Submissions on the Draft Environment Impact Assessment Notification 2020

August 2020

V | D H | Centre for Legal Policy

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Any errors remain with the authors.

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I. Context and Approach

On 11th April, 2020, the Ministry of Environment, Forest and Climate Change (the 'MoEF&CC') published the Draft Environmental Impact Assessment ('EIA') Notification, 2020 in the Official Gazette, inviting public comments in the form of objections or suggestions. These submissions are a response to this call.

A. Applying the Environmental Rule of Law to the Draft EIA Notification

The EIA Notification was initially notified in 1994 with the objective of allowing developmental activities for the country while maintaining an acceptable quality of environment and reserves of natural resources to cater for future generations. It has been 26 years since the notification was introduced under the Environment Protection Act 1986 as delegated legislation. The 1994 notification was replaced by a fresh notification in 2006 and the current draft seeks to replace the 2006 notification.

Over the years, the EIA process has become firmly entrenched in India's environmental governance system. The original notification has been supplemented by various circulars, guidelines, and manuals issued by the MoEF&CC 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.

As the MoEF&CC seeks to overhaul the entire system of EIA in the country by means of a new notification, technical inputs on improving the draft EIA notification are being received from all quarters. We seek to supplement these technical inputs by analysing the *quality* of the delegated legislation. Since there is no formal mechanism In India for conducting this type of assessment, we believe that the concept of the environmental rule of law can provide a useful theoretical framework to assess the notification.

According to the United Nations Environment Programme's first global report in 2017:
'[e]nvironmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet.

According to this report, there are seven core elements which make up the environmental rule of law. Together, they represent the manner in which the environmental system of governance should function across multiple levels of institutions, sectors and actors. The system must:

- Be fair in its application, unambiguous in its understanding and implementable in a country like India.
- Allow easy access to information and justice and facilitate public participation wherever possible.
- Ensure accountability and integrity of all concerned institutions and decision makers
- Set clear and coordinated mandates and roles, across and within institutions.

- Create accessible, fair, impartial, timely and responsive dispute resolution mechanisms
- Recognize mutually reinforcing relationship between rights and the environmental rule of law
- Establish specific criteria for the interpretation of environmental law

We have assessed the EIA Notification against these seven, core elements, and have identified the following ways in which it falls short of the ideal of the environmental rule of law:

S. no.	Core Element of Environmental Rule of Law	Gap in EIA Notification
1	Fair, clear and implementable laws	There is no clear statement setting out the objectives of the Notification on the basis of which decisions are made about the necessity of including or excluding particular projects or activities from the EIA process. The 'Definitions' section contains the following ambiguities: • Sometimes, modernization can also include expansion. This is not clear from the definition of both terms. • 'Project' is vaguely defined, includes only the main project site and completely ignores the impact of connected and sequentially dependent components such as transmission lines, tunnels, pipelines, roads, rail lines etc. • 'Study area' is only upto a uniform radius of 5 and 10 km from the project boundary, which fixes a standard impact area without taking into account unique regional, scientific and technical considerations. Different categories of projects will have different spatial, temporal and cumulative impacts and this definition ignores that aspect. • The distinction between 'non-compliance' and 'violation' is confusing and trivialises a failure to comply with the conditions of the environmental clearance. • The basis on which it will be determined whether a project requires Prior Environment Clearance or Prior Environment Permission is unclear. Provision of only Environment Management Plan ('EMP') for B2 projects without an EIA is unfair since an EMP cannot be prepared without knowing the impact. Moreover, Prior Environment Permission is a diluted form of Environment Clearance which can cause important environmental aspects to be missed. Pollution load Certificates from State Pollution Control Boards or Union Territories Pollution Control Committees (the 'PCC') under Air Act and Water Act cannot replace the more holistic requirements of the EIA.

		Providing an option of post facto clearance for violations legitimises violations.
2	Access to justice, information and public participation	Removal of public consultation for expansion or modernization projects resulting in less than 50% increase in capacity is arbitrary. The exemption from public consultations for notified estates, building/ construction projects, townships, area developments, flyovers, elevated roads, bridges, linear projects in border areas 100 kms from Line of Actual Control unfairly impacts affected persons. Allowing a regulatory authority to decide on the feasibility and requirement of public hearing gives room for arbitrariness. Adjoining districts will be left out of public consultations in the case of pipeline projects passing through national parks or wildlife sanctuaries or coral reefs or ecologically sensitive areas, thereby ignoring the impact of a project in a particular region/ geography. The decision to keep EC documents pertaining to national defence, security and strategic considerations from being published in the public domain is unfair as it disallows even project affected persons from knowing information that will be relevant to them. The penalties imposed for violations and non compliance for EC conditions are not adequate. The non availability of options to cancel or suspend such projects is a glaring gap.
3	Accountability and integrity of all concerned institutions and decision makers	The requirement to submit yearly compliance reports in contrast with half-yearly compliance reports under the previous notification affects accountability. This relaxation is unjustified in light of the past record of non-compliance regarding the submission of such reports. A study conducted by the Vidhi Centre for Legal Policy, 'Environmental Clearances and Monitoring in India: Report Card for the Ministry of Environment, Forest and Climate Change' demonstrated that iin 6 out of 10 Regional Offices (Bangalore, Lucknow, Bhopal, Nagpur, Chandigarh and Shillong), less than 5% of the self-compliance reports were uploaded. Penalties for non-submission of self-compliance reports are negligible.

4	Clear and coordinated mandates and roles, across and within institutions	The qualifications of members of the Expert Appraisal Committee (the 'EAC'), State Environment Impact Assessment Authority (the 'SEIAA'), and State Expert Appraisal Committee (the 'SEAC') members are uniform. If the composition of these authorities is identical, it is unclear what the basis is for creating a hierarchy *inter se*. The Technical Expert Committee ('TEC') that is supposed to provide inputs regarding the categorization or re-categorization of projects. However, its powers and authorities seem unclear given that there is no clarity regarding which body will have the final say in determining the categorisation of projects. It is not clear if 'competent authority' is the same as 'regulatory authorities'. There is no clear exhaustive list of authorities or officials who have the power to take action under this notification.
5	Accessible, fair, impartial, timely and responsive dispute resolution mechanisms	No citizen, environmentalist or project affected persons can file complaints for violations as well as non-compliance, negating the spirit in which environmental vigilance and litigation takes place in India. It also goes against Supreme Court and NGT decisions that have recognised the standing of environmental organisations and public-spirited citizens to bring cases on behalf of affected persons.
6	Recognition of mutually reinforcing relationship between rights and the environmental rule of law	The Notification does not lay down guiding principles to govern decision-making that involves competing rights and interests, as is inevitable in the context of EIA. For instance, it does not provide a guide to decision-making on resolving conflicts like: • Right to livelihoods v. right to the environment • National security v. Environment conservation • National security v. Right to information
7	Clear criteria for interpretation of environmental law	The Notification does not provide information on the eligibility of members of the TEC. Scoping is not mandatory for expansion/modernization activities and the provision in question vests too much discretion in the hands of authorities. Projects are still defined by reference to size and production capacity, rather than by a more principled reference to their impact on the environment. The exemption of a large range of activities within 'notified industrial estates' from the EIA process is arbitrary.

		Some of the projects under category B1 (located outside the notified industrial estate) are conditionally treated as category B2 if they are located within the notified industrial estate. A prerequisite condition for categorizing these category B1 industrial units (items 16, 18 and 25 of the schedule) as Category B2 is that the unit is located within a 'notified industrial estate'. It is not specified whether the industrial estate itself where these projects will be located should be in a category A or B1.

II. Draft EIA Notification not mindful of international environmental obligations

The Draft EIA Notification contains provisions which go against various environmental principles. Obligations set out in the Rio Declaration of 1992 regarding the precautionary principle and the 'polluter pays' principle have been subverted in this Notification. The proposed safeguards of penalties and compensation are inadequate to counter the irreversible ecological destruction. The proposed Notification also violates the principle of Non-regression which requires that *"norms which have already been adopted by states should not be revised, if this implies going backward on the subject of standards of protection"*. This principle was endorsed by the NGT decision in *SpenBio v. Union of India* of 2018 that quashed a Central Government notification which had diluted the requirements for environmental clearances for construction activities.

Access to environmental information by the public is recognized in several international conventions such as the Stockholm Declaration, 1972, Rio Declaration, 1992, Convention on Biological Diversity (CBD), 1992, United Nations Framework Convention on Climate Change (UNFCCC), 1992, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 1998, African Union's Declaration of Principles on Freedom of Expression in Africa, 2002, American Convention on Human Rights (ACHR), 1969, Arab Charter on Human Rights, 2004, Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters (Escazú Agreement), 2018. While the trend in international environmental law appears to be towards ever-increasing access to information and public participation in environmental matters, the Draft Notification appears to be going the opposite way.

III. Addressing Administrative Hurdles within the EIA Process

Proper implementation of the Draft EIA notification would require dependence on a large network of implementing agencies spread across central, state and local levels. These agencies require adequate expertise, manpower and funding to ensure a smooth implementation. According to the CAG report on 'Environmental Clearances and Post Clearance Monitoring' from 2017, these administrative requirements have not been met adequately. For instance, only 15 scientists were available for monitoring of EC conditions against the sanctioned strength of 41. Regional Offices have not been delegated the powers to take action against the defaulting project proponents and they have had to report non-compliance with EC conditions directly to the Ministry. Further, clear cut responsibilities have not been assigned to SPCB/PCC to undertake post EC monitoring. 24 SPCBs/PCCs were also found not to have sufficient infrastructure and manpower for monitoring despite having sufficient funds. Without addressing the issues of manpower and funding for implementing agencies, the implementation of the Draft Notification is unlikely to be successful.

IV. Need for a Forward Looking Law

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. Previous submissions made by the Vidhi Centre for Legal Policy on the EIA Process, 'Submission to the High-Level Committee constituted by the Environment Ministry on strengthening the existing Environmental Impact Assessment (EIA) process' in 2014, argue that the draft EIA notification is an executive instrument posing as a delegated legislation. Not only does this create uncertainty in the status of the law but also goes against the tenets of the environmental rule of law and is contrary to the international environmental principles mentioned above. To address this problem, legislators should look into the possibility of framing a standalone statute on EIA.

While developing such a statute, parameters such as impact on stakeholder groups and citizenry; costs of implementation; administrative ease and inter-departmental coordination; legal considerations such as constitutional and administrative obligations; time frame for implementation and effects; and potential risks must be kept in mind. Certain aspects which should be included to make the law forward looking, are as follows:

- There must be a **general principle or preamble guiding the EIA process** in India which must be provided within the legal instrument so as to help make decisions about competing interests. This would help the implementing agencies mentioned under the law in decision making as well as assist the NGT and higher courts with an appropriately principled standard of review.

- **Mitigation Hierarchy:** The EIA process must follow the basic mitigation hierarchy in all decision making steps. ie. Avoid, Minimise, Restore, Offset.

- **Pre-Appraisal Peer review of Final EIA Report:** Expert Committees meet once a month and consider a large number of projects during their meetings. This does not give them sufficient time to go into details of the EIA reports and point out discrepancies. **Box ticking approach** by concerned authorities should end. We recommend an independent peer-review of EIA reports by subject experts to be placed alongside the EIA report. This will improve the quality of the EIA reports as well as facilitate informed decision-making during appraisal.

- **Post Appraisal Objections:** Between the EAC recommendation and final decision of the SEIAA/MoEFCC, there should be a 30 day window for people to send objections based on the SEAC/EAC minutes.

- **Follow Up and Monitoring of EIA results:** EIA is entirely based on predictions and modelling exercise, which are subject to vary in the actual impacts realized on the ground. Thus a follow-up should be mandated to identify and mitigate new environmental problems which were not foreseen in the pre-project stage. This can be complemented with periodic EIAs to prescribe additional conditions to the Environmental Clearance. The active engagement of stakeholders in follow-up processes should be encouraged, with genuine opportunities for involvement.

- **Project Specific Grievance Redressal System:** There should be a dedicated grievance redressal mechanism for each project, at least in the case of category A projects due to their scale of impact spatially as well as temporally. Such grievance systems should be easily accessible and function transparently in a time bound manner.

- **Early Public Participation:** Public consultation should not be restricted just to the 'Public Hearing' stage after the EIA. Public participation should be encouraged from the strategic to operational level to maximise the benefit of local knowledge in decision making and the impact assessment studies. For the public hearing process, it is often seen that the affected people do not have technical and legal capacity to understand the EIA reports or even the EIA summary. Sometimes, people do not have prior experience of how to respond in an environmental public hearing. Thus, it is imperative that initiatives for capacity building, facilitation and assistance should be made part of areas where people are illiterate or new to public hearings. There should be adequate resources and time given for people to understand the impacts fully and effectively raise concerns.

- **Health Impact Assessment:** Presently, most of the Terms of Reference (the 'ToRs') are limited to occupational health and baseline data of health. No impact assessment is done for predicted impacts and the management plan. We recommend including Health Impact Assessment as part of EIA, which must include issues like health inequalities, impacts on public health (direct & indirect), effects on vulnerable groups, burden on health sector services etc. for an EIA report to be comprehensive.

- **Strategic Environmental Impact Assessment:** Strategic Environmental Assessment (SIA) is 'plan-level impact assessment' meant to ensure that the environmental consequences of a proposed policy, plan or programme are appropriately addressed at earlier stages or higher tiers of planning and decision-making than would take place for a project through EIA. The present EIA law provides very limited scope to undertake SIA, except for projects including industrial estates and townships. However, it is highly recommended that any urban/rural masterplan or policies which include change of land use and land cover must undergo a basic SIA. This will be beneficial in predicting cumulative impacts at a much earlier stage.

- **Biodiversity Inclusive Impact Assessment:** Ideally, biodiversity-inclusive EIA, which is promoted by the Convention on Biological Diversity, should use biodiversity information to determine the biological or ecological sensitivity of a site; and generate new biodiversity records about the site. To make meaningful assessments, this information must be accessible in a readily usable form using standardized protocols. The Indian government must develop a biodiversity data sharing portal similar to *The Global Biodiversity Information Facility*. Establishing such a system will be helpful in understanding the cumulative impact on biodiversity due to various projects as well as help other project proponents to use readily available information in preparing the EIA report for future projects. This will also be helpful in identifying vulnerable species groups and preparing management plans for their conservation.

- **Biodiversity offsetting:** Loss of biodiversity is not well accounted for in the present EIA process, especially areas which are not part of established 'Protected Areas' under the Wildlife (Protection) Act, 1972. Different projects have different impacts on different species and their ecosystem requirements which are ignored in present day EIA reports. 'Biodiversity Offsetting' is an internationally accepted mechanism to address loss of biodiversity while proposing any industrial or developmental projects. The 'No Net

Loss' and 'Net gain' approaches for biodiversity use targeted and measurable environmental goals that allow governments and companies to take into account biodiversity when engaging in any type of project. These goals can only be achieved systematically through the application of the mitigation hierarchy, which is a decision-making framework involving a sequence of steps starting with the avoidance of impacts, followed by the minimization of inevitable impacts, on-site restoration and finally, where feasible and necessary, biodiversity offsets. IUCN's Policy on Biodiversity Offsets, adopted by the Members' Assembly of the World Conservation Congress, which took place from 1-10 September 2016 in Hawaii, provides a framework to guide the design, implementation and governance of biodiversity offset schemes and projects.

- **Climate Change Impact Assessment:** All EIA reports must include impact on global climate change, increase or decrease in GHG emissions, effect of the project on areas already affected by climate change and plans to mitigate the same. It is also observed that Climate Change has negatively affected the feasibility of certain projects while some may worsen the impact of climate change related events. Such impacts hardly find a mention in the EIA reports. Given India's commitments under the United Nations Framework on Climate Change Convention, there must be protocols in place to assess environmental and social consequences of climate change in proposed project areas.

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