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EIA 2020: Two Steps Back…

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The draft Environment Impact Notification 2020 has been widely criticised because it is not designed to protect the environment. It will further weaken the 2006 EIA and rather than deter violations, encourage them. The poorly drafted rules must be withdrawn.

The Ministry of Environment, Forest, and Climate Change (MoEFCC) published the draft Environment Impact Assessment (EIA) Notification 2020 in the Official Gazette on 11 April 2020. If brought into force, it will replace the existing EIA Notification 2006. It has met with widespread public opposition. According to some reports, the Environment Ministry has received 17 lakh representations in response, and politicians across party lines have strongly opposed the draft.

That a proposed environmental regulation has led to such public outcry should not come as a great surprise. There has been a spate of industrial disasters recently. We are experiencing an increase in the frequency of extreme weather events. Environmental indicators such as air and water quality continue to deteriorate in vast regions of the country. The resulting increasing morbidity and loss of life, property, and livelihood is a stark reminder that lax environmental regulation comes at a very high cost to the environment and the people.

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It is not just the content but also the context and manner in which the draft notification has been proposed that have made it so contentious. Environmental regulations are being diluted across the board in the country. Ensuring ‘ease of doing business’ has become the primary policy goal. Projects of ‘national and strategic importance’ are being conceived and executed, notwithstanding high ecological and social costs. Environmental violations continue with impunity (Dubash and Ghosh 2019).

Against this backdrop, the environment ministry has put out the draft EIA notification 2020 largely modelled on the current 2006 notification, with little attempt at reform and with further dilution. It has also undertaken the statutory public consultation for this notification during an unprecedented public health crisis, that too in a manner that necessitated the intervention of two high courts.[1]

In this essay, I begin with a brief overview of the environment clearance process under the EIA notification. I then discuss four principal reasons why the 2020 draft is misconceived and should be withdrawn. I contextualize these reasons within the broader regulatory landscape of the 2006 notification. As we await far-reaching regulatory reforms of the kind the country desperately needs, I propose four ways in which the existing regulatory framework can be strengthened to achieve significant environmental and social gains.

The Backdrop

The first EIA notification was issued in January 1994. Prior to this, environmental impact assessment of large developmental projects was an administrative requirement, not one mandated under the law (Kohli and Menon 2005). The 1994 notification was replaced by the 2006 notification that is currently in place. Like the 2020 draft notification, both the 1994 and the 2006 notifications were issued by the central government while exercising its powers under the Environment (Protection) Act 1986 (EP Act) to take all necessary measures to protect the environment. This includes demarcating areas where certain industries and operations are either not permitted or permitted with safeguards. All three notifications follow the same approach— before commencing any work, projects and activities need to first get an approval from the appropriate government agency, the environment ministry, or a specially constituted state-level authority.

The approval — called an ‘environment clearance’ (EC) — is either given or not given based on environmental impact assessment (EIA) studies, opinions elicited through public consultation, and expert scrutiny of all relevant documents and information (Ghosh 2013). The nature, scope and extent of impact assessment, consultation, and scrutiny vary across categories of projects and activities.

Over time, several exceptions have been created. The approval is accompanied with conditions to mitigate the environmental and social impacts of the project and to ameliorate the resulting state of affairs. Compliance with these conditions is therefore critical for the regulatory process to be meaningful.

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Over the years, this approach has largely failed to adequate check environmentally damaging activities. Several projects and activities with environment clearance have had serious adverse environmental and social impacts that were foreseeable and, thus, avoidable. Many others have been either exempted from statutory scrutiny or have illegally avoided such scrutiny (Dharmadhikary and Verma 2019). There is poor monitoring of compliance of clearance conditions, and punitive action is rarely taken in cases of violation (Kohli and Menon 2009). Several underlying reasons for this failure have been identified: poor regulatory design, weak institutional capacity, poorly defined desired environmental outcomes, exclusion of affected persons from the decision-making processes, and extraneous factors influencing decision making (Saldanha et al. 2007; Menon and Kohli 2014). Demands for addressing these concerns and reforming the clearance process have been raised on numerous occasions but met with little success.

Having decided that regulatory reform was in order, the environment ministry could have used the draft notification as an opportunity to strengthen the 2006 notification in ways that would have stemmed the deteriorating environmental conditions in the country. But, instead, the bulk of the draft notification is a reorganized version of the 2006 notification incorporating all the amendments made and clarifications issued over the years. Through these amendments and clarifications, the applicability and rigour of the 2006 notification, already flawed in many ways, has been increasingly curtailed over time. This trend continues in the proposed law. As a result, the draft 2020 notification perpetuates a weak regulatory framework and, as I elaborate below, further dilutes it in some respects.

Why should the draft notification be withdrawn?

Reason 1: It is not designed to protect the environment

The objective of issuing the draft notification does not appear to be environmental protection. According to the preambular text, the central government wants to make the clearance granting process ‘more transparent and expedient’, rationalize and standardize processes, and bring violators ‘under the regulations in the interest of the environment’. There is no reference to improving environmental outcomes or strengthening of assessment and scrutiny processes to reduce environmental impacts.

The draft notification has classified fewer projects as requiring the strictest scrutiny processes. Far more are either exempt from seeking any approval or can be approved with light scrutiny. A class of projects will not have to undertake any environmental impact assessment before applying for a ‘prior environment permission’. This class includes projects like inland waterways and hydroelectric power generation of up to 25MW capacity, which can potentially destroy riverine and hill ecology. Worryingly, projects exempt from seeking approval include activities such as dredging that have devastating environmental impacts. They simply have to submit an application with an Environment Management Plan (EMP). It is unclear how the regulatory agency will assess the adequacy of the EMP with no impact assessment studies to refer to. There is also no independent expert scrutiny of such projects.

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Another glaring omission in the draft 2020 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. The draft could have provided crucial guidance to decision makers on how causes and impacts of climate change should be considered while deciding environment clearance applications. Projects and activities that will increase the vulnerability of ecologically sensitive areas (like the Western Ghats), or will reduce the adaptive capabilities of communities (like permitting removal of mangroves) should either be rejected or permitted only after the strictest scrutiny and with the most stringent conditions. But the draft is largely silent on this aspect. One exception perhaps is the incentivization of renewable energy through exemptions to solar power projects and solar parks from seeking environment clearance. However, this too overlooks the potentially adverse environmental and social impacts of such projects.

For related reasons, it may even be argued that the draft 2020 notification is legally untenable. It is a subordinate legislation issued under the EP Act by the government while purportedly exercising its powers to take measures to protect the environment. But the draft fails to put in place processes that respond to the steadily degrading environmental quality in the country and does not address climate change considerations. Decisions taken under the draft notification are much more likely to harm the environment than protect it. It is therefore not in consonance with the objective and provisions of the EP Act. Its legal validity as a subordinate legislation may be reasonably challenged.

Reason 2: It does not deter violations, but encourages them

To deal with violations, the draft notification proposes a mechanism which does not have a basis in law and is incongruous with the goal of environmental protection. Over the years, numerous projects and activities have illegally commenced work before obtaining environment clearance. The 2006 notification does not include a specific penalty provision for such cases, but the penalty provisions of the EP Act are applicable.

The draft introduces an amnesty scheme in the law that allows the project proponent to seek environment clearance *after* it has commenced project work. The project proponent has to go through all the processes of obtaining a clearance, as applicable. If the clearance is granted, then the project proponent has to deposit with the state pollution control board (SPCB) a bank guarantee of an amount that covers the cost of a remediation plan and a resource augmentation plan. These plans have to be implemented in three years, or the guarantee will be forfeited.

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This mechanism to ‘bring violation projects under the regulations’ is problematic for five reasons. First, the mechanism will most likely not deter violations, but instead encourage project proponents to ignore the law. If they are caught, their project can still be regularized and they are likely to be let off after paying some costs for remediation. In 2013, the National Green Tribunal (NGT) struck down a 2012 government memorandum permitting the environment ministry to grant *ex post facto* clearances. The NGT pertinently observed: “Repetitive condonation of violation of law would only aim at encouraging violators to flout the law repeatedly.”[2]

Second, the Supreme Court has declared that the concept of retrospective clearances is “completely alien to environmental jurisprudence including EIA 1994 and EIA 2006”, and that “an EC will come into force not earlier than the date of its grant.”[3] This means the part of the project that has come up before it has been regularized is illegal and therefore appropriate legal consequences such as demolition should follow.

Third, the mechanism is an upgraded version of a 2017 scheme of the ministry,[4] the validity of which was upheld by the Madras High Court only because it was a one-time measure.[5] That scheme had a cut-off date for filing applications for regularisation, and the Madras High Court subsequently directed another window of thirty days.[6] The 2020 draft notification does not have a cut-off date. Rather, it is an amnesty scheme in perpetuity!

Fourth, the processes outlined to deal with violations are closed-door and non-transparent. The draft does not allow the person who may have brought the violation to the notice of the regulatory authority to be involved subsequently to present evidence. The proposed remediation plan and resource augmentation plan will not be made public and those directly affected by the project violations will not be part of the process.

Fifth, there is no guidance on the consequences if the project proponent does not implement the two plans within three years. Apart from forfeiture of the bank guarantee amount, what other action will be taken against the project proponent who has essentially violated the law all over again?

Reason 3: It does not enhance procedural environmental rights, but encumbers them

The draft notification significantly curbs procedural environmental rights—in particular, the right of the public to participate in decision-making processes and the right to access information. The design and execution of the public consultation component in the 2006 notification is such that it has limited impact on the final decision (Rajamani and Ghosh 2016). The 2020 draft could have strengthened the public’s ability to contribute in multiple ways. But it mostly adopts the faulty processes of the 2006 notification, and in some ways

further curtails the scope of public participation.

The list of projects exempt from the requirement of public consultation has only lengthened over the years. The draft notification adds more items to the list. It will now include resource-intensive projects like building and construction projects, and all projects which are planning for production capacity enhancement of up to 50%. The list continues to include an ambiguously worded entry: 'all projects concerning national defence and security or involving other strategic consideration as determined by the Central Government'. Now, additionally, no information relating to these projects is required to be placed in the public domain. This provision could potentially allow large infrastructure projects to evade impact assessment and scrutiny.

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The public consultation process allows people to peruse project-related documents like the draft EIA report and its summary, raise questions, and make representations. This is often not easy as project documents, apart from being difficult to access, are quite technical and people may need assistance in understanding them before forming an opinion. The draft notification makes this process even harder. The draft EIA report is to be provided only in English and the public will have 20 days, not 30 days as in the 2006 notification, to submit their responses.

Post consultation, the feedback loop remains broken. The public will not know the project proponent's responses. The final EIA Report—prepared after the public hearing—will not be shared with them to verify if their concerns have been adequately dealt with. Although the project proponent is allowed to attend an EAC meeting and provide clarifications, there is no specified process to extend the same opportunity to project-affected persons or other stakeholders.

In a 2013 judgment, the NGT had directed project proponents to not only publicise the fact that they had been granted an environment clearance but also publish the conditions included in the clearance in two local newspapers.[7] This was to ensure that the contents are widely known and easily accessible to the public. The draft notification whittles down this disclosure requirement and the project proponent no longer has to publish the contents of the environment clearance.

Reason 4: It does not improve quality of decision-making processes

The draft notification does not strengthen the quality, rigour, or credibility of the decision-making processes of the 2006 notification. It in fact weakens them in crucial ways. One of the major lacunae in the 2006 notification 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. There is little scope for independent verification of the contents of the EIA report.

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 2006 notification.[8] The need for such an assessment is particularly important for projects proposed in critically polluted industrial and mining areas. The draft notification unfortunately maintains status quo on both these issues.

Appraisal by the ministry-appointed Expert Appraisal Committees (EACs) is the only stage in the process for experts to verify the project proponent's claims and consider concerns raised during the public consultation. Over the years several instances of poor appraisal have come to light, which have affected the final outcome of the process.[9] Yet the 2020 draft notification reduces the time for appraisal to 45 days, from 60 days under the 2006 notification. It also curtails the EAC's discretion and sets a high bar for them to seek additional studies from project proponents.

If not the draft notification, then what?

Given the state of our environment and natural resources, a regulatory overhaul is the need of the hour. The draft notification clearly does not serve that purpose. However, as we wait for the government to put in place an improved regulatory framework, there are at least four ways in which the existing framework may be strengthened.

First, the capacity and capabilities of the environment ministry, its regional offices, and the pollution control boards need to be urgently enhanced. Apart from the 2006 notification, these agencies perform functions under multiple other regulations, and are critically understaffed. In SPCBs, 44% of the sanctioned posts are vacant (Lok Sabha 2020). According to an affidavit of the environment

ministry submitted to the NGT in September 2019, the ministry has 32 persons at its 10 regional offices to undertake monitoring of compliance with environment clearance conditions. With this strength of personnel, the affidavit admits that the ministry can inspect projects granted clearances from 2013 to 2019 only once in four and a half years.[10] Therefore, hiring additional personnel should be of the highest priority. Along with hiring, these agencies also need to build technical expertise to perform their assigned functions. For instance, if the SPCBs are to be more actively involved in monitoring projects and assessing the damage caused by such projects, they should have internal expertise to undertake such an assessment.

Second, the environment ministry has to actively create knowledge and manage data relating to various natural resources and environmental health indicators. It must commission studies from reputed institutions to establish baseline data and to understand the latest technology options, growth trends, costs, and end-of-pipe solutions in different sectors. This will significantly enhance the ministry's capacity to assess and verify project proposals. Access to this kind of information will also be greatly empowering for citizen groups.

> [P]ublic consultation processes need to be made more meaningful, and the ministry has to reverse the trend of exempting more and more projects from public consultation requirements.

Third, there needs to be an independent mechanism to verify claims made by the project proponent. Currently the only substantive quality check is by the EACs, which are not full-time bodies and whose functioning is hampered by many factors. The EACs have to be given more autonomy, discretion, time, and resources to competently and independently scrutinize project proposals. To increase the credibility of the impact assessment process, the environment ministry could consider independently appointing the EIA consultant for every project from an accredited pool, while the project proponent pays the necessary fees to a common account.

Fourth, public consultation processes need to be made more meaningful, and the ministry has to reverse the trend of exempting more and more projects from public consultation requirements. Ministry officials as well as EAC members have to actively engage with affected and interested persons and consider their concerns while making final decisions. All project-related information, including the final EIA report and the project proponent's past regulatory compliance record (Menon and Kohli 2019) should be easily accessible to the public, with the aim of addressing information asymmetry and enabling people to question false or inaccurate claims.

Conclusions

The draft notification 2020 has to be withdrawn. It is a poorly drafted piece of delegated legislation. Indeed, its language is incomprehensible in parts, and it serves no discernable environmental protection goal. A regulatory overhaul is necessary but that requires a proper understanding of how and why the current system has failed, an openness to public debate, significant enhancement in institutional capacity and, most importantly, a clear prioritization of improved environmental outcomes over other, primarily economic, policy goals. This is a tall ask, but we need to start moving towards it.

In the meantime, the government ought to stop undermining the current regulatory framework for reasons that do not align with the larger and critical goal of environmental protection.

(*All errors and omissions are the responsibility of the author.*)

Footnotes:

1 *United Conservation Movement Charitable and Welfare Trust (R) v Union of India* WP 8632/2020, Order of the High Court of Karnataka dated 05.08.2020; *Vikrant Tongad v Union of India* WP 3747/2020, Order of the High Court of Delhi dated 30.06.2020.

2 S.*P. Muthuraman v Union of India* OA 37/2015, Judgment of NGT dated 07.07.2015, para 81.

3 *Common Cause v Union of India* (2017) 9 SCC 499, para 125; *Alembic Pharmaceuticals Ltd. v Rohit Prajapati and Others* (2020) SCC OnLine SC 347, para 27.

4 MoEFCC, Notification, S.O. 804(E) dated 14 March 2017.

5 *Puducherry Environment Protection Association v Union of India* (2017) SCC OnLine Mad 7056, para 5.

6 *Appaswamy Real Estates Limited v Puducherry Environment Protection Association* (2018) SCC OnLine Mad 1283.

7 *Save Mon Region Federation v Union of India and Others* Appeal No. 39/2012, Order of NGT dated 14.03.2013.

8 *Jeet Singh Kanwar and Another v Union of India and Others*, Appeal No. 10/2011 (T), Order of NGT dated 16.04.2013; *Alaknanda Hydropower Co. Ltd. v Anuj Joshi* (2014) 1 SCC 769, para 51.

9 *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.

10 *Sandeep Mittal v Ministry of Environment, Forest and Climate Change and Ors* Application No. 837/2018, Order of NGT dated 22.11.2019.

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