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A Critical Analysis of Environmental Impact Assessment (EIA) Draft Notification, 2020

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ABSTRACT

This Article discusses the recently proposed Environmental Impact Assessment (EIA) Draft Notification issued by Government of India. It throws light on the concept of EIA and its necessity in modern civilizations which is largely dominated by industries and technology. This article also highlights leading Indian judicial precedents which have been enforcing international norm of sustainable development, emphasizing EIA and importance of public involvement in approval of developmental projects. In the past we have observed conflicts between interested environmental stakeholders and project proponents, however more disengagement from the local men and reality may have severe disastrous effects to a nation. The article analyses and critiques the changes that are proposed through this draft. Factors like public consultation, self-reporting, post facto clearances, prior environmental clearances are focused in this article and the repercussions of these vital changes are reviewed. Even though the current Environment Impact Assessment Notification (2006) has been instrumental in implementing goals of sustainable development, there is not only scope, but also a dire necessity also to rethink, reassess the rules regarding Environment Impact Assessment. The time demands stricter implementations of sanctions so that the environment is preserved. Patch up policies, post facto clearances and regularizing fait accompli situations are becoming loopholes for project proponents to get away from fines/penalties of environmental damage. The proposed Rules, if in force, would prove to be an anti-thesis to sustainable development and, by extension, our international obligations and therefore they need to be actively deliberated.

Keywords: *Environment, EIA Notification, sustainable development, project proponent.*

I. THE CONCEPT OF ENVIRONMENTAL IMPACT ASSESSMENT

The Environment Impact Assessment (EIA) was first introduced and implemented in the United States of America. It is a brief report, or in some cases, permits for various projects relating to environmental concerns. Through the powers given to the government under section 3 of the Environment (Protection) Act, 1986 and its rules, this is a method to assess the possible

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environmental impacts for any construction/modernization/expansion project, which goes through certain stages and is also assessed by interested stakeholders in the society. EIA fundamentally goes through the following stages: a) screening, b) scoping, c) public consultation, d) appraisal. These stages are important to identify and address the likely environmental issues in any kind of project. These issues are then addressed which pave way to sustainable development goals, a principle which has been adopted by India in the international sphere. EIA acts as a precautionary step against environmental damage and undoubtedly aids sustainable development. In Narmada Bachao Andolan Case², when allegations were made of granting faulty environmental clearances, the court stressed on adequate rehabilitation for the local residents and ordered continuous monitoring of the project. The 2006 Notification, which is currently in operation, also has a prescribed proforma for EIA.³ The EIA Notification 2006 contains list of projects which are classified into schedules, namely Category A, Category B and Category B2, the first requiring a compulsory EIA, the second requiring a limited EIA and clearance while the last one requiring least of compliances. These categories are divided as per the quantity and/or magnitude of business or activity about to be launched. For example, > 150 ha (hectares) of mining lease area in respect of coal mine lease requires the applicant to mandatorily have a full Environmental Clearance (EC), whereas $\leq 150 \text{ ha} \geq 5 \text{ ha}$ of mining lease area in respect of coal mine lease requires a limited EC.⁴

The projects are also classified on the basis of the kind of work it involves – such as mineral resources, primary processing, materials production, material processing, physical infrastructure with environmental services and townships, buildings and so on. Some classifications also have to undergo General Conditions and Specific Conditions (GC and SC respectively). The screening process in the current EIA Rules is meant for mainly category B projects to determine whether the project requires any environmental assessment.

It is learnt that one of reasons for the recent Vizag (Vishakhapatnam) Gas leak was absence of due diligence in EIA and that the plant personnel had not obtained prior EC (Environmental Clearance) from the concerned authorities.⁵ Several other plants in India are operating without ECs. It was observed in Deepak Kumar Etc. v. State of Haryana and ors⁶, that any ways to

²Narmada Bacaho Andolan Samiti vs. Union of India, AIR 2000 SC 3751.

³ Ibid.

⁴The EIA Notification 2006, Ministry of Environment, Forest and Climate Change, (2006) <http://www.environmentwb.gov.in/pdf/EIA%20Notification,%202006.pdf> (last visited 30st June, 2020).

⁵ Aashish Aryan, Pranav Makul, 'Vizag gas leak: Don't have green nod, company told state last May' The Indian Express, New Delhi, 8th May 2020, <https://indianexpress.com/article/india/vizag-gas-leak-lg-polymers-india-green-nod-6399440/> (last visited on June 2nd, 2021).

⁶ (2012) 4 SCC 629

circumvent the EIA procedures will not stand. The court also recommended the State and Ministry of Environment to frame requisite rules to protect the environment. In *Society for Protection of Environment and Biodiversity v. Union of India*⁷, the issue before the court was regarding the validity of a draft Notification (2016), which exempted certain construction projects from the ambit of environmental clearances. The amendments proposed sought to dilute the provisions of the EIA Notification, 2006. The court came down heavily on the respondents and commented, “..‘Ease of doing responsible business’ cannot be in fact and in law the ground for making amendment to the environmental laws, as it primarily falls beyond the scope of the object and purposes of the environmental laws in force. It is only a ploy to circumvent the provisions of the environmental assessment..’. The Court quashed down the said Notification declaring it to be contrary to the environmental spirit of the Constitution of India and EIA Notification 2006.

II. THE EIA DRAFT NOTIFICATION 2020- HIGHLIGHTS AND CRITIQUE

The Ministry of Environment has recently issued a draft which revises the EIA Notification 2006. This draft has introduced various definitions – such as Rule 3 (13) Certificate of Green Building, Rule 3 (42)(b) standard conditions, Rule 3(56) having specific terms of reference and standard terms of reference. The new draft also has come up with concepts like constitution of District Level Expert Appraisal Committee having its secretary from either State Pollution Control Board or Union Territory Pollution Control Board, technical expert committee, self reporting of any violation, etc.⁸

Term of Reference (ToR) is a detailed study carried out by the authorities to facilitate the EIA and identify the possible drawbacks. Unlike the 2006 Notification process, in few projects, a standard Terms of Reference (ToR) shall be issued to projects without appraisal committee’s interference. If the appraisal committee feels that any specific ToR is needed, it may issue so within 30 days. The project proponent will then prepare an EIA based on these ToRs.

Another crucial component of EIA is the public consultation process. While the current EIA has sought to give this term a true meaning, the draft notification has made this process a mere formality. A lot of significant projects which may require the public participation such as secondary metallurgy industry, chlor alkali industry, chemical fertilizers and standalone ammonia plants, manmade fibres manufacturing, synthetic organic chemicals like dyes,

⁷ Application No. 148/2017, National Green Tribunal, <https://drive.google.com/file/d/11Ro51TM0EK8zqDC97C1oLbNNcm3t9Uzg/view> (last visited on July 1st, 2021).

⁸ Ministry of Environment, Forests and Climate Change, (2020), http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf (last visited on June 1st, 2021).

manufacturing of paints, common effluent treatment plants, are left out of purview of public consultation. In addition to this, the draft EIA Notification 2020 also excludes all highways, expressways, multi-modal corridors, elevated roads, flyovers, off-shore projects beyond 12 nautical miles, all category B2 projects, national defence related projects from public consultation (as is under current operative Notification). This is a wide exemption compared to the current EIA public consultation process, which has more involvement of people and other stakeholders. In *Centre for Social Justice v. Union of India*⁹, the court emphasized on the importance of public hearing and laid down detailed procedures of public hearings. In *Samarth Trust and Anr. v. Union of India and Ors.*¹⁰, while Delhi High Court decided whether the procedures for public hearing were observed or not, it also threw light on the concept of public hearing, re-iterated that such a step is a principle of natural justice. Public consultation gives NGOs, environmentalists, local residents a fair chance to express their views about the potential development in their area. Not only it is their fundamental right to live in a pollution free environment- a component of right to life, but is also backed by years of environmental jurisprudence as well as methods like EIA. Similar comments regarding importance of public consultation process were also made in the case *Hanuman Aroskar v. Union of India*,¹¹ however the EIA draft Notification 2020 has put a very limited window for this process.

III. TOWARDS MINIMUM REGULATIONS

The 2006 notification prescribes Prior EC process for expansion and modernization for all applications which are considered by the Appraisal Committee which is then empowered to decide on the EIA and any other requirements. However in the proposed draft, projects which have more than 10 percent of increase in their production are required to have an Environmental Management Plan (EMP), a revised EIA, and a referral to the appraisal committee. Under the 2006 Notification all the applications have to be considered by the appraisal committee irrespective of the degrees of changes made. However in the new draft such a thing is done away with, in order to lessen the procedure for prior EC.

Another important issue is the validity of Prior EC/EP. The draft suggests the validity for mining EC/EP for 50 years, river valley projects for 15 years, and all other projects for 10 years (2006 Notification states 30, 10 and 5 years respectively). Even though these figures may not look substantial in terms of industrialization, this severely reduces the participation of nodal

⁹ AIR 2001 Guj. 71.

¹⁰ *Samarth Trust Through its General Secretary Manish Manjul and Another v. Union of India, Ministry of Environment and Forests Through its Secretary and Others, Writ Petition (Civil) No.9317/2009 & 2010 Indlaw DEL 1755.*

¹¹ (2019) SCC 15 401.

agencies in the environmental processes, thereby giving an extension to environmental clearances and environmental permissions. Renewal procedures are made less often and the report submission by the project proponent is also made annual instead of half yearly, with a power given to the regulatory authority to ask for the reports at any time. The draft EIA Notification deviates from the 'Precautionary Principle' and ignores the directions of courts.

IV. IMPACT ASSESSMENT AT THE MERCY OF INDUSTRIALISTS

Rule 22 states that the project proponent may suo moto present an application regarding any environmental non-compliances. This rule seems impractical; and it is very unlikely that any project proponent who has invested a large sum of money may come up with such an application all by himself- considering the amount of heavy fines that may be imposed by the concerned authorities. What this entails is nothing but years of environmental damage under the garb of self-reporting. The Government has been extending deadlines for project proponents to complete their pending EIA/EC processes. In such times endeavour should be to compel the project proponent with adequate criminal and civil sanctions, instead of giving him a leeway to further correct himself through this notification's rule.

V. POST FACTO CLEARANCE

Perhaps the most alarming Rule of this draft Notification is Rule 27 (2) – which states that all EC/EP applications will be deemed to be issued irrespective of their application stage. This is antithesis to goals of sustainable development and entire environmental jurisprudence in India. In *Lafarge Umiam Mining Pvt. Ltd. v. Union of India*¹², when a group of environment enthusiasts and interested stakeholders approached the court alleging the lack of necessary ECs by a French mining company, the court effectively sought the balance between industrial development and environment conservation. It also addressed the issues of native people, NGOs and the wants of mining company and issued detailed set of guidelines and urged the government to form an institution which would strive to avoid such fait accompli situations and give true effect to EIAs. In *Sunil Kumar Chugh and Another v. Secretary, Environment Department, Government of Maharashtra and Others*,¹³ the court came down heavily on the illegal constructions done by the developers. It highlighted the importance of fundamental right under Article 21 and upheld the environmental principles. The Supreme Court recently frowned upon post facto clearances¹⁴ and stated that "...this Court must take a balanced approach which

¹² (2011) 7 SCC 338.

¹³ Writ Petition (Civil) No. 66 of 2014.

¹⁴ *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati and others*, Civil Appeal No. 1526 of 2016, 2020 SCC Online SC 347.

holds the industries to account for having operated without environmental clearances in the past without ordering a closure of operations...The Court cannot be oblivious to the environmental degradation caused by all three industries units that operated without valid ECs. The three industries have evaded the legally binding regime of obtaining ECs. They cannot escape the liability incurred on account of such non-compliance.” Here the court allowed the industries to continue; but also imposed heavy fines.

The policy of the current government is clearer through this draft - it wants to attract more investments and build projects with lesser hassle. Even though the EIA Notification initially was a big step in awakening environmental awareness of the state machineries in India, it still has some lacunas. The numerous additional, supplementing notifications issued by the Ministry of Environment regarding Environmental Clearances have only created more problems of applicability and its effectiveness. The overall process of EIA has proved inefficient in India; primarily because the government has been extending the deadline of getting the compliances done. Regularizing the environmental degradation through bye-laws, rules, notifications does not serve the purpose of the delegated legislation as is envisaged under the Environment (Protection) Act, 1986. The project proponents therefore have borne a care-free attitude, are further procrastinating and misusing the government’s forgiving attitude. The numerous amendments, addendums to the Notification were expressed as a concern in the form of a writ petition¹⁵, however the Court had upheld the validity of subsequent amendment Notifications, and recognized the government’s power of issuing them. The cost in this entire affair i.e environment degradation and subsequent irreparable loss, may not be visible now, but would be evident within upcoming years. While the project proponents may get away with fines and penalties, it is difficult to measure the sustainability of our lifestyle in this manner. India has pledged herself to Agenda 2030¹⁶, however such policies of the government may seriously affect our international obligations. The object of the draft Notification 2020 is to streamline the EC processes, remove the inconsistencies of the current EIA processes and make it more transparent. The draft itself has also mentioned few court cases in which such recommendations were offered. The sorry state of affairs in implementing the concept of Environmental Impact Assessment was highlighted in the case *Sandeep Mittal v. Union of India*¹⁷ in 2019 by the National Green Tribunal. The court also ordered immediate remedial steps and urged the

¹⁵ Puducherry Environment Protection Association v. Union of India, W. P. No. 11189 of 2017, Mad HC, Oct 13th, 2017.

¹⁶ Transforming our World- The 2030 Agenda of Sustainable Development, <https://sustainabledevelopment.un.org/> last visited on May 15th, 2020).

¹⁷ Original Application No. 837/2018, National Green Tribunal, Delhi, <https://kerala.gov.in/documents/10180/0a7ba8e0-59d3-48ef-9487-4d8aacf953fc>.

Ministry of Environment, Forest and Climate Change (MoEFCC) to augment the EIA process. This view has also been adopted and encouraged further along with necessary procedural advancements in their 2021 judgment with some additional recommendations. However, after looking at some of the proposed suggestions, it seems that this draft has moved away from environment preservation and does not pay attention to the Courts' directions and reprimands.

VI. CONCLUSION

Suggestions for this draft would be to remove such anathema rules. The government had made a feeble attempt of extending the deadline for invitation of objections to this draft. If one wishes to see a true step towards sustainable goals, one must be bold enough to put such objections/critics on record. Fortunately, High courts have also stepped in and given suggestions for this draft to have as much public access as possible, which included Orders given regarding the language of this draft. In *M/s. Lafarge case*¹⁸, the Supreme Court had suggested that there be a national agency to review, grant or assess the Environmental Assessments. It is high time these suggestions be recorded by the government officially. The recent CSIR-NEERI Report¹⁹ may be a ray of hope to the people who have critiqued this draft. Care has to be taken by the government, that it does not create, through policies and regulations, retrospective application to any of the environmental scrutiny/processes, which are currently underway. *Fait accompli* actions must be avoided both by courts and the government. In sustainable development, preservation is the first step and not the subsequent mitigation or repair. That is basically what 'precautionary principle' means in environmental law. It must not be forgotten that what may take years to repair, rebuild, remake may just take months to save. One must understand that without walking the path of sustainable development and adhering to stricter environmental norms, it is difficult to see a happy future.

In conclusion, while the 'Ease of Business' policy of the government may be appreciated, the cost of the same is too high to ignore. The Ministry must understand that it is creating a policy paralysis, which can be very difficult to cure. The concept of sustainable development must not be forgotten when one pursues industrial development, investor friendly attitude and free trade and commerce.

¹⁸ *Supra* Note 12.

¹⁹ Manthan Adhyayan Kendra, Thoughts on the Way Forward - CSIR-NEERI Report regarding the draft EIA Notification 2020, April 9th, 2021.