COMMENTS & OBJECTIONS ON

DRAFT EIA NOTIFICATION 2020

Submitted by

VINDHYAN ECOLOGY & NATURAL HISTORY FOUNDATION

RESEARCH & INPUTS

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Established in the year 2012, Vindhyan Ecology & Natural History Foundation is a research based voluntary organization working for protection of nature and nature dependent people in Mirzapur region of Uttar Pradesh.

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About this document

The Ministry of Environment, Forest & Climate Change has published the Draft EIA Notification 2020 on its website on 12 March 2020 and comments were invited from the general public within 60 days. Vindhyan Ecology and Natural History Foundation is hereby sending its official representation submitting its comments and objections to the Draft EIA Notification 2020 for consideration by the Ministry.

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A Preliminary Note to the Draft EIA Notification, 2020

The Draft EIA Notification, 2020 significantly dilutes the provisions of the EIA Notification, 2006. The Draft Notification introduces substantial changes which are contrary to the parent legislation - the Environment (Protection) Act, 1986 - and various other rules and regulations. This goes against the constitutional mandate of the state to protect the environment under the Public Trust Doctrine, and the standards set out in international conventions including the Rio declaration (1992) and Paris Agreement, 2015.

While the stated purpose of the notification is the improvement of the environmental clearance process, this is done through diluting fundamental and crucial safeguards. It not only ignores the Precautionary Principle but also violates the principles of natural justice and fundamental right to life guaranteed under Article 21 of the Constitution. The proposed safeguards of penalties and compensations are inadequate to counter the inevitable and irreversible ecological destruction. It is submitted that if the Draft Notification is implemented, it will ultimately lead to unscientific and unsustainable development. The proposed notification is completely contrary to the Principle of Non-regression as it significantly weakens the existing environment laws to the detriment of environment protection. At a time when the global community is faced with climate emergency and increasingly intense natural disasters, environmental safeguards should be strengthened and not diluted.

This Report compiles a critical analysis of some clauses in the proposed Draft Notification. It identifies the provisions which could be modified to enable better environmental safeguards and also highlights clauses which would lead to severe environmental harm, and therefore require to be reconsidered and reviewed in larger public interest.

Comments and Objections to the Draft EIA Notification

1. Definitions

i) Definition of Accredited Environment Impact Assessment Consultant Organization (ACO) should include individual EIA consultants

The Draft Notification, 2020 defines ACO as an organization that is accredited with the National Accreditation Board for Education and Training (NABET) of Quality Council of India (QCI) or any other agency, as may be notified by the Ministry from time to time.

This would imply that only organizations can be engaged as EIA consultants. It is submitted that both individuals and organizations accredited by NABET or other agencies should be permitted to conduct EIA studies. This is in consonance with professional practices such as lawyers, chartered accountants and doctors where the service providers can also be a registered individual. It should be the discretion of the project proponent to either approach the individuals or organizations.

ii) Definition of 'Eco-sensitive Areas/Zones' needs to be broadened

The definition of 'Eco-sensitive areas' and 'Eco-sensitive zones' in the Draft Notification only includes the Eco-sensitive areas/zones which are notified by the MoEFCC. It is submitted that there are several ecologically fragile landscapes such as Reserved/Protected Forests, floodplains, wetlands, sacred groves, watershed areas, habitats of vulnerable flora and fauna which are ecologically sensitive areas and perform significant ecological functions. While there are other laws which provide for the protection of some of these ecosystems (like the CRZ Notification, the Wetlands Rules to mention a few), the mapping and demarcation of these areas have largely not been completed. The current definition would imply that such ecosystems would remain in the blindspot while granting environmental clearances to projects and cause irreversible harm to the ecosystem and biodiversity. It is therefore recommended that the provision should include eco-sensitive sites and areas even if they are not officially notified by the MoEFCC.

iii) General Conditions should be applicable to a wider category of projects

It is submitted that the condition (a) of the General Condition should be extended to ecologically significant areas protected under Indian Forest Act 1927, Wetland Conservation and Management Rules 2017, CRZ Notification 2019, Island CRZ Notification, 2019 and Rivers notified as National Waterways under National Waterways Act, 2016.

'Ecologically fragile areas' such as floodplains, wetlands, sacred groves, watershed areas, including habitats of vulnerable flora and fauna should also be included under the General Conditions irrespective of whether the same are notified by the Ministry.

There is also no justification of exempting category B2 projects from the applicability of General Conditions. It is submitted that any industrial or developmental activity in areas mentioned in (a) and (b) and ecologically fragile areas as mentioned above are bound to create significant disturbance to the ecosystems, landscape continuity, wildlife corridors etc. It would also increase the likelihood of human-wildlife conflict or natural disasters. Therefore, projects in such areas should be permitted only as a last option. Considering the potential environmental impacts of projects or activities listed under Category B2, the same must be brought under the purview of General Conditions.

iv) Definition of 'Project' must include sequentially dependent project components

The Draft Notification, 2020 has vaguely defined 'project' as *project or an activity*. It is submitted that this definition should be strengthened to include aspects of projects which are overlooked. In several cases, the EIA is conducted only on 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. This was also specifically prescribed in clause 8(v) of the EIA Notification, 2006. However, in the Draft Notification of 2020 this clause appears to be diluted.

Further, in several cases, projects have been proposed in separate phases or in distinct components to evade a comprehensive EIA. The dictionary meaning of project means '*a piece of planned work or an activity that is finished over a period of time and intended to achieve a particular purpose*'[1]. The EIA should be conducted for the project as it has been conceived in its entirety.

[1] https://dictionary.cambridge.org/dictionary/english/project

It is therefore submitted that the term project must be explicitly defined to include all connected components of the project which are sequentially dependent due to requirement of law or technical reasons.

v) Extent of 'Study Area' must be determined by the respective EAC

The Draft Notification, 2020 defines the study area to a uniform radius of 5 and 10 km from the project boundary for projects under category B and A respectively. This sets out a standard impact area without taking into account the regional, scientific and technical considerations. It is submitted that different categories of projects will have different spatial, temporal and cumulative impacts. For e.g. for a river valley project, the impact is seen several hundred kilometers downstream of a river while the impact of emissions from thermal power plants may extend beyond 300 kilometers.

This kind of administrative interference on a purely scientific assessment will arbitrarily restrict the jurisdiction of the Expert Appraisal Committee (EAC) should determine the ToR on a case to case basis. It will greatly limit the power of EAC to ask for an assessment beyond the study area prescribed in the Notification, even if it is necessary for a particular project/case.

It is suggested that the minimum study areas should be specified separately for each sector-specific Standard TORs by the respective EACs, and allow the EAC to increase the study area if found necessary in Specific TORs.

vi) 'Violation' should include non-compliance of conditions laid down in Environmental Clearance

The Draft Notification, 2020 has defined the term 'violation' as only those cases where projects started the construction/installation/excavation/expansion/modernization without obtaining prior EC. However, the definition is silent on projects which violates conditions of EC granted by the regulatory authority. It is submitted that violations and non-compliance of the conditions of EC must be included in the definition of violation.

2. Requirement of Prior Environment Clearance or Prior Environment Permission

A comprehensive assessment of direct and indirect impacts should be considered before any activity is undertaken. Any dilution of this will defeat the purpose of the entire exercise of conducting EIA.

Under the proposed Draft Notification, it is stated that 'construction work' for the purpose of this notification shall not include securing the land by fencing or compound wall; temporary shed for security guard(s); leveling of the land without any tree felling; geo-technical investigations if any required for the project.

This means that a project proponent can start construction of a wall and also undertake leveling of the land where tree felling is not required without obtaining prior EC. Activities like construction of walls and levelling of land will change the land use-land cover of any particular landscape and leave permanent footprints. In many cases, the land for proposed project or activity involves ecologically fragile areas, wildlife corridors, wetland, grasslands, floodplains, hills, scrubland, desert etc. where trees are not necessarily present but any construction or levelling on such lands could lead to a significant disturbance causing irreparable and irreversible damage to ecosystem functions, important habitats and wildlife corridors.

This is a departure from the EIA Notification, 2006 (para 2), which specifically required EC to be obtained before any construction of work or preparation of land by the project management except for securing the land, is started on the project or activity.

It is therefore submitted that the standard of the 2006 EIA Notification is not diluted and that securing the land by fencing or compound wall and levelling of the land should not be allowed without obtaining prior EC.

3. Categorization of projects and activities

i) EIA related documents must be made public in case of projects of national security/defence/strategic consideration

The Draft Notification creates room for many projects to be placed beyond the purview of public engagement. It states that, "*all projects concerning national defence and security or involving other strategic considerations, as determined by the Central Government, shall require prior-EC or prior-EP, as the case may be, from the Ministry without any change in the category of the project. Further, no information relating to such projects shall be placed in public domain*".

It is submitted that this provision is widely worded and creates room for executive discretion to exclude public engagement on developmental projects. The provision in the 2006 EIA Notification, which only exempted the requirement of public consultation for projects of national defence or security or involving other strategic considerations, is sufficient in protecting security considerations. The expansion of this to remove all information from the public domain is unwarranted.

It is relevant to refer to other laws which have attempted to arrive at the balance between broad-based engagement and protecting sensitive information on grounds of security and national importance. Clause 10 of the Right to Information Act provides for exemptions to certain kinds of information which cannot be disclosed. However, the Act doesn't prohibit the citizens to access complete information. The provision states:

Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

Specifically on information relating to the environment, it has been held that by the High Court of Delhi[2] that "*if the information has a bearing on the state of the economy; the moral values in the society; the environment; the national safety, or the like, the same would qualify as 'larger public interest'*", and should be made publicly available.

It is therefore suggested that this exemption is revisited. Only the parts of the information which are declared 'confidential due to reasons of national security' should be exempt from disclosure, and this must be decided on a case to case basis. Creating a blanket exemption for all information to a widely interpretable category of projects would undercut the existing framework of transparency and public participation.

4. Dilutions for Category B2 projects

The Draft Notification proposes a fundamental change from the current framework in the process for Category B projects.

Under the current framework, the SEAC is mandated to undertake detailed scrutiny of EC applications for Category B projects to determine whether the particular project requires EIA studies based on the 'nature of the project' and 'location specificity' of the project. The projects requiring EIA were categorized as B1 and remaining were treated as B2. This process is very critical for category B projects and is known as 'Screening'.[3] The MoEFCC issues guidelines for categorization of projects under B1 and B2. However, during screening the SEAC had full discretion to appraise a category B2 project as B1 based on the nature and impact of

[2] UPSC vs. R.K. Jain, W.P. (C) 1243/2011

[3] Clause 7(i) of EIA Notification 2006

the project.[4] This decision must be made after a detailed scrutiny by experts, which cannot be replaced by standard procedures, and proposed by the Draft Notification.

The Draft Notification exempts most Category B2 projects from the entire EIA process of screening, scoping, preparation of EIA, public consultation and appraisal by the SEAC. Only building and construction projects listed under column (5) of item 42 are proposed to be placed before the appraisal committee while the applications for prior EC will be straightaway decided by the regulatory authority without referring the same to the SEAC.

As per the clause 5(5) and 5(6) of the Draft Notification, 2020:

(5) All projects under Category 'B2' that are required to be placed before Appraisal Committee as specified in the Schedule, shall require prior-EC from the SEIAA or UTEIAA, as the case may be.
(6) All other projects under Category 'B2' (other than those projects specified under subclause (5) above), shall require prior-EP from the SEIAA or UTEIAA, as the case may be. These projects shall not be placed before Appraisal Committee

The Draft Notification introduces a new process of Prior Environmental Permission which is a substantially diluted requirement. Clause 10(3) of the Draft Notification, 2020 states:

The Prior Environment Permission process for Category 'B2' that are not required to be placed before Appraisal Committee as specified in the Schedule, will comprise a maximum of two stages. The two stages, in sequential order, are:

Stage (1): Preparation of EMP Report;
Stage (2): Verification of completeness of the application by the Regulatory Authority; and
Stage (2): Grant or Rejection of Prior Environment Permission.

By its very nature, an 'Environmental Management Plan' precludes any independent application of mind and relies only on mitigating the negative outcomes. Further, an EMP without an EIA will not be able to assess the ecological impacts of the activity or anticipate the necessary mitigative measures that would be necessary. The entire process is then reduced to a mere formality. The cumulative impact of no comprehensive studies for such a wide range of activities in the entire country would have very severe repercussions at scale.

During the 'Screening' stage, all category B projects which by virtue of its 'location' have potentially greater environmental impacts are asked to conduct an EIA report after a careful examination of the application by the Expert Committee.

[4] MoEFCC OM dated 24 December 2013

Removal of the Screening and other remaining stages for category B2 projects in the Draft Notification are major dilutions of the EIA process and undermine the role and functions of the SEAC. It is submitted that such drastic change in the EIA regulations will have serious environmental consequences. It is therefore submitted that for category B2, no such exemptions must be made.

5. Scoping

In its attempt to reduce delays, the Draft Notification significantly dilutes the scoping process. Three particular instances have been highlighted here:

i) Baseline data collection should start only after deliberation by EAC

Clause 12(1) of the Draft Notification, 2020 states:

To facilitate due diligence by the Project Proponent including collection of primary or secondary data, as the case may be, even before filing of application for grant of ToR or prior-EC or prior-EP, sector wise Standard ToR developed by the Ministry, from time to time, shall be displayed on the website of the Ministry.

Clause 6(4) of the Draft Notification, 2020 further states:

All new projects other than specified in sub-paragraph (3) above, shall be referred to the Appraisal Committee by the Regulatory Authority within 30 days from the date of application, for recommending the specific ToR in addition to the Standard ToR, if deemed necessary. In case, the Regulatory Authority does not refer the matter to the Appraisal Committee within 30 days of date of application in Form-I, sector specific Standard ToR shall be issued, online, on 30th day, by the Regulatory Authority.

The Draft Notification opens the possibility that only some projects are referred to the Appraisal Committee - and all other projects can proceed with the collection of baseline data on the basis of standard ToR. This dilutes the procedure of Scoping and restricts the functioning of Expert Committees. No similar projects/activities proposed at different locations will have similar environmental impact. By virtue of its location itself, there will be different magnitudes of environmental and social impacts. The very concept of the EIA study is to assess the impact of such projects on the surrounding environment which is done on the basis of the project specific ToR prescribed by the Expert Committees. Referring projects to the EAC/SEAC for grant of TOR is a mandatory procedure in the EIA Notification and cannot be left to the discretion of the regulatory authority.

Further, the collection of baseline data even before grant of ToR based on standard ToR will defeat the sequence of the EIA process and compromise the quality of the EIA which is based on technical and scientific deliberation by EAC based on Form-1 and Pre-Feasibility report. The project can be rejected by the EAC at the Scoping stage itself. While sector specific standardized ToRs can be indicative, the project specific ToRs must be made after a detailed scrutiny by experts, and the baseline data should be collected on the basis of the same.

Project proponents may be allowed to start collecting baseline based on Standard TOR only when EAC fails to deliberate the application within the stipulated time.

ii) 'Expansion Proposals' of existing Projects should prepare EIA only after deliberation of the EAC

The Draft Notification proposes relying on standard ToRs for another type of activities. Clause 12(3) of the Draft Notification stipulates for issuance of Standard TOR within 7 days for certain projects without referring to EAC/SEAC which are as follows:

(a) All Highway projects in Border Areas covered under entry (i) and (ii) of columns (3) and (4) against item 38 of the Schedule;
(b) All projects, proposed to be located in notified industrial estates and which are not disallowed in such notification;
(c) All expansion proposals of existing projects having earlier Prior Environment Clearance;
(d) All Building construction and Area development projects covered under entries of column (4) against item 42 and 43 of the Schedule.

Provided that Appraisal Committee shall be informed regarding issuance of standard ToR for a project. The Appraisal Committee may recommend specific ToR in addition to the Standard ToR, if found necessary for that project, within 30 days from the issue of Standard ToR.

This implies granting ToR for expansion projects by default. In the true intention of EIA, ToR should not be issued without deliberation of the EAC/SEAC. The Expert Committee at the stage of Scoping not only recommends the grant of ToR, but also reserves the right to reject a proposal if the same is found to be environmentally unsustainable. The proposed provision will undermine the advisory/recommendatory role of the EAC and must be removed. This provision would also create the adverse incentive of projects being proposed at a lower capacity and subsequently expanding without critical scrutiny.

iii) Amendments in TOR should be based on the recommendation of EAC

Clause 6(8) of the Draft Notification, 2020 states:

In case of any change in the scope of the project, for which the ToR was prescribed by the Regulatory Authority, an application shall be made by the project proponent, online, in Form-3, for amendment in ToR within the validity of the ToR and before public consultation. ***All such proposals may be referred to the Appraisal Committee, if required,*** *within 30 days from the date of application. However, the validity of the amended ToR will be counted from the date of issue of earlier ToR.*

It is submitted that any proposal for amendment of TOR should mandatorily be referred to EAC and the Regulatory Authority should not have any discretion. Technically, it is the EAC which deliberates whether the project should be recommended for amendment of ToR and based on the said recommendation the Regulatory Authority takes a decision. Making the provision discretionary is another attempt to suppress the role of the EAC.

6. Preparation of EIA Report

i) The collection of baseline data should not be limited to one season

The Draft Notification in clause 13(2) stipulates that the "*Baseline data shall be collected for one season other than monsoon for EIA Report in respect of all projects other than River Valley projects.*"

This is severely inadequate. Many impacts, like the dispersal of air pollution caused by polluting industries/activities vary upon seasonal, spatial and temporal factors which change from season to season. Thus, the environmental impact assessment of all industries which come under 'Red category' should be assessed for the entire year and not limited to just one season.

ii) Allowing use of older Baseline data before Scoping is contrary to concept of EIA

The Draft Notification allows clearance to be granted on the basis of outdated baseline data. Clause 13(6) states:

Baseline data, referred in sub-clause (1) to (5) above, can be collected at any stage, irrespective of the application for the scoping. However, such baseline data shall not be older

than three years at the time of submission of draft EIA Report to the SPCB or UTPCC for Public Consultation.

This further weakens the scoping process. The Appraisal Authority should prescribe the parameters and manner of collection of baseline data in the TOR on the basis of the information supplied at the time of the proposal. This includes information about other ongoing/existing projects at the time of the proposal. If this provision is enacted, these aspects might not be reflected in the baseline data and the parameters for the environmental clearance will be outdated.

The EIA study is a process of assessing the potential environmental impacts of the project which also takes into consideration the cumulative impact of all other activities in the present and future. Allowing the project proponents to start collecting the same before deliberation by the EAC will have a cascading effect on the entire EIA process.

Thus, it is submitted that the baseline data must only be collected after the application of the project proponent has been deliberated upon by the EAC for the grant of TOR.

7. Public Consultation

i) Information about the project should be comprehensively made available before public consultation

At present, only the summary of Draft EIA report is made available on the website of SPCB/UTPCC before the public consultation. It is submitted that a GPS based shapefile as a Google Earth file of the proposed project along with the soft copy of the Draft EIA Report must be also shared online along with the summary EIA on websites of SPCB/UTPCC, MoEFCC and project proponents for meaningful participation of the public.

ii) Notice for Public Hearing in newspapers having wide circulation in the concerned region

Though the EIA Notification, 2006 and the Draft Notification, 2020 mandates publication of notice in one national and one regional vernacular newspaper, it is often misused by project proponents by publishing them in news newspapers that have lesser distribution. It is suggested that notice of public hearing should be published in newspapers having wide circulation in the area where the project is proposed and at least one of such newspapers has to be in vernacular language. This will ensure maximum publicity of the public hearing

granting ample opportunity to people to participate and raise their concerns regarding the project.

ii) Minimum notice period for public hearing must be increased to at least 60 days

The proposed notification has reduced the notice period for public hearing from 30 days (as prescribed in the EIA Notification,2006) to 20 days. However, the time period stipulated in the 2006 notification has also been found to be inadequate considering the EIA document which is purely based on scientific and technical information and requires legal understanding of certain issues. It is important that for a meaningful and effective participation of the affected people, ample time and opportunity is given where the affected people could communicate and discuss the information provided in the EIA and furnish a comprehensive response. It is therefore submitted that at least a period of 60 days shall be provided for the people to give their responses. It is pertinent to mention that even for inviting objections/comments to a draft legislation, a minimum period of 60 days is usually provided.

iii) Conducting the public hearing

The public hearing should be conducted with a deliberate attempt to ensure that the participation is free, fair and informed. The video recording of public hearing must be submitted with Form 2 to the Regulatory Authority for final appraisal.

8. Appraisal

i) Any additional study conducted during appraisal stage must undergo Public Consultation

Clause 14(7) states that no fresh studies shall be sought by the appraisal committee at the time of appraisal. However, in case such studies are sought, the same shall be clearly reflected in the minutes of the meeting.

This clause discourages the full functioning of the Appraisal authority, and should not be included. The need for additional studies may arise in the course of the appraisal, especially taking into account any concerns that might be raised at the stage of public participation. Such language in the law discourages this important aspect of scrutiny.

Further, it is suggested that in case any additional studies are submitted by the project proponent after the public consultation stage is over, those studies should also be required to be placed before the public. This has been held by the NGT in *Save Mon Region Federation*

v. Union of India, Appeal No. 39 of 2012, National Green Tribunal (07 April 2016). It is further submitted that right to access environmental information and participating in environment decision making are part of fundamental right to life and also Principle 10 of the Rio declaration. The state has a duty to facilitate and encourage public awareness and participation by making information widely available. Any documents or information sought by the EAC/SEAC if not made available to the public would prevent the people from knowing the complete information about the project which is contrary to the fundamental rights of the affected people. It is therefore submitted that if any additional studies are being sought at the time of appraisal, it must undergo Public Consultation.

ii) All applications and EIA related documents should be made public at the earliest

The timely and comprehensive availability of information in the public domain is a crucial requirement for any meaningful public engagement with the EIA process. This is sought to be diluted by the Draft Notification which provides that only very restricted information is made available. Clause 17(4) of the Draft Notification, 2020 states:

On expiry of the period specified for decision by the Regulatory Authority under sub-clause (2) above, the decision of the Regulatory Authority, and the final recommendations of the Appraisal Committee shall be public documents.

It is submitted that all the information related to the proposed project or activity starting from the application made by the project proponent for prior EC to the Final EIA and additional documents submitted as part of appraisal should be made available online as soon as the same is processed by the Regulatory Authority.

iii) Recommendation from NBWL should be a prerequisite for processing applications of prior EC

Clause 17(5) of the Draft Notification, 2020 mentions the approvals that may be required for different projects under other laws - like mining plan from competent authority; in-principle approval for diversion of forest land under Forest (Conservation) Act, 1980 and recommendation of State/UT Coastal Management Authority etc. as a prerequisite for processing prior EC, wherever applicable. However, the clause omits the recommendation of the National Board of Wildlife (NBWL) and Monitoring Committees set up under Eco-sensitive Zones and Areas which are equally important.

It is suggested that this clause must include the recommendation from NBWL and ESZ Monitoring Committees as a prerequisite for processing prior EC in cases where the proposed

project involves Protected Areas, Wildlife Corridors and eco sensitive zones/areas. It is submitted that till the clearance of the NBWL and ESZ Committees is obtained, EC should not be granted to the project proponent.

iii) Punitive action against the EIA consultant and project proponent for concealment and submission of false/misleading information

Clause 17(6) and 17(7) of the Draft Notification, 2020 provides for rejection and cancellation of EC in case of concealment and submission of false/misleading information and blacklisting of EIA consultants/coordinator in such cases.

It is submitted that this provision should be modified to include stricter sanctions - both EIA consultants and project proponents should in addition be made liable and prosecuted for concealment and submission of false or misleading information. Also, apart from blacklisting the EIA consultant, provisions for strict punitive action should be initiated in case of repeated practices of corruption, negligence and actions taken in bad faith.

9. EC for modernization projects

i) Pollution load Certificate cannot replace EIA

In certain cases, the requirement of EIA is dispensed with. Clause 17(7) of the Draft Notification, 2020 states:

'*No increase in pollution load' certificate issued by the SPCB or UTPCC on recommendation of Technical Committee constituted under Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974, shall also be considered in place of EIA and EMP required under column (5) and column (6) of the table given at sub-clause (1) above*.

It is submitted that a certificate of Pollution Control Board/Committee certifying 'No increase in pollution load' for modernization projects cannot be a replacement of EIA and EMP as the environmental impact assessment of projects/activities are not limited to just air and water pollution.

It is submitted that the EIA study undertakes assessment of various environmental impacts which includes change in land use-land cover, ecological impact, impact on biodiversity, impact on wildlife, impact on hydrology, impact on soil erosion, impact on ambient noise, impact on public health, cumulative impact of the existing and proposed projects/activities etc. which may not necessarily be directly linked with air and water pollution. Relying on a

certificate from technical committees under the Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 is not sufficient and cannot replace the mandatory requirement of EIA. This particular clause is bad in law and should not be included.

10. Process for amendment in prior EC

The experience of the EIA framework in India has demonstrated that the project proponents have frequently resorted to applying for amendments in the EC to introduce substantial changes and additions that render meaningless the rigour of the EIA process.

The Draft Notification, 2020 does not clearly specify that in which cases or circumstances the amendment in the prior EC or EP could be sought by the project proponent. Unless the same is clearly mentioned, this provision of amendment in prior EC will lead to corrupt practices. It is therefore submitted that this provision must be more specific for the cases where amendment of EC could be sought or allowed.

11. Perpetual validity of EC during operational phase

Clause 19 of the Draft Notification, 2020 prescribes the period of validity into three phases- construction/ installation, operational and redundancy/ closure/ dismantling phase. This provision also states that *validity of prior EC/EP for the operational phase of projects, except mining, shall be perpetual for the remaining life of the project.*

It is submitted that a project or activity is designed keeping in mind two variables- the intended purpose and the duration for which it would serve the said purpose effectively and efficiently. The EIA study for a project/activity is made based on the present-day knowledge of the technology used, scientific understanding and prevailing environmental conditions which are bound to change over a period of time. It is suggested to keep the validity of the operational phase of projects for declared project life with maximum validity up to 25 years, after which the project may be granted renewal of the EC based upon a post-facto study and deliberation of the EAC. A project should be renewed considering the compliance with the EC conditions, and a thorough evaluation of the impacts, viability and effectiveness of the project at the time.

12. Post-EC Monitoring of Projects

i) Yearly submission of Self-Compliance reports is insufficient

Under the current EIA Notification, industries have to submit half-yearly self-compliance reports. The Draft Notification, 2020 proposes to change this to a yearly requirement. It must

be understood that the Regional Offices of MoEFCC, CPCB and SPCB offices are highly understaffed to conduct monitoring. Thus, it is important that self-compliance reports must be submitted more frequently, at the least quarterly. Changing this provision to yearly will give undue favour to the project proponents since it will become more casual and relaxed, compromising with the quality of environmental safeguards.

ii) Penalties for non-submission of self-compliance reports are negligible

The Draft Notification, 2020 has introduced a penal provision for non-submission of self-compliance reports as Rs 500, Rs 1000 and Rs 2,500 per day for projects under category B2, B1 and A respectively.

While it is a welcome step to introduce a penalty, the amount proposed is too small to have any deterrent effect on defaulters. The provision for submission of the self-compliance reports is a mandatory procedure under EIA regulations and must be made more stringent for effective compliance by the project proponent. Non-submission of reports, or submission of false information in such reports should have serious repercussions including suspension and cancellation of the prior EC.

13. Grant of Post-facto EC

The Draft Notification proposes to regularize industries which have commenced operations without obtaining prior EC. Granting post-facto Environment Clearance is against the Precautionary Principle which is the sole basis and objective of EIA regulations. This will encourage industries to commence operations and eventually get regularized by paying the penalty amount. This implicitly gives rise to a situation of '*fait accompli*', where the damage to the environment is irreversible.

This provision seeks to directly circumvent judgments of the Supreme Court where this has been held to be unacceptable. In *Alembic Pharmaceuticals* v. *Rohit Prajapati & Ors*[5], it has been held that an executive notification allowing post-facto clearance goes against the parent legislation, the Environment (Protection) Act, 1986, and is therefore illegal: "*Being an administrative decision, it is beyond the scope of Section 3 and cannot be said to be a measure for the purpose of protecting and improving the quality of the environment.*"

In *Common Cause v Union of India*[6], the Supreme Court held that "*the concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA*

[5] Civil Appeal No. 1526 of 2016 (01 April, 2020)
[6] (2017) 9 SCC 499

1994 and EIA 2006". Such projects will defeat the very purpose of the EIA process which must undergo each stage before construction of the project.

In Association for Environmental Protection v State of Kerala[7]*,* the Supreme Court has held that commencement of projects without obtaining prior EC is a violation of the fundamental right to life guaranteed to the people of the area under Article 21 of the Constitution.

It is submitted that the said provision will only encourage negligence and casual approach of the project proponent towards the mandatory procedures, considering the same as a mere formality. It would also affect the rights of those who have the opportunity to register their concerns before any changes to their environment are made by a project or activity. It is further submitted that the EIA regulation is based on the concept of "prior EC" and not "post EC". If the same is diluted or amended to include post facto EC, the same will be unconstitutional and ultra vires the Environment (Protection) Act, 1986.

14. Non-compliance of prior EC or prior EP

Clause 23 of the Draft Notification, 2020 has detailed out the procedure for dealing with non-compliance of prior EC or prior EP conditions by project proponents.

Clause 23(6) and (7) states:

(6) On conclusion of the proceeding, the Expert Committee shall make categorical recommendations to the project proponent for time bound action plan for compliance of the conditions of prior-EC conditions and the amount of the bank guarantee deposited as an assurance for the purpose of compliance with the SPCB or UTPCC, as the case may be.

(7) The bank guarantee will be released after successful implementation of the action plan and on the recommendations of the Regional office of the Ministry or Regional Directorate of CPCB in case of Category "A" projects; SPCB or UTPCC in case of the Category "B" projects.

It is important to note that the EC letter granted under the EIA Notification, 2006 specifically stipulates:

'Failure to comply with any of the conditions may result in withdrawal of the clearance and attract provisions of Environment (Protection) Act, 1986'.

The Draft Notification has diluted the penal provisions of non-compliance and in fact curtails the power of the Regulatory Authority to withdraw the EC or take punitive action against the

[7] (2013) 7 SCC 226

project proponent under the Environment (Protection) Act, 1986. This has reduced the provision to a 'pollute and pay' model, which is unsustainable.

Further, the penalty has been limited to a maximum penalty amount of the bank guarantee deposited with SPCB or UTPCC. The said provision is *ultra vires* its parent act as it dilutes the penalty provisions laid down in the Environment (Protection) Act, 1986 which provides for a wider range of actions, including prosecution and punishment for non-compliance and contravention of the provisions, orders and directions issued under the Act.

15. Restricted provisions for registering complaints for non-compliance

The Draft Notification restricts the locus of persons who can raise complaints against non-compliance of EC conditions. Clause 12(1) states:

The cognizance of the violation shall be made on the: -

(a) suo moto application of the project proponent; or
(b) reporting by any Government Authority; or
(c) found during the appraisal by Appraisal Committee; or
(d) found during the processing of application, if any, by the Regulatory Authority.

Similarly, Clause 23(1) states:

The cognizance of the non-compliance of conditions of prior-EC or prior-EP, as the case may be, shall be made based on the suo moto reporting by the project proponent or reporting by any Government Authority or found during the appraisal of Appraisal Committee or during the processing of application if any by the regulatory authority.

The clauses mentioned above is an attempt to undermine the legal and constitutional rights which empowers the citizens of the country to raise their concerns against any project or activity which is found to be violating the environment laws in force or causing damage to the environment and ecology of the country. It is submitted that the cases of violation can be reported by 'any person', affected or concerned, who gains knowledge of the fact that a project or activity is being established without taking prior permission under the regulations or is functioning in utter disregard of the conditions laid down in the permission letter or has been found to damage or destruct the environment or ecology in any part of the country. Taking away the right of the concerned persons to report against violation cases will be a direct attack on their constitutional rights which empowers the citizens of the country to participate in the protection and governance of the environment.

16. Projects exempted from requirement of prior EC

Clause 26 of the Draft Notification, 2020 has exempted about 40 different project activities from the requirement of prior EC/EP. We are of the considered view that MoEFCC should set up a high-level expert committee to review the decision to exempt a large number of projects/activities from the requirement of EC. The following categories of projects if not included in EIA regulations will lead to significant impact on land use and wildlife which are discussed below.

i) Solar Thermal Power Plants and Photovoltaic (PV) Plants

Large scale solar power plants have significant impact on land use, ecosystem functions and wildlife habitat. While large-scale PV plants range from 3.5 to 10 acres per MW, the solar TPP plants can use up to 16.5 acres per MW. [8] Solar TPP uses massive quantities of water for production of electricity, which is bound to create a significant impact on surface water and groundwater sources. Also, Solar TPPs often use hazardous chemicals as coolants, leakage and disposal of which is linked to environmental degradation. Further, the cumulative impact of its ancillary components such as access roads, transmission lines and water pipelines will have a significant impact on regional topography and ecology. Large focusing mirrors in solar TPPs are also harmful to Avian fauna. Birds that fly in the way of the focused rays of the Sun can be incinerated. According to one report, there are about one bird death every two minutes at the 392 MW Ivanpah solar plant in California[9].

Thus, it is completely unjustified to keep Solar Thermal Power Plants and Photovoltaic plants outside the purview of EIA Notification. It is submitted that the said projects must be included in the EIA Notification as category A and B1.

ii) Maintenance Dredging

In the EIA Notification, 2006, *the maintenance dredging is exempted provided it formed part of the original proposal for which the Environment Management Plan (EMP) was prepared and environmental clearance obtained*. However, the proposed draft has made a deliberate attempt to remove this provision.

[8] https://www.ucsusa.org/resources/environmental-impacts-solar-power

[9] https://www.eenews.net/stories/1060011853

The Draft Notification has completely exempted maintenance dredging from the requirement of EIA. This will have severe environmental consequences as many rivers and wetlands are important habitats of animals and insects which get significantly disturbed due to dredging activities. Proper management of the disposal of the dredged material is crucial to avoid severe downstream impacts. Most of these rivers are habitats of several Schedule-1 animals which are going to be affected. Further, a large portion of the population who depend on rivers for their livelihood can be adversely affected.

Requirement of EC for maintenance dredging is now much more important as 106 rivers have been declared as new National Waterways in the year 2016. In absence of any requirement of scoping, EIA, and public consultations for projects related to inland waterways-unabated dredging activities are bound to severely affect fragile river ecosystems and their habitats.

iii) Extraction of earth for linear projects

The exemption granted to extraction/sourcing/borrowing of ordinary earth for linear projects such as roads, pipelines, etc. will have significant impacts for the areas where they are planned. Such linear projects create huge disturbance to wildlife movement and habitats by fragmenting continuous landscape and obstructing movement. Giving clean chit to such projects to extract earth from surrounding areas will create irreparable damage.

It is submitted that extraction of earth from protected areas and other ecologically fragile areas should not be allowed. In other areas, such extraction should be made part of the EIA study undertaken by the linear projects for prior EC.

iv) LNG terminal

The EIA Notification 2006 mandated LNG terminals to require prior EC and treated it as a category A under item 6(a) of the schedule. However, the Draft Notification 2020 has removed the same without any justification. It is submitted that the same should be retained as a Category A project.

17. Schedule

i) Recategorization of certain projects in Category B dilutes the EIA process

The Draft Notification 2020 has recategorized a plethora of projects under Category B2, exempting them from Scoping, EIA study, public consultation and expert appraisal. This exemption can be made justified only for very low footprint projects which have minimal environmental impacts or projects which are proposed within already notified industrial

estates of certain category. The arbitrary exemption of a large range of activities from the EIA process is *ultra vires* of its parent Act, against the concept of precautionary principle, contradictory to various significant judgments of the Supreme Court and NGT and against the fundamental right to life guaranteed to the people under Article 21 of the Constitution. Some of such projects and activities categorized as B2 in the present draft notification are discussed below.

A) Irrigation [item 4]

Under EIA Notification, 2006 irrigation projects with culturable command area (CCA) of more than 10,000 hectares were considered as category A, and those between 2,000-10,000 hectare were category B1. Projects below 2,000 hectares of CCA were exempted from the requirement of EC through an amendment in the year 2014.[10]

In the Draft Notification, 2020- All irrigation projects between 2000-10,000 hectares of CCA are now placed under Category B2, and projects with capacity between 10,000-50,000 hectares CCA as B1, and projects beyond 50,000 hectares as Category A.

There is no justification for increasing the CCA from 10,000 ha to 50,000 ha to be classified as a category A project. The implication for this reclassification would be that most dams constructed for irrigation would fall under Category B2 of the Draft Notification, which do not have any component of public consultation. It is important to note that these projects are the centre of many environmental conflicts. Keeping such projects under category B2 would mean preventing people from raising objections against such projects and undermining their role in the decision-making process.

These projects also have huge environmental and social costs as they submerge forests, wildlife habitats & corridors and involve large scale displacement of people. It is strongly suggested that the categorization of irrigation projects should not be changed.

B) Secondary Metallurgical industry (Non-Toxic metals) [item 10(f)]

The Draft Notification, 2020 has categorized the following industries as Category B2

(i) Foundries involving furnaces such as Induction Furnace or Electric Arc Furnace or Submerged arc
furnace or other gas-based furnaces, with capacity more than 1,00,000-1,50,000 ton/ annum as B2 and more than 1,50,000 ton/ annum as category B1.
(ii) Foundries involving furnaces such as cupola or other furnaces using coal with capacity more than 60,000-1,00,000 ton per annum as B2 and more than 1,00,000 ton/annum as B1.

[10] S.O. 1599 (E), dated 25 June 2014

(iii) Standalone re rolling mills involving pickling with a capacity more than 1,00,000 ton/ annum.
(iv) Standalone re rolling mills not involving pickling with a capacity more than 2,00,000 ton/ annum.
(v) Medium enterprises

In contrast, the EIA Notification, 2006 only categorized secondary non-toxic metallurgical processing industries *involving operation of furnaces only, such as induction and electric arc furnaces, submerged arc furnaces and cupola with capacity 30,000 to 60,000 TPA and located within notified industrial estates* under Category B2. All other non-toxic secondary metallurgical industries were treated as category B1. The 2006 Notification also required EC for all secondary metallurgical processing industrial units involving operation of furnaces only, such as induction and electric arc furnaces, submerged arc furnaces, cupola and crucible furnace with capacity more than 30,000 tonnes/annum.

Thus, the draft notification not only downgraded the category of the projects but has also increased the lower limit of the industries to obtain prior EC from 30,000 tons/annum to 60,000 and 1,00,000 tons/annum. This recategorization is unjustified and should not be done.

C) Significant recategorization of other Metallurgical Industry [item 10 (a)-(e)]

Under EIA Notification, 2006 all primary metallurgical industries; Sponge Iron manufacturing capacity of more than 200 tons/day (which amounts to max 73000 tons/annum); and secondary metallurgical processing industry (all toxic & heavy metal) producing units of more than 20,000 tons/annum were treated as category A.

Under the Draft Notification 2020, ferro alloy plants with production capacity of up to 1,50,000 tons/annum; sponge iron plants of capacity up to 5,00,000 tons/annum; and integrated steel plants of capacity 10,00,000 ton per annum of crude steel are specifically recategorized as category B1.

Previously, all projects under primary metallurgical industries and Sponge Iron manufacturing plants ≥ 200 tons/day were treated as category A, but the Draft Notification has now narrowed down the industries under primary metallurgical to only certain types of industries which will require prior EC under category A and B1. As per the Draft Notification- Integrated Steel Plants, Sponge Iron and Ferro Alloy plants of production capacity above 10,00,000 tons/annum; 5,00,000 tons/annum; and 1,50,000 tons/annum respectively and all projects under Non-Ferrous Smelting and Refining will be treated as category A.

This significant change in threshold capacity of up to 50 times of production for recategorization of a project from category A to B1 is completely unjustified and without any scientific basis.

D) Projects in respect of Inland Waterways [item 37]

The Draft Notification, 2020 treats all projects under Inland Waterways as Category B2. This, along with the fact that maintenance dredging is exempted from the requirement of prior EC, would put beyond scrutiny the severe ecological and social impact of any dredging on rivers. This is particularly relevant since 111 river systems are declared as National Waterways with 106 of them declared for the first time in 2016. The current EIA Notification, 2006 includes a clarification that capital dredging includes dredging inside ports, harbours and channels. Presently, maintenance dredging is exempted only if it formed part of the original proposal for which the EMP was prepared and EC was obtained. While the Draft Notification has removed the above-mentioned note from the Schedule, it has further exempted maintenance dredging altogether under Clause 26 of the Draft Notification.

It is submitted that this would have severe long-term consequences, and that projects in respect of inland waterways should undergo all stages of the EIA process.

E) Highways/ Expressways/ Multimodal Corridors/ Ring Roads [item 38]

The Draft Notification, 2020 has exempted the applicability of General Conditions to these projects. This implies that any new or expansion proposal of highways, even if proposed near or within ecologically sensitive areas, protected areas etc, will not be appraised by central government or treated as category A irrespective of their size and magnitude.

Wildlife habitats and corridors are fragmented and severely disturbed by roads which is one of the major threats to the shrinking wildlife habitats in the country. The Ministry should ensure that these projects remain within the strictest EIA framework. The projects under this category should therefore be brought under the purview of General Condition.

F) Aerial Ropeways [item 39]

Under the EIA Notification, 2006 ropeway projects located at altitude of 1000 mtr. and above; and all projects located in notified ecologically sensitive areas are treated as Category A projects. All other projects under Ropeway were made Category B2 through an OM dated 24 December 2013.

The Draft Notification, 2020 has completely deviated from the original provisions by only including projects located in notified ecologically sensitive areas only in Category B2. Other projects do not require any prior EC whatsoever. This exemption to ropeways projects of Category A will have severe environmental consequences, especially because such projects are mainly proposed in areas of high ecological sensitivity and wildlife habitats. It is strongly suggested that these projects are included in Category A.

G) Building Construction & Area Development Projects [item 42]

In the EIA Notification 2006, all projects between 20,000-1,50,000 sq.m. are treated as Category B1 but exempted from the requirement of Scoping. Projects of 1,50,000 sq.km and beyond are treated as township & area development projects and are appraised as Category B1 projects. Only building & construction projects were exempted from the requirement of Scoping and EIA studies but the same was appraised by SEAC based on Form I/ Form IA and the conceptual plan. Both the categories were also exempted from the requirement of Public Consultation, provided that it does not include any Category A project.

The Draft Notification has relaxed this requirement by placing under Category B2 all building & construction projects between 20,000-50,000 sq.m. and projects between 50,000-1,50,000 sq.m. having a provisional 'certificate of green building' or related to industrial sheds, educational institutions, hospitals and hostels for educational institutions.

This relaxation given to industrial sheds, educational institutions, hospitals and hostels for educational institutions from expert appraisal are unjustified as environmental impacts of any project of this magnitude can also be significant. Without the mandatory process of Scoping, EIA study, public consultations and appraisal, these projects will lead to irreparable damage to land use and local ecology.

H) Elevated Roads [item 43]

In the Draft Notification only projects with area above 1,50,000 sq.m. of built up area are included in the notification, and in the B2 Category. This means, most of the projects will not require prior EC as such big projects are rare (for e.g. the constructed area of Delhi's Signature Bridge is 1,55,260 sq.m.), and even those which require prior EC will not undergo any scoping, EIA study, public consultation and expert appraisal.

Therefore, it is submitted that all elevated roads with the built-up area up to 1,50,000 sq.km should be included in Category B1 and above 1,50,000 sq.km. should be placed under Category A.

ii) Category B1 projects which are proposed to be treated as B2 on account of being located 'within notified industrial estate', the category of the industrial estate in such items must be prescribed as Category A or B1

In the Draft Notification 2020- the Industrial Estates (item 34) are required to take prior EC under category A, B1 or B2. The criteria for any industrial estate to be categorized as A or B1 is that it should house at least one project of the corresponding category. Irrespective of its area, if an industrial estate houses any category A project then the estate will require prior EC

as category A and the same condition applies to category B1. This simply means that an industrial estate which was granted EC as B2 cannot have any projects listed under category B1 or A. Similarly, an industrial estate receiving EC as B1 cannot have category A projects.

The draft notification proposes some of the B1 projects (located *outside* the notified industrial estate) to be conditionally treated as 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'. However, it is not prescribed whether such industrial estate where these projects will be located should be in a category A or B1.

It is submitted that instead of only mentioning '*notified industrial estates*', the term '*notified industrial estates of category A or B1*' must be used for such category B1 items to be treated as B2.

iii) EIA requirement should not be linked to the Micro, Small and Medium Enterprises Development Act, 2006

The Draft Notification 2020 has categorized projects under several items (8, 9, 11, 24, 25 and 27) of the Schedule as B2 if these are small or medium enterprises. The definition of Small and Medium enterprises under the Draft Notification is adopted from Micro, Small and Medium Enterprises Development Act, 2006 (MSMEDA) and its subsequent amendments. As per MSMEDA, the following definitions are provided:

7 (l) (a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, as- 65 of 1951 as-
(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;
(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or
(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

The monetary investments in plant or machinery does not form the basis to assess its environmental impacts. The categorization of projects or activity in the schedule is made based on the potential social and environmental impacts and spatial extent of these impacts, which is specified clearly in clause 5(1) of the Draft Notification.

It is therefore suggested that the EIA should not be linked to the MSMEDA, 2006 and that projects should only be categorized on the basis of their potential environmental impacts.

vi) General Conditions should apply to B2 Category

In the scheme of the EIA Notification, 'General Conditions' lay out an overriding requirement of a higher degree of scrutiny, irrespective of the categorization of the project. Under the Draft Notification, *any project or activity specified in Category 'B1' shall be appraised at the Central Level without change in the Category, if located in whole or in part, in areas*

a. *within 10 km in respect of items numbers 3, 5, 32, 33 of the schedule and within 5 km in respect of other items, from the boundary of-*
   (i) Protected Areas; or
   (ii) Critically Polluted Area; or
   (iii) Eco-sensitive area; or
   (iv) Inter State or Union Territory.

b. *within the boundary of-*
   (i) Severely Polluted Area; or
   (ii) Eco-sensitive Zone.

In the Schedule of the Draft Notification, it is further added:

1. General Conditions shall not apply for: -
   i. Items 9, 10(f), 11(b), 25, 38, 40, 41, 42, and 43
   ii. River bed mining projects on account of inter-state boundary; and
   iii. All Category 'B2' projects.

Thus, the Draft Notification, 2020 exempts all B2 projects from the applicability of General conditions and various other items in the Schedule viz. 9- Pellet plants or agglomeration plants), 10(f)- Secondary Metallurgical industry), 11(b)- Standalone clinker grinding units, 25-Synthetic Organic Chemicals, 38-Highways/Expressways/Multimodal corridors or Ring Roads, 40-Common Effluent Treatment Plants, 41-Common MSW Management Facility, 42-Building Construction & Area Development Projects, and 43- Elevated Roads or Standalone Flyovers or Bridges.

As per the EIA Notification 2006, General Condition applies to all of the above-mentioned projects except building constructions and area development projects. Therefore, the exemptions provided in the Draft Notification is a major dilution of the existing EC regulations and could severely threat ecologically sensitive areas and wildlife habitats. It is important that the said exemption is removed and GC is made applicable to all the said projects and activities.