

From Prior to Post:

Legalising environmental violations¹

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WORKING
PAPER



¹ This working paper is based on the applications that had been put out for three months. This would be updated based on the new applications and meeting minutes of the Expert Appraisal Committee that has been set up exclusively look at these violating projects.

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On March 14, 2017, India's environment ministry, issued a [notification](#), which gives an opportunity for projects that have violated conditions of the Environment Impact Assessment (EIA) Notification 2006 to be brought into compliance. Under this notification, a process is laid down for all those projects that have started construction, operation, expansion, modernization or change of product mix, without obtaining an environmental clearance to now apply for an environmental clearance. They have the opportunity to seek these approvals within six months from the issue of the notification, i.e by September 15th.

There had been widespread criticism of the draft and final notification as well as a set of justification that has been given by the Ministry that have been discussed in Section 2 below.

This working paper is an attempt to understand the sectoral and geographical spread of all the applications submitted to the Ministry within three months of the notification being gazette. In the first two sections, we deal with the backdrop under which the notification was passed and the debates it generated. In the third section we examine the data of the 207 applications received for a Terms of Reference³ between March 15th and June 15th 2017. And in the final section of the study, we look at the implications of this data.

Few clear trends emerge:

- The sector which reflects highest number of applications is the mining sector, especially that of minor minerals.
- The maximum number of applications has been received from Tamil Nadu, reflecting five sectors.
- There are also several applications from the real estate sector, primarily from Tamil Nadu and Maharashtra.
- Applications also reflect instances of repeated violations where the same project proponent has multiple applications.
- The proponents have given a range of reasons for the violations like the State Environment Impact Assessment Authority (SEIAA) delisted the file earlier; the application is still under process etc.

More details are discussed in Section 3.

The Ministry has set up a committee consisting of eleven members under the Chairmanship of Dr SR Wate. The committee had its first meeting on 22nd June 2017 to review the proposals received in compliance with the 14th March, 2017 notification.

The Committee in its first meeting has examined ten applications. Out of these ten applications, the committee has already recommended seven for grant for a Terms of Reference, subject to conditions.

BACKGROUND OF THE NOTIFICATION

There are several developments at the ministry and by the courts that are important to understand the context of this notification:

³ Terms of Reference

By the environment ministry

There have been several attempts by the environment ministry to bring violating units into compliance. In 2010 an Office Memorandum⁴ was issued by the MOEFCC under which laid down the procedure to deal with violation of the EIA Notification 2006. Instances where construction has begun on site or expansion has been undertaken without obtaining the required prior environmental clearance were considered as 'violation cases'. As per the notification the projects were to be examined either by the Expert Appraisal Committee (EAC) at the central level or the State Expert Appraisal Committee (SEAC)⁵, and if the recommendations given by the EAC/SEAC were accepted by the competent authority, the project proponents were required to submit a written commitment to the Environment Ministry stating such violations would not be repeated. Further the respective State government was to be informed to initiate legal action against the project proponent as per the provisions of the Environment protection Act.

A similar Office Memorandum⁶ was passed in 2012, two conditions of which were contested in the courts. The first condition was that the notification required a written commitment in the form of a formal resolution by the Project proponents to ensure that "violations will not be repeated". The second condition under contest was that in case of a violation, the State Government concerned would need to initiate credible action on the violation by invoking powers given to it under the Environment (Protection) Act, 1986.

Orders of the court

In 2014, the Jharkhand High Court had held that the conditions passed in the Office Memorandum in 2012 were illegal and unconstitutional. That the Ministry asked for an undertaking that would say, "violations will not be repeated in the future" amounted to admission of the violation itself. This essentially meant that the companies were asked to give evidence of its own violation. The court held that this violates the basic principle of rule of law, as it was self-incriminating evidence. On the second condition the court said that the state government could not be compelled to initiate action against the violators nor the process of environmental clearance be dependent on a court proceeding.

In *S.P. Muthuraman versus Union of India & Another*⁷ also the O.M of 2012 was held to be unconstitutional as they were *ultra vires* the provisions of the Act of 1986 and the Notification of 2006.

It was under this context that this Notification was passed, which would essentially take care of the shortcomings of the previous notifications that the court had highlighted.

THE JUSTIFICATION AND ITS CRITIQUES

The environment ministry's justification

- **For Better Environment:** The main justification that the Ministry gives for passing the notification is that it necessary for is for the purpose of protecting and improving the quality of the environment and for abating environmental pollution. The Ministry says that for doing so that it is necessary to bring all the entities that are not complying with environmental regulation under the EIA notification 2006 to be brought under compliance with the laws in an expedient manner.
- **Applying Polluter Pays Principle:** Further the Ministry emphasis on another judgment passed by the Supreme Court in 1996. In this judgment, the case deals with pollution caused by chemical industries in Bichhri, Rajasthan, the court highlights the importance of the Polluter Pays principle. In the judgment, it was

⁴ Office Memorandum dated November 16th 2010 which can be accessed from here-<http://www.moef.nic.in/circulars>

⁵ The EIA Notification 2006 has categorized projects according to their capacity and impacts into Category A and Category B. Category A projects are examined by the EAC while Category B projects are looked at by the SEAC.

⁶ Office Memorandum dated December 12, 2012 which can be accessed from here: <http://www.moef.nic.in/circulars>

⁷ *SP Muthuraman & Others v. Union of India & Others*, Original Application No. 37 of 2015, Judgment dated 7 July 2015

laid down that “*The polluter pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer.*” In this case the industries had changed its product without obtaining clearance, continued production without obtaining requisite consents and No-Objection Certificates from the designated authorities.

- **A stop gap arrangement:** The ministry also argued that the notification is to deal with the violations that have come through the 2010 and 2012 notification. While a Civil Penalties Bill, which would deal with such violations is still pending, they argued that this is a stop-gap arrangement to deal with such violations in the intervening period.⁸

Criticism of the notification

Both when the draft notification was put up by Ministry inviting for comments as well as after the final notification was passed, there were wide criticisms of the process laid down in the notification.

- **Contrary to the EIA notification:** One of the major criticisms of this notification is that it was passed against the spirit of the EIA notification (See articles by [Menon & Kohli](#), [Dutta R, policy brief](#) by Shibani Ghosh) Under the EIA notification, projects that would have possible social and environmental impacts are to undergo a process in which these impacts are assessed before a project begins or modernization or expansion of a project. After a draft EIA report is prepared, there are then public consultations and examination of the project by an appraisal committee. Only after this, recommendations are made for the project, usually having conditions attached to its approval. Giving post facto environmental clearances would make this process redundant. It would also take away the forum for public consultations.
- **Extension of Polluter’s Pay principle:** Another criticism that the notification has faced is that the Ministry is wrongly extending the Polluters Pay principle in this case. It is said that this notification gives violators a licence to pollute and pay⁹ and this measure is neither likely to reduce the adverse impact on environment nor the overall risk to public health caused due to the violation.¹⁰
- **Reading of the court judgments:** While the Ministry has placed reliance on two judgments (as mentioned above), the criticism is that it has wrongly extended the import of these judgments (See article by [Menon & Kohli](#) and Submission by CPR-Namati Environmental Justice Program). It is said that the Jharkhand judgment neither condones EIA violations in general nor prescribes a way out for erring companies. In the 2015 NGT judgment, the court had observed that the O.M “provide benefits to the class of the project or activity owners who have started construction in violation of law, i.e. prior environment clearance.”

EXAMINING THE APPLICATIONS

In this section, we present the data and trends that are emerging out of the applications that have been given in so far to the MOEFCC for condoning violations.

- **Sector wise:** The applications so far show that highest number of applications that have come in are from mining of minerals, followed by building and construction projects. As per the information filled by the project proponents¹¹ 175 of these are Category A projects, while 32 are Category B projects.¹² This information

⁸ <https://www.pressreader.com/india/the-times-of-india-new-delhi-edition/20160704/281724088868510>

⁹ <http://www.deccanherald.com/content/555108/recall-notification-environment.html>

¹⁰ <http://www.indiaenvironmentportal.org.in/files/file/Final%20Comments%20on%20Ministry%20of%20Environment.pdf>

¹¹ Last accessed from environmentclearance.nic on 15th June 2017

¹² In the EIA Notification, projects are categorized according to the extent of their potential impacts into Category A and B. Category A projects apply for environmental clearance to the Expert Appraisal Committee constituted by the central government while Category B projects apply

has however been incorrectly filled by many project proponents, so the actual number of Category B projects will be much higher. For example, in a limestone-mining project with land area of 3.33 ha, the project proponent has applied under Category A.

Building and construction projects have the second highest number of applications.

Table 1: Sector wise list of the applications

Sector	Number of projects
Mining of minerals	142
Mineral beneficiation	7
Metallurgical industries	4
Cement plants	1
Pesticides industry and pesticide specific intermediates	1
Synthetic organic chemicals industry	10
Building and Construction project	30
Townships and Area Development projects.	10
Isolated storage & handling of hazardous chemicals	2
Total	207

- Repeat Violators:** In the set of applications that has come in, it is observed that 34 of the project proponents have applied for atleast 2 projects. For example, one violator -The Singareni Collieries Company Limited has 5 applications in 3 districts in Telegana for mining of minerals. The reason given for violating is expanding the production beyond for which environmental clearance was obtained. In another instance, the Tamil Nadu Slum Clearance Board has put in 3 applications, each involving building and construction projects which involves land area ranging between 35000 sq ha and 53000 sq ha. All three project's files were delisted by the Tamil Nadu SEIAA and have now come, after construction, for clearance to the EAC.
- Pending Litigation:** 13 of the projects out of the set of applications have pending court cases in the respective district and high courts against the project. These cases are either against the project or the land in which the project is proposed to set up. No further details are available in the applications as uploaded on the ministry's website.
- Geographic spread:** A look at the state wise break-up of which all states the applications are coming in from shows that Tamil Nadu has the highest number of violators who have out in their applications. Tamil Nadu captures 66.18 percentage of the total. Gujarat comes as a far second, followed by Maharashtra. Gujarat has majority of its applications in the mining sector (almost 85%) while most of Maharashtra's are from the Building and Construction sector (almost 64%).

Table 2: State wise break up of the applications

State	No of projects
Andhra Pradesh	5
Bihar	1
Jharkhand	3
Jammu and Kashmir	1
Gujarat	13
Karnataka	7
Telegana	9
Tamil Nadu	137

to the State Environmental Impact Assessment Authority (SEIAA). Following an amendment in 2016, Category B was further divided into B1 and B2, wherein B1 projects were assessed by SEIAA and B2 projects assessed by District Environmental Impact Assessment Authority (DEIAA).

Himachal Pradesh	2
Haryana	3
Punjab	1
Odisha	7
Maharashtra	11
Madhya Pradesh	2
Uttar Pradesh	2
West Bengal	3
Total	207

Case of Tamil Nadu

As Tamil Nadu showed the highest number of applications, we decided to examine the applications in detail.

- Mining of minerals have the highest number of projects while building and construction are the second. Salem, Dindigul and Karur are the districts having the highest number of violations.

Table 3: District and sector wise break-up of the projects from Tamil Nadu

District	Mining of Minerals	Building and Construction	Township and Area Development Projects	Mineral Beneficiation	Synthetic organic chemicals industry	Total
Karur	14					14
Namakkal	3					3
Perambalur	8					8
Tiripur	3					3
Virudhunagar	4					4
Ariyalur	10					10
Chennai		1				1
Coimbatore		5	1			6
Dindigul	14					14
Kanchipuram		6	1			7
Salem	16					16
Madurai	5					5
Tirunalveli	12					12
Tiruvannamalai				7		7
Viluppuram	3					3
Krishnagiri	8					8
Erode	1					1
Tiruvalur		3	1		1	5
Sivaganga	2					2
Tiruchirappalli						8
Total	103	15	3	8		137

- **Reasons for violations:** Few of the reasons that were cited by project proponents in Tamil Nadu while submitting their application is given in the table below. In 41 cases it was cited that the mine was operating without a clearance and as per the January 2016 notification that it now requires a clearance. The Ministry had in January 2016, declared that mining of minerals of less than 5 hectares also require a prior environmental clearance.

The data also shows that the Tamil Nadu SEIAA delisted 15 of the projects as the construction work had begun without obtaining an environmental clearance while 9 of the projects have been brought to the Centre due to delay in processing the application by the state authority.

Table 4: Reasons cited by project proponents in Tamil Nadu

Reasons given by project proponents in Tamil Nadu	Number of projects
File delisted by the Tamil Nadu SEIAA ¹³	15
Under process with the SEIAA, application delayed	9
Operation of mine without EC, attracting violation as per notification on 15 th January 2016	41

OBSERVATIONS

- Tussle between Centre and the state:** In the EIA Notification, there is a clear demarcation of the centre-state division of powers and responsibility. The centre is responsible for examining Category A projects while the state body is responsible for examining Category B projects. While in the Office Memorandum in 2010 had recognized this division for even violation cases, the 2012 O.M on violation cases doesn't. The role of the state appraisal body is done away with even in the current notification, with the responsibility given solely to the Centre.

Seeing the Tamil Nadu example, where a number of cases are observed the SEIAA had delisted the project and now it has come to the centre, it remains to be seen what would be the recommendations that the Centre ie. environment ministry will give. Examining the projects that the state authority has delisted itself means exceeding the authority of the state. Looking at the projects that are still in process (See TN case where the projects have applied because the process has been delayed), would also mean undermining the authority of the state.

- Easing regulations for building and construction projects:** As per an amendment made by the MOEFCC on 9th December 2016¹⁴, the requirement of an environment clearance was removed for building and construction projects. The reason cited for such an amendment was that the Ministry has, "*received suggestions for ensuring Ease of Doing Responsible Business; and streamlining the permissions for buildings and construction sector which is important for providing houses and for this purpose the scheme of Housing for all by 2022 with an objective of making available affordable housing to weaker sections in urban area*".

The current EIA amendment has an added clause that was not there in the draft notification that was issued in 2016, of occupancy certificates. It holds that no occupancy certificate will be issued until the project is granted environmental clearance. Occupancy certificates are granted by concerned municipal or local development authorities, which allow the owners to occupy the residential complexes. This makes it harder for the illegal constructions to be fully functional without environmental clearance, giving them an incentive to apply for an environmental clearance.

Combined with both the EIA amendments—one that allows past violations of the construction sector to be legalized and the other that says that building and construction projects no longer need environmental clearance, would the real estate sector be facing fewer obstacles on environmental grounds?

¹³ The reasons for delisting are not given by the project proponent in all the cases. In a few cases, the reason given for delisting is because the project proponent started construction on site without obtaining prior environmental clearance.

¹⁴ <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155550>

- **Illegal mining of minor minerals for more than a year** : On January 15th 2016, the Ministry had made an amendment to the EIA notification, which made it compulsory for projects involved mining of minor minerals in an area of less than 5ha also to obtain a prior environmental clearance. Earlier these projects were exempt from obtaining environmental clearance. This amendment did not mention the time period within which the project proponents already having their units should apply for an EC. The data from Tamil Nadu shows that almost 30 percent of the applications are due to mining in less than 5 ha without an environmental clearance. These applications are being put in more than a year after it was made mandatory.