



Delhi
7 May 2018

To
The Secretary
Ministry of Environment, Forest & Climate Change
Government of India
New Delhi

Subject : ERC's Suggestions on Draft Notification on Building and Construction (S. O. No. 1132 (E) 13 March 2018)

Dear Sir

EIA Resource and Response Centre (ERC) is a national level voluntary programme, keeping a watch on EC and FC processes. ERC regularly engages with the Ministry of Environment, Forest and Climate Change (MoEF&CC) and its expert committees providing comments and suggestions on important proposals under consideration for clearances as well as on policy and law issues.

Here, we are presenting comments and suggestions on the draft Notification (S. O. No. 1132 (E) 13 March 2018) issued by MoEF&CC to ease out the norms for building and construction sector projects. The Notification proposes to amend the EIA Notification, 2006.

The proposed draft has increased the threshold value of built-up areas from 20,000 sq m to 50,000 sq m, which means building and construction projects having built-up area of less than 50,000 sq m will not require any prior environmental clearance under the EIA Notification, 2006. Nevertheless, such projects will have to comply with prescribed environmental conditions through 'Self Declaration Form' while applying for building/construction permission from local authority.

Observations

Is the exemption for urban poor or urban rich?

The objective of the draft notification is questionable and not justifiable. It is stated in the draft notification that in order to ensure housing for all by 2022 and to provide housing to urban poor, the proposed amendment is required. According to Ministry of Urban Development (MoUD) specification on the size of a dwelling unit for urban poor is 27-30 sq m. The built-up area of less than 20,000 sq m was already out of the purview of the EIA Notification, 2006 and therefore an approx number of 700 dwelling units could have been made within the limit of 20,000 sq m itself at a particular site. Therefore, it was not needed to increase the threshold limit on that ground of providing housing for urban poor.

SEIAA West Bengal – 57 B&C project appraised but none for Urban Poor

An analysis of building and construction projects of the State of West Bengal was done by the EIA Resource and Response Centre (eRc) team. It was found that, a total of 57 projects came for appraisal in the year 2017, out of which none was considered for providing housing to urban poor, rather it was a combination of residential, commercial, hospital and institutional projects. This clearly reflects that, the built-up area of less than 20,000 sq m was enough to make housing for urban poor and therefore no such threshold value increase is needed.

How can removal of application of environmental law / Environmental Clearance help environment?

The proposed draft notification states that in order to streamline permission for building and construction sector besides strengthening efforts to improve environment through greater objectivity and transparency, the Ministry has proposed to remove building and construction projects of up to 50,000 sq m of built up area from the purview of the EIA Notification, 2006. This is a paradox as how removal of application of environmental law /Environmental Clearance from a certain sector can ensure protection and improvement of the quality of environment!

There are about two dozen other statutory approvals required from various state and central agencies for commencement of construction. Why is there problem with Environmental Clearance only?

Local bodies do not have environment for environment protection

Local authorities have been given the responsibility of monitoring the compliance of the environmental conditions through existing mechanism. This is going to be impossible, as the local bodies do not have expertise in the various sectors of environment, neither are they concerned about the protection of environment. The local bodies / development authorities in towns are in general approving new construction projects of various categories and sizes without any concern for environment. These bodies lack adequate resources and infrastructure to deal with this kind of monitoring.

This draft if implemented will only be beneficial to the builders, as they will get unrestricted leverage to capture the land and water bodies to convert them into the concrete buildings.

Further, any violations or non-compliance by any of the proponent which was earlier punishable under the Environment (Protection) Act, 1986 will not remain effective any more, if the draft gets notified.

Legal Implications of the Notification

Beyond Scope of Parent Legislation

The draft notification is purportedly issued under the provisions of Section 3 (1) and 3 (2) (v) of the Environment (Protection) Act, 1986 and Rule 5 (3) (d) of the Environment (Protection) Rules, 1986.

Section 3 deals with the power of the Central Government to take measures for protection and improvement of the environment. Further Section 3 (2) (v) states that such measures include restriction of areas in which any industries, operations or processes or class of industries shall not be carried out or shall be carried out subject to certain safeguards. It is clear that a blanket exemption of the building sector up to 50,000 sq m is in no way a restriction as per Section 3 (2) (v).

The Hon'ble Supreme Court has in a catena of decisions held that a delegated legislation cannot go beyond the scope of the Parent Legislation, nor can it go beyond the objective of the parent legislation. (State of Tamil Nadu and Anr. vs P. Krishnamurthy and Ors. reported in (2006) 4 SCC 517))

Another point to be noted is that the Ministry cannot abdicate its functions to an authority which is not within the control and supervision of the Ministry as is clear from the provision of Section 3 (3). It is clear, that local authorities or Urban Local Bodies (ULBs) are governed by their

specific Statutes. The draft notification is completely silent on the issue of “control and supervision” of the Ministry over the ULBs.

Violation & Contempt of the Honorable Supreme Court’s Order in AQFMY Case

In the matter in reference to news item published in the Hindustan Times titled “And Quiet Flows the Maily Yamuna” [(2004) 9 SCC 569], the Supreme Court, in its order dated 04.12.2001 first ordered the central government to look into the inclusion of construction projects within the ambit of the EIA Notification. The relevant portion of the order is reproduced as hereunder:

“The learned Solicitor General submits that in relation to town planning the provisions of the Environment (Protection) Act, 1986 would be applicable and whenever any decision is taken in regard to town planning, environment impact assessment must first be undertaken, clearance obtained and then the decision taken. Unfortunately, the Rules under Environment (Protection) Act, as such do not cover town planning. In regard to this aspect, the learned Solicitor General wants to address arguments and give suggestions to the Court as to what effective orders can be passed with a view to prevent the Yamuna from becoming history. The Central Government should also consider and inform the Court on the next date of hearing whether it should not amend the Rules under the Environment (Protection) Act so as to require the environment impact assessment for the purposes of town planning Acts.”

Subsequent to the passing of the said order and in compliance thereof, the construction sector was included in the EIA Notification, 1994 and was later included in the EIA Notification, 2006.

There is no study or report available which states that the situation as it existed during the time when the Hon’ble Supreme Court passed the above quoted order, with regard to the need for EIA for construction sector, has improved and therefore, the same can be done away with.

Violations of the Judgment & Directions of the National Green Tribunal

It is pertinent to note that prior to issuance of the draft notification in question, the Ministry had issued a similar notification dated 9.12.2016 which had envisaged similar changes to the EIA Notification, 2006. However, the said notification was challenged in a series of cases before the Hon’ble National Green Tribunal at New Delhi which was pleased to quash the said notification vide its judgment dated 8.12.2017 in the matter of Society for Protection of Environment and Biodiversity (SPEnBIO) v. Union of India & Ors. (O.A. No. 677 of 2016) wherein the Tribunal had specifically directed that the laudable objective of “housing for all” should not be used to perpetuate commercial profitability and business concerns. The present draft notification also

seeks to achieve the same purpose by using the façade of “housing for all” to perpetuate all kinds of commercial projects.

In Violation of Provisions of the Biodiversity Act, 2002

Section 36 of the Biological Diversity Act, 2002 clearly states that the Central Government shall take measures wherever necessary, for assessment of environmental impact of that project which is likely to have adverse effect on biological diversity, with a view to avoid or minimize such effects and where appropriate, provide for public participation in such assessment.

Nothing on Non-compliance

The draft notification does not propose any action against a Project Proponent, or lays down a procedure there for, in case of non-compliance of provisions of the notification.

Violation of the Principle of Non-Regression

The present draft notification is in violation of the Principle of Non-Regression which has been recognised as a part of international environmental law and stipulates that the existing environmental laws should not be modified or changed to the detriment of protection of environment.

Implications on Environment

Building and construction sector has its own burden on environment, as on one side it extracts natural resources through building materials, water, energy and vegetation from the environment, whereas on the other side it generates waste water, solid waste and construction waste and also put pressure on energy sector.

Air Pollution

According to EMEP/EEA air pollutant emission inventory guidebook 2016¹, by European Environmental Agency, PM10 and PM2.5 emission factor for uncontrolled fugitive dust emissions during construction of all types of apartments is 0.30 kg/sq m and 0.030 kg/sq m respectively. This means, an additional construction of 30,000 sq m of built up area will generate 9000 kg of PM10 and 900 kg of PM2.5. This will continue emitting in the air without having any regulator control over it.

¹ Page 7 of the handbook, accessed on <https://www.eea.europa.eu/publications/emep-eea...b.../2-a-5-b-construction>

Possible impacts on local air quality during construction phase include fugitive dust emission from the initial land development operations which include land clearing, excavation, hauling, dumping, spreading, grading, and traffic over unpaved roads. However, the actual extent of the emission depends on many factors like the speed of vehicles, speed at which construction takes place, methods adopted to control the dust like water sprinkling etc. According to United States Environmental Protection Agency (US EPA), an overall emission rate of about 1.2 tons of particulate matter per acre per month of active construction occurs from all phases of land clearing activities if no fugitive dust control measures are adopted².

Building and construction sector has proved to be a major contributor to air pollution. 23% of the global air pollution and 50% of the climate change gases are attributed to the building and construction projects, according to Willmott Dixon in a factsheet titled '[Impact of construction and built environment](#)', published in 2010.

Water usage during construction

It is estimated that, during the construction phase, the total water required for construction³ of 1 sq m of built-up area is 1.10 KL⁴. Therefore construction of an additional 30,000 sq m of built-up area (increase from 20,000 sq m to 50,000 sq m) will result in additional water consumption of about 33,000 KL. This amount of water will either be extracted from the ground water or will be taken from municipal water supply or any other sources by the proponent without any check and balance. There will be no scope for assessing the potential impact on the other competent users from the proposed usage by the proponent during construction phase, as the draft notification asks for no requirement of prior environmental clearance any more.

Natural resource usage in construction

To emphasis further on environmental impact from the proposed draft notification, excerpt of an interview of a real estate promoter of Kolkata is worth mention here. According to him, a 2BHK flat of 74 sq m of built-up area requires 4000 (+/- 15%) bricks and 28 sacks (50 kg each) of cement to meet the Kolkata Municipal Corporation approved width of outer and inner wall of an apartment.

²

http://www.nyc.gov/html/oec/downloads/pdf/dme_projects/07DME025M/DEIS/07DME025M_%20DEIS_20_Construction.pdf

³ Construction include production of ready mix concrete and fly ash brick & cement block; construction of cement plant, water proofing,brick or block soaking, mortar and gypsum plaster; curing of concrete, masonry, cement plaster, water proofing and flooring works

⁴ Presentation by Mr. Thomas of Environmental Engineers & Consultants Pvt Ltd, New Delhi

Therefore, the construction of additional 30,000 sq m of built up area will entail requirement of approximately 16 lakh bricks. On an average each clay fired brick contains 3 kg of clay, 0.8 liter of water and 0.187 kg of coal as raw material⁵.

Energy usage during operation

In addition to this specific contribution during the construction period of buildings, operational phase of the building is largely responsible for energy consumption and resultant CO₂ emission. A study, titled 'Environmental and Energy Sustainability: An approach for India' by McKinsey and Company, published in August 2009 claimed over 60 percent of commercial space is likely to be air-conditioned and 4 in every 10 urban households are likely to have an air-conditioner by 2030. This increase in air conditioning demand along with increased electrification and greater use of appliances is likely to increase energy consumption from 140 TWh⁶ in 2005 to 1300 TWh in 2030 and a corresponding rise in emission to about 1.2 billion tonne of CO₂.

This is also contradictory to India's commitment in Paris Agreement. India, in its Climate Action Plan ahead of the Paris Agreement has committed to address reduction in CO₂ emission. It has further set targets under the Intended Nationally Determined Contributions (INDC) to reduce the emission intensity of its GDP by 33 to 35 percent by 2030 from the level it was in 2005. It has also been pledged to create an additional carbon sink of 2.5 to 3 billion tonne of CO₂ equivalent through creation of additional forest and tree cover. The draft amendment, if notified will have contradictory effect, as in the absence of any regulatory control, the building and construction sectors are likely to convert more land into concrete, thereby leaving less area for creation of carbon sink.

Rejection by Experts Earlier

A Committee constituted by the MoEF under the Chairmanship of Sh. J. M. Mauskar, Addl. Secretary, MoEF looked into the request for diluting the threshold value. The Committee analyzed the situation and rejected the request.

Further, the committee constituted in the past to look into the request of CREDAI (an apex body of private real estate developers associations) specifically raised significant doubt on the capacity and resources of local bodies. In 2003, when MoEF had first included construction sector in the purview of EIA, the preamble of the notification has categorically mentioned that the urban local bodies/development authorities in towns have been approving new construction projects of various categories and sizes without any concern for the environment.

⁵ Interview with Mr. Sonal Kumar of Greentech Knowledge Solutions Pvt. Ltd

⁶ 1 TWh is equal to 1,000,000,000 KWh as checked on <https://www.convert-measurement-units.com/conversion-calculator.php?type=energy>

HLWG in ESA-WGs recommended restricting the threshold value to <20,000 m²

The High Level Working Group (HLWG) of Ministry of Environment and Forests (MoEF) has identified around 37 per cent of the total area of the Western Ghats as ecologically sensitive. The Group has 'recommended a prohibitory regime on those activities with maximum interventionist and destructive impact on the environment'.

The Group recommended restrictions in developmental activities in the proposed ecologically sensitive areas - 'Building and construction projects of 20,000 m² and above should not be allowed. Townships and area development projects should be prohibited.'⁷

Building and Construction related Committee did not agree for Dilution

Building and Construction related Committee constituted by MoEF on 11.12.2012 submitted its report in March 2013. The Committee did not agree for dilution in threshold value provided for in Schedule 8 (a) of the EIA Notification 2006. It presented the following argument.

'9. There was discussion on the desirability of increasing the threshold built-up area from 20,000 sq m to 50,000 sq m under item no. 8 (a) of the Schedule under EIA Notification, 2006, especially for the project of housing for economically weaker section in urban areas. Ministry of Housing & Urban Poverty Alleviation (MoHUPA) informed that they have constituted a committee for Streamlining Approval Procedure for Real Estate Projects (SAPREP). They stated that while the report of the committee for SAPREP has not been finalized, with a view to boosting private sector investment in housing projects for urban poor, the proposal for increasing the threshold built-up area under the schedule may be considered by the present Committee. The Committee desired to know the basis of suggesting threshold limit of 50,000 sq m. MoHUPA admitted that they do not have any statistical information about the size of urban housing projects for poor, which have obtained EC during, say, last three years or are awaiting EC at different SEIAAs. In the absence of the report of the committee for SAPREP and non-availability of statistical data to justify the increase in the threshold limit of 50,000 sq m the Committee was not in position to take any view on the request of MoHUPA.'

⁷ http://www.moef.gov.in/sites/default/files/1%20HLWG-Report-Part-1_0.pdf accessed on 26 April 2018.

Suggestion

We have established that

1. Actual objectives of the draft notification are different from what are laid out
2. Building and Construction sector is a serious burden on environment and natural resources.
3. It is beyond the scope of parent legislation and violates several judicial orders
4. Repeated attempts were made by the real estate lobby to take building and construction activity out from the purview of the EC process (EIA Notification and from the ambit of the Environment (Protection) Act, 1986) and various expert committees have not agreed to it.

The whole idea of shifting the environmental governance of this sector into the hand of urban local bodies is not at all justifiable.

ERC finds that this Notification should be withdrawn in totality.

Furthermore, on the lines of HLWG (Kasturi Rangan Committee) report, Schedule 8 of the EIA Notification, 2006 should be amended to bring down the threshold value for Building and Construction in sensitive areas.

We are sure, MoEF&CC would consider and acknowledge the issues raised and suggestions made, and let us know of the action taken. Thanks, with regards

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