



NAJAR

National Alliance for Justice, Accountability & Rights

*[An initiative of the National Alliance of People's Movements (NAPM),
collectivising progressive legal professionals for democratic causes]*



 National Alliance for Justice, Accountability and Rights (NAJAR)



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NAJAR Expresses Strong Opposition to the Statutory Pathway for Post-Facto Environmental Clearances Legitimized in the Recent Vanashakti Judgment of the Apex Court

Post-facto Environmental Clearances Severely Undermine Environmental Rule of Law; Threaten our Ecological and Democratic Futures

5th August, 2026: National Alliance for Justice, Accountability & Rights (NAJAR), a pan-Indian coalition of lawyers, law students, law faculty, law researchers and environmental justice advocates expresses deep concern at the Supreme Court's recent judgment in Vanashakti v. Union of India, dated 29th July, 2026, on post-facto environmental clearances. While the Court has rightly reaffirmed that prior environmental clearance remains mandatory and that an executive Office Memorandum cannot override the EIA Notification of 2006, it has raised a deeply disturbing red flag by leaving open a future statutory route for 'retrospective regularization' of environmental violations in the name of public interest. This judgment raises grave questions of constitutional import and needs to be placed before a Constitution Bench of the Supreme Court for fresh and fair adjudication.

As is well-established, the EIA Notification, 2006 requires prior Environmental Clearance (EC) before any construction work or preparation of land begins in connection to projects under its ambit. It structures that decision through screening, scoping, public consultation, and appraisal, so that the environmental consequences of a proposal are assessed before the project alters land, ecology, or affected communities. A prior Environmental Clearance is the centrepiece of this statutory notification, ensuring that the environmental impacts have been duly considered, the affected communities have been fairly consulted and appropriate systems are put in place to limit environmental damage and compensate for it, in other ways.

In *Vellore Citizens' Welfare Forum v. Union of India* [AIR 1996 SC 2715], the Court incorporated the precautionary principle and sustainable development into Indian law. In *M.C. Mehta v. Kamal Nath* [AIR 1997 SC 1461], it affirmed the public trust doctrine. In *Common Cause v. Union of India* [AIR 2017 SC 3570] and *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati* [AIR 2020 SC 2476], it made clear that ex post facto environmental clearance is alien to environmental jurisprudence because it defeats the preventive logic of environmental regulation. **The Supreme Court's own environmental jurisprudence has consistently proceeded on the basis that prior appraisal is not a procedural technicality but a substantive safeguard.**

In 2017, the Central Government had issued a notification allowing a one-time relaxation in the EC process - opening a narrow window of six months within which projects, in breach as on date of its issue, could apply for EC upon complying with strict norms of damage assessment, remediation and community augmentation. Later, in 2021, another Office Memorandum (OM) was issued, laying down the Standard Operating Procedures for grant of ECs to projects that were in violation of the EIA

notification (e.g. those which had commenced activities or expanded their capacities, without obtaining the appropriate EC). Both, the 2017 Notification and the 2021 OM had been struck down in the **first Vanashakti** judgment (2025 INSC 718: 2025 SCC Online SC 1139), delivered by a Bench of Oka and Bhuyan JJ, which held that the grant of an *ex post facto* EC was alien to environmental jurisprudence. It also restrained the Central Government from issuing any similar instrument in the future.

After the first Vanashakti judgment was recalled by allowing a Review petition filed by Confederation of Real Estate Developers of India ('CREDAI'), it was placed for rehearing before a bench comprising the CJI, Bagchi and Pancholi JJ. This bench has passed the current order on 29th July 2026, which quashes the OM of 2021, holding that such a power cannot be wielded on the administrative side. However, this order upholds the 2017 notification as a valid delegated measure, and further empowers the Central Government to issue 'valid notifications' under the Environment Protection Act of 1986, laying down conditions and procedures for grant of *ex post facto* ECs to projects which have commenced in violation of 2006 Notification.

It is this allowance of post facto clearances, which alarms us. Once the project is built and the environment is altered, the pressure to regularise illegality becomes overwhelming, and the law begins to respond to a fait accompli rather than prevent harm at the outset. This is a serious constitutional and environmental concern and we fear that it will contribute to the general weakening of an already feeble Environmental Rule of Law, under continuous assault from big corporations and unscrupulous politicians and bureaucrats. Public reporting indicates that the 2017 one-time scheme regularised 53 central and State projects worth nearly ₹19,500 crore. The July 2026 judgment preserves the legal effect of those clearances, while also wrongly recognising a future statutory route for similarly structured exceptional schemes.

Such a trajectory has far-reaching ramifications. It weakens the preventive purpose of environmental law, rewards non-compliance, and creates incentives for projects to proceed first and seek 'legalisation' later. The Jan Vishwas Act of 2023, which had reduced criminal penalties to civil liabilities for a whole host of offences, had already stripped the EIA notification of any criminal consequences for the defaulter for proceeding construction without first obtaining a prior EC. The possibility of a post-facto EC, read together with the Jan Vishwas decriminalization framework risks converting environmental compliance into a cost of doing business rather than a constitutional duty.

Having carefully considered the judgment and its implications, NAJAR is of the view that the present position raises the following serious concerns:

- 1. Weakening of the prior-clearance rule:** The judgment correctly holds that prior environmental clearance is mandatory and that the 2021 Office Memorandum could not lawfully create a perpetual post-facto regime. Yet, the opening left for a 'future statutory notification' cuts against the logic of that very holding. If prior clearance is a mandatory preventive safeguard, a continuing legal route for retrospective regularization undermines the normative force of the rule itself.
- 2. Departure from the Court's own precautionary jurisprudence:** The Court's earlier environmental decisions have treated precaution, public trust and inter-generational equity as substantive constitutional principles, not merely 'balancing considerations' to be invoked after a violation has occurred. A legal architecture that permits later regularization of projects begun in breach of law sits uneasily with that jurisprudential foundation.
- 3. Creation of perverse incentives:** Where projects can be built first and justified later through payment, classification and public-interest reasoning, the regulatory system creates a perverse incentive structure which seems to suggest that the bigger the violation and the greater the sunk

investment, the stronger the later plea against demolition, restoration or closure becomes, which effectively turns illegality into leverage.

4. **Expansion of amnesty through the language of exception:** The judgment itself condemns the 2021 OM as a perpetual amnesty scheme applicable to all permissible projects, yet it simultaneously preserves the possibility of a narrowly tailored amnesty notification in supervening public interest. Where narrowness, public interest, and time limitation are left undefined with precision, the practical effect is the same. The exemption is merely repackaged in a more legally potent statutory form, with greater force than an Office Memorandum, and the danger is that what is described as ‘exceptional’ will become normalised in practice.
5. **Weakening of deterrence under the Jan Vishwas framework:** Where civil penalties replace criminal consequences and retrospective regularization remains legally imaginable, violation becomes more easily calculable as a financial risk. This weakens deterrence and risks normalising ecological harm as something that can be priced, settled and absorbed.

For these reasons, we feel the present Vanashakti judgment (July 2026) raises grave questions of constitutional import and needs to be placed before a Constitution Bench for fresh and fair adjudication. The continued recognition of a statutory pathway for retrospective regularization is difficult to reconcile with the Court’s own reasoning that prior environmental clearance is mandatory, preventive, and central to environmental rule of law. The judgment itself reaffirms that environmental protection is integral to constitutional guarantees, and that any departure must be narrowly tailored and justified. Yet the continuing recognition of a statutory route for retrospective regularization compromises that logic and risks defeating the jurisprudence the Apex Court has built over decades.

In the light of the above serious concerns, we also demand the Central Government to ensure:

1. **No recurring or sector-wide amnesty schemes:** No future notification should be permitted to operate as a general or recurring regularisation mechanism for violating projects. Any attempt to create such a regime would hollow out the prior-clearance requirement and incentivise unlawful construction followed by later pleas of public interest and sunk costs.
2. **Strict exclusion of deliberate and irreversible violations:** Even in the rarest case, no regularisation should be available for deliberate, repeated or strategic violations, or for projects causing irreversible ecological harm, serious community injury, or unlawful alteration of ecologically sensitive areas.
3. **Restoration, accountability and public disclosure:** Monetary penalties alone should never be treated as sufficient. Any exceptional case, if at all entertained, must require independent damage assessment, mandatory public disclosure, restoration obligations, continuous monitoring, and personal accountability for public officials who enabled or ignored the violations.
4. **Preservation of prior clearance in letter and spirit:** The rule of prior environmental clearance must remain a real safeguard and not a formality capable of later cure. Environmental rule of law requires prevention, not post-hoc negotiation after ecological damage has already occurred.

As legal professionals committed to a progressive environmental jurisprudence, we feel judicial pronouncements from the higher courts should strengthen and not weaken the environmental governance regime, which is already under immense stress in India, today.

Issued by Land, Forests and Ecology Thematic Group of NAJAR: National Alliance for Justice, Accountability & Rights

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