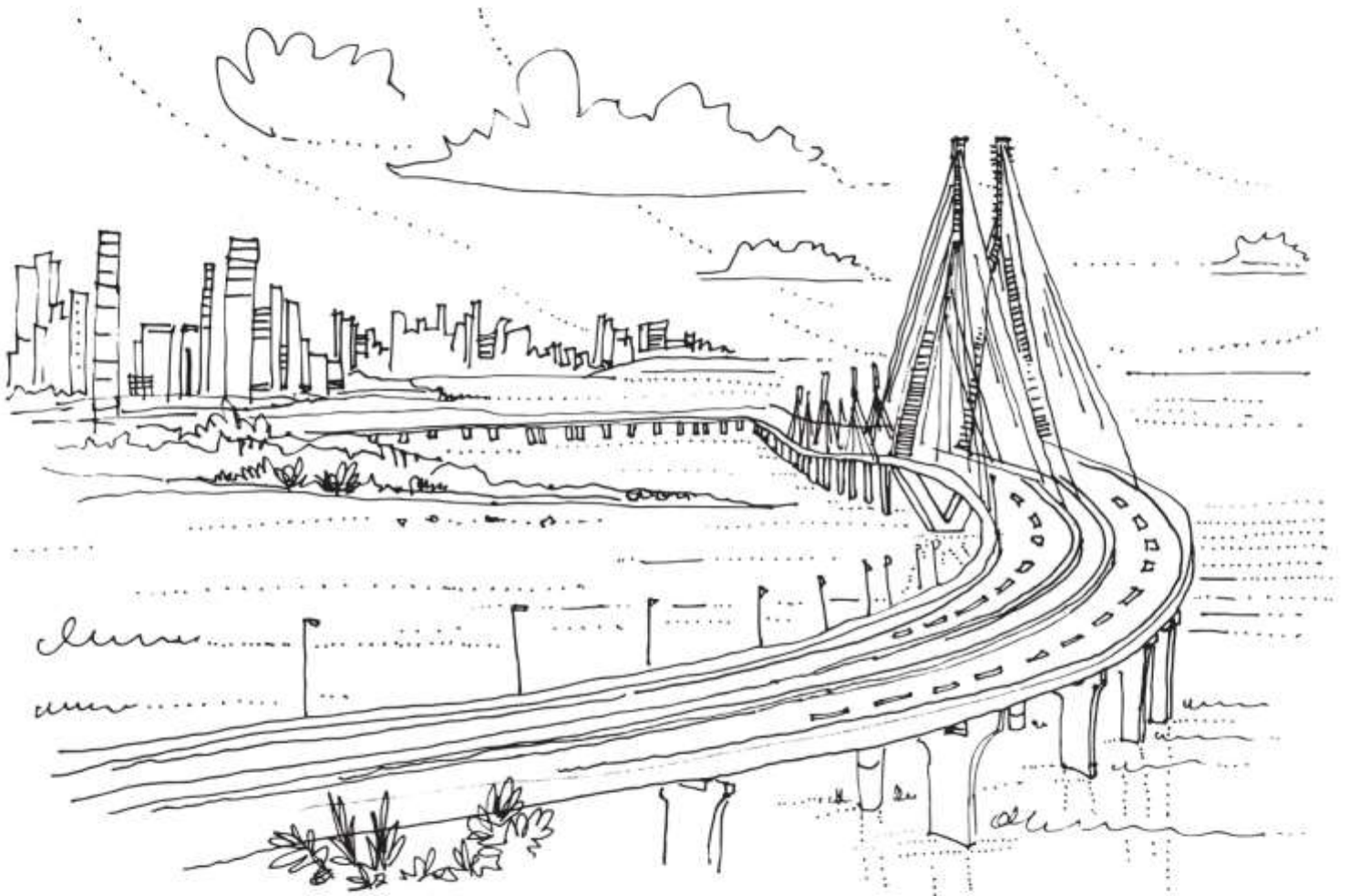




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# **Infrastructure and Energy Digest**

## **Overview of Legal and Regulatory Developments**

August 2019

# INFRASTRUCTURE



## Dam Safety Bill, 2019

India has close to 5700 dams<sup>1</sup>. Yet, Governments have been unable to put together a comprehensive legislation for safety of dams since the 1980s. The Dam Safety Bill, 2019 (Bill) which was passed by the Lok Sabha on August 2, 2019, has come as a welcome relief. The Bill provides for the surveillance, inspection, operation and maintenance of

specified dams across India for circumventing disasters associated with dam failure. The Bill also aims at ensuring the safe functioning of dams by putting in place an institutional mechanism along with uniform safety procedures designed for ensuring the safety of dams.

### Applicability of the Bill

The Bill applies to specified dams in India having either a:

- Height of more than 15 metres; or
- Height between 10 metres and 15 metres and satisfying at least one of the following design and structural conditions:
  - Length of the crest: At least 500 metres
  - Capacity of the reservoir formed by the dam: At least 1 million cubic meters
  - Maximum flood discharge dealt with by the dam: At least 2000 cubic metres per second
  - If the dam faces especially difficult foundation problems
  - If the dam is of an unusual design

### Salient Features of the Bill

#### ▪ National Committee on Dam Safety (NCDS)

The Bill contemplates constitution of the NCDS whose primary functions would be as follows:

- Formulating policies and regulations regarding dam safety standards and prevention of dam failure related disasters
- Acting as a forum for exchange of views on adoption of remedial measures for relieving distress conditions in specified dams and appurtenant structures
- Analyzing causes of major dam failures and suggesting changes in dam safety practices
- Making recommendations on the (i) rehabilitation requirements of ageing dams (ii) coordinated reservoir operations of cascading dams (iii) provision of funds associated with research and development for dam safety

#### ▪ National Dam Safety Authority (NDSA)

The Bill also considers the formation of the NDSA for which will perform the following functions:

- Implementing the policies formulated by the NCDS
- Resolving issues between State Dam Safety Organisations (SDSOs) or between a SDSO and any dam owner in that State
- Maintaining a national level database of all specified dams in India, including serious distress conditions
- Liaising with the SDSOs and the owners of specified dams for standardization of dam safety related data and practices, and related technical or managerial assistance
- Providing secretarial assistance to the NCDS and its sub-committees

#### ▪ State Dam Safety Organisation (SDSO)

As per the Bill, State Governments are to establish SDSOs which would have jurisdiction over specified dams situated in the state. The NDSA would act as the SDSO in the following cases:

- Dam owned by one State but situated in another State
- Dam extending over multiple States
- Dam owned by a central public sector undertaking

<sup>1</sup> Central Water Commission (CWC) data, presented by the Ministry of Water Resources in December 2018

The SDSO would inter alia be responsible for:

- Dealing with dam safety
- Perpetual surveillance, inspections and monitoring the operations and maintenance of dams
- Maintaining a database of all dams
- Investigate/cause to investigate or gather/cause to gather data for review and study of the design, construction, repair and enlargement of dams, reservoirs and appurtenant structures

▪ **State Committee on Dam Safety (SCDS)**

Additionally, the Bill proposes that SCDS be constituted to perform the following functions:

- Reviewing the work of the SDSO
- Establishing priorities for investigations for dams under distress
- Ordering investigations with regard to the safety of dams
- Recommending dam safety measures and reviewing the progress on such measures
- Assessing the potential impacts of specified dams in upstream States and downstream States
- Recommending provision of funds for rehabilitation of ageing dams

▪ **Obligations of dam owners**

As per the Bill, dam owners would be required:

- To provide a dam safety unit in each dam which will inspect the dams (i) pre and post monsoon, (ii) during and after every earthquake, flood, or any other calamity or sign of distress or unusual behaviour noticeable in the dam
- To prepare an emergency action plan and undertake disaster management
- To carry out risk assessment studies for each dam at specified regular intervals
- To prepare a comprehensive dam safety evaluation of each dam, at regular intervals, through a panel of experts
- In certain cases, such as major modification of the original structure, or an extreme hydrological or seismic event, evaluation will be mandatory

**Our view:** The Ministry of Water Resources, Government of India had (vide its press release dated June 20, 2018) accorded recognition to the Bill as a step towards standardizing and strengthening dam safety practices and institutions. Although the Bill largely serves to address concerns about dam safety, it lacks specific provisions for flood control and flood prevention. Flooding, a cause of several catastrophes - has been a critical issue which has been surprisingly overlooked.



# ENERGY



## Notification of the Ministry of Power on utilization of cash surplus for servicing debt

The Ministry of Power (MoP) has, vide Office Memorandum dated August 5, 2019 (OM), stipulated a mechanism for ensuring that the net surplus generated by stressed thermal power projects, after meeting operating expenses, is entirely utilized for servicing debt in the first place.

The OM comes as a follow up to the High-Level Empowered Committee's report dated November 12, 2018 addressing the issues of stressed thermal power projects. Further, the OM is in alignment with an earlier sanction accorded by the Government<sup>2</sup> on the utilization of net surplus for servicing debt, after the operating expenses have been met.

### Mechanism to be put in place for servicing debt

The OM lays down the following mechanism for ensuring the utilization of net surplus generated after meeting operating expenses, towards servicing debt in the first place:

- Developers using coal linkage under the amended Scheme for Harnessing and Allocating Koyala Transparently in India (**SHAKTI**) are required to set up a Trust Retention Account (**TRA**). The entire revenue from generators would be deposited in the TRA.
- The TRA would be managed by the lead banker. In case of non-banking finance companies, the TRA may be managed by any bank which is a lender.
- Priority of making payments
  - The TRA would be utilised for making payments to stakeholders in the following order:
    - Payments towards statutory dues
    - Payments towards fuel cost
    - Payments for transmission expenses
    - Payments for operation and maintenance expenses of the power plant
    - Interest payments to lenders
    - Principal payments to lenders
  - Residual amounts, if any, after making all the aforesaid payments are to be retained by the Developer.
- Financial costs would be allowed on actual basis subject to the aforesaid priority of making payments.
- Additionally, the OM also contemplates that a Cash Flow Monitoring Agency (**CFMA**) (such as lender's financial adviser and lender's engineer/project manager) be appointed by the lenders to verify cash flow and actual costs incurred.

**Our view:** Inefficient utilization of financial resources is often a core attribute of stressed power plants. In this connection, the mechanism for better management of cash which has been laid down by the MoP in consultation with the Department of Financial Services is a welcome move at reducing stress in the power sector.

## Update on Andhra Pradesh tariff renegotiations

ELP's July 2019 Infrastructure and Energy Digest's discussed the Government of Andhra Pradesh's (AP Government) move to review all power purchase agreements (PPAs) that had been signed during the earlier Telugu Desam Party (TDP) government.

Following the AP Governments' announcement, the move has been widely criticized by those within the industry given that several companies that have been awarded PPAs are funded by foreign investments and overseas sovereign & pension funds. As per news reports, on August 14, 2019, the Japanese Ambassador to India, Kenji Hiramatsu, voiced the concerns of Japanese companies that have been closely following the

developments in the renewable energy sector in Andhra Pradesh. The Japanese Ambassador requested the AP Government to re-examine its stance in the context of honouring laws and for ensuring continued investment in the renewable energy sector in India.

It has also been reported that the Ministry of Power and the Ministry of New and Renewable Energy also wrote to the AP Government in this regard.

Since then, news articles suggest that the AP Government has softened its stance on the re-negotiation of the PPAs. The spokesperson for the AP Government indicated that only PPAs with allegations of corruption would be looked into.

<sup>2</sup> Vide Office Memorandum (of the Ministry of Power) bearing No.L-2/2018-IPC (Part-4), dated March 8, 2019

## RENEWABLE ENERGY

### Ministry of Power amends Bidding Guidelines for wind power projects

The Ministry of Power (MOP) through its notification dated July 22, 2019 (Amendment) amended the Guidelines of Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects which had been notified on December 8, 2017 (Tariff Guidelines). The Tariff Guidelines provide a framework for the

procurement of wind power and define the roles and responsibilities of the various stakeholders involved in such procurement.

The following are the key amendments made by the MOP:

Subject	Amendment
<p><b>Land Acquisition</b></p>	<p><b>Earlier:</b> The wind power generator was required to procure the land required for the wind power project (<b>Project</b>) within 7 months of the date of execution of the Power Purchase Agreement (<b>PPA</b>).</p> <p><b>Amendment:</b> The timeline for the procurement of land for the Project has now been extended to 18 months as the procurement is now to be done on or before the Scheduled Commissioning Date (<b>SCD</b>).</p> <p>The SCD would be the date as on 18 months from the execution of the PPA or the Power Sale Agreement (<b>PSA</b>), whichever is later.</p>
<p><b>Capacity Utilization Factor (CUF)</b></p>	<p><b>Earlier:</b> The WGP was to declare the CUF of the Project at the time of signing the PPA which could be revised once within 1 year of the Commercial Operations Date (<b>COD</b>).</p> <p><b>Amendment:</b> The WGP could be revised within the first 3 years of the COD.</p> <p>If the project supplied energy less than the energy corresponding to the minimum CUF, the WGP is required to pay to the procurer, penalty for the shortfall in availability of energy. Whilst the Tariff Guidelines contemplated that such penalty would be calculated as directly proportional to the amount of shortfall of energy generated, the Amendment has clarified that the penalty would be calculated as 50% of the PPA tariff. Post the amendment, the penalty as recovered from the WGP is required to be passed on from the Intermediary Procurer to the End Procurer after deducting the losses of the Intermediary Procurer.</p>
<p><b>Part Commissioning</b></p>	<p><b>Amendment:</b> Subsequent to the Amendment, the WGP is required to demonstrate the procurement of the land that corresponds to the part capacity to be commissioned, prior to such part capacity being commissioned.</p>
<p><b>Early Commissioning</b></p>	<p><b>Earlier:</b> Under the Tariff Guidelines, if the Project was commissioned early at part capacity, the Procurer could purchase the generation at 75% of the PPA tariff.</p> <p><b>Amendment:</b> In case of early part commissioning, the Procurer may now purchase the generation at the full PPA tariff.</p>

**Our view:** These amendments are a step toward improving the investment climate with regard to wind power generation as they aim to mitigate some of the risks that have concerned investors so far. The extension of the timeline for land acquisition ought to ease (if not completely mitigate) the risks associated with delays in procuring land. The increase in the revision period of the CUF would also be a welcome relaxation as the CUF of a power plant is a function of many factors that could vary / be improved with the change in technology and the costs associated with it. Thus, widening the window in which the CUF could be revised allows the wind power generators more time in which to gauge and implement these changes in technology. The Amendment has also provided more certainty to the computation of the penalties for the shortfall in the availability of power, as the earlier provision had the potential to cause unpredictable losses. Lastly, the amendments to the commissioning provisions create an incentive for operationalizing the project as soon as may be possible.

## MoEF relaxes lease rent for wind power projects

As per a press release dated August 22, 2019 by the Ministry for Environment, Forests, and Climate Change (**Ministry**), the Ministry relaxed the lease rent of INR 30,000 per MW for wind power projects. Prior to such review, wind power projects established over forest land were mandatorily required to pay costs for compensatory afforestation and net present value. In addition to the aforesaid mandatory costs, wind power projects were required to pay a lease rent of INR 30,000 per MW.

According to the Union Minister for Environment, Forest and Climate Change, Shri Prakash Javadekar, the aforesaid decision was made to encourage investment into wind power projects and help provide wind power at a cheaper rate as the rent would have caused an increase in the per unit cost of wind power.

**Our view:** In light of the present state of affairs in the context of the Andhra Pradesh Government's proposal to re-open/cancel signed power purchase agreements and the uncertainty surrounding such projects, the aforesaid relaxation is a welcome move.

## MERC reiterates Solar Safeguard Duty as change in law

The Maharashtra Electricity Regulatory Commission (**MERC**) vide an order dated July 18, 2019 (Order) stated that the Ministry of Finance's notification dated July 30, 2018 (Notification) imposing 25% on imports of solar cells whether assembled in modules or panels would constitute a 'Change in Law'.

The petitions before the MERC were filed by Juniper Green Energy Private Limited and Nisagra Renewable Energy Private Limited, against the Maharashtra State Electricity Distribution Company Limited requesting compensation for losses incurred due to the imposition of the safeguard duty.

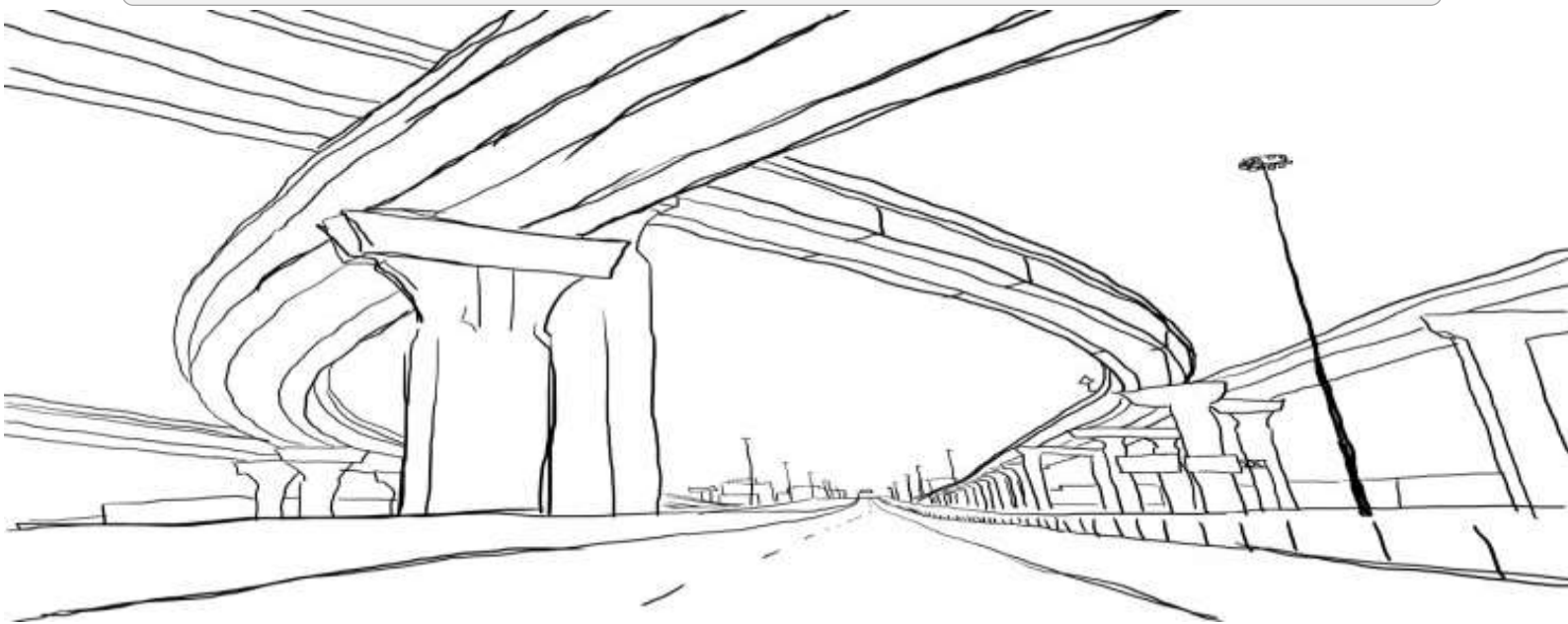
The MERC held as follows:

- The Notification qualified as a 'Change in Law' event.
- Additional expenditure, along with other consequential impact would be considered on actual basis for reimbursement under 'Change in Law'. However, the

MERC emphasized that it (MERC) had in the past declared imposition of solar safeguard duty as a 'Change in Law' event and directed solar project developers to approach the MERC for determination of compensation only when actual impact of the solar safeguard duty is known.

- Accordingly, the MERC observed that it expects that solar project developers approach the MERC only with the actual impact and not waste time and resources by seeking in-principle approval of imposition of solar safeguard duty as a 'Change in Law' event, unless it has a specific case or different relief is being sought. Accordingly, as regards the aforesaid petition, the MERC held that the reimbursement would be subject to prudent checks after the petitioners approach the MERC afresh with all the details in accordance with the provisions of the power purchase agreement (**PPA**).

**Our view:** Consistent with decisions made earlier this year, the MERC has clarified that the imposition of the solar safeguard duty amounts to a 'Change in Law'. Importantly, it has also clarified that solar developers do not have to approach MERC with regards to this issue, as the question of law is already settled. It would however be interesting to see orders of the MERC determining the quantum of the actual impact of the Notification on PPAs.





## Power Ministry approves proposal to declare ocean energy as renewable energy

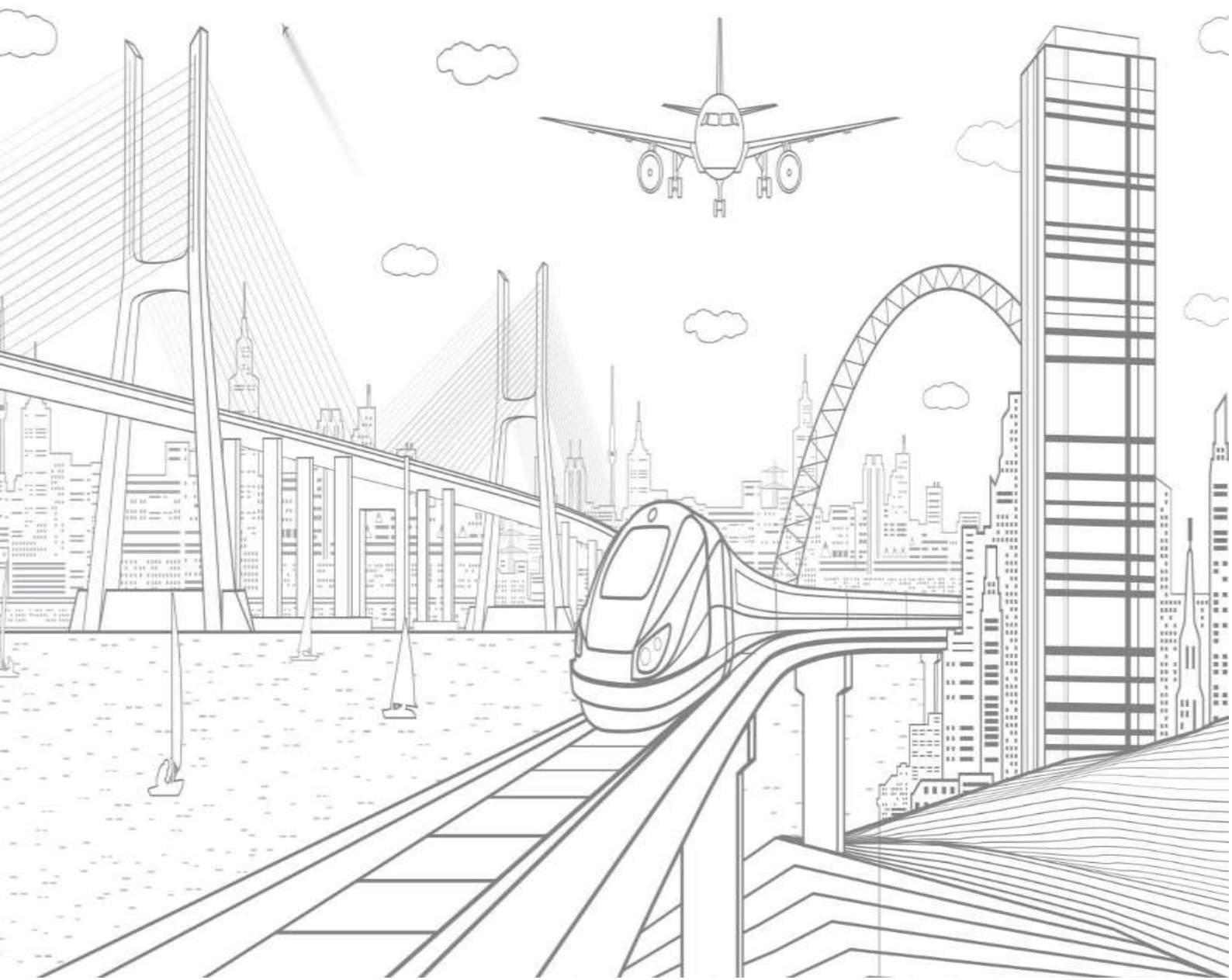
Vide its notification dated August 22, 2019, the Ministry of New and Renewable Energy (MNRE) stipulated that the various forms of ocean energy such as tidal, wave, ocean thermal energy conversion and the like would be considered as renewable energy.

Classified as such, sourcing electricity from ocean energy will be considered toward the fulfilment of the non-solar Renewable Purchase Obligation (RPO). RPOs are obligations which are imposed on certain obligated entities, such as power distribution companies, captive power plants and certain other large electricity consumers, to purchase

energy from renewable sources by various state electricity regulatory commissions, based on each state's varying renewable energy potentials.

The given classification is in accordance with MNRE's emphasis on a technology program that is aimed at overcoming the barriers to harnessing the ocean energy in the country. All stakeholders who are looking at harnessing the power of ocean energy have been invited by the MNRE to demonstrate projects with proven technology under its Research, Design, Development and Demonstration (RDD&D) program/policy.

**Our view:** The MNRE estimates the total theoretical potential of tidal, wave energy, and ocean thermal energy conversion along India's coast to be 12455 MW, 40,000 MW, and 180,000 MW respectively. This is subject to advancement in the existing technology that is deployed in India. Classification of ocean energy as a renewable energy source, allowing RPOs to be fulfilled by ocean energy, and the invitation to demonstrate and develop the necessary technology could create the necessary incentive for investment in ocean energy.





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#### **MUMBAI**

109 A, 1st Floor, Dalamal Towers  
Free Press Journal Road, Nariman Point  
Mumbai 400 021  
T: +91 22 6636 7000

#### **NEW DELHI**

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg  
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge  
New Delhi 110 001  
T: +91 11 4152 8400

#### **AHMEDABAD**

801, 8th Floor, Abhijeet III  
Mithakali Six Road, Ellisbridge  
Ahmedabad 380 006  
T: +91 79 6605 4480/8

#### **PUNE**

202, 2nd Floor, Vascon Eco Tower  
Baner Pashan Road  
Pune 411 045  
T: +91 20 4912 7400

#### **BENGALURU**

6th Floor, Rockline Centre  
54, Richmond Road  
Bengaluru 560 025  
T: +91 80 4168 5530/1

#### **CHENNAI**

No 18, BBC Homes, Flat-7 Block A  
South Boag Road  
Chennai 600 017  
T: +91 44 4210 4863



[elplaw.in](http://elplaw.in)



[insights@elp-in.com](mailto:insights@elp-in.com)



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