11th October 2014

Shri T.S.R.Subramanium
Chairman
High Level Committee (Review of Environment Laws)
Ministry of Environment, Forests and Climate Change
New Delhi
Email: hlc.moef2014@gmail.com

Subject: Substantive submission to the High Level Committee on review of Environment Laws

Dear Sir,

We write to you with reference to the High Level Committee (HLC) which has been constituted vide OM 22-15/2014-IA-III, dated 29.08.2014 to review and give recommendations on five environmental laws in the country.

We would like to engage with the tasks of this Committee with the understanding that though the Committee is new, the review of environment laws has been an ongoing process. Our environmental laws are several decades old and each law and its notifications have been reviewed many times over by government appointed committees based on judicial pronouncements, institutional practice and expert recommendations. These laws and the experience of their implementation has also been a subject of study and advocacy for many reputed research organisations, NGOs and grassroot organisations working in the field of environment and conservation. We hope that this Committee will build on this rich body of work and suggest ways forward in the interest of the environment and the poorest people of the country who face the impacts of environmental degradation as if it were a normal experience.

The following are some key themes or problem areas that the HLC could consider in its review of environment laws. Based on these themes, legal clauses and procedures would need to be revised/amended.

1. Define positive outcomes for laws: Describing in tangible terms what would we like our laws to create

The environment laws and related notifications under the committee’s review do not have any clearly defined positive social or environmental outcomes attached to them. All they have are broad, preambular objectives or vision statements. In operation, they set out to achieve that there should not be environmental impacts, rather than what we should get from these laws. It is critical to identify
and lay out what positive outcomes are to be achieved, if the laws are implemented. There need to be qualitative indicators identified which form the basis of directing and also assessing the laws and institutions set up to implement them. At present these laws are evaluated on the basis of the number of committees set up, how frequently they meet and the number of approvals granted. All of these are output driven and quantitative in nature.

The present review must suggest the tying of laws to positive outcomes and indicators related to improving social or ecological parameters. For instance:

- Parameters like improvement of the environmental quality or livelihood protection in an area where industrial operations and activities are being regulated could direct the decisions of appraisal bodies of the Environment Impact Assessment (EIA) notification.
- The CRZ notification states its objectives as being the protection of local communities living along the coast and the conservation of the coastline. Its implementation results in outputs such as setting up of an administrative structure, finalisation of maps, appraising project approvals or identifying violations. In no decision making process do Coastal Zone Management Authorities rigorously test project proposals for positive impacts. Instead it only requires thin evidence that there will be no negative impacts.
- The Forest Conservation Act (FCA), 1980 lays out the objective of forest conservation upfront. However, the remaining of the text of the law lays out a procedure through which forestland diversion is to be regulated. This makes it difficult to implement and evaluate the law for conservation outcomes. The FCA can only be assessed on the amount of forestland officially diverted or rejected.

The laws under review need to be redrafted in such a way that they can become outcome based legal instruments rather than a set of routinized regulatory procedures. In order to identify good outcomes, the committee could recommend a widespread process that involves consultations with various departments, regulatory bodies and public hearings with citizens engaged with these legislations and those affected by environmental and social impacts.

2. Close the Enforcement Gap: Making Monitoring and Compliance a visible part of environment regulation

Most environment laws and related notifications are not only referred to but act as clearance procedures. Though all clearances are granted with conditions, the conditions rarely matter in regulatory action. Project clearance letters state emphatically that if these conditions are not followed, the approval can be revoked, permission cancelled or consent to operate not renewed. While some of these conditions are procedural in nature, many of them are ones, which can substantially alter the environmental impacts of a said industrial or infrastructure project. For instance, conditions regarding the non destruction of mangroves or preventing encroachment into forest areas by a project authority have clear purpose of restricting impacts. These need to be closely monitored and enforced. At another level, conditions such as assuring compensatory
afforestation (CA) following forest diversion require the involvement of the forest department in identifying land for CA as well as overseeing the actual plantation work.

In this regard we would like to bring to your attention our 2009 study (Calling the Bluff: Revealing the State of Monitoring and Compliance of Environment Clearance Conditions). The study reveals empirically that the rate of non-compliance is above 90%. To gain fully from environment regulation, it critical that:

- The manner in which the conditions are drafted make it possible to monitor by the regulatory agency. For instance a vague drafting with use of words like “adequate”, “as far as possible” in conditions will not make it possible for the regulatory agency to monitor its compliance effectively.
- Studies like cumulative Impact Studies, wildlife impact studies or other such substantive knowledge gathering exercises should not be included as conditions to be followed post clearance. Even if complied with, they make redundant the expert appraisal and other clearance granting procedures as these studies with have little or no bearing on site selection or design of the project.
- The capacity of regulatory agencies should be strengthened, especially when it comes to monitoring projects long distance where site inspections are not possible. Regulatory agencies rely on the submissions made by project authorities, which cannot be trusted for authenticity.
- There should be annual public hearings for clusters of projects. These could be held by the concerned regulatory agency or through inter-departmental coordination to seek public feedback on project performance and compliance. This will strengthen the process of monitoring which is extremely weak in present regulation.
- Documentation and evidence of non compliance and its effects produced by affected communities should be treated as third party audit reports, based on which action is taken by regulatory authorities. We would like to bring to your attention one such study that was submitted to the Ministry of Environment and Forests in October 2012. (Closing the Enforcement Gap: Findings of a community-led ground truthing of environmental violations in Mundra, Kutch enclosed with this letter)
- The impunity enjoyed by project developers in instances of false reporting and non-compliance needs to be immediately checked. The options of revocation of clearance and suspension of activity need to be exercised. In the case of pollution laws these are already in built into the annual consent renewal procedures, but these need to be implemented much more effectively.

3. Get real about baseline data: EIAs and other project documents to furnish data on existing impacts, environmental performance and violations.

Most places in India now have industrial, mining or energy projects located and are already facing environmental and social impacts of several decades of planned development. Baseline data presented in EIA reports and project
documents do not factor in the data on impacts presently experienced in these areas as that will affect the chances of receiving clearance. As new projects get located, impacts accumulate in such areas and they are written off as places sacrificed for development. From the government's side too, there is no institutional or procedural mechanism through which this data on impacts is collated and made available for appraisal purposes or project decision making. Although the government spends time and resources on some monitoring efforts, the data on non-compliance has almost no bearing on decision making on new projects or project expansions.

In this regard we have the following suggestions:

- Regulatory agencies should have a mechanism to regularly collect and analyse data on environmental impacts. This data needs to go beyond compliance submissions of the project authorities and include evidence and complaints made by affected people. Such data should be made public, *suo moto*, and through other dissemination mechanisms.
- New EIA reports, forest diversion proposals, consent to operate extensions should accompany details of the past environmental record, including pending litigation and show cause notices, of project proponents who propose to set up or expand projects. This information should also inform the public consultation and appraisal processes under the EIA notification. Habitual violators of environment laws should be weeded out to relieve burden on the regulatory system.
- Cumulative Impact Assessments (CIAs) should be commissioned by regulatory agencies to assess the additional load of impacts that the proposed project will create in the proposed region. These studies should include data on non-compliance.
- The CAG could undertake retrospective impact assessments and environmental audits of clearances, consents and forest diversions on an ongoing basis.

4. **Develop strong and well-briefed institutions: Wafer thin bodies cannot achieve sensible environmental goals.**

In all the laws under review, there are important issues of institutional design and capacity to be attended to. In this regard, we would like to highlight some observations and possible next steps:

- As stated in the point on outcome based legislations, clear outcomes and indicators of good decision making will play a significant role in directing the efforts of institutions set up for environmental decision making. In the absence of outcomes and indicators, institutional bodies take decisions based on their perceptions of problems and solutions. The presence of clearly articulated outcomes and well-defined indicators will also take away the pressure to compose the committees with the ‘right’ kind of members.
- Many of the institutions, especially at the state level work part time or are housed within other departments and institutions. Further, almost all the members on these authorities are affiliated with government or academic
institutions and the task of environment protection is in addition to their other roles. This has often impacted the quality of decisions, participation in meetings and ability to engage more deeply with the institutional mandate.

- There is a need to strengthen or create institutions and empower them at the district level with the powers to act as effective redressal agencies. Environment regulation is effective at the point closest to where environment and social impacts of clearance and approvals for land use change is taking place. One such institution that has been created but is yet to be empowered is the District Level Coastal Committee under the CRZ notification.

- These institutions need to have an ongoing and robust mechanism for public interface so that impacts experienced by affected people, especially against non-compliance of legal clauses or clearance conditions can be dealt with at an administrative level. This can avoid long processes in courts and tribunals.

We do hope the committee will include these issues in its review and create space for examining how these could be introduced into our environment laws.

Thanking you

Sincerely

Manju Menon and Kanchi Kohli
Namati-Centre for Policy Research Environment Justice Program

CC:
1. Shri Biswajit Sinha, Member Secretary, HLC
2. Shri Hardik Shah, Member Secretary, HLC

Encl:
1. Calling the Bluff: Revealing the State of Monitoring and Compliance of Environment Clearance Conditions (2009)