Subject: Comments on Draft Notification dated 10th May 2016 related to the drafting of Environmental Supplemental Plan (ESP)
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13th June 2016

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Dear Sir,

We have read in detail the above mentioned draft notification along with all the office memoranda and the judgments cited as the background to the draft the notification dated 10.5.2016. This proposal seeks to put in place a process of preparing an Environmental Supplemental Plan (ESP) incase of projects that have already initiated construction activity and expansion prior to approaching the MoEFCC for the grant of ToR or an environment clearance. We appreciate the fact that the Ministry has taken the initiative to explain to the public the reasoning and justifications behind the issuance of this draft for public comments. However, we are surprised that the ministry has proposed a solution to violators of the law that not only amounts to condoning the violations of the EIA notification, 2006 and the Environment Protection Act, 1986; but also promotes and encourages such illegalities.

The draft notification selectively interprets the reasons why the OMs were quashed by the National Green Tribunal (NGT). Prior to highlighting specific comments we would like to share two critical observations to bring to your attention that the two judgments should not be misread or misinterpreted to allow for the proposal as specified under the draft notification dated 10.5.2016.

1. The judgment of the National Green Tribunal (NGT) quashes the OMs dated 12.12.2012 and 24.6.2013 on two specific grounds. First, OMs are executive instructions which cannot replace the requirements of the EIA notification, 2006 and; second, they amount to permitting what is otherwise *"prohibited to be done"* by law. The judgment clearly

observes that the steps laid out in the OMs *"provide benefits to the class of the project or activity owners who have started construction in violation of law, i.e. prior environment clearance."* In this case the NGT upheld the spirit of the EIA notification and quashed the OM that was violating it.

2. The judgment of the High Court of Jharkhand was issued under peculiar circumstances where *prima facie* the procedural lacunae was on the part of the MoEFCC, as a result of which there were delays in issuance of ToR. However, even this does not justify the initiation of construction activity without approval, even though the court in one specific instance but took a lenient view in favour of the project proponent. Further, this judgment only makes an observation that action against ascertaining violations and proposals for environment clearances should not be merged. It nowhere directs that the action should not be taken at all.

Based on the above observations, we have the following comments:

The draft notification states that in order to protect and improve the quality of environment, *"the process should be such that it deters non-compliance and the pecuniary benefit of non-compliance and damage to environment is adequately compensated for…"* There can be no disagreement on this goal. However, the purpose by which the draft notification sets out to achieve this is in absolute contradiction to this goal. Instead of strengthening the legal liability on violators, the draft does the following:

1. **Provides ESP as a license to violate:** The draft notification lays out a process, which legally allows for a violator to damage the environment and subsequently obtain an ESP to compensate for the damage. The idea of the ESP is an undue favour to a violator. It will not act as a deterrent, but will encourage the practice of non-compliance as the project proponent is at no point under scrutiny for an "illegal act". The polluter pays principle cannot be extended in this manner that it translates into becoming a license to pollute and then pay up.

2. **Negates the purpose of EIAs:** The practice of EIA internationally has been to help make environmentally sound decisions on development. It draws upon strong environmental baselines, good science and informed appraisal so that decisions for economic growth take into account socio-environmental concerns.. This practice also encourages the precautionary principle to say that unless risk and impacts are understood, no proposal for land use change should be approved. Globally, EIA practices have been seen beneficial and now sectoral and strategic EIAs are done. Instead of improving our EIA practice this draft notification allows violators to bypass the EIA process altogether.

3. **Limitation of pecuniary benefit**: The draft notification proposes the "*thorough assessment of pecuniary benefits"* so that damage to the environment can be restored. As you are aware, in many instances construction activities that involve felling of trees, blocking of water bodies or restriction of local livelihoods can have irreversible damage and restoration, if even possible, could take decades. Release of toxic materials and activities such blasting can also have long-term impacts on both local livelihoods as well as the ecology. Pecuniary benefits can only calculate the damage in monetary terms, which is an extremely limited form of valuation of environmental loss.

4. **"Post-facto" application of the EIA notification**: Although the draft notification lays out a clause that the process of ESP will *"Ensure that the project satisfies all of the procedures, and requirements of the Environment Impact Assessment Notification, 2006"*, it is not clear how this will happen. If the construction activity has taken place in violation of the notification, does this imply that the entire process of screening, scoping, public consultation and appraisal can be done post facto? The outcomes of this process would be unduly favourable to the violator, encourage *fait accompli*, and allow for the continuation of project activities unabated. Rather than being a deterrent such a practice will encourage illegality.

The Draft notification in question goes against the logic of assessing impacts before undertaking environmentally damaging activities. It puts faith in a party which has already violated the law assuming that the same will not happen again if an ESP is prepared as per the proposed procedure. None of the court judgments mandate such a perverse solution to the problem of non-compliance. Infact the NGT judgment has already questioned the very premise on which the proposal for ESP is based as this proposal is only an extension of what was allowed for in the quashed OMs. We therefore request the ministry to take the following steps:

1. Withdraw the draft notification dated 10.5.2016.
2. The MoEFCC could issue a new draft notification that states:
   - Violation of environment clearance procedures would summarily lead to the rejection of the application for environment clearance or ToR.
   - The requirement of a legally binding declaration from an applicant of prior environment clearance that they are not in violation of any of the regulatory processes.
   - A set of procedures by which information on non-compliance of environment clearance conditions is used to determine approvals related to modifications and expansions.
   - A systematic process of determining whether violation has taken place and the extent of damage incurred so that liability can be established and the illegal act is stopped with immediate effect.

The implementation of the above-mentioned requirements will push project authorities to respect rule of law, rather than violate it.

We are encouraged by the emphasis that the ministry considers environment justice as "*the fair treatment and meaningful involvement of all people, caste, colour, creed or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies."* We therefore request the ministry to undertake steps to check non-compliance by including the active participation of affected communities as third party monitors, who could enhance enforcement through the collection of legally admissible evidence. We would be happy to share our experiences on how this has already happened in over 50 cases over the last two years and in three states of India.

We look forward to the considered responses and action of the ministry in this regard.

Sincerely

Kanchi Kohli and Manju Menon
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New Delhi