

F.No. 15(3)/2011-MV
Government of India
Ministry of Mines

New Delhi, 10th June 2011

To

The Secretaries (Mines & Geology) of the State Governments
(as per list attached)

Sub:- Guidelines regarding MoUs for transparency and scientific mineral development-reg

The Ministry of Mines has prepared draft guidelines for the State Government to enter into MoUs with the interested persons/ companies for enhancing the transparency and scientific development of minerals, in line with the policy guidelines enunciated in the National Mineral Policy, 2008. **A copy of the draft guidelines is enclosed for consideration and it is requested that comments, if any, may be positively sent by the 1st July 2011 by email at anil.sub@nic.in or at psas.dom@nic.in.** The draft guidelines have also been uploaded on the website of the Ministry of Mines (<http://mines.gov.in>) for inviting the comments of concerned persons/organisations/Associations.

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(Anil Subramaniam)

Under Secretary to the Government of India

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Copy uploaded on website for (not sent individually by mail):

All concerned persons/organisations/Associations (with a request to submit their comments by the 1st July 2011 by email at anil.sub@nic.in or at psas.dom@nic.in).

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(Anil Subramaniam)

Under Secretary to the Government of India

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**F.No.15(3)/2011-MV
Government of India
Ministry of Mines**

New Delhi, dated the June, 2011

To

The Secretaries (Mines & Geology) of the State Governments,
(as per list attached)

Sub:- Guidelines regarding MoUs for transparency and scientific mineral development.

Sir,

The National Mineral Policy in para 7.4 underlines the contribution of mining to the generation of wealth and creation of employment, and encourages linkage between user industry and mineral producing units. Mining as a backward linkage and value addition as a forward linkage is, therefore, to be encouraged.

2. The National Mineral Policy in para 7.7. also points out the fact that mineral deposits generally occur in remote and backward areas with poor infrastructural facilities which often inhibit their development and, therefore, a major thrust needs to be given to the development of linking infrastructure, and an enabling environment should be created to motivate large mining companies to undertake creation of transportation infrastructure on their own.

3. The matter has been under consideration of the Central Government, and it is felt that it is necessary to develop a clear, transparent and reasonably uniform approach to the issue of development of inter-linkages, given the following:-

- (i) Mining activities create investible surpluses, and incentivizing investment in forward linkages such as value addition increases sectoral efficiency and reduces costs for the consumer.
- (ii) Mining activities require infrastructural inputs including transportation infrastructure, which large mining projects can absorb and the cost can be internalized. Execution of infrastructural projects related to mining by the mining company serves a public purpose, ensures ownership and

consequent maintenance of the created infrastructure and achieves the objective of local area development.

- (iii) In those minerals where there are Small and Medium Enterprises (SMEs), institutionalizing the system of Long Term Agreements (LTAs) by mining companies for supply of raw material will stabilize the SME sector and moderate the adverse impact of cyclic patterns which characterize metal and ore prices, and mining companies who work in this manner perform a useful purpose in public interest.
- (iv) As the National Mineral Policy points out, the backward linkages towards mining are equally important. Metal making industry can obtain economy of operations by ensuring raw material security and should be facilitated in transparently acquiring mining rights (captive mining) or gaining assured access through Long Term Agreements (LTA) on prices and /or quantities.

4. In the context of the issues brought out in the preceding paragraph, it needs to be distinguished that while forward linkages from mining are relatively easy to structure through Memoranda of Understanding (MoU) with mining companies (even at exploration stage), transparently achieving the objectives of a backward linkage policy may involve encountering many of the following situations:-

- (i) The nature or location of the mineral deposit is such that it can only be processed or value added near the deposit (or another site away from mines) and using specific technologies and, therefore, the exploitation of the deposit is linked with the choice of technology or siting of value addition unit.
- (ii) The nature of the value addition process is complicated requiring provisioning of several inputs such as water, power, coal, transportation, infrastructure, etc., and the choice of location for value addition is techno-economic and must be left to the entrepreneur.
- (iii) The value addition industry has a long gestation period even after financial closure because of the various requirements including, in many cases, forest or environmental clearance and/or land acquisition, and, therefore,

creation of processing capacity and tying up raw materials security may have to be disaggregated or may proceed at different speeds.

- (iv) Because of changes in global or national mineral scenario for a particular metal, currently existing raw material security may be under a new or sudden threat (eg. need to remain globally competitive, likelihood of prolonged supply or price volatility or even transportation bottlenecks) forcing an existing unit to build backward linkages for increasing its level of comfort.

5. While industry already well entrenched in place, with raw material security, experiencing changes in the industrial environment (of the kind mentioned in para 4(iv) above) would need to devise their own strategies and responses to the challenges, industries who are to take techno-economic decisions on setting up of a downstream industry in an environment of multiple uncertainties need to be facilitated by reducing the levels of risk or increasing the levels of comfort, enabling them to access capital at lower cost and ensuring that industry can be established in remote and backward areas with poor or no infrastructure. This requires the State Government to assure such industries all possible support and incentives for early execution of the backward linkages. The State Governments are, therefore, advised to issue State-specific guidelines or advisories in this behalf from time to time.

6. Several States already have a procedure for entering into Memoranda of Understanding (MoU) which partially covers many of the above mentioned concerns. It may, however, be mentioned that such MoUs have no specific legal force in the context of the provisions of the Mines and Minerals (Development and Regulation) Act 1957 (MMDR Act). MoU is at best, a tool to assist development and promote investment in areas of priority identified by the State Government. It needs to be clearly recognized that merely the fact that a company or a person has entered into a MoU with the State Government cannot be used by a company or person as a legally binding contract to obtain any preference over other competing interests, especially in case of a situation of multiple applicants for obtaining allocation of natural resources. However, the individual

items per se committed in the MoU by a company or person in itself can stand on its own, as a basis for being considered for grant of preference to such company or person in competitive situations. However, for guidance of the States the following may be mentioned:-

- (i) MoUs by their very nature are merely non-legal documents setting out the intention of the parties (i.e., State Government and the industry) to work towards certain objects and goals which may include a number of activities (mining as well as non-mining related) such as setting up plant/unit, constructing a township, R&R activities, local area development, etc. in addition to mining. The MoU is intended to identify the expectation of the parties from each other, enabling each party to plan and execute activities based on their expectation. Achievement of any of the objectives or goals would indicate the commitment of the parties, and is intended to reinforce the expectation that the other party perform with equal diligence. However, since many of the objectives and activities may be conceptual or conditional or facilitatory, and performance under MoU is not directly linked to any consideration. Very often MoUs are not enforceable as contracts but only serve as a statement of intention at a level or two higher than a gentleman's agreement.
- (ii) In the mining sector, downstream value addition as well as upstream development and R&R activities are often viewed as important aspects of a good mining project and MoUs are often entered into by State Governments in order to get best value for a mineral deposit and to mitigate some of the adverse effects of mining activities. Since the MMDR Act does not empower to State Government to enter into contractual obligations for a mineral deposit in lieu of promise of stipulated upstream and/or downstream activities by the companies, entering into a MoU merely enables the company to start making investment in upstream/downstream activities with the comfort of an MoU, in the full knowledge that an MoU is not a guarantee to a mineral concession. Since in many cases, mineral ore as a tradable commodity

could enable the company to start business, clearly it is not necessary that the mineral deposit be given first before the company makes its investment. Indeed, given the long gestation period and uncertainty in setting up the industrial unit, etc. at the inception stage, it would be anybody's guess as to whether the unit will come up first after all clearances, or the mineral concession will be available after all relevant clearances, since each of the two streams of activities will move at its own pace, governed by local dynamics. In any event, it can be easily recognized that provided that such matters are transparently and properly regulated, MoUs can be used as a tool to ensure planned and systematic development of the mineral sector, sub-serving public interest.

(iii) Of course the MoU must fall squarely within the ambit of the declared public policy, and under no circumstance seek to supersede the MMDR Act. As such, it can be discerned that:-

(a) There must be compliance with the National Mineral Policy, 2008, and with the MMDR Act, with provisions of the legislated Act taking precedence over the executive policy to the extent of inconsistency and *per contra*, interpretation most in consonance with the Policy being applied where the legislative provision permits alternative interpretations;

(b) There must be compliance with the State Government public policy in this regard, which obviously has to be consistent with the MMDR Act;

(c) For the Central Government to take cognizance of a matter, the State Policy has also to be consistent with the National Policy.

(iv) Having regard to the above observations, and in order to clarify all aspects relating to the MoUs in the context of their application in mineral concessions, the following additional points also gain significance:-

(a) The items committed in the MoUs signed by the State Government must be in conformity with the declared public

State Mineral Policy and must be entered into in a transparent manner, and suitably notified in the State Government Website and put for public display in the Directorate of Mining and Geology.

(b) While the fact that a company or a person has entered into a MoU with the State Government cannot be used by a company or person as a legally binding contract to obtain any preference over other competing interests, especially in case of a situation of multiple applicants for obtaining allocation of natural resources, the individual items per se committed in the MoU by a company or person in itself can stand on its own, not exactly as part of the MoU, as a basis for being considered for grant of preference to such company or person in competitive situations. An indicative list of such items are given below:-

- Exceptionally large-scale investments in the mining project or value addition unit (the investment value should clearly stand out in comparison with any other existing or proposed investments in the region);
- Large scale infrastructure development (of a nature to be specified) in the designated remote or backward areas of mineral occurrence;
- Introduction of state-of-art or special technology with proven potential of better or more efficient utilization of the mineral resources;
- Long-term ore linkages particularly to serve a public purpose such as supply to small and medium enterprises (SMEs), price setting in the interest of mineral development, etc.

(Any item considered as a special reason needs to be clearly specified as such by the State Government in its State Mineral Policy which should be displayed in the State website)

- (c) Each individual items of commitment in a MoU must clearly specify the quantum and nature, and the extent of applicability in the specific context. Obviously, signing of a large number of MoUs indiscriminately and without considering what the other party is bringing to the table, is not compatible with the use of the committed items in the MoU as a special reason.

- (d) An MoU for exploitation of a mineral resource at a specific location (i.e., specific lease area) in anticipation of the concession is more in the nature of a contract than an MoU and must be deemed to be incompatible with principles of fair play and equity because it will give that MoU applicant an unfair advantage in relation to competitive (MoU or non-MoU) applicants who apply for the same area.

- (e) However, where the State Governments consider that specific committed items in the MoU may qualify as special reasons in a competitive situation, especially involving cases of chronological priority, then in such situations, the State Government should invariably offer all the competitive applicants an reasonable opportunity to match the committed item of MoU being considered as special reason within a reasonable time, and then consider the competitive offers for allocation of resources, rather than exercise discretion.

- (f) In case any committed item of the MoU and not MoU per se is treated as a basis (special reason) for giving preference in grant of concessions in competitive situations, it is necessary to make its provisions enforceable, and as such State Government must send all details of the MoU along with the mineral concession proposal to the Central Government while seeking approval,

and furnish justifications to make such items of the MoU which were considered as special reasons enforceable as special conditions in the lease agreement in terms of Rule 27(3) of the Mineral Concession Rules, 1960. These special conditions may indicate specific items and general items of the commitment. Specific items of commitment could include the following:-

- Milestones of achievement and triggers for steps by the other party on that basis;
- Captive use and ore linkage terms and conditions;
- Investment size and phasing;
- Beneficiation/value addition of ore;
- Setting up of end-use plant for the minerals;
- Employment of technical staff;
- Local area development to be undertaken including infrastructure and services and investment in this regard.

General items of commitment should invariably include:

- Prohibition on assigning, subletting, mortgaging or in any other manner, transferring the concession rights without prior approval of the Central Government, in case the concession is granted on the basis of special reasons.
- Prohibition on change in terms and conditions of MoU without prior approval of the Central Government in case priority is given on the basis of special reasons where such change are likely to have a bearing on the 'special reasons'.

- (v) As already stated, MoUs are generally used by the State Governments as a composite document for obtaining commitment for setting up a metal making or other value addition plant as well for facilitating State support

in obtaining access to natural resources. It is natural that the bonafides of the other party is ascertained by ensuring that only such MoUs will be considered where a plant/industry (or other specific action) has been set up on the basis of the MoU but mineral concession has not yet been granted as per any committed item of the MoU.

(vi) A common reason for State Government to pick and choose among the MoUs during allocation of natural resources is a claim of non-performance of the signatory company or person, in respect of the MoU. Such a procedure at the stage of allocation of natural resources involves discretion and may be totally non-transparent and even arbitrary. In order to consider any item of MoUs to be used as special reasons it is necessary that the evaluation of performance under MoUs be enforced systematically, periodically, transparently, and separately. In this respect, it would be appropriate to manage the process within a framework which could possibly comprise the following:-

- (a) Existing MoUs should be reviewed every six months in terms of the specified milestones and MoUs which have outlived their utility or where there is substantive non-performance of the other party should be scrapped so that there is a regular process of 'weeding out'.
- (b) Fresh MoUs should be entered into keeping in mind earlier MoUs of the same nature where the State Government is yet to deliver on its part, and also the available natural resources in the State.
- (c) Since it is inevitable that with changes in techno-economic environment, fresh MoUs may be necessary from time to time, MoUs should have 'sunset' clauses with alternative solutions or renegotiation provisions in case the State is unable to deliver within a stipulated period (say 5 years).

- (vii) It may be noted that while the above guidelines elaborate the process and procedures, they do not specify the policy and content of the MoUs since they have to be State specific. In order to enable this to be done, it will be necessary for the States to notify a comprehensive circular specifying the policy and content, and including therein the details of these guidelines in so far as procedures and consequences are concerned, subject to any variation that the State Government may consider desirable.
- (viii) The State Government will also need to enter into supplementary MoUs with existing MoU companies to comply with the guidelines notified by the State Governments, and while doing so may ensure that the process of entering into supplementary MoUs filters out routine MoUs that may have been entered into earlier. The list of all qualifying MoUs (including supplementary MoUs) may then be put up by the State Government on its website.
- (ix) In the Annexure, we are enclosing some of the best practices which are suggested based on our analysis of MoUs entered into by the various State Governments in the recent past. State Governments may like to keep these factors in mind while entering into MOUs/supplementary MoUs.

Yours faithfully,

(Anil Subramaniam)

Under Secretary to the Government of India

Ministry of Mines

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Copy to:

1. Indian Bureau of Mines, Nagpur
2. FIMI
3. CII
4. ASSOCHAM
5. FICCI

ANNEXURE

The following are some of the best practices which are suggested based on analysis of MOUs entered by the various State Governments.

- i) **Description of Project/Activity:**

The MOUs should clearly state the manufacturing capacity of the plants and also the captive power plants details. In case of Steel Plants, the type of steel they are making are to be specified along with the proposed total investment in the MOU.
- ii) **Land:**

The MOU entered between the State Government and the companies specifies that the Land required for establishing plant is given on lease basis and the State Government generally acquires the land and hand it over to the company through the Collector. The land acquisition cost is generally borne by the company. In the scheduled areas, the land owned by tribals is generally excluded from acquisition. The MOU also gives other details of the State resettlement and rehabilitation policy in case of people who are going to be relocated.
- iii) **Water:**

The facilities for water to the plants are provided by the State Government from an identified source and the usual rates charged for water are specified in the MOU.
- iv) **Infrastructure :**

The MOU agreed between the State and the companies give the details of the infrastructure required for the plants and also for development of mines. Most of the State Governments provide the infrastructure such as roads, railway links, water, transmission lines on payment basis to the companies.
- v) **Raw Material, Iron and Other Minerals:**

The State Government on completion of certain agreed milestones of the MOU provides the transfer of mining lease or provides an assurance for supply of raw material. The quantity of the raw materials to be supplied such as iron ore, manganese ore, limestone, dolomite etc. are specified in the MOUs. In some cases, the State PSUs involved in the mining will supply the raw material to the MOU companies at a price determined by the price fixing Committee constituted by the State Government.

- vi) **Coal:**
The State Government also facilitates the allotment of coal blocks/coal linkages to the companies who entered into MOUs. These details are agreed upon between the State Government and companies and specified in the MOUs.
- vii) **Environment and other clearances:**
The State Government in the MOUs agree to facilitate the MOU companies to obtain the Environment and Forest and other clearances by taking up with concerned authorities of Central Government.
- viii) **Power:**
The MOUs give the assurance by the State Government for initial power supplies for establishment of units and township on payment basis till companies establish their own captive power plants.
- ix) **Incentives:**
The MOUs specify the incentives under the Industrial Policies of the State Government, such as exemption from Octroi, Entry Tax and other incentives agreed upon between the State Government and the Companies.
- x) **Local Area Development:**
In some MOUs the State Government insists on certain percentage of the revenues to be spared by the companies for the community development, training of the local people, environmental care, health facilities etc.
- xi) **General Clauses:**
In case of Joint Ventures, equity will be given to the State PSUs in the MOU company considering the value of giving mining sub-leases, expenditure incurred for infrastructure.