COMMENTS ON THE DRAFT EIA NOTIFICATION 2020

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Overview

1. These comments are being submitted in response to Notification No. 1199(E) published in the Gazette of India on 23 March 2020, seeking comments from the public on a draft notification [hereinafter 'draft Notification'] proposed to supersede the EIA Notification 2006 dated 14 September 2006 currently in force.

2. At the outset it is stated that the EIA Notification 2006 (as amended from time to time) and the regulatory framework developed around it has largely failed to achieve the larger objective of environmental conservation and protection of our natural resources. While several projects and activities that have been granted environmental clearance [hereinafter 'EC'] have had serious adverse environmental and social impacts (that were foreseeable and avoidable), many others are either exempted from statutory scrutiny or have illegally avoided it.

3. The weaknesses in this regulatory framework have been repeatedly highlighted by the judiciary, various government committees, members of the civil society, media, and significantly, by those directly affected by the impacts of projects. In brief, these include poor regulatory design; weak institutional capacity and inability to effectively implement, monitor and enforce the legal provisions; non-alignment between the objectives of the Environment (Protection) Act 1986 [hereinafter 'EP Act'] and specific provisions of the EIA Notification; and exclusion of affected persons, particularly vulnerable groups, from the decision-making processes.

4. There is a crying need to overhaul the EIA Notification 2006 and the regulatory framework built around it – not only to address the inherent weaknesses highlighted above, but also to put in place systems and processes that respond to the steadily degrading environmental quality in the country. However, the draft EIA Notification 2020 fails to do so. In its current form, the draft Notification is legally untenable as it does not conform to its parent Act – the EP Act, and is in the teeth of various judgments of the Supreme Court, High Courts and the National Green Tribunal [hereinafter 'NGT']. It dilutes the already weak processes of environmental impact assessment, expert scrutiny and public consultation, and wrongly condones violations and illegalities.

* *Views expressed here are personal, and should not be considered an institutional position, as CPR does not take institutional positions on issues.*

5. The comments are divided into two sections. In Section I, I discuss four specific reasons why the draft notification is legally untenable. In Section II, I highlight five major concerns that arise from the proposed regulatory design.

SECTION I

6. In this Section, I discuss four specific reasons why the draft Notification is legally untenable, and should therefore be withdrawn immediately.

I. Draft Notification is not in consonance with EP Act

7. The draft Notification has been issued by the Central Government while exercising its powers under Sections 3(1), 3(2)(v) and 23 of the EP Act. Section 3(1) gives the Central Government power to take measures necessary or expedient for 'protecting and improving the quality of the environment and preventing, controlling and abating environment pollution'. As a subordinate legislation, the draft Notification has to be in consonance with the provisions of the EP Act, and must carry out its purposes. If it is not, it is a well-established legal principle that it will be legally untenable.[1]

8. The design of the draft Notification, and the processes outlined in it, are unlikely to support measures to protect the environment as envisaged in Section 3(1). In fact, by reducing the ambit and stringency of the scrutiny of impact assessment, it will be severely detrimental to the environment. For instance,

- Categories of projects that will be scrutinized as Category A or Category B1 have been reduced;
- Majority of the projects in the newly created Category B2 will require no environmental impact assessment before being granted a prior environment permission [hereinafter 'EP']. A prior EP may be granted based on just an application to the regulatory authority. Category B2 includes projects like inland waterways and hydroelectric power generation of upto 25MW capacity which can potentially destroy riverine and hill ecology;
- Categories of projects that do not require either EC or EP have increased, and include activities such as dredging which have devastating environmental impacts;
- EIA reports for all projects other than river valley projects will rely on baseline data of only one season (other than monsoon) – which will lead to an incomplete understanding of the impacts of the projects all year round, and risks poor appraisal.

[1] *State of Tamil Nadu and Another v. P. Krishnamurthy and Others* (2006) 4 SCC 517, para 15 and 16; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India and Others* (1985) 1 SCC 641 para 75; *Cellular Operators Assn. of India v. TRAI* (2016) 7 SCC 703, para 37.

9. Another glaring omission in the proposed notification is that there is no mention of climate change and related considerations. India is extremely vulnerable – geographically and economically – to the effects of climate change. More than 14% of the population lives in coastal districts. A significant proportion of the country's population lives below the poverty line. There is sufficient evidence that if business as usual continues India will experience significant sea-level rise, higher temperatures, and higher frequency of extreme weather events by the end of this century.[2] It should be of utmost priority for the Government to ensure that regulatory approvals do not make parts of the country more vulnerable, or adversely impact the adaptive capabilities of communities (e.g. permitting mining and road building in ecological sensitive areas like the Western Ghats, allowing removal of mangroves, etc.). India is the third highest emitter of green house gases in the world,[3] and decisions that will lock-in carbon intensive infrastructure in the long term need to be examined very carefully, particularly in light of India's mitigation pledges submitted as part of its Nationally Determined Contribution (NDC).

10. The National Green Tribunal has observed that there is *'no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances'*.[4] The draft Notification provided an excellent opportunity to convert this presumption into specific guidance on how causes and impacts of climate change should be taken into account while considering EC applications.

11. **As a subordinate delegated legislation, the draft Notification needs to conform to the provisions of the EP Act. By reducing the nature and scope of scrutiny of environmental impacts of proposed projects, and by omitting to include climate change considerations in decision making processes, the proposed notification goes against the mandate given to the Central Government under Section 3 of the EP Act to protect the environment.**

II. Proposed amnesty scheme for environmental offenders is illegal

12. Clause 22 of the draft Notification lays down the process for dealing with 'violation cases', i.e. cases in which work has commenced at the project site without the necessary prior EC or prior EP. It adopts the amnesty scheme that was introduced through the Office Memorandum dated 14 March 2017.[5] The legal validity of this Office Memorandum was challenged before the Madras High Court in *Puducherry Environment Protection Association v Union of India*. The High Court had upheld its validity on two grounds: *first*,

[2] Ministry of Earth Sciences, Government of India, *Assessment of Climate Change over the Indian Region* (2020).
[3] Climatewatch, Historical GHG Emissions <https://www.climatewatchdata.org/ghg-emissions> accessed 14 July 2020.
[4] *Ridhima Pandey v Union of India,* Application No. 187/2017, National Green Tribunal, 15 January 2019.
[5] Ministry of Environment, Forest and Climate Change, Notification, S.O. 804(E) dated 14 March 2017.

that the requirement of public consultation will be read in before an EC is granted to a project, and *second*, that the amnesty scheme to regularize projects that were functioning without an EC 'shall certainly and clearly be a one time measure'.[6] This was based on a statement made by the counsel for the Central Government to the High Court. The draft Notification illegally extends the amnesty scheme by incorporating the terms of the Office Memorandum into the Notification, despite the assurance given to the Madras High Court.

13. An amnesty scheme by its very nature has to be have a strict time period, or it will encourage violations. The draft Notification in effect puts in place an amnesty scheme with no cut-off date. The Central Government appears to be expecting the violation of a mandatory statutory requirement – to obtain a prior EC or EP – to be a frequent occurrence, and is willing to 'regularise' or 'legitimise' violations as and when the need arises. As a result, projects that have not been granted a prior EC are allowed to cause damage to the environment, perhaps irreversibly, with the tacit support of the government.

14. The Government should not have implemented the Office Memorandum of 14 March 2017 in the first place. It sent a signal to those who were not in compliance with the EIA Notification 2006 that they will not be punished, but instead be let-off by paying a paltry fine. By incorporating this scheme into the draft Notification, the Central Government is yet again sending the signal that it will continue to condone illegalities, and thus encourage future violations. This is antithetical to the duty imposed on the Central Government to protect and improve the quality of the environment under the EP Act.

15. **Those who violate environmental laws cannot be allowed to benefit from an amnesty scheme. Furthermore, an amnesty scheme which has no cut-off date is illegal. The draft Notification does not deter future violations of itself, but encourages them through an illegal in-built amnesty scheme.**

III. Ex post facto *environmental clearance is not lawful*

16. The scheme proposed in Clause 22 of the draft Notification permits the regulatory authority to grant an *ex post facto* EC – i.e. even if the project proponent has illegally commenced construction or operations without obtaining a prior EC or EP, the project proponent will be allowed to obtain the necessary approval subsequently. This process of 'regularising' a gross violation has no basis in law.

17. The Supreme Court of India has categorically held that an *ex post facto* EC is 'alien to environmental jurisprudence', and that 'environment law cannot countenance the notion of an *ex post facto* clearance'.[7] The Court has also held that the grant of an *ex post facto* environmental clearance would be detrimental to the environment and could lead to

[6] *Puducherry Environment Protection Association v. Union of India* (2017) SCC OnLine Mad 7056, para 5.
[7] *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati and Others* (2020) SCCOnLine SC 347, para 27.

irreparable degradation of the environment.[8] Although these two judgments were delivered in the context of the EIA Notification 1994, the *ratio* will be similarly applicable to the provisions of the EIA Notification 2006 and to any other notification which requires projects to obtain a *prior* EC.

18. The rationale for requiring a prior EC 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* construction/ operations commence. 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 adverse impacts on the environment – is entirely defeated.

19. **The draft Notification puts in place a process that grants *ex post facto* EC to project proponents who are in clear violation of the law. This has no basis in law as has been categorically held by the Supreme Court.**

IV. Monitoring mechanism proposed does not comply with NGT's directions

20. Monitoring of compliance of EC conditions has been one of the weakest aspects of the EIA Notification 2006. This has allowed grave violations of EC conditions to go unnoticed, and unpunished. The draft Notification does not strengthen the process in any substantive way. In fact, in at least two ways it undermines orders of the NGT to strengthen the process. *First*, to ensure that the content of an EC order is widely known and easily accessible, the NGT in *Save Mon Region Federation v Union of India*[9] had stated that apart from the factum of grant of the EC, the project proponent also has to publish the environmental safeguards and conditions in two local newspapers. The draft EIA Notification only requires the project proponent to advertise the fact that the project has been granted the EC or EP, not its contents. This is in violation of the NGT's order.

21. *Second*, the draft EIA Notification proposes a monitoring process which does not comply with NGT's directions in *Sandeep Mittal v Ministry of Environment, Forest and Climate Change and Ors*.[10] The National Green Tribunal in this case has considered the monitoring process under the EIA Notification as well as the institutional capacity in the country to implement the same. After detailed analysis of submissions made by the Ministry of Environment, Forest and Climate Change [hereinafter 'MoEFCC'], the NGT made the following remarks: '*Primary and essential regulatory functions must be discharged by the statutory authorities and it is only validation which may be outsourced. Wholesale*

[8] *Common Cause v. Union of India* (2017) 9 SCC 499, para 125.
[9] *Save Mon Region Federation v. Union of India and Others,* Appeal No. 39/2012, National Green Tribunal, 14 March 2013.
[10] Application No. 837/2018, National Green Tribunal.

outsourcing may make it difficult to have any accountable mechanism.'[11] It further observed, '*During interaction, the Tribunal has conveyed to the Joint Secretary that with regard to category 'A' projects, the data validation has to be the primary concern of the MoEF&CC and ought not be outsourced. For category 'B' projects, such data validation may be done through SEIAA.*'[12] In a subsequent order, the NGT held, '*We are, thus, of the view that for meaningful monitoring, all Category A projects are monitored not less than twice in a year and all Category projects are monitored not less than once in a year*.'[13]

22. The duty to monitor compliance of EC conditions for Category A projects has been assigned to the MoEFCC and the CPCB, while for Category B1 projects it has been assigned to the SPCB or the UTPCC, not the SEIAA. The draft Notification also envisages reliance on empaneled government institutions for carrying out compliance monitoring of projects – a form of outsourcing that the NGT has clearly criticised. Furthermore, the frequency of inspections directed by the NGT finds no mention in the draft Notification.

23. **Monitoring of compliance of EC conditions has been one of the weakest aspects of the EIA Notification 2006, and grave violations of EC conditions have gone unnoticed due to poor monitoring capacity and regulatory design. The draft Notification does not strengthen the process in any substantive way, and undermines directions issued by the National Green Tribunal in this regard.**

SECTION II

24. In this Section, I identify five major areas of concern with the proposed regulatory design. As is discussed below, the draft Notification adopts the inherent weaknesses of the EIA Notification 2006, and in some cases dilutes the existing framework even further.

I. No effort to improve quality, credibility and scope of the EIA report

25. One of the major lacunae in the EIA Notification 2006 is that the EIA reports are commissioned by the project proponent. This has raised serious questions about the quality of the assessments and the credibility of the decision-making process. Even the Supreme Court of India has remarked that it '*would have been more comfortable if the environment impact studies were made by the MoEF or by any organization under it or at least by agencies appointed and recommended by it*'.[14] This problem is greatly magnified in the Indian context as it is unlikely that any other stakeholder would have the wherewithal to commission an alternative impact assessment and even more unlikely that such an entity

[11] *Ibid.*, 29 April 2019.
[12] *Ibid.,* 23 July 2019.
[13] *Ibid.,* 22 November 2019.
[14] *In Re: Noida Memorial Complex Near Okhla Bird Sanctuary* [*T.N. Godavarman v. Union of India and Others*] (2011) 1 SCC 744, para 84.

would have access to accurate information about the proposed operations. The lack of a mandatory requirement for cumulative impact assessment – apart from a pro forma checklist requirement in Form I – is another serious lacuna in the EIA Notification.[15] The need for such an assessment is particularly critical for projects proposed in dense industrial and mining areas. The draft Notification unfortunately maintains *status quo* on both these issues.

II. Draft Notification reduces scope of public consultation

26. The public consultation component of the EIA process has been considered as "an embodiment of the principles of natural justice".[16] The Supreme Court while reiterating its importance in the EIA Notification process has held '[u]*nderlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects.*'[17]

27. The draft Notification could have strengthened the ability of the public to contribute to the process in multiple ways, but it mostly adopts the faulty processes laid down in the EIA Notification 2006, and in many ways curtails the scope of consultation further. The following is an illustrative list of ways in which the draft notification impacts the nature and scope of public consultation:

- Blanket exemption of certain categories of projects from public consultation, without any discretion to the relevant regulatory authority to initiate public consultation in case the need is felt. List of exempted projects includes resource intensive projects likes building and construction projects, and also has an ambiguously worded entry – 'all projects concerning national defence and security or involving other strategic consideration as determined by the Central Government' – which could potentially allow large infrastructure projects to evade public scrutiny;
- Draft EIA report has to be only provided in English by the project proponent, and not in any local/regional language;
- Draft EIA report will not be openly accessible to the public, but on written request it will be made accessible for electronic inspection at a notified place, during office hours;

[15] *Jeet Singh Kanwar and Another v. Union of India and Others,* Appeal No. 10/2011 (T), National Green Tribunal, 16 April 2013; *Sarpanch Gram Panchayat, Tiroda and Others v. Ministry of Environment and Forests and Others,* Appeal No. 3/2011, National Green Tribunal, 12 September 2011; *Alaknanda Hydropower Co. Ltd. v. Anuj Joshi*, (2014) 1 SCC 769, para 51.
[16] *S. Nandakumar v. The Secretary to Government of Tamil Nadu Department of Environment and Forest and Others* (2010) SCC OnLine Mad 3220, para 33.
[17] *Hanuman Laxman Aroskar v. Union of India and Others* (2019) 15 SCC 401, para 112.8.

- The track record of regulatory compliance of the project proponent is not disclosed to the public before the public consultation;
- Project proponent is required to address only 'material' environmental concerns expressed during the public consultation, and make changes to the draft EIA Report and the EMP. There is no guidance about what constitutes 'material'. Further, members of the public have no access to the project proponent's responses, and the Final EIA Report is not shared with them to verify whether their concerns have been adequately dealt with;
- No information about 'projects concerning national defence and security or involving other strategic consideration as determined by the Central Government' can be placed in the public domain.

III. Past compliance record of proponent not a factor in decision making

28. A project proponent's track record of regulatory compliance needs to be an important factor in the decision-making process under the EIA Notification. It is a relevant consideration for the public during the public consultation process, for the EAC during the appraisal process, and for the regulatory authority while taking the final decision on whether to grant EC or not. This information should be readily available, and actively relied upon by all the stakeholders. The High Court of Bombay has held '*The issue as to whether an applicant for environmental clearance has acted in breach of the condition which prohibits work prior to the receipt of environmental clearance is a material consideration in determining whether environmental clearance should be granted. A project proponent who seeks an environmental clearance under the law must demonstrably act in accordance with law*.'[18]

29. The draft notification in its preambular text refers to the judgment of the Jharkhand High Court in *Hindustan Copper Limited v Union of India* wherein the High Court had held that consideration of an EC application cannot await initiation of action against the project proponent for alleged violation, and that the application should be considered independent of any proposed action for the alleged violation.[19] The judgment of the High Court did not place any embargo on the disclosure of violations or non-compliance to the public, or such information being made part of regulatory disclosure requirements while applying for a new EC or expansion of an existing project. The draft Notification should have included such a mandatory disclosure requirement.

IV. No effort to improve the quality of expert appraisal

[18] *Gram Panchayat Navlakh Umbre v. Union of India & Others* (2012) SCC OnLine Bom 851, para 38.
[19] *Hindustan Copper Limited v. Union of India and Others* (2014) SCC OnLine Jhar 2157, para 21.

30. The role of the expert appraisal committee (EAC) in the EC process is a critical one. But over the years several instances of poor appraisal have come to light, which have affected the final outcome of the process. For example, the Supreme Court in its 2019 judgment on the legality of the EC granted to a new airport in Goa criticised the EAC for abdicating its responsibility and being influenced by extraneous considerations while recommending the project for approval.[20] The EACs' functioning has been hampered by many factors – committee members not given adequate time and data to scrutinize projects properly, on-site inspections not conducted to verify claims made by the project proponent, conflict of interest, and more recently, signals sent by Government not to delay the process unnecessarily. The draft Notification does not strengthen the design of the appraisal process, instead adopts a process that will negatively impact the quality of appraisal.

31. The appraisal process proposed in the draft Notification reduces the time for appraisal available to the EACs from sixty days under the 2006 Notification to forty-five days. It acknowledges the need for transparency – but only for the project proponents. They have to be given adequate notice of the meeting when their project will be discussed and have to be given an opportunity to provide clarifications to the committee. But there is no process to allow project-affected persons, or other concerned persons/ experts, to present their points of view to the committee. Further, the draft Notification clearly curtails the discretion of EACs by disallowing them from seeking fresh studies from project proponents, and sets a high bar to seek additional studies from the project proponents.

V. Processes to deal with violations and non-compliance are incongruous to the objective of environmental protection

32. The draft Notification in Clauses 22 and 23 lays down the processes to deal with violations and non-compliances. As discussed in Section I, granting *ex post facto* clearances and extending a one-time amnesty scheme indefinitely is legally untenable. Apart from these clear illegalities, these processes are of concern for several other reasons:

- In cases where the project proponent commences work without a prior EC, the draft Notification allows the project proponent to prepare the report of assessment of ecological damage, along with a remediation plan and a natural and community resource augmentation plan, which the EAC subsequently includes in the EMP. This is a clear conflict of interest.
- Once the Appraisal Committee has given a positive preliminary finding, the draft Notification permits the project proposal to be considered *de novo* – preparation of EIA

[20] *Hanuman Laxman Aroskar v. Union of India and Others* (2019) 15 SCC 401, para 160; *Utkarsh Mandal v. Union of India* (2009) SCC OnLine Del 3836, para 40; *Samata and Another v. Union of India and Others*, Appeal No. 9/2011, National Green Tribunal, 13 December 2013, para 45; *Sreeranganathan KP. v. Union of India and Others*, Appeal No. 172/2013, National Green Tribunal, 28 May 2014, para 182, 183.

report, public consultation and appraisal. The draft Notification does not envisage a rejection of EC at this stage. It is assumed that the EC will be granted after the bank guarantee is deposited.

- Sub-clause (7) lacks clarity. It appears to equate the remediation plan with the ecological damage assessment through a formula – which does not make sense as there cannot be a straightforward formula to calculate that. It further makes an illogical distinction between violations brought to the notice of the regulatory authority *suo moto* and those through other mechanisms while calculating the value of the ecological damage caused.
- The clause explaining the 'date of violation' does not make sense and will not stand judicial scrutiny. To the extent that it opens up a new amnesty period, it is in clear violation of the Madras High Court order as discussed above.
- There is no guidance on what is the process if the project proponent is unable to successfully implement the remediation plan and the natural and community resource augmentation plan within three years. When and what amount of the bank guarantee will be forfeited? And apart from forfeiture of the bank guarantee amount, what other action can be taken against the project proponent who has defaulted – yet again.
- The process to deal with non-compliance of EC conditions does not envisage action being taken under Section 15 (read with Section 19) of the EP Act.
- The processes to deal with violations and non-compliance of EC conditions are closed-door and non-transparent. The draft Notification does not allow the person who may have brought the violation to the notice of the regulatory authority to be involved in the hearing before the Appraisal Committee. Such a person has no avenue or forum to introduce evidence that she may have against the project proponent. The proposed remediation plan and natural and community resource augmentation plan is not made public, and those directly affected by the project and its violations are not made part of the decision-making process.

Conclusion

33. It is strongly urged that the draft Notification be withdrawn as it is legally untenable and significantly weakens the processes for environmental impact assessment, public consultation and expert appraisal under the EIA Notification 2006. It is entirely misconceived to believe that the draft Notification will achieve any environmental protection goals; in reality, it will most likely only accelerate the pace of environmental devastation in the country.