EIA 2020 – A TICKING TIME BOMB

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ABSTRACT

*The Environmental Impact Assessment ("**EIA**") Notification was introduced to protect the environment and to ensure a symbiotic relationship between environmental protection and the development of the country. The Draft EIA Notification 2020 ("**Draft**"), instead of resolving the controversies surrounding the EIA Notification 2006, has created several new ones. With the advent of the Draft, it can be seen that the Government views the EIA process as an impediment to the ease of doing business. The EIA process has been enhanced in the interest of the corporate sector and promotes commercial development at the cost of environmental depletion. This paper aims to provide the reader with an understanding of the EIA process through a critical examination of the provisions introduced in the Draft. This paper examines provisions of the Draft, which violate the principles of environmental law and various judicial decisions. It further investigates the administrative conflict of interest in the*

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formation of the authorities and the weak monitoring compliance mechanism under the Draft. Upon such analysis and a comparative study of laws in other jurisdictions, the paper recommends solutions and a new set of procedures that should be implemented in India to make the EIA process more effective, public-friendly and to strengthen it for the protection of the environment.

I. INTRODUCTION

The United Nations Environment Programme ("**UNEP**") has defined Environmental Impact Assessment ("**EIA**") as a process to ascertain the human health, socio-economic, and environmental impacts of a proposed project.[1] EIA is to be a tool to determine and suggest alternative measures best suited to the local environment by identifying, collecting, predicting, and assessing the impacts of any developmental activity on the environment before its implementation. It is meant to be a well-planned approach for collecting and investigating the environmental information of a particular project and such information can be used in deciding whether the project should be executed.[2] It is required to analyse both the negative and positive impacts of a project and aims to enhance the benefits of the project through environment-friendly implementation.[3]

EIA was first introduced as a mandatory decision-making process in the United States through the National Environmental Policy Act,

[1]'What Is Impact Assessment?' (*Cbd.int.,* 27 April 2010) <https://www.cbd.int/impact/whatis.shtml> accessed 22 August 2020.
[2]United Nations Environment Programme, *Report: Environmental Impact Assessment: Issues, Trends and Practice* (1996).
[3]United Nations Environment Programme, *Report: Assessing Environmental Impacts- A Global Review of Legislation* (2018).

1969.[4] An EIA of the major actions of all federal agencies affecting the human environment was made mandatory by this Act.[5] It was the first major law introduced for environmental protection and is therefore considered as the *Magna Carta* of the environmental laws.[6] Similar initiatives were taken by various other countries like Canada (1973),[7] Australia (1974),[8] and the United Kingdom (1978).[9]

In 1992, the United Nations Conference on Environment and Development adopted the Rio Declaration which provided that EIA should be conducted for all the activities that may harm the environment.[10] It made EIA a globally recognised principle of international environmental law. Convention on Biological Diversity also provides that the adverse effects of a project on biological diversity should be minimised by using the EIA process.[11] Further, the World Commission on Environment and Development released a report titled 'The Brundtland Report' which also recognised the use of scientific assessment to analyse the impacts of a project on the environment before its implementation as one of the sustainable industrial development strategies.[12]

In India, the process of EIA was first applied in 1976 when the Department of Science and Technology started analysing the

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[4]National Environmental Policy Act 1969, 42 USC §§ 4321-4335 et seq (1969) ("NEPA 1969") (USA).
[5]NEPA 1969, s 102.
[6]'Welcome' (*NEPA.GOV National Environmental Policy Act*) <https://ceq.doe.gov/> accessed 2 August 2020.
[7]Environmental Assessment and Review Process 1973 (Canada).
[8]Environment Protection (Impact of Proposals) Act 1974 (Cth) (Australia).
[9]Environmental Protection Act 1990.
[10]United Nations Conference on Environment and Development, Rio Declaration on Environment and Development 1992 (12 August 1992), UN Doc A/CONF.151/26 (Vol I) ("Rio Declaration"), principle 17.
[11]Convention on Biological Diversity 1992 (adopted on 5 June 1992) 1760 UNTS 69, art 14.
[12]United Nations General Assembly, Report of the World Commission on Environment and Development Our Common Future (20 March 1987), UN Doc A/42/427.

environmental impact of river valley projects.[13] A separate Department of Environment was created in 1980 to make the administrative machinery for environmental protection more effective.[14] In 1985, the Ministry of Environment and Forest ("**MOEF**") was created which consisted of the Department of Environment and the Department of Forests and Wildlife.[15]

On January 27, 1994, the first EIA notification was enacted by the MOEF, which provided for restrictions and prohibitions to be imposed on the development of certain projects in the country and provided for the mandatory requirement of prior Environmental Clearance ("**EC**") for such projects from the MOEF.[16] It was enacted by the Central Government in exercise of its powers conferred under the Environment Protection Act, 1986 ("**EPA**")[17] and Environment Protection Rules, 1986.[18] Until 1994, there was no legislation which provided for the mandatory requirement of EIA.

A. EIA Notification 1994

The EIA Notification, 1994 mandated thirty categories of projects to obtain an EC before their expansion, development, or implementation.[19] Any person who intended to seek an EC was required to submit, before MOEF, an application with the EIA report, which was to be evaluated by the Impact Assessment Agency.[20] For

[13]SP Ajmire, Dr NS Raman and AZ Chitade, 'Environmental Impact Assessment' (2018) 1(5) ICJESR <http://troindia.in/journal/ijcesr/vol5iss1part2/31-35.pdf> accessed 6 August 2020.
[14]Government of India, Presidential Notification No 74/2/3/80-Cab (1 November 1980) SO 878(E) of 1980.
[15]Government of India, Presidential Notification No 74/2/3/85-Cab (4 January 1985) SO 7(E) of 1985.
[16]Environment Impact Assessment Notification 1994, SO 60(E) of 1994 ("EIA 1994") (India).
[17]Environment Protection Act 1986 ("EPA 1986"), ss 3(1) and 3(2)(v) (India).
[18]Environment Protection Rules 1986 ("EP Rules 1986"), r 5(3)(d) (India).
[19]EIA 1994, sch I.
[20]ibid, cl 2(III)(a).

any consultation as required by the Agency, a committee of experts was to be necessarily appointed. The said committee of experts had the right of entry and inspection of the site / factory premises of the project at any point of time[21]

After evaluating the submitted documents, the assessment was completed within ninety days; thereafter, within the next thirty days, the process of public hearing was concluded, and then EC was granted which was valid for five years.[22] Moreover, to check the implementation of the conditions and environmental safeguards specified in the EC, the Project Proponent ("**PP**") had to submit a compliance report twice a year.[23]

B. EIA Notification 2006

The EIA Notification, 2006 ("**EIA 2006**") was more detailed and comprehensive than the EIA Notification, 1994. One of the significant amendments was the separation of projects in category A and category B based on their impacts on artificial and natural resources, human health, and their spatial extent.[24] Projects under category A were required to seek EC from the MOEF and projects listed under category B from the State Level Environment Impact Assessment Authority ("**SEIAA**") / Union Territory Level Environment Impact Assessment Authority ("**UTEIAA**").[25] Ten projects were exempted from seeking prior-EC including industrial estates of area below 500 hectares not housing any industry of Category 'A' or 'B', air strips not involving bunkering / refuelling facility, and power plants using waste heat boiler

[21]ibid, cls 2(III)(a) and 2(III)(b).
[22]ibid, cl 2(II).
[23]ibid, cl 2(IV).
[24]Environment Impact Assessment Notification 2006, SO 1533(E) of 2006 ("EIA 2006"), cl 4(1) (India).
[25]ibid, cl 2.

without any auxiliary fuel.[26] Further, no rationale for such exemption was provided by the MOEF.

The EIA, 2006 has been amended by the MOEFCC in 2014, MOEF was renamed as Ministry of Environment, Forests and Climate Change ("**MOEFCC**") several times. An amendment in 2014 allowed the use of three-year-old baseline data in the preparation of the EIA reports. Another amendment provided guidelines for treatment of some projects as B2 category and also empowered the State Level Expert Appraisal Committee ("**SEAC**") to treat any B2 project as B1 depending on its environmental impact.

The EIA 2006 has described four stages of granting EC:

Stage 1 - Screening: Screening is the first stage in the process of granting EC. At this stage, project applications are scrutinized by the SEAC to determine whether further environmental study is required. Screening is conducted for projects listed under Category B and they are further categorised by the SEAC under Category B1 and B2 based on their environmental impacts. B1 projects are required to make the EIA report for appraisal before the grant of EC whereas B2 projects do not require an EIA report. Projects listed under category A do not have to undergo the process of screening as they have to mandatorily make the EIA report.[27]

Stage 2 - Scoping: It is the stage where detailed and comprehensive Terms of Reference ("**TOR**") for the preparation of an EIA report are provided to the PP. After screening of projects, the Expert Appraisal Committee ("**EAC**") in the case of Category A projects and SEAC in the case of Category B1 projects, determine the TOR within sixty days from the receipt of project applications. If the TOR are not provided within the said time period, the TOR suggested by applicant are deemed as final. The TOR help in the formation of the EIA report

[26]ibid, sch.
[27]ibid, cl 7(i)I.

addressing all environmental concerns regarding the project for which EC is sought.[28]

Stage 3 - Public Consultation: After the preparation of the draft EIA report, the concerns of the public are taken into account before making the final EIA report. All Category A and B1 projects are required to undergo the process of public consultation. It consists of two components – first, a public hearing at the site of the project for the affected locals and second, obtaining written responses from other concerned persons. Every PP is required to submit a request for public hearing and to take into account the concerns of the local population who would be affected by the project. The regulatory authority is required to call for written grievances and suggestions from other concerned persons who have plausible stake in the environment aspects of the project or its activities. The process of public hearing has to be completed by the State Pollution Control Board or the Union Territory Pollution Control Committee and conveyed to the regulatory authority within forty-five days. If the proceedings are not forwarded within forty-five days, the regulatory authority shall engage another public agency to ensure completion of public hearing in additional forty-five days.[29]

Stage 4 - Appraisal: It is the final stage before approval or denial of the application for prior-EC. After the preparation of the final EIA report, the application form along with other documents like the EIA report, outcome of public consultation of a project, etc. are submitted by the PP before the regulatory authority for the grant of prior-EC. Appraisal is the conclusive study by the EAC/SEAC in which the documents submitted before the regulatory authority are scrutinised. After inspecting all the documents, the EAC/SEAC makes recommendations to the regulatory authority either for grant of prior-EC on certain terms or conditions, or for rejection of the application of prior-EC. The

[28]ibid, cl 7(i)II.
[29]ibid, cl 7(i)III.

process of appraisal has to be completed by the EAC/SEAC within sixty days of the receipt of the final EIA report. Thereafter, within the next fifteen days, the recommendation of the EAC/SEAC is placed before the regulatory authority for the final decision.[30]

C. Draft EIA Notification 2020

The new Draft EIA Notification dated March 23, 2020 ("**Draft**") introduces substantial changes in the provisions of EIA 2006, including the grant of *ex-post-facto* approvals.[31] The Central Government has proposed implementing a verified online system, decentralisation of powers, and standardisation of the process of granting clearance in the Draft to make the EIA process more transparent and prudent.

The Draft has defined various terms which were earlier ambiguous with respect to their meaning and application under the EIA 2006, such as violation and study area.[32] It has removed the process of screening and has segregated the projects into three categories. For category A and B1, the stages are – scoping, preparation of draft EIA report, public hearing, preparation of final EIA report, appraisal, and grant/rejection of EC.[33] For category B2, the stages are – preparation of environment management plan ("**EMP**"), verification of the application, and grant/rejection of environment permission ("**EP**").[34] Further, the submission of the compliance report by the PP has been relaxed from the six-month requirement to only once a year.[35] The number of projects in the exempted list has also been increased to forty.[36]

[30]ibid, cl. 7(i)IV.
[31]Environment Impact Assessment Notification 2020, SO 1199(E) of 2020 ("EIA 2020") (India).
[32]ibid, cl 3.
[33]ibid, cl 10(1).
[34]ibid, cl 10(3).
[35]ibid, cl 20(4).
[36]ibid, cl 26.

The changes introduced by the Draft significantly dilute the provisions of EIA 2006 and the EPA which have been criticised on various levels. In the next section of this paper, a critical analysis of some of the clauses proposed in the Draft has been presented, identifying provisions that could enable better environmental safeguards and highlighting provisions that might lead to severe environmental harm.

II. CRITICAL ANALYSIS

A. Categorisation of projects

The Draft has categorised the exhaustive list of projects into category A, category B1, and category B2.[37] Earlier, the categorisation and re-categorisation of projects were done through amendments by the MOEFCC after public consultation.[38] But the Draft has proposed the formation of a Technical Expert Committee for this purpose.[39] This would give huge discretion to the Government to downgrade the category of any project restricting the right of the general public to be included in the categorisation process and will make it arbitrary and non-transparent. Therefore, any categorisation and re-categorisation of projects should be done after consultation with the public.

In 2006, the projects were classified into category A and category B.[40] The screening process was conducted for category B projects to divide them further into category B1 and B2 to determine whether the project needed a detailed EIA report, depending upon its location and nature.[41] The MOEFCC provided the guidelines for a list of projects to be treated

[37] ibid, cl 5(1).
[38] EP Rules 1986, r 5(3)(c).
[39] EIA 2020, cl 9(2).
[40] EIA 2006, cl 4(i).
[41] ibid, cl 7(i)(I).

as B2 category and empowered the SEAC to treat any project listed under category B2 as B1 depending on its environmental impact.[42]

However, under the Draft, screening has been eliminated, and projects have been listed in the Schedule, thereby standardising the categorisation of projects and leaving no scope for flexibility. The power to treat any category B2 project as B1 has also been taken away from the SEAC. This allows projects listed in category B2, which may have significant environmental impacts or are proposed in critically polluted areas, to avoid the rigours of environmental scrutiny. Therefore, the screening process should be compulsorily conducted by the SEAC based on the environmental impact, location, and nature of the project. The flexibility of the SEAC to treat any B2 category project as B1 should also be restored.

The Draft has shortened the procedure for category B2 projects by creating a new category of approval called EP for expediting the procedure to grant clearance to these projects. There are now only two stages for category B2 projects which include the preparation of an EMP and the verification of their application by the regulatory authority.[43] The process of screening, scoping, public consultation, EIA report, and even the process of appraisal has been eliminated for these projects. Thereby exempting these projects from any detailed impact assessment and turning their approval process into a mere formality. An EMP without an EIA report would be of no use as it only identifies mitigation measures and does not examine the environmental impacts of a project. For example, Onshore and Offshore Oil and Gas exploration projects cause huge economic loss to the farmers due to their large exploration sites, damage wildlife and vegetation, and

[42]Office Memorandum, Ministry of Environment, Forests and Climate Change (24 December 2013) No J-13012/12/2013-IA-II (I) (India).
[43]EIA 2020, cl 10(3).

various socio-economic impacts.[44] These projects primarily involve completion of seismic surveys that are an acoustic source of noise and light disturbances that create intolerable conditions for humans and wildlife.[45] After identification of a geological structure, required for the project site, through seismic surveys, boreholes are drilled into the ground to explore the presence of hydrocarbons. The digging of these wells induces various socio-economic changes including changes in land using pattern for agriculture, logging, fishing etc. leading to the exploitation of natural resources due to unplanned resettlement and rehabilitation. The oil and water-based fracking fluids which are produced during drilling are toxic in nature, which affect the aquatic mammals and contaminate the fresh water that is used for exploration.[46] Moreover, the removal of vegetation for digging wells results in soil erosion and certain secondary changes in drainage patterns, surface hydrology and habitat damage, eventually decreasing the capacity of environment to accommodate wildlife and vegetation.[47] Another example is the Pulp and Paper industry involving bleaching/decolouring/deinking which has also been included in the B2 category. This industry has been placed in the red category by the Central Pollution Control Board ("**CPCB**"),[48] as it generates all sorts

[44]John Pichtel, 'Oil and Gas Production Wastewater: Soil Contamination and Pollution Prevention' (2016) Applied and Environmental Soil Science <https://doi.org/10.1155/2016/2707989 accessed 2 December 2020.

[45]Douglas P Nowacek and others, 'Marine seismic surveys and ocean noise: time for coordinated and prudent planning' (2015) 13(7) Frontiers in Ecology and the Environment 378 <https://core.ac.uk/download/pdf/31299677.pdf> accessed 10 May 2021.

[46]Nenibarini Zabbey and Gustaf Olsson, 'Conflicts - Oil Exploration and Water' (2017) 1 Global Challenges <https://doi.org/10.1002/gch2.201600015> accessed 11 May 2021.

[47]*John Pichtel* (n 44).

[48]Modified Directions under Section 18(1)(b) of the Water (Prevention & Control of Pollution) Act, 1974 and the Air (Prevention & Control of Pollution) Act, 1981 regarding harmonization of classification of industrial sectors under Red / Orange / Green / White Categories, Central Pollution Control Board, Ministry of Environment, Forests and Climate Change (7 March 2016) No B-29012/ESS(CPA)/2015-16 (India).

of pollution such as non-biodegradable waste production, extreme deforestation, production of a large volume of acidic waste acidic waste and other harmful effects on the environment.[49] But the Draft has exempted it from the EIA process ignoring its destructive environmental impacts. Small and medium enterprises engaged in secondary metallurgical non-toxic processes, petroleum products, bulk drugs, and synthetic organic chemicals are some other harmful projects placed in category B2. All these projects would be given the approval to proceed without assessing their impacts on the environment leading to severe damage to the ecology, flora, fauna, and the livelihood of the locals.

Moreover, the CPCB has classified industries into four categories based on the pollution they generate.[50] Industries listed in the red category and the orange category are the highest polluters, which includes building and construction projects.[51] The National Green Tribunal ("**NGT**") has recognised the need to assess the utilisation of resources in the building construction activities as they have been carried out all over the country without paying much attention to their environmental impact.[52] It stated that the construction industry emits 22% of the total annual carbon-dioxide emissions of the country.[53] The Government has ignored this categorisation of industries done by CPCB and has diluted the EIA process for Building and Construction projects by placing them in category B2, thereby benefiting the real-estate industry. Therefore, the process of appraisal, preparation of EIA

[49]Pratibha Singh and others,'Effect of Toxic Pollutants from Pulp & Paper Mill on Water and Soil Quality and its Remediation' (2019) 12(1) International Journal of Lakes and Rivers <https://www.ripublication.com/ijlr19/ijlrv12n1_01.pdf> accessed 2 December 2020.
[50]Modified Directions under Section 18(1)(b) of the Water (Prevention & Control of Pollution) Act, 1974 and the Air (Prevention & Control of Pollution) Act, 1981 (n 48).
[51]ibid.
[52]*SP Muthuraman v Union of India* (2015) ALL (I) NGTR (2) (Delhi) 170.
[53]*Society for Protection of Environment & Biodiversity v Union of India* (2018) NGTR (1) B 1.

report, and public consultation should also be mandatorily done for these projects.

Further, the Draft exempts forty different types of projects from obtaining prior-EC.[54] However, only ten projects are exempted in EIA 2006.[55]

The list of exempted projects includes Solar Thermal Power Plants, Solar Photovoltaic ("**SPV**") Power projects, and the development of Solar Parks.[56] Solar power plants have the potential to produce sustainable electricity but are also capable to critically harm the environment in terms of land usage, ecosystem, and wildlife habitat. Another important impact is on the mortality rate of birds. According to a report published in California, a bird dies every two minutes at the Ivanpah solar power plant.[57] Further, studies show that California solar valley ranch and California solar one also have high mortality rates of birds.[58] A report by Bridge to India, a renewable energy firm, determined that the waste volume produced by SPV panels in India will grow by 2030 to more than 190,000 tonnes and by 2050 to approximately 1.79 million tonnes.[59] If such hazardous waste enters into soil and water, it will have a serious impact on the human health and ecosystem of our country. While the solar industry is expanding at a high rate, no policy has yet been implemented to recycle or manage the waste produced by the solar panels. Thus, it would be cruel and

[54]ibid, cl 26.
[55]EIA 2006, sch.
[56]EIA 2020, cl 26(14).
[57]Phil Taylor, 'Bird Deaths at Calif power plant a PR nightmare for industry' *E&E News* (California, 19 January 2015) <https://www.eenews.net/stories/1060011853> accessed 2 December 2020.
[58]Leroy J Walston Jr and others, 'A preliminary assessment of avian mortality at utility-scale solar energy facilities in the United States' (2016) 92 Renewable Energy 405 <https://doi.org/10.1016/j.renene.2016.02.041> accessed 11 May 2021.
[59]Sangeetha Suresh, Surbhi Singhvi and Vinay Rustagi, 'Managing India's PV Module Waste' (*Bridge to India*, 2019) <https://bridgetoindia.com/backend/wp-content/uploads/2019/04/BRIDGE-TO-INDIA-Managing-Indias-Solar-PV-Waste-1.pdf> accessed 3 August 2020.

unfair to the people to keep such projects out of the purview of the EIA process.

In EIA 2006, the process of maintenance dredging could be done only after the project was granted EC.[60] However, the Draft has exempted it from the requirement of prior-EC.[61] Noise production, physical injury from collisions, and increased turbidity due to the dredging process affect marine mammals grievously.[62] It can also cause permanent hearing damage to the humans in the long term due to its low-frequency noise disturbance and the disturbance it causes to sediments can release toxic pollutants in the water deteriorating the marine environment and sabotaging human health.[63] Other severe impacts maintenance dredging causes to marine organisms are alteration of certain characteristics such as habitat degradation, tidal currents, remobilisation of contaminants, entrainment, etc.[64] Therefore, these projects should be scrutinised by the EIA process.

Extraction of ordinary earth for linear projects including borrowing, sourcing, and extraction for pipelines, roads, etc. is also exempted from obtaining EC.[65] These projects significantly impact the environment by continuous fragmentation of the landscape, obstructing human movement, and disturbing wildlife. Extraction from protected areas should also be evaluated by the EIA process in order to protect environment and to avoid unnecessary disturbance to wildlife.

The Liquefied Natural Gases ("**LNG**") terminal projects which were earlier listed under category A in EIA 2006 have been exempted in the Draft. An LNG terminal is a facility that heats LNG, brought to the

[60]EIA 2006, sch.
[61]EIA 2020, cl 26(7).
[62]Victoria LG Todd and others, 'A review of impacts of marine dredging activities on marine mammals', (2015) 72(2) ICES Journal of Marine Science 328 <https://doi.org/10.1093/icesjms/fsu187> accessed 3 August 2020.
[63]ibid.
[64]ibid.
[65]EIA 2020, cl 26(6).

terminal from production zones, into a gaseous state. The main operational risks at LNG terminal projects are the gas tanker and terminal operations which should be carried out in a protective location. Some of the possible environmental concerns related to LNG are hazardous material management, the risk of spilling of flammable LNG, wastewater discharges, biological hazards, radiological hazards, etc.[66] The appropriate reason behind this exemption can be the proposal of the Government to construct various new LNG terminal projects.[67] By exempting LNG terminal projects, the Government has violated the doctrine of non-regression[68] and therefore, these projects should be brought back under the ambit of the EIA process.

B. Lack of expertise in EAC

The EAC is a committee of experts appointed for the purpose of scrutinising the application form and other documents like the final EIA report, outcome of public consultation, etc. of a project submitted along with the application form. It is required to make recommendations to the MOEFCC on whether a project should be granted prior-EC or not, and to suggest better alternatives to a project.[69] It also enjoys the power to issue specific TOR to the project besides the

[66]World Bank Group, 'Environmental, Health and Safety Guidelines for Liquefied Natural Gas Facilities' (*International Finance Corporation*, 11 April 2017) <https://www.ifc.org/wps/wcm/connect/ab72db72-736a-43e7-8c81-f2d749ec3ad1/20170406-FINAL+LNG+EHS+Guideline_April+2017.pdf?MOD=AJPERES&CVID=lJuCgVs> accessed 3 August 2020.

[67]'Factbox: Existing and proposed LNG terminals in India' *ET Energy World* (Singapore, 15 March 2019) <https://energy.economictimes.indiatimes.com/news/oil-and-gas/factbox-existing-and-proposed-lng-terminals-in-india/68420962> accessed 2 December 2020.

[68]*Society for Protection of Environment & Biodiversity v Union of India* (2018) NGTR (1) B 1.

[69]EIA 2020, cl 3(27).

standard TOR.[70] It has to be mandatorily appointed by the MOEFCC for appraisal of projects and has tenure of a period of 3 years.

The Draft provides that the members of the EAC should have an experience of fifteen years in certain fields. Most of the fields mentioned in the Draft such as life sciences, marine sciences, environment economics, environment laws, social impact assessment, and environmental sciences are related to the environment and an expert appointed under these heads would be able to appraise the project properly. But some of them such as project management, management of process or facilities or operations in the field of power generation, power processing, fabrication, materials production, manufacturing, materials processing, physical infrastructure, occupational health, or public administration are not at all related to the environment and an expert appointed under anyone of these fields will not be able to assess the environmental impacts of a project properly which would lead to improper consideration of the application of prior-EC.[71] Yet, the Government can appoint an expert experienced in any one of these fields as a member of the EAC.

Further, the Draft prescribes that the Chairperson of the EAC should have experience in public administration, management, or issues related to environmental policy.[72] In EIA 2006, the same qualifications for appointment of Chairperson have been prescribed but the NGT directed the MOEFCC to not appoint experts experienced in the field of 'public administration or management' as Chairperson.[73] But the Draft has prescribed the same qualifications for the Chairperson of the EAC. If a person experienced in the field of management or public administration is appointed as the Chairperson of the EAC, it would be difficult for her to ascertain the environmental and social impacts of a proposed project which will be detrimental to the interests of the

[70]ibid, cl 12(3).
[71]ibid, cl 6(1)(c).
[72]ibid, cl 6(4).
[73]*Kalpavriksha v Union of India* OA No 116 of 2013(THC) (NGT).

environment. There have been various instances where people having a conflict of interest have been appointed as the Chairperson of the EAC. For example, in 2017, the Chairperson of the EAC on river valley, Sharad Kumar Jain, was also the additional Director-General of the National Water Development Agency ("**NWDA**") and cleared various NWDA river linking projects.[74] Similarly, in 2009, P. Abraham was the chairperson of the EAC and approved various projects of his hydropower companies.[75]

Moreover, the Supreme Court ("**SC**") has stated that the EAC has failed to function as per its expertise and has indicated instances where there has been a non-application of the mind by the EAC.[76] Recently, it suggested that only persons who have specialised knowledge related to environmental protection should be appointed as members of the EAC.[77] The NGT also instructed the MOEFCC to not appoint Chairperson or experts experienced under the categories 'public administration' or 'management' in the EAC and stated that if Chairperson or experts are appointed under these heads, then it would lead to improper disposal of application of prior-EC.[78] It also established that if non-environmentalists are appointed as members of the EAC, it will cause serious prejudice to the ecology and the environment.[79] Though granting EC rests with the regulatory authority, the same is based upon the recommendations of the EAC. If the appraisal is conducted by an expert having no knowledge or expertise in environment-related fields, then the EAC's existence would bear no fruit. The lack of expertise in the members of the EAC causes serious

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[74]Vishwa Mohan, 'Chief of EAC on rivers faces conflict of interest charge' *Times of India* (New Delhi, 1 June 2017) <https://timesofindia.indiatimes.com/india/chief-of-eac-on-rivers-faces-conflict-of-interest-charge/articleshow/58937121.cms?from=mdr> accessed 3 August 2020.
[75]ibid.
[76]*Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401; *Shreeranganathan KP v Union of India* (2014) ALL (1) NGTR (1) (SZ) 1.
[77]*Hanuman Laxman Aroskar v Union of* India (2020) SCC Online SC 41.
[78]*Kalpavriksha v Union of India* OA No 116 of 2013(THC) (NGT).
[79]ibid.

and irreversible damage to the environment, and therefore, the Government should revise the eligibility criteria laid down for appointing the members of the EAC by appointing members having knowledge in fields related to the environment.

C. Lack of an independent regulator

The SC has recognised the need for an independent national regulator for enforcing environmental conditions, appraising projects, and imposing penalties.[80] In 2011, the then Prime Minister, Dr. Manmohan Singh, also proposed to establish an independent environment regulator for revamping the process of granting ECs.[81] In 2014, the SC further reiterated the need for a national environment regulator to overlook the process of granting clearances and directed the Union of India to appoint a regulator.[82] In the same year, the High-Level Committee on environment-related laws also proposed establishing the National Environment Management Authority to deal with clearances and permissions under environmental laws.[83]

The existing regulatory mechanism, which comprises of the State and Central level Pollution Control Boards, monitors compliance but lacks regulatory authority and independence from the MOEFCC. The EAC overseeing the appraisal process is also a part-time body which is required to meet only once a month.[84] This also leads to lack of continuity in the process of grant of clearances. An independent

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[80]*Lafarge Umiam Mining Pvt Ltd v Union of India* (2011) 7 SCC 338.

[81]BS Reporter, 'Independent Environment regulator soon, says PM' *Business Standard* (New Delhi, 25 July 2011) <www.business-standard.com/article/economy-policy/independent-environment-regulator-soon-says-pm-111072500054_1.html> accessed 3 August 2020.

[82]*TN Godavarman Thirumulpad v Union of India* (2014) 4 SCC 61.

[83]Government of India, Report of the High Level Committee to review Acts administered by Ministry of Environment, Forest & Climate Change (November 2014) (India).

[84]EIA 2020, cl 6(12).

regulator will ensure continuity in the process of grant of clearances and will eventually lead to expedition of grant of clearances.

In many other sectors including telecom, insurance etc., the setting up of independent sectoral regulators has resulted in considerable streamlining and expediting of issues arising out of such sectors. It may be advisable for matters related to the environment to also be regulated by an independent environment regulator free from the political framework of the MOEFCC. There is a need for an independent regulator to remove the political interests in the clearance process and to deal with the concerns related to compliance monitoring, dealing with violation cases, etc. in a better and more transparent way. An independent regulator would also fast-track the grant of EC as it would be free from the lengthy bureaucracy of the MOEFCC. The Draft does not address the need for an independent environment regulator in spite of the same being directed by the SC several times. The formation of an independent regulator would lead to a stronger institutional mechanism by providing strictness in granting EC, which is essential for the protection of the environment. Therefore, before changing environmental norms, the Government should establish an independent environment regulator to oversee the process of granting EC.

D. Decentralisation

The Draft decentralises the power to constitute the EACs at the district and UT/state level by appointing these committees based on the names given by the District Administration, UT Administration, or State Government.[85] However, if the State Government/UT administration fails to submit the names of members to constitute the SEIAA/UTEIAA and SEAC/UTEAC, it would be formed by the MOEFCC without any consultation with the concerned State Government/UT administration.[86] Likewise, if the SEIAA/UTEIAA

[85]EIA 2020, cl 8(5).
[86]ibid, cls 7(7) and 8(8).

fails to form the DEAC within the stipulated period, the Central Government will assume the power to appoint the DEAC.[87]The Draft unreasonably gives the authority to the Central Government to constitute the committees without consulting the State/UT administration, which was mandated under EIA 2006. The decentralisation of powers and functions was introduced to accelerate the approval process, support a better understanding of the local environmental problems, increase public participation at the district level, and decrease the burden on the Central Government.[88] But how can it be decentralisation if these committees are formed by the Central Government itself? The question is whether the decentralisation proposed is the *real* devolution of powers or an *illusion*. This change gives even more power to the Centre and is against the aim of decentralisation.

It is important to minimise the interference of the Centre in State administration to ensure its independence.

E. Scoping

During the stage of scoping, TOR are issued to the PP to mention certain specific data in the project report in relation to the impacts of the project. In EIA 2006, the EAC/SEAC has to provide TOR to the PP within sixty days.[89] The Draft dilutes this process of scoping by decreasing the time period for providing TOR from sixty to thirty days.[90]

Further, if the matter is not referred within thirty days to the EAC by the regulatory authority, the sector-specific standard TOR will be

[87]ibid, cl 8(10).
[88]Ruth Kattumuri and Stefania Lovo, 'Decentralisation of environmental regulations in India', (2018) 53(43) EPW <https://www.epw.in/journal/2018/43/perspectives/decentralisation-environmental.html> accessed 2 December 2020.
[89]EIA 2006, cl 7(II)(ii).
[90]EIA 2020, cl 12(3).

applied to the project.[91] The specific TOR determines the details a PP should mention in the EIA report with respect to specific environmental issues. The specific TOR means project specific or location specific TOR. For example, Project X is a Paper and pulp industry near a river whereas Project Y is a paper pulp industry near a barren land, far from any water bodies like river, sea, ocean etc. Paper and pulp industry generates all types of pollutions including water pollution, terrestrial pollution, etc. as has been specified in this paper above. Since Project X is near the river, it would require a deeper study of water species, and terrestrial species of plants and animals that would be harmed by the implementation of Project X. Whereas Project Y, not being near water bodies, would not require much deeper study of water pollution. Such specific TOR help in scrutinizing all the significant environmental impacts of each project based on environmental surroundings, size of the project, or the location of the project which might not be required if the specifications of the project would have been different. In contrast, sector-specific standard TOR are the general guidelines issued for different sectors. The scientific and technical considerations vary for projects in different sectors as well as in the same sector. Therefore, issuing general guidelines for projects will not be sufficient for assessing their impact on the environment. The regulatory authority grants EC to the projects on the basis of the EIA report which is prepared based on TOR provided by the EAC/SEAC. Thus, it is vital to provide specific TOR to make sure that the EC is issued adequately after scrutinising every aspect of the project.

F. Study area

The EIA 2006 does not define the term 'study area', the study area of projects is determined according to the sector-specific TOR. It can also be extended by the EAC for different types of projects taking into account their site or project-specific considerations. The Draft has

[91]ibid, cl 12(4).

defined the term 'study area' but it has also fixed the study area for different types of projects ignoring their spatial and territorial impacts. Study Area is the area surrounding the project for which data related to the environmental scenario and the environmental impact of the project is collected for the EIA report. The Draft limits the study area to 10 km for category A projects and for category B projects to 5 km around their boundary.[92] The right of the EAC to study the impact of the project beyond the specified study area has also been taken away.

The setting up of the same study area for all projects without taking into account their regional, scientific, and technical considerations can have a disastrous effect on the environment. Territorial impacts vary according to the sector-specific projects as different categories of projects have different spatial impacts. The impacts of some projects extend way beyond the prescribed study area of 10 km and 5 km. For example, the impact of river valley projects can extend up to 100 km downstream of the river[93] and emissions from the thermal power plants can impact beyond 300 km.[94] Transportation of material for coal mines also has a huge impact on the environmental surroundings of the area.

By limiting the study area, the Government has taken away the right of the EAC to ask for the assessment of data beyond the prescribed study area if it thinks that the impact of the project can extend beyond such area. Therefore, the study area should be fixed separately by the EAC for each sector-specific project due to the variation in their spatial and territorial impacts and the right of the EAC to extend the study area of a project beyond the prescribed study area should also be restored.

[92]ibid, cl 3(55).
[93]Garnett P Williams and M Gordon Wolman, *Downstream effects of Dams on Alluvial Rivers* (Geological Survey Professional Paper 1286, 1984).
[94]Sarath K Guttikunda and Puja Jawahar, 'Atmospheric emissions and pollution from the coal-fired thermal power plants in India' (2014) 92 Atmospheric Environment 449 <http://www.indiaairquality.info/wp-content/uploads/docs/2014-08-AE-Emissions-Health-Coal-PPs-India.pdf> accessed 11 May 2021.

G. Baseline data

Baseline data is the data related to flora, fauna, land, water, air, socio-economic, etc., collected from the study area and the site of the project depicting the environmental conditions of the area.[95] The Draft allows older baseline data collected in the period of the last three years to be used in the preparation of the EIA report.[96]

The MOEFCC in 2014 issued a notification allowing the use of three years old baseline data in the preparation of the EIA report provided it is subjected to due diligence by the EAC/SEAC, which may make recommendations with regards to the data, including its revalidation.[97] In the Draft, the mandatory requirement of due diligence to be conducted by the EAC/SEAC, including its power to make recommendations, has been taken away. This curtails the discretion of the EAC/SEAC to order for revalidation of data if it finds that the baseline data collected is not appropriate and needs updating.

The provision of allowing the use of older baseline data is contrary to the aim of the EIA which is environmental protection. The collection of baseline data should be done as prescribed by the EAC. The data of the ongoing existing projects in the area at the time of the proposal of any new project should also be taken into account. For example, the baseline data was collected for Project X in 2014, and the project was implemented in the year 2016. Meanwhile, in 2015, another project Y was implemented in the same area bringing major changes in the environmental scenario of that area. In this case, the baseline data collected for Project X will be rendered ineffective as the impacts of Project Y on the environmental scenario of that area would not be included in the baseline data of Project X. This would lead to an EIA report being made for Project X on outdated baseline data and EC will

[95]ibid, cl 3(5).
[96]ibid, cl 13(6).
[97]Office Memorandum, Ministry of Environment, Forests and Climate Change (22 August 2014) No J-11013/41/2006-1A-11 (I) (India).

be granted on an outdated EIA report. Such a scenario would cause huge damage to the environment and health of the people residing in such areas.

The projects are granted approval on the basis of their EIA report, which is made on the basis of the baseline data collected prior to the implementation of the project. And if these reports are corrupted by the non-inclusion of effects of the projects implemented after the collection of the baseline data but prior to the implementation of the project, it would lead to biased and badly researched approval. For example, in the above scenario, the environmental assessment for project X is being evaluated on baseline data which does not include the effects of project Y. There might be a possibility that project X would not have been approved if the impacts of project Y were to be included in its assessment. The whole point of establishing an EIA process was to evaluate the impact on the environment and then consider granting approval, however, in this scenario the approval is based on biased and incomplete information about the environment which could eventually lead to the depletion of the environment.

The Draft also proposes that the collection of baseline data should be done for only one season except for monsoon.[98] Each season plays a different role in the flora, fauna, and environment of a region.[99] For example, migratory bird species arrive seasonally, water flow changes every season along with the biodiversity patterns of the wetlands, and pollutants in the air are low during summer and high during winter. Any change in one of these parameters would lead to a change in other parameters.[100] Although the Draft prescribes that baseline data for the monsoon season should also be required to be collected in cases where

[98]EIA 2020, cl 13(2).

[99]SS Palmate and others, 'Climate Change impact on forest cover and vegetation in Betwa Basin, India', (2017) 7 Applied Water Science 103 <https://link.springer.com/article/10.1007/s13201-014-0222-6> accessed 3 August 2020.

[100]ibid.

the EAC prescribes for the same while granting the TOR, the same will still not be sufficient, as in those cases, baseline data of only two seasons would be required to be collected. For example, the climate in Western Ghats in summer is very different than how it is in winter and in monsoon and the same applies to Eastern Ghats also.[101] In wetlands, the water spread and aquatic vegetation is very different in monsoon, pre-monsoon as well as post-monsoon.[102] If baseline data is confined to only two seasons, the impact of the project in all other seasons would go unchecked.

Further, confining the collection of baseline data to two seasons including monsoon would lead to the PP choosing the other season according to his own whims and fancies. For example, if a project is being implemented near a bird sanctuary where migratory bird species arrive in winter season, the PP would collect and submit the baseline data of the summer season. This would lead to the impact of the project on the nearby bird sanctuary when the birds arrive in the winter season unnoticed. Therefore, baseline data should be collected through all seasons and should not be confined to only two seasons. The study of the environmental impacts of the project in all seasons would lead to a well-informed decision making regarding the grant of prior-EC. It should be made mandatory for the PP to collect baseline data throughout the year in every season. If it is confined to only two seasons, then the environmental impact of the project in other seasons would stand in the way of environment protection causing serious damage to the environment.

[101]'Western Ghats' (*Geo 121 Wiki Spring 2015*) accessed 11 May 2021.
[102]UK Sarkar and others, 'Conserving Wetlands – An Effective Climate Change Adaptation in India' (*Nicra-icar*, 2016) <http://www.nicra-icar.in/nicrarevised/images/publications/Tbu2016_Fish_Conserving%20Wetlands%20-%20An%20Effective%20Climate%20Change%20Adaptation%20in%20India.pdf> accessed May 11, 2021.

H. EIA consultant

The Draft specifies that the EIA report shall be made by the PP through an Accredited EIA Consultant Organisation ("**ACO**").[103] The ACO can be held responsible for the data and the content of the EIA report along with the PP.[104]

The submission of false information by the EIA consultant has been held as gross negligence and professional misconduct by the NGT.[105] There have been incidents where forged EIA reports were submitted by the PP and supported by the EIA consultant to receive clearance.[106] Recently in the *Mopa Airport* case, the SC held that an incomplete and false EIA report was submitted for obtaining clearance.[107] In another case, the Madras High Court ('HC') scrapped the EIA report due to non-application of mind by the EIA consultant.[108] Issues of plagiarism and lack of seriousness in impact assessment has always been arising in the EIA reports. Furthermore, the EIA consultants were not made liable in any of these cases.

The Draft has empowered the MOEFCC to blacklist the organisation or the individual responsible for submitting such misleading or incorrect information in the EIA report.[109] But, this provision does not expressly provide for imposition of stricter punishments such as prosecution and imprisonment of the ACO or other responsible persons.

Such instances arise because the PPs themselves hire the ACOs and pay for their service which leads to a fundamental conflict of interest and a biased report being made as the ACOs are unable to make a report

[103]EIA 2020, cl 13(8).
[104]ibid, cl 13(10).
[105]*V Srinivasan v Union of India* 2012 SCC OnLine NGT 22.
[106]*Lafarge Umiam Mining Pvt Ltd v Union of India* (2011) 7 SCC 338.
[107]*Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401.
[108]*PV Krishnamoorthy v The Government of India* (2019) 3 CTC 113.
[109]EIA 2020, cl 17(7).

against the one who pays them. The MOEFCC can adopt a similar framework as has been provided in the Land Acquisition Act, 2013[110] for preparation of the Social Impact Assessment report. The local public communities that will be affected by the project should also be included in the process of making the EIA report.

To break this direct link between the PP and the ACO, an independent regulator should be appointed by the MOEFCC to hire the ACO for making the EIA report. The EIA consultants can be paid by the independent regulator which can charge the same from the PP. This will remove the conflict-of-interest present in the existing process and will ensure that the report being made is fair, transparent, and in the interest of the environment.

The Government should also mandatorily evaluate the report prepared by the ACO so that such instances of plagiarised or forged reports do not occur. The EAC should thoroughly analyse the EIA report to weed-out such instances of plagiarised/forged reports. The EIA report should be accepted only after mandatory due diligence has been conducted by the EAC. Further, the ACO should be made liable and be subject to prosecution and imprisonment in cases where the EIA report is found to be false or forged.

I. Public consultation

The dispute on the Dibang Dam project depicts how the voices were given to the general public but were not meant to be heard by the government. In the public hearing of the Dibang Project, 99% of the Idu-Mishmi community raised their voices against the project regardless of which the project was granted clearance.[111] To coerce the

[110]The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (India).

[111]Manju Menon, 'How consent for Dibang dam was manufactured by terrorising the people of Arunachal Pradesh' *Scroll* (25 July 2019), <https://scroll.in/article/931504/how-consent-for-dibang-dam-was-manufactured-by-terrorising-the-people-of-arunachal-pradesh> accessed 11 May 2021.

locals to consent for the building of the hydro-electric project, the government sent armed personnel who opened fire in the premises of a Durga Puja pandal and injured several people including children. To safeguard their capital interest and to protect themselves from protests like these, the government has now proposed to exempt hydro-power projects from the public consultation process before the grant of prior-EC under the Draft. Now acting within the purview of law, they can accomplish their capitalistic goals. Other polluting projects including acids industries, petroleum and petrochemical products, treatment plants, pesticides, construction industries, biomedical waste, synthetics, paints and chemical fertilizers industries have also been exempted from public consultation. The commencement of improper public hearing violates the principle of natural justice of being able to represent oneself[112] and also the doctrine of legitimate expectation[113] where locals and other environmentalists were waiting for the government to let them raise their concerns regarding the proposed project. Similarly, the Baghjan oil wells explosion in Assam is another recent example of a disaster caused by an unassessed project which was granted permission for expansion on the basis of a five-year-old public hearing.[114]

[112] *National Central Co-operative Bank v Ajay Kumar* AIR 1994 SC 39; *Fateh Sing v State of Rajasthan* AIR 1995 Raj 15.

[113] MP Ram Mohan and Himanshu Pabreja, 'Public Hearings in Environmental Clearance Process – Review of Judicial Intervention' (2016) 51(50) EPW <http://re.indiaenvironmentportal.org.in/files/file/environmental%20clearance_0.pdf> accessed 11 May 2021; *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374; *State of Kerala v KG Madhavan Pillai* (1988) 4 SCC 669.

[114] Jayanta Kalita, 'Oil India Skipped Public Hearings Before Expanding Drilling in Assam's Baghjan' *The Wire* (Guwahati, 21 June 2020) <https://thewire.in/environment/exclusive-oil-india-skipped-public-hearings-before-expanding-drilling-in-assams-baghjan> accessed 26 August 2020; 'Minutes of 20th Expert Appraisal Committee (Industry-2) Meeting, Ministry of Environment, Forest and Climate Change', (27 February 2017) <http://environmentclearance.nic.in/writereaddata/Form-1A/Minutes/22032017KWOKFD7K20thEACMinutesofMeeting27-28February.pdf> accessed 3 August 2020.

The Draft also exempts all strategic projects but the power to mark any project as *strategic* has been given to the Central Government.[115] This will authorise the Central Government to exempt any project they desire from public interference without providing any substantial reason for the same, thereby sabotaging the rights of the public to review projects.

Public consultation consists of two components: first, conducting a public hearing at the site of the project or in its close proximity for ascertaining concerns of the affected locals, and second, obtaining responses in writing from other concerned persons having a plausible stake in the environmental impacts of the project. It is the most important stage before the grant of prior-EC as it ensures public participation. But the Draft has introduced a new provision which allows the authorities to conduct public consultation for projects in any way they think appropriate.[116] The introduction of such a provision during the global pandemic shows the opportunistic nature of the Government which has been swiftly clearing projects over video conferencing.[117] Conducting public hearings over video conferencing would lead to the curtailment of the voices of the affected people who do not have access to the internet or smartphones, making the decision heavily biased in the favour of industries.

It is nothing but a mockery of the laws that were initially made for the public but have now been turned into a tool to achieve the degrading and demoralising private goals of the Government. The provision of exemption of projects from public hearing is an infringement of the fundamental rights of the public and is also morally and socially unjust.

[115]EIA 2020, cl 5(7).
[116]ibid, cl 14(1)(c).
[117]Nihar Gokhale, 'To kickstart the economy, India's environment ministry is clearing projects in 10 minutes' *Quartz India* (5 May 2020) <https://qz.com/india/1851634/india-fast-tracks-green-clearance-to-spur-coronavirus-hit-economy> accessed 11 May 2021.

Legislations are there for public benefit, therefore, they should have a primary say in every project before its implementation.

J. Weak compliance and monitoring mechanism

When EC is granted to a project, certain conditions and environmental safeguards are imposed by the regulatory authority to be followed by the PP, known as Prior-EC conditions.[118] The PP has to submit a compliance report before the regulatory authority in respect of prior-EC conditions.[119] After the grant of EC, the compliance report and regular monitoring are the only measures to check that the detrimental social and environmental impacts of a project are addressed and mitigated in due time.

But the Draft has mandated the PP to submit the compliance report only once a year,[120] which was earlier required to be submitted every six-months.[121] With the submission of the compliance report every six months, the authorities had the opportunity to regularly evaluate whether damage was caused or could potentially be caused to the environment. The increment in the time period for submission of this report reduces the responsibility and liability of the PP to stay compliant and gives them more opportunity to hide the damaging effects of the project or downplay its environmental impacts. The NGT has held that monitoring should be done quarterly and in no case can it be done less than twice a year.[122] The same has been reiterated by the NGT in the *Vishakhapatnam Gas Leak* case.[123] Mandatory submission

[118]EIA 2020, cl 3(42).
[119]ibid, cl 20(4).
[120]ibid.
[121]EIA 2006, cl 10(ii).
[122]*Sandeep Mittal v Ministry of Environment, Forests & Climate Change* 2018 SCC OnLine NGT 2540.
[123]*In Re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village, Vishakhapatnam in Andhra Pradesh* 2020 SCC OnLine NGT 128.

of compliance report at more frequent intervals will ensure the protection of the environment and should be prescribed in the Draft.

Further, the Draft allows the PP to submit the compliance report themselves which should be submitted by a Government organisation, thereby giving them opportunity to submit forged and false report regarding the project. The CAG report pointed out that of a total of 259 cases, compliance report was submitted regularly only in ninety cases, irregularly in 113 cases, and in fifty-three cases, it was not even submitted once.[124] The Draft has prescribed a fine of only Rs. 500/- to Rs. 2500/- in cases where the compliance report is not submitted by the PP.[125] The penalty prescribed in the Draft is too low to address the issue of non-submission of the compliance report and will have no deterrent effect on the defaulters. Thus, a more stringent penalty including cancellation of the prior-EC should be imposed. Although the Draft stipulates that if the compliance report is not submitted for a continuous period of three years, the prior-EC will be revoked.[126] But such revocation after a period of three years would be an intervention too late as significant irreversible damage could be caused to the environment and ecology of the surrounding area within such a time period.

The Draft also proposes that the monitoring of compliance of prior-EC conditions should be done only by Government organisations,[127] thereby excluding the public from compliance monitoring. Therefore, this provision should be amended; the affected people, environmental organisations, and other stakeholders should also be included in monitoring compliance with prior-EC conditions.

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[124]Report of the Comptroller and Auditor General of India on Environmental Clearance and Post Clearance Monitoring, Ministry of Environment, Forests and Climate Change (10 March 2017) Report 39 of 2016 (“CAG Report”) (India).
[125]EIA 2020, cl 20(5).
[126]ibid.
[127]ibid, cls 20(8), 20(9) and 20(10).

In cases of non-compliance, the only punishment prescribed in the Draft is the submission of a bank guarantee by the PP which will be eventually released.[128] In the CAG report, it was highlighted that no PP has been penalised for violating the conditions of the EC.[129] Moreover, the Draft has curtailed the powers of the regulatory authority to withdraw the EC or take penal action against the PP under the EPA. The punishment imposed by the Parliament under EPA for non-compliance is fine of up to one lakh or imprisonment up to a period of five years.[130] EPA is a law passed by the Parliament whereas the EIA Notification is an act enacted by the Executive. The law passed by the Parliament prescribes a punishment of imprisonment which cannot be curtailed by the Executive by prescribing a punishment of submission of only a bank guarantee which will be eventually released. The Executive cannot frame laws and monetise environmental crimes.

The SC has held that the principle of sustainable development and the precautionary principle are a part of right to life under Article 21 of the Constitution.[131] Further, the NGT has held that non-compliance with prior-EC conditions is violative of the right to life of the general public.[132] The PP is allowed to operate even after such non-compliance, thereby hampering the survival of the wildlife and livelihood of the local communities. Therefore, the Draft should prescribe for a stricter punishment in case of non-compliance such as the prosecution or blacklisting of the PP along with imposition of fine and imprisonment. In cases where the PP does not submit the yearly compliance report, an extension of two-three months should be granted to submit the same and where no compliance report is submitted even after such extension, prior-EC should be immediately revoked.

[128]ibid, cls 23(6) and 23(7).
[129]CAG Report (n 124).
[130]EPA 1986, s 15.
[131]*ND Jayal v Union of India* (2004) 9 SCC 362.
[132]*Sandeep Mittal* (n 122).

K. Ex post facto approvals

The Draft proposes to grant *ex post facto* approvals to projects which have started their operations or expanded without obtaining any prior-EC/EP.[133] The SC has held that the commencement of industries without any prior-EC is a violation of the right to life of the general public.[134] The Government introduced the provision of granting ex post facto approvals to the industries working without any prior-EC through a circular dated 14th May 2002.[135] This circular was struck down by the SC and it held that "the circular is unsustainable in law".[136] It further held that the grant of ex-post facto clearance is violative of the principles of environmental law and against the principle of sustainable development.[137] In another case, it reiterated that awarding an *ex post facto* EC is completely alien to environmental jurisprudence and would lead to irreparable degradation of the environment.[138]

For example, in Vishakhapatnam, the company operating the chemical plant which caused a gas disaster, injuring thousands of people, admitted that it was operating without any valid EC.[139] In the Baghjan Oil explosion in Assam, the NGT report found that Oil India Limited had been operating the oil field without obtaining the required consent and mandatory clearances.[140] In 2013, the Justice M.B. Shah

[133] EIA 2020, cl 22.
[134] *Association for Environmental Protection v State of Kerala* (2013) 7 SCC 226.
[135] Circular, Ministry of Environment, Forest and Climate Change (14 May 2002) No J-21011/8/98-IA II (I) (India).
[136] *Alembic Pharmaceuticals Ltd v Rohit Prajapati* (2020) 4 MLJ 277.
[137] ibid.
[138] *Common Cause v Union of India* (2017) 9 SCC 499.
[139] LG Polymers India Pvt Ltd, 'Undertaking Affidavit of the Director of Operations of the LG Polymers Plant' (*Portal for Environmental and CRZ Clearances*, 10 May 2019) <http://www.environmentclearance.nic.in/writereaddata/FormB/TOR/ConceptualPlan/10_May_2019_1907099537XGSWYR2EDSReply.pdf> accessed 3 August 2020.
[140] Karishma Hasnat, 'NGT panel report finds OIL was operating in Baghjan without mandatory clearances' *The Print* (Guwahati, 5 November 2020) <

Commission report found that ninety-four of the 192 iron ore mines were operating without the mandatory environmental clearance.[141]

The Draft has prescribed a procedure for grant of *ex post facto* approvals wherein the appraisal committee is required to mandatorily assess the operations of the project before granting *ex post facto* approval. The committee would have to examine whether the project operating without an EC can be run sustainably under compliance of environmental norms with adequate environmental safeguards. Following a procedure after damage has already been done to the environment will not be in consonance with the aim of environment protection. It is against the precautionary principle of environmental law and promotes the 'pollute and pay' regime where industries will be allowed to work without any prior-EC and can later pay for the damage they caused to the environment. It will lead to huge exploitation in high biodiversity regions which harbour wildlife populations. In cases where EC is denied to a project, the damage done to the environment would be irreparable. Such damage is irreversible; no monetary compensation or remedial plan can undo it. The idea that monetary compensation and remedial plans can undo the damage caused to the environment is an erroneous idea as damage caused to the quality of water, soil, air, ecosystems and wildlife, in regions of high biodiversity which harbour wildlife populations, is often irreversible.

The EIA Notification was introduced to evaluate the environmental impacts of a project before its implementation. Introduction of *ex post facto* clearance in the environmental jurisprudence of the country would promote a culture where industries commence their projects without obtaining any prior-EC. It institutionalises a practice which has

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https://theprint.in/environment/ngt-panel-report-finds-oil-was-operating-in-baghjan-without-mandatory-clearances/537988> accessed 11 May 2021.

[141] Nitin Sethi, 'Half of Odisha's iron ore mines lack clearance: panel' *The Hindu* (New Delhi, 25 December 2013) <https://www.thehindu.com/news/national/half-of-odishas-iron-ore-mines-lack-clearance-panel/article5498482.ece> accessed 11 May 2021.

been declared time and again by the SC as violative of principles of environmental law and against the principle of sustainable development. The Government is indirectly sanctioning approvals to illegal projects by allowing them to apply for *ex post facto* approvals. This provision should not be extended to all defaulters but only to the industries working without any ulterior motive or any *malafide* intention. It should be granted only in cases where the applicability of the EIA Notification and requirement of obtaining prior-EC is not clear. Such a relaxation would dilute the requirement of obtaining prior-EC, weaken the environmental law of the country, and would lead to huge exploitation of the environment.

L. Reporting of violations and non-compliance

The Draft defines *violations* as the start of work or expansion of a project without obtaining any prior-EC/EP.[142] It provides that violations can be reported only in the following four ways – *Suo moto* application by the PP, reporting by a Government authority, found by the regulatory authority or found by the EAC.[143] Similarly, the non-compliance of prior-EC/EP conditions can also be reported in the above-mentioned four ways.[144]

By introducing these provisions, the Government has made it clear that the cognisance of violations or non-compliance will not be taken if it is reported by the affected people, locals of the area, any environmental organisation, or by any news media. There have been several instances where non-compliance and violations have been brought to the limelight by the affected communities and organisations like SANDRP, Manthan Adhyayan Kendra, etc.[145] It can be clearly seen

[142]EIA 2020, cl 3(60).
[143]ibid, cl 22(1).
[144]ibid, cl 23(1).
[145]SANDRP, 'EAC Rejects 2 VIDC Projects from Buldhana for Violations' (*SANDRP*, 26 April 2013) <https://sandrp.in/2013/04> accessed 3 August 2020; Team CPR-Namati Environmental Justice Program, 'Can Legal Compliance address

that the Government is trying to shield the big industries and corporates who commit such violations by taking away the right of the affected communities, environmental organisations, and other stakeholders to report such violations or non-compliance.

Relying on the PPs for the reporting of violations or non-compliance is a mockery of the law and clearly shows that the Government has enacted these provisions to favour the industries. No PP would report their own violations or non-compliance when they can easily function while hiding the same. The Government has not provided any rationale for restricting such an important right of the general public.

By not allowing them to raise their voices against any project or activity causing damage to the ecology and the environment, these provisions are in direct violation of the human, legal, and constitutional rights of the citizens. Therefore, this right of the public to report violations and non-compliance should be restored.

M. Levelling

The Draft has excluded activities like fencing, levelling of ground without any tree fall, and geotechnical investigation from the term *construction work*, thereby exempting these activities from the requirement of prior-EC.[146] Land levelling is the construction of a uniform field by adding or removing the soil from the landscape transforming the natural features of the land. It induces certain permanent changes in the low-lying land like the destruction of natural drain channels, physical indicators of soil, water bodies, marshlands, and also changes the land-use pattern, erodes soil, triggers landslides when performed on the tropical terrains or hilly areas.

environmental injustice?' (*India Waterportal*, 18 March 2018) <https://www.indiawaterportal.org/articles/can-legal-compliance-address-environmental-injustice> accessed 3 August 2020.

[146]EIA 2020, cl 4(3).

Further, if projects are permitted to start these activities before the grant of clearance, the authorities would prefer to grant clearance for the same sites on which the PP has already started working rather than considering alternative sites. This would give implicit power to the PP to make the authorities choose the sites they desire.

Since excluding these activities from the ambit of the EIA process will permit the destruction of land without any accountability or responsibility and will give notorious construction powers to the developers, it is important that activities like levelling and geotechnical investigation should be allowed only after the issuance of prior-EC.

N. Violation of the principles of environmental law and the fundamental rights of citizens

The provisions of the Draft propose a number of changes in comparison to the EIA 2006, as have been discussed above in this paper. Some of these changes are in direct violation of the essential principles of environmental protection and the fundamental right to clean and healthy environment enshrined under Article 21 of the Constitution. These have been discussed below –

a) Sustainable development

The SC has held that the principle of sustainable development means development done for the present generation of the society in such a way as to meet its needs without hampering the environmental prospects of the future generation to meet their own needs.[147] The Draft has categorised building and construction projects which cause huge pollution to the environment, into B2 category diluting the process of grant of prior-EC for them. Such exemption has been held as a violation of the principle of sustainable development by the NGT.[148] The exemption of a number of projects from the EIA process such as solar

[147] *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647.
[148] *Shashikant Vithal Kamble v Union of India* 2018 SCC OnLine NGT 2601.

power plants, dredging, paper pulp industries, offshore and onshore oil explorations, etc. which cause huge damage to the ecology and the environment would also be in violation of the principle of sustainable development. Other substantial changes under the Draft such as the grant of *ex post facto* clearances and the weak compliance monitoring mechanism that allow the PP to operate despite non-compliance are also violative of the principle of sustainable development.

b) Polluter Pays principle

The polluter pays principle as propounded by the SC conveys that the costs of avoiding and remedying the damage caused to the environment must be borne by the industries polluting it.[149] The provision of *ex post facto* approvals is against the polluter pays principle and promotes the 'pollute and pay' regime where the industries will be allowed to work without any prior-EC and can pay later for the damage they caused to the environment, thereby leading to huge exploitation of the environment.

c) Precautionary principle

The precautionary principle stipulates that the Government must anticipate, thwart and attack the causes of degradation of the environment and must enact measures to prevent threats of serious and irreversible damage to the environment and to environmental depredation.[150] The process of granting *ex post facto* approvals is violative of the precautionary principle as it allows industries to commence their operation without any prior-EC leading to serious and irreversible injury to the environment. Further, the categorisation of building and construction projects under B2 category and leniency in compliance monitoring are also violative of the precautionary principle of environmental law.

[149] *Indian Council for Enviro-Legal Action v Union of India* (1996) SCC (3) 212.
[150] *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647.

d) Public Trust doctrine

The doctrine of public trust stipulates that the state holds all the natural resources of the country as a trustee and these resources are meant for the enjoyment of the general public.[151] The state cannot relinquish the ownership of the natural resources and turn them into private ownership or for commercial use.[152] Allowing industries to operate without obtaining any prior-EC and then legitimizing their violations would lead to exploitation of the natural resources and would be a clear violation of this doctrine. Further, following the doctrine, the government, as a trustee to the public property, should invite and acknowledge public responses before constructing any profit generating private industry on public property or exploiting any public resources.[153] The SC has also held that the government should motivate public participation in order to protect the environment from any destruction.[154] But by exempting a number of projects from public consultation, the government is violating the doctrine of public trust.

e) Violation of Article 21

The SC has held that the right to life under Article 21 of the Constitution includes the right to enjoy pollution free air and water,[155] right to live in a healthy environment,[156] right to pollution free environment,[157] and the right of wholesome, clean and fair environment.[158] Consequently, it would be unjust to not consult the public in cases where their fundamental rights are about to be infringed.

[151] *MC Mehta v Kamal Nath* (1997) 1 SCC 381.
[152] ibid.
[153] *Lake Lanoux Arbitration, France v Spain* (1957) 24 ILR 101; *MC Mehta v Kamal Nath* (1997) 1 SCC 388.
[154] *Research Foundation for Science Technology National Resource Policy v Union of India* (2005) 10 SCC 510.
[155] *Subhash Kumar v State of Bihar* AIR 1991 SC 420.
[156] ibid.
[157] *Ratlam Municipality v Vardicharan* (1980) AIR 1622.
[158] *Sher Singh v State of Himachal Pradesh* 2014 SCC OnLine NGT 226.

Therefore, it is important to consider the grievances and suggestions of public before granting EC to any industrial project in the area. Further, the MOEFCC is allowing industries to cause damage to the environment without going through the rigours of environmental scrutiny by granting *ex post facto* clearance to projects, not monitoring the compliance of prior-EC conditions frequently, exempting a large number of projects from EIA, not enhancing the study area of EIA reports, and exempting red and orange category projects from the detailed EIA process. Thereby, violating the fundamental rights of the citizens to a pollution free and healthy environment enshrined under Article 21 of the Constitution. Moreover, it is the responsibility and duty of the state under Article 48A of the Constitution, to safeguard and improve the environment of the country.[159]

O. Language of publication

The Draft was published in only Hindi and English whereas it is to be applicable throughout the country. The Delhi HC directed the Government to publish the Draft in regional languages and at least in all the twenty-two languages listed in the Eighth Schedule of the Constitution.[160] But the MOEFCC had not done so before the last date of submission of objections and the Draft was available only in three other languages, thereby depriving the rural and tribal people of the ability to review the Draft and submitting public comments.

Although the Centre translated the Draft in all the twenty-two languages listed in the Eight Schedule of the Constitution as directed by the Delhi HC, it was done much after passing of the deadline for submission of objections. The last date of submitting objections to the Draft was August 11, 2020, whereas the Centre translated the Draft in the twenty-two languages on September 23, 2020.[161] Translating the

[159] The Constitution of India 1950, art 48A.
[160] *Vikrant Tongad v Union of India* WP(C) 3747/2020 (Delhi High Court).
[161] 'Centre translated draft EIA 2020 in all 22 languages after HC deadline' *The Tribune* (New Delhi, 23 September 2020)

Draft after the deadline becomes a mere formality and serves no purpose as no objections were allowed after the deadline. Therefore, by not publishing the Draft in all the twenty-two languages, the Centre has deprived the rural and tribal people from submitting objections to the Draft.

III. COMPARATIVE ANALYSIS

Several important stages of the EIA process such as screening, scoping, public consultation, and preparation of EIA reports are conducted differently in countries around the globe. In this section of the paper, we have analysed the EIA process of various other jurisdictions and compared them with the Indian scenario. The stages of the EIA process implemented by these countries demonstrate how it can be made more effective. India should adopt similar procedures under the Draft to improve environmental conditions, increase transparency and public participation in the EIA process, and decrease environmental crimes.

A. Screening

In Japan, which is ranked 12th on the Environment Performance Index, 2020 ("**EPI**"),[162] the Environment Impact Assessment Act, 1997 provides that screening of certain projects should be done by the Government authority.[163] The Government decides whether an EIA is required or not based on the degree of the environmental impacts of the project.[164] The decision is made by the licensing authority, etc. concerned with the project based on the criteria provided by the

<https://www.tribuneindia.com/news/nation/centre-translated-draft-eia-2020-in-all-22-languages-after-hc-deadline-145516#top> accessed 11 May 2021.

[162]Yale University, '2020 Environmental Performance Index Results Overview', <https://epi.yale.edu/epi-results/2020/component/epi> ("EPI 2020") accessed 3 August 2020.

[163]Environment Impact Assessment Act 1997 ("EIA 1997"), art 4 (Japan).

[164]ibid, art 4(3).

Environment Minister.[165] For example, in road projects, the decision is taken by the Ministry of Land, Infrastructure, Transport and Tourism, and in power plant projects, the decision is taken by the Ministry of Economy, Trade and Industry. Further, the Government has to provide the reasons for its decision on whether an EIA is needed for the project or not.[166]

Canada also conducts screening of projects and involves the general public and the affected Indigenous groups in the process.[167] Similarly, in the United States, the Government agency determines whether there is a need for an Environmental Impact Statement ("**EIS**") based on the environmental impacts of the project.[168] When the agency finds that no EIS is needed, it has to make the findings available for review to the affected public before the final decision.[169]

India, which has secured 168th position in the EPI[170], has proposed to eliminate the process of screening. Screening is necessary so that projects that have the potential to significantly impact the environment do not get an EC without a detailed impact assessment. It also identifies projects which will not impact the environment severely and exempts them from the EIA process, thereby expediting their implementation and the process of development.

B. Preparation of the EIA report

In Canada, which is 20th on the EPI,[171] the Impact Assessment Agency or a Review Panel established by the Agency prepares the Impact

[165]ibid, art 4(9).
[166]ibid, art 4(3).
[167]Impact Assessment Act 2019, ("IAA 2019") c 28, s 1, ss 16(1) and 16(2)(d) (Canada).
[168]Regulations For Implementing The Procedural Provisions Of The National Environmental Policy Act, 40 CFR Part 1500(2005) ("CEQ Regulations 2005"), s 1501.4 (US).
[169]ibid, ss 1501.4(e)(1) and 1501.4(e)(2).
[170]EPI 2020.
[171]ibid.

Assessment report.[172] The Impact Assessment Agency has to necessarily appoint members in the Review Panel who are unbiased and free from any conflict of interest related to the project.[173] They are also required to have knowledge related to the anticipated effects of the project or of the interests and concerns of the affected Indigenous people.[174] In the United States, an EIS is prepared by the Federal Agency and the public is also involved in reviewing the EIS.[175]

In India, the EIA report is prepared by an EIA consultant who is appointed and paid by the PP, which has led to various incidents of plagiarised or forged reports being submitted. For example, a false and incomplete EIA report was submitted in the Mopa Airport project for obtaining EC,[176] and another false and incomplete EIA report was submitted in Salem-Chennai Eight Lane Highway Green Field project.[177] The preparation of an EIA report by a Government agency would ensure that such false reports are not submitted, thereby making the reports more credible. The Government agency can also take into account all the anticipated impacts of the project in a detailed manner which can be intentionally omitted if the PP prepares the report.

In India, the EAC is tasked with the scrutinising of the application form, EIA report, outcome of public consultation, etc. of a project and is also required to give recommendations to the MOEFCC with regard to the grant or rejection of EC. But there have been instances where the Court has held that there was non-application of mind by the EAC. Recently, the SC held in the *Mopa Airport* case that there was non-application of mind by the EAC.[178] The Madras HC in another case held that while appraising the project, there was no application of mind by

[172]IAA 2019, ss 25 and 36(1).
[173]ibid, s 41(1).
[174]ibid.
[175]CEQ Regulations 2005, s 1502.5.
[176]*Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401.
[177]*PV Krishnamoorthy v The Government of India* (2019) 3 CTC 113.
[178]*Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401.

the EAC.[179] Such instances arise because the members of the EAC are not mandatorily required to have knowledge or experience in the fields related to the environment. A person having knowledge in public administration or management can also be appointed as a member of the EAC. Further, there have been instances where persons having a conflict of interest have been appointed as Chairperson of the EAC. For example, the additional director general of NWDA, Sharad Kumar Jain, was also the Chairperson of the EAC on river valley projects and cleared various NWDA projects including the Ken-Betwa link during his tenure.[180] Similarly, P Abraham also cleared various projects of his hydropower companies while he was the Chairperson of the EAC.[181]

The qualifications of the members of the EAC should be changed and it should be mandated to appoint persons having knowledge or experience in the field of environment as members of the EAC. The members appointed should also be unbiased and free from any conflict of interest related to the project. This would ensure that there is proper application of mind by the EAC and would make the appraisal process more effective. Persons having knowledge or experience in environment law would also be able to suggest better alternatives or make better recommendations to the project.

C. Public consultation

The Council on Environmental Quality ("**CEQ**") Regulations of the United States stipulate that the Government agency has to determine whether an EIS should be prepared for the project or not after public review.[182] Recommendations from the affected local agencies, state, PP, and other interested persons are considered to decide the conditions on which the EIS is to be prepared.[183] Before preparation of the final

[179] *PV Krishnamoorthy v The Government of India* (2019) 3 CTC 113.
[180] *Vishwa Mohan* (n 74).
[181] ibid.
[182] CEQ Regulations 2005, s 1501.4.
[183] ibid, ss 1501.7(a)(1) and 1501.7(a)(5).

EIS, public comments are invited and hearings are conducted.[184] Further, public comments are also reviewed after the preparation of the final EIS.[185] The involvement of the public is one of the features that helped USA secure 24th rank in the EPI.[186]

Similarly, the EIA Regulations of South Africa provide that public comments should be considered at the time of submission of the Basic Assessment report, Environment Management Programme, Scoping report, and EIA report.[187] Canada also promotes public participation by inviting public comments at the stage of screening, preparation of reports, and conducting public hearings before the grant of approval to a project.[188]

In India, public participation is restricted to a single public hearing conducted after the preparation of the draft EIA report. Engaging public at every stage of the EIA process is the key to promote transparency and to protect the environment. The most effective approach would be to include either a public representative from the local affected area in the EAC or take public recommendations at the stage of scoping where TOR are prescribed to a project. This is significant because the socio-economic and environmental effects of the project can be better explained by the people who live in the area where the project is proposed. After the formation of the draft EIA report, public should be approached again before the preparation of the final EIA report to give them a chance to get their grievances raised at the time of scoping and claim answers for the same. Subsequently, after the preparation of the final EIA report, it must be published and given wide publicity to get public comments, and the recommendations of the affected locals should be taken into account. After the process of

[184]ibid, ss 1501.8(b)(2)(iv) and 1502.5(c).
[185]ibid, s 1501.8(b)(2)(vi).
[186]EPI 2020.
[187]Environmental Impact Assessment Regulations in GN R982 GG 38282 of 4 December 2014, ss 19, 21 and 23 (South Africa).
[188]IAA 2019, ss 11, 28(1)(b), 41(1) and 51(1)(c).

appraisal and before the grant of EC, the conditions of the EC should also be discussed with the general public who will be affected by the project. The project should be granted EC only after the affected locals have given their consent to the establishment of the project. The establishment of industries at any place causes an immutable fundamental change to the environment of that place. Therefore, there is a need to include the participation of the public at every stage of the EIA process to protect the environment and to promote transparency.

Amendment in prior-EC conditions

In Denmark, which has topped the EPI,[189] the Environmental Protection Act has empowered the Supervision Authority to revise the conditions of approval granted to the PP at any point of time.[190] This power can be exercised to manage the internal control of pollution or for improving the effectiveness of supervision.[191] But in India, there is no such provision that authorises the regulatory authority to amend the prior-EC conditions. This may prove to be a drawback considering that certain projects like mining which significantly impact the environment are granted EC for a construction phase of fifty years and no authority has the power to amend its prior-EC conditions. When there is an increase in the cumulative pollution of an area or change in climatic conditions, it would be in the interest of the environment to amend the EC conditions to balance environmental protection with industrial development. The amendment in EC conditions should be made by the MOEFCC either *suo moto* or on the basis of compliance reports regularly submitted by the PP. This approach will be more beneficial if the PPs are obligated to submit the compliance reports in a timely manner. If amendment of EC conditions is proposed on the basis of compliance reports regularly submitted by the PP, it will reduce the burden of the MOEFCC who will not have to analyse every project

[189]EPI 2020.
[190]Environmental Protection Act 1998, s 72(2) (Denmark).
[191]ibid.

separately and on their own expense to make amendments in the EC conditions.

D. Criminal liability in case of non-compliance and violation

Australian Environment Protection and Biodiversity Conservation Act imposes a punishment of imprisonment for two years in cases of non-compliance or violation of the prior-EC conditions.[192] Such deterrent punishment builds a fear among the people who violate these conditions, thereby facilitating environmental protection. But in India, no criminal liability is imposed in cases of non-compliance and violations. Although the EPA prescribes for a punishment of imprisonment up to 5 years for failure to comply with the provisions of the Act or the rules made thereunder[193], no PP has ever been subjected to any criminal liability under the EPA for non-compliance or violation of prior-EC conditions. Taking into account the increasing number of such cases, India should also impose criminal liability including imprisonment for non-compliance or violation of prior-EC conditions under the Draft to deter or prevent people from destroying the environment. The Draft should propose a mechanism in which PPs should be subjected to criminal prosecution for non-compliance or violation of prior-EC conditions.

IV. CONCLUSION

The EC is a precautionary step taken for the safety of the environment which helps in the survival of mankind and benefits them in many other ways. However, in the name of 'streamlining the process of granting EC', the Government has turned the EC process into a mere formality threatening the ecology of the nation and exposing us to even more

[192]Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 142A (Australia).
[193]EPA 1986, s 15.

unforeseen environmental disasters. Though the elaborative structure of the Draft has determined certain necessary elements like the definitions of various key terms and introduction of an online EIA system, it is difficult to rely on the Draft for environmental protection because it has not only proposed several unfair provisions but has also disregarded various judicial pronouncements, thereby warranting further environmental deterioration.

Moreover, the Draft has been published online restricting the rural, agrarian population, and the majority of the affected people who do not have access to the internet or knowledge to use the online portals, from submitting their comments. The Government should have advertised that the Draft has been made available for public comments on national television, regional and national newspapers as most of these people who will have to face the ecological devastation legalised by this law are not even aware of its publication.

Our Honourable Environment Minister, Shri Prakash Javadekar, is also the Minister for Heavy Industries and Public Enterprises which is a conflict of interest and sabotages public trust. When the MOEFCC, established for the protection of the environment, abdicates its duty in the guise of development, the environment of the country is put at harm which in turn harms the health and safety of the citizens.

With the various newly introduced provisions critically analysed in this paper, it can be seen that the Government is acting according to its own private rules of selfishness and compromising on the EIA process for promoting development. To ensure that environmental damage does not become a collateral cost for development, we need to enforce stronger laws that promote environment-friendly industrial development rather than laws which are only industrial-friendly. The COVID-19 pandemic has taught us that there is a direct connection between the wildlife, forests, environment, and us. The way to move forward is not exclusion but inclusion and coexistence.