Comments on the Draft ENVIRONMENTAL SUPPLEMENTAL PLAN (ESP) Notification

The Draft ENVIRONMENTAL SUPPLEMENTAL PLAN (ESP) Notification 2016 is intended to develop and implement an Environmental Supplemental Plan (ESP) for restoration of the damage caused to the environment and for further improvement of the environment. The ESP is developed by an Expert Group constituted by the MoEF & CC. The intention of the ESP is to penalize "projects which have expanded, have undertaken expansion, modernization, and change in product- mix without prior environmental clearance" by making the project proponent undertake compensatory action for damaging the environment. For this purpose, the project proponent should "implement the Environmental Supplemental Plan to remediate the damage caused or likely to be caused, and take out the undue economic gain due to non-compliance and violation".

At the outset we categorically state that we do not accept or agree to the Draft Regulations in its current form as we feel it does not provide for the necessary measures required to protect the environment. Our comments therefore may be read only as a response from the public to its contents and not as its acceptance.

Comments:

1. **Definition of Violation is "Administrative" in nature and does not constitute "Environmental Violation"**

   Firstly, the Draft ESP Regulations states "violation" as "projects which have expanded, have undertaken expansion, modernization, and change in product- mix without prior environmental clearance". The above definition of violation only defines the scope of "administrative violation" and does not include "environmental violation". In effect the Environment Supplemental Plan (ESP) seeks to remedy an administrative infringement which is likely to cause environmental damage.

   In fact, this has been the perplexing question which the High Court of Jharkand tried to resolve in the Hindustan Copper Limited Versus Union of India 2014, was also puzzled by what constitutes an environmental /administrative "violation". The High Court states[1]

   "Neither the notification dated 14.09.2006 nor OMs issued by MoEF provide a procedure for deciding what exactly would constitute a "violation" case."

   Secondly, the explanation for violation does not take into account threats to the environment.

   For example, the US Environmental Protection Agency defines environmental violations and classifies - breaches of environmental law into two different categories: violations and threats.

[1] https://indiankanoon.org/doc/157152082/

An environmental violation is something that violates environmental law or regulation. It could include for example: improper emissions, the improper treatment of hazardous waste, or the improper dredging of wetlands.

While the cumulative effects of environmental violations can be significant and hazardous to the environment or public health, it is unlikely that an individual breach will cause an immediate threat to public safety.

Violations may also include non-compliance with the Environmental Protection Act 1986 (Sections 7, 8, 9, 10(3), 11(4) (a) and (b), 15, 16) and Environmental Impact Assessment Notification 2006 and may in the form of a) refusal to comply, b) pay governmental fines rather than pay the compliance costs, which surpass the total costs of the fines, c) willfully causing pollution by, for example, dumping hazardous waste into rivers, streams, oceans, d) causing air pollution by not installing electrostatic precipitators, d) falsifying compliance and monitoring information pertaining to environmental regulations, f) committing fraud relating to environmental regulations.[2]

All these aspects should be considered together as **environmental and administrative violations** rather than a narrow definition set out in the draft regulations.

Submission: It is submitted that the "violations" defined above should be re-defined and expanded to include both "administrative and environmental violation". This should be clarified before even venturing into details of the Environmental Settlement Plan.

2. **Similarities with US Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update and Selective Application:** The regulation appears to have drawn its inspiration from the "U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update"[3]. Specifically, sections referring to Definitions, Priorities, Certification, Completion Report and categories find similarities with the said regulation. However, it is noticed that there has been only selective application of the EPA Supplemental Environmental Projects Policy 2015 Provisions.

   As a result, the Environmental Supplemental Plan (ESP) does not have any real connection to the Indian conditions and is at odds with the Indian context and environmental laws and regulations for the reasons given in subsequent sections.

   Submission: The above regulations should be reworked and be tailor made for the Indian situation.

3. **EIA Document/Environment Management Plan(EMP) not considered:**

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[2] Cornell Law School, Environmental Law Violations, https://www.law.cornell.edu/wex/environmental_law_violations

[3] https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf

The Draft Regulations have not considered either the final EIA Report or Environmental Management Plan (EMP) which is an integral part of the EIA process. This has left the EIA documents and its process as *"administrative paper work"* rather than being the basis for Environmental Supplemental Plan.

This is essentially because the draft Regulations have been taken from another country and not contextualized for Indian conditions. This has shifted the focus away from the EIA Notification 2006, EIA Report and Environmental Management Plan.

This has led to inconsistencies between ESP and EMP with the latter having narrow scope and parameters while EMP has a wide remit.

As the Ministry is aware, the EMP contains of all mitigation measures for each item wise activity to be undertaken during the construction, operation and the entire life cycle to minimize adverse environmental impacts as a result of the activities of the project. It would also delineate the environmental monitoring plan for compliance of various environmental regulations. It will state the steps to be taken in case of emergency such as accidents at the site including fire.

In addition, the EIA document also has various sections which can act as additional parameters for incorporation within the ESP.

Submission: The parameters of EMP and EIA Report documents should find inclusion in the Environmental Settlement Plan.

The Environmental Supplemental Plan should be reworked by taking into account the above aspects**.**

The legal status of the EIA documents and EMP should be upheld and Environmental Supplemental Plan should be subsumed under the EIA process.

4. **Operationalising Precautionary Principle by strengthening monitoring and compliance Regimes as a response to existing polluting industries.**

The fundamental flaw in the draft regulations is a lack of strengthening of monitoring and compliance regimes which is seen as a way to operationalise Precautionary Principle. The Supreme Court has upheld the precautionary principle through the Narmada Case *"When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution."*[4]

[4] Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.

As a result, the project proponent has to put in place adequate technologies to ensure "a higher level of environmental protection through preventative decision-taking in the case of risk". Therefore, the onus of responsibility lies with the project proponent to ensure that the highest levels of preventive measure are taken to protect the environment and human health. The precautionary approach focuses on the need for more effective preventative action and the introduction of control measures not requiring proof of causality between contaminants and their effects.[5]

Due the lack of focus on monitoring and compliance regimes, the Draft Regulations do not investigate the level of preventive measures undertaken by the project proponent to prevent recurrence of the event. Specifically, the regulations do not take into consideration monitoring and compliance related process and documents and make efforts to strengthen the same e.g. Consent to operate, Consent to Establish, Water Cess, environment Statements, Fly Ash utilization reports and other documents to strengthen the ESP should also be considered.

Further, the onus of the State to prevent such acts from happening is not brought out in the draft regulations as per Section 3 (x) of the Environment protection Act 1986 which states

"inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;"

And Section 17 on offences by Government Departments

17. OFFENCES BY GOVERNMENT DEPARTMENTS

(1) Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this section shall render such Head of the Department liable to any punishment if he proves that the offence was committed without his knowledge or that he exercise all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Department of Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the Head of the Department, such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

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[5] A.R.D. Stebbing, Environmental capacity and the precautionary principle, Marine Pollution Bulletin, Volume 24, Issue 6, 1992, Pages 287-295, ISSN 0025-326X, http://dx.doi.org/10.1016/0025-326X(92)90589-X. (http://www.sciencedirect.com/science/article/pii/0025326X9290589X)

Submission:

- It is submitted that Precautionary Principle should be brought and sufficiently strengthened draft regulations
- The draft regulations should also focus on developing a robust monitoring and compliance regimes to ensure preventive measure are taken by the project proponent.
- Government Monitoring should be made more robust and accountable.

5. Inclusion of "penalties" to prevent recurrence

The Draft Amendments takes into consideration only one view of the cathedral. The draft regulations are focused on remediation only and are silent on penalties which will have to be levied on the project proponent over and above the remediation costs. By focusing solely on remediation, the draft regulations do not prevent recidivism or recurrence of the event. The cost of damages must be high enough to be "a deterrent for others not to cause pollution in any manner".

Supreme Court's Ruling in the Span Motel Case on the importance of exemplary damages over and above the remediation costs.[6] The ruling is as follows and needs to be included in the ESP Regulations regulations

"Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s Span Motel although it ought to have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded."

Further, it is an internationally accepted that accepted formula that environmental liability (costs) consists of two parts - remediation and penalty – e.g. the U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 (from where the Draft ESP Regulations are taken), The EU Environment Liability Directive etc. The EU Environment Directive defines prevention and remediation costs [7] as:

[6] M. C. Mehta vs Kamal Nath & Ors on 15 March, 2002
[7] DIRECTIVE 2004/35/CE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

" 'costs' means costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs."

Taking into account US EPA Policy from where the regulations have been taken, the Environmental Supplemental Plan (ESP) has left out an important part of the U.S. EPA Policy formula which deals with environmental liability i.e. penalty provisions. This is placed under IX. Calculation of the Final Settlement Penalty (Page 21). This section deals with minimum and maximum penalty provisions but has not been incorporated.

Quoting from the EPA Policy (Page 21)

"In calculating an appropriate penalty, the EPA considers factors such as the economic benefit associated with the violations, the gravity or seriousness of the violations and the violator's prior history of noncompliance. Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s). SEPs are not penalties, nor are they accepted in lieu of a penalty. However, a violator's commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP, compared to the violator who does not."[8]

The EPA has also made provision wherein the penalty may be reduced if the project proponent has shown sincerity and has been able to bring the environment to its natural form.

Submission: To include penalties in addition to the remediation costs to ensure prevention of recurrence of the event.

6. **Silent on non-performance:** The ESP is silent on non-performance by merely stating the EPA Policy "The failure to complete satisfactory implementation of Environmental Supplemental Plan will be a serious violation of Environmental Clearance condition and action will be initiated accordingly. In Environmental Supplemental Plan preparation, the proponent and the Expert Group should be able to identify a minimum activity or number of actions that can be the basis of satisfactory completion."

   On the other hand, the US EPA Policy has in-build checks and balances in the Settlement Plan under the heading *"Stipulated Penalty Provisions in the Settlement Document"*[9] (Page 28). The

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http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0035-20130718

[8] https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf

[9] https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf

EPA Policy provides "stipulated penalties for failure to satisfactorily complete a SEP, based on the description of the SEP and definition of satisfactory completion in the settlement document". They range from a combination of "daily or one-time lump-sum penalties, or a combination of both, as deemed appropriate by the case team". For example, failure to submit interim reports will entail daily penalties.

Submission: It is submitted that the regulations should include penalties for non-performance for remediation and suspension of Environmental Clearance

7. **Lack of Timeline for completion of ESP:** The ESP does not stipulate any minimum timeline remediation. Depending on the urgency, the US EPA Policy has a concept of accelerated compliance wherein the project proponent has to complete remediation activities within 2 years – depending on the nature and extent of the environmental damage.

   Submission: The regulations should include a timeline for remediation and adequate penalties in the event of non-adherence to the timeline.

8. **Opaque Expert Group:**

   Under section 2 of the ESP, it has been stated that an "Expert Appraisal Committee or State Expert Appraisal Committee shall refer such cases of violation to the Expert Group constituted by the Ministry for assessment of damage to the environment and undue economic benefit derived from non-compliance of provisions of the Environment Impact Assessment Notification, 2006."

   The Central Government appoints the Expert Group but does not reveal the members who will be part of the Group. As a result, there is nothing to indicate that the members of the Expert Group will have the requisite qualifications and experience to assess the environmental damage. It does not also indicate or ensure that the Expert Group will be neutral, independent and impartial.

   There is no guarantee that the qualifications of the administrative/ technical member will denote impartiality in decision making. Again, there is a genuine concern whether the technical members and scientists, having been very much a part of the government administrative setup, will effectively contradict the government decisions and challenge the findings of government departments (state and central pollution control boards) to identify violators and levy penalties or whether they will be another obstacle and delay in getting justice.

   In recent regulations and legislations, the composition of such Committees is set out in primary legislation e.g. in the Electricity Act 2003 (Section 78 (1)) Composition of the Selection Committee to appoint Electricity Regulatory Commission officials are spelt out.[10] In the same way, the Consumer Protection Bill (Section 12) gives lists out details of Selection Committee

[10] Electricity Act 2003, http://aptel.gov.in/pdf/The%20Electricity%20Act_2003.pdf

for the appointment of officials of the Central Consumer Protection Authority.[11] This absence of rules puts the question mark over the entire selection process of the Expert Group.

Submission: It is submitted that the selection of the members of the Expert Group should be made transparent and accountable.

9. Regulatory Capture by Project Proponent

Again in Section 2 of the Draft ESP Regulation, it is stated, "The Expert Group will work on the preparation of Environmental Supplemental Plan with the project proponent."

By making the project proponent part of the Environmental Supplemental Plan (ESP), there is a genuine danger that the Expert Group will be subject to capture by the project proponent. There is every likelihood that the ESP will be watered down to suit the project proponent's requirement – entailing less remediation costs, thereby making the ESP plan a non-starter. It is well documented that industry capture of regulatory agencies usually occurs through these kinds of administrative mechanisms. [12]

Submission: The Expert Group should prepare the ESP independently and should not involve the Project proponent. Project proponent should not be made part of the ESP process.

The procedure to be followed should be in the form of regulatory hearings or court oriented procedures entail submission of documents and filing of evidence.

Expert Group should appoint independent verification agencies to ascertain the level of environmental damage caused in the area of operation.

10. Estimation of Damage: Section 2 (iv) of the Draft ESP Regulations states that the Expert will "Determine the appropriate cost of remedying the ecological damage and amount of undue economic gain to the proponent due to violations or non compliance;"

It is unclear about the methodology that will be adopted by the Expert Group to arrive the cost of remedying the ecological damage. Valuing the environment and quantifying the level of damages and then converting it into compensatory amount requires ascertaining total economic value (TEV) (sum of direct-use value, indirect-use value, options value, non-use value and intrinsic/existence value) - plus monetarily quantifiable levels of pollutions/degradation over the life time of development activity (Ekins, 2002). From an Indian context, the technicalities required are enormous, both in terms of information gathering and research, while intrinsic value may affect valuation drastically. Any ad-hoc figures will put an unreliable value.[13]

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[11] Consumer Protection Bill 2015, http://consumeraffairs.nic.in/writereaddata/CP%20Bill%202015.pdf

[12] Industry's 'Capture' of Federal Agencies Pervasive as Regulatory Failures Pile Up, Administrative Law Expert Tells Congressional Panel , http://www.progressivereform.org/articles/Shapiro_AgencyCapture_NR_080310.pdf

[13] http://www.epw.in/journal/2015/37/discussion/t-s-r-subramanian-report.html

Further, it is understood that each level of damage will entail a different geographical location, varied flora and fauna will be affected. This requires a different methodology and approach that should be dealt on a case by case basis.

The methodology which will be followed by the Expert Group will turn out to be opaque and obscure. It is necessary that public participation is envisaged to ensure transparency and accountability in operations.

In India, the Electricity Act 2003 provides for a framework of accountable and transparent regulation setting which may be used for transparency on arriving ecological damages and methodology for arriving at the cost.

The steps are as follows:

a. Draft regulations and methodologies are prepared by the Regulatory Commissions

b. The draft Regulations are then placed in the public domain for 60 days for comments

c. Adequate publicity is given ensure that the large number of comments are received.

d. Based on the comments, the regulations and methodologies are then reworked and placed in the public domain

This approach is also followed by United Nations Convention for Combating Climate Change (UNFCCC) for developing standardized baselines and methodologies for assessing for technologies/projects to ascertain its eligibility and monetizing of carbon credits[14]

a) *"development of guidelines for demonstration and assessment of barriers and of standardized methods to calculate financial parameters;"*

b) *(b) Development of guidance for project participants on the use of a first-of-its-kind barrier and the assessment of common practice, including the definition of the applicable region, similar technologies and thresholds for penetration rates;*

Further UNFCCC encourages public inputs of new methodologies and baselines developed to ensure transparency and accountability in operations.[15][16]

Submission: The method for calculating environmental damage should be first put out in the public domain for comments and rigorous scientific verification.

[14] Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fifth session, held in Copenhagen from 7 to 19 December 2009 http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf#page=4
[15] https://cdm.unfccc.int/methodologies/PAmethodologies/pnm/pending
[16] https://cdm.unfccc.int/methodologies/PAmethodologies/tools-clarifications/pending

11. Role of the National Green Tribunal

The Draft Regulations are silent on the role of the National Green Tribunal in the Environmental Supplemental Plan. In the event of community disagreement of the ESP, it must be made clear that the NGT is the final recourse for Appeal for upholding and validating the ESP.

Submission: It is necessary that National Green Tribunal should have be the final approving Authority for the sanctioning and upholding the validity of the ESP.