

Legal Issues
in
Grant of Ex-Post Facto Environmental Clearances

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INTRODUCTION

- ❖ Broadly, Environmental Clearance (“EC”) is a clearance which needs to be obtained from the govt. for any activity that may have a negative impact on the environment.
- ❖ EC is granted after an Environment Impact Assessment (“EIA”) is conducted.
- ❖ Basis of EIA and EC: Precautionary Principle.
- ❖ Reference to Precautionary was first made in Clause 11 of the World Charter for Nature, 1982 and subsequently in the Rio Declaration, 1992.

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WORLD CHARTER FOR NATURE, 1982

❖ Clause 11 – “*Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular:*

(a) *Activities which are likely to cause irreversible damage to nature shall be avoided;*

(b) *Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature and where potential adverse effects are not fully understood, the activities should not proceed;*

(c) *Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects”*

RIO DECLARATION, 1992

- ❖ Principle 15– “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”
- ❖ In **MC Mehta vs Union of India** [(1996) 8 SCC 462], it was observed “***The Precautionary Principle has been accepted as a part of the law of the land. Articles 21, 47, 48A and 51A(g) of the Constitution of India give a clear mandate to the State to protect and improve the environment and to safeguard the forests and wild life of the country."The Precautionary Principle" makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation.***” (emphasis supplied)

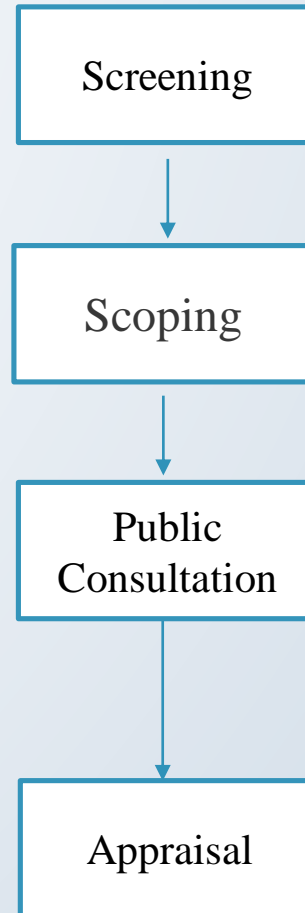
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LAWS GOVERNING ENVIRONMENTAL CLEARANCES (ECs) IN INDIA

- ❖ EIA Notification, 1994– Prior EC from Central Govt. is mandatory for expansion or modernisation of any activity or for setting up new projects listed in Schedule I of the Notification.
- ❖ EIA Notification, 2006 – Projects in Schedule I are divided into Categories A&B. Projects in Category A require prior EC from Central Govt and projects in Category B require prior EC from State Govt.
- ❖ Draft EIA Notification , 2020 provides for Ex Post Facto Environmental Clearances. [Publication has been stayed - United Conservation Movement Charitable And Welfare Trust(R) v. Union Of India, WP 8632/2020 (Decided on 07.09.2020)]

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PROCEDURE FOR OBTAINING EC



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Clause 22 of EIA Notification, 2020

- ❖ 22(1) – *“The cognizance of the violation shall be made on the:- (a) suo moto application of the project proponent; or (b) reporting by any Government Authority; or (c) found during the appraisal by Appraisal Committee; or (d) found during the processing of application, if any, by the Regulatory Authority.”*
- ❖ 22(2) – *“The cases of violation will be appraised by Appraisal Committee with a view to assess that the project has been constructed or carried at a site, which under prevailing laws is permissible or expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; In case, finding of the Appraisal Committee is negative, closure of the project shall be recommended along with other actions under the law including directions for remediation....”*

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Clause 22 of EIA Notification, 2020 (Contd.)

- ❖ Clause 22(3) – *“In case, where the findings of the Appraisal Committee are positive, the project under this category will be prescribed with appropriate specific Terms of Reference on assessment of ecological damage, remediation plan and natural and community resource augmentation plan in addition to the standard ToR applicable to the project.”*
- ❖ Clause 22(5)- *“The project proponent shall prepare the report of assessment of ecological damage as per the guidelines issued by the CPCB in this regard from time to time, along with remediation plan and natural and community resource augmentation plan as an independent chapter in the EIA Report...”*

JUDICIAL TRENDS

- ❖ **Common Cause vs Union Of India, (2017) 9 SCC 499 –**
 - *“There is no doubt that the grant of an EC cannot be taken as a mechanical exercise. EIA 1994 is therefore very clear that if expansion or modernization etc. of any mining activity exceeds the existing pollution load, a prior EC is necessary... Such importance having been given to an EC, the grant of an ex post facto environmental clearance would be detrimental to the environment and could lead to irreparable degradation of the environment. The concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence including EIA 1994 and EIA 2006.”*

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JUDICIAL TRENDS (Contd.)

- ❖ **Alembic Pharmaceuticals Ltd. vs Rohit Prajapati and Ors, (2020) 4 MLJ 277 –**
 - *“The reason why a retrospective EC or an ex post facto clearance is alien to environmental jurisprudence is that before the issuance of an EC, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment. An EC can be issued only after various stages of the decision-making process have been completed... Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC...Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment.”*

JUDICIAL TRENDS (contd.)

❖ **Puducherry Environment Protection Association v. UOI** , (2017) 8 MLJ 513 –

- *“The question is whether an establishment contributing to the economy of the country and providing livelihood to hundreds of people should be closed down only because of failure to obtain prior environmental clearance, even though the establishment may not otherwise be violating pollution laws or the pollution, if any, can conveniently and effectively be checked. The answer necessarily has to be in the negative.”*

JUDICIAL TRENDS (contd.)

❖ **S.P. Mutturaman vs Union of India and Ors.**, Appeal No. 33/2015 (SZ) [Decided by NGT on 01.02.2019] –

- *“It is also in a way admitted...that certain work was proceeded with anticipating clearance from the department. They also explained the delay in getting the clearance as well. **There is no dispute regarding the fact that first public hearing was conducted on 27.11.2014...thereafter...the impugned order was issued...His only grievance was that the work of the project was started without getting prior Environment Clearance... Most of the participants welcomed the project and they wanted that this will have to be implemented quickly also...No other major work was done...(anticipating Environment Clearance from the MoEF)... and thereafter it was stopped in the year 2011 itself... In view of the above discussion, we do not find any reason to quash the impugned environment clearance granted by the Ministry of Environment, Forest and Climate Change for the project on the ground of technical lapses considering the fact that the scheme is going to help farmers and it is intended for using the surplus flood water flowing from Tamiraparani river to the sea in a beneficial way benefiting large number of farmers and also for the agricultural purposes.”***

JUDICIAL TRENDS (contd.)

- ❖ **Goel Ganga Developers India (P) Ltd. vs Union of India, 2018 (5) BomCR 481 –**
 - *“A large number of flats are already occupied and a large number of persons have paid money for occupying these flats...we are of the view that in the peculiar facts and circumstances of the case, demolition is not the answer. This would put innocent people at loss. Normally, this Court is loathe to legalize illegal constructions but in the present case we have no option but to do so. We hasten to clarify that the project proponent cannot be permitted to build any more flats. What we are permitting him to do is to only complete construction of 807 flats, 117 shops/offices and cultural centre including the club house... The project proponent will only be permitted to seek environmental clearance for completion of the project subject to payment of costs in the aforesaid terms and it may be granted ex post facto environmental clearance in the peculiar facts of the case.”*

Criticism levelled against Ex- Post Facto ECs

- ❖ *Derogation of Precautionary Principle*
- ❖ *Scope for concealment*
- ❖ *Difficult to assess the damage*
- ❖ *Irreparable damage to the environment*

THANK YOU!

Questions?

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