NAVEEN PATNAIK
CHIEF MINISTER, ORISSA

सत्यमेव जयते
ORISSA STATE

Telephone { (0674) : 2531100 (Off.)
(0674) : 2591099 (Res.)
Fax { (0674) : 2535100 (Off.)
(0674) : 2590833 (Res.)
E. Mail–cmo @ ori.nic.in

D. O. No. UM-18/10-268/CM

BHUBANESWAR

Dated 3.07.2010

Dear Shri Hanique ji,

As you are aware, the mineral bearing States in the eastern region of India, namely, Orissa, Jharkhand and Chhatisgarh, continue to be among the poorest States in the country in spite of having high deposits of 'bulk minerals' such as iron ore, manganese, bauxite, chromite and coal etc. Majority of the inhabitants in these States, particularly in the mineral bearing areas are Scheduled Tribes. Locally exploited minerals are consumed at far away places, giving rise to a sense of deep discontentment in the region. This sentiment of 'injustice' and 'deprivation' is being exploited by Left Wing Extremists and these areas have become fertile ground for Naxalite activities. We, therefore, have been insisting on maximum value addition of the minerals within the States of their occurrence. This will not only ensure that the benefits of mineral exploitation flow back to the inhabitants of the region through increased employment opportunities, but also provide the much-needed revenues to the States for taking up various welfare measures for ensuring socio-economic development.

Against this backdrop, the Chief Ministers of Rajasthan, Karnataka, Jharkhand, Chhatisgarh and Orissa had met you and the Hon'ble Prime Minister on several occasions. Joint Memorandums have been submitted highlighting the concerns of the mineral bearing States.

It is, therefore, a matter of disappointment that the new M&M (D&R) Act, which has been hosted on the website of Ministry of Mines on 4th January, 2010, does not address many of the concerns expressed by us. In fact, certain clauses run counter to the interests of the State. I am enclosing our comments on the various clauses of the draft Bill for due examination. I would, however, like to highlight some of the issues in this letter.

1. One of the major concerns of my State Government and that of other mineral bearing States has been that the principle of value addition within the States should be recognized as a major consideration for allotment of mines. Although the proposed Act speaks about value addition, this has been completely negated by the provision that the existing applications will be disposed of on a **'first in time'** principle. Since a large number of applications are already pending relating to most, if not all, major mineral bearing areas, especially in the case of bulk minerals, the discretion of the State Government to choose the most meritorious of them in terms of value addition will be completely done away with. The discretion available to the State Government under the existing

provisions of the Act (Section 11) will no longer be available under the proposed Act. The wisdom of **'first in time'** principle in such a vital area as mineral development is not easily understood. The new Act should have provided an opportunity to break with the archaic provisions of the existing Act. This does not appear to have been done. On the other hand, the proposed provision will be retrograde step.

2. The proposed Act provides for a seamless transition from LAPL and PL to ML by providing in Section-26 that mining lease "shall be granted only on application made by a person who has held a large areas prospecting license or a prospecting license for the area". Reading of Section 22 and Section 23 along with Section-5, clearly shows that the State Government has very little scope to reject the application of the first applicant who can then proceed to acquire the mining lease by the mandatory provision of Section-26. This will enable select individuals / entities to block large areas for long periods which is not in the interest of economic development or socio-economic justice. This provision would further erode the powers of the State Government to consider applicants on the basis of merit instead of on the basis of date of the application. There will be little scope to impose any condition on the grantee to set up industry in the State.

3. Section 5 (ii) among other things stipulates certain special conditions of eligibility for grant of concession in areas covered by the 5th and 6th schedules of the Constitution of India. While the intention of this provision is laudable, the modalities of protecting the interest of the tribals should be carefully designed. The need for a steady stream of income to the tribals should be harmonized with the need for scientific mining of minerals which are a national resource.

4. The Act underplays the role of the public sector. Legal provisions (Section 38) for reservation of areas where minerals have been discovered by State agencies, in favour of PSUs should continue as at present, since they play an effective role in making equitable allocation of minerals among the clients, especially to small and medium enterprises, particularly where the mineral is scarce.

5. The proviso made under sub-section 2 of Section 4 restricts the powers of the State agencies like GSI, AMD and State Directorates to take up reconnaissance or prospecting operations where no application for license or ML is pending. Since a large number of applications are already pending for different mineral bearing areas, the scope for the State agencies to take up such operation will be severely restricted after promulgation of the new Act. This will not be in public interest. It must be appreciated that the State is the owner of all minerals and it should not be entirely divested of its role in prospecting and exploitation of minerals in the larger public interest.

6. Royalty revision should be an automatic process at a prescribed interval of not more than three years. The proposed Act states that enhancement of royalty shall be carried out not more than once during any period of five years. Royalty

should be ad valorem for all minerals and the floor value for such minerals should be fixed by IBM on a transparent and real time basis. The rates of royalty should be revised immediately, especially in the case of bulk ores, so that private agencies do not enrich themselves through windfall profits, while denying the State its legitimate due. Any additional levy on minerals by way of cess or export duty should also be entirely passed on to the State of origin.

7. The polluter pays principle must be laid down in the Act itself making it mandatory for the lessee to pay a cess for the negative externalities related to mining activities. Mining of coal and setting up of coal washeries inflict a huge pollution load on the environment in the surrounding areas. The benefits of such mining do not invariably flow to the State of its occurrence since the power produced from coal is consumed by more advanced States which collect electricity duty on the energy consumed. The coal bearing States are saddled with the pollution load, increased ambient temperature of the mining areas and the huge fly ash dumps generated by power plants. Similarly there are a few other minerals like Chromite which can pose various types of health hazards to the nearby people if due precaution is not exercised during mining and for treating the dumps and wastes. The Act should, therefore, provide for an environmental cess leviable by the States from these miners on the polluter pays principle. This should be over and above the coal royalty.

8. The enforcement provisions of the proposed Act should have more teeth to ensure that mining is as per the environmental laws and mine closure plans and mining areas are properly rehabilitated.

I hope the above concerns are duly addressed while formulating the new Act.

With regards;

Yours sincerely,

(NAVEEN PATNAIK)

Shri Bijoy Krishna Handique,
Minister of Mines,
Government of India,
Shastri Bhawan,
New Delhi.

This is the same one as enclosed to the File D.O. No. DM-1/10-267/CM, dt. 3.02.10.

Version : 28.02.2010

COMMENTS ON AND CHANGES SUGGESTED TO CERTAIN SECTIONS OF THE NEW DRAFT MMDR ACT

--

Section 3 (Definitions)	Sub-sec. 3 (e) & (h)	:	It may not be necessary to introduce terms like "Detailed Exploration" 3(e)" and "General Exploration 3(h)". The existing provision of prospecting appears to be adequate.
	Sub-sec 3 (a b)	:	Introduces UNFC in the Act. It may be more appropriate to provide for this in the Rules to be framed under the Act. This will afford greater flexibility as & when amendments are needed.
Section 4	Sub-sec. 4(2)	:	The provisio to sub-section (2) needs to be omitted so as to enable the State Agencies like GSI, AMD and State Directorates etc. to take up reconnaissance or prospecting operations in an unhindered manner. The restrictions introduced by the provision that no such operation shall be undertaken in an area for which a license or mining lease has been granted or for which application for a license or mining lease is pending is not in public interest. It is suggested that pending applications for license or mining lease should not be an objection to assigning the State Agencies to undertake reconnaissance or prospecting. However, areas for which license or ML has already been granted can be excluded from such a provision. At the ground level, it is almost impossible to find an area that has not been covered by one or other application for license or mining lease. **In such a situation the proviso renders section-4 redundant in practice.**

Hence, a change is needed.

Section 5	Sub-sec. 5(1)	:	The requirement of Section 5(1) that to be eligible for grant of a concession, a person or company or society in addition to fulfilling various other terms laid down threin has to register oneself / itself with the Indian Bureau of Mines or the State Directorate for a mineral concession with respect to major mineral and minor mineral respectively does not seem to serve any useful purpose. **It appears to be an avoidable procedure. This aspect of the section may be reconsidered.**

The proviso relating to adherence to the conditions laid down in the Fifth and Sixth Schedules of the Indian Constitution needs to be further examined.

This particular proviso seems to be influenced by the Judgment of the Hon'ble Supreme Court in the case of Samatha Vrs. Andhra Pradesh. Andhra Pradesh is the only State in the country, that has enacted a State Law under the provision of Section 5(2) of the Fifth Schedule of Article 244(1) of the Constitution of India. This law is called "**Andhra Pradesh Scheduled Area Land Transfer Regulation, 1959"** which prohibits grant of prospecting license or mining lease to a non-tribal in a scheduled area.

In pursuance to this, Clause-5 came to be inserted in the M&M(D&R) Act,1957 by the Andhra Pradesh State Government vide G.O.M.S No. 264 Dt. 07.08.1991 applicable in

the State of Andhra Pradesh w.e.f. 14.08.1991.

Section 11(5) of the said regulation reads as follows :

“Notwithstanding any thing contained in this Act no prospecting license or mining lease shall be granted in the Scheduled areas to any person who is not a member of the Scheduled Tribes;

Provided that this sub-section shall not apply to an undertaking owned or controlled by the State or Central Government or to a society registered or deemed to be registered under the Andhra Pradesh Co-operative Societies Act,1964 which is composed solely of members of Scheduled Tribes”.

Notwithstanding the above restrictions, the Andhra Pradesh Government granted mining lease to non-tribals in the scheduled areas which was obviously in violation of the law. This issue was agitated by an N.G.O, namely, Samatha and the Hon’ble Supreme Court which heard the case directed cancellation of the mining lease granted in the scheduled area to the non-tribals.

The issue now is whether such a restriction should be introduced in all the scheduled areas of the country. It is a fact that most of the minerals are located in the scheduled areas. Hence, any restriction in granting a prospecting license or a mining lease in favour of a non-tribal would automatically limit the scope of considering mineral concession applications to

cooperative societies alone. While, it is certainly necessary to protect the interests of the tribal community, a provision that restricts larger participation in economic activities in a scheduled area may not be the best way of facilitating development and growth of the tribal population. It is possible that the non-tribal individuals/ companies etc. desirous of acquiring a mineral concession may resort to manipulation and still manage to enter into such area using the tribals only as a subterfuge. This is likely to introduce unfair means including depriving the common tribal citizen of benefiting from the intended spirit of such a provision i.e. giving exclusive right to the cooperative societies composed solely of members of scheduled tribes. Simultaneously, it may also result in surrogate cooperatives of scheduled tribes members controlled by some influential or monied individual (s) belonging to either tribal or non tribal category. This situation besides defeating the intended purpose will also deprive the Government from an option of choosing the best applicant who can add value to the mineral resources or / and offer highest revenue to the State. Thus, facilitations like value addition or realization of highest revenue provided in the draft may not be relizable. This may rather hinder generation of employment opportunities that the local communities including tribals can benefit from and generation of optimal revenues which would add to the finances and enable the State Govt. to take up various welfare activities.

Therefore, instead of restricting the

			participation, the interests of the tribals may be better protected by making certain other interventions compulsory. These include adherence to PESA Act. 1996, revenue sharing with the local communities by the mineral concession holder as also the Government. It can be made compulsory for the mineral concession holder to provide substantive shares and pay dividend to the local / tribal community and also make it compulsory for the Government to reserve a part of the royalty for developmental activities in the schedule areas.
Section 6	Sub-sec. 6 (2) Sub-sec 6 (6)	:	The minimum areas prescribed for PL (1.00 sq km) and ML (0.1 sq km) may not always be possible. While minimum area for an LAPL serves a purpose therefore can be retained, such prescription in case of PL & ML may lead to waste of fragments of ore bearing areas. Small deposits' need to be defined sharply to avoid confusion.
Section 7	Sub-sec. 7(4)	:	In the provisio to sub-section(4), the word 'exploring' may perhaps be substituted by the word 'mining' – as it relates to leases.
Section11	Sub-sec. 11(3)	:	It needs to be reconsidered if the related provisio to section-5 in respect of restrictions in the schedule areas is deleted/ modified.
Section 13	Sub-sec.13(1)	:	This section enables invitation of applications in the form of competitive offers for grant of PL over any area where reconnaissance has been conducted and sufficient evidence of enhanced mineralization has been established. However, it

restricts such an opportunity to **areas where no application for a LAPL or PL is pending.**

It is suggested that such restriction should be deleted and an open opportunity provided for inviting competitive offers by holding that all pending PL/ML applications are dropped. All the applicants whose applications for LAPL or PL are pending may also be given an opportunity to participate in the bid. Generally large number of PL and ML applications already filed over most of the areas are pending and applications will continue to be filed. In this context the provision of Section 13(1) is likely to turn out to be redundant and deprive the State Government from maximizing the revenue from minerals which is the intended spirit of this section.

- It is also suggested that a similar option of inviting applications in the form of competitive offers must be open to LAPLs too. The criteria can be as those vide sec 13(2) and also include the applicant's desire and ability to bring the high technology substantive financial investment.

Sub-sec. 13(2)

In sub-section 2(f) and (g), add chromite, mineral sands and manganese ore also.

- In addition to the parameters indicated for assigning weightage, another parameter suggested for similar weightage is the **financial competence showing the**

ability of the applicant to mobilize the requisite funds for undertaking prospecting and mining and also value addition & end use including industries based on the mineral.

Sub-sec 13(5)

- The concern of restriction as indicated vides Sec 13(5) in case of PL holds good herein too in respect of inviting applications for competitive offers for grant of mining lease. Similar suggestion for modification as made in case of Sec 13(1) is made in case of this Section too.

- The second proviso to sec 13(5) that warrants obtaining of all forest clearances under the F.C Act 1980 before issuing the notification is restrictive in nature. This may be deleted. In case the State has been able to obtain such a clearance this advantage will get factored into the offers that will be received automatically and the State would stand to benefit from higher bid compared to an area where no such clearance has been received. Hence, it is suggested that this restrictive provision may be deleted retaining only the other condition, namely, obtaining of al permissions from the owners of the land and those having occupation rights.

Sub-sec 13 (6) : The following suggestions are made:

sub – section 13(6) (d)

- Modification to the sub-section: The sub-section recognizes setting up industries

based on the mineral, having achieved financial closure for such project as a parameter to which weightage can be assigned. The same may be modified as follows:

> "that the setting up of industries based on the mineral where such a project has been approved by the competent authority of the State Government and an MoU to this effect has been signed and such applicant has achieved the minimum milestones including financial closure as per the terms and conditions laid down in the MoU to the satisfaction of the State Government."
>
> From the experience of Orissa State, it is seen that such a condition alone binds an applicant for MC to fulfill the commitments made in the MoU. This also puts pressure on the applicant who has envisaged a value addition facility in the State to execute the project as per time schedule. This in result is a win-win situation for the state & the country.

- Another clause relating to financial competence indicating the applicant's ability to mobilize the requisite funds for undertaking mining and the envisaged

			value addition project may also be included as one of the parameter for assigning due weightage.
	Sub-sec.13(6)(g)	:	• This may be modified to include manganese ore, chromite and mineral sands in addition to iron ore, bauxite and limestone listed now. • Further, revenue sharing on the lines suggested for sub-section 13(2)(g) may also be included as one of the parameters herein.
Section 14	Sub-sec 14(1) & (2)	:	• The time limits prescribed for disposal of applications are not feasible and therefore not practical. Retention of time limits as exist in the current Act is suggested.
Section 15 & 16		:	No comments
Section 17 & 18	Sub-section 17 (1) and Sub-section 18.	:	The provision of transfer of RL & PL will only encourage speculative transaction, profiteering and altendant delay in operatioalsing the mines. Hence, direct transfer as a consequence of RL/PL holder negotiating with a transferee, even with approval of Government is not advisable. There is very little that Government can do to check transactions of undesired consideration money on the back of public assets. If the RL & PL holder wishes to transfer/ relinquish the concession, he/she/company/ society may be allowed do so to the State Government for which he/she/company / society may be paid appropriate compensation as to be decided by

the State Government.

The only exception to such a transfer may be in case of individuals, companies & societies transferring the license and lease to another individual, company & society who/which already has a value addition facility or has a facility which has been approved by the State Government and has already met the minimum milestones as per the MoU signed with the State Government required to be met and has therefore been declared as eligible for consideration of his/its mineral concession application or in case of acquisition & mergers changes in partnership & company status as per Companies Act. In such cases direct transfer can be allowed subject to the satisfaction of other conditions and terms laid down in the Act with permission of the State Government. In all other cases no transfer should be allowed. When direct transfer takes place there is no way to regulate that the transferee is not only not eligible for a concession as per the Act but is also an appropriate person deserving of a mineral concession as per provisions of the Act and Rules.

Section 17 (1) : Now enables transfer of license to any person eligible for hold such license under the provisions of the Act & Rules made thereunder. Under such a circumstances, the State has very little to regulate transfer of licenses and consequent grant of mining lease, as the transferee comes to enjoy the concession of seamless transition.

However section 18 dealing with transfer of mining leas, while laying down a stricter protocol for transfer does not enable the State Govt. a scrutiny of the transferee's credentials except as those provided in section 18(3). Even this is not likely to check speculative transfers resulting a unaccounted transactions of black money as seen today.

Section 19		Minor Minerals should be excluded from the purview of grant of RL.
Section 20,21	:	No comments.
Section 22 & 23	sub-sec. 22(4) & 23(4) :	These two sections are very critical from the perspective of the consistent demand of the State Government seeking legal freedom to choose the most appropriate applicant.

Section 22 deals with the procedures for grant of LAPL and section 23 deals with procedures for grant of PL. In both the cases the State Govt. shall consider only such application as are eligible in terms of the Act. The terms of eligibility for grant of concessions are listed in section 5. As regards the issue of grant of the mineral concession section 22(4) that deals with LAPL and section 23(4) that deals with PL make it compulsory for the State Govt. to grant mineral concession in favour of the first applicant eligible under the Act and Rules made thereunder and all other applicants shall be deemed to have been refused to the extent of an area granted to the applicant. The state Govt. enjoys no freedom to refuse the

first applicant a grant of PL or LAPL as the case may be. Though sections 22(5) and 23(5) provide for consideration of a subsequent application it can be done only after communicating and giving an opportunity to the applicant whose application is refused to represent within a reasonable period of not less than 30 days. A reading of section 22(4) and 23(4) along with terms listed in section 5 makes it clear that there hardly exists any ground for rejecting the first applicant. These two sections make the claim of the first applicant absolute. The State Govt. desirous of utilizing its mineral resources for value addition locally with a view to maximizing revenue generation as also employment creation for the local people gets circumscribed by such absolute provision. In the current Act the State Govt. enjoys the option to exercise its discretion under the provision of section11(2), 11(3), 11(4) and 11(5) of MMDR Act, 1957. Such provisions are not available in the new Draft Act. Hence, section 22(4), 23(4) and 13(1) may appropriately be modified to enable the State Govt. to choose a later applicant in preference to the earlier application.

Section 23- 28		:	No Comments.
Section 29	Sub-sec. 29(2)	;	The necessity of seeking prior approval of the Central Government for extension of mining leases may be omitted. The State Government should be authorized to do so even in case where the lease was granted with prior approval of the Central Govt. if the application

			for extension is complete in all respects and satisfies the criteria laid down.
Section 30-37		:	No Comments
Section 38	Sub section 38(1)	:	Sec 38(1) enables reservation of any area not already held under a PL or ML for purposes of mineral conservation. This is analogous to Sec 17A(1) of the existing Act. However, other provisions like Sec 17A(IA) and 17A(2) have been omitted in the draft bill. Sec 17A(2) which enabled the State Government to reserve any area not held under PL or ML for undertaking prospecting or mining operations through a Government company or corporation owned or controlled by it have been now omitted. A similar provision should continue in the draft Act too. It is seen from experience that the Orissa Mining Corporation(OMC), a State PSU has facilitated Orissa to promote mineral based industries in the State by meeting ore requirement partly or wholly. This comfort of sustained ore linkage in the absence of an ML has ensured secured supply of ore to the industries and made possible investments in Steel etc. Further, the price leadership provided by OMC in the State has proved to be a balancing factor in the mineral market of the

			state and the country. There are many other reasons and there would be many exigencies in the long run that warrant existence of a strong & stable state / central mining PSU in the interest of mineral mining and marketing besides value adding manufacturing sector. Hence, a reservation provision in favour of State PSUs is suggested.
Section 39 - 40			No comments
Section 41 & 42			The rates of royalty should be fixed on ad valorem basis and in cases, where it is not possible to do so, the period of enhancement in the rates of Royalty and Dead Rent should be “3 years” and not “5 years”. Such enhancement should also be compulsory.
Section 43 & 44		:	No Comments.
Section 45	Sub Section 45(2)		• While the provision empowering the State Govt. to levy and collect cess on both major and minor minerals is welcome, the prescription of a limit of such levy to maximum of 10% of royalty is restrictive in nature. In line with section 44 where no such upper limit has been indicated in case National Mineral Fund, the discretion of percentage of levy be left to the States in case of State Mineral

		Fund.
Sec.46-51		• Further, the interval of enhancement should be reduced from 5 years to 3 years.
Section 52		No comments
		This provides for seizure of loots, vehicles etc. by authorized officers leaving the confiscation process to the courts. This does not enable a strong enforcement. The magnitude of mining activities and consequent irregularities / illegalities have increased manifold. Approaching the courts for confiscation causes avoidable procedural delays. It is necessary to empower the officers authorized by the State Govt. with powers to confiscate the seized loots, vehicles, commodities etc. This will bring in quick results and make enforcement more meaningful.
Section 53-67	Sec.38	: No Comments
Section 68		: The list of minerals initially included in the First Schedule should have been included in the Draft Act so that the stakeholders would have known which minerals are in and which are out.
Section 69-75		: No Comments.