EIA 2020 legitimises environmental damage, undermines democracy say environmentalists to MoEFCC

By Prerna Singh Bindra and Vaishali Rawat

In March 2020, a draft notification for the Environment Impact Assessment, 2020 was issued by the Ministry of Environment, Forests and Climate Change (MoEFCC). This is an important notification, since all new infrastructure projects, including expansion of existing ones, for instance, construction of roads, mining projects, factories, power plants, are required to conduct a mandatory Environment Impact Assessment report. The report assesses how these projects will impact the environment, and is the basis of consideration for the MoEFCC approving or rejecting a project. The notification has been heavily criticised for fundamentally dismantling environmental safeguards to promote ease of doing business. It undermines the right of every citizen to a clean environment and subverts the democratic process.

We have sent a letter to the MoEFCC asking for a withdrawal of the EIA draft notification, and asking instead for a strengthening the existing EIA 2006 notification to safeguard the country's environment, forests, natural ecosystems and wildlife. Our critique highlights the impacts of the draft notification EIA on forests, wildlife, natural ecosystems, affected local communities, and citizens across the country. The letter, drafted by us (Prerna Singh Bindra and Vaishali Rawat), was signed by 110 individuals, researchers, ecologists, conservationists and allied professionals, and co-signees include former members of the National Board for Wildlife, Project Tiger, Forest Advisory committee, National Tiger Conservation Authority, and various State Wildlife Boards, and former government officers. We encourage all interested individuals to refer to this letter, use it as a resource, and send their own comments.

Public comments are invited for the draft notification until 11th August 2020, and can be emailed to the MoEFCC at eia2020-moefcc@gov.in.

The authors would like to acknowledge the work of <u>Goa Foundation</u>, <u>Vindhya Bachao</u>, Kanchi Kohli and Manju Menon of the Center for Policy Research, and various others for their work in critiquing the EIA2020 draft notification. We have drawn on their work for this letter, and they have helped us understand the issue better.

Shri Prakash Javadekar

Union Minister of Environment, Forests and Climate Change Indira Paryavaran Bhawan Jor Bagh

New Delhi

10th July 2020

Subject: Plea to withdraw the Environment Impact Assessment 2020 Draft Notification

Shri Javadekar,

We write to you as concerned citizens regarding the draft notification of the Environment Impact Assessment, 2020 that was circulated by the Ministry of Environment, Forest and Climate Change on 23rd March, 2020, and for which public comments are invited until 11th August, 2020.

The Environment Impact Assessment is an important regulation through which the impacts of various developmental projects, land use, forest diversion, industrial pollution, etc on the environment are studied, and used to make informed choices in developmental decision making.

One important lens we view the EIA 2020 draft notification through is whether it is in conformity with the legislative intent behind its parent legislation, the Environmental Protection Act, 1986. The EIA 2020 draft notification diminishes its scope significantly, and fundamentally changes the EIA process by:

- Greatly reducing the rigour and number of regulatory oversights
- Reclassifying various industries so they are not required to get environmental clearance
- Compromising on public hearings with their scope and duration reduced.
- Normalising environmental violations

Under Section 3, Subsection (1) of the Environment Protection Act 1986, the central government is empowered to take measures "for the purpose of protecting and improving the quality of the environment, and preventing, abating and controlling environmental pollution." The EIA 2020 draft notification thereby is in stark contradiction of these powers vested to the Central government.

The EIA 2020 draft notification also falls woefully short of addressing issues that have plagued the earlier environment impact assessments ("EIA"), for instance, the poor manner in which Public Hearings are conducted, the lack of cumulative Environment Impact Assessments, lack of transparency in the finalisation of the EIA Reports, failure to assess, monitor lack of compliance or to hold violators accountable - to name just a few. The proposed EIA draft notification 2020 will only aggravate such concerns and further exacerbate the rate of ecological degradation in India, which 177 out of 180 countries in 2018 on the world's Environmental Performance Index, slipping 36 places in just a matter of 2 years (2016).

We therefore request the MoEFCC to withdraw, and shelve, the EIA 2020 draft notification, and instead, strengthen the EIA 2006.

Our key concerns with the EIA 2020 draft notification:

1. Legitimising post-facto environmental clearances

The EIA 2020 draft notification directly contradicts the basic precautionary principle of environmental governance. It legitimises *post-facto* clearance, which means that even in cases where a project has come up without environment clearance, the project can continue to run. Thus, the notification proposes to regularise violations that may occur, when instead it needs to take stringent action against the defaulting project proponent and shut down violating projects.

A recent example of the dire consequences of *post-facto* regulation is the gas leak at the LG Polymers factory in Visakhapatnam on 7th May 2020, which killed 12 people, and left several hundreds ill, and ailing. This unit was operating without an Environmental Clearance (EC), and was due to be considered for grant of a *post-facto* EC.

There are many such existing projects running without Environmental Clearances, likely hazardous to both the environment and human health, and potentially ticking time bombs of environmental disasters of the kind seen in Visakhapatnam. Worryingly, prior ECs for mining projects in the construction and installation phase can be valid for up to 50 years as per the new notification, an increase of 20 more years on the period mentioned in the EIA 2006 notification.

Such *post-facto* clearances for infrastructural expansions are known to cause irreversible damage to the ecology in regions which have high biodiversity value and may harbour wildlife populations. The idea that environmental degradation can be compensated monetarily is a flawed concept, as the damage to the quality of water, soil, air; on ecosystems and wildlife, and indeed, human health, is often irreversible.

The fundamental principles of environmental jurisprudence do not recognise the concept of *ex post-facto* clearances. There is precedent from previous court rulings by the Supreme Court, various High Courts, and the National Green Tribunal, where cases of *post-facto* clearance have been considered illegal and condemned. A recent 01.04.2020 decision of the Hon'ble Supreme Court of India in the case of Alembic Pharmaceuticals Ltd. vs. Rohit Prajapati being Civil Appeal No. 1526/2016 ruled that *post-facto* ECs are contrary to environmental jurisprudence. In 2013, *Association for Environmental Protection v State of Kerala*, the Supreme Court held that commencement of projects without obtaining prior EC is a violation of the fundamental right to life guaranteed to the people of the area under Article 21 of the Constitution.

This draft notification would be contrary to both the precautionary principle as well as the need for development that is sustainable and equitable.

2. Exclusion of major industries from the EIA process

The EIA's scope has shrunk vastly with this notification, in direct contradiction to its mandate of safeguarding the environment. One of the most worrying new regulations is regarding the re-classification of industries that are required to undergo a complete scrutiny under the EIA. Overall, the EIA 2020 draft notification reclassified forty types of projects including sand and clay extraction, manufacturing of solar PV, coal and non-coal mineral prospecting, and others, to be exempted from needing prior environmental clearance.

In the EIA 2020 draft notification, the ministry has also altered the definition of capital dredging to keep rivers out of the purview of the new environment clearance process. This will mean that capital dredging and maintenance projects from Inland Waterways, which affect over 100 rivers across India, have been reclassified as B2 projects and thereby will evade scrutiny. This move directly endangers the survival of a host of aquatic wildlife found in river ecosystems, including India's national aquatic animal, the Gangetic River Dolphin, as well as livelihoods of communities dependent on riverine ecosystems for survival.

The construction industry is another such beneficiary, as the new draft requires that only the largest industries be fully scrutinised while the others escape appraisal. The notification mentions that only the largest building and construction projects shall be referred to an Appraisal Committee. This seriously weakens regulatory processes for various other construction projects of smaller scales, reclassified as B2 projects.

The move is alarming, since the construction industry is one of the most polluting industries, and in urban areas it is one of the main contributors to increased air pollution levels. In Delhi (ranked as one of the most polluted cities in the world), 28-30 percent of total air pollution is due to dust emanating from construction sites. Alarmingly high levels of air pollution, as are seen in most major Indian cities, are linked to dire consequences on public health. Additionally, respiratory illnesses are also a co-morbidity factor determining COVID19 mortalities.

At a time of such an existential crisis, India must strengthen environment laws and ensure accountability from polluting industries.

3. Subverting the public hearing process

One key feature of the EIA 2006 notification is that it empowers citizens, especially those directly impacted, to voice their opinions regarding new projects through mandatory

public consultations. This is a hallmark of democratic decision-making, and a crucial step in ensuring accountability from potentially polluting industries.

The EIA 2020 draft notification undermines this process by exempting various types of projects from having to conduct public hearings before beginning construction, including B2 projects. Additionally, expansions up to 50 percent are exempted from public hearing.

Projects concerning national defence or security are also exempt from public hearing. What is worrying here is that the EIA 2020 draft notification fails to define 'strategic project' thus giving the State unbridled power to determine what projects fall under 'strategic' consideration, and thereby out of the purview of environmental impact assessment. Such strategic projects will not be placed in the public domain, thus making room for non-transparency.

Exempting projects from public hearing strips citizens—often vulnerable communities—from having any voice in decisions that will directly impact their health and well-being, and affect their livelihood. A recent example of this was seen in Baghjan, Assam, where a gas-rig operated by Oil India Ltd (OIL) leaked uncontrollably for 12 days before catching fire. The continuous leak of toxic gases like methane, propane and propylene combined with oil and condensate has severely affected agricultural fields of local communities, while also displacing them to temporary refugee camps. The leaking of condensate and oil into the nearby wetlands and forests has caused irreversible damage to these ecosystems and immense hardship to local communities that depend on the Maguri wetlands for fishing and agriculture. Maguri-Motapung wetlands are a globally recognised Important Bird Area, and part of the Dibru-Saikhowa Biosphere Reserve which harbours several endemic and endangered species.

OIL has escaped conducting public hearings before expanding for drilling in this landscape, and was given an EC, regardless.

Even the Hon'ble Supreme Court has repeatedly upheld the importance of public hearings. One prominent example is the case of *Lafarge Umiam Mining Private Limited v. Union of India*, where it held that public consultation is a mandatory requirement of the environmental clearance process in providing an effective forum for any person aggrieved by any aspect of any project to register and seek redressal of their grievances.

Public consultations are critical for participatory development. Removing them takes away from local communities their democratic right and the only opportunity to voice their concerns on projects and other developments that directly impact their lives.

4. Citizens cannot take cognizance of violations

A troubling aspect of the EIA 2020 draft notification is that the power to officially report environmental violations in projects under the EIA is with the project developers and government authorities, leaving no scope for directly affected communities to report violations. This effectively strips away the right of citizens, especially local communities and other stakeholders from taking recourse against violations .

5. Impact on wildlife and habitats, including tiger landscapes

Even though the projects falling under the purview of the EIA (and otherwise) have profound impacts on wildlife and their habitats, the EIA process has fallen woefully short of addressing these concerns, a failing that continues in the draft notification. This failure to factor in wildlife considerations is one we can ill-afford, given the unprecedented extinction rates and collapse of nature.

- I. Historically, Expert Appraisal Committees have not had the domain expertise to deal with impacts on wildlife, and thus, this aspect continues to be neglected in the EIA process. Even for projects fringing Protected Areas, in forests, and other natural, high biodiversity landscapes, there is no appraisal/assessment from the point of view of wildlife conservation.
- II. One critical area where such oversight is needed is for railway projects. Railway projects have enormous impacts on wildlife and natural landscapes; frequent wildlife mortality is noted due to collision with trains, including animals like tigers, elephants, leopards, and the linear infrastructure associated with railways fragments natural landscapes. For instance, a total of 65 elephants died in railway accidents between 2016 and June 2019, according to figures tabled by the Railways Ministry in Lok Sabha (July 2019). The lacunae needs to be addressed to strengthen the EIA process.
- III. The list of projects reclassified as 'B2', and thus exempted from a full appraisal and public hearing, includes expansion or widening of existing National Highways, State Highways, expressways, multi-modal corridors and some Ring Roads, and all aerial-ropeway projects located in notified ecologically sensitive areas. In many cases, the land for proposed projects involve ecologically fragile regions, forests, wetlands, grasslands, floodplains, and deserts. These are fragile ecosystems, where construction

can cause irreversible damage to wildlife habitat and ecosystems functioning.

- IV. The draft notification proposes to regularise any and all violations that may occur, instead of taking stringent action against the project proponent and shutting down the project that is in violation. No exception has been spelt out for violations inside Protected Areas or their Eco Sensitive Zones.
- V. The EIA 2020 draft notification includes only those areas as notified by the MoEFCC as Eco-sensitive zones and areas. This excludes reserve forests, and other ecologically fragile areas such as high altitude ecosystems, wetlands, deserts, floodplains, peatlands, mangroves, habitats of sensitive flora and fauna and watershed areas. This eases clearances for projects to be undertaken in these ecologically significant areas, endangering wildlife.
- VI. The EIA 2020 draft notification permits activities such as "leveling of the land without any tree felling" before EC is granted. This can irreversibly damage threatened and important ecosystems like grasslands, wetlands, mangroves and deserts. These habitats also provide the last strongholds for endangered and Schedule-I species like the Great Indian Bustard, Fishing Cat, Indian wolf, Lesser Florican, Otters and a host of migrant water fowl, and other forms of life.
- VII. The EIA 2020 draft notification does not clarify whether such activities that do not qualify as 'construction work' can be carried out in projects proposed inside Protected Areas. This is a loophole that may be exploited by project proponents to start construction activities within Protected Areas before grant of EC, causing irreversible damage to some of the country's best protected natural habitats and wildlife. The draft also does not explicitly restrict construction inside protected areas without a wildlife clearance, leaving room for *fait accompli* situations where project construction once started can continue, even if it is in violation of existing laws.

VIII. India is home to an astonishing diversity of wildlife, including wide-ranging species like tigers, elephants, leopards, bears etc., whose ranges extend well beyond protected areas, and often, into human-dominated landscapes. For instance, a third of India's wild elephant population is outside protected areas, and 35-40 percent of India's tigers are found outside protected areas, and are especially vulnerable. Other endangered species like wolves, leopards, Lesser Floricans, Great Indian Bustards, are also found outside Protected Areas. Any environmental impact assessment must acknowledge that wildlife is found in a diversity of landscapes, and holistically assess how development projects may potentially impact these populations. Exempting certain projects from the requirement of EIA will imperil India's rare, endangered wildlife. The EIA 2020 draft notification, in its current form, will potentially cause irreversible damage to habitats that sustain these populations outside Protected Areas.

We are also deeply concerned that inviting public comments on the EIA 2020 Draft Notification during COVID19 lockdown, at a time when the country is grappling with a pandemic and humanitarian crisis, is insensitive. This is especially since vulnerable communities who are directly affected by environmental issues and polluting projects, and lack the technology and access will find themselves unable to take part in this exercise. This move lacks transparency and flouts principles of participatory democracy.

The climate crisis will only worsen our challenges. A Government of India report by the Ministry of Earth Sciences released in June 2020, titled 'Assessment of Climate Change over the Indian Region' warns: "the rapid changes in India's climate [projected by climate models] will place increasing stress on the country's natural ecosystems, agricultural output, and freshwater resources, while also causing escalating damage to infrastructure. These portend serious consequences for the country's biodiversity, food, water and energy security, and public health."

At such a time in history, the need for regulations that equip us to deal with these challenges cannot be overstated. We cannot be exacerbating environmental degradation; the cost of a poor environment, vanishing biodiversity and the collapse of natural infrastructure will be suffered by generations to come.

Article 51 A (g) of the Indian Constitution dictates that it shall be the fundamental duty of every citizen "to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures." We are surprised that the environment ministry needs to be reminded that an EIA law should imbibe these values.

In light of the above concerns, we request the MoEFCC to withdraw and shelve the EIA 2020 Draft Notification. The need of the hour is to strengthen the EIA 2006 notification that must ensure that it upholds the principles of environmental jurisprudence that include the precautionary principle, polluter pays principle and access to justice and administrative transparency.

We request you to kindly acknowledge the receipt of this letter.

Yours sincerely,

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