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STREAMLINING AND STRENGTHENING THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

SUBMISSIONS TO THE HIGH-LEVEL COMMITTEE CONSTITUTED TO REVIEW VARIOUS ENVIRONMENT ACTS

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RECOMMENDATIONS

This Note seeks to respond to the call for public comments issued by the High-Level Committee (the 'HLC') constituted by the Ministry of Environment and Forests (the 'MoEF') to review the following environment acts- the Environment (Protection) Act, 1986, the Forest (Conservation) Act, 1980, the Wildlife (Protection) Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, and the Indian Forest Act, 1927. The terms of reference of the HLC are very broad, and it is beyond the scope of this Note to undertake a detailed analysis of the working of all the abovementioned statutes. Instead, **this Note makes a focused set of recommendations on reforming the Environmental Impact Assessment (the 'EIA') process in India**. The EIA process is primarily governed by the EIA Notification issued on 14 September, 2006, under sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986. This Notification is supplemented by various circulars, guidelines, and manuals issued by the MoEF from time to time. Orders passed by the National Green Tribunal (the 'NGT'), various High Courts, and the Supreme Court (the 'SC') complete the regime governing the EIA process. It is this body of law to which **this Note seeks to make recommendations in three, distinct ways**.

Recommendation I

The various amendments, circulars, guidelines and other office memoranda relating to the EIA process ought to be consolidated and re-enacted in a stand-alone set of rules.

The state of the law on the EIA process in India is highly fragmented. Over the last twenty years, the two principal EIA notifications (1994 and 2006) have been amended more than twenty times. **The complexity created by such frequent amendment is compounded by the lack of accessibility of information to the most current version of the law** on the MoEF website. For example, it is not possibile to access a comprehensive set of all the amendments to the EIA notification in one, single section of the MoEF website. Further, amendments to the notification dating as far back as January 2012 have still not been incorporated in the latest version of the 2006 notifcation on the MoEF website. According to an amendment dated 25th January, 2012, in cases where public consultation is not required as a part of the EIA process, the appraisal of the project must be conducted on the basis of an EIA report; however, the latest version of the notification on the MoEF website still states that the appraisal ought to be conducted on the basis of a pre-feasibility report. This is a crucial provision and the circulation of two, conflicting versions of it is seriously detrimental to the accessibility of environmental information.

To compound this lack of clarity, **the EIA notification is regularly supplemented through circulars, guidelines and exemptions issued as office memoranda by the MoEF**, clarifying

or changing some aspect of the EIA process. **These memoranda do not officially amend the EIA notification, but often introduce some substantive change to the EIA process that is tantamount to an amendment**. For example, a recent memorandum was issued, in response to representations from industry, preventing expert appraisal committees from seeking additional terms of reference from project proponents after a certain stage of the EIA process. This is an important change and ideally ought to have been incorporated in the principal text of the EIA notification under Point 7 ('Stages in the Prior Environmental Clearance Process for New Projects). Similar memoranda have been issued in the form of 'guidelines', relaxing requirements in the conduct of the EIA process for certain kinds of projects. Thus, there is **inconsistency in the methods used to make changes to the EIA process**-similar kinds of changes are sometimes brought about through amendments, and sometimes through circulars and guidelines. This **creates uncertainty about the status of the law, as well as the binding nature of the different kinds of instruments used to bring about changes in the EIA process**.

This **lack of clarity and certainty** is not merely a problem of convenience. It is **symptomatic of a general state of ambiguity about the scope, content and legal force of the various instruments that make up the body of EIA law**. This has a **damaging effect on the rule of law**, and is **contrary to international norms on the link between access to environmental information and human rights** (note the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters).

The frequent, piecemeal changes to the EIA notification also reflect the ease with which it can be amended, **which is at least partially a function of its legal status as a notification.** Frequent amendment increases uncertainty and reduces transparency in Government decision-making. Changes in other fields of environmental law that are governed by rules and regulations, rather than notifications (examples include noise pollution, hazardous wastes, municipal solid wastes) are not made nearly as frequently. **Moreover, amendments to the EIA notification are increasingly being made after dispensing with the requirement of obtaining public comments as required by Rule 5(3) of the Environment (Protection) Rules, 1986.**

To address the problems highlighted above, it is recommended that **the various amendments, circulars and guidelines relating to the EIA notification be consolidated and re-enacted in a stand-alone set of rules.**

Recommendation II

The new EIA rules recommended in Point I above should provide a principled basis on which projects are required to obtain environmental clearance, as well as a requirement that expert appraisal committees and impact assessment authorities provide an explanation of the manner in which environmental and developmental concerns have been balanced while making their decision.

Projects or activities that require environmental clearance under the existing law in India are determined by their inclusion or exclusion from Category A or Category B of the Schedule to the EIA notification. This Schedule sets out a list of different kinds of projects, often with reference to their area or production capacity. **No other criteria are prescribed in any other part of the notification which explain the basis on which projects are included or excluded from the requirement of prior environmental clearance**. Point 4 of the notification, which deals with categorisation of projects and activities, gives some hint of the kinds of projects that are to be included by dividing them into two categories 'based on the spatial extent of potential impacts and potential impacts on human health and natural and man-made resources.' However, **if a particular project or activity is not specifically mentioned in the Schedule to the EIA notification, there is no manner in which it can be required to be submitted to the EIA process unless the Schedule is specifically amended to include it**.

Laws and regulations governing the EIA process in other jurisdictions like the United States of America (USA) and the European Union (EU) c**ontain a clear statement setting out the objectives of the EIA process**. It is on the basis of this statement that decisions are made about the necessity of including or excluding particular projects or activities from the EIA process. For example, the National Environmental Policy Act (NEPA) in the USA contains a Congressional declaration of purpose, as well as a subchapter on the policies and goals of the legislation. **All projects and activities 'significantly affecting the quality of the human environment' are required to undergo an EIA process. This inclusion of a guiding principle in the statute has furnished a standard on the basis of which the decision of the government to include or exclude a particular project from the EIA process has been reviewed**. Such a review would be difficult to undertake in the Indian context, in the absence of a clear articulation in the governing legislation of the goals of the EIA process. Even Form-I in Appendix I of the EIA notification only sets out indicators on the basis of which expert appraisal committees may determine whether or not a project requires an EIA report. There are no corresponding indicators that are used to determine whether or not a project requires environmental clearance in the first place.

Although the category of projects in the Schedule under the current EIA notification is more exhaustive than the 1994 notification, **projects are stil defined by reference to size and**

production capacity, rather than by a more principled reference to their impact on the environment. For example, the mere fact that a project does not meet the criteria set out in the Schedule does not mean that it is unlikely to have a significant effect on the environment. Thus, it might be located near an ecologically sensitive area or near a wildlife park or national sanctuary. Such a project might also have an adverse impact in cumulation with other projects that do not meet the threshold criteria, as the ecological damage caused by small mines in India demonstrates. Under the current notification, if a project is not included in either one of the categories, it will be exempt from environmental clearance even if it is located near an environmentally fragile area. **The absence of a general principle guiding the inclusion or exclusion of projects frequently allows the Government to amend the Schedule to exempt certain categories of projects from requiring prior environment clearance.** This also **increases the chances of regulatory capture** by certain powerfully organised interest groups within Government.

Even the EU EIA Directive 2011/92/EU, which contains a list of categories of projects similar to the Indian EIA notification, additionally sets out a clear statement of applicability of the EIA process to all projects that are likely to have 'significant effects on the environment.' The **EU Directive also sets out specific criteria** which are intended to guide Member States on the inclusion or exclusion of projects from the EIA directive- these include **cumulation with other projects, as well as the intensity, complexity and reveresibility of the impact.**

Thus, there are **two advantages of including a guiding principle** to determine which projects ought to be included or excluded from an EIA process- one, it **allows the Government flexibility in determining the applicability of the EIA process** without requiring repeated amendment of the parent legislative instrument; secondly, it **furnishes a clear standard on the basis of which courts may review decisions to include or exclude projects** from the ambit of the EIA process. A new set of rules on the EIA ought, therefore, to combine the existing category of projects with a statement requiring prior environment clearance for any project that is 'likely to have a significant effect/impact on the environment.'

The **inclusion of such a principle should also guide expert appraisal committees and impact assessment authorities in making their recommendations and decisions** on whether or not projects ought to be granted environment clearance. Expert appraisal committees in India have been criticised for a lack of deliberation in their meetings and for furnishing inadequate reasons for their decisions. The **new EIA rules ought to require them to explain their grant or refusal of environmental clearance with specific reference to: (i) whether the project is likely to have a significant effect/impact on the environment and (ii) if yes, whether the benefits of the project outweigh the adverse environmental impact, and why**.

This will introduce **transparency and accountability in the EIA process**, besides **furnishing an appropriately principled standard of review** for the National Green Tribunal and higher courts.

Recommendation III

The new EIA rules ought to require major Government plans and programmes that are likely to have a significant effect on the environment to undergo a limited form of the EIA process. Although the implementation of such plans and programmes ought not to be contingent upon approval by the MoEF or other impact assessment authority, the appraisal by independent expert committees of the environmental effects of such plans and programmes ought to be conducted and made public.

The current EIA notification is restricted to projects and activities, including those in the private as well as the public sector. However, the original impetus for such projects is often provided by a Government policy. For example, industrial siting policies determine which clusters in which particular categories of industries ought to be promoted, while the National Mineral Policy sets out criteria for sustainable extractive practices that ultimately guide the measures adopted by mining industries while carrying out their operations. **If such policies themselves do not represent an appropriate balancing of environmental concerns and development interests, this will have ripple effects on the downstream environmental clearance process and compromise the efficacy of the EIA process.**

Moreover, the Government is **increasingly taking up large-scale projects like the mission to clean up the Ganga and a project to inter-link rivers. Submitting such plans to a holistic EIA process is likely to be more efficient than skipping straight to piecemeal EIA processes for individual projects that will form a part of the larger mission**. Thus, the **submission of plans and policies to an EIA process is a good application of the precautionary principle**- shortcomings in policies can be suitably modified before they result in actual harm to the environment in the form of projects or activities that are a manifestation os such policies. This measure wil also **encourage consultation between different ministries and departments within government and internalise environmental concerns in everyday government decision-making**. Particular plans and policies that are likely to benefit from such EIA review are those in the sectors of energy, water and agriculture.

The review of Government policies and plans is a part of the EIA process in other jurisdictions as well. In fact, the pioneering US National Environmental Policy Act was enacted primarily to require federal departments to factor in environmental concerns in their routine functioning. Similarly, the EU has a Strategic Environmental Assessment Directive (Directive 2001/42/EC) which requires the mandatory assessment of plans and

programmes in a variety of sectors, as well as of any plans that set the framework for projects that are otherwise required to undergo an EIA process.

A **new set of rules governing the EIA process in India also ought to include a similar requirement, requiring major Government policies likely to have a signifcant effect on the environment to undergo an EIA process**. Some of the salient features of such a process ought to include: (i) appraisal by a **mix of independent environment experts and representatives of government departments/ministries** with a particular stake in the policy under review (ii) **recommendation of modifications or reasonable alternatives** to the ministry promoting such policy (iii) **recommendations of the appraisal committee to be made public** and (iv) concerned ministry, while implementing the policy, **ought to explain the manner in which it has taken the recommendations of the appraisal committee into account** (v) **implementation of any policy not to be made contingent on approval** by any assessment authority, merely to require it to undergo an EIA process.

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