

IS THE MoEFCC ENCOURAGING ENVIRONMENTAL VIOLATIONS ?

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INTRODUCTION

On 10 May 2016, the Ministry of Environment, Forest and Climate Change issued a draft Notification proposing a mechanism to deal with projects that have commenced activities before obtaining an environmental clearance [Draft Notification].¹ Such activities are illegal and amount to criminal offences under the provisions of the Environment (Protection) Act, 1986 [EP Act].² The Ministry had previously issued two Office Memoranda laying down the process for dealing with such projects, including requiring the concerned State Government to initiate action under the relevant provisions of the EP Act.³ But these were struck down by the National Green Tribunal as being *ultra vires* to the provisions of the EP Act.⁴ According to the Ministry, the existing penalty provisions are proving to be inadequate, and a process is underway to introduce stringent civil penalties.⁵ Till that process is completed, it is faced with 'almost 400' projects that have commenced illegally (which have apparently been put on hold for further consideration), and this Draft Notification is expected to provide a solution in the interim.⁶

Need for a Prior Environmental Clearance

The environmental clearance is a mandatory requirement for several categories of projects and activities. The process for obtaining the clearance is detailed in the Notification of 14 September 2006 – the EIA Notification – issued under EP Act. The crux of the EIA Notification is that projects and activities are required to seek a *prior* environmental clearance. The four stage clearance process is designed (albeit with many faults) to appraise projects based on their potential environmental impacts, and if approved, to impose restrictions and prohibitions to limit their impacts. The rationale for requiring a prior clearance is based on critical ecological and social considerations. It is to prevent, or to take adequate precautionary measures to mitigate, adverse impacts of projects before work commences. If the clearance is sought *ex post facto*, the main objective of the EIA Notification – to impose restrictions and prohibitions on certain projects and activities because of their potential impacts – is defeated.

About the Draft Notification

The Draft Notification has been issued by the Central Government while exercising its powers under Section 3(1) and 3(2)(v) of the EP Act read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986:

- Take measures necessary or expedient for ‘protecting and improving the quality of the environment and preventing, controlling and abating environment pollution’.
- Restrict areas in which industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.

The aim of the Draft Notification is to deter non-compliance and ensure that the ‘unfair economic advantage’ accrued to the violator is recouped. It proposes that projects which have commenced without the mandatory environment clearance, though treated as cases of violations, will still be appraised for grant of clearance. Simultaneously, such projects ‘may implement the Environmental Supplemental Plan to remediate the damage caused or likely to be caused, and take out the undue economic gain due to non-compliance and violation’. The Appendix – I to the Draft Notification provides details on how this Environmental Supplemental Plan [ESP] will be designed and implemented. An Expert Group will be constituted and it will be responsible for preparing the ESP and monitoring its implementation. The ‘satisfactory implementation’ of the ESP will be included as one of the conditions of the environmental clearance granted to the (non-compliant) project.

THE CRITIQUE

The main objective of the Draft Notification appears to be to ensure projects and activities that have commenced without an environmental clearance are still considered for approval, without necessarily initiating any penal action against the offender. In effect, the Draft Notification condones the illegal (and criminal) act of commencing work without obtaining an environmental clearance based on the assumption that an ESP would be prepared and implemented.

As a subordinate legislation, the Draft Notification has to be in consonance with the provisions of its parent Act – i.e. the EP Act. If it is not, it is a well-established legal principle that it will be legally untenable. The following analysis will evidence that the Draft Notification is against the core legislative mandate of the EP Act, and for that reason will not be able to stand judicial scrutiny.

Draft Notification not in Consonance with EP Act

The Draft Notification has been issued by the Central Government ostensibly while exercising its powers to take measures necessary for protecting and improving the quality of the environment and to regulate areas in which industries, operations or processes may be carried out.

However, the Government does not perform either of these functions. The Draft Notification does not regulate the geographical location of projects (instead undermining the EIA Notification which does that), and it does not support measures to protect the environment for several reasons, including the following:

1. *No cut-off date*

The Draft Notification does not have a cut-off date – it is valid indefinitely. The ESP is supposed to reduce the ‘likelihood that similar violations will occur in the future’. The Government is therefore expecting the violation of a mandatory statutory requirement – to obtain a prior environmental clearance – to be a frequent occurrence, and it appears to be willing to ‘regularise’ or ‘legitimise’ violations as and when the need arises. As a result, projects that may not have been approved eventually, but which commenced illegally without any concern for the environment (or the law), will now be allowed to continue with the tacit support of the Government.

2. *Implementation of the ESP not a pre-condition*

The ESP mechanism is likely to encourage future non-compliance, not deter them. Even if an ESP is designed to potentially reduce the adverse environmental impacts of a non-compliant project, its successful implementation is not a pre-condition to the grant of environmental clearance. In fact, according to the Draft Notification, the appraisal process under the EIA Notification is supposed to move simultaneously with the ESP preparation process. This means the project proponent can obtain a clearance under the EIA Notification, complete the project and start operation, but is not required to successfully and effectively implement the ESP. The Draft Notification notes that ‘action will be initiated accordingly’ in case the ESP is not satisfactorily implemented, but the nature of this penalty action has not been defined. There appears to be no mechanism to enforce the implementation of the ESP.

3. *Existing statutory obligations likely to be in the ESP*

The ESP has to include projects and activities which are beyond what the project proponent is legally required to do. The Draft Notification lists categories of projects that may be considered to be part of the ESP including projects on public health, pollution prevention, pollution reduction, and environmental restoration and protection. At the same time, the Draft Notification requires the ESP to include projects that are ‘designed to remediate the ecological damage caused due to violations’. There is a clear contradiction here. If the project under the ESP must have some connection to the violation, the project proponent would be required by law to undertake such a ‘project’. This is evident from many of the examples given in the Draft Notification. For instance, if the project proponent has caused hazardous waste to pollute the water stream,

stopping the polluting operations to prevent further pollution is statutorily mandated under the provisions of the Water (Prevention and Control of Pollution) Act, 1974. To require projects under the ESP to be something more than what is required by law will most likely result in characterising statutory obligations as going beyond the call of duty and paint a misleading 'law abiding' picture of the project proponent.

4. Academic exercises do not deter environmental offences

The Draft Notification lists assessments and audits, and compliance promotion through organisation of conferences and seminars to be eligible projects under the ESP. These types of academic exercises though extremely valuable cannot in any form or manner pose a threat to the economic baseline of a company. Nor are they likely to reduce the adverse impact on the environment and overall risk to public health caused due to the violation. To expect such categories of projects to deter future violations and to undo environmental damage is farcical.

5. Project proponent's consent defeats the purpose

The consent of the project proponent has to be obtained for implementing the ESP. Assuming the ESP has been prepared in a professional and independent manner by the Expert Group and it could indeed recoup the economic advantage illegally accrued to the project proponent, and ameliorate the environmental harm, giving the choice to the project proponent to then not implement the ESP appears to go against the very objective of the Draft Notification.

6. Non-application of mind while deciding four 'priorities'

The Draft Notification lists four 'priorities' under the ESP which are perhaps to be treated as principles guiding the preparation of the ESPs. The description of these 'priorities' illustrates non-application of mind by the Central Government. For example:

- **Environmental justice:** There is no clear enforcement mechanism to implement the ESP and in any case it is not a pre-condition to the environmental clearance process under the EIA Notification. In such a scenario involving members of the affected community in the ESP development process so that they 'feel' they are meaningfully involved in the enforcement process is a false promise.
- **Pollution prevention:** A 'hierarchy of environmental management' has been proposed in which prevention of pollution has to be prioritised over reduction or control strategies. It is not clear what this means. Is it that the ESP must prevent (or reduce) pollution caused by the non-complying project activity? If yes, the ESP is only aggravating an environmental offence as the unauthorised project causing pollution must be stopped outright instead of developing control

strategies. Or is it that the ESP would include other projects that comply with this hierarchy? In that case, how are these projects related to the violations committed by the project proponent and how would they ensure restoration of the environment?

- **Climate change:** Projects that reduce green-house gas emissions or assist in climate adaptation measures can qualify to be part of an ESP. While these are indeed important measures, how will these projects demonstrate that they are designed to remediate the ecological damage caused by the project proponent and reduce the 'likelihood that similar violations will occur in the future' – a mandate of the Draft Notification?

Legally Untenable Nature of the Draft Notification

The Supreme Court of India has held in catena of judgments that the legality of a subordinate or delegated legislation may be challenged on various grounds, including conformity to, and consistency with, the parent Act, as well as others laws in force.⁷ The Draft Notification is unlikely to withstand judicial scrutiny on these grounds. First, as is argued above, the design and implementation of the ESP is antithetical to the legislative mandate of the EP Act, and despite being a subordinate legislation, the Draft Notification does not conform to the EP Act. Second, the requirement to obtain a prior environmental clearance under the EIA Notification is part of the existing law. It appears that the spirit, intent and effect of the Draft Notification is to undermine and violate the EIA Notification. This form of a 'waiver of rule' has been held to be unlawful by the Supreme Court.⁸ In *ITC Ltd. v. State of U.P.*⁹ the Court held:

"82. ... It is thus clear that where an authority makes regulations and issues policies and procedures, they are intended to be followed and complied with. They cannot be ignored or avoided unless superseded or amended. The fact that the Authority has the power to amend the regulations, policies and procedures, does not mean that they can be ignored. As long as they are in force, they are required to be obeyed by the Authority."

Another ground on which the Draft Notification may be found to be legally untenable is that the Government is not permitted to make subordinate legislation which widens or constricts the scope of a law or the policy laid down under it.¹⁰ The EP Act has specific penalty provisions for offences committed under it, including commencement of operations without an environmental clearance. To create a mechanism which overlooks such offences, albeit at some 'cost' to the project proponent, is a poorly veiled attempt to widen the scope of penalties under the EP Act.

In the context of coastal regulation, the Hon'ble Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*¹¹ has emphasised on the need to enforce environmental laws. It observed:

“26. Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to, be tolerated in any civilized society. Law should not only be meant for the law-abiding but is meant to be obeyed by all for whom it has been enacted. A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that Parliament enacted the anti-pollution laws, namely, the Water Act, Air Act and the Environment (Protection) Act, 1986. These Acts and Rules framed and notification issued thereunder contain provisions which prohibit and/or regulate certain activities with a view to protect and preserve the environment. When a law is enacted containing some provisions which prohibit certain types of activities, then, it is of utmost importance that such legal provisions are effectively enforced. *If a law is enacted but is not being voluntarily obeyed, then, it has to be enforced. Otherwise, infringement of law, which is actively or passively condoned for personal gain, will be encouraged which will in turn lead to a lawless society. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which will have to be borne by the future generations.*” [emphasis added]

CONCLUSION

If work commences before an environmental clearance is granted, the likelihood of irreversible environmental harm is very high. Subsequent monetary payments and restoration measures are likely to be inadequate to undo that harm. A real fear of criminal conviction could go a long way in deterring such environmental offences. But the Government rarely prosecutes offences under environmental laws. The National Crime Records Bureau's data for the year 2014 records only 101 incidents of offences under the EP Act.¹²

Contrary to what is stated in the Draft Notification, the interest of the environment is in punishing defaulters to deter future violations, not in welcoming them within the 'regulated community' by granting them approvals. The suggested design of the ESP and its implementation process will neither deter future non-compliance, nor in any way undo the environmental damage caused due to such non-compliance. It will, instead, encourage project proponents to factor in an 'ESP-cost' that they may be required to bear if they decide to commence without the mandatory clearance. They are then likely to find ways to (profitably) internalise the cost, rather than avoid it by complying with the law. This legitimises a 'pay and pollute' regulatory regime which entirely undermines the polluter pays principle – a foundational principle of Indian environmental jurisprudence.

Instead of deterring violations, the Draft Notification is likely to encourage commission of environmental offences as they will not be too 'costly', and no time will be wasted while waiting for the necessary regulatory approvals. If considerable resources are invested in effectively penalising offenders under existing statutory provisions, it would send an important signal that could deter environmental violations.

NOTES

1. The Draft Notification is available at <http://environmentclearance.nic.in/>. It has been issued for public comment in compliance with Rule 5(3)(d), Environment (Protection) Rules, 1986.
2. Section 15 read with Section 19, Environment (Protection) Act, 1986.
3. See Office Memorandum dated 27 June 2013, available at <http://www.moef.nic.in/sites/default/files/om-270613.pdf> and Office Memorandum dated 12 December 2012, available at <http://moef.nic.in/assets/om-12122012-b.pdf> (accessed on 25 July 2016).
4. *SP Muthuraman & Others v. Union of India & Others*, Original Application No. 37 of 2015, Judgment dated 7 July 2015, available at [http://greentribunal.gov.in/Writereaddata/Downloads/37-2015\(PB-I-Judg\)OA7-7-2015.pdf](http://greentribunal.gov.in/Writereaddata/Downloads/37-2015(PB-I-Judg)OA7-7-2015.pdf) (accessed on 25 July 2016).
5. Manoj Kumar Singh, 'New law to provide for stiff penalty' *Deccan Herald*, 8 July 2016, available at <http://www.deccanherald.com/content/556585/law-provide-stiff-penalty.html> (accessed on 25 July 2016). This piece was a response of the Ministry of Environment, Forest and Climate Change to an earlier article published in the newspaper demanding the recall of the Draft Notification.
6. *Ibid.*
7. *State of T.N. v. P. Krishnamurthy* (2006) 4 SCC 517, para 15.
8. *State of Kerala v. K. Prasad* (2007) 7 SCC 140, para 10.
9. (2011) 7 SCC 493.
10. *Agricultural Market Committee v. Shalimar Chemical Works Ltd.* (1997) 5 SCC 516, para 26.
11. (1996) 5 SCC 281.
12. Data available at <http://ncrb.gov.in/> (accessed on 25 July 2016).