

Re-engineering the Legal and Policy Regimes on Environment

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Environment impact assessment was supposed to be a critical tool in environmental decision-making. But it has been re-engineered to severely reduce its usefulness as an instrument for public participation in decision-making. This article, written against the backdrop of proposals for a new coastal regulation zone notification, analyses the different characteristics of environmental regulations and the new environment policy, and shows how a new perspective facilitates speedy clearance of projects that affect people's livelihoods and the environment.

This article is an updated version of a deposition made at the Independent People's Tribunal on the World Bank held in New Delhi from September 21-24, 2007.

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In 2006, India got its National Environment Policy (NEP) that subsumes the objective of environmental conservation within the agenda of "sustainable development", such that the economic growth of the country is not compromised [Lele and Menon 2005; Open Letter 2004, 2005]. Despite widespread protest and opposition, the NEP was passed. It also set itself as the all significant last act in the drama of amending environmental clearance procedures that govern environmental decision-making for development projects. The foremost casualty being the Environment Impact Assessment (EIA) notification. This critical tool was "re-engineered" to severely compromise the spirit of public participation and transparency in decision-making. The process reduced the decision-making to mere identification of mitigation measures and the public consultation process was turned into merely a forum to improve an EIA report. As this article is being written, the coastal regulation zone (CRZ) notification is being put through a similar process to achieve the same results: reduced protection to India's coasts and greater opportunities to locate to development projects on the coast through a subterfuge of the language of better science and management.

Preparing the Ground

The foundation for changes in environment clearance norms was laid with the beginning of the World Bank-funded National Environment Action Plan (NEAP), 1993. The project was undertaken by the

government of India (GOI) through the ministry of environment and forests (MOEF). The five objectives of the NEAP included assessing the environment scene in India against the backdrop of the changing economic policies and programmes; reviewing the current policies and programmes addressing various environmental problems of the country; pointing out the future direction and thrust of these policies and programmes; identifying programmes and projects for a sustained flow of investment resources and for integrating environmental concerns into development projects; and finally, singling out projects for organisational strengthening for better environmental management [MOEF 1993].

Following this, a more detailed project proposal made by the ministry resulted in another Bank-funded project called the Environment Management Capacity Building (EMCB) project. This technical assistance project between the World Bank's International Development Agency (IDA) and the MOEF was approved in 1998. Slated to be completed by December 2002, the extended processes under the ECB project went on till December 2004. The ECB project was a step in the Bank's assistance to the MOEF in implementing the NEAP. And for this, a diverse range of project components, that included research, training and procedural amendments were designed. The objectives of these included strengthening environment policy planning and administration, making decentralisation of environment management more effective, firming up implementation of environmental law and toughening monitoring and compliance in specific high priority and environmental problem areas such as mining and coastal zone management [Anon 1997].

In April 2001, an important change was introduced to the ECB project objectives. The review of the "environment assessment", was added to Development Credit

Agreement. This had the three focus areas including, improving the screening, scoping, analysis of options, and clearance process for environmental assessments; improving the quality of EIAs; and improving project compliance through environment management plans. The process of reforms that were built on these objectives rather than greater democratic and environmentally appropriate decision-making ensured that decisions on projects would be predetermined based on economic imperatives and fully biased towards the mitigation-based approach. These changes in the EIA notification are the most critical output of the World Bank intervention in the environment sector, whose project lending portfolio had suffered significantly after the withdrawal from the Sardar Sarovar Project.

ERM Report on EIA, 'Good Practices' and NEERI EIA Manuals: In order to carry out the reforms to the EIA notification and the environment clearance procedure prescribed therein, the MOEF commissioned ERM India to carry out the review of the procedures.¹ The MOEF claims that the ERM report was based on consultations with various stakeholders. But there is an evidence that very few and select persons were called for these consultations. In June 2003, the Environment Support Group (ESG), a Bangalore-based NGO, wrote to Udayan Banerjee, one of the MOEF officials overseeing the reforms process about this. The MOEF had sought comments from a few select non-governmental organisations (NGOs) like ESG on the draft report.

In May 2004, the MOEF announced a set of "good practices in environmental regulation". But these were in reality only meant to address the concern of "delays" in the process of grant of clearance to projects (such as the repeated requirement for additional information sought by the ministry from the developers and delays in expert appraisal committee meetings). While the MOEF had identified that these delays affected the investors as their "applications remain under consideration for years, and are not decided upon till long after all the other regulatory requirements have been met, and after financial closure in case of investment

projects", it did not alongside state that the dismal quality and often, deliberately faulty information provided in the EIA reports was one of the main reasons for a protracted project clearance process.

The MOEF also contracted the National Environment Engineering and Research Institute (NEERI) to prepare sectorwise EIA manuals for mining, hydro projects, pharmaceutical industries, ports and harbours, thermal power stations and petrochemical projects, in the year 2003. The draft of these were prepared and two consultations took place. This time too a few select civil society organisations were invited for consultations. The manuals were extremely detailed and laid out several parameters based on which EIAs should be conducted. These manuals have not been officially accepted by the MOEF till date.

Drafting and Finalisation of EIA Notification 2006: On November 29, 2004, at a meeting with the NGOs, the MOEF distributed a draft format for a new environmental clearance (EC) process. This note titled 'Reforms in Grant of Environmental Clearances' clearly established the link between the EMCB project and the EIA review. It also gave reference to the Govindarajan Committee report on investment reforms [Kohli and Menon 2005; GOI 2002]. The meeting was, again, with a very limited number of civil society organisations. Attempts were made by representatives of people's movements to attend the meeting, but they were expelled from the ministry premises. On the contrary several consultations were held with industry associations, where this note and subsequent drafts of the notification were discussed. As per the ministry's own submission (to applications under the Right to Information Act) filed in 2005-06, consultations on the draft notification were held only with representatives of industries and central government agencies. A revised version of the draft notification was also shared with industry associations in mid-2006 before the final version was issued in September 2006 [Menon and Kohli 2007; Open Letter 2006]. According to documents received through Right to Information, it was revealed that specific instructions for this were given from the prime minister's office.²

Despite protests from political party representatives of the Communist Party of India (M), Samajwadi Party, All-India Forward Bloc, All-India Anna Dravida Munnetra Kazhagam (AIADMK), the Pattali Makkal Katchi (PMK) and Congress, the MOEF went ahead to issue a re-engineered EIA notification, on September 14, 2006 [Menon and Kohli 2007].

After a year and a half of the implementation of the new EIA notification 2006, the ministry's rate of grant of clearance to projects has increased manifold. True to its objective of speedy clearances, the new notification has made possible the grant of clearance to a total of 1,736 projects in 16 months of its existence [MOEF 2007]. In a period of 20 years before this, the ministry had granted clearance to 4,016 projects [MOEF 2006a]. The efforts to further dilute the EIA requirements for projects for airport and port modernisation persist [Ghosh 2008].

Coastal Regulation Reforms – the Second Casualty: As stated earlier, a proposal was made under the EMCB project to develop an appropriate coastal zone and marine area environmental regime through Integrated Coastal Marine Area Management Plans (ICMAMPS). The World Bank aimed at providing an expert assistance for the same [MOEF 2007a].

In July 2004, the MOEF set up an expert committee headed by M S Swaminathan to carry out a comprehensive review of the CRZ notification. The mission of this committee was to enable the MOEF to base its coastal regulations on strong scientific principles so that they would meet the urgent need for coastal conservation and development/livelihood needs. The Swaminathan Committee submitted its report in February 2005, a month after the Indian Ocean tsunami [Sridhar et al 2006].

While the committee report was well placed in terms of understanding the problems of the coast, it hardly offered any new direction on the subject of institutions for coastal regulation, despite there being a wide range of experiences to show how the present mechanisms had proved ineffective [ibid, Menon et al 2007]. The committee report included as an annexure, a draft coastal zone management notification. The draft was a

vague and incomplete document that was fully opposed by fisher groups and coastal communities as it compromised their rights to the coastal space. A subsequent draft found its way into the hands of environmental groups through unofficial sources. This time, the plan to open up the sensitive coastline to projects such as oil pipelines and tourist resorts were clearly laid out [Menon et al 2007].

The MOEF had expected to finalise the CRZ reforms by March 2006 [MOEF 2006]. But this did not materialise. Nevertheless, the World Bank was already considering a loan of Rs 100 crore³ to the MOEF to implement the recommendations of the Swaminathan report and the draft CZM [Sethi 2007]. Due to unrelenting pressure from fishworker groups who mobilised mass protests against this “draft”, the ministry was forced to call for a meeting in November 2007 with NGOs/fisherfolk organisations to receive their comments/suggestions on a concept note for “replacing Coastal Regulation Zone 1991 with the new Coastal Zone Management Notification”. The most vociferous opposers of the notification were conspicuously absent from the list of 86 invitees in the official letter of the MOEF [MOEF 2007b]. The “concept note” circulated for the meeting was not significantly different from the much thrashed “draft” that the MOEF publicly distanced itself from. This MOEF has finally put out a draft notification dated May 1, 2008 and has invited comments from the public within a mandatory period of 60 days following which the process of its finalisation will be undertaken.

Bad Process, Worse Regulations

A study of the characteristics of these new regulations and the NEP are valuable to understand the changing perspective on environment protection by regulators. These characteristics mirror those of the environment policies of institutions such as the World Bank. With these new regulations in place, there are no longer any gains to be expected from advocacy against faulty planning and decision-making of individual projects. The grant of environment clearance to projects no matter how harmful will, by design, be the only outcome.

Assessments Are Downstream in Decision-making Process: The new process outlined in the EIA notification fails to bring impact assessment studies upstream in the environmental decision-making process. The criticism that the studies are incapable of influencing project siting, design and technology because of its location in the process of decision-making, has been consistently made for two decades now. Decisions on project clearance are still not based on carrying capacity assessments of ecosystems, acceptable risk indicators and options assessments that embrace demand-side management [Kohli and Menon 2005]. Even if these studies are undertaken in few cases, these are done after granting clearance to a project in question and they remain unused in the clearance process of subsequent projects.

The greatest pitfall of such a situation is the impossibility of rejection of grant of clearance to a project on environmental grounds. At best, alterations, mostly only of the type that can be easily undertaken are recommended while granting it clearance. Additional assessments may be sought from the project proponents, to develop mitigation measures and bring in specialised technologies for reducing impacts. It needs to be borne in mind that mitigation is the foremost form of a safeguard mechanism that the Bank has promoted.

Determination of Costs and Benefits:

Clearance procedures are now based on establishing quantitative values to “environmental services” so that these “costs” that may accrue from the loss of services may be internalised into projects. Such a system of determining the extent of environmental impacts draws attention to the ethical questions about who has the power to give certain values to these services, are they only for the present or do they account for the importance of these services in future years, are services that are attached to non-material uses such as aesthetics and culture computed for, and many others. This “polluter pays” principle is based only on an arbitrary valuation based on the expert’s notion of the importance and function of a resource. Lele and Menon criticise this approach strongly. They state “the idea of using ‘economic approaches’ to solving environmental

issues has gained much currency in recent years and is linked to the exalted position that the concept of ‘economic efficiency’ has come to occupy in development thinking” [Lele and Menon 2005].

From Regulation to Management: Rather than focusing on protective regimes, based on the precautionary principle, that ensure that environmentally and socially destructive projects are avoided altogether, the spate of reforms has brought in an unprecedented shift to less protection and more management. This opens the doors to projects even with substantial impacts based on feeble claims by project proponents that impacts can be “managed”. Several environment management plans submitted at the time of grant of clearance contain mitigation measures that developers propose to adopt. These are either inadequate or then impossible to achieve.

The proposed CZM notification relies heavily on ICZMPs to plan for activities along the coast. In the assumption that this will work, it has liberally cut down the number of activities that used to be restricted along the coast after 1991. CRZ 1 areas⁴ under the CRZ notification were initially defined as areas where no activities would be permitted until several dilutions were introduced to change that.

Open Review

Several international journals are moving away from closed “Peer Review” of research papers, towards an “Open Review” process. In open reviews anyone can comment on a paper submitted for publication. This will increase transparency in reviews as well as enhance participation and involvement of the research community.

EPW occasionally posts a submission on its web site and invites comments. Visitors to the EPW web site and readers of the journal are encouraged to offer detailed comments. EPW will discuss the comments with the author and a revised version will be processed for publication.

Please visit the Open Review section on our web site (www.epw.in) to read and comment on the paper currently submitted for Open Review.

The proposed CZM notification builds on this regressive trend and establishes that various activities will be allowed in these sensitive ecosystems as long as they are recorded in the "Integrated Coastal Zone Management Plans" (ICZMP) [Menon et al 2007].

Management or mitigation solutions recommended have the potential to cause serious ecological and social ramifications too. In the clearance of hydel projects in the north-east of India, several traditionally accessed shifting cultivation lands will be taken over by the state [Menon and Vaghlikar forthcoming], CMZ II areas are being given the option of constructing seawalls along the coast that have proven erosion impacts in the adjoining coastal areas [Menon et al 2007].

Disclosure of Information and Public Participation: In the initial years of the EIA notification 1994, the public hearing process held much promise as it was the first formal space where citizens could rightfully participate in environmental decision-making. This euphoria quickly vanished with the stories of how power and social dynamics were playing up in public hearings [Kohli and Menon 2005; Varadarajan 2004]. Today, the platform has become a space for project proponents to prove their popularity and support at any cost. They resort to corrupt practices of bribing influential elders and politicians, providing faulty information about the project and obstructing the presentation of opinions that may be critical to the project. The use of violence by the state machinery is a feature in almost every public hearing that is taking place today.

The complete lack of public participation is also evident in the way the MoEF went about reforming the EIA notification, drafting its NEP by keeping it a secret and is non-committal about the changes to the CRZ notification. Even elected representatives are kept out. When members of Campaign for Environment Justice-India met the chairperson of the Parliamentary Standing Committee on Science and Technology, Environment and Forests, P G Narayanan they were told that the committee had no information whatsoever about the new EIA notification that was

being proposed. This was just a month before the final EIA notification of 2006 was issued.

Rule of the 'Experts': Along with a mitigation model to deal with environmental challenges, the MoEF has also been made to adopt a process that has an overbearing role of consultants and "experts". In 2004, in tune with its good practices and as a curtain raiser to the new EIA regime, the MoEF, drew up their definition for an "expert". This understanding of expertise did not have a space for those without a formal training in the physical sciences or technology. Read along with the changes made to the clause on who can participate in a public hearing as per the new EIA notification, this was meant to keep out any critical voice in the decision-making process. Almost all the expert committees that recommend clearance (or its rejection) of projects to the MoEF have been headed by ex-bureaucrats [Open Letter 2005a].

Development Disaster

The legal framework for the facilitation and speedy clearances of infrastructure and development projects has been achieved through a series of undemocratic processes. Impacts of these policies have been felt on the ground for long, and are today being amplified. More than ever before, today, the establishment of development projects is marked by violence. There is an unprecedented use of power by the state machinery to protect the project promoters from communities that anticipate negative impacts due to their plans. Despite detailed critiques presented against the viability of projects, through research, expert committees and the MoEF grant clearances to them in the name of "development". While we are told that policies and processes are being made more scientific, a staggering number of projects which cause irreversible impacts on a large number of forests, wetlands and coastal areas are being permitted. The science of environment management has justified these losses.

NOTES

- 1 Source: <http://envfor.nic.in/divisions/iass/emcb/reportforec.htm>
- 2 Note dated April 28, 2006. PMO ID No 250/31/C/4/05-ES-II to Secretary, MoEF.

- 3 Response by MoEF to RTI application from Aarthi Sridhar No 20-149/2007-IA-III dated December 11, 2007.
- 4 The most ecologically sensitive areas on the coast – the inter tidal zone and areas which have which coral reefs, turtle nesting sites, mangroves or other sensitive habitats.

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