

**‘ENVIRONMENTAL IMPACT
ASSESSMENT DRAFT
NOTIFICATION, 2020-
CAN THE EIA LAW IN INDIA
BROADEN ITS HORIZON?’**



**NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
(NLSIU)**



**CENTRE FOR ENVIRONMENTAL LAW,
EDUCATION, RESEARCH AND ADVOCACY (CEERA)**

27TH AUGUST, 2020

Prologue

This Opinion piece titled '*Environmental Impact Assessment Draft Notification, 2020 - Can the EIA Law in India broaden its Horizon?*' and the opinion contained herein is independently prepared by the **Centre for Environmental Law, Education, Research and Advocacy (CEERA), National Law School of India University (NLSIU), Bengaluru**, in response to the invitation for suggestions and objections on the proposal contained in the Draft Notification on Environment Impact Assessment, 2020 published by the Ministry of Environment, Forest and Climate Change, Government of India.

The opinion piece has been prepared by the team headed by Prof. (Dr.) Sairam Bhat along with associates including Mr. Rohith Kamath, Ms. Lianne D'Souza, Mr. Raghav Parthasarathy, Ms. Madhubanti Sadhya, Mr. Vikas Gahlot and Ms. Geethanjali K.V.

This opinion piece is also available on our websites - www.nlsenlaw.org, www.nlspub.ac.in, www.nlsabs.com.

The information, views and recommendations contained herein are specifically for the purposes as mentioned hereinabove and may not be used by any other party or for any other purpose. The said opinion does not reflect the views of NLSIU or any other individual, officer of the institution.

Prof. (Dr.) Sairam Bhat

Professor of Law and Coordinator of CEERA,
National Law School of India University, Bengaluru
© Copyright, CEERA-NLSIU, 24th August, 2020.

TABLE OF CONTENTS

ABOUT CEERA	4
EXECUTIVE SUMMARY OF RECOMMENDATIONS	6
PART I	9
OVERVIEW OF THE DRAFT ENVIRONMENTAL IMPACT ASSESSMENT NOTIFICATION, 2020	9
Background:	9
Draft Notification, 2020.....	9
COMPARATIVE STUDY OF EIA NOTIFICATIONS : SIMILARITIES AND DISTINCTIONS ..	11
PART-II.....	14
UNDERSTANDING CRITICISMS OF THE NOTIFICATION BY STAKEHOLDERS SO FAR	14
Post-facto Environmental Clearances	14
Re-Categorisation of Projects	15
Compliance and Monitoring.....	15
Public Participation	16
Climate Change Mitigation	16
Land Acquisition and Land Grab	17
Statutory Dilutions.....	17
PART-III	19
DETAILED RECOMMENDATIONS ON ENVIRONMENTAL IMPACT ASSESSMENT	
DRAFT NOTIFICATION, 2020 - SUGGESTIONS FOR AN IMPROVED NOTIFICATION	19
Integration of Environment Impact Assessment and Environment Clearance in the Notification Title, followed by substantial provisions on EC process.	19
Strengthening the Functioning and Accountability of the Appraisal Committee.....	19
Amendment of the term ‘Violation’ in the Definition Clause	20
Violations with respect to the Public Consultation Process.....	22
Clarity on Procedural and Substantive Violations.....	23
Whistle Blowers Protection for Disclosure of Information	24
Widen Public Participation in Public hearing.....	25
EIA to include Strategic Impact Assessment	27
Investment Amounts incurred by Project Proponent to implement sustainable practices, as a ratio to the total outlay should be included as a parameter	27
Exemptions from Environmental Clearance should be based on sound Environmental Management Principles on a case-to-case basis, and not by means of a blanket-exemption.....	27
Mandate that the Expert Appraisal Committee is bound by principles of Environmental law, especially precautionary principle and the Public trust doctrine.	28

ABOUT CEERA



Centre for Environmental Law Education, Research and Advocacy (CEERA), established in 1997 is a benefactor of the Ministry of Environment, Forest and Climate Change (MoEF&CC), Government of Karnataka, the Bar and the Bench in India and abroad. Building an environmental law database, effectively networking among all stakeholders, building an environmental law community and policy research in the area of environment are CEERA's main objectives. To achieve the aforesaid objectives, CEERA has been able to build functional and professional linkages with government agencies and non-governmental organisations in India, the South Asian Region and at International levels. Apart from handling and furthering India's environmental conservation work involving policy analysis, campaigning, community capacity building and strategic level intervention on critical environmental issues, CEERA serves as a rich resource centre for environmental law teaching and research for both the undergraduate and post graduate courses at NLSIU.

One of the first in India, to successfully be granted a World Bank project and thereafter being a steady choice for the Ministry of Environment Forest and Climate Change, CEERA has been entrusted with some of the most fundamental trainings of important Forest Officers, Revenue Officers, Officers of the Central Pollution Control Board and also of the Government of Karnataka. Over the years the Centre has been approached for carrying out research projects and conduct effective training programmes.

CEERA has imparted training on Contracts & Energy Sector for various organisations including the Mitsubishi Power Corporation, Bengaluru; Reliance Energy Management Institute, Mumbai; Gujarat Energy Training & Research Institute; Administrative Training Institute, Mysore; National Academy of Direct Taxes, Delhi; Vaizag Steel; Central Silk Board; National Productivity Council; GIPARD, Goa and Fiscal Policy Institute, Bengaluru.

CEERA has also made several publications in the area of environmental law, the law and public policy along with Newsletters, CEERA March of the Environmental Law, NLSIU's first e-Journal - Journal on Environmental Law, Policy and Development and manages two websites viz., www.nlsenlaw.org, wherein the law and policy on environment is regularly updated, and www.nlsabs.com, a dedicated portal where the law and policy on Access and Benefit Sharing is updated periodically. All our publications are duly updated on our online portal www.nlspub.ac.in, which is open for subscription to all readers.

Contact Details

Centre for Environmental Law Education, Research and
Advocacy (CEERA), National Law School of India
University, Nagarbhavi, Bengaluru - 560072

Websites: www.nlsenlaw.org

www.nlspub.ac.in

www.nlsabs.com

E-Mail: ceera@nls.ac.in

Centre Coordinator:

Prof. (Dr.) Sairam Bhat,

Professor of Law,

National Law School of India University, Bengaluru 560072

EXECUTIVE SUMMARY OF RECOMMENDATIONS

For the purposes of brevity, the recommendations suggested in detail is summarised in brief as follows:

1. The Notification should be retitled as the “Environmental Impact Assessment and Environmental Clearance Notification” to reflect the administrative process of the EIA, which is essential for an EC. The Notification must integrate the process of EIA as an essential tool for Environmental Clearance compliance under the EPA 1986. Further, the notification must define ‘Forest clearance’, ‘CRZ Clearance’ and the procedure involved in the same. If EIA study is connected to the manner in which the ‘FC and ‘CRZ’ are given, the said notification may as well include it. [Suggested amendment to the **Title** and **Clause 4**]
2. For the purpose of clarity, the Notification must state in express terms the definition of ‘Environmental Clearance’, ‘Forest Clearance’ and ‘Coastal Regulation Zone Clearance’. As the process of granting EC is in light of the Environment (Protection) Act, 1986, it is integral to specifically include the process and procedure involved in granting forest clearances under the Forest Conservation Act 1981, and the regulations made thereunder. [Suggested amendment to **Clause 3**]
3. There must be a clear definition of what constitutes a ‘violation’ *vis-à-vis* the EIA process and ‘violation’ of EC norms. Furthermore, violations in the EIA process be recognised explicitly and enumerated. These violations should take into account the following circumstances:
 - Failure in conducting scientific study for assessment of a proposed project.
 - Furnishing of false information by any member of the appraisal committee.
 - Intentionally furnishing false reports or false data.
 - Undue delay in conducting an assessment/appraisal or in production of reports. [Suggested amendment to **Clause 3**]
4. Further having EACs at district level must not be permitted. This will essentially dilute the functions of the expert body and may lead to circumvention of State level policies on environmental management. [Suggested amendment to **Clauses 3(4) and 3(19)**]
5. The Accreditation of EIA Agency, apart from ACO, must be also notified in the Notification along with the criteria on the basis of which the accreditation is based. EIA agencies may be rated on a year to year basis. [Suggested amendment to **Clause 3**]
6. Investment Amounts incurred by Project Proponent to implement sustainable practices, as a ratio to the total outlay should be included as a parameter. [Suggested amendment to **Clause 5(1)**]
7. EIA must be restricted to only those projects that have 'significant impact on environment'. Drawing reference to the European Commission’s EIA Directive 1985, the coverage of the Notification should by and large be limited to all projects that are likely to have ‘significant impact on environment’.[Suggested amendment to **Clause 5**]

8. To ensure a level of permanency in the EAC, it is suggested that the EAC must be given a statutory status with at least 3-year minimum term for its members.[Suggested amendment to **Clause 6**]
9. The eligibility criteria for the appointment of the chairpersons of the State level EACs, be amended to make ‘environmental expertise/knowledge’ a mandatory requirement. [Suggested amendment to **Clause 6**]
10. The dominance of IFS officers be withered down and instead former officers from the Pollution Control Boards, MOEF having knowledge and expertise in matters of environmental concerns be given primacy.[Suggested amendment to **Clause 6**]
11. To ensure prompt reporting and due diligence, suggested that the project proponent or the EIA agency preparing the report, must make a declaration in the form of a sworn affidavit to the effect that the reporting was conducted free from any bias or undue influence and to the best of their knowledge.[Suggested amendment to **Clause 13**]
12. The summary of the EIA report must be furnished in two parts to facilitate an informed process. The same must include a technical summary on one hand and a non- technical summary on the other. The non-technical summary is important to make the public consultation process effective. This will ensure that communities and stakeholders, especially in the rural districts of India will be able to take active part in the public hearing only on the basis of the non-technical report, which should be necessarily published in the regional language as well.[Suggested amendment to **Clause 13**]
13. The EIA report prepared by the project proponent should also include the architectural design and landscape of the project so as to ensure that the project creates minimal or the least impact on the environment. [Suggested amendment to **Clause 13**]
14. The Draft Notification must incorporate a provision that that defines explicitly what amounts to a violation vis-à-vis public consultation. This definition must include failure of the SPCBs, UTPCCs and the Regulatory Authorities to conduct public consultations in the manner provided in the Notification.[Suggested amendment to **Clause 14**]
15. The public consultation process is to be strengthened through a multi-level public hearing process by integrating public hearings as provided under the Land Acquisition Act. [Suggested amendment to **Clause 14**]
16. The Notification must enumerate a mandatory set of documents, over and above the specific and standard terms of reference, which necessarily have to be produced by the Committee in support of its recommendations.[Suggested amendment to **Clause 15**]
17. Before conducting the appraisal of any project, every member of the EAC must compulsorily disclose any ‘conflict of interest’ with the project proponent or any such related party.[Suggested amendment to **Clause 15**]
18. The Notification should mandate that the EAC be bound by principles of environmental governance such as the precautionary principle; polluter pays principle, principles of sustainable development and intergenerational equity and doctrine of public trust.[Suggested amendment to **Clause 15**]
19. The Notification should reflect an expansion in the dimension of environmental impact assessment through high-level assessments in the form of a strategic impact assessment that reflects a holistic approach to the EIA process. Furthermore, the study and appraisal of EIA should not be limited to the processes involved in a proposed project. Rather, it

should involve another dimension of an 'outcome-based EIA Study' that would necessarily involve environmental audit of products and services that are the outcome of a proposed project. [Suggested amendment to **Clause 15** and **Appendix II**]

20. Post the decision of granting an EC, a copy of the same must be furnished with due communication to the concerned Local Panchayat, Urban Local Body, District Administration, Pollution Control Board, State MOEF, Forest Rights Administrator, the Land Acquisition officer as well as the Forest Department.[Suggested amendment to **Clause 17**]
21. With regard to post-decision monitoring, while it is implicit, the notification must clearly specify that the post decision monitoring of the conditions of EC is vested in the Pollution Control Boards of the respective State.[Suggested amendment to **Clause 20**]
22. The EIA Agency concerned should also be permitted to monitor the industrial activity post the granting of the EC and during the course of the operation of the project. This will allow the EIA Agency to report any change in the 'environment' or eco-system to the appropriate regulatory authority for a re-assessment and bring to the notice of the concerned regulatory authority any possible violation of conditions of compliance with the EC.[Suggested amendment to **Clause 20**]
23. Clause 22(1) should include cognizance of violations on the basis of 'disclosure made by any employee engaged in the gainful employment of the project proponent or any other person who may be likened to a 'whistle blower' and 'disclosure made by any 'public-spirited person'. [Suggested amendment to **Clause 22**]
24. In consonance with the polluter pays principle, substantive violations whereby the project proponent has not secured prior-EC or prior-EP should be met with deterrent costs that include the cost of compliance, cost of restoration of damage, cost of mitigation measures, and cost of compensation to those affected by the undertaking including punitive penalties.[Suggested amendment to **Clause 23**]
25. Exceptions from Environmental Clearance should be based on sound Environmental Management Principles on a case-to-case basis, and not by means of a blanket-exemption.[Suggested amendment to **Clause 26**]

PART I

OVERVIEW OF THE DRAFT ENVIRONMENTAL IMPACT ASSESSMENT NOTIFICATION, 2020

Background:

Notion of Environment Impact Assessment (EIA): EIA denotes a formal process that guides human activity towards the goal of sustainable development. It refers to a comprehensive review of all the environmental consequences of a proposed development project by analysing whether the benefits of development outweigh the cost of environmental harm or damage.

In other words, EIA is a tool designed to identify and predict the impact of a project on the bio-geophysical environment and on man's well-being, to interpret and communicate information about the impact of a project, to analyse site and process alternatives and provide solutions to sift out, or abate the negative consequences on the environment.¹

In India, the EIA regime includes multiple stages of assessment including public consultation, thereby involving the participation of several stakeholders. It enables the government to impose conditions and thresholds on the undertaking of some projects or expansion or modernization of such existing projects entailing capacity addition considering the environmental impacts of such projects.

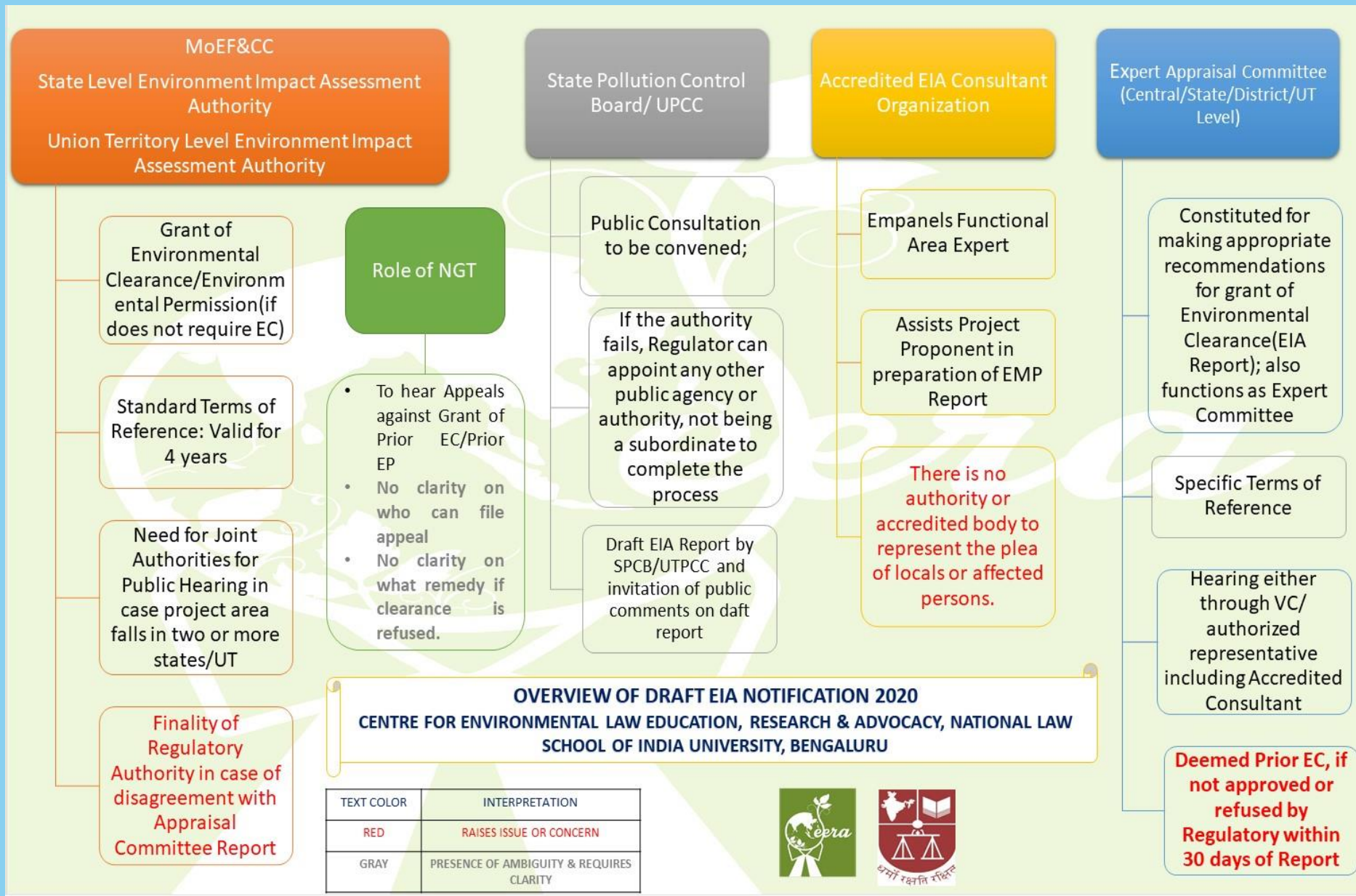
Draft Notification Environment Impact Assessment, 2020

Positive Outlook: The present Draft Notification, 2020, as envisioned, seeks to make the process more transparent and expedient through implementation of online system, further delegations, rationalization, standardization of the process.

It is set to supersede the erstwhile 2006 Notification with many amendments in place. Unsurprisingly, the Notification has come under criticism from several stakeholders and has also received stiff opposition for many changes that it proposes to bring about in the existing framework.

Administrative Process under the Draft Notification 2020: It is pertinent to note that the draft notification supports the constitutional bifurcation of powers and manifests a three-tier regime towards the conduct of Environment Impact Assessment, while at the same time providing for a nexus of the control with the Ministry of Environment, Forests & Climate Change, Government of India. The table below attempts to capture the same, highlighting the lapses, and lacunae in the draft Notification, which requires immediate attention.

¹Environmental Impact Assessment (EIA) and Environmental Auditing (EA), available at <http://www.fao.org/3/v9933e/v9933e02.htm#:~:text=Environmental%20Impact%20Assessment%20is%20a,to%20sift%20out%2C%20or%20abate%2F> (last accessed on 20.8.2020).



COMPARATIVE STUDY OF EIA NOTIFICATIONS: SIMILARITIES AND DISTINCTIONS

EIA Notification, 1994		EIA Notification, 2006	Draft EIA Notification, 2020
<p>The 1994 EIA Notification was a cornerstone piece of legislation that for the first time marked an active step in the direction of expressly laying down rules and procedures relating to environment impact assessment in India. The objective of the Notification was to push for more sustainable industrialisation process in the country after giving due consideration to environmental and social impacts.</p> <p>The Notification was however wrought with many limitations. Powers with regard to the grant of environmental clearances were primarily vested with the Central Government leading to severe back-logs and inefficiencies in the EIA process.</p> <p>The process envisioned in the Notification was very</p>	Application	The Notification does not have an application clause specifically providing for its scope and application, but the introductory clause states that it is applicable to any part of India.	Clause 2 specifically provides that notification is applicable to any part of India including territorial waters.
	Definitions	The Notification does not have an exclusive definition clause that defines specific terms for the context of the Notification.	The Draft Notification includes a definition clause [clause 3] wherein it lays down 60 provisions defining specific terms in context of the said Notification.
	Expert Appraisal Committee	EAC to be established at Central, State and Union Territory Levels.	EAC to be established at Central, State, Union Territory and District Levels.
	Prior Environmental Clearance	All Category A and Category B projects must secure environmental clearance.	The Draft Notification seeks to create categories in the form of Category A, Category B1 and Category B2 projects. Certain projects under Category B2 have been exempted from the Environmental Clearance Process, by providing for an alternate route of Prior-Environmental Permission from the concerned regulatory authority.
	Stages of Environmental Clearance	The environmental clearance process for new projects will comprise of a maximum of four stages: Stage (1) Screening (Only for Category 'B' projects and activities)	The Prior Environment Clearance process for Category 'A' or Category 'B1' will comprise of a maximum of six stages: Stage (1): Scoping; Stage (2): Preparation of Draft

<p>limited as it lacked specific and detailed provisions relating to scoping of projects, handling of violations, regular monitoring and compliance mechanisms. Even the process of public consultation was very limited in scope and gave very little opportunity for public opinion to have any effect on the outcome of projects proposed.</p>		<p>Stage (2) Scoping Stage (3) Public Consultation Stage (4) Appraisal</p>	<p>EIA Report Stage (3): Public Consultation; Stage (4): Preparation of Final EIA; Stage (5): Appraisal; Stage (6): Grant or Rejection of Prior Environment Clearance.</p> <p>The Prior Environment Clearance process for Category 'B2' that are required to be placed before Appraisal Committee as specified in the Schedule, will comprise of a maximum of three stages: Stage (1): Preparation of EMP Report Stage (2): Appraisal Stage (3): Grant or Rejection of Prior Environment Clearance.</p>
	Screening	<p>All Category B projects were required to undergo a process of screening to determine whether they call for further environment impact studies.</p>	<p>There is no screening process as projects have been specifically categorised on the basis of whether they have to undergo appraisal by the EAC.</p>
	Scoping	<p>The process of scoping involved inspection of site and formulation of terms of reference. The terms of reference by the EAC was to be conveyed within a period of 60 days of receipt of Form 1.</p>	<p>The scoping process includes the due diligence by the Applicant based on the Standard Terms of Reference developed by the ministry from time to time, for each sector.</p> <p>In respect of a few projects including expansion projects, the Standard Terms of Reference have to be issued online within a period of 7 days, with a power to the Appraisal Committee to provide for Specific Terms of reference where required.</p> <p>Projects listed under Category</p>

			<p>B2 have been exempted from the process of Scoping.</p> <p>In any case the timeline for issue of Terms of Reference is not more than 30 days, from the erstwhile 60 days.</p>
	Public Consultation Process	<p>Public Consultation to be completed within 45 days. All Category 'A' and Category B1 projects or activities shall undertake Public Consultation, with certain exceptions.</p> <p>The notice period for public hearing is 30 days.</p>	<p>Public Consultation to be completed within 40 days. All Category 'A' and Category "B1" projects of new or expansion proposals or modernization with capacity increase of more than 50 percent shall undertake Public Consultation with certain exemptions. Furthermore, projects of Strategic importance exempted from public consultation or public domain.</p> <p>The Notice period of public hearing is 20 days</p>
	Appraisal by EAC	<p>The Appraisal of a project shall be completed within a period of 60 days from the date of receipt of the final EIA report.</p>	<p>The Appraisal of a project shall be completed within 45 days from the date of acceptance of application.</p>
	Monitoring and Reporting	<p>To ensure regular monitoring of conditions of compliance, compliance Report were to be submitted every six months by the project proponent.</p> <p>In the event of transfer of prior-EC, there is no specific mention of the time period.</p>	<p>The Draft Notification only requires compliance report to be submitted on an annual basis.</p> <p>Transfer of any prior-EP or prior EC should be made within one year from the date of transfer.</p>

PART-II

UNDERSTANDING CRITICISMS OF THE NOTIFICATION BY STAKEHOLDERS SO FAR

The Draft EIA Notification has undoubtedly brought about many sweeping changes in the existing framework. Some of these changes have however posed many concerns from the perspective of environmental governance. The Draft Notification has been criticised to be regressive by watering down norms of environmental law and management.

Post-facto Environmental Clearances - Many critics argue that the provision for condoning violations by allowing for post-facto clearances poses severe environmental risks.² It has been observed that the concept of an ex post facto or a retrospective EC is not only completely alien to environmental jurisprudence including EIA 1994 and EIA 2006³ but is also said to strike at the very root of the precautionary principle as it goes against the anticipatory approach of managing environmental risks in a prudent manner. The courts in India have time and again denounced the idea of post-facto approval of projects as it undermines the principles that shape environmental governance in current times. The Apex Court in a recent judgement observed that post facto explanations for environmental violations are inadequate to deal with a failure of due process in the field of environmental governance⁴ and the concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence.⁵ The notion of granting an ex post facto environmental clearance would not only be detrimental to the environment but would also lead to irreparable degradation of the environment.⁶ The Apex Court has rather explicitly expressed its concerns on the repercussions of post-facto environmental clearances in the case of *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati & Ors*, where in it observed that;

“Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.”

²Why the Draft EIA needs a re-evaluation? available at <https://www.downtoearth.org.in/blog/environment/why-draft-eia-2020-needs-a-revaluation-72148>(last accessed on 20.8.2020).

³Common Cause and Ors.vs. Union of India (UOI) and Ors.(2017) 9 SCC 499.

⁴Bengaluru Development Authority vs. Sudhakar Hegde and Ors, (17.03.2020 - SC) : MANU/SC/0308/2020.

⁵Alembic Pharmaceuticals Ltd v. Rohit Prajapati and Ors. Civil Appeal No. 1526 of 2016.

⁶Common Cause and Ors.vs. Union of India (UOI) and Ors.(2017) 9 SCC 499.

⁷Alembic Pharmaceuticals Ltd v. Rohit Prajapati and Ors. Civil Appeal No. 1526 of 2016, ¶ 23.

Re-Categorisation of Projects - Concerns have also been raised over the re-categorization of all the projects and activities from 'A' category to 'B2' category.⁸ Under the Draft Notification, the Prior Environment Clearance process for Category 'A' or Category 'B1' will comprise of a maximum of six stages:⁹

Stage (1): Scoping.

Stage (2): Preparation of Draft EIA Report

Stage (3): Public Consultation.

Stage (4): Preparation of Final EIA;

Stage (5): Appraisal.

Stage (6): Grant or Rejection of Prior Environment Clearance.

Similarly, the Prior Environment Clearance process for Category 'B2' that are required to be placed before Appraisal Committee as specified in the Schedule, will comprise of a maximum of three stages:¹⁰

Stage (1): Preparation of EMP Report

Stage (2): Appraisal

Stage (3): Grant or Rejection of Prior Environment Clearance.

The re-categorization clearly depicts that Category B2 Projects will be exempt from public consultation. Furthermore, many projects that were earlier classified as high-risk Category A projects have now been re-categorized into type B2. The re-categorization is criticized for being an arbitrary move devoid of any scientific backing or reasoning.¹¹ The re-categorization overlooks the social and environmental impacts of projects, making this move an easy way out for industrialists to seek prior environmental permissions without having to go through the process of stringent appraisal by the Expert Appraisal Committee.

Compliance and Monitoring- With respect to minimum standards of adherence in preparing the EIA and compliance, experts first suggest that there is a grave flaw in the way in which baseline data ought to be collected.¹² Baseline data in EIA reports predict the impact a project will have on the environment of an area. According to the Draft Notification, Baseline data shall be collected for one season other than monsoon for EIA report with respect to all projects, other than River Valley projects.¹³ By doing away with the collection of baseline data spanning across all seasons, there is great potential for masking the true environmental impact

⁸What Is Environment Impact Assessment Notification Draft 2020? Know History, Amendments, Issues & More, available at <https://news.abplive.com/news/india/what-is-environment-impact-assessment-notification-draft-2020-history-amendments-issues-1308046>(last accessed on 24.8.2020).

⁹ Clause 10 of the Draft Notification, 2020.

¹⁰*Id.*

¹¹EIA Draft Notification 2020: Of Licensing the Damage and Silencing the Voices, available at <https://www.livelaw.in/columns/eia-draft-notification-2020-of-licensing-the-damage-and-silencing-the-voices-161161>(last accessed on 20.8.2020).

¹²Draft EIA notification institutionalises 1 season data for baseline available at <https://www.downtoearth.org.in/news/pollution/draft-environment-impact-assessment-eia-notification-institutionalises-1-season-data-for-baseline-72115>(last accessed on 20.8.2020).

¹³Clause 13(2), Draft Notification, 2020.

of a project. Baseline data that reflects the atmospheric and geographic conditions as prevailing in only one season will fail to a great extent, to capture the actual and potential impact of a project on the environment. Additionally, concerns about the pro-industry motive underlying the Draft Notification have also been reflected by the fact that project proponents who were required to submit compliance reports twice a year are now only required to submit reports on an annual basis. Under the 2006 Notification, project proponents were mandated to submit compliance reports on the first of June and December respectively. However, under the Draft Notification, the burden of compliance has reduced whereby the project proponent is only required to submit reports for the previous financial year by the 30th of June. This move is heavily opposed for watering down the monitoring process thereby taking away the stringency with which projects ought to be carried out.¹⁴ The said amendment is said to make the process more opaque as violations that may be apparent through reports will be brought to the notice of the concerned regulatory authorities at a much later date causing delay in taking remedial action.

Public Participation - In the context of public participation, the Draft Notification is said to dilute the public consultation process by excluding many projects from public purview. It renders ineffective the voice of affected communities by exempting projects like irrigation, widening of national highways, ropeways, building constructions etc. from public participation and also reduces the time allotted for public participation with a view to expedite the process. Furthermore, much dissatisfaction has been expressed against the bureaucratic stronghold in the category of projects tagged as ‘strategic’ as it completely ousts these projects from public domain. Another supporting critique that dilutes the democratic nature of the public consultation process is the load of technical jargon available in the EIA reports. The nature of the reports prepared by the project proponent or the EIA agencies make it unviable for affected groups to comprehend them due to heavy emphasis on scientific terms and technical jargon that may not be understood in common parlance.¹⁵ Thus, the entire process does not seem to ensure an ‘informed’ decision by the public at large because of the lack of cognitive assimilation in terms of the project undertaken and the socio-economic and environmental impacts of the same.

Climate Change Mitigation- In present day, climate change is a global environmental concern that most if not all countries are striving to mitigate. India being a signatory to the United Nations Framework Convention on Climate Change (UNFCCC), has an obligation to take “climate change considerations into account in impact assessments, to the extent feasible, in their relevant social, economic and environmental policies and actions”.¹⁶ In the domestic arena, the National Green Tribunal has also given due consideration to the implications of climate change as an environmental issue and the need to incorporate the impact of projects on climate change within the EIA process. In the case of *Ridhima Pandey v. Union of India*, the

¹⁴EIA Draft Notification 2020: Of Licensing the Damage and Silencing the Voices, available at <https://www.livelaw.in/columns/eia-draft-notification-2020-of-licensing-the-damage-and-silencing-the-voices-161161>(last accessed on 20.8.2020).

¹⁵Draft EIA 2020 notification: Moving beyond technical jargon , available at <https://www.downtoearth.org.in/news/environment/draft-eia-2020-notification-moving-beyond-technical-jargon-72674>(last accessed on 20.8.2020).

¹⁶ Art. 4.1(f), U.N.Framework Convention on Climate Change, May 9,1992, 31 I.L.M. 849.

NGT confirmed that climate change considerations should be covered in the process of impact assessment and has presumed that the Government of India is considering climate-related factors while granting environmental clearances.¹⁷ However, a glimpse of the existing EIA regime depicts scant regard for concerns of climate change. The environmental clearance process indicates flagrant violations, non-compliance of conditions of environmental clearances, lack of rehabilitative measures, poor monitoring, and shortcomings in the conduct of public hearings. The proposed Notification is said to only add to these shortcomings to the extent that it dilutes process of public hearings and scrutiny of certain exempted projects. The facilitation of expedited processes of environmental clearances with regard to high-risk projects such as capital dredging, oil-drilling, coal-mining and many more indicate that provisions of the Draft Notification give minimal consideration to India's nationally determined contributions (NDCs) under the Paris Agreement.

Land Acquisition and Land Grab - The former Environment Minister, Shri Jairam Ramesh also voiced certain concerns in respect of land grab and land acquisition that underlie the Draft Notification. The Senior Congress Minister stated that draft law increases the validity of environment clearances and allows projects to "secure" land for a longer period even when they are not constructed which in turn promotes land grab.¹⁸ Interestingly, under clause 19 of the Draft Notification, the validity of prior-EC or prior-EP has witnessed a significant jump.¹⁹ For example, in the 2006 Notification, completion of all construction activities and installation of plant and machinery was to be done within a period of 30 years, which has been increased to 50 years under the current Draft Notification. Similarly, for river valley, nuclear and irrigation projects, the validity period has increased from 10 to 15 years. This has drawn much attention in light of enabling project proponents to secure land for longer time period without initiating any productive activities. Additionally, it was also pointed out that the provision that confers upon the Union Government full powers to appoint State Environment Impact Assessment Authorities strikes at the heart of co-operative federalism in India,²⁰ thereby affecting the independence of the state governments in the EIA process.

Statutory Dilutions - From a legal standing, the Draft Notification is also heavily opposed for going against the very objectives of its parent Act, *i.e.* the Environment Protection Act, 1986. The Environment Protection Act, 1986 was enacted with a view of providing a guarantee for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property.²¹ A cursory glance of the Draft Notification depicts that it reduces the scope and stringency of the EIA process thereby providing an easy

¹⁷Available at

<https://static1.squarespace.com/static/571d109b04426270152febe0/t/5cb424defa0d60178b2900b6/1555309792534/2019.01.15.NGT+Order-Pandey+v.+India.pdf>

¹⁸EIA 2020: Former Environment Minister Shri Jairam Ramesh defends his letter of concern over draft law, available at

<https://scroll.in/latest/968707/eia-2020-former-environment-minister-jairam-ramesh-defends-his-letter-of-concern-over-draft-law> (last accessed on 20.8.2020).

¹⁹ Clause 19 of the Draft Notification, 2020.

²⁰*Id.*

²¹ Objective Clause, The Environment (Protection) Act, 1986.

pass for industries and project proponents to proceed with certain projects.²² This is not only legally untenable in light of the domestic laws but also in light of international agreements such as the Convention on Biological Diversity²³ and the United Nations Framework Convention on Climate Change.²⁴ Furthermore, from a jurisprudential perspective, the Draft Notification weakens existing environmental regulations and promotes high-risk activities contrary to the well-established doctrine of public trust and principles of precautionary approaches, intergenerational equity, and sustainable development as recognised in environmental law and policy.

²²Explained Ideas: What ails with the draft EIA notification 2020?, available at <https://indianexpress.com/article/explained/draft-environmental-impact-assessment-notification-2020-shibani-ghosh-explained-ideas-6549609/> (last accessed on 20.8.2020).

²³Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79.

²⁴U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

PART-III

DETAILED RECOMMENDATIONS ON ENVIRONMENTAL IMPACT ASSESSMENT DRAFT NOTIFICATION, 2020 - SUGGESTIONS FOR AN IMPROVED NOTIFICATION

While the new Draft Notification brings in substantial changes in the existing framework, there are evident loopholes that may be remedied and rectified to render the proposed Notification a robust and comprehensive law that is environmentally sound. CEERA recommends the following points that may address the GAPS in the EC-EIA process introduced by the Draft EIA Notification 2020:

- **Integration of Environment Impact Assessment and Environment Clearance in the Notification Title; followed by substantial provisions on EC process.**

EC and EIA are integral part of the environmental law decision making process. It also is undisputed that EIA is an inexorable element of the Environment Clearance (EC). As such the current regime of environmental clearance in India ought to integrate processes of EIA and EC into one robust framework. Although the EIA Notification, by implication, makes necessary references to the pre-requisites, process of and authorities responsible for granting of environment clearance, there is a need to clearly demarcate in express terms the processes of EIA and EC. In this regard, it is suggested that it would be most appropriate to amend the title of the Notification to 'Environment Impact Assessment and Environment Clearance Notification'. This change would pave way for clearly demarcating violations in context of the EIA process and those with respect to the grant of environment clearance or those that are deemed as violations of conditions in the EC. Furthermore, the objective of the Notification should reflect streamlining of the process of EIA and EC with an aim to make the entire fabric clear, transparent and more expedient. Hence, it is suggested that the Notification be titled as EC-EIA Notification 2020.

Further, granting of EC is an administrative function. Denial of EC, grounds for such denial, principles of natural justice to be followed, making of a reasoned order, conditions as stated in the EC, renewal, power to withdraw, cancel the EC, appeal against the order of EC-all must explicitly be defined and stated in the proposed Notification.

- **Strengthening the Functioning and Accountability of the Appraisal Committee**

The Expert Appraisal Committee (EAC) is the foremost body in the EIA process that not only determines the specific Terms of Reference for projects²⁵ but also provides recommendations after due appraisal of projects to the concerned Regulatory Authority for grant or rejection of an EC. It is essentially an expert body established at the Central, State and District level²⁶ that provides expert opinions on whether impugned projects meet certain criteria that broadly encompass aspects of sustainable development. As the EAC is an expert body required to

²⁵See Clause 3(56)(a) of the Draft Notification, 2020.

²⁶See Clause 3(4) of the Draft Notification, 2020.

conduct appraisals on objective criteria, the independence of such a Committee is undeniably a crucial factor. At this juncture, to ensure that recommendations of the EAC are based on objective criteria, it is desirable that the Notification enumerate a mandatory set of documents, over and above the specific and standard terms of reference, which necessarily have to be produced by the Committee in support of its recommendations. For example, guidance documents on scoping and screening will not only provide practical insight for the project proponent in preparing the EIA report but will also ensure qualitative standards that must necessarily be met by the project proponent.

Another noteworthy suggestion that arises in context of the functioning of the EAC, is with respect to tenure of the members and the appointment of the chairperson or chairman of the EAC. Clause 6(2) provides that the tenure of the members of the EAC shall not be more than three years.²⁷ Therefore, to ensure some form of permanency, it may be suggested that the EAC must be given a statutory status with at least 3 year minimum term for its members. The Draft Notification provides that ‘the Chairman or Chairperson shall be an eminent person having experience in environment policy related issues, in management or in public administration dealing with various developmental sectors.’²⁸ From a cursory glance, it can be stated that the eligibility criteria provided in the said provision is rather broad which smacks of environmental expertise. Instead, the criteria so provided, allows for bureaucratic usurpation of responsibility/power. As the core of the EIA process is that of environmental sustainability, it is imperative that the top-most personnel must have significant knowledge and expertise in environmental matters. Thus, it may be suggested that the eligibility criteria for the appointment of the chairpersons of the State level EACs, Union Territory level EACs and the District Level EACs be amended to make ‘environmental expertise/knowledge’ a mandatory requirement. In addition to this, it is also suggested that the dominance of IFS officers be withered down and instead former officers from the Pollution Control Boards, MOEFs, officers from other Environmental Institutions having knowledge and expertise in matters of environmental concerns be given primacy.

Furthermore, it is also suggested that before conducting the appraisal of any project, every member of the EAC must compulsorily disclose any conflict of interest with the project proponent or any such related party. Such a disclosure guarantees independence, freedom from bias or undue influence in the appraisal stage and the EIA process as a whole.

- **Amendment of the term ‘Violation’ in the Definition Clause**

Another significant issue that may be highlighted with the Draft Notification is the definition of the term ‘violation’ provided in the definition clause. The Draft Notification currently defines a ‘violation’ under Clause 3(60) to mean ‘*cases where projects have either started the construction work or installation or excavation, whichever is earlier, on site or expanded the production and / or project area beyond the limit specified in the prior-EC without obtaining prior-EC or prior-EP, as the case may be.*’²⁹ It is pertinent to note that this definition of the term ‘violation’ has been defined in context of securing Prior EP or EC. The violations as envisioned in the said provision refer to those illegal actions carried out in derogation of the duty of project

²⁷See Clause 6() of the Draft Notification, 2020.

²⁸See Clause 6(4) of the Draft Notification, 2020.

²⁹Clause 3(60), Draft Notification, 2020.

proponents to avail prior-EC or prior-EP either for commencing a new project or expanding an already existing project that has been cleared with prior-EC/EP. The definition in no manner includes or makes a reference to any derogation or dereliction of duty in the process of conducting an environment impact assessment by the project proponent.

The role of the Agency that prepares the EIA report must be one of objectivity and independence, free from any errors, mistakes and misleads. The EIA 2006 says that ‘deliberate concealment and/or submission of false or misleading information or data...’ can lead to a rejection of the application or cancellation of the approval.

It is suggested that deliberate false information, misleading information or preparation of false report, or forged data must attract stricter penalty on the agency which is involved or hired to prepare the EIA report. The project proponent, who should be considered as the ‘owner’ of the EIA study must be penalised with fine of a sum of Rupees 5 lakh, atleast. Further the Agency that prepared the said report and the respective team members involved in preparing the said report must be barred from any EIA work for atleast a period of two years. This will ensure accountability of individual in the EIA process and also ensure that the system is reliable and accountable.

The independence of the EAC is as crucial a factor as its expertise to infuse transparency into the EIA process. It is established that the Appraisal Committee is vested with certain responsibilities under the Draft Notification. Clause 15 of the Draft Notification lays down the duties and responsibilities of the Appraisal Committee in conducting the appraisal of a proposed project.³⁰ These responsibilities include *inter alia* strict adherence to the time in conducting appraisal, recording of the minutes of meeting and intimation of the agenda the project proponents in a timely manner, ensuring transparency in proceedings of appraisal. As far as the legal phraseology goes, these duties are mandatory and not merely directional.³¹ Bearing this in mind, there is no particular definition that specifically addresses ‘violations’ in relation to the process of conducting an environmental impact assessment or specifically, in relation to the proceedings of the Appraisal Committee. Therefore, to create accountability *vis-à-vis* the members of the Appraisal Committee, it is essential that violations in the EIA process be recognised explicitly and enumerated. These violations should take into account the following circumstances:

- Failure in conducting scientific study for assessment of a proposed project;
- Furnishing of false information by the project proponent or the EIA Agency;
- Intentionally furnishing false reports or false data;
- Plagiarism of EIA reports.

To ensure prompt and unfabricated reporting by the project proponent or the EIA agency, it may be suggested that misinformation, misleading data, false reporting, both orally during the public hearing or hearing before the EAC and in any written form shall constitute a violation under the said Notification. Furthermore, to ensure prompt reporting and due diligence, it is

³⁰Clause 15, Draft Notification, 2020.

³¹ Clause 15 provides that the Appraisal Committee ‘shall’ carry out the functions enumerated in the said provision.

suggested that the project proponent or the EIA agency make a declaration in the form of a sworn affidavit to the effect that the reporting was conducted free from any bias or undue influence and to the best of their knowledge. Furthermore, the said declaration ought to reflect the manner in which the reporting was conducted and the basis upon which the recommendations rest. In addition to this, it may also be suggested that the EIA Coordinator and Functional Area Experts involved in the preparation of the EIA report and permitted to assist the project proponent in this regard, be required to make a similar declaration. Such a requirement will hold the concerned bodies and individuals accountable for their actions and inactions.

- **Violations with respect to the Public Consultation Process**

Public participation is an essential facet of the EIA process as it infuses democratic notions of government ‘by the people and for the people’. The public consultation process³² as a mandatory stage in EIA for certain projects as provided for in the EIA Notification³³ guarantees legitimacy of actions, transparency in decision making process and accountability of project proponents. Interestingly, Clause 13(9) of the Draft Notification recognises the importance of public consultation before the final EIA report is submitted for appraisal.³⁴ Clause 14 also sets out in detail the process of public consultation and the duty of the concerned State Pollution Control Board (SPCB) and the Union Territory Pollution Control Committee (UTPCC) to conduct a public hearing in a time bound manner.³⁵ Furthermore, in the event that the SPCB or UTPCC concerned does not undertake and complete the public hearing within the specified period, as above, the Regulatory Authority shall engage another public agency or authority which is not subordinate to the Regulatory Authority, to complete the process within a further period of forty working days, as per procedure laid down in this Notification.³⁶ With respect to responses from other concerned persons having a plausible stake in the environment aspects of the project, the concerned SPCB or UTPCC is also duty-bound to invite responses from such concerned persons by placing the Summary EIA report prepared by the applicant along with a copy of the application in the prescribed form, on their website, within ten days of the receipt of a written request for arranging the public hearing.³⁷

A perusal of these provisions demonstrates that public consultation is a pre-requisite for specific categories for projects. It embodies the principle of natural justice, *audi alteram partem*, by allowing those parties whose interests are at stake to present their opinions and views. The SPCBs and UTPCCs are therefore mandated to conduct public hearings in a time-bound manner. As the process of public consultation is the only legal avenue through which

³² Clause 3(46) of the Draft Notification, 2020 defines ‘Public Consultation’ to mean “*the process by which the concerns of local affected persons and others, who have plausible stake in the environmental impact of the project, are ascertained with a view to appropriately take into account all such material concerns while designing the project.*”

³³ See Clause 10(1), Draft Notification, 2020. Only Category ‘A’ and Category ‘B1’ projects will necessarily attract public consultation on the impact of these projects.

³⁴ Clause 13(9) of the Draft Notification, 2020 provides that the “*Draft EIA report shall be prepared for the purpose of public consultation and Final EIA Report for the purpose of appraisal.*”

³⁵ Clause 14 (6) of the Draft Notification 2020 mandates the SPCB or UTPCC to complete public hearings within a period of forty working days from date of receipt of the request letter from the project proponent.

³⁶ Clause 14(7), Draft Notification, 2020.

³⁷ Clause 14(9), Draft Notification, 2020.

affected parties, local communities, public spirited citizens and the general public may voice their concerns, it is essential that this process be conducted with utmost diligence and due regard to the interests of various stakeholders.

Further, public hearing as a format of public participation in decision making process, is also mandated under other legislations like the Biological Diversity Act 2002,³⁸ Forest Rights Act 2006,³⁹ Land Acquisition Act 2013,⁴⁰ Electricity Act 2003⁴¹ and such other laws. Hence, it is suggested that the EC-EIA Notification, wherever necessary and possible, should allow an opportunity to organise multiple public hearings, with integration and clubbing of concerns, department, Ministry, in the development process. This will not only save time and resources, but will also help integrated and holistic approach towards decentralised governance. It will also to a large extent help achieve the sustainable development goals with human rights governance.

- **Clarity on Procedural and Substantive Violations**

The Draft Notification recognises certain substantive and procedural violations in terms of non-compliance with the conditions of prior-EC or prior-EP, transfer of prior-EC or Prior- EP, failure in submitting compliance reports on a regular basis and construction or expansion of projects without prior-EC or prior-EP. While the existing framework in the Draft Notification covers a broad range of violations, it fails to impose personal liability on project proponents for substantive violation *i.e.* undertaking a project or expanding an existing project without securing prior-EC or prior-EP. Under Clause 22(2), in the event the finding of the Appraisal Committee pertaining to any project illegally undertaken is negative, the only action suggested is that of closure of the project. However, considering the irreparable nature of environmental damage, it may be pointed out that mere closure or shutting down of the project illegally undertaken is not adequate to meet the damage caused. Thus, it is suggested that the Notification include specific provisions which impose personal liability upon projects proponents who undertake any construction or expansion of such project without having secured prior-EC or prior-EP as the case may be. This should be explicitly stated as violation of EPA Act 1986.

Furthermore, taking into consideration the gravity of substantive violations in failing to secure prior-EC, punitive measures ought to be strictly prescribed so as to deter possible violators.

It is also pertinent to note that in case of non-compliance, the existing framework is merely remedial in nature, which appears to be inadequate.⁴² Under the proposed draft Notification, in case of any non-compliance, the project proponent shall be required to give necessary clarifications for non-compliance and issue a bank guarantee in furtherance of compliance. The said provision can be said to be inadequate in light of repeat instances of non-compliance. As such, in addition to imposing higher penalties, personal liability - which may include criminal liability - ought to be included in dealing with matters of non-compliance.

³⁸Section 36(4), Biological Diversity Act, 2002.

³⁹ Section 6(2), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

⁴⁰Section 5, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

⁴¹Section 3(4).Electricity Act, 2003.

⁴²Clause 23, Draft Notification, 2020.

- **Whistle Blowers Protection for Disclosure of Information**

An overview of Clause 22(1) of the Draft Notification depicts that the cognizance of violations shall be made on *suo moto* application of the project proponent, reporting by any Government Authority, violations found during the appraisal by Appraisal Committee or violations found during the processing of application by the Regulatory Authority.⁴³ Interestingly, the said provision does not include cognizance of violations disclosed by any other interested person, including persons who are employed by the project proponent, where such disclosure amounts to a public-interest disclosure. Therefore, it is essential that Clause 22(1) should include cognizance of violations on the basis of ‘disclosure made by any employee engaged in the gainful employment of the project proponent or any other person who may be likened to a whistle blower’ and ‘disclosure made by any public-spirited person’.

Furthermore, to ensure prompt disclosure by personnel in the event certain violations have not been reported, specific protection in the form of confidentiality/concealment of the identity of such persons making any disclosure ought to be provided. To ensure that disclosure of such violations is made in good faith, such persons who are afforded protection in the form of concealment of identity must be required to make a personal declaration stating that he reasonably believes that the information disclosed by him and allegation contained therein is substantially true. This will not only incentivise individuals possessing knowledge of violations enlisted in the Notification to bring it to the notice of concerned authorities, but will also curb frivolous complaints or allegations that hamper the progress of any project.

- **Imposition of cost/penalties for not securing prior-EC or prior-EP**

The Draft Notification has been brought under criticism for condoning violations *i.e.* permitting project proponents who undertook new constructions or expansions to continue the same by granting approval after the fact. In other words, the Notification allows for a post-facto approval in the event any violation is brought to the notice of the regulatory authority.⁴⁴ In the interest of development, taking into consideration the cost of undertaking the project and the investment involved, post facto clearance would allow for compliance with EIA norms as well as meeting economic needs. In several instances, the Apex Court has also taken note of the significant investment and expansion undertaken by an industry albeit the expansion or undertaking was without obtaining requisite clearances. In the case of *Electrotherm Ltd. v Patel*, the Supreme Court did not order for the closure of the project as significant expansion had already taken place. Furthermore, at the length of the time, the expansion was undertaken, and in light of the peculiar facts and circumstances, in order to meet the ends of justice, the Court deemed it appropriate to allow for post facto approval and conducting of a post-decisional public hearing.⁴⁵ Similarly, in the case of *Lafarge Umiam Mining Pvt. Ltd. v Union of India*, the Supreme Court upheld the legality of an ex post facto public hearing in a matter that dealt with the question of whether ex post facto clearances stood vitiated by alleged suppression of the nature of the land by the project proponent and whether there was non-application of mind by the MoEF while granting the clearances.⁴⁶ Interestingly, the court observed that;

⁴³Clause 22(1), Draft Notification, 2020.

⁴⁴Clause 23, Draft Notification, 2020.

⁴⁵(2016) 9 SCC 300.

⁴⁶(2011) 7 SCC 338.

“The time has come for us to apply the constitutional “doctrine of proportionality” to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices.”

An overview of these judgements reflects that in light of individual facts and circumstances of each case, the most viable solution will not entail closure of projects already undertaken. Considering the prospective benefits and economic gains from industrial activity so undertaken, shutting down of undertakings and expansions may render futile the costs already borne. This being stated, it is important to discourage proponents from undertaking projects *in absentia* of prior-EC or prior-EP. The option for post facto clearances ought not to turn into gateway of *fait accompli* situations where there is no option but to grant clearances or permissions despite the significant violations. This window of condonation should function only as a matter of exception and not as a matter of the normal rule of practice. Thus, to deter possible violations that may pose drastic and irreparable environmental damage, it may be suggested the Notification impose higher costs of reparation and compliance.

In consonance with the polluter pays principle, substantive violations whereby the project proponent has not secured prior-EC or prior-EP should be met with deterrent costs that include the cost of compliance, cost of restoration of damage, cost of mitigation measures, cost of compensation to those affected by the undertaking including punitive penalties. This will disincentivize possible violators because the cost of compliance in accordance with the procedure provided in the Notification will ordinarily be significantly lesser than the costs to be borne in the event of any violation.

It is suggested that Prior EC should be a rule and any activity that does not comply with the same [as is the case in under the Companies Act 2013], the activity and its promoters must be penalised at least upto 10% of the project cost as the penalty/fine for non-compliance.

However, it is pertinent to make a distinction between two kinds of polluters/accidents/violations. Industries that pollute/or involved in an industrial accident or commit a violation in relation to the Water Act/Air Act/EPA must be penalized. However should not the law make a distinction between those who have EC and then pollute to those who do not have EC and then pollute. Non-compliance of prior EC and thereafter any pollution/accident/violation must be viewed far more seriously and industries must clearly see the incentive for compliance and find adequate distinction in law for the same.

- **Widen Public Participation in Public hearing**

The Draft Notification mandates that all Category ‘A’ and Category “B1” projects of new or expansion proposals or modernization with capacity increase of more than 50 percent shall undertake Public Consultation.⁴⁷ It ordinarily comprises of two components, name; a) A public hearing at the site or in its close proximity, district wise in case of the project area located in more than one district, to be carried out in the manner prescribed in the Notification, for

⁴⁷Clause 14(2), Draft Notification, 2020.

ascertaining concerns of local affected persons and b) Inviting responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project.⁴⁸ Interestingly, the Draft Notification exempts certain projects from the purview of public consultation⁴⁹ and also does away with the process if the local situation is not conducive for public consultation.⁵⁰

The Supreme Court, in the case of *Hanuman Laxman Aroskar and Ors. v. Union of India (UOI) and Ors.*, while deliberating on the EIA process has vehemently observed that “the Rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to the Rule of law and public access to information is fundamental to the preservation of the Rule of law.”⁵¹ Furthermore, the Court also observed that “in our domestic context, environmental governance that is founded on the Rule of law is strongly supported by the values of our Constitution such as right to equality and right to life. Proper structures for environmental decision-making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution.”⁵² In mapping the underlying purpose of public consultation in the EIA process, the Supreme Court has noted that.

“Public consultation cannot be reduced to a mere incantation or a procedural formality which has to be completed to move on to the next stage. Underlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects. Apart from the intrinsic value of public consultation, it serves an instrumental function as well. The purpose of ascertaining the views of stakeholders, is to account for all the material concerns in the design of the proposed project or activity.”⁵³

Apart from the exemptions, it is pertinent to note that the phrase ‘plausible stake’ in the said provision dilutes the democratic nature of the public consultation process. As provided under Article 51A (g) of the Constitution, every citizen has a fundamental duty to protect and improve the environment. This constitutional duty has also been recognised and explicitly provided for under several legislations such as the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006,⁵⁴ the Biological Diversity Act, 2002,⁵⁵ the Land Acquisition Act, 1894,⁵⁶ and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation And Resettlement Act, 2013.⁵⁷ Thus, it is essential to enable public

⁴⁸Clause 14(1), Draft Notification, 2020.

⁴⁹ Clause 14(2), draft Notification, 2020.

⁵⁰ Clause 14(8), draft Notification, 2020.

⁵¹(2019) 15 SCC 401.

⁵²*Id.*

⁵³*Hanuman Laxman Aroskar and Ors. vs. Union of India (UOI) and Ors.* (2019) 15 SCC 401.

⁵⁴ Section 6(2), The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

⁵⁵Section 36(4), Biological Diversity Act, 2002.

⁵⁶ Section 5(A), Land Acquisition Act, 1894.

⁵⁷Section 5, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

participation by and large on a wider scale by including local communities, public-spirited individuals and the citizenry at large.

- **EIA to include Strategic Impact Assessment**

The present regime of environmental clearance is primarily based on the environmental impacts of development projects. This being stated, there are several other socio-economic factors that determined the viability of particular project. As such there is compelling need to conduct a high-level impact assessment that takes into account environmental, social and economic concerns. A possible step towards this positive shift can be taken in the direction of integrating the public consultation process under laws governing land acquisition with that under the environment clearance regime. For example, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013⁵⁸ and similar state laws provide for a comprehensive, all-round assessment of proposed land acquisitions by the government for its own use, hold and control or by public-private partnership or by private acquisition for public purposes taking into consideration cost of displacement, effect of displacement of local communities, number of families being displaced, inventory of movable and immovable properties likely to be impacted, effect on cattle, degradation of grasslands, green belt, forest area and other relevant factors. As the projects enumerated under the EIA Notification are likely to pose significant social impacts, over and above the negative externalities on the environment, the inclusion of high-level assessments in the form of a strategic impact assessment reflects a rather holistic approach to the EIA process.

- **Investment Amounts incurred by Project Proponent to implement sustainable practices, as a ratio to the total outlay should be included as a parameter**

The Draft Notification categorises projects into three broad categories on the basis of the potential social and environmental impacts and the spatial extent of these impacts.⁵⁹ While the basis of such a categorisation are relevant for determining the overall transaction costs of a proposed project, it is pertinent to note that financial aspects of projects also have a significant bearing in determining strategic impact of projects. As such, it is viable to include another criterion for categorisation of projects *i.e.* the amount of investment or cost involved in sustainable practices for a project as opposed to the total investment outlay in such project. Such a parameter enables to verify the feasibility of the proposed measure and overall economic outcome or benefit of the project, while including sound environment management principles. Categorisation that includes investment as a criterion will also allow for a proper analysis of the cost of pollution control and the cost of mitigation measures as may be required.

- **Exemptions from Environmental Clearance should be based on sound Environmental Management Principles on a case-to-case basis, and not by means of a blanket-exemption**

The Notification exempts a list of projects from prior requirements including coal and non-coal mineral prospecting, solar thermal power projects, extraction or sourcing of ordinary earth, crushing and screening of ore and dredging.⁶⁰ While these projects, undeniably are accompanied with certain benefits, there are several other environment and social factors such

⁵⁸ Section 5, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

⁵⁹ Clause 5(1), Draft Notification, 2020.

⁶⁰ Clause 26, Draft Notification, 2020.

as diversion of agricultural land, conversion of green belts, impact on drainage patterns, effects on wildlife corridors, diversion of inland waterways, effects on bio-diversity and displacement issues that ought to be considered. As evident in the Draft Notification, the projects exclusively categorised as 'Exceptions' under Clause 26 also include Solar Photo Voltaic Projects, Solar Thermal Power Plants and Solar Parks. It is an undisputed fact that solar energy has great potential as a renewable source, especially in a country like India which is endowed with suitable geographical conditions. This being stated, there are several environmental and geographical concerns - including land use, water depletion, loss of habitat - that are accompanied with projects of such nature.

For instance, Solar Thermal Power Plants require a substantial supply of water for purposes of cooling and condensation. As such, current practices depict that such power plants be located within a reasonable distance from a reliable water source such as rivers, which poses grave implications in terms of changing course of rivers, depletion of ground-water level and receding water levels of lakes and ponds. Furthermore, large utility-scale solar power plants and solar parks are said to have tremendous repercussions in the form of the loss of habitat and fertile land. Estimates for utility-scale photo voltaic systems range from 3.5 to 10 acres per megawatt, while estimates for concentrating solar thermal plants facilities are between 4 and 16.5 acres per megawatt.⁶¹ These numbers clearly depict the enormity of solar power projects and their consequences on the environment if not managed efficiently.

From the example given above, it can be stated that the exceptions are too sweeping and exemption from seeking prior-EC or prior-EP may pose severe irreversible repercussions for the environment. As such these exemptions call for a re-look in terms of its categorisation. A possible suggestion in this regard is to determine each project on a case to case basis and provide a window of 'categorical exclusion' in disallowing exemptions in extraordinary circumstances. Solar Power projects have environmental impacts such as disposal challenges on the expiry of the life cycle of the solar panel, hence environmental study must be included.

- **Mandate that the Expert Appraisal Committee is bound by principles of Environmental law, especially precautionary principle and the Public trust doctrine.**

It is established that EIA is a key tool in environmental management. It thus goes without saying that in evaluating the environmental consequences of projects, principles of environmental governance - that have by and large been recognised at the international level - should also be given due consideration, especially the precautionary and the public trust doctrine. We suggest the proposed EC and EIA Notification make it a mandate for the Appraisal Committee to follow these principles in all their decision and recommendatory processes.

In India, courts have time and again expounded environmental principles such as the precautionary principle, the polluter pays principle, principle of sustainable development, principle of inter-generational equity and the doctrine of public trust. For instance, in the case of *Vellore Citizens' Welfare Forum v. Union of India*,⁶² the Supreme court explicitly recognized

⁶¹Environment Impact Assessment of Solar Power, *available at* <https://www.ucsusa.org/resources/environmental-impacts-solar-power> (last accessed on 24.8.2020).

⁶²(1996) 5 SCC 647.

the precautionary principle and principle of sustainable development as an essential part of the law of the land. The Court held that *“Environmental measures by the central government and the statutory authorities must anticipate prevent and attack the causes of environmental degradation and where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”*. Similarly, in the case *T. N. Godavaram Thirumulpad v. Union of India (UOI) and Ors.*,⁶³ the Supreme Court held that *“adherence to the principle of Sustainable Development is a constitutional requirement, and that it is the duty of the State to devise and implement a coherent and coordinated programme to meet its obligation of sustainable development based on inter-generational equity.”* In the cases such as *M.C. Mehta v. Union of India & Ors.*⁶⁴ (*Taj Trapezium Case*) and *M.C. Mehta v. Union of India & Ors.*⁶⁵ (*Ganga Pollution Case*), the Supreme Court has recognised and applied the polluter pays principle in imposing liability on those responsible for environmental damage.

In the context of environmental impact assessment, Courts have also read in these principles as guiding norms that ought to be given utmost consideration. With regard to the current practice in granting of mining leases and quarry permits, courts have relied on the doctrine of public trust and have adamantly expressed that whenever the Government decides to grant quarry permit or renew such permits, it must always take into account the availability of natural resources and the ecological impact and other environmental factors.⁶⁶ Furthermore, while considering the existence of public purpose the issues of environment degradation and damage to ecosystem have to be kept in mind, thus holding the governments and the regulatory authorities concerned, duty bound to enforce the precautionary principle and public trust doctrine for protection of the environment.⁶⁷ In the case *Gram Panchayat Navlakh Umbre v. Union of India and Ors.*, the High Court of Bombay has stressed on the relevance of the principle of sustainable development in granting of environmental clearances. The Court clearly states that *“An intention to develop is not sufficient to sanction the destruction of local ecological resources. In applying the principle of sustainable development, there must be a balance between developmental needs which project proponents assert, and environmental damage and degradation, that communities seriously apprehend.”*⁶⁸ The Supreme Court has also backed this line of thought in the case of *Lafarge Umiam Mining Pvt. Ltd v. Union of India*, where the Court reiterates that *“It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity.”*⁶⁹

These cases depict that fundamental nature of such principles and demonstrate that legislative and executive action must be guided by these principles in matters concerning the environment. Furthermore, as a matter of conformity with the obligations under international environmental treaties and agreements, India is duty-bound to reflect these principles in its

⁶³(2008) 2 SCC 222.

⁶⁴AIR 1997 SC 734.

⁶⁵AIR 1997 SC 1037.

⁶⁶Peter and Ors.vs. Union of India and Ors.(06.08.2020 - KERHC) : MANU/KE/2103/2020

⁶⁷Radheshyam and Ors.vs. State of C.G. and Ors, 2012(4) CGBCLJ 289.

⁶⁸Gram PanchayatNavlakhUmbre vs. Union of India and Ors. 2012(114)BomLR2695.

⁶⁹Lafarge Umiam Mining Pvt Ltd v Union of India, (2011) 7 SCC 338.

domestic action.⁷⁰ As these principles have been expressly recognised by India through ratification, it is imperative that the EIA process imbibes these principles. Thus, in this regard, it is suggested that the Expert Appraisal Committee should be bound by principles of environmental law in its decision-making process.

⁷⁰See United Nations Conference on the Human Environment, Stockholm Declaration, June 16, 1972, UN Doc. A/CONF.48/14 (1972), reprinted in 11 ILM 1416, 1419 (1972) and Rio Declaration on Environment and Development, adopted at UN Conference of Environment and Development, 1992, UN Doc. A/CONF. 151/26 reprinted in 31 ILM 874