

COMMENTS ON THE PROPOSED AMENDMENTS TO FOREST CONSERVATION ACT, 1980

Submission to the Ministry of Environment, Forest & Climate Change



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1. Executive Summary

The Ministry of Environment, Forest & Climate Change (“MoEFCC”) has released a consultation paper proposing to introduce amendments to the Forest Conservation Act, 1980 (“FCA”). This submission seeks to address positive changes as well as shortcomings in the consultation paper, and make recommendations for consideration by the MOEFCC.

Appreciable steps under the intended amendments include protections for pristine forests, introduction of penal provisions for violation of FCA, and the exclusion of afforestation on non-forest lands after 12.12.1996 from the purview of the Act.

However, the consultation paper and proposed amendments fall short on a number of counts. Most importantly, the paper is premised on an incorrect interpretation of *T.N. Godavarman Thirumulpad v. Union of India*. It has been settled by the Supreme Court, High Court and the National Green Tribunal that any plantation or forest-like land not notified or recorded as forests in government records will not attract provisions of Section 2 of the FCA, and yet, the consultation paper asserts that the scope of the applicability of FCA extends to all areas which conform to the ‘dictionary’ meaning of ‘forest’.

Some of the proposed exemptions digress from the National Forest Policy, 1988 and the constitutional mandate of the State to preserve and protect forest and wildlife. It is proposed by the MoEFCC to provide exemptions from prior government approval (under FCA) for lands acquired before 1980, when the FCA first came into existence, noting that its inclusion under the Act has caused resentment in public sector bodies. We believe that this will significantly dilute the Godavarman decision as it will exclude large amounts of land that may have otherwise been deemed or notified as forests. When the government notifies or records lands as forests, it is cognizant of the land use and ownership, and great care is exercised during such notification. Hence, it would be inconsistent to exclude lands acquired prior to 1980 from the purview of the Act.

Some additional concerns are summarized below:

- a. Exemption of 0.05 hectares of forests for access to roads and railways is arbitrary, likely to be misused and may result in serious fragmentation of forest land.
- b. Complete exemption to technologies such as Extended Reach Drilling is dangerous in the absence of sufficient evidence regarding the impact it may have on biodiversity.
- c. Bringing all zoos, safaris and forest training infrastructures within the ambit of forestry activities, is inconsistent with the FCA and the FCA Guidelines, 2019 which clearly differentiate low footprint conservation establishments from exhibition-oriented outreach centers. Further, this may disproportionately commercialize forests and disturb forest ecosystems.
- d. Exemptions for all surveys and investigations are arbitrary, and such exemptions should depend on the underlying project and its implications on the forest and associated wildlife.
- e. Blanket exemptions for border infrastructure projects are problematic as they have significant impact on sensitive landscape and biodiversity, and may adversely impact the infrastructures themselves, due to resultant environmental hazards in case of extreme weather events. Clearances are currently being given at reasonable speeds, and any changes will unduly compromise the necessary forest clearance processes.
- f. Exemption from obtaining prior approval under Section 2 of FCA for various projects interferes with rights/procedures under the Forest Rights Act, 2006.

This submission also outlines recommendations with respect to FCA, going forward. The importance of inculcating biodiversity offsetting as opposed to mere compensatory afforestation, the need for an ecosystem-based interpretation and a wildlife habitat based approach for the term ‘forest’ have been suggested.

2. Comments on the Proposed Amendments

The Ministry of Environment, Forest & Climate Change (“**MoEFCC**”) proposes to introduce amendments to the Forest Conservation Act, 1980 (“**FCA**”). A consultation paper was published by the MoEFCC on October 2, 2021 inviting comments from the public.

While the proposed amendments bring certain positive changes such as protection of pristine forests, introduction of penal provisions, and exclusion of afforestation on non-forest lands after 12.12.1996 from the purview of the FCA, the amendments also propose exemptions from clearance processes, which are problematic and antithetical to forest conservation.

Some of the proposed exemptions digress from the *National Forest Policy, 1988* (“**NFP**”) and the constitutional mandate of the State to preserve and protect forest and wildlife¹. The NFP aims to maintain environmental sustainability through preservation and restoration of ecological balance including atmospheric equilibrium which are vital for sustenance of all lifeforms, human, animal and plant.² It advocates that derivation of direct economic benefit must be subordinated to this principal aim. The proposed changes in the consultation paper allow for blanket exemptions which run contrary to the NFP. These proposed changes also ignore the rights of forest dependent people and their continued dependence on forest resources for livelihood.

Please find below our views on the proposed amendments outlined in the consultation paper accompanied by our suggestions on the scope and focus of such amendments.

A. FCA is not applicable to any land bearing vegetation

The consultation paper appears to mainly rely on the interpretation of forests and applicability of the FCA as directed by the Supreme Court (“**SC**”) in *T.N. Godavarman Thirumulpad v. Union of India*³ (“**Godavarman case**”).

The consultation paper asserts that the *scope of the applicability of FCA extends to all areas which conform to the ‘dictionary’ meaning of ‘forest’, and further mentions that ‘lands bearing vegetation irrespective of ownership and classification also attract the provisions of the Act, if the same are considered forest based on some locally defined criteria.’*

We are of the primary view that such assumptions provided in the consultation paper are based on an incorrect interpretation of the *Godavarman case* and the same has been clarified in subsequent judgments of the Supreme Court, High Courts and the National Green Tribunal⁴⁵⁶. These judgements have stated that any plantation or forest-like land not notified or recorded as forests in government records will not attract provisions of Section 2 of the FCA. In its judgment (in *Godavarman case*) dated 12.12.1996, the SC has only interpreted the term ‘forest’ as it was not provided in the FCA, and put the onus on State governments to identify forests in their respective states by constituting expert committees.

However, the scope of the applicability of section 2 of the FCA was limited to only statutorily recognized forests and areas recognized as forests in government records as stated in the judgment:

“The word "forest: must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act.”

In the initial years following the judgment dated 12.12.1996 in *Godavarman case*, various State Governments and lower courts have misinterpreted the decision. However, the SC has clarified on all such occasions that any land bearing trees/vegetation do not qualify for restrictions under Section 2 of the FCA, unless the same has been notified or recorded as forest. The most important of these cases are discussed below.

In *Ram Saha v. State of West Bengal*⁷, a person was stopped by the State government from cutting trees from his garden, citing the *Godavarman case*. He challenged the government action in the Calcutta High Court. The HC ordered him to obtain permits under the provisions of the West Bengal Land Reforms Act, 1955. However, the SC overturned the decision and made the following observation:

“25. The High Court, being clear in its mind that the ban imposed in T.N. Godavarman Thirumulkpad (supra) in the matter of felling of trees did not extend to non-forest private plantation and there being no State enactment dealing with the felling of trees in non-forest private plantation, in our view, was not right and justified in reading in the provisions of Sections 4-B and 4-C that permission of the authorities is required for felling of trees even in non-forest private plantation/orchard.”

In *In Re: Construction of Park at Noida Near Okhla Bird Sanctuary*⁸, the Government of Uttar Pradesh wanted to construct an ‘urban park’ on lands where trees had been planted and grown for 12-14 years. This land had not been classified as ‘forest’ in the Government records by the expert committee (constituted under the *Godavarman case*) for Uttar Pradesh. While deciding on the applicability of Section 2 of the FCA to this project, the Court held that the land in question was not ‘forest’. The SC in this case affirmed the observation of the Central Empowered Committee, which stated that:

“...In the present case, even though as per the Report of the Forest Survey of India, the area was having good forest/tree cover and the project area had more than 6000 trees, it does not fall in the category of "forest" for the purpose of Section 2 of the Forest (Conservation) Act and therefore does not require any approval under the Forest (Conservation) Act. The project area does not have naturally grown trees but planted trees. The area has neither been notified as "forest" nor recorded as "forest" in the Government record. In the exercise carried out by the State of Uttar Pradesh, after detailed guidelines for identification of deemed forest were laid down, the project area was not identified to be deemed forest.”

If the criterion fixed by the State Level Expert Committee that in the plains a stretch of land with an area of 2 hectares or above, with the minimum density of 50 trees/hectare would be a deemed forest is applied mechanically and with no regard to the other factors a greater part of Lutyens Delhi would perhaps qualify as forest. This was obviously not the intent of the order dated December 12, 1996.

Thus, it is abundantly clear that the FCA does not apply to all lands which consist of vegetation or trees. However, felling of trees in such areas may be regulated by separate state legislations on preservation of trees for the respective states such as Delhi Preservation of Trees Act, 1994, the Karnataka Preservation of Trees Act, 1976, among others.

Suggestions

In order to bring clarity to the applicability of Section 2 of the FCA in consonance with various judgments of the SC, an office memorandum/circular may be issued to State governments stating that the provisions of FCA will apply to only such areas which are:

- 1) Statutorily notified forests under the Indian Forest Act, 1927 or State Forest Acts;
- 2) Land recorded as forest in the government record;
- 3) Identified as forests by the expert committees constituted by States subsequent to the SC direction dated 12.12.1996 in the *Godavarman case*.

The MoEFCC may issue a clarification that plantations and afforested lands which do not qualify for any of the above categories will not attract provisions of Section 2 of the FCA, either by publishing a notification under section 4 of the FCA or amending the Forest Conservation Rules, 2003.

B. Exemption of lands acquired before 25.10.1980 from the purview of FCA must be avoided

The MoEFCC is considering exemption from prior government approval for the lands which were acquired before 1980, when the FCA first came into existence, noting that it has caused resentment in public sector bodies for interpretation of the scope of applicability of the Act over the right of way of railways, highways, etc. The consultation paper mentions that part of such acquired lands was left unused and planted with trees under various government schemes and some of them were notified as protected forests.

As is evident from the FCA and the SC rulings, such government lands where plantations have been undertaken and look like forests but are not recorded or notified as 'forest' will not attract provisions of section 2 of the FCA (as discussed in previous section).⁹

Furthermore, any land is notified as Protected Forest under the Indian Forest Act, 1927 or the respective State Forest Act only after following statutory procedures and giving due consideration to ownership rights. The concerned section dealing with Protected Forests in the Indian Forest Act, 1927 states:

29(3) No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the State Government thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved:

Provided that, if, in the case of any forest-land or waste land, the State Government thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the State Government may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

Thus, such government land when notified or recorded as forests not only implies that the government was cognizant of the land use and ownership but they have been declared forests with a purpose and not by chance.

There were enough legal remedies available to the concerned agencies to challenge such notification or classification of the land as forests under the concerned Act under which they were notified.

Similarly, the process of identification of deemed forests in the *Godavarman case* has been carried out by the Expert Committees appointed by State Governments following various criteria and considerations. The MoEFCC in a circular dated 14.11.2019 to all State Governments acknowledged that there cannot be any uniform criteria to define forest which can be applicable to all forest types in all State/UTs.¹⁰ The circular also mentions that

“States, having well established forest departments, are in a better position, rather than MoEF&CC, to understand their own forests and needs, and should frame criteria for their forests. The criteria so finalised by a state need not be subject to approval of MoEF&CC.”

Thus, any dilution of the restrictions through FCA will defeat not only the Act itself, but will significantly dilute the State’s control on forests as well as contradict the directions of the SC in the *Godavarman case*.

It is further submitted that the current procedure for forest clearance under Section 2 of the FCA involves vetting and scrutiny of proposals for diversion of forest by state governments and eventually the central government, depending on the forest area to be diverted. The scrutiny undertaken is vital as it assesses the direct and indirect impact of such forest diversion on the ecosystem, wildlife and other competitive uses and rights. Forest clearances issued to Railways and allied government agencies in the past, point to adverse impacts in environmentally sensitive areas. The MoEFCC’s exemption to 13 Railway projects in 2019, was subsequently revoked by the National Board of Wildlife, as the project ran across eco-sensitive tiger reserves.¹¹¹² Similar issues were faced regarding clearances issued for the Karnataka-Goa Railway line in 2021, which ran across the Western Ghats.¹³ The Centrally Empowered Committee constituted by the SC recommended withdrawal of the forest clearance to doubling of the single line railway track in the same project.¹⁴ Considering poor implementation of the FCA and other environmental regulations, such blanket exemptions without qualifications would further defeat the purpose of the FCA and may lead to wide scale deforestation causing irreversible damage to ecosystems and biodiversity.

Suggestions

The purpose of the FCA is to check indiscriminate clearing of forests and not to prohibit any developmental activity. Exemptions from the requirement of FCA are not recommended to any recorded or notified forest area as those amount to a significant dilution of the original purpose of the Act. To prevent misinterpretation of the FCA and the *Godavarman order*, an office memorandum/circular may be issued that all such forests/plantations which are not notified and never recorded as forests will be exempted from the requirement of forest clearance under Section 2 of the FCA.

In order to avoid conflicts or misuse of the FCA for plantations raised on non-forest lands in the future, States may be requested to publish a district wise georeferenced map of all notified and recorded forests. It may be pertinent to note that the SC direction to state governments to identify forests was a one-time exercise, reiterating that private lands where vegetation and trees spontaneously generate are not forests.

C. Suggestions on other exemptions

1. Exemption of 0.05 hectares for access to roads and railways

The MoEFCC must provide a justification for any exemptions for an area up to 0.05 hectares of land. This proposed exemption not only has the potential to be grossly misused, but also in many cases such diversion without any check may lead to fragmentation of landscape and cause significant impact on wildlife where such land is surrounded by forests and other ecologically important areas. Hence, such areas must be spared from such an exemption.

2. Exemptions to exploration or extraction of oil and natural gas using Extended Reach Drilling

While Extended Reach Drilling (“ERD”) is considered to have lesser environmental impact¹⁵, it is not entirely safe. Furthermore, the environmental impact of ERD depends on many other interventions and comprehensive guidelines to be effective.¹⁶ Recently, the Gauhati High Court stayed Environmental Clearance to Oil India Limited with respect to exploration and drilling through ERD for hydrocarbons at seven locations in Dibru Saikhowa National Park due to the absence of Biodiversity Impact Assessment.¹⁷ Therefore, a blanket exemption to ERD is not appropriate.

3. One-time relaxation to private forest owners for construction of structures for bonafide purposes

The MoEFCC proposes to provide a one-time relaxation to owners of private forests for bonafide purposes which include forest protection measures and residential unit up to an area of 250 sqm. It is submitted that such relaxation has been given to the Mussoorie Dehradun Development Authority (“MDDA”) area of Uttarakhand under the Forest Conservation Guideline, 2019 for places where non-forest land is not available. Such exemption is applied only for construction of residential buildings for domestic purpose and shall not be extended to any institutional buildings or commercial development.^{18 19} Thus, any exemptions for bonafide purposes shall be granted only conditionally, as in the case of MDDA-Uttarakhand.

4. Exemptions to zoos, safaris, forest training infrastructures etc.

The consultation paper proposes that zoos, safaris, forest training infrastructures etc. should not come within the meaning of "non-forestry activity" for the purpose of Section 2(ii) of the Act. This would technically mean that no forest clearance will be required for diversion of forest for such activities. The term ‘activity being ancillary to conservation’ must be interpreted strictly with regards to the necessity of that activity in implementing forest management and wildlife conservation objectives on ground. A loose/liberal interpretation will only invite more activities which require massive building constructions on forest lands.

i) Concerns with zoos and safaris

The Forest Conservation Guidelines, 2019 treats Zoo, Rescue, Rehabilitation Center and Captive breeding facility for wildlife management as a forestry activity for the purpose of applicability of the provisions of the FCA. However, for the construction of a Zoo over forest land, not more than 15% of the total forest area, requested for diversion under the FCA, may be used for non-forestry activities. This exemption is extended till 30% for government agencies. The guidelines further states that:

Establishment/Re-location of zoos or rescue centers in forest areas, including rescue centers in a zoo/ wildlife safari or otherwise where wild animals are kept also for exhibition to the public, requires diversion of forest land with prior approval of Central Government under FCA, 1980. However, establishment of a rescue center inside the forest by the State Government purely for rehabilitation and recapitulation and not for public display and enjoyment is not treated as a non-forest activity.

The establishment of Zoo and Wildlife Safari whether stationary or mobile, where captive animals are kept for exhibition to the public that does not include a circus and an establishment of a licensed dealer in captive animals, are non-site specific and requires diversion of forest land with prior approval of Central Government under FCA 1980.

The conditional relaxations outlined in the Forest Conservation Guidelines, 2019 are well reasoned and clearly define and distinguish low footprint conservation establishments from exhibition-oriented outreach centers. A zoo or safari, although one component of conservation, must not come at the cost of a biodiversity rich forest region. Establishment of a zoo, safari for public outreach or any training infrastructure will significantly disturb the forest ecosystem, alter the topography and will drive away the majority of the megafauna. Allowing zoos and safaris within the scope of non-forest activities may disproportionately commercialize forests and wildlife without due consideration to the rights of forest dependent people, wildlife and ecosystem services. Therefore, any exemptions to building infrastructure, zoos or safari will be detrimental to the forest and must not be given. Certain relaxations may be granted to establishments meant for rescue and conservation of wild animals which do not involve any exhibition or public outreach purpose.

ii) Concerns with forest training infrastructures

Diversion of forest land for training institutions will lead to use of forest for construction of infrastructures such as lecture halls, workshop theatres, sports, games, etc. Irrespective of the purpose, such large-scale construction activities will have the same impact as that of any building and construction activities. In 2019, the MoEFCC while considering a proposal for construction of an all-weather swimming pool for IFS trainees at Indira Gandhi National Forest Academy in Dehradun, interpreted the activity as not being a non-forestry activity.²⁰ It is submitted that such exemption is against the provisions of the FCA and must not be encouraged.

Section 11.8 of the Forest Conservation Guidelines, 2019 provides some guidance on the extent to which such exemptions may be permitted as follows:

“..... As such all States Government should ensure that the basic spirit and essence of the Forest (Conservation) Act, 1980 is not to divert forest land for construction of residential buildings,

Bungalows, quarters etc. Bare minimum (operational) buildings, which are essential for management of forest and conservation of bio-wealth such as forest guard hut, check posts, range offices, small inspection bungalow (2-3 room), un-tarred single lane roads etc., can be taken up in

selected areas without causing damage/destruction to the forests thereon. But if the structures are large and would impact on conservation, prior permission under the Forest (Conservation) Act, 1980 would be required.”

The MoEFCC must undertake a wider consultation and review on which activities may be treated as 'ancillary to conservation' under the FCA and lay out clear guidelines to ensure such relaxations are not misused or interpreted in a manner detrimental to forest and wildlife.

5. Exemptions to surveys and investigations

The consultation paper proposes that all such surveys and investigation activities where the impact is not perceptible, the provisions of the FCA may not be applicable. We do not see any harm in exempting research and investigation-oriented activities, but the exemption should depend on the underlying project and its implications on the forest and associated wildlife. Such exemptions or relaxations must be given conditionally where there is no clearing of vegetation or involvement of heavy machinery and transportation.

Any activity which requires drilling/digging of surface, clearing of vegetation, creating access roads and producing high decibel noise or use of light at night or any other activity which might be detrimental to the wildlife and the ecosystem must go through the forest clearance process to ensure proper safeguards and mitigation measures to minimize the impacts.

6. Exemptions from requirement of Centre's approval for infrastructure projects on international border

The MoEFCC is considering exemption for projects along the international borders from obtaining prior approval of the Central Government under the FCA and allow the States to permit non-forest use of forest land for implementation of such strategic and security projects that are to be completed in a given time frame.

Infrastructure projects along the border include linear projects (such as border roads) and non-linear infrastructure (such as border outposts, fencing, surveillance infrastructures, floodlights etc.). Majority of the international border of peninsular India lies on the ecologically fragile and biodiversity rich regions (Himalayas and North-East India) which are also vulnerable because of the seismic risks, climate change induced extreme weather events which have been on the rise since the past few decades.²¹²² Infrastructure and linear development projects are particularly blamed for intensifying the impact of such extreme weather events due to the activities involving blasting and excavation of hillsides, creating tunnels through hills, damming of water streams etc. which has significant and irreversible damage to the ecologically sensitive landscape of the Himalayan regions. Experts have pointed out the role of such infrastructure development as a major contributor to landslides and increasing intensity of floods.²³²⁴²⁵ For instance, over half of the landslides studied following the Kashmir earthquake were linked to human activity. Landslides in Ladakh have caused damage to the infrastructure which connects remote villages and army bases in the region.²⁶ Thus, unfettered deforestation and infrastructure development in border areas are not just likely to increase the intensity of environmental disasters but also adversely impact defence infrastructures themselves. The review of such projects under the FCA will only help prevent such environmental disasters.

The Central government has, on multiple occasions, provided exemptions to defence infrastructure. For example, in July 2014, the MoEFCC had granted a general approval for diversion of forest land for construction and widening of two-lane roads by various defence related organizations in areas falling within 100 km aerial distance from Line of Actual Control.²⁷²⁸²⁹ General approvals have also been granted to border security related infrastructure which not only includes roads but also border outposts, fencing, floodlights, surveillance and power infrastructure. In January 2015, general approval was granted for diversion of forest land for such activities

within 5 km aerial distance from international borders for paramilitary organizations such as Sashastra Seema Bal and Border Security Force.³⁰³¹³² According to the Compensatory Afforestation Fund Management and Planning Authority (CAMPA), between 1996-2016, defence projects have taken up the second largest amount of forest land (1,549 sqkm), second only to mining (4,947 sqkm).³³

Considering the wide ambit of exemptions already available to defence infrastructure, there is in fact, the need for a systemic evaluation framework for grant of approvals for border/defence infrastructure as opposed to an exemption. The MOEFCC should also come up with a clear definition and large scope of the term 'strategic and security projects' to avoid ambiguities around the scope of this exemption which paves the way for gross misuse without redress. Further, clearances for defence infrastructure under the current FCA are being granted at reasonable speeds and any alterations may compromise the vital forest clearance processes.

7. Affects rights/procedure under Forest Rights Act, 2006

The consultation paper proposes exemption from obtaining prior approval under Section 2 of the FCA for various projects. An essential part of the diversion of forest land includes compliance with The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ("FRA") by seeking the consent of the Gram Sabha. The FRA does not provide any exemption to any category of projects. The centrality of the Gram Sabha's role has also been reaffirmed by the SC in *Orissa Mining Corporation v. Ministry of Environment and Forests and Others*³⁴ where it was held that the decision of affected Gram Sabhas is necessary before diversion of forest land for non-forest purposes or for any development project, big or small.

In 2019, the MoEFCC wrote to all state governments, stating that compliance with the Forest Rights Act was not required for getting Stage-I or 'in-principle' forest clearances.¹³⁵ The Ministry of Tribal Affairs expressed its concern over such exemptions stating that neglecting compliance with the FRA before granting Stage-I forest clearances will make FRA clearance *a fait accompli* and put forest dependent people to a great disadvantage.³⁶

Forest dependent people including tribal communities are integral to the survival and sustainability of forest ecosystems and biodiversity. Thus, failure to recognise the rights of forest dependent people under the FRA and the provisions of The Panchayats (Extension to The Scheduled Areas) Act, 1996 will result in great injustice and violation of such laws.

D. Proposed changes which are appreciable but needs improvement

1. Recording in revenue records of plantation, afforestation etc. on any non-forest land after 12.12.1996 to remain outside the purview of the Act to encourage forestry activities

Contrasting entries of the same land in both revenue and forest records has led to misinterpretation and litigation.³⁷ This has also affected restoration and forestation efforts in non-forest lands by owners, owing to fear of legal repercussions. Therefore, it is reasonable to exempt lands which were never recorded as forest from the purview of the FCA. However, there is lack of clarity on whether the baseline for this exemption of plantation

¹ The forest clearance process under FCA, is carried out in two Stages-Stage I, the in-principle approval, and Stage II, the final approval.

and afforestation etc. on non-forest land is subsequent to the date of the *Godavarman* order or subsequent to the date on which forest areas were identified based on the order. Such clarity is essential as the process of identifying forests based on the *Godavarman order* followed years after the order was passed. For instance, the government of Karnataka was not satisfied with the findings of the expert committee in 1997 and reconstituted another committee in 2002 to identify forests in Karnataka under *the Godavarman case*.³⁸

There is also lack of clarity on what happens on land where transfer of private forests to the government has remained incomplete with pending notifications. In colonial times, non-government forests were controlled by zamindars, tribals, rulers, jagirdars etc. These privately managed forests came under state control after independence, through separate private forests acts of states like the United Provinces Private Forests Act, 1948, Tamil Nadu Preservation of Private Forests Act, 1949 etc. However, the process of transfer of several of such privately controlled forests has still not been completed at State levels and some of them are also pending with litigation. Any decision to exempt such lands acquired before 1980 will have significant impact on such transfer processes and court cases.

The SC in an order dated 12.05.2001 directed the MoEFCC to make guidelines on felling of trees in non-forest areas including plantations. The first set of guidelines were issued on 15.12.2004, and were expanded upon in 2014, where the purpose of the guideline was to “*create an enabling environment for massive tree plantation outside the natural forests.*”³⁹ The guidelines also elucidate that plantation efforts on non-forest land would aid in increasing India’s forest cover and help meet the growing demand for wood.

In cases where trees are planted in non-forest land, the provisions of the respective state tree preservation legislations come into play. States ought to provide relaxations under their respective tree preservation legislations to encourage plantation of indigenous and exotic trees on non-forest lands.

2. Deletion of Sub-Section 2(iii) (need for central government approval for leasing forest land to private individuals or organizations) of the Act and add a clarification that sub-section 2 (ii) can be invoked for any kind of lease assignment having an intention of using land for non-forestry purpose

It is unclear as to why the confusion regarding leasing and deforestation activities exists in current practice. Ideally all lessees who are also engaged in non-forestry activities must pay, in addition to the Net Present Value of the forests, other compensatory levies such as Compensatory Afforestation (“CA”) money, CA Land, safety zone plantation, etc. While there is need for clarity on how such an implementation issue arose in the first place, this amendment is largely positive as the end goal is to ensure that mining lessees are mandated to pay compensatory levies.

3. Introducing a provision in the FCA to keep certain pristine forests “showcasing rich ecological values” intact for a specific period.

Pristine forests have been fragmented because of extensive commercial and developmental activities over the past few decades. The proposed amendment will allow the central government to delineate forest areas where conversion to specific non-forest uses would not be permitted for a fixed period of time. While this is a commendable proposal, the MoEFCC should set objective parameters for identification of such pristine forests.

4. Adding a penal clause including simple imprisonment for a period which may extend to one year and make it cognizable and non-bailable. The government also proposes penal compensation to make good for the damage already done.

Since there are several instances of violations of the provisions of the FCA, making the punishments more stringent would discourage offences under the law. The Comptroller and Auditor General of India (“CAG”) in a 2013 report stated that the penal clause prescribed in the FCA was largely inadequate and ineffective to put any deterrence towards illegal and unauthorized practices.⁴⁰ The CAG also observed that there were numerous instances of unauthorized renewal of leases, illegal mining, the continuance of mining leases despite adverse comments in the monitoring reports, projects operating without environment clearances, unauthorized change of status of forest land and arbitrariness in decisions of forestry clearances. There have also been previous efforts to increase penalties in order to make offenders accountable and liable for their actions.^{41,42} The Delhi Preservation of Trees Act, 1994, U.P Protection of Trees Act, 1976 provides for a similar provision. Therefore, the proposed amendments strengthen the existing penal system and are a welcome change.

E. Some additional suggestions

1. Need for a relook into the interpretation of ‘forests’

The current legal interpretation of forests is narrow and does not account for vital ecosystems such as grasslands, deserts, scrublands, semi-arid lands, marshlands, swamps etc. which are critical for maintaining environmental balance and supports a wide diversity of endemic flora and fauna. Such critical ecosystems have multiple uses and ecosystem services, and a simplistic classification does not justify exclusion of any aspect of forests.⁴³ The approach of the Government in interpreting forests must reflect an ecosystem-based approach that accounts for ecosystem services, wildlife and requirements of forest dependent people.

2. Forests as wildlife habitats

The 2018 tiger census reveals that one-third of tigers reside outside Protected Areas (“PAs”) notified under Wildlife (Protection) Act 1972 which includes mainly the forests owned by State and private entities.^{44,45} Such areas are also important habitats for endemic and protected wildlife species such as Wolf, Dhole, Hyena, Sloth Bear, Leopard etc., emphasizing why such forests need protection.⁴⁶ Moreover the forests outside the PAs also act as important foraging and breeding grounds and corridors of wild animals. It therefore becomes critical to protect forests outside protected areas as many of these forests play a crucial role in maintaining genetic linkages between different major tiger and other wildlife habitats.⁴⁷

3. Biodiversity offsetting instead of compensatory afforestation

Compensatory afforestation is not a substitute to diversion of forests for industrial projects including defence projects, dams, mining, power plants, industries and roads, existing ecosystems. Experts in India are pointing to the failure of the Compensatory Afforestation mechanism in truly compensating loss of ecosystems.⁴⁸ Forests have millions of species of flora and fauna living in a complex “ecological mix”, with natural nutrient cycling processes that “cannot be restored by creating monoculture plantations”.⁴⁹

The regulatory compensation regime in India must consider biodiversity offsetting⁵⁰ for strengthening the compensatory afforestation mechanism, to truly gauge and redress the loss of ecosystems due to economic/ industrial development. Inculcating biodiversity offsetting will aid in accurately determining net loss of biodiversity/ impact on ecology, and ensuring that any afforestation activity will lead to a net gain, or at the least, not a net loss in overall biodiversity.⁵¹

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