

F.N. C-12025/8/15-CS-III
Government of India
Ministry of Environment, Forest and Climate Change

2nd Floor, Vayu Wing,
Indira Paryavaran Bhawan
Jor Bagh Road, Aliganj,
New Delhi-110003

Dated: 10th September, 2018

OFFICE MEMORANDUM

Subject: Directions under Section 48 of the Biological Diversity Act, 2002, to the National Biodiversity Authority for enhancing implementation of the Act.

The Biological Diversity Act, 2002 (hereinafter referred to as the "Act") came into force in 2003 to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto. The Biological Diversity Rules, 2004 were introduced to facilitate implementation of the Act. One of the functions of the National Biodiversity Authority (hereinafter referred to as the "Authority") under Section 18 (1), is to regulate activities referred to in Sections 3, 4 and 6 and by regulations issue guidelines for access to biological resources and for fair and equitable benefit sharing. Further, Section 18 (3) of the Act empowers the Authority to perform such other functions as may be necessary to carry out the provisions of the Act.

2. It has been brought to the notice of the Ministry by the Authority that a large number of entities are not fully aware of the provisions of the Act but are desirous of complying with the same. Thus, there is a need to provide an opportunity to all such entities which are required to

obtain prior approval of the Authority for undertaking activities as specified under Sections 3, 4 and 6 of the Act, including cases that may relate to past, in line with the objectives of the Act and regulate them in a manner that enhances implementation of the Act.

3. The Biological Diversity Act, 2002 lays down procedure for taking cognizance of matters relating to the Act. Section 61 of the Act provides that cognizance of any offence under this Act can be taken only by the Central Government or officers authorized in this behalf by the Central Government. Further, any benefit claimer can make a complaint only after providing a notice of not less than thirty days to the Central Government or an authority/officer authorized by it.

4. The Central Government has taken note of these provisions and after taking into account all material facts before it, in exercise of the powers vested to it under Section 48 of the Act, hereby directs that all such cases where prior approval was required but a person/entity has not obtained such approval, shall be heard by the Authority, which shall then pass appropriate orders with respect to acts that may have occurred in past, taking into account scientific evidence as well as any damage that might have been caused in furtherance of the powers available to the Authority under Section 18 of the Act, with the objective of ensuring conservation and sustainable use of biodiversity and fair and equitable sharing of benefits arising from its use. The Authority shall consider all such cases on the basis of merit and shall ensure that only those cases are granted approval for future activities which would have otherwise been approved in the normal course, had the person/entity concerned applied in time for prior approval. The Central Government further directs the Authority to take decisions thereon within a period of 100 days from the date of issuance of this Office Memorandum, including course of action for matters related to past. These directions shall come into force with immediate effect. The Authority shall also continue to spread awareness about the Act to various stakeholders to avoid the occurrence of such activities.

5. These directions are intended to facilitate and enhance implementation of the Act in public interest towards meeting the objectives of the Act, namely, conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising from commercial use. In implementing these directions, the Authority shall be guided by the principles of natural justice and various pronouncements of Hon'ble Courts in similar matters, including judgments cited below.

6. In respect of the requirement of prior environmental clearance under the Environment Protection Act, 1986, the Ministry had issued a Notification S.O. 804 (E) dated 14th March, 2017, wherein six months period was provided to apply for environmental clearance for projects on which the project proponent had started work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance. The Hon'ble High Court of Madras while vacating the stay on the aforesaid Notification vide Judgment dated 13th October, 2017 in *Puducherry Environment Protection Association Vs. Union of India*, Writ Petition (Civil) No. 11189 of 2017, held that,

"...However, one time relaxation and that too only in cases where the projects are otherwise in compliance with or can be made to comply with the pollution norms is, in my view, not impermissible. The notification ought not to be interfered with.

It is reiterated that protection of environment and prevention of environmental pollution and degradation are non-negotiable. At the same time, the Court cannot altogether ignore the economy of the Nation and the need to protect the livelihood of hundreds of employees employed in projects, which as stated above, otherwise comply with or can be made to comply with norms.

The impugned notification does not compromise with the need to preserve environmental purity, but only allows those industries and/or projects which might otherwise have been given prior environmental clearance, but omitted to obtain environmental

clearance to operate, on the conditions imposed by the authorities concerned, including their liability under the principle polluter pays."

7. Similarly, in respect of the requirement of prior forest clearance under the Forest (Conservation) Act, 1980, the Hon'ble Supreme Court in *Supreme Court Monitoring Committee Vs. Massoorie Dehradun Development Authority & Ors.* (1997) 11 SCC 605, held that,

"...the State of UP as well as the MDDA will enlist cases in which they gave permission to make use of any forest land for non-forest purpose without seeking the prior approval of the Central Government. All those cases will be forwarded to the Central Government for seeking ex post facto approval in the matter which will be considered in accordance with the Rules framed under the 1980 Act."

8. The Hon'ble Supreme Court in *T.N. Godavarman Thirumulpad, Vs. Union of India*, Writ Petition (Civil) 202 of 1995 held that,

"...according to CEC this was a typical case where ex post facto approval under the 1980 Act is sought after the mine has been allowed to operate illegally. Since fait accompli situation arose according to CEC there was no option but to recommend the case for grant of permission for the use of forest land for mining lease, conveyor belt system and associated activities subject to certain conditions mentioned therein".

The Hon'ble Court in the same case further held that, "...accordingly, we see no reason to interfere with the decision of MoEF granting site clearance...";

9. The Hon'ble Bombay High Court in *Vijay Krishna Kumbhar vs The State Of Maharashtra & Others* held that,

"In such a matter it would have been more appropriate to take action in accordance with section 37 of the M.R.T.P Act. Now as

indicated above, the P.M.C. has already started action. After the P.M.C. gave permission, it appears that the developer has also made construction. Now it has become a fait accompli. Therefore there is no alternative except to follow the action which has become fait accompli and take further actions in accordance with the Government's directions."

10. This issues with the approval of the Competent Authority.

C. Palpandi 10/9/2018
(Dr. C. Palpandi)
Deputy Director

To

The Chairperson
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