RELOCATING ENVIRONMENTAL REGULATORY POWERS

By Kanchi Kohli and Manju Menon

No one who has been following the environmental regulatory landscape in India for the last two decades could have missed the government's proposal to resolve the contested design and implementation of environment regulation in the country. This is especially related to impact assessment and pollution related norms and procedures. Twenty five years after it was set up, the Ministry of Environment and Forests ("MoEF") has admitted that it does not have the capacity to grant environmental approvals and monitor them thereafter. Therefore, what is needed is an independent expert authority to which a part of the MoEF's responsibility can be handed over, while MoEF continues to retain the law-making function.

On the 15th of August 2011, as part of his Independence Day speech, the Prime Minister of India reiterated the government's intention to constitute an environmental assessment and monitoring authority to streamline the process of environmental clearances in the country. This was important, as it was the same Prime Minister who had set the ball rolling when he announced the intention to establish a National Environment Protection Authority ("NEPA") at the National Conference of Ministers of Environment and Forests from all states of the country back in August 2009.

It was soon after this announcement that the MoEF had put out a discussion note on the NEPA. But even before the public could respond to the proposal, the government firmed up its commitment to NEPA by virtue of its mention in the "U.S.-India Green Partnership to Address Energy, Security, Climate Change, and Food Security." A 24th November 2009 press release of the U.S. Senate and Indian Prime Minister's office stated that, "the U.S. Environmental Protection Agency will provide technical support for Indian efforts to establish an National Environmental Protection Authority focused on creating a more effective system of environmental governance, regulation and enforcement."

The MoEF subsequently revised its discussion paper and presented three possible models for the proposed NEPA prior to a public consultation held in New Delhi on 25th May 2010. These three models represented roles for the NEPA with varying combination of roles for grant of environment clearance (under the EIA Notification, 2006), pollution mitigation and the overall enforcement and monitoring of the norms laid alongside these approvals. The third model was one where the NEPA would only have the function of monitoring and compliance of environment clearance conditions (explained in a later section) and no powers to grant environmental clearances. At the public hearing with limited participation held in New Delhi, there were many questions raised about the need, format, and mandate of all three frameworks. It was also stated that the NEPA is likely to be a non-solution to the vexed problems of environmental clearances and pollution mitigation in the country. The reasons for this are discussed later on in this article.

Later in 2010, the MoEF revised its note to propose a National Environment Assessment and Monitoring Authority ("NEAMA") that would manage approvals of industrial and infrastructure projects and monitor them thereafter. What this essentially meant was that the Ministry sought to outsource the functions of its Impact Assessment ("IA") division that looks after environment clearances under the Environment Impact Assessment notification, 2006, and the function of ensuring compliance of environment clearance conditions laid out at the time of approvals. According




to the MoEF, the NEAMA will be an autonomous institution with scientific and professional rigour which is what is missing in the current system of appraisals following which clearances are granted.

The NEAMA note states clearly that there has been tremendous pressure on the environment due to rapid industrialisation, infrastructure development, and population growth. Ironically however, the solution offered remains restricted within the scope of institutional reform. The justification of the Ministry continues to be within the limited realm of its lack of capacity to process the large number of environmental permit applications that are placed on the expert committee desks.

Previous reforms in the environmental regulatory area have also focused on this aspect substantially. The 2006 re-engineering of the Environment Impact Assessment ("EIA") Notification had brought on board the concept of State Level Environment Impact Assessment Authorities ("SEIAAs") as an institutional change to reduce the pressure and burden on the MoEF to administer and appraise environment clearance applications. As of September 2011, two of the otherwise 23 functional SEIAAs have closed down and all pending environmental clearances have been transferred back to the Ministry. However, it cannot be said with any confidence that the quality of assessment, monitoring and compliance, public participation and final appraisal has improved. The constant increase in the number and faulty processing of clearances has continued to put ecological landscapes and peoples' livelihoods under continued distress (Kohli and Menon, 2005; Kohli and Menon, 2009; Menon and Kohli 2009).

The problems with the NEAMA discussion paper can be understood through its five specific premises.

First, is its statement that the EIA notification, 2006 was a marked improvement over its 1994 version. The 2006 notification was pushed through despite strong opposition to both the content and the drafting process. As a result of that, we continue to deal with the repercussions of a limited public hearing process. In the 1994 version of the EIA notification the final EIA was to be completed and then presented before the public based on which responses were sought. In the 2006 law, this space has shrunk to one where a draft EIA is made available to the affected people so as to seek feedback on the same—the final version of which never reaches the affected people before it is appraised by the expert committees of the MoEF. It also weakens the clause for rejection of application on the grounds of misleading information, wherein the powers to summarily reject the project on the above grounds are now subject to a personal hearing to the project authority. This clause has hardly even been used by the MoEF, nevertheless. Further, it allows for no EIAs and special procedures for real estate and construction projects on grounds that they have fewer environmental impacts. Ironically, this is one of India's largest industries today where massive land-use changes are taking place, both in cities and also peripheries of villages and towns. Many of these are in ecologically and socially fragile regions.

Second is the issue of conditional clearances. Each time a project is granted approval under the EIA notification it is done with a list of general and specific conditions which range from pollution mitigation, organised dumping, felling of trees, following pollution parameters, labour issues, green belt and so on. The NEAMA note quotes the Minister of Environment, Jairam Ramesh, stating that the conditions levied at the time of clearance should be objective, measurable, fair and consistent, and should not impose inordinate financial or time costs on the proponents. But there is absolutely no mention of the fact that the conditions are often a medium of obtaining clearances rather than addressing environmental issues. The compliance of such conditions renders a *fait accompli* situation to whatever the result of post facto assessment of impacts




or damage might be, as by then, the projects are already well underway. The Lower Subansiri Hydro Electric Project in Arunachal Pradesh was approved with a condition that the downstream impact assessment will be carried out alongside the construction of the project. In the case of the Jaigad thermal power plant in Ratnagiri, Maharashtra the impact on the alphonso mangoes is being studied even as the first phase of the plant is already commissioned. While the NEAMA note sympathises with project authorities when it says that conditions should not add additional costs on them, it fails to recognise the absolute disregard that project authorities have previously shown to the compliance of conditions that are critical to mitigating environmental impacts. In its understanding of conditional clearances the NEAMA note is also oblivious to instances where clearances defy logic by, say, laying down 121 conditions, almost forcing an approval from the approving authority, which in this case was the State Environment Impact Assessment Authority. A detailed assessment with case studies has been carried out by Kalpavriksh in 2009 in their report *Calling the Bluff: Revealing the state of Monitoring and Compliance of Environmental Clearance Conditions* (Kohli and Menon, 2009).

Third is the manner in which MoEF interprets and presents the of issue conflict of interest in the note on NEAMA which is very different from the issues raised by civil society groups. The NEAMA note mentions that it is the dual role of the government in both appraisal as well as approval that results in a perception of conflict of interest. For instance the MoEF is both the authority which along with an expert committee appraises a project for impacts and it is also the Impact Assessment Agency which actually grants final approval giving the impression that there might be an element of bias. This premise completely ignores the broader understanding of the problem that questions the appointment of expert committee members who have a direct stake in promoting a particular sector, project or project proponents. The current format of the NEAMA only replicates the existing structure of Expert Appraisal Committees ("EACs") prescribed under the EIA Notification, 2006 and locates them outside the MoEF in the form of Thematic Appraisal Committees ("TACs") prescribed under the draft NEAMA proposal, with no guarantee that the compositions will be any different than what they are today. There have been several instances that have been brought to the notice of the Ministry where the chairpersons of the expert bodies have had previous or current affiliations for the sectors like thermal power, hydro power or mining for which they are now appraising approvals. Until 2010, the chairperson of the mining EAC was a person who was on the Board of Directors of five mining companies. Officials retiring as heads of Power Ministry have almost immediately taken over as chairpersons of a committee looking at approvals of hydro-electric projects. Protests from civil society groups have pushed the Minister, Environment and Forests to take steps to remove one such member from the Chairperson after this was pointed out (Menon and Kohli, 2010; Kohli 2010). A litigation filed by Kalpavriksh and Ors is also pending before the High Court of Delhi where this issues has been highlighted (W.P.(C) 2667/2011).

Fourth is the issue of autonomy. The NEAMA will be an authority under the Environment Protection Act, 1986. It has also been clarified in the note on NEAMA put out for comments, that it is the MoEF that will finally issue the environment and Coastal Regulation Zone ("CRZ") clearances (another important law for the management of India's coastline where additional approvals for projects located on specified coastal zones needs to be taken) based on the Authority's decision. Some part of the financial support may also come through the Central Government, presumably the MoEF itself, as was the case with the National Environment Appellate Authority ("NEAA") a redressal body now non-functional, and is with the National Biodiversity Authority ("NBA") set up as an independent authority under the Biological Diversity




Act, 2002. So, how can this authority be considered autonomous and independent? In all practical terms, the NEAMA will essentially be a relocation of the Impact Assessment Division of the MoEF, its regional offices and the EACs into what is being termed as a body with scientific rigour.

Fifth is the amalgamation of tasks of the MoEF's impact assessment division, monitoring tasks of the MoEF regional office, as well as the mapping and management functions of the Coastal Zone Management Authorities into one Authority called the NEAMA. The reasons explained relate to increased pressure on these Authorities and the plethora of responsibilities to which they are unable to attend. MoEF seems to find a solution by vesting this responsibility into one full time body dealing with multiple functions of appraising projects for clearances, monitoring their compliance, advising the central government on environmental policies as well as supervising and coordinating with state level authorities. Additional tasks include preparing coastal zone management plans, carrying out investigations, and researching and facilitating the creation of national databases of environmental information, and disseminating such information. The tasks of three functional set ups spread across different regions of the country are now being collapsed into one authority. With no clarity on the number of full time members, number of regional offices of the NEAMA and other issues related to staffing, MoEF's note prematurely assumes that the institutional structure envisaged will indeed been able put aside the woes of capacity shortfall which are being faced by a vast network of full time officials and part time experts.

The Prime Minister's words and also rulings by the Supreme Court of India continue to push for different versions of an expert body that they envisage. In a recent judgment allowing the continuation of limestone mining in the north eastern state of Meghalaya by the French company Lafarge, the Supreme Court ordered the Central Government, i.e., MoEF, to appoint a "National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters". This judgement dated 6th July 2011 (in I.A. Nos. 1868, 2091, 2225-2227, 2380, 2568 and 2937 in Writ Petition (c) No. 202 of 1995, has given the government six months to act upon this direction .

What is ironic is no one seems to be interested in viewing the range of acknowledged problems of the environment clearance regime as being symptomatic of the regulatory framework in operation today. These are unlikely to be resolved only through the singular act of creation of new institutions as such bodies will face the same hiccups, similar road blocks and inherit the legacy of the faulty regulatory framework which would be difficult to maneuver away from. If environment protection and upholding peoples' livelihoods is truly the agenda of this reform process, then it cannot be done without a complete regulatory revamp of the legal framework through which projects are appraised and public participation in decision making ensured—a topic the MoEF continues to shy away from. Institutional restructuring is only a part of this process and is limited both in trying to locate the problem and also presenting a full solution.

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