Gmail EAS Sarma <eassarma@gmail.com>

(napmap) Fwd: Post-facto CRZ clearance- Violates the principles of environmental justice

1 message

EAS Sarma <eassarma@gmail.com> 20 March 2021 at 11:32
Reply-To: napmap@googlegroups.com
To: rangandutta42@gmail.com, napm <napmap@googlegroups.com>, Himanshu Thakkar <ht.sandrp@gmail.com>

---------- Forwarded message ---------
From: **EAS Sarma** <eassarma@gmail.com>
Date: Sat, 20 Mar 2021 at 11:30
Subject: Fwd: Post-facto CRZ clearance- Violates the principles of environmental justice
To: <secy-moef@nic.in>, <dgfindia@nic.in>

E.A.S.Sarma
14-40-4/1 Gokhale Road
Maharanipeta
Visakhapatnam 530002
Mobile: 91-9866021646
Email: eassarma@gmail.com

To

Shri R P Gupta
Secretary
Ministry of Environment, Forests & Climate Change (MEFCC)
Govt of India

Dear Shri Gupta,

Please read this letter in continuation of my earlier letter dated 19-3-2021 (enclosed) on imprudence on the part of your Ministry allowing ex-post facto approvals for projects coming up in violation of the CRZ notification.

I have had an opportunity to go through MEFCC communication F No. 19-27/2015-IA.III dated 19-2-2021 in which your Ministry has permitted ex-post facto CRZ approvals for projects. The instructions contained in that communication are legally unsustainable and are liable to be contested for the following reasons, in addition to the objections I have already raised.

1. CRZ notifications are issued by your Ministry in exercise of the power vested in your Ministry under sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986. Before issuing such notifications, there is an elaborate public consultation process to be followed, as it implies a significant change in the ambit of the earlier statutory notifications. On the other hand, the above cited communication is merely an executive order which cannot override the statutory notifications. It should therefore be deemed to be prima facie illegal.
2. As pointed out by me in my earlier letter dated 19-3-2021, absence of prior CRZ

clearance cannot be regularised through the fiat of an executive order, as CRZ clearance for a given project should be preceded by MEFCC's expert appraisal committee (EAC) laying down the Terms of Reference (TOR) for an EIA study, a comprehensive EIA study that should follow to evaluate the environmental impact of the project on scientific lines, a public consultation procedure that affords an opportunity to the affected communities to express their objections and an objective appraisal of the project by the EAC on the basis of the views expressed by the stakeholders including the affected communities, before MEFCC can finally issue CRZ clearance on the basis of EAC's recommendation. Ex-post facto approval does away with the public consultation process based on an EIA study and allows CZMA to exercise its judgement on whether the project is permissible under CRZ or not and whether the project involves CRZ violations or not. In my view, this is unacceptable, as no accurate assessment of the environmental costs is possible without considering the objections of the major stakeholders, namely, the affected communities. The process of environment impact assessment as provided in the relevant statute involves participative decision making, which will get abridged as a result of the latest executive order of your Ministry. It violates the principles of natural justice which lie at the core of our Constitution. From this point of view, the latest MEFCC communication is legally untenable.

3. The majority of the projects that have come up illegally without prior CRZ clearance violate the CRZ norms. Even assuming that there are a few projects which do not violate the CRZ norms per se except the prior-approval requirement, since they have resulted in bypassing the public consultation process, it is necessary to fix the responsibility for allowing such projects to come up without approval, on the regulatory authorities who are expected to monitor such cases. The concerned regulatory authorities include MEFCC and its Regional Offices, the State Pollution Control Boards, the local authorities dealing with regulation of the use of land, especially the coastal land etc. Considering that MEFCC itself has a possible role in this, it amounts to a clear conflict of interest in MEFCC issuing the latest communication. Such a conflict of interest is self-evident in the contents of the communication which is conveniently silent on taking penal action against the errant officials of the Ministry. In my view, the latest communication is meaningless without holding the officers responsible (MEFCC, PCBs etc.) for allowing projects to come up without prior approval.
4. There are many projects which have come up without approval, which violate the CRZ norms and have caused environmental damage. What is the penal action proposed against the concerned MEFCC officials, the officials of the PCBs, the officials of the local authorities etc.? As a result of the environmental damage, there are social costs imposed on the local communities. How does MEFCC propose to compensate them appropriately? How does MEFCC expect the errant project promoters to be forced to bear the cost of the environmental damage and a deterrent penalty to discourage repetition of such instances? Are there some units whose continued operation will aggravate the damage to the coastal environment and, hence, should be dismantled forthwith? The latest communication is conveniently silent on these aspects.
5. MEFCC/ PCBs sometimes take shelter on the ground that they have staff shortages to monitor the projects (as they have done in NGT proceedings in OAs 73 &76 of 2020 in LG Polymers case). Regulatory bodies facing staff shortage are expected to devise their own means to address the staff shortage problem by adopting a system of conducting random, surprise inspections within the limitations of the staff available. How many such random inspections have

been conducted by MEFCC and its Regional offices and has MEFCC cared to make a public disclosure of the inspection reports? After all, it is the tax payer that bears the expenses on maintaining such regulatory bodies and the least that MEFCC can do is to remain accountable to the tax-payers.

6. One standing example of the callousness in monitoring projects lies in non-implementation of the compensatory afforestation concept introduced by the apex court in the well known Godavarman case. C&AG, in their report No 2 of 2013, had analysed this and come to the conclusion that, though large extents of forest land had been diverted for projects, no matching compensatory afforestation had been done in compliance with the apex court's directions. This represents a clear case of failure to monitor such projects on the part of the regulatory authorities at the Centre and in the States.
7. Most cases of projects coming up without prior CRZ clearance also represent cases of connivance of the project promoters with corrupt officials. They call for suitable action under the relevant provisions of the IPC and Prevention of Corruption Act. Unless these issues are dealt with frontally, MEFCC's latest communication will only pave the way for continuing CRZ violations and damage to the environment. The recent studies on the coastal environment show the loss of large extents of mangroves, mudflats and marine resources. Should MEFCC continue to preside over such a widespread process of environmental destruction?

Please ponder over these issues urgently and, keeping in view the legal infirmities pointed out, revoke the latest communication before it wreaks havoc on the environment.

Regards,

Yours sincerely,

E A S sarma
Former Secretary to GOI
Visakhapatnam
20-3-2021

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From: **EAS Sarma** <eassarma@gmail.com>
Date: Fri, 19 Mar 2021 at 17:15
Subject: Post-facto CRZ clearance- Violates the principles of environmental justice
To: <secy-moef@nic.in>

E.A.S.Sarma
14-40-4/1 Gokhale Road
Maharanipeta
Visakhapatnam 530002
Mobile: 91-9866021646
Email: eassarma@gmail.com

To

Shri R P Gupta
Secretary
Ministry of Environment, Forests & Climate Change (MEFCC)
Govt of India

Dear Shri Gupta,

I have just come across a disturbing news report that your Ministry has issued orders permitting industrial projects to obtain ***post-facto*** CRZ clearances (https://www.newindianexpress.com/nation/2021/mar/18/centre-allows-projects-to-obtain-post-facto-coastal-regulation-zone-clearance-2278359.html). If this report is factually correct, I am afraid that, by issuing such a regressive order, your Ministry is not only committing a breach of the Constitutional obligation imposed on it by Article 48A but also continuing to dismantle the elaborate system of environmental regulation built over the past several decades. Last year, when your Ministry issued a modified EIA notification, there were voices of dissent from all those concerned with the need to protect the environment and the matter has since come up for judicial scrutiny.

Any post-facto regularisation of a statutory violation is bad in law, as it gives room for a moral hazard that incentivises further violations and literally gives a license to errant units who are fully aware of the existence of the statute but have wilfully chosen to violate it, knowing well that a compliant government will eventually condone it.

This matter has come up again and again before the Hon'ble Supreme Court. The apex court discussed this in some detail in their judgement dated 1-4-2020 in CA No.1526/2016 (Alembic Pharmaceuticals Ltd. Vs Rohit Prajapati & Ors.). I have extracted below the apex court's observation:

> "*The concept of an ex post facto EC is in derogation of the fundamental principles of environmental jurisprudence and is an anathema to the EIA notification dated 27 January 1994. It is, as the judgment in Common Cause holds, detrimental to the environment and could lead to irreparable degradation. 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.*
>
> *Requirements such as conducting a public hearing, screening, scoping and appraisal are components of the decision-making process which ensure that the likely impacts of the industrial activity or the expansion of an existing industrial activity are considered in the decision-making calculus. Allowing for an ex post facto clearance would essentially condone the operation of industrial activities without the grant of an EC. In the absence of an EC, there would be no conditions that would safeguard the environment. Moreover, if the EC was to be ultimately refused, irreparable harm would have been caused to the environment. In either view of the matter, environment law cannot countenance the notion of an ex post facto clearance. This would be contrary to both the precautionary principle as well as the need for sustainable development.*"

These observations are valid in the case of ex-post facto CRZ violations as much as in the case of ex-post facto ECs as the principles enunciated are one and the same.

Whether it is a process of Environmental Impact Assessment or a CRZ clearance, there is an elaborate process of MEFCC's Expert Appraisal Committee (EAC) laying

down the Terms of Reference (TOR) for an EIA study, a process of an impact assessment study on scientific lines, a public consultation process and finally the EAC appraising the project proposal in the light of its likely impact on the environment and the concerns expressed by the different stakeholders, specially the affected communities. Once MEFCC sends a signal belittling this process, it amounts to giving an undue license to the industrial units to take the authorities for granted and play havoc with the environment in a manner that hurts the public interest.

What distresses me is that there have been several scientific studies on global warming and the likely rise in the sea levels across the world that point towards the need to tighten coastal regulation. Several countries have already responded to this emerging problem and started introducing more and more rigorous norms of coastal regulation. To introduce CRZ relaxations of the kind cited above would amount to ignoring what prudence calls for and adopting a myopic point of view.

I have personally dealt with the CRZ violations along the AP coast and I can say with some confidence that most CRZ violations have occurred as a result of outright collusion between the regulatory authorities and the errant project promoters who are prepared to pay a price to corrupt officials for consciously ignoring the violations. There is already a feeling among such project promoters that they could pressurise the political leaders and pliant officers to present their case for post-facto CRZ approvals. Many of them have been openly saying that they have done enough lobbying with the State government and MEFCC to be able to secure relaxations. It looks as though they have had the last laugh in the matter!

What do such post-facto approvals imply?

For example, mechanical pumping of ground water within the CRZ results in the salinity of the sea contaminating the ground water aquifers. Most projects within the CRZ have drilled bore wells as a result of which the local ground water aquifers have already turned saline. Who should be penalised for this? Once contaminated, it may not be easy to restore the the ground water aquifers to their pristine condition. Similarly, projects set up in CRZ III release their waste water directly into the sea without any treatment, which in turn has caused an enormous damage to the marine resources. There has been a decline in the tonnage of fish harvesting along the coast as a result of pollution from industrial units. Such violations have long-term adverse economic implications. If there is a well laid down regulatory procedure, it will be possible for the different regulatory authorities to study the environmental implications of a given project, elicit the concerns of the stakeholders and take a well considered view on it.

There are well established principles of environmental jurisprudence that should govern regulation through CRZ and EC processes.

For example, the Precautionary Principle places a burden on the State to take measures tp prevent risk, even if there is no sufficient scientific evidence to establish that risk. This principle owes its genesis to the Rio declaration on environment. Similarly, the "Polluter Pays" principle envisages the cost of containing the pollution being born by the polluter.

There are international treaties on these to which India is a signatory. Instead of adopting a leadership role among the nations in this respect, by issuing such regressive orders, MEFCC seems to be consciously denying itself such a role,

merely to cave in to errant project promoters at home. No wonder that several polluting industries are willing to move to India in view of the lax regulation we seem to be favouring!

One large community that will get directly affected by the latest MEFCC decision is that of the fisherfolk pursuing traditional fishing activity for their livelihoods. Their population is in excess of 14 million. Your decision to grant post-facto CRZ approvals literally bypasses them and deprives them from having a say in decision making on coastal projects. It looks as though MEFCC has subordinated their interests to those of promoters of projects. MEFCC's decision thus runs counter to a democratic, participative decision making process that should lie at the core of the governance system in India.

I therefore request MEFCC to review the order urgently and revoke it forthwith.

Regards,

Yours sincerely,

E A S Sarma
Former Secretary tro GOI
Visakhapatnam
19-3-2021

E.A.S.Sarma
14-40-4/1 Gokhale Road
Maharanipeta
Visakhapatnam 530002
Mobile: 91-9866021646
Email: eassarma@gmail.com

Website: http://eassarma.in

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E.A.S.Sarma
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Visakhapatnam 530002
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Email: eassarma@gmail.com

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