Ref. No. MCHI/GEN/12-13/162

February 22, 2013

To,
The Chairman & Members
Committee on review issues pertaining to EIA clearance on construction

Dear Mr. Kasturiranjan and Honourable Members,

We write to you to represent the Housing Industry and put forward its genuine concerns. Accordingly, through this reference, we solicit your serious indulgence in the matter of carrying out amendments in the Environment Impact Assessment Notification of 2006.

The mandate to this Hon'ble Committee is to delve on issues with respect to our industry. Therefore, we seek to raise the following points in this reference:

A. To review the requirement of Environment Impact Assessment:

AVOIDABLE ENVIRONMENTAL CLERANCES DELAYING "REAL ESTATE PROJECTS"

B. Review OM Dated 7.2.12.

C. The Simplification of approval by reaffixing threshold requirements for building construction projects.

Our conclusive stand on pertinent issues in relation therewith, is submitted hereunder for your consideration:

(I) STATUTORY TIME-LIMITS PRESCRIBED IN THE ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION OF 2006 NOT ADHERED TO:

It is seen that the statutory time limits prescribed in the Environment Impact Assessment Notification of 2006 is followed more in breach than in compliance. This is apparent from the following charts:

Chart I: Collective Table showing standardization of Environment Clearance clauses in 5 states (As per Annexure attached herewith)

Chart II: Time taken by SEIAAs of different states for granting Environment Clearance (Shown below).

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Data from Chart II as submitted along with this representation shows that the average time taken by all states to clear projects is much more than the mandatory time prescribed in Para 7 and Para 8 of the EIA Notification, 2006. The average time taken to clear building and construction projects in Maharashtra is the highest at approximately 20 months per project. This is far in excess of the statutory limits specified in the Environment Impact Assessment Notification of 2006.

Such enormous delays have caused undue hardship to developers, many of whom have to incur heavy outgoings by way of interest on loans taken to buy the land for the project.

The following table illustrates the average time taken for project clearance in different states:

Chart II

State	Average Time Taken for Clearance (Approximate)
Maharashtra	20 months
Punjab	10 months
Kerala	8 months
Madhya Pradesh	1 year

(II) THERE HAS TO BE A DIFFERENTIATION BETWEEN REAL ESTATE VIS-À-VIS POLLUTING INDUSTRIES:

It is important to understand that there is a basic difference between Polluting Industry and Real Estate Projects. While in the case of former, the pollutants start flowing and polluting the air / water on the day one of starting production, whereas in the latter case it takes decades for the actual habitation, which follows years of infrastructure development, construction of houses / flats and development of community facilities surrounding the same. Unless the habitation picks up, neither any effluents will be generated for treatment or will the consumption of resources commence.

Obviously polluting industries necessitate proper environmental study and clearance before the industrial plants are set up, whereas in the case of Real Estate Development, only issuance and implementation of suitable guidelines for the habitation, whensoever it comes up are needed, based on the then available technology and requirement. Hence, disallowing the start of a real estate development works / project for years / months on the pretext of arranging an environmental study and multiple clearances is certainly against the actual need or even against the country's growth process.

We would like to highlight that the committee on Affordable housing has pointed out that one of the major reasons for delay and effectively increase in cost is due to delay in EIA clearances. (Annexure)
There was an effort to increase the limit of 20000sqmtr to 50000sq. mtr in the past. This would have removed the EIA requirement for many projects but unfortunately this was not implemented.

(III) THE MAUSKAR COMMITTEE REPORT ON DRAFT AMENDMENT TO EIA NOTIFICATION 2006, WHICH SUGGESTED NO CHANGES, IS NOT BASED ON FACTS:

It is seen that the Mauskar Committee Report which suggested that no changes be done because time limits are being adhered to, is not based on true facts which are reflected in the charts mentioned in Annexure above.

The observations made by the committee are reproduced as under:
"As far as delays in the EC process encountered by project authorities are concerned, these have now been largely minimized / eliminated as the SEAC / SEIAAs have already been set up in 23 States and Union Territories which can expeditiously examine the proposal. The Building Industry, since they are also now exposed to this type of appraisal, should be able to provide all the necessary information and get their proposals examined fast. It may, therefore, not be prudent to enhance the threshold limit for construction and area development projects. The limits already given in the EIA Notification, 2006 be retained."

Annexure shows that the entire report of the committee is based on incorrect assumptions.

(IV) CENTRAL GOVERNMENT HAS EXCEEDED ITS JURISDICTION BY ISSUING IMPUGNED NOTIFICATION U/S 3(1) OF THE ACT OF 1986:

If the relevant provisions of Environment (Protection) Act 1986 and the Rules are to be seen side by side, having regard to the statement of objects and Reasons for enactment of Act No.29 of 1986, it shall become clear that prima facie, the Central Government has exceeded its jurisdiction by issuing impugned Notification under Section 3 (1) of the Act of 1986 – conferring power on the Central Government generally to take measures to protect and improve the quality of environment etc. The Central Government is not empowered to take over the functions of the local Authority and regulate construction of buildings. In the matter of this kind, Section 3 (2) (v) of the Act of 1986, read as under: -
"Section 3 (2) (v):

(2) In particular and without prejudice to the generality of the provisions of Sub-Section (1), such measures may include with respect to or all or any of the following matters namely: -

(i) x xxxxxxxxxxxxxxxx
(v) restriction of areas in which any industry, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards."

(V) EIA MANUAL BY ASCIM – STANDARD GUIDELINE TO BE FOLLOWED BY LUBs IS THE SOLUTION.

(VI) TIME LIMITS SPECIFIED IN THE ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION OF 2006 NEED TO BE FOLLOWED AND DEEMED CONSENT TO BE GIVEN IN CASE WHERE THE TIME LIMITS ARE EXCEEDED:

Para 7 and Para 8 of the Environment Impact Assessment Notification, 2006 prescribes a time limit with regard to appraisal of Construction Projects:

Para 7 of the EIA Notification, 2006 reads as hereunder:

*"(iii) The appraisal of an application be shall be completed by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within **sixty days of the receipt of the final Environment Impact Assessment report** and other documents or the receipt of Form 1 and Form 1 A, where public consultation is not necessary and the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee shall be placed before the competent authority for a final decision within the next fifteen days .The prescribed procedure for appraisal is given in Appendix V;"*

It may be kept in mind that no public consultation is required for building projects; hence it is mandatory that their appraisal be completed with 60 days of receipt of EIA report.

Para 8: Time prescribed for grant of EC

Para 8 of the Environment Impact Assessment Notification lays down the following stipulations regarding

*"(i) The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the applicant within **forty five days** of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words **within one hundred and five days of the receipt of the final Environment Impact Assessment Report**, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents, except as provided below."*

By comparing the statutory time limit prescribed under Paras 7 and 8 with the figures in Chart II it becomes clear that there are glaring violations of law on the part of SEIAAs of many states who delay the grant of environment clearance to projects. It is evident from Chart II that the authorities take much more time than the prescribed limit for granting EC.

It is imperative that the Hon'ble Committee recommend the institution of a **time bound system for granting EC**. A system of penalties can also be established so as to ensure timely processing of applications.

Further the committee may also recommend the institution of **Deemed EC** in case the SEIAA delays the grant beyond the prescribed period in the EIA Notification 2006. This will help result in faster approvals and reduced prices for consumers. There is provision for grant of 'Deemed Consent' under Section 25 of The Water (Prevention and Control of Pollution) Act, 1974. The same system, if applied to Environment Clearance for Deemed Projects, will help in fast tracking projects and meeting the growing demand for housing in the country. Similar provisions of deemed consent/approval exist in section 45 of the Maharashtra Regional and Town Planning Act, 1966 and Mumbai Municipal Corporation Act, 1888.

(VII) HIGH LEVELS OF STANDARDIZATION OF CLAUSES ARE EVIDENT FROM CHART I - CAN BE EASILY COVERED UNDER GENERAL RULES:

A perusal of various approvals in the respective Environment Clearance letters shows that they are more or less repetitive. It is like a statement of set rules made specific to a category of project. For instance, fly ash cannot be used or green belt has to be developed in terms of the guidelines issued by the Central Pollution Control Board - all these are insertions made in every letter of Environment Clearance. So are almost all of the other clauses.

If the Environment Clearance letter is more or less a statement of rules, then it would be incorrect to state the same by invocation of discretion by the State Level Expert Appraisal Committee or the State Level Environment Impact Assessment Authority.

It is very well-settled position of law that if an issue can be covered by rules then to infuse and element of administrative discretion therein shall be ultra vires to Article 14 to the Constitution of India. This is because administrative discretion inhibits equal application of laws.

It is needless to state all the other elements related to discretion are covered by the comprehensive laws related to town planning. Hence to have another layer of approvals on the same subject of town planning would not be fit and proper and would not only be administratively inconsistent but also create undesirable contradictions.

(IX) WHAT SHOULD BE GOVERNED BY RULES IS IN FACT SUBJECT TO ADMINISTRATIVE DISCRETION - NOT PERMITTED UNDER THE CONSTITUTION OF INDIA:

Under Section 6 and Section 25 of the Environment Protection Act, 1986, there are several subjects which have been mandated to be covered by rules. This is apparent from the mere perusal of the relevant sections of the Act the text of which is as below:

Section 6: RULES TO REGULATE ENVIRONMENTAL POLLUTION

(1) The Central Government may, by notification in the Official Gazette, make rules in respect of all or any of the matters referred to in section 3.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the standards of quality of air, water or soil for various areas and purposes;4

(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;

(c) the procedures and safeguards for the handling of hazardous substances;

(d) the prohibition and restrictions on the handling of hazardous substances in different areas;

(e) the prohibition and restriction on the location of industries and the carrying on process and operations in different areas;

(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.

Section 25 of the Act also confers rule-making power on the Central Government, the text of which is given hereunder:

Section 25. POWER TO MAKE RULES

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely--

(a) the standards in excess of which environmental pollutants shall not be discharged or emitted under section 7;

(b) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or caused to be handled under section 8;

(c) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of the prescribed standards shall be given and to whom all assistance shall be bound to be rendered under sub-section (1) of section 9;

(d) the manner in which samples of air, water, soil or other substance for the purpose of analysis shall be taken under sub-section (1) of section 11;

(e) the form in which notice of intention to have a sample analysed shall be served under clause (a) of sub section (3) of section 11;

(f) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under sub-section (2) of section 12;

(g) the qualifications of Government Analyst appointed or recognised for the purpose of analysis of samples of air, water, soil or other substances under section 13;

(h) the manner in which notice of the offence and of the intention to make a complaint to the Central Government shall be given under clause (b) of section 19;

(i) the authority of officer to whom any reports, returns, statistics, accounts and other information shall be furnished under section 20;

(j) any other matter which is required to be, or may be, prescribed.

It is seen that most of the stipulations which constitute the Environment Clearance letters are such which can be covered within the realm of the rule-making powers of the Central Government. That being so, if the statute provides for making rules on a subject and instead of that these topics get covered by the discretion of the State Level Expert Appraisal Committee, or the State Level Environment Impact Assessment Authority, this would be in violation of the Environment Protection Act, 1986.

It is needless to state that conferring of discretion in matters which can be covered under the rules is unconstitutional and that there are several rulings given by the Apex Court in this regard.

(X) VIOLATION OF SECTION 26 OF THE ENVIRONMENT PROTECTION ACT, 1986, AS RULES OF THE COMMITTEES ARE NOT TABLED BEFORE PARLIAMENT:

It is seen that most of the stipulations set under the Environment Clearance letters are those which have be covered through the invocation of rule-making powers of the Central Government conferred under section 25 of the Environment Protection Act, 1986. Further, these rules have to be tabled before the Parliament so that the Parliament may take cognizance of such rules and to make necessary amends if required.

The stipulation to table the rule before Parliament is in section 27 the text of which is as under:

Section 27: RULES MADE UNDER THIS ACT TO BE LAID BEFORE PARLIAMENT

Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

It is seen that the State Level Expert Appraisal Committee and the State Level Environment Impact Assessment Authority put forward those conditions which have to be covered by such rules which have to be implicitly ratified by the Parliament. Thus the powers which are being exercised by the Committee and the Authority undermine the fundamental democratic process enshrined in the Constitution of India based on which the Environment Protection Act, 1986 has been made.

(XI) NO STATUTORY CONSEQUENCE SPECIFIED FOR VIOLATION OF TIME LIMITS SET IN THE ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION OF 2006:

It is the essential element of any law, and it is that if a stipulation set therein is breached, then a specified consequence has to be follow. This however, has not been provided for in situations where there is a breach of time limits set in the Environment Impact Assessment Notification of 2006.

For example, under section 45 of the Maharashtra Regional and Town Planning Act, 1966, if the 60 day time limit is breached then it is deemed that the approval has been granted. Similarly, under section 353 of the Mumbai Municipal Corporation Act, 1888, if in 21 days there is no reply, then it would be deemed that an Occupancy Certificate is granted. Under Right to Information Act, 2005, if the Public Information Officer breaches the time limits then he can be fined.

It is however, seen that there is no such consequence prescribed in the Environment Impact Assessment Notification of 2006. For these reasons, the Environment Impact Assessment Notification of 2006, turns arbitrary in nature and would not pass the test of equal application of laws mandated under Article 14 of the Constitution of India.

(XII) ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION OF 2006 CONSTRAINS A PERSON TO DO AN ACT WHICH MAY BE PROHIBITED UNDER ANOTHER LAW – ARBITRARY LAW:

The exact methods and scope of construction are specified in the Development Control Regulations of various municipalities duly notified as a Development Plan under the provisions of the Maharashtra Regional and Town Planning Act, 1966.

Under the condition of approvals granted through this process prescribed under the notified Development Plan, the method of construction and the extent of construction both are covered by the specific elements of the said approvals.

However, it is seen that many a time Environment Clearance letters put in such conditions which run contrary to the conditions set in the process required to be complied with under the provisions of the Development Plan.

For example, the Environment Clearance letter may stipulate to prune a basement or to alter certain plans. However, if this is done then it would mean deviation from an approved plan which is an offence under section 53 of the Maharashtra Regional and Town Planning Act, 1966. It is also seen that in certain Environment Clearance letters, water harvesting is not permitted in Coastal Regulation Zone areas since it is banned under the Coastal Regulation Zone Notification. However, Municipal Corporations while approving plans put forward conditions that water harvesting shall be done.

(XIII) MAJOR VIOLATION OF ARTICLE 243-W OF THE CONSTITUTION OF INDIA WHICH MANDATES THAT ALL POWERS OF TOWN PLANNING SHALL BE EXERCISED BY LOCAL MUNICIPALITIES ONLY:

It is well-defined position of law that the Constitution of India is supreme and that all laws have to abide by them both in letter and spirit.

Article 243W of the Constitution of India provides as under:

Article.243W. Powers, authority and responsibilities of Municipalities, etc. *: subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-*

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;
(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule,

Despite the overriding provisions as above, and despite fact that the Twelfth Schedule details many elements of town planning, inter alia, such as *"Urban*

planning including town planning" and *"Regulation of land--use and construction of buildings."* and many other ancillary provisions in relation therewith, the State Environment Impact Assessment Authorities frequently tend to overstep their mandate and impose conditions which conflict with the provisions of town planning acts and development regulations enacted by the State Legislatures and the LUBs.

(XIV) OM OF 7.2.12 VIOLATES THE CONSTITUTIONAL PROVISIONS AND HENCE IS UNTENABLE - REQUIRED TO BE WITHDRAWN:

It is seen that the OM of 7.2.12 is fundamentally in conflict with the Constitutional provisions and hence it is necessary to be withdrawn at once. A detailed note in this reference is attached herewith.

It is apparent from this note that thelegislative subjects of Town Planning and Urban Development have been entered in the Twelfth Schedule. This schedule is to be read with Article 243W. Article 243W(a)(ii) lays down that the legislature of a state may, by law, endow the municipalities and urban local bodies with power and authority to carry out functions pertaining to matters listed in the twelfth schedule. Thus in the States, the legislature has empowered the municipalities to legislate on Twelfth Schedule subjects by means of various specific laws, **leaving Central Government with little or no say in this field**.

It is submitted that the creation of this OM amounts to colourable exercise of power by the MoEF. The Ministry has transgressed the constitutional limits on the law-making powers of the Union. Therefore the MoEF, by issuing the impugned OM, has attempted to legislate on a subject outside the Union list by giving it the colour and appearance of a subject on which the union is competent to legislate. The Ministry has thus violated the principles of federalism as enshrined in Article 246 of the Constitution of India.

Further the said OM has been issued without following the mandatory procedure laid down in Rule 5 of the Environment Protection Act, 1986. Thus it does not have the legal relevance of a rule made under the Environment Protection Act, 1986 and hence must be quashed.

5.0 CONCLUSION:

Considering the presentations made in the foregoing, it is respectfully submitted before this Hon'ble Committee to favourably consider the following requests:

1. To remove the requirement of Environment Clearance with reference to building construction projects from the schedule of the Environment Impact Assessment Notification of 2006:

From the account presented in the aforesaid, it is clear and apparent that the Environment Impact Assessment Notification of 2006 with respect to construction projects is ultra virus to the Constitution of India. For, such projects are duly regulated by the town planning laws prepared under the elaborate process of the preparation of Development Plan through the statutory process mandated in the Maharashtra Regional and Town Planning Act, 1966 and other allied legislations prevailing in other state as well.

THEREFORE THE ENTIRE PROCESS FOR EIA HAS TO BE REMOVED FOR THE BUILDING CONSTRUCTION PROJECTS AND LUBs BE GIVEN SET OF RULES TO BE INCORPORATED IN THEIR RESPECTIVE BYELAWS.

2. Review OM Dated 7.2.12: Since the OM of 7.2.12 violates Constitutional provisions, as shown in the Annexure and the reference thereto in the foregoing, hence this needs to be withdrawn.

3. Simplification of Procedures: Till the time the entry with reference to building construction projects is removed the procedures be simplified as traversed through in this representation.

4. Remove the latest OM dated 12.12.2012 on already started work.

We are sanguine that this Hon'ble Committee will do the needful and recommend abolition of provisions of EIA clearance for building construction projects and save huge unwarranted losses of the country which needs growth and employment as much as it needs housing for the masses.

With Best Regards,
For MCHI-CREDAI

Deepak Coradia
Vice President