

# MP-IDSA

## *Issue Brief*

### India's Environment Impact Assessment Draft 2020: Issues and Challenges

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#### **S***ummary*

The Ministry of Environment, Forest and Climate Change (MoEFCC) released a new draft Environment Impact Assessment (EIA) 2020 on March 12, 2020. Several inputs have been received from the public on the draft. Concerns have been raised on issues such as reduction in the time period allotted for public hearings, the extended time give for submission of compliance reports, and regularisation of projects through 'post-facto clearance'. The government has assured that it will strive to strike a balance between the environmental and developmental concerns. As and when the EIA is finalised, it is expected to incorporate the perspectives of multiple stakeholders in a balanced manner.

The Ministry of Environment, Forest and Climate Change (MoEFCC) released a new draft Environment Impact Assessment (EIA) 2020 on March 12, 2020 and sought comments from the public, till August 11.<sup>1</sup> The ministry received around 1.7 million comments from the public.<sup>2</sup> This draft EIA will replace the 2006 EIA notification.

### EIA Genesis

The UN Environment Programme (UNEP) defines an EIA as “an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.”<sup>3</sup> The ‘environmental movement’ that arose in the US in the 1950s and early 1960s against the reckless exploitation of natural resources was a major driving force that laid the foundation for the development of EIA.<sup>4</sup> The US Congress in 1969 implemented the National Environment Policy Act (NEPA), which required federal agencies to produce a statement of environmental impact.<sup>5</sup>

Since then, several countries have adopted mandatory EIAs to evaluate development projects. The commitment to the norms of EIA have not only spread ‘horizontally’ to other states but have also spread ‘vertically’ influencing the development of EIA norms within international organizations.<sup>6</sup> For instance, to avail loans and grants from international financial institutions such as the World Bank, compliance with EIA norms are required.

Non-compliance may have an adverse impact on possible loans agreements. For instance, In July 2019, the World Bank backtracked on the agreed \$300 million loan for the Amaravati Sustainable Infrastructure and Institutional Development Project in Andhra Pradesh, following complaint from farmers.<sup>7</sup>

While the aim of the EIA is to protect the environment, analysts point out that its impact appears to be limited.<sup>8</sup> The UNEP in its 2018 evaluation of national EIA

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<sup>1</sup> [“Draft Environment Impact Assessment Notification-2020”](#), Ministry of Environment, Forest and Climate Change, Government of India, March 12, 2020.

<sup>2</sup> [“Environment ministry says 17 lakh comments on draft EIA notification”](#), Hindustan times, August 11, 2020.

<sup>3</sup> [“Goals and principles of environment impact assessment”](#) UN Environment Programme, June 1987.

<sup>4</sup> Samuel P. Hays, [“The Environmental Movement”](#), *Journal of Forest History*, 25(1), 1981, pp. 219-221; Riley E. Dunlap and Angela G. Mertig, [“The Evolution of the US environmental movement from 1970 to 1990: An overview”](#), *Society and Natural Resources*, 4(3), 1991, pp. 209-218.

<sup>5</sup> Richard K. Morgan, [“Environmental impact assessment: the state of the art”](#) *Environment Impact Assessment and Project Appraisal*, 30 (1), 2012, pp. 5-14.

<sup>6</sup> Neil Craik, *The International Law of Environmental Impact Assessment: Process, substance and integration*. Cambridge University Press: Cambridge, UK, 2008.

<sup>7</sup> [“World Bank statement on Amravati and its ongoing partnership with Andhra Pradesh”](#), *The World Bank*, July 21, 2019.

<sup>8</sup> Stephen Jay et al. [“Environment impact assessment: retrospect and prospect”](#), *Environment Impact Assessment Review*, 27 (4), 2007, pp. 287-300.

legislations suggested that there was an attempt to weaken the EIA process in some countries in order to speed up the development process.<sup>9</sup>

## **Draft EIA Notification, 2020**

Under the Environment (Protection) Act of 1986, the first EIA notification was issued in 1994. Later, it was replaced by a modified draft in 2006. Union Minister Prakash Javadekar stated that the reason for the draft notification on EIA 2020 was to consolidate all the 55 amendments and 230 office memorandums issued since 2006.<sup>10</sup> The Secretary of MoEFCC, S.K. Gupta pointed out that while industries are essential to help in the country's development, clearance to establish them should be "expeditious but...with a proper scrutiny."<sup>11</sup> Industrial bodies like the Federation of Indian Mineral Industries (FIMI) have welcomed the new draft.<sup>12</sup> The major proposals of the 2020 EIA draft are appraised below.

### **Public Participation**

Under the mechanism of EIA, generally four steps are followed: screening, scoping, public participation and appraisal. Public participation has been widely recognised as an essential element of EIA. This is recognised in the 1992 Rio Conference on Environment and Development, which stated that "environment issues are best handled with the participation of all concerned citizens at the relevant level."<sup>13</sup>

By an amendment to the 1994 EIA notification in 1997, India adopted the principle of public hearing for Environmental Clearance (EC). However, the process has been undermined by several factors, including poor quality of information, lack of a mechanism to ensure effective involvement of local communities, and blanket exemption on certain categories of projects for public consultations.<sup>14</sup> As a result, on several cases, the Indian judiciary had to intervene and re-interpret the procedural aspect of public hearing. For instance, between May 2012 and May 2016, 31 judgments on the aspect of public hearing were delivered.<sup>15</sup>

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<sup>9</sup> ["Assessing Environment Impacts: A Global Review of Legislation"](#), *United Nations Environment Programme*, Nairobi, 2018.

<sup>10</sup> ["Draft EIA in line with green rules, court rulings: Prakash Javadekar, Environment Minister"](#), *The Economic Times*, August 17, 2020.

<sup>11</sup> ["Longer time for clearance doesn't mean regulations being enforced"](#) *The Indian Express*, August 11, 2020.

<sup>12</sup> ["Draft EIA notification to streamlines environmental clearance process: FIMI"](#) *Business Standard*, September 21, 2020.

<sup>13</sup> ["Report of the United Nations Conference on Environment and Development"](#), *United Nations*, August 12, 1992.

<sup>14</sup> Lavanya Rajamani and Shibani Ghosh, "Public participation in Indian environmental law" in Lila Barrera-Hernandez et al., *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities*. Oxford University Press: Oxford, UK, 2016.

<sup>15</sup> M.P. Ram Mohan and Himanshu Pabreja, ["Public Hearings in Environmental Clearance Process: Review of Judicial Intervention"](#), *Economic and Political Weekly*, 51(50), 2016, pp. 68-75.

One of the major proposals made in the 2020 draft is reduction of the notice period for public hearings from 30 days to 20 days. Javadekar explained that the shorter window was “in tune with the times”, given the growth of internet and mobile telephony.<sup>16</sup> Several environmental activists and organisations have instead argued that even the 30 day timeframe was inadequate as information failed to reach the stakeholders residing in remote and inaccessible terrains.<sup>17</sup>

Furthermore, by classifying a number of projects into A, B1 and B2 (in terms of risk to the environment), a host of projects are exempted from public scrutiny. Projects under Category A and B1 require mandatory EC. Category A projects are appraised by central agencies while Category B1 projects are appraised by state agencies. Category B2 projects, meanwhile, do not require mandatory EC<sup>18</sup>

The major grievance of a number of environmental experts and activists as well as by state governments like Chhattisgarh, is that by limiting public consultation, the draft is not in consonance with protecting the rights of tribals, among others.<sup>19</sup>

The new draft also proposed that projects having implication for ‘national defence and security’ or having ‘strategic consideration’ will be determined by the central government and are exempt from public hearing. Additionally, all ‘linear projects’ like pipelines and highways in border areas, “falling within 100 kilometers aerial distance from the Line of Actual Control” are exempt from public hearing.

Analysts note that by this provision, the government shall have discretion to designate any project as being of strategic importance.<sup>20</sup> Activists in states with crucial resources like uranium, as in Meghalaya, have also opposed this provision.<sup>21</sup>

Environment ministry officials affirm that sensitive projects “should not be held up for procedural reasons” but rather executed in a timely manner.<sup>22</sup> Indeed, subsequent to the recent military clash between the Indian troops and Chinese PLA in the Ladakh region, improvement in infrastructure development along border areas to avert the growing security challenges has come into greater focus.

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<sup>16</sup> [“Draft EIA in line with green rules, court rulings: Prakash Javadekar, Environment Minister”](#), *The Economic Times*, August 17, 2020

<sup>17</sup> [“Govt legitimizing and legalizing environmental violations for business by amending EIA rules: Activists”](#), *Himachal Watcher*, July 06, 2020.

<sup>18</sup> Under the new draft, a list of 40 projects are included in Category B2. These include hydroelectric projects up to 25 MW; irrigation projects between 2000 and 10,000 hectares; inland waterway projects; expansion or widening of highways between 25 km and 100 km with defined parameters; micro small and medium enterprises (MSMEs) in dye intermediate, bulk drugs, among others.

<sup>19</sup> [“Chhattisgarh CM raises objection over draft EIA notification, writes to union environment min”](#), *The Hindustan Times*, August 14, 2020.

<sup>20</sup> [“India’s proposed overhaul of environment clearance rules could dilute existing regulations”](#), *Mongabay*, March 2020.

<sup>21</sup> [“KSU moves centre against EIA notification, seeks withdrawal”](#), *The Shillong Times*, July 18, 2020.

<sup>22</sup> [“Green ministry plans exempting strategic projects from long-drawn clearance process”](#) *The Economic Times*, June 25, 2020.

### **Post-Clearance Compliance**

Post-clearance compliance implies that once a project gets approved by the concerned authority, the proponent projects are required to adhere to certain rules laid down in the EIA report in order to ensure that no further environmental damages take place. There are several cases where the proponent projects have substantially failed to comply with the rules. The NGT, for instance, imposed fines for non-compliance with environmental conditions on Jindal Power Limited (JPL) and Coal India South Eastern Coalfields (SECL), in March 2020.<sup>23</sup>

The 2016 report by Comptroller and Auditor General of India (CAG) on 'Environmental Clearance and Post Clearance Monitoring'<sup>24</sup> cited several shortcomings in following the conditions of the EC. These included non-obtaining of permission from competent authority for cutting trees; no separate head of account and embarking of funds for Environment Management Plan (EMP); irregular use of ground water; change of scope of work after obtaining the EC; non-construction of rain water harvesting structures and residential facilities for workers; irregularities in relief and rehabilitation; violation in handling of hazardous waste materials; and shortfalls in development of green belt.

The new draft EIA, contrary to the 2006 notification — which required submission of the compliance report every six months, proposes annual reports. Environmental experts are of the view that allowing a longer period for filling the compliance report will give an opportunity to project proponents to hide disastrous consequences, which could go unnoticed.<sup>25</sup>

Meanwhile, submission of the compliance report will be solely prepared by the project proponents itself, which, without oversight and review, may lead to inaccurate information submitted on the project. One of the effective tools to strengthen the monitoring and compliance system is allowing the affected communities to participate in monitoring activities.<sup>26</sup>

In July 2020, a bench headed by NGT Chairperson, Justice Adarsh K. Goel, observed that the mechanism for monitoring environmental norms was inadequate and hence,

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<sup>23</sup> [“Dukalu Ram & Ors versus Union of India & Ors”](#) *National Green Tribunal*, Government of India, 2020.

<sup>24</sup> [“Report of the Comptroller and Auditor General of India on Environmental clearance and post clearance monitoring”](#), *Comptroller and Auditor General of India*, Government of India Report No.39, 2016.

<sup>25</sup> [“How draft environmental impact assessment notification dilutes green clearance norms”](#), *Northeast Now*, June 5, 2020.

<sup>26</sup> Manju Menon and Kanchi Kohli, [“Regulatory Reforms to address environmental non-compliance”](#), June 7, 2019, Centre for Policy Research.

required the MoEFCC to monitor EC clearance conditions “on periodical basis, at least once in a quarter.”<sup>27</sup>

### **Post-facto Clearance**

Another major proposal in the draft 2020 is granting ‘post-facto clearance’ where a project that has been operating without environmental clearance, can be regularised or allowed to apply for clearance. The judiciary has held — as in the case of *Alembic Pharmaceutical vs. Rohit Prajapati* in April 2020 that “environment law cannot countenance the notion of an ex post facto clearance.”<sup>28</sup>

Firms found violating the terms of their establishment, if they have to get the clearance, however, will have to pay a penalty.<sup>29</sup> Expressing apprehension on this provision, environmental lawyers argue that it is likely to “encourage industries to commence operations without bothering clearance and eventually get regularized by paying the penalty amount” and likely “open a floodgate of violations ...”<sup>30</sup>

## **Conclusion**

The EIA 2006 notification was not a sufficient condition for protecting the environment. Several provisions in the latest draft seem to tilt the scale in favour of ‘easing the norm’ for doing business. In the 2019 ‘Ease of Doing Business’ report by the World Bank, India has steadily risen from 142<sup>nd</sup> ranking in 2014 to 63<sup>rd</sup> ranking in 2019.<sup>31</sup> India, however, has steadily declined on Environment Performance Index, from 141<sup>st</sup> rank in 2016 to 168<sup>th</sup> rank out of 180 countries in 2020.<sup>32</sup> The government has assured that it will strive to strike a balance between the environmental and developmental concerns. As and when the EIA is finalised, it is expected to incorporate the perspectives of multiple stakeholders in a balanced manner.

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<sup>27</sup> [“Sandeep Mittal versus Ministry of Environment, forest Climate change”](#) National Green Tribunal, Government of India, 2020

<sup>28</sup> [“Alembic Pharmaceuticals Ltd. Versus Rohit Prajapati & Ors. Civil Appeal No. 1526 of 2016”](#), Supreme Court of India, Government of India, 2020.

<sup>29</sup> [“Nothing disturbing in the clauses of draft EIA 2020”, say R P Gupta](#)”, *Hindustan Times*, August 17, 2020.

<sup>30</sup> [“Post Facto clearance Environmental clearance set to be New Normal in India”](#), *NEWS Click*, May 4, 2020.

<sup>31</sup> [“Doing business 2020: Reforms boost India’s business climate ranking: among top ten improvers for third straight year”](#) *The World Bank*, October, 2019.

<sup>32</sup> [“Environmental Performance Index 2020”](#) *Environment Performance Index*, June 2020.

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