clean Air Federal Project is only possible if the experiment participants are free to determine ways and methods to achieve them. Experiment participants are mostly entities involved in business activities. Based on their financial, personnel, and equipment resources, the participants themselves determine an action plan to achieve the established quotas. Due to the specific aspects of each business, it is impossible to determine a single approach, and such attempts can only harm the existing positive trends.

In addition, as noted above, two types of quotas were established in the experiment: based on the contribution to the concentration of pollutants and based on target indicators for reducing emissions into the atmosphere. When achieving the second type of quotas, experiment participants must ensure a reduction in the gross volume of emissions by at least 20%, having various methods of such reduction at their disposal (for individual priority pollutants). However, the effectiveness of each of the possible methods cannot be determined in advance, in particular, due to the nature of generating equipment, force majeure circumstances, sanctions pressure, and many other factors. For example, while implementing detailed plans for modernizing equipment of at their facilities causing negative environmental impact, fuel and energy companies have faced obstacles due to the need to search for new equipment, replace fuel, and so on, leading to the need to make fast decisions to continue operation and capacity production under the existing circumstances. The need to ensure uninterrupted operation of the company and provide the region with resources forces the experiment participants to develop new technologies. In this case, the effectiveness of the method can only be reliably established at the final stages, after sufficient time has passed to confirm the results of its application.

Therefore, summarizing the above, we can conclude that when determining the responsibility of an experiment participant failing to achieve the established quotas based on the experiment results, the court needs to process a huge amount of information and analyze what caused its failure to fulfill the obligation to reduce pollutant emissions. When deciding whether an entity is responsible and should be subjected to administrative penalty under Art. 2.1, Part 2, of the Code of Administrative Offenses, the court must determine whether the legal entity has taken all measures within its power to comply with the violated law. Meanwhile, the wording of the draft law does not answer the question of what actions of an experiment participant can be considered sufficient, where the line is drawn.

Thus, it seems that the draft law in question has a number of shortcomings that need to be eliminated. To resolve these problems, it is not enough to amend draft law ID 02/04/07-21/00117556, new by-laws must also be developed to ensure the practical application of the adopted regulations.

First of all, we believe it is crucial to return to the issue of establishing the type and amount of the fine. Considering the above arguments and the current circumstances, it seems best to revise the potential fines for failure to achieve (untimely achievement of) the established emission quotas and reduce their amount to an objectively acceptable level in accordance with the general atmospheric air protection provisions of Chapter 8 of the Code of Administrative Offenses. When determining the adjusted fine amount, it should be noted that, in accordance with clause 3, subclause c, of the List of Instructions of the President of the Russian Federation dated December 25, 2021, the "turnover-based" fine was not the only available option.

Moreover, before the draft law in question enters into force, it is important to adopt a by-law approving the method for achieving emission quotas and the mechanism for determining the degree (level) of achieving the established quotas, taking into account the fact that emission quotas are established either for each priority pollutant of each quota-bound facility as a whole or for each emission source.

The proposed method must answer the most important questions without which it is impossible to make a decision on bringing an entity to administrative liability for failure to achieve (untimely achievement of) the quotas. In particular, it seems necessary to develop key criteria for adequate implementation of measures to reduce emissions, as well as to establish a tentative list of possible deviations from planned measures and the degree of their impact on determining the final quota achievement values.

Taking into account the specific nature of assigning quotas, such method must include sections directly focused on calculating the achievement of each quota type for experiment participants having one or several facilities causing negative environmental impact for each priority pollutant. The development of such calculations requires a thorough study of all the aspects of assigning and achieving quotas, taking into account the industries of "quota-bound" companies, their legal status and social significance. Establishing such formula and

recognizing it as mandatory when deciding on the extent to which quotas have been achieved will reduce the excessive burden of developing a procedure for determining the required values for the courts. In addition, the transparency of such calculation will have a positive effect on the experiment participants, giving them the right to make their own calculations and take the necessary measures in a timely manner to eliminate shortcomings in their activities.

Considering that the application of sanctions for failure to achieve emission quotas is in fact only possible after the experiment has been completed, we believe that the best decision is to postpone the adoption of the draft law in question in order to conduct public discussions and introduce the necessary adjustments. It is impossible to thoroughly define sanctions for the introduced administrative offense or to adopt the required methods without due regard for the reality and changes taking place.

To summarize, it should be noted that the increased importance of certain issues, such as environmental protection, necessitates careful control by the state over the implementation of current regulations. As the most crucial and global problems cannot be solved without all parties to legal relations (both businesses and the state) working together, joining efforts and adequate enforcement measures, including punishment for failure to fulfill assigned obligations, are of utmost importance. The most important objective of any mechanism of state influence should be ensuring compliance with the basic principles of law, as well as achieve the established goals.

Statutorization of a fair and adequate punishment on can have a greater impact on the parties to legal relations than an overly severe punishment, which jeopardizes the very existence of such entity. It seems that working on the above issues, such as the type and amount of punishment, as well as bridging the gaps in the regulatory framework for achieving emission quotas, will have a positive impact on the further development of the environment protection and may also increase the volume of investments in the environmental protection against the negative impact of production companies.

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