

**ENVIRONMENTAL CLEARANCE DRAFT NOTIFICATION, 2020: A CASE OF
OBSCURE VISIBILITY?**

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INTRODUCTION

The year 1987, remains to be a significant milestone when the ‘Brundtland Report’ was officially released, curving out the gist of the concept “Sustainable Development.”³ The United Nations in its General Assembly urgently appealed to the World Commission to prepare a vision document for “*A global agenda for change*”.⁴ This action UNGA was to create a global alternative to the existing conflicting dynamics of environment and development. The concept of sustainable development was designed to create a synthesis amongst the conflicting dimension of human development and natural environment. The conference at Stockholm in 1972 was partially successful in creating the awareness towards the environmental obligations of mankind⁵.

Thereafter in 1992, at Rio de Janeiro the more detailed blueprint map of sustainability was curved out in the next global conference held on the theme integrating the environment and human development.⁶ The principles of Rio Conference along with its two binding instruments are considered as the essential part of the international environmental jurisprudence till date. A few important principles of the Rio Convention such as principle 4,⁷ highlights the need for and importance of integration of the developmental growth with

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³ Our Common Future [Report], <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁴ Report of the World Commission on Environment and Development: Our Common Future, Chairman’s Foreword, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁵ Stockholm Conference 1972 [e-book], <https://www.un.org/en/conferences/environment/stockholm1972>

⁶ Sustainable Development vis a vis International Cooperation, <https://sustainabledevelopment.un.org/milestones/unced>

⁷ Principles 4: In order to achieve Sustainable Development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

environmental protection. Further, in principle 10 it lays down the stress for people's participation for environmental decision making and the need for developing the adequate environmental redressal mechanism.⁸ Lastly, the Principle 17 encourages for the adoption of the domestic instrument for guidance in the decision making in cases with potential adverse decision making.⁹ Thus, to sum up conceptually, we can say that EIA:

“Environment Impact Assessment (EIA) is a planning tool to integrate the environmental concerns into developmental process right at the initial stage of planning and suggest necessary mitigation measures. EIA essentially refers to the assessment of environmental impacts likely to arise from a project.”¹⁰

According to the aforesaid principles of the Rio Convention, most of the state nations developed environmental legal framework for environmental decision making within their own jurisdiction. India in the early 1980's had no specific legal mechanism for scrutinizing the developed projects for environmental safety. The department of Science and technology was the sole authority to grant environmental clearances having a narrow jurisdiction mostly focused on river-valley projects. Further, it was only post Rio Conference, in 1994 the MoEF(Ministry of Environment, Forest and Climate Change) passed the first exclusively devoted legislative instrument for environmental decision making in India based on the precautionary approach of sustainability popularly known as Environmental Impact Assessment Notification, 1994. The said notification prescribed both the substantive and procedural guidelines for the granting environmental clearances in diverse fields of developmental projects in India.

⁸UNEP Principle 10 and the Bali Guideline, <https://www.unenvironment.org/civil-society-engagement/partnerships/principle-10#:~:text=Principle%2010%20was%20adopted%201992,citizens%2C%20at%20the%20relevant%20level.&text=States%20shall%20facilitate%20and%20encourage,by%20making%20information%20widely%20available.>

⁹Environment Impact Assessment, Principle 17 UNEP, <https://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/17.html>

¹⁰ As defined in PARIVESH, FAQ, by the Ministry of Forest and Environment and Climate Change, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

JOURNEY OF EIA LAW TILL DATE

The EIA Notification of 1994 seems to have paved the way for better environmental governance in India. This legislative initiative soon met with several dilution and successive amendments to suit the need of the other socio-economic domains, i.e., trade- commerce, industries, tourisms and other developmental lobbies.¹¹ Hereafter, in 1997 a welcome change was initiated to make this decision-making tool more effective, and goal oriented by introducing the process of “Public Hearing” *vide* amendment¹².

Further, in September 2006 a major amendment *vide* S.O.1533 (E) was issued to replace the original EIA Notification of 1994 and to substitute with a new notification with a legislative intent to restore the spirit and objective of law.¹³ This new notification introduced several welcome changes by prescribing for seeking the prior environmental clearance at the planning of the project itself, launching of online system to bring about more transparency in the decision making, increase the scope for delegation by bifurcating the projects into category “A”- whereby the Central government is the regulator and category “B”- whereby the respective State is the regulator and establishing the standardization in EIA evaluation process etc. Several amendments were also introduced to the existing 2006 EIA Notification to accommodate the directions of NGT for decentralization and better implementation.¹⁴ Thus, we can say that with successive amendments the letter of the law changed significantly, and its spirit was diluted to defeat the legislative intent.

¹¹ EIA Notification 1994, <http://dest.hp.gov.in/?q=eia-notification-1994>

¹² EIA Notification No. SO 319 (E) dated 10th May, 1997 issued by the MoEF, India.

¹³ *Id.*

¹⁴Key amendment to Environment Impact Assessment (EIA) Notification 2006, to ramp up availability/production of bulk drugs within short span of time., Press Information Bureau Government of India, Ministry of Environment, Forest and Climate Change., <https://pib.gov.in/newsite/PrintRelease.aspx?relid=202284>

PROPOSED DRAFT, ITS LEGISLATIVE INTENT AND CHALLENGING ISSUES AND PITFALLS

In November 2014, the High Court of Jharkhand passed an order in respect to the writ petition filed before it in the matter between Hindustan Copper Limited and Union of India¹⁵. The said High court laid an important precedent stating that all project proposals for environmental clearance must be thoroughly examined solely on the basis of its merits. Any collateral issue of alleged environmental violations must be looked into separately rather than clubbing it with clearance issue.¹⁶ Similarly, the National Green Tribunal in 2018 in the case of Sandeep Mittal v/s MoEFCC¹⁷ directed that the MoEF would make the compliance monitoring system more robust prior to granting any environmental clearance. So, there has been on and off several such judicial pronouncements highlighting the grey areas of the EIA domain and exposing the loopholes of the existing system

Further, in March 2020, a new draft EIA Notification¹⁸ was proposed to substitute the exiting EIA Notification of 2006. The said draft notification was published in April 2020 in the official gazette to invite the objectives and comments but later due to the prevailing pandemic the deadline for same was extended up to the month of June 2020. Soon, the said EIA Notification caught the eye of the activists and environmental experts for wrong reasons. By virtue of a comparative analysis, it was put forth that these newly proposed draft of 2020, i.e. EIA Draft 2020 is weaker even than those of 2006. The question arises can we substitute a legislation with a weaker legislation?¹⁹

Concept of “*Post-facto Clearance*” is completely opposite of the basic philosophy of the underlying Precautionary principle on which the very EIA process is designed. The concept of granting Post-facto clearance will encourage the overlooking of the potential and adverse

¹⁵ Hindustan Copper Limited Versus Union of India, W.P. (C) No. 2364 of 2014, in the High Court of Jharkhand

¹⁶Ministry of Forest and Environment and Climate Change, PARIVESH, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

¹⁷ Original Application Number 837/2018, NGT, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

¹⁸ MoEFCC issued the EIA Draft Notification, 2020 under section 3 (2) r/w S 23 of EPA, 1986 r/w EPA rule5 to suppress the existing EIA Notification of 2006.

¹⁹ Abhijit Mohanty, “*Why draft EIA 2020 needs a evaluation?*” Published by Down to Earth, CSE, Delhi, July 2020, <https://www.downtoearth.org.in/blog/environment/why-draft-eia-2020-needs-a-revaluation-72148>

impacts of any developmental project. However, inspite of this fallacy the environmental clearance will granted as proposed under this new draft notification. Those who may argue against this logic and favour the idea of post-factor clearance, they need to consider the recent industrial disasters of Oil India Ltd.

OTHER ADVERSITIES WITH THE PROPOSED DRAFT

a. It puts in vain, the very purpose of Public Consultation

The draft gives a deadline to raise feedbacks, inputs and objections by the people within 60 days of the distribution of the notice. These 60 days were inclusive of the Nationwide Lockdown due to the COVID 19 Pandemic. It was not feasible for general society to send in their remarks as the majority of the postal administrations were suspended during these uncommon conditions.

Also, Principle 10 of the Rio Declaration unmistakably expresses that, "*States will encourage a lot of open mindfulness and investment by making data generally accessible*".²⁰

Ironically no regard has been made to the above principle in the present instance. The Central Government has merely circulated the Notice and has not made practical for any State Governments or Organizations to cast their inputs on the same. Owing to the action of Ministry of Forest, Environment and Climate change, no external evaluation whatsoever has been propounded by other authorities.

Subsequently, it is proposed that either as far as possible for submitting remarks be broadened or the draft be circled, even more generally this time, since the lockdown has been lifted, so successful public conference can occur.

b. Reducing duration for written responses by public is a step backwards

²⁰ *Id.*

By virtue of Rule 3.1. of the draft, 20 days have been provided to the public members for submitting their responses for Public Hearing. This has further reduced the deadline from 30 days under the 2006 Regulations to 20 days.²¹

Principle 10 of the Rio Declaration reads as: “*Environmental issues are best handled with the participation of all concerned citizens*”.²² Even Brian Clark has emphasized that, “*the input of the public reflects a better understanding of the choices involved than the vote of an elected official who does not have the time to study each issue in depth*”²³.

Reducing the response time given to the general population for presenting their composed reactions is really a step-in reverse.

If reducing the time is the sole key towards achieving the goal, the time limit for advertisements, endorsements, approvals, etc. could have been reduced. Shifting all the veracities to public shoulders in order to submit a hurried response serves no use.

The people at large should be provided with sufficient amount of time in order to make a rational choice and put forth their assumptions and inferences by submitting a detailed composite response. Eventually, it is they who will get straightforwardly influenced by the task and along these lines they would need to endure the worst part of taking a rushed choice.

Hence, the Ministry should ponder over increasing the deadline for response with respect to the general population and strengthen their ability to present a composite reaction.

c. The provision for Post-Facto Approvals is contrary to established principles of law

As per Rule 22 of the proposed draft Notification, the Appraisal Committee is constituted to analyze any cases of violation.

²¹Draft EIA 2020, MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, http://parivesh.nic.in/writereaddata/Draft_EIA_2020.pdf

²² Principle 10, Rio Declaration on Environment and Development, 2020.

²³ Brian D. Clark, *Improving Public Participation in Environmental Impact Assessment*, 20 (4), Built Environment 294, 307, (1994).

If Appraisal committee grants approval to a project, it then becomes eligible to receive the formulation of a remediation plan, assessment of resource damage and resource and community augmentation plan²⁴. Sub-rules 8 and 9 also provide for submission of late fee by the project proponent.

These provisions diverted from being strict in nature and contradicts the very purpose of their presence as against the earlier rules that provided stringent penalties and no possibility of rectification whatsoever. These rules do nothing but grant provisions for post-facto approvals which is a blatant violation of the precautionary principle and defeats the very purpose of an EIA framework. This even runs against the expert committee constituted by UNEP in 1987 which provided that any framework for EIA must operate “prior” to the beginning of the project.²⁵

The Supreme Court in the latest 2020 case of *Alembic Pharmaceuticals Limited v. Rohit Prajapati & Ors.*²⁶ has pointed out in specific terms that that no retrospective approvals can be given in matters of environmental clearance. Reliance was placed on *Common Cause v. Union of India*²⁷.

In 2014, the NGT held that, it is not lawfully acceptable to consider post commencement examination upon the completion of project. *The importance of conducting an exhaustive EIA before any project is granted Environmental Clearance has been acknowledged internationally.*²⁸

d. Increase in land for projects which do not need EIA approval from 20,000 to 1,50,000 square meter a retrograde step

²⁴ Rule 22 (2), Draft EIA Notification, 2020.

²⁵ Rule 9 (2), Draft EIA Notification, 2020.

²⁶ *Alembic Pharmaceuticals Limited v. Rohit Prajapati & Ors.*, MANU/SC/0353/2020.

²⁷ *Common Cause v. Union of India*, (2017) 9 SCC 499.

²⁸ *S.P. Muthuraman v. Union of India*, MANU/GT/0116/2015.

By virtue of Rule 42 of the draft 2020 Notifications, the territorial extent of foregoing the EIA requirement has been increased to 1,50,000 sq mts as against 20,000 sq mts under 2006 rules.²⁹ This leads to the practice that more such construction activities shall now be outside the domain of the notice.

e. The Number of compliances has been reduced that may lead to incompetency of framework

Rule 20 (4) of the draft EIA Notification, 2020 now limits the submission of compliances reports to annually, i.e., once a year.³⁰ This is a shift from the present law that provides for half-yearly compliances, i.e., two compliances per year on a gap of six months.

f. Empowering the Central Government to declare certain projects as “Strategic” could have severe adverse implications

Rule 5 (7) of the draft EIA Notification, 2020 further puts that in case the central government decides any area to be of strategic importance, any information regarding to such projects will not be placed in the public domain. This is a regression against transparency of actions.

EIA -PUBLIC HEARING: KARNATAKA HIGH COURT PIL W.R.T. PERIPHERAL RING ROAD PROJECT IN BENGALURU

This EIA Draft Notification not only raised a series on debates and controversies but also gave rise to a number of judicial interventions. For example, in August 2020 hearing a PIL filed by local NGO namely United Conservation Movement Charitable and Welfare Trust, the high court of Karnataka ordered a stay on publication of the said notification till its further hearing³¹.

²⁹ *Supra Note 21.*

³⁰ Rule 24, Draft EIA Notification, 2020.

³¹ EIA Notifications to remain non- implemented, <https://www.downtoearth.org.in/news/environment/eia-notification-2020-delayed-till-september-7-72673>

Similarly, another collateral petition was filed in the said high court at Bengaluru to highlight a case of procedural and substantive violation of EIA norms of 2006. This PIL was filed by students from NLSIU and JGLS. The matter highlights the call taken by the local regulator KSPCB, directed to only conduct an online appraisal for granting the environmental clearance for a proposed eight lane peripheral ring road project. The high court admitted the matter and ordered an interim stay.³²

The HC gave notification to Karnataka State Pollution Control Board (KSPCB) and the Bangalore Development Authority (BDA), finding out if virtual hearings were adequate and legitimate under the Environment Impact Assessment notice (EIA), 2006.³³ It requested that they show how a particular hearing could guarantee the soul of the EIA, 2006. Three understudies of law appealed to the court September 20, provoking the choice to hold formal proceedings by means of Zoom — a private, web-based application. The HC just as the public virtual hearings occurred the exact day; the HC one was before recorded for September 22 yet was deferred.³⁴

As per the request, the fast EIA study led for the undertaking found that 63 towns, settlements and homes would be straightforwardly affected by the venture.³⁵ It added that 14.32 percent of the influenced populace had a place with the networks from planned clans and standings; 12.67 percent of influenced family units were going by ladies.³⁶ The eight-path project, traversing 65.5 kilometers, was proposed twenty years prior to decongest the city. The BDA had before conceded that the development would require the expulsion of 33,838 trees.³⁷

³²<https://www.livelaw.in/news-updates/bengaluru-peripheral-ring-road-project-karnataka-hc-stops-appraisal-of-eia-report-on-law-students-plea-163407>

³³ Highlights of EIA Draft Notification 2020, <https://www.drishtias.com/daily-updates/daily-news-editorials/draft-eia-notification-2020>

³⁴ Public Hearing under EIA in times of COVID- 19 Pandemic, <https://www.mondaq.com/india/clean-air-pollution/990100/public-hearing-amidst-the-covid-19-pandemic>

³⁵EIA Notification 2020 and its impact on the Environment on the Environment and Society, <https://blog.ipleaders.in/draft-eia-notification-2020-and-its-impact-on-the-environment-and-society/>

³⁶ Environment Clearance Report, Press Trust of India, <https://environmentclearance.nic.in/>

³⁷ Experts slam EIA 2020 Draft for Lack of Public Participation, <https://timesofindia.indiatimes.com/city/nagpur/experts-slam-eia-2020-draft-for-lack-of-public-participation-in-vetting-projects/articleshow/75543124.cms>

What can be the Potential harms?

The project has been in news due to various fears, the major of them include –

non-accessibility of the Detailed Project Report (DPR);

the legitimacy of the Environmental Impact Assessment (EIA) report;

the quantity of trees which will be felled for it.

However, the major issue that the researchers would like to address here is the futility of the Outer Ring Road Project.

A 'ring road', by definition, is a detour street that encompasses a town. Its responsibility is to permit free-streaming traffic that lessens the traffic in the center of the city.³⁸ At present instance, the city is provided with two ring roads already- The Inner Ring Road and the Outer Ring Road.³⁹

In 2015, an investigation demonstrated that The ORR was intended to oblige 5,400 PCUs (Passenger Car Units) each hour, yet is teared up with only 4,000 PCUs each hour and has in no substantial way, reduced the load it was meant to lessen.⁴⁰

Now, after the construction of the ORR, rather than decongesting, the city, its unchecked commercialization merely multiplied the traffic congestions and issues. An interesting expression, if there ever was one.⁴¹

PRR may witness the same problem. This is so because it has a similar issue of permitting huge scope business activities in huge lots of land.⁴² This shall serve no purpose but to add the

³⁸ Ring Road meaning, Cambridge, <https://dictionary.cambridge.org/dictionary/english/ring-road>

³⁹ Bengaluru has Rain Hangover: RIngroads to blame?, <https://www.thehindu.com/news/cities/bangalore/City-still-has-rain-hangover/article16301668.ece>

⁴⁰ Peripheral Ring road zoning, <https://bengaluru.citizenmatters.in/prr-peripheral-ring-road-orr-traffic-land-use-zoning-rmp-2031-52237>

⁴¹ Ejipura Hosur Flyover, <https://lbb.in/bangalore/ejipura-hosur-road-corridor-flyover/>

⁴² Revision of the Revised Master Plan, <https://www.thehindu.com/news/cities/bangalore/bda-withdraws-draft-revised-master-plan-2031-to-review-and-rewrite/article31929610.ece>

thickness of traffic or vehicles and shall serve as a classic example of the Devil and the Deep Blue Sea.⁴³

CONCLUSION AND SUGGESTIONS

The COVID-19 pandemic has taught humans the lesson in keeping up the perplexing and fragile connection between the nature and development. Human advancement ought not to happen at the expense of harming the environment as this will lead to a total breakdown of the environmental equilibrium. Remembering this, the Central Government explicitly the Ministry of Forest, Environment and Climate Change, need to pay notice to the worries of the different gatherings and work towards fortifying the EIA cycle such that the security and preservation of the climate turns into the point of convergence while additionally pursuing reasonable turn of events.

It appears to be that for the legislators, the driving force behind these modifications have been the ability to get a geared-up approval from the people in the shadow of the Nationwide Lockdown. This works by coupling the fact of scarcity of opposition from the general people in these uncommon pandemics of COVID- 19.

Apart from the aforementioned, problems or tricks such as the nitty gritty meaning of each term, presentation of the Technical Expert Committees, presentation of Accredited EIA Consultant Organization (ACO), presentation of online method of entries, diminishing the timeframe for award or dismissal of EC, presentation for arrangement for offer etc have been playing a major role in turning these notifications as a regressive departure from the existing law.

Notwithstanding these arrangements, some other recommendations which are at present lacking under the draft EIA Notification 2020 and might be viewed as added before conclusive inconvenience are as under:

- ***Strict Timelines for Getting EC and Penalty provisions in case of delay***

⁴³ *Id.*

The council may consider consolidating an arrangement for considered endorsement, is that the candidate may consider the endorsement to have been given on the off chance that the specialists postpone the equivalent past a specific time limit. Administrative postponement in allowing ecological freedom should be cut down. This would guarantee opportune removal on applications for natural leeway.

- ***Mandate on States for wider circulation of the Notification***

The draft EIA legislation does not presently provide for any provision for adding officials from the State Governments into the decision-making process. This, in turn directly infringes Principle 10 of Rio Declaration.

- ***More Clarity on New Concepts***

The draft EIA Notification proposes to present a few new ideas which are strange to the current structure, for instance, an Environment Permission, people group asset expansion plan, Accredited EIA Consultant Organization and so forth. It is along with these lines proposed before the last warning, the Ministry to give some further lucidity.