Green Tapism

A Review of the
Environmental Impact Assessment Notification - 2006

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Arpita Joshi, Subramanya Sastry

ESG Environment Support Group

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PREFACE

We are happy to present to you "*Green Tapism: A Review of the Environmental Impact Assessment Notification - 2006*". This Notification was issued on 14 September 2006 and its journey from the draft stage to its final form and after has been marked by controversy and widespread protests.

This review was undertaken acknowledging the widespread concern that the EIA Notification was manipulated to suit certain vested interests thus putting to enormous risk the ecological and livelihood security of India. The fact that the Notification is the only legal instrument that explicitly mandates and defines the process for public involvement in environmental decision-making, and that this very process was being undermined, compelled us even more to undertake this task. In so doing we have had to review the objectives by which the Union Ministry of Environment and Forests (MoEF, which issued the Notification) was established. Clearly the mandate has always been to make the task of conservation and environmental management everyone's responsibility and not subject to "expert systems". In that sense it is natural to expect that MoEF would meaningfully involve the public in all stages of the process of formulation of the Notification.

As we discuss in this review, the Ministry made no effort to actively involve the public besides organising token consultations with a few invited NGOs (which, by no stretch of the imagination, can be considered to adequately represent the wider public). During the finalization of the Notification, however, the Indian Environment Ministry went so far as to firmly shut its doors on the public and admittedly consulted only industrial and investor lobbies. State Governments and parliamentarians too were not accorded such a privilege. This has serious consequences to democratic decision making in India.

The resulting legislation clearly subordinates environmental and social concerns to the interests of industry and investment. This Notification was hurriedly finalized and is atrociously drafted. Rather than simplifying the process of environmental decision making in an effort to include the wide public, the Notification complicates clearance procedures to such an extent that even officials within the Ministry have difficulty understanding its provisions and implement them. A good indication of this is about 10 documents as notes/ circulars/ corrigenda that the Ministry has already issued in clarification since the Notification came into effect about seven months ago. Foxed by widespread demands for clarification regarding operational difficulties with the Notification, the Ministry has weakly responded by even decreeing a *carte blanche* abeyance of the Notification's operation till 30 June 2007. *The Notification is in operation, and yet it is not.*

We empathise with you if you have had problems understanding the EIA Notification – 2006. We too have struggled to understand many parts of the Notification, and in some cases we have simply not been able to appreciate what is being stated.

We sincerely feel that at a stage when India is fast expanding its manufacturing and infrastructure sectors, and the consequent environmental and social impacts are being felt almost everywhere, the formulation of EIA norms represent a wonderful opportunity to help rationalize the push-pull factors between sustaining development and ensuring ecological and livelihood security. We fear that this opportunity has been lost as the Union Ministry of Environment and Forests - driven by a zeal to promote itself as a pro-investment Ministry – has compromised the very purpose for which it was constituted.

It is likely that the EIA Notification – 2006 will cause widespread confusion when it is fully implemented. We also fear that this Notification will unnecessarily burden courts with a variety of litigations. All of this could easily have been avoided if the Ministry had adopted a transparent approach and had objectively listened to all views, and not just those of powerful industrial and investment lobbies. The misery resulting from the Notification's complicated and confusing approach will most likely be borne by project-affected communities, who most often are the economically and politically weaker sections of our society. This is a truly unfortunate outcome of this Notification.

In our review, we make a very strong case for this Notification to be repealed. We would be grateful for your support if you agree with our position, and do welcome your criticisms if you disagree with our views. In any case, we hope this review will fuel a healthy debate on the nature and consequences of the EIA Notification – 2006.

The responsibility for all omissions and misinterpretations remains fully ours.

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The task of writing a review of a very poorly drafted legislation is quite cumbersome and one is often tempted to not persevere. Had we not had the active encouragement of our families, our colleagues at ESG and associates from various networks, especially the Campaign for Environmental Justice – India, this review would never have been possible.

In particular we want to acknowledge the contribution of Souparna Lahiri (Dehi), Kalpavriksh members Kanchi Kohli, Manju Menon and Divya Badami, and Ravindranath of Rural Volunteers Centre (Akajan, Assam), who provided incisive comments and helped us focus on developing a clearer structure to our review. Abhinav Srivatsav and Pranshu Bhutra, students of the NALSAR University of Law, Hyderabad, and Jyotsna Jayaraman of Christ College of Law, Bangalore, who interned with us, supported us with extensive legal research on the import of many provisions of the Notification. We thank all of them sincerely for their support.

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While writing the review is one part of the task, effectively disseminating the review is important for fueling the debate over the EIA Notification. This has been made seamless by the efforts of Mallika Biddappa, student at Tata Institute of Social Sciences, Mumbai, and Dolly Kalitha, volunteering at ESG, who have together built an excellent repository of contacts. Rajanna has further lightened the burden for us by providing much needed logistical support for dissemination. We sincerely thank them all.

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Table of Contents

Abbreviations Used x
Index Of References xii

Introduction 1
- International treaties and Indian environmental legislations 2
- Judicial determinants for environmental regulation in India 2
- Counter trends: self-certification and complete exploitation of natural resources 3
- Political and economic factors that influenced the new EIA norms 6
- How the EIA Notification was "reengineered" 8
- MoEF ignores efforts to broad-base consultations 10
- No Parliamentary oversight over EIA norms 13
- Why the EIA Notification – 2006 is deeply flawed 14
  1. EIA Notification – 2006 finalisation based on demands from industrial and investor lobbies 16
  2. Inadequate decentralisation and devolution in environmental decision-making 17
  3. Wasteful creation of new technical bureaucracies and other structural issues 17
  4. Process deficiencies in the new environmental clearance system 18
  5. Unwarranted exemptions, exclusions and other loopholes 18
  6. Inadequate monitoring and enforcement regime 19
  7. Total confusion regarding applicability of the new Notification 19
- The new EIA Notification - ready to be discarded? 20

Box 1: Abstracting the Rio Principles in Developing EIA Law 1
Box 2: Contrary Legislative Trends 4
Box 3: "Self Certification", at whose Cost? 4
Box 4: The FICCI 'Self-regulatory' Agenda 5
Box 5: The Questionable Role of International Consulting Firm Environmental Resource Management (ERM) in Formulating the EIA Notification – 2006 8
Box 6: Brazen Admissions! 12
Box 7: Who Cares about Climate Change? 14

Chapter 1: Decentralization and Devolution 21
- Failure of proportionate allotment in Centre-State-Local Government responsibilities 22
  1. Excessive centralisation of environmental decision-making 22
  2. All projects are Category A until SEIAA and SEAC are set up 23
  3. Untrammelled State overview for Category B projects 24
- Role for Local Governance Bodies completely ignored 24
  1. Key provisions of Nagarpalika and Panchayat Acts ignored 25
  2. No involvement for Gram Sabhas as required under PESA 25
  3. Minimal compliance with Forest Rights Act 26
- False claims of devolution of power 26

Box 8: No Safeguards against Administrative Coercion 22

Chapter 2: Structural Issues Relating to Decision-Making 28

- Environment Impact Assessment Authorities 29
1. No accountability or clarity regarding the central regulatory authority 29
2. Time lines and procedures for creation of regulatory authorities not prescribed 30
3. SEIAA decisions must be unanimous 30
- Expert Appraisal Committees 31
1. Flawed composition of the Committee 31
2. No prescribed time line for creation of expert bodies 32
3. Capacity and composition of EAC disproportionate to scale of review demanded 32
4. EAC/SEAC opinion hampered by 'collective responsibility' 33
5. Diminished efficacy of expert site visits 34
6. SEAC representing several states contrary to federalism 36

Box 9: The Not So 'Expert' Committees 31

Box 10: Dismal Quality of EIA Reports to Continue 35

CHAPTER 3: DEFICIENCIES IN THE VARIOUS STAGES OF THE EC PROCESS 38
- Stage 1 – Screening 39
1. No safeguards in Screening process 39
2. No clarification on 'Pre-Feasibility Report' and 'Conceptual Plan' 40

- Stage 2 – Scoping 40
1. No public participation in 'Scoping' process 40
2. Limited access to information in scooping process 43
> No meaningful access to EIA Terms of Reference 43
> Preliminary rejection of project not public 43

- Stage 3 - Public Consultation 44
1. Democratic Deficit in 'Public Consultations' 45
> Narrow scope for public participation 45
> Limited consultation in public hearing 47
> Public hearing process easily undermined 48
a) *Regulatory authority can cancel public consultations* *48*
b) *Exemptions galore in public consultation process* *48*
> *Are all nuclear projects in India civilian facilities?* *52*

2. Procedural and prescriptive infirmities in public consultation process 53
> Time period for public consultation process reduced 53
> No criterion for alternate public agency to conduct public hearing 54
> Public hearing panel non-representative 55
> No clarity on venue for public hearing 56
3. Access to Information in the Public Consultation Stage 57
> Limited access to EIA Summary, Draft EIA, Final EIA, etc. 57
a) *Undue reliance on summary EIA report and application* *57*
b) *Limited access to Draft EIA report* *57*
c) *Limited information disseminated before public hearing* *59*
> Broad exemptions to information access in EIA documents 59
a) *No guarantee of Public Access to final EIA report* 60
> Skewed information access during public consultation stage 61

- Stage 4 – Appraisal 62
1. Non-transparent, non-participatory appraisal process 62
2. Public in the dark while project proponent is privy to information during Appraisal 63
3. Grant or rejection of prior environmental clearance 63
> Confusing time-frames for decision of regulatory authority 63
> Unguided regulatory hegemony over the final decision 64
> Troubling consequences of 'deemed clearance' 64

Box 11: UNESCAP Principles for Environmental Clearance Process 38
Box 12: Components of Screening 40
Box 13: What is Scoping? 41
Box 14: MoEF Plagiarises from European Union EIA Formats! 42
Box 15: The Access Initiative (TAI) Perspective 45
Box 16: How CREDAI 'manipulated' the EIA Notification 2006? 49
Box 17: Why have Construction Projects been Excluded? 49
Box 18: Highways and Environmental Clearances 51
Box 19: Defence Projects and Environmental Impacts 52
Box 20: Poor Choice of Media for Information Dissemination 58
Box 21: NEERI's EIA Manuals Wasted 62

CHAPTER 4: UNWARRANTED EXEMPTIONS, LOOPHOLES AND LACUNAE IN THE EC PROCESS 66

- Land acquisition without environmental clearance 67
- Un-regulated 'Preconstruction Activity' of Hydroelectric Projects 69
- Flawed categorization of projects and activities 70
1. Non-scheduled industries escape environmental clearance requirements 70
2. No rationale for classification of projects as Category A or Category B 74
3. No rationale for classification of projects as Category B1 or B2 74
4. Problematic categorization of Industrial estates/parks/complexes/areas, Export Processing Zone (EPZs), Special Economic Zones (SEZs), Biotech Parks, Leather Complexes 75
- The highly flawed regulation of Biotech Parks 76

- 'Specific Conditions' create loopholes 77
1. Polluting units shielded within Industrial Estates 77
2. No priority for disaster management and liability 77
- Unclear application of 'General Conditions' 78
- Weak regulation of expansion, modernization and change in product mix 79
1. Unregulated expansion of mining projects 80
2. Unclear applicability of threshold limits 80
3. No procedural safeguards for expansion and modernization 81
- Validity of environmental clearance 81
1. Unwarranted extensions in validity of clearance 81
> Serious problems in review of River Valley and Mining Projects 81
> Limited regulation of Area Development and Township Projects 82
2. Typographical errors create confusion on period of validity of EC 83

- Transferability of environmental clearance 83
1. No safeguards in transfer of environmental clearance 83

Box 22: Railways – Time to Draw the Line? 66
Box 23: Legitimating the Land Grab? 68
Box 24: CDP Exempted from Environmental Clearance 70
Box 25: Manufacturers of Lead Acid Batteries Appeased? 71
Box 26: Power Play by the Automobile Manufacturing Sector 71
Box 27: Urban Projects cause no environmental impact! 73

CHAPTER 5: PROBLEMS WITH THE ENFORCEMENT OF ENVIRONMENTAL CLEARANCES 84

- Monitoring weak after investor secures environmental clearance 84
- Weak punitive measures against deliberate concealment and supplying of false data 86

Box 28: Registration of EIA Consultants outsourced 87

CHAPTER 6: RELATIONSHIP WITH AND CONTINUED RELEVANCE OF EIA NOTIFICATION 1994 88
- Applicability of 1994 Notification undecipherable 88

CONCLUDING REMARKS 91

CASE STUDIES 93
1: Construction Projects - the Athashri Paranjape Project, Bangalore 93

2: Mockery of Environmental Public hearings 94

3: EIA Notification 2006 Ignores the Deadly Health and Environmental Hazards posed by Electronic Waste 95

4: Bogibeel Project: Bridge to destroy rivers 97

5: Special Economic Zones with Special Exemptions 98

6: Illegal dumping of Solid Wastes at Mavallipura village, Bangalore 99

7: Careless Expansion: West Coast Paper Mills 100

8: Ship-Breaking Yards and Units Brought Under Ambit of EIA Notification 2006 101

9: Planning commision and the EIA process 103

ANNEXURE

Annexure A Comparison of the Environment Impact Assessment Notifications of 1994 and 2006.

Annexure A1 A Schematic of the Environmental Clearance Process per the EIA Notification 1994.

Annexure B Comparison of Draft EIA Notification (2005) and EIA Notification - 2006

Annexure C EIA Notification – 2006

Annexure D Additional Circulars, Memos, Corrigendum and Clarifications issued by the MoEF to the EIA Notification – 2006 (Updated till 15 April 2007)

Annexure E EIA Notification 1994

Annexure F Extracts from Indian Environmental Policies

Annexure G Open Letters by Indian NGOs/Campaign Organisations Questioning the National Environment Policy -2006

Annexure H Campaign for Environmental Justice – India, Release on why a 'Death Certificate' was issued on MoEF

Annexure I Campaign for Environmental Justice Press Release Critiquing the Process by which EIA Notification – 2006 was formulated

Annexure J EIA Stages Recommended by UNESCAP

Annexure K UNECE Principles for Meaningful Implementation of the EIA Process

ABBREVIATIONS

ASSOCHAM- Associated Chambers of Commerce and Industry of India

BMIC - Bangalore-Mysore Infrastructure Corridor

BMP - Bangalore Mahanagar Palike

BRO – Border Roads Organisation

CDP – Comprehensive Development Plan

CEJI - Campaign for Environment Justice- India

CFE- Consent for Establishment

CII- Confederation of Indian Industries

CMSWMF - Common Municipal Solid Waste Management Facility

CPCB - Central Pollution Control Board

CREDAI- Confederation of Real Estate Developer's Associations of India

CRZ - Coastal Regulation Zone, 1991

DPC- District Planning Committee

EAC - Expert Assessment Committee

EC- Environmental Clearance

EEZ - Exclusive Economic Zones

EIA - Environment Impact Assessment

EIS - Environment Impact Statement

EMCB – Environmental Management Capacity Building

EMP - Environment Management Plan

EPA - Environment Protection Act, 1986

EPR - Environment Protection Rules, 1986

EPZ - Export Processing Zones

ERM – Environmental Resources Management

ESG – Environment Support Group

ETP - Effluent Treatment Plant

FICCI- Federation of Indian Chambers of Commerce and Industry

GC - General Conditions

GEAC - Genetic Engineering Approval Committee

GMB - Gujarat Maritime Board

GOI- Government of India

IDA - International Development Association

IAA - Impact Assessment Agency

IPCC – Intergovernmental Panel on Climate Change

JNNURM - Jawaharlal Nehru National Urban Renewal Mission

KSPCB - Karnataka State Pollution Control Board

MKSS - Mazdoor Kisan Shakti Sangathan

MoEF - Ministry for Environment and Forest

NBA - Narmada Bachao Andolan

NEEPCO - North Eastern Electric Power Corporation

NEERI - National Environmental Engineering Research Institute

NEP - National Environment Policy 2005

NGO - Non-Governmental Organisation

NOC- No Objection Certificate

NRBPT - National Registration Board for Personnel and Training

PESA- Panchayat (Extension to the Scheduled Areas) Act, 1996

PMO- Prime Minister's Office

RTI Act - Right to Information Act, 2005

SC - Special Conditions

SCMC - Supreme Court Monitoring Committee

SEAC - State Expert Appraisal Committee

SEIAA - State Environment Impact Assessment Authority

SEZ - Special Economic Zones

SPCB - State Pollution Control Board

TOR – Terms of Reference

UNECE - United Nations Economic Commission for Europe

UNEP - United Nations Environment Programme

UNESCAP - United Nations Economic and Social Commission for the Asia and the Pacific

UPA – United Progressive Alliance

UTPCC - Union territory Pollution Control Committee

WCPM - West Coast Paper Mills

WMO – World Meteorological Organization

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INTRODUCTION

On September 14th 2006, the Indian Ministry of Environment and Forests (MoEF) issued a new Environment Impact Assessment (EIA) Notification.[1] According to the MoEF, the objective for amending the norms under the EIA Notification -1994 was to formulate a transparent, decentralised, and efficient regulatory mechanism in order to:[2]

* Incorporate necessary environmental safeguards at planning stage;
* Involve stakeholders in the public consultation process;
* Identify developmental projects based on impact potential instead of the investment criteria.

In this comprehensive review, we demonstrate, contrary to MoEF's claims, that the EIA Notification - 2006 is poorly developed, promotes non-transparency, concentrates power (either with the Centre or States), and unnecessarily creates new layers of bureaucracies. In effect, we believe this legislation will lead to:

* Weak review of environment and social impacts;
* Reduced involvement of local governance bodies and the wider public;
* A preferred status to investment over environmental and social concerns.

Additionally, the Notification's commitment to constitutional provisions and environmental jurisprudence evolved over decades is highly suspect. This review report makes a case that the strong nexus between MoEF and industrial lobbies has resulted in weakening India's key environmental impact assessment regulations. The Notification is also in abject violation of the spirit and import of Rule 5 (3) (c) of the Environment (Protection) Rules, 1986, Section 3 of the Environment (Protection) Act, 1986, and well-entrenched constitutional and judicial precepts.

Box 1: Abstracting the Rio Principles in Developing EIA Law

The importance of effective environmental regulation is most adequately amplified in the Rio Declaration, particularly principles 10, 11, and 17. These principles highlight the importance of:

* Meaningful and progressive participation of people at all levels, especially the local;
* Introduction of environmental legislation and ensuring their implementation;
* Developing special regulatory mechanisms to assess potential social and environmental impacts and ensure they are implemented honestly and fairly, and;
* Utilising environmental impact assessment, as a national instrument, that ought to be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Only if these principles are comprehensively adhered to would EIA become a meaningful instrument to 'anticipate measure and weigh the socio-economic and bio-physical changes that may result from a proposed project'.[a] EIAs

a. *Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, 2nd Edition, OUP, 2002, p. 417.*

1. An amendment or reform of applicable EIA norms (or the EIA Notification) is regulated by Rule 5(3)(a) of the Environment Protection) Rules, 1986, which states:

> *"Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area, it may by Notification in the Official Gazette and in such other manner as the Central government may deem necessary from time to time, give notice of its intention to do so."*

For the text of the EIA Notification 2006, see Annexure C.
2. The MoEF Secretary, Dr. Prodipto Ghosh, made a presentation at the "Sustainability Summit: Asia 2006 – Promoting Excellence for Sustainable Development" organised by the Confederation of Indian Industry (CII) in New Delhi, 19-20 December 2006. The objectives highlighted have been extracted from this presentation, which is accessible at (last viewed on 14th March, 2007) <http://ww.ciionline.org/services/70/dr.pdf>.

if sincerely prepared can enable decision-makers to decide which projects are environmentally justified, and which not. In addition it can significantly enhance decision making capacity in evaluating a project's environmental costs and benefits.[b]

Flowing out of such expectations, the reform of the EIA Notification should have acknowledged and integrated the wide experience across the country, especially in reviewing the record of implementation of the EIA Notification - 1994. Some obvious signposts for improving the quality of our environmental decisions could have been by deepening the processes of public participation, promoting a logical framework based on strong principles of environmental and social sciences for forming clearance conditions, and by ensuring a fool proof mechanism for post-clearance compliance.

b. The pioneering example of EIA is to be found in the National Environment Policy Act, 1969 that requires American federal agencies to submit an Environment Impact Statement (EIS) for proposed projects. Similarly, in New Zealand, the EIA norms and requirements are incorporated into the Resource Management Act, 1991. At the European level, EIA norms have received sustained parliamentary-level attention before being enshrined in the form of the EIA Directive on Environment Impact Assessment, 1985 and the SEA Directive, 2001. In Thailand, while the Minister of Science Technology and Environment does have the power to issue a notification with specific details of the EIA applicability – it is provisions in the Enhancement and Conservation of National Environmental Quality Act, 1992 which expressly confer such power on the Minister who has to act with the approval of the National Environment Board.

Before going into our detailed critique of the EIA Notification - 2006, we present an overview of the evolution of environmental jurisprudence in India. We also identify some of the key factors that have influenced this pro-investment Notification, which we believe is in gross variance to the fundamental and laudatory principles of India's environmental jurisprudence.

International treaties and Indian environmental legislations

India has been, consistently, in step with global initiatives to develop an effective response to widespread environmental degradation. Most international treaties advancing progressive environmental objectives have been readily accepted by India. For instance: the UN Conference on Human Environment (Stockholm Conference, 1972), the Montreal Protocol in 1987, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989 (Basel Convention, 1989), UN Conference on Environment and Development (Rio Summit, 1992), the Convention on Biological Diversity (Rio 1992), the Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto, 1997), and several others. In conformance with such international treaty obligations, India has passed several legislations and articulated policies to provide for an effective environmental regulatory framework.[3] (*See Box 1: Abstracting the Rio Principles in Developing EIA Law.*)

The past three decades has seen the country develop a variety of environmental laws, led initially by reform of wildlife and forest protection legislations and followed soon after by laws to control and prevent pollution. All these legislations were brought under the realm of the country's umbrella environmental legislation - the Environment (Protection) Act in 1986 – that also resulted in the creation of the MoEF. During this process, the Indian judiciary has made remarkable contributions - innovatively interpreting fundamental rights and duties to include objectives of environmental conservation, expanding the central role and responsibilities of the State in environmental protection, and emphasising the importance of public involvement in providing for the needs of all peoples.

Judicial determinants for environmental regulation in India

Delivering the keynote address at a workshop on "*Judicial Enforcement of Environmental Law in Karnataka*" in 2002,[4] the doyen of Indian human rights and environmental jurisprudence, Justice V. R. Krishna Iyer, highlighted the interdependence of environmental decision-making and human rights in the following manner:

> *"The survival of Life needs an environment which sustains it and so it is that human rights make sense only where human life can flourish and this condition mandates the preservation of propitious environment. Our Founding Deed therefore lays great stress on environmental and ecological justice sans which flamboyant phrases about fundamental freedoms are*

3. In this regard, see Annexure F: Extracts from Indian Environmental Policies.

4. V. R. Krishna Iyer, "Environmental Justice though Judicial process: Ratlam to Ramakrishna", presented at the "Workshop on Judicial Enforcement of Environmental Law in Karnataka", Bangalore, 3-4 August 2002, organised by Environment Support Group in collaboration with the Karnataka Judicial Academy and Environmental Law Institute (USA). Copies of workshop proceedings are available on request (at cost) from Environment Support Group.

Justice V. R. Krishna Iyer, former Judge of the Supreme Court of India speaks as noted environmental lawyer M. C. Mehta looks on

> *glittering gibberish. If life is dear, environment too is dear and environmental justice is thus a foremost constitutional value.*"

In a paper entitled "*Environmental Justice through Judicial process: Ratlam to Ramakrishna*" that Justice Krishna Iyer presented, the acute importance of environmental regulation in protecting India's ecological security was emphasised. Pointing to the landmark judgement in the *Ratlam Municipality case*, he highlighted that the ruling "*emphasises the substantive law and, equally importantly, the procedural law bearing upon environmental and ecological conservation and the defence against pollution.*"

> "*The Constitutional provisions have to be read broadly*," he argued, "*with the right to life and dignity as cornerstone of Constitutional guarantee*".

In that sense, "*(p)rocedural law is the instrument of substantive provisions*".

Similar opinions have been echoed in the landmark judgement delivered by Justices M. N. Venkatachalaiah and B. P. Jeevan Reddy in the decision popularly identified as the *Sariska case*.[5] The Justices strongly argued in favour of robust environmental regulation and drew inspiration for this from an American case in the following way:

> "*A great American Judge emphasizing the imperative issue of environment said that he placed Government above big business, individual liberty above Government and environment above all….. The issues of environment must and shall receive the highest attention from this Court*".

Clearly, the Supreme Court has not only emphasized the importance of environmental concerns above economic considerations, but also established for itself new standards in prioritising its responses. Similarly, several judicial pronouncements have expanded the scope and import of constitutional provisions to environmental decision-making in India.[6]

Court judgments have emphasised the doctrines that the right to life is inclusive of the right to livelihood and a clean environment; least tolerance to polluters invoked the "*polluter pays principle*"; the "*precautionary principle*" was highlighted as a major tool for social and economic planning; the state's preeminent role in ensuring the ecological security of the country was stressed by invoking the "*public trust*" doctrine; and in warning government agencies against a lackadaisical approach to environmental regulation, the Supreme Court held that public agencies could not "*plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws*."[7]

Counter trends: self-certification and complete exploitation of natural resources

In stark and shocking contrast to such hortatory and doctrinal judicial pronouncements, two newly proposed Bills – The Environment Clearance (Self Certification) Bill, 2006,[8] and the National Commission for Exploitation of Natural Resources Bill, 2006,[9] currently make their way across the Indian parliamentary landscape. Both these Bills, in essence, subordinate environmental protection to other factors when weighing the wider public interest of development. (See Box 2: Contrary Legislative Trends.)

Under the Self-Certification Bill, it is urged that developers, investors, miners, industrialists, etc. can secure "*environmental clearance required for important infrastructural projects on the basis of self-certification*".[10] The Government must inspect this "*environmental clearance*" within a 30-day period to approve or reject the same. If it fails to conduct this inspection within this period, "*it shall be presumed that the clearance has been granted by the Government.*" (*See Box 3: "Self Certification", at Whose Cost?*)

5. Tarun Bharat Sangh, Alwar v. Union of India (Sariska Case), Writ Petition (Civil) No. 509 of 1991, Supreme Court, 14 May 1992 (M. N. Venkatachaliah and B. P. Jeevan Reddy, JJ.).

6. Indian courts have been guided here by principles highlighted in two significant UN led initiatives, the UN Conference on Human Environment (resulting in the Stockholm Declaration, 1972) and the UN Convention on Environment and Development (resulting in the Rio Declaration, 1992).

7. See Dr. B. L. Wadehra v. Union of India (Delhi Garbage Case), AIR 1996 SC 2969.

8. Available on the Parliament website at (last viewed on 15th March, 2007) <http://164.100.24.208/ls/Bills/26,2006.pdf>.

9. Available on the Parliament website at (last viewed on 15th March, 2007) < http://164.100.24.208/ls/Bills/36,2006.pdf>.

10. Cited from the Preamble of the Environmental Clearance (Self-Certification) Bill, 2006.

Box 2: Contrary Legislative Trends

THE ENVIRONMENTAL CLEARANCE (SELF-CERTIFICATION) BILL, 2006 - EXCERPTS

STATEMENT OF OBJECTS AND REASONS

"Therefore, it is proposed that any development work, which is intended for public benefit, may be undertaken on the basis of self-certification without waiting for environmental clearance. At the same time a provision has been made to ensure that clearance by environmental authorities should be given within a fixed time frame. This will ensure that public projects are not stalled for want of clearance and at the same time environmental norms are also followed."

"3. Notwithstanding anything contained in any other law for the time being in force or any judgement of any court or tribunal or judicial authority, no authority or organization including any private organisation shall require any prior environmental clearance from the Ministry of Environment and Forests of the Central Government or any authority constituted for the purpose for undertaking any project."

"4. Any authority or organisation undertaking a project shall, before starting work on the project, submit a certificate to the Ministry of Environment and Forests of the Central Government that the project is clear from all angles of environmental aspects and it has satisfied all the norms prescribed for the prevention of environmental pollution."

"8. If no communication is received from the Government regarding clearance within three months from the date of submission of certificate, it shall be presumed that the clearance has been granted by the Government."

THE NATIONAL COMMISSION FOR EXPLOITATION OF NATURAL RESOURCES BILL, 2006 - EXCERPTS

"7. (*1*) The National Commission shall, on receipt of communication under section 6 from a State Commission or a Union territory Commission, immediately depute a team of experts for verification, confirmation and further investigation of the findings of the State Commission or the Union territory Commission, as the case may be.

(*3*) The National Commission shall make its recommendations on the basis of report of the team of experts and the communication of the State Commission or the Union territory Commission to the Central Government regarding setting up of industries or other methods to be adopted for exploitation of natural resources in the area."

"8. The Central Government, on receipt of recommendation under section 7, shall take steps for setting up of industry or other means of exploitation of natural resources on its own or shall extend full financial assistance to the State Governments or the Union territory administrations for the same."

"9. It shall be the duty of the Central Government to ensure that all natural resources are properly and fully exploited so as to result in maximum benefit to the country."

Box 3: "Self Certification", at whose Cost?

Support for "self certification" in securing of "environmental clearance," as promoted by the Environmental Clearance (Self-Certification) Bill, 2006, is likely to grow from industrial lobbies. It is very likely that investors will follow this Bill with very keen interest and spare no effort in ensuring its success in Parliament. The benefits, for investors, include freedom from the need to comply with mandatory procedural prerequisites before grant of conditional clearances from environmental regulatory authorities. Investors will no longer have to submit their investment or industrial plans to 'public consultations', for instance. Already FICCI has already declared its intention to push for the success of this Bill, citing as evidence some of its "studies" that apparently demonstrate that environmental regulation is amongst the chief reasons for slowing down industrial production.[a]

In this context, it helps to recall the deathly gas leak from the Union Carbide factory in Bhopal during the early hours of 3rd December 1984 that instantly killed hundreds in their sleep and injured thousands. The existence of progressive pollution control laws such as the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981, completely failed in preventing this industrial

disaster – considered the worst industrial disaster to strike the world. Worsening the plight of those affected, legal efforts both in India and the United States failed in establishing the pre-eminence of the right to life over the wealth-creation objectives of corporate systems. To this day, justice continues to be denied to thousands of victims who still suffer from one night's pollution. Besides raising a whole range of issues connected with environmental regulation, the Bhopal Tragedy exposed corporate India's hollow credentials as an environmentally sensitive sector.

The Bhopal gas disaster also rang a tragic alarm bell across the world - highlighting how careless and ill-considered industrial and infrastructure development does not amount to progress at all. One industrial accident is all that it takes to set the clock back by decades. The erstwhile Union of Soviet Socialist Republic learnt this lesson in an equally harsh way from the April 1986 nuclear accident at Chernobyl, now in Ukraine. More recently India has witnessed massive explosions at the Reliance Refinery in Jamnagar, Gujarat and some years earlier at the public sector Vizag refinery in Andhra Pradesh. Our mining sector is as notorious as the Chinese mining sector - for annihilating the lives and livelihoods of dozens of workers due to death and injury. India is also one of the few countries to have absolutely no transparent safeguards for highly hazardous operations such as nuclear power generation or ship breaking.

Clearly, these instances mandate a very rigorous approach in evolving legislation that identify potential social and environmental impact of industrial and infrastructure development (with the intent of minimising widespread social, environmental and economic damages). Shockingly, we are now being asked to develop confidence in industrial "self certification" measures!

a. Despite a thorough search of the FICCI website, neither a summary nor the full content of these study reports are available. The FICCI website is accessible at (last accessed on 27 March 2007) <http://www.ficci.com>. The only information available in support of FICCI's claim is a Press Release (dated 21 March 2007) entitled "INTRODUCE SELF-CERTIFICATION FOR THE INDUSTRY BY 2010: FICCI", accessible at (last accessed on 27 March 07) <http://www.ficci.com/press/release.asp>

Box 4: The FICCI 'Self-regulatory' Agenda

Excerpts from the Federation of Indian Chambers of Commerce and Industry (FICCI) representation to the MoEF – 'Objections/Suggestions on the Proposals in the Draft EIA Notification no. S.O. 1324 (E) of 15/9/05'[a]

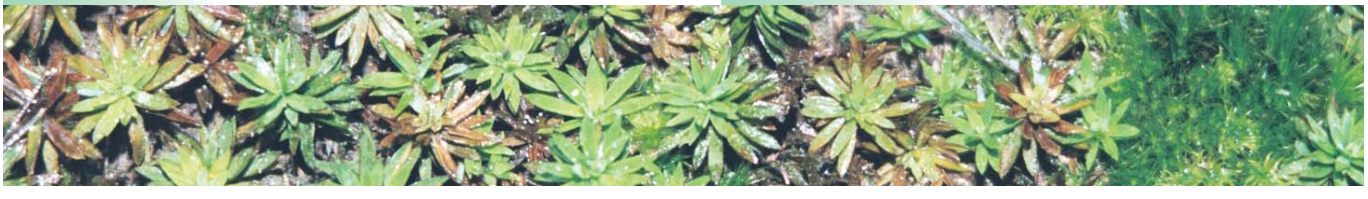
"a) We therefore propose that the following projects – irrespective of size should fall under the self-regulatory process: and just as CREP was devised and designed as a joint effort of the CPCB and the concerned Industry, the processes of self regulation can be similarly designed.

Schedule no (of the draft notification) 2 (a) Coal Washeries; (b) Mineral beneficiation 3 (a) Primary metallurgical Industries (ferrous & nonferrous); (b) Sponge iron industry; (c) Cement plants; (d) Manufacture of lead acid batteries; (e) Leather/skin/hide processing industry

4 (a) Petroleum Refining Industry; (b) Coke oven plant; (c) Asbestos based products; (d) Chlor alkali/soda ash industry (other than mercury) 5 (a) Chemical fertilizers; (b) Pesticides and Pesticides intermediates; (c) Petrochemical complexes and related products; (d) Man-made fibres; (e) Petrochemical based processing; (f) Synthetic organic chemicals industry (dyes & intermediates bulk drugs and intermediates, synthetic rubbers, basic organic chemicals; (g) Distilleries; (h) Integrated paint industry; (i) Pulp and paper industry; (j) Sugar Industry (k) Induction arc furnace; (l) Automobile manufacturing unit; (m) Isolated storage and handling of hazardous chemicals.
b) Further the mining of minerals from the EC process should be completely deleted……..
c) Power plants upto 500 MW capacity irrespective of feed stock should be brought under self approval process.

d) Similarly, captive power plants, irrespective of capacity and fuel should also be approved on self approval basis, because such power projects would be part and parcel of the larger industrial process."

a. Available at (last visited on 29th March, 2007) <http://www.ficci.com/media-room/speeches-presentations/2005/oct/eia-representation.pdf>.



Federation of Indian Chambers of Commerce and Industry (FICCI) has jumped in support of such incredible ideas, arguing that according to its surveys "…. maximum number of inspections - 106 in a year - are done under environment related regulations. Around 30 to 40 days in a year are required on an average for an industrial unit to comply with these environment-related inspections."[11] Not very surprisingly, the solution that FICCI proposes is one of "self certification" - very much what the pending Bill proposes to institute. (*See Box 4: The FICCI 'Self-regulatory' Agenda.*)

The National Commission for Exploitation of Natural Resources Bill, 2006 pushes the sole agenda of ensuring "that all natural resources are properly and fully exploited," and towards this end, envisions complex new bureaucratic machinery. In effect, natural resources are considered solely in terms of their value as raw materials and their utility for industrial processes, and this Bill urges for an accelerated program for full exploitation of these natural resources (to fuel economic growth) without sparing a thought for the environmental and social issues at hand. (*See Box 2: Contrary Legislative Trends.*)

Political and economic factors that influenced the new EIA norms

In recent years, as India attempts to catch up with the frenetic pace of globalisation (often obsessed with the Chinese model of growth), priorities for development are being largely determined by indices such as economic growth rates. Indian Finance Minister Shri. P. Chidambaram, who recently remarked that the Government of India was '"*willing to tolerate debate, and perhaps even dissent, as long as it does not come in the way of 8 per cent growth*" of the Indian economy,[12] is one of the staunchest believers in the fundamental importance of economic growth to India in current times. In effect, the Indian Finance Minister has revealed that the Government's emphasis was on economic indicators over all else, including democratic decision-making. A statement that would have caused widespread political turmoil, perhaps even a decade ago, has been willingly accepted by the political apparatus of the day without even a murmur of protest.

Shri. Chidambaram's utterances are just the most recent in a line of aggressive pro-growth statements that strongly reflect the current focus of governmental priorities. The previous Union Government, headed by Shri. A.B. Vajpayee, was equally aggressive in its approach in promoting investment - with several special Ministries being created for this purpose. One such - was the peculiarly named Ministry of Disinvestment[13] - headed by Shri. Arun Shourie, which had the task of creating a pro-investment regulatory climate. In navigating an aggressive pro-investment reform agenda through the Union Cabinet, Shri. Shourie helped set up an inter-ministerial committee of bureaucrats with the task of identifying bottlenecks to investment and

Credit : Lawrence Moore.

proposing remedies to ensure that investment flows remained unaffected by other considerations.

In 2002, this committee headed by Shri. V. Govindarajan, then Secretary of the Department of Industrial Policy and Promotion, presented a set of two volumes entitled "*Report on Reforming Investment Approvals and Implementation Procedures*".[14] Popularly known as the *Report of the Govindarajan Committee on Investment Reforms*, this report has since provided the architectural framework for identifying legislative and administrative systems considered unhealthy for promotion of a strong investment climate, thereby marking such systems for mechanistic reform through "*re-engineering*".

Prime amongst the legislative instruments so identified were environmental and forest clearance mechanisms,

11. "Ficci seeks end to inspections, calls for self-regulation", Economic Times, March 23, 2007, accessible at (last viewed on 27 March 2007) <http://economictimes.indiatimes.com/Ficci_seeks_end_to_inspections_calls_for_self-regulation/RssArticleShow/articleshow/1795846.cms>.

12. See 'Dissent will be brushed aside if it impedes growth', Hindu Business Line, 11 September 2006, accessible on-line at (last viewed on 14th March, 2007) <http://www.blonnet.com/2006/09/11/stories/2006091102260300.htm>.

13. The objective of the Ministry of Disinvestment was to encourage Indian and foreign direct investors to take a stake or even takeover various public sector enterprises.

14. Both volumes of the "Report on Reforming Investment Approvals and Implementation Procedures" are accessible on-line at (last viewed on 14th March, 2007) <http://dipp.nic.in/implrepo/implrepo1.pdf> and <http://dipp.nic.in/implrepo/implrepo2.pdf>.

along with laws safeguarding labour rights. Another key area identified for reform included the crosscutting legislations relating to land acquisition. The broad theme of these reforms was to simplify processes for securing clearances under the environmental and forest regulatory systems, to limit worker oversight on investment profiles, and to ensure quick and easy access to land for investment purposes. The Govindarajan Committee effectively lent strength to the argument that environmental conservation priorities were to be tolerated only so long as they did not affect the promotion of investment.

In this exercise, the Committee was assisted by a carefully chosen set of pro-investment industrial lobbies, both Indian and foreign. Foreign consultancy firms involved included Boston Consultancy Group and A. T. Kearney while the Indian consultancies included the Associated Chambers of Commerce and Industry of India (ASSOCHAM), Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII). The World Bank, particularly its private sector financing wing - the International Finance Corporation, also had a strong influence on the final outcomes of the process identifying measures for investment reform. The empirical basis for all the sweeping changes that the Committee was to propose was merely a set of *"PMO [Prime Minister's Office] commissioned 13 case studies, in the private and public sector, to identify various procedural, institutional, regulatory and implementation bottlenecks that cause delays in approval, commissioning and operation of such projects."*

The committee also borrowed from the *"(f)indings of 5 case studies (that) were integrated by A.T. Kearney"* into a synthesis study, which identified that:

* Environmental clearances require disproportionate level of details;
* Certain clearances do not appear to serve any specific purpose or public interest.

Echoing similar sentiments in its final report, the Govindarajan Committee identified India's environmental and forest regulatory systems as prime sectors for reform. The nature of reforms proposed is evident in the following recommendations:

> *"In case site visits for environmental and forest clearances are not carried out within the specified time period, it may be deemed that such visits are not required. Similarly, in case the members of the Expert Committee do not give their response within specified time period, it may be presumed that they have no comments to offer and next stage of the approval process may be taken up."*
> (Paragraph: 4.34)

> *"v. MOEF may consider permitting diversion of forestland for preconstruction activities based on the 'in principle' clearance after the non-forest land identified for compensatory afforestation has been transferred to the forest department and funds for raising compensatory afforestation deposited by the user agency."*
> (Paragraph: 4.40)

The need to ensure that investments are not unnecessarily bogged down by bureaucratic red-tapism is well appreciated. But it is an altogether different matter if investments are to be promoted even when they encroach upon and fundamentally violate key precepts of Indian environmental and forest protection legislations. The recommendations cited above pitch *"deemed clearances"* as pro-investment measures – thereby completely trivialising the complex issues involved in environmental and social impact assessments. Forests, for instance, are complex systems whose value is not merely in serving anthropogenic interests. For the Govindarajan Committee, however, forest clearances were merely an item in the environmental clearance process – therefore, an administrative remedy was in order to ensure the investor did not lose time on project activity - even if this meant that precious natural forests were to be wantonly replaced by monoculture plantations. This recommendation for allowing *"diversion of forestland for preconstruction activities based on the 'in principle' clearance"* is now an integral part of the EIA Notification – 2006. Clearly then, the Notification attacks the very letter and spirit of the Environment (Protection) Act, 1986, which insists on holistic consideration of all environmental and social impacts prior to any activity being initiated.

Interestingly, one of the members of the Govindarajan Committee was Dr. Prodipto Ghosh, IAS, the then Addl. Secretary to the Prime Minister's Office. In an interview

Dr. Prodipto Ghosh, IAS, Secretary, MoEF (centre) flanked by FICCI representatives, deliberating the draft EIA Notification on 25 October 2005 in New Delhi. Source: http://www.ficci.com

he gave during the finalisation of the committee's report, he highlighted that *'(w)e have the Govindarajan Committee to address the procedures and very serious changes are underway to address the procedural problems*."[15]

How the EIA Notification was "reengineered"

Soon after the Govindarajan Committee submitted its report to the Union Cabinet, Dr. Ghosh was appointed as Secretary to the MoEF. With a missionary zeal, he went about addressing "*procedural problems*" that affected investments within the environmental decision-making framework and pushed for "*serious changes*" by "*reengineering*" India's environmental regulatory systems. One of the very first steps identified in the so-called "*reengineering*" exercise was to revamp the Environment Impact Assessment Notification, 1994 (issued under the Environment (Protection) Act, 1986)[16] and harmonize it with the Govindarajan Committee recommendations.[17]

In a presentation that he made to Confederation of Indian Industry (CII) very recently,[18] Dr. Ghosh has acknowledged that the three major imperatives in reforming the EIA Notification were:

* the comprehensive review of the Environmental Clearance process initiated by MoEF under the Environmental Management Capacity Building (EMCB) Project, financed by the World Bank;
* the recommendations of the Govindarajan Committee set up by the Central Government for Reforming Investment Approvals and Implementation Procedures; and
* MoEF studies that brought out the need for reforms, which were found to be consistent with the Govindarajan Committee recommendations.

The World Bank's role in reshaping India's environmental regulatory systems is an interesting aspect to this "re-engineering" exercise, and the EMCB process constituted a critical intervention in determining India's environmental regulatory regime. The World Bank provided millions of dollars to MoEF - almost entirely financing the EMCB project. Since its initiation in 1996, this project has supported a variety of research and training initiatives, both within academia and the corporate sector. Each of these initiatives however has been restricted within a particularly narrow view of reforms (involving the prioritisation of investment reform imperatives over environment conservation needs).

A very significant component of the EMCB project was the "re-engineering" of India's environmental clearance mechanisms. This component was awarded to the international consultancy firm Environmental Resources Management (ERM) - to present a draft proposal to "re-engineer" India's environmental clearance systems. ERM produced its draft proposal for the reform of the EIA Notification in 2003, and ran this draft through very poorly organised consultations in Bangalore and Delhi. What should have been a highly public and very transparent exercise was instead relegated to mere conversation sessions largely involving industrialists, bureaucrats and representatives of regulatory agencies. The invitation of a few NGOs for these consultations constituted the only fig leaf of protection against potential claims of in-transparency. Expectedly, widespread protests against such feeble consultations resounded from various parts of India. However, neither ERM nor MoEF (nor the World Bank as sponsor) found these protests to be an adequate basis for broad-basing the public consultation in finalising of the amendments to the EIA norms. (*See Box 5: The Questionable Role of International Consulting Firm Environmental Resource Management (ERM) in Formulating the EIA Notification – 2006.*)

BOX 5: The Questionable Role of International Consulting Firm Environmental Resource Management (ERM) in Formulating the EIA Notification – 2006

The World Bank in 1996 (through its International Development Association (IDA) facility) provided US $ 50 million to the MoEF for setting up an initiative called the Environment Management Capacity Building (EMCB) program. The objective of this exercise was to raise Indian environmental management and regulatory practices to international standards. The proposal identified the following areas of environmental management for the revamping exercise:
(1) Environmental Policy Planning
(2) Environmental Administration
(3) Decentralization of Environmental Management
(4) Implementation of Environmental law
(5) Monitoring and Compliance in Specific High Priority Problem Areas.

15. See "'Forecast not unrealistic. We can achieve 8% GDP growth', an interview on rediff.com with Dr. Prodipto Ghosh available on-line at(last viewed on 14th March, 2007) < http://www.rediff.com/money/2002/jul/19inter.htm>.
16. See Annexure E : EIA Notification 1994.
17. See Annexure A : Comparison of Environment Impact Assessment Notifications of 1994 and 2006.
18. The MoEF Secretary made this presentation at the "Sustainability Summit: Asia 2006 – Promoting Excellence for Sustainable Development" organised by the Confederation of Indian Industry in New Delhi, 19-20 December 2006. The focus of the summit was mining, forestry and innovation. The complete presentation by Dr. Ghosh - while not available on the MoEF website - is accessible at (last viewed on 14th March, 2007) <http://www.ciionline.org/services/70/dr.pdf>.

The proposal defined Environmental Management as-

> *"a continuous process that consists of three interconnected steps:*
> *(a) the collection and analysis of relevant data; learning from worldwide "best practices"; and incorporating these in the planning and formulation of policy including the setting of standards;*
> *(b) the effectiveness and location of the policy including the setting of standards;*
> *(c) program implementation and monitoring to ensure active compliance with established laws and standards."*

MoEF employed different organisations to research into the various aspects of the project as defined by the World Bank. For Component A of the project (Review of procedures and practices of environmental clearance in India), the international consultancy firm Environment Resource Management (ERM) was employed.

ERM went through notional consultation exercises - one in Bangalore and the other in Delhi – as a process of eliciting "public comment" on its recommendations for changes in the Environmental Clearance Process of India. For the Bangalore meeting, Environment Support Group was the only local non-governmental organisation invited. Even the Secretary of the Karnataka Department of Ecology and Environment was not aware of these proceedings! The draft of the ERM report was also not made available prior to the 'consultation'. The Delhi consultation was similarly non-transparent, and such a non-participatory approach led to protests from across the country. Demands for wider consultation in all parts of the country were not acted upon at all and the ERM report was finalized in 2004.

In issuing the EIA Notification – 2006, MoEF has borrowed substantially from the ERM proposals. Strongly influenced by both the ERM recommendations and the Govindarajan Committee Report on Investment Reform, there was little hope for the EIA Notification 2006 to advance democratic decision-making through its agenda of environmental reform.

Meanwhile, MoEF had already started organising some sporadic consultations on a draft National Environmental Policy (NEP). In the month of November 2004, MoEF organised a set of three consultations to discuss the draft NEP: one for the corporate sector, the second for state government representatives, and the third for NGOs.[19] These consultations were held on different days and each consultation was open only to "invitees". Despite widespread criticism over such unnecessary secrecy in developing a national policy, MoEF moved on mechanistically in finalising India's 'environmental policy'. Dr. Prodipto Ghosh and Ms. Meena Gupta (Additional Secretary, MoEF) coordinated these consultations. Invited participants at the NGO consultations, to their surprise, discovered an additional item for their consideration apart from the draft NEP. This was a sketchy four-page proposal for the reform of the EIA Notification and the applicable EIA norms in India.[20] None of the participants had been informed about, or were prepared for, a review of proposals relating to reform of the EIA Notification. The whole exercise was organised with a cavalier attitude that belittled the widespread import of the proposed reforms and also grossly undermined the vital need for

29/8/05

2 The New Indian Express Bangalore

CITY

What are the babus hiding?

By Anupama Jayaraman

Activists are outraged that the ministry is keeping the draft National Environmental Policy under wraps

Bangalore, Aug 28: Activists, environment groups and individuals are protesting the secretive ways of the Union Ministry of Environment and Forests (MoEF).

The ministry has finalised a draft of the National Environment Policy (NEP) and submitted it to the Cabinet for approval, without making the policy public, as stipulated under the Right to Information (RTI) Act of 2004.

"Over 70 citizens' groups and individuals have written to the Prime Minister to make it public. The first draft of the NEP was filled with contradictions. The revised draft should have been shown to us, and national consultations held with citizens, before it was sent to the Cabinet," said Ashish Kothari of Kalpavriksh.

On October 29 last year, 90 organisations and individuals from across the country got together to point out serious inconsistencies in the Draft Bill in a letter to MoEF.

The Right to Information Act states that the government should "publish all relevant facts while formulating important policies or announcing the decisions which affect the public".

"The Government, after the formulation of the first Draft Bill in August 2004, put it out on the government website. But after several protests by activists and individuals, it removed it. But today when the Bill is being placed for approval, no one has a clue on what it contains, as the Government has not placed the revised version on the website," said Leo Saldanha of Environment Support Group (ESG).

Environment activists have demanded a new perspective that incorporates ecological and food security for the citizens of the country. They also want local Panchayats to be involved in the revision of the new Bill.

Civil society organisations have protested the private-investment thrust of the policy. "The entire policy has been made weak to help private participation. It comes across as an environment management policy more than an environment conservation policy. Pradipto Ghosh, Secretary in MoEF, was earlier part of a committee that wanted to give a fillip to FDI and liberalisation," added Leo.

19. The term non-governmental organisation, though widely used, has never been accurately defined. In practice, the mere absence of direct governmental involvement in an agency is sufficient to label such an agency as an NGO. In general, NGOs are seen as non-profit agencies emerging from the voluntary sector. However, there are many instances wherein consultancy organisations, issue specific lobby organisations, industry and financial institution supported initiatives, etc. are promoted as NGOs in spaces of official discussion. This has severely compromised securing spaces and opportunities for those who articulate the interests of disadvantaged communities an objectively advance social, health, environmental, and scientific concerns.

20. See MoEF, "Reforms in grant of Environmental Clearances", 2004, available at (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/envt.decision.making/index.html>.

considered debate and review of the changes proposed.[21]

Subsequent months saw widespread debate on the contents of the NEP and on the undemocratic manner in which it had been pushed through.[22] Environmental groups and networks across the country came together in issuing a variety of Open Letters challenging the formulation process and content of both the NEP and the proposed amendments to the EIA Notification.[23] One primary concern was that pro-investment interests were largely motivating the 'reforms' of environmental regulatory systems in India, without sensitively or adequately addressing the complexities involved in environmental decision-making. [24]

CEJI protestors rallying against the EIA Notification at the MoEF Headquarters at Paryavaran Bhavan Complex, New Delhi

Even as these debates raged, the draft version of the EIA Notification – 2006 was released by MoEF on 15th September 2005 inviting public comments and objections.[25] This document could only be accessed on the MoEF website or through the Official Gazette where it was published. No effort whatsoever was made to use the media (print, radio or television) to broadcast the proposed reforms. Apart from a Hindi version of the Notification that was released subsequently, there was no effort to translate the proposed reforms into any of the regional languages. Clearly, MoEF was just not interested in maximising public involvement in the formulation of the EIA Notification!

MoEF ignores efforts to broad-base consultations

Such utter lack of respect for wide-ranging or dissenting views from across the country troubled many. In response, the Campaign for Environmental Justice – India (CEJI) organised two significant interventions in Delhi involving widespread participation from across the country.

The first was *MoEF Suno*, on 13th November 2005, which involved a variety of depositions (before a Citizens' Public Hearing Panel) by communities affected by environmental clearance decisions. This forum highlighted deep concerns over widespread exploitation of environmental clearance mechanisms for advancing of investor priorities at the cost of all else. MoEF officials were invited to freely participate in the process and respond to the concerns raised. However, no one came .[26]

Participants at *MoEF Suno* included people who continued to suffer from the criminal gas leak at Dow/Union Carbide's Bhopal plant, fishing communities who resisted the proposal to build the Sethusamudram ship canal in the Bay of Bengal (as it would rout their fishing zone and thus their livelihood), representatives of tribal communities resisting the 7th dam on the Chalukady river in Kerala, forest dwellers from the Central Indian region who argued that their existence in forests was less disruptive when compared with the mining companies that were being continually allowed to exploit the forests, communities disrupted by mining in Rajasthan, communities resisting eco-tourism ventures in Sunderbans on grounds that it would destroy the mangrove forests and also the livelihoods of thousands, and many others. They had strong reason to be aggrieved by the MoEF officials' lackadaisical attention to their concerns. Further, each one of these participants had travelled great distances at their own cost to come to Delhi and raise their concerns.

Troubled by such systemic lack of response to coordinated efforts that presented peoples concerns, CEJI organised a protest rally to Paryavaran Bhavan

21. Annexure G: Open Letters by Indian NGOs/Campaign Organisations Questioning the National Environmental Policy -2006.
22. The Union Cabinet eventually approved the NEP on 18th May, 2006. On this issue, see CEJI, "Why is India's Environment Policy a Secret", Open Letter to the Prime Minister of India, August 25, 2005, available at (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/envt.decision.making/index.html>.
23. See CEJI, "Stop the regressive changes to the Environment Clearance process", Open Letter to the Prime Minister of India, June 29, 2005, available at (last visited on 10th February, 2007) http://www.esgindia.org/campaigns/envt.decision.making/OpenLetter_PM_290605.htm>.
24. See CEJI, "National Environmental Policy: Rejected – NGOs walk out of 'official consultation' in protest", Press Release, New Delhi, 1 December 2004, available at (last visited on 7th March, 2007) <http://www.esgindia.org/campaigns/envt.decision.makingNEP.rejected.pr.011004.htm>.
25. See Annexure B: Comparison of Draft EIA Notification (2005) and EIA Notification – 2006.
26. To learn more about MoEF Suno see (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/nvt.decision.making/index.html#moefsuno>.

Certificate of Death

This is to confirm and certify the death of

Union Ministry of Environment and Forests

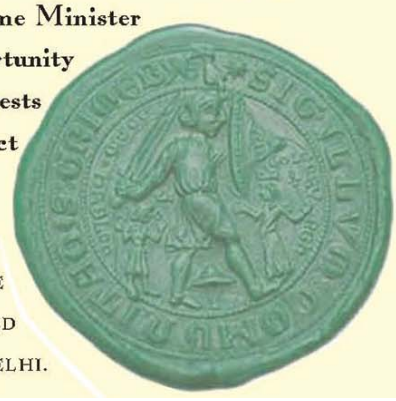
at *New Delhi* **on** *13th November 2005*

WE, THE PEOPLE REPRESENTING A WIDE RANGE OF TRIBAL, RURAL and urban communities, the rivers and forests, wildlife and coastal regions, deserts and mountains, declare the *Union Ministry of Environment and Forests* dead as it has failed to protect our environment.

This death befell the Ministry by its own act of commission, omission and collusion in order to support the agenda of destructive development in India prescribed by agencies like the World Bank, IMF, and our own technocrats. Financed by grants from such institutions, Ministry officials have casually and carelessly given clearances to all and sundry, including to those investors with plans causing environmental destruction at any cost.

The cause for the Ministry's death is rigor mortis. Normally this condition visits the dead after death has occured. But the Ministry suffers from a very rare disease of the living dead. The cause of which is its penchant to twist law and policy to advantage investors at any cost. A related cause was its compulsive habit of treating with disdain the simple and wise opinion of ordinary folks across the country, who have asked for that kind of development that would benefit all. That kind of development that would not compromise the survival of wildlife and its habitats, and the livelihoods of present and future generations.

We must not mourn this death, however. Instead we must celebrate this death. For the living dead are a terrible affliction on the truly living. For this is an opportunity for us to create anew the kind of Ministry of Environment and Forests that this great country, with its wonderful diversity of ecosytems and peoples, deserve. Delivering this Death Certificate to the Prime Minister of India, we present the Government of India an opportunity of bringing to life a Ministry of Environment and Forests that will uphold the law of the land and serve to protect the country's environment and human rights.



ISSUED ON THE APPROVAL OF PEOPLES' GROUPS ACROSS INDIA, BY THE CAMPAIGN FOR ENVIRONMENTAL JUSTICE IN INDIA, FOLLOWING A PUBLIC HEARING ENTITLED "MOEF SUNO", 13TH NOVEMBER 2005, AT DELHI.

MoEF 'Death Certificate' issued by CEJI

(MoEF's Headquarters in the high security Central Government Office Complex in New Delhi) the following day, to press for its key demand of cancellation of the proposed amendments to the EIA norms. Over 200 representatives of peoples' movements, environmental networks, and local communities - who had gathered for *MoEF Suno!* - actively participated in the protest march and stormed into the MoEF headquarters in an event publicised as MoEF Chalo.[27] Despite strong police presence, the protesters managed to enter the Paryavaran Bhavan building and squatted in the lobby demanding that the Indian Minister for Environment and Forests come and meet them and listen to their concerns.

As the day progressed, no one from MoEF was willing to come and interact with the gathering. In symbolic protest over such highly unresponsive attitudes of MoEF, CEJI issued the Ministry's 'Death Certificate' – a statement that highlighted the Ministry's complete failure to the country in discharging the mandate vested upon it by the Environment (Protection) Act, 1986.[28] The 'Death Certificate' was served to the Prime Minister of India as a symbolic statement drawing his attention to the lackadaisical functioning of a critical Ministry.[29]A memorandum justifying why such a method was in order, and providing detailed evidence highlighting how the proposed EIA Notification would severely compromise progressive efforts in securing livelihoods and in advancing effective regulation, accompanied the Death Certificate.[30] The Prime Minister was urged to urgently intervene and stop the draft EIA Notification from being finalised. In parallel, all political parties and various parliamentarians were approached to enlist their support for CEJI's objective of ensuring that the Notification was not hurriedly passed without adequate debate in local governments, legislatures, Parliament and public fora.[31]

While the Prime Minister never responded to CEJI's memorandum, systematic efforts helped CEJI representatives secure a meeting with the Union Minister for Environment and Forests, Shri. A. Raja, on 9th August 2006. In this meeting, CEJI pressed for wider and more open consultations across the country on the proposed amendments to the EIA norms. Agreeing with the CEJI delegation that such a critical Notification could not be passed without due, meaningful and widespread consultations, the Minister promised CEJI members that more public consultations would precede the final issuance of the Notification.[32]

CEJI meanwhile intensified its campaign with parliamentarians across the political spectrum and also with members of Special Parliamentary Committees. In a refreshing change from the experience with MoEF and the PMO, parliamentarians were readily accessible and each parliamentarian who was met readily supported CEJI's demands. In response to CEJI appeals, many parliamentarians wrote to Union Environment and Forests Minister Shri. A. Raja stressing the importance of public consultation before issuing the Notification.

Shri. P. G. Narayanan, Member of Parliament (Rajya Sabha) and Chairman of the Parliamentary Standing Committee on Science, Technology, Environment and Forests wrote to Shri. Raja on 1st September 2006 expressing that he was "*shocked to learn that the Ministry has been working on redrafting this critical Notification for over a year now. Unfortunately no consultation has been sought with the Parliamentary Committee on Science & Technology, Environment and and Forests, of which I am the Chairman.*"

Shri. Sitaram Yechury, Member of Parliament (Rajya Sabha), Leader CPI(M) Group and Department-related Parliamentary Standing Committee on Transport, Culture and Tourism, in his letter of 31 August 2006 to Shri. Raja expressed concern that the "*consultations on the draft of the EIA Notification by the Ministry has been restricted to Industry Associations like CII, FICCI, ASSOCHAM and CREDA and some Central Ministries and Departments. This cannot be interpreted as extensive public*

BOX 6: Brazen Admissions!

MoEF Response to CEJI Concerns (on instruction from Parliamentary Sub-Committee)

The Union Ministry of Environment and Forests (MoEF) had failed to acknowledge many Open Letters collectively issued by a variety of environmental groups criticizing the contents of the draft EIA Notification for over several months. However, when the CEJI sought the intervention of the Parliamentary Sub-Committee on Science,

27. To learn more about MoEF Chalo see (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/nvt.decision.making/index.html#moefchalo>.

28. Available at (last visited on 10th February, 2007)<http://www.esgindia.org/moefsuno2005/moef.death.certificate.131105.pdf>. See also, Ranjan Panda, "MoEF's 'Death Certificate' issued", Deccan Herald, November 24, 2005.

29. See Annexure H: Campaign For Environmental Justice – India Release on why a 'Death Certificate' was Issued on MoEF.

30. You can download all the cases submitted in the MoEF Suno Hearing from (last visited on 10th February, 2007): <http://www.esgindia.org/moefsuno2005/index.html>.

31. This has been extensively documented at (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/envt.decision.making/index.html>.

32. See "Environmental Notifications: wider consultations assured", Hindu, 14 August 2006.

Technology, Environment and Forests to force MoEF to respond, the selectively communicative Ministry wrote several pages justifying why the process it had followed and the amendments of the EIA Notification proposed were justified.

Mr. C. B. Rai, Under Secretary of the Parliamentary Committee forwarded these comments to CEJI in a letter dated 18th August 2006. Following are some excerpts from this letter entitled: "Concerns of CEJI on the changing policies and regulations of the MoEF relating to natural resources and the communities dependent on them,"

"*A large number of objections/ suggestions have been received in response to the Draft notification, these have been examined and a final revised draft Notification has been prepared. A presentation on the final revised draft notification has been made to Principal Secretary to PMO by Secretary E&F on 26th April 2006. The meeting was also attended by the Member – secretary, planning commission in this meeting it was decided that the MoEF should be another round of discussions with the Apex Industry Associations namely: CII, ASSOCHAM, FICCI, CREDAI after circulation to them the amended version of the notification prepared by the Ministry. It was also directed that simultaneously the notification be circulated to all the concerned Central Ministries and their comments invited within 15 days.*"

"*Pursuant to the above decision, the Ministry has circulated the final revised draft notification to the Apex Industry Associations and Ministries including the Planning Commission. The revised notification was discussed at length in the meeting with the Apex industry Associations held on 22nd May 2006 under the Chairmanship of Secretary (E&F). Subsequent to the meeting, the written comments/views on the notification were obtained from the Associations. Another round of discussions exclusively with CREDAI and the representatives of the Apex Industry Associations followed this. The Ministry has also circulated the final revised draft notification to the Central Ministries/ Departments and the Planning Commission on the 5th May 2006 seeking their comments/views, if any, within 15 days from the date of issue of the said letter.*"

"*The comments of the Apex Industry Association and the Central Government Ministries and the Planning Commission have been received and have been examined in the Ministry. Accordingly, necessary amendments have been made in the revised draft final notification.*"

consultations under any circumstances.....It is important for the Ministry to hold extensive consultations by organising zonal workshops involving the State Governments, Zilla Parishads, Panchayats, mass organisations and NGOs. There should also be a full discussion on this issue in the Winter session of the Parliament. I hereby request you to withhold the finalisation of the EIA Notification till such extensive discussions and parliamentary debate take place on the issue."

Even Cabinet Ministers, such as Shri. Mani Shankar Iyer, Union Minister for Panchayati Raj, wrote to Shri. A. Raja urging careful consideration and public debates before issuing the EIA Notification. Shri. D. Raja, Member of Parliament from CPI, even met with the Minister on the issue.

But the Ministry was in no mood to step back on issuing the Notification. Instead it argued that it was well within its powers to issue this Notification without consulting Parliamentarians. This was articulated in a letter dated 13 September 2006 from the Union Environment Minister A. Raja, to Shri. Yechury in which he argued that: "*(t)he proposed final Notification is a "Subordinate Legislation" and therefore as per Parliamentary procedure, immediately after it is published in the Gazette of India an authenticated copy will be forwarded to the Lok Sabha and Rajya Sabha Secretariats for being laid on the Table of the House for scrutiny by the Committees on Subordinate Legislation. My Ministry will be guided by the recommendations of these Committees. Therefore, a parliamentary debate prior to the issue of the Notification is not considered as necessary*".

The very next day, 14th September 2006, MoEF issued the EIA Notification – 2006. Not even one additional consultation with the public - as promised by Union Environment Minister A. Raja in August – was held. MoEF admitted brazenly in response to a Right to Information application by CEJI that it did however consult industrial lobbies such as CREDAI, ASSOCHAM, FICCI, CII, etc. not only once, but repeatedly even, and that too well after the official period allowing for public comments had closed.[33] (*See Box 6: Brazen Admissions!*)

No Parliamentary oversight over EIA norms

Undoubtedly, the nature of the legislative or executive vehicle used to introduce norms in any area is of significance – this has a bearing on the nature of legislation (whether primary or subordinate or delegated legislation), issues of legislative and executive competence, and questions of constitutional compliance and statutory interpretation.

33. See Annexure I: Campaign for Environmental Justice Press Release Critiquing the Process by which EIA Notification – 2006 was Formulated.

The fact that the MoEF has chosen to bring in norms on as vital an issue as EIA through the instrument of a mere executive Notification, as opposed to a new legislation or even rules under the Environment (Protection) Act, 1986, indicates that the Government has tried to avoid a deeper democratic debate and deliberation over this issue. Section 26 of the Environment (Protection) Act, 1986, provides that every rule made under that Act shall be laid before each House of Parliament as soon as it is made. This allows both houses of Parliament to debate the legality and appropriateness of such legal provisions, to suggest changes, or even to annul them.

The preeminent status of Parliament in appropriately developing environmental legislations has not been brazenly ignored in this manner before. Often enough, MoEF has created Rules under the Environment (Protection) Act, 1986 to address various environmental problems such as municipal solid waste management, handling of spent batteries, controlling noise pollution, controlling ozone depletion, regulating hazardous wastes, etc. In most cases of legislating, MoEF has relied on its rule making powers – and each of these Rules has been placed before the Parliament for consent. However, when it came to the issue of developing a EIA based planning regime in India (arguably among the most important legal provisions relating to environmental protection) – the Ministry has chosen to usher in new EIA norms through a profoundly ill-drafted, and largely inadequate, Notification. A mere Notification now governs the entire process of environmental clearance - largely within the control of the bureaucracy and without any strong Parliamentary oversight over amendments.[34]

Why the EIA Notification – 2006 is deeply flawed

EIA norms are amongst the most critical legislative/ policy instruments to promote the objectives of the Precautionary Principle in Indian environmental law.[35] EIA norms should

* help balance priorities of development with those of environmental conservation,
* anticipate pollution with the intention of minimising adverse impacts, and
* attempt to minimise dislocation of communities and thereby protect livelihoods.

Simply stated, EIA norms must mandate

* the appreciation of all long term and short term environmental and social consequences of industrial projects and activities, and
* provide adequate room for public involvement in decision-making.

Therefore, it would not be an overstatement to present any Notification consolidating EIA norms as a critical link in ensuring the ecological security of India.

Seen in this light and in the context of growing concern over the adverse impact of development on

BOX 7: Who Cares about Climate Change?

Recognizing the catastrophic problem of global climate change, the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC) in 1988. The role of the IPCC is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socioeconomic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. It is currently finalizing its Fourth Assessment Report "Climate Change 2007".

The "Summary for Policy makers" document available on the IPCC website briefly highlights the most important findings of the Fourth Assessment Report:

* *"Global atmospheric concentrations of carbon dioxide, methane and nitrous oxide have increased*

34. Considering EIA norms in other jurisdictions – most often, the law providing for EIA has resulted based on careful deliberation and debate by elected representatives at the Parliamentary level. For example, the pioneering example of EIA is to be found in the National Environment Policy Act, 1969 that requires American federal agencies to submit an Environment Impact Statement (EIS) for proposed projects. Similarly, in New Zealand, the EIA norms and requirements are incorporated into the Resource Management Act, 1991. At the European level, EIA norms have received sustained parliamentary-level attention before being enshrined in the form of the EIA Directive on Environment Impact Assessment, 1985 and the SEA Directive, 2001. In Thailand, while the Minister of Science Technology and Environment does have the power to issue a Notification with specific details of the EIA applicability – it is provisions in the Enhancement and Conservation of National Environmental Quality Act, 1992 which expressly confer such power on the Minister (who has to act with the approval of the National Environment Board).

35. Divan and Rosencranz explain this principle in the following words: "The 'precautionary principle' requires government authorities to anticipate, prevent and attack the causes of environmental pollution. This principle also imposes the onus of proof on the developer or industrialist to show that his or her action is environmentally benign." See Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, OUP, 2002, p. 42.

markedly as a result of human activities since 1750 and now far exceed pre-industrial values determined from ice cores spanning many thousands of years. The global increases in carbon dioxide concentration are due primarily to fossil fuel use and land- use change, while those of methane and nitrous oxide are primarily due to agriculture.

* *The understanding of anthropogenic warming and cooling influences on climate has improved since the Third Assessment Report (TAR), leading to very high confidence (9 out 10 chance of being correct) that the globally averaged net effect of human activities since 1750 has been one of warming.*

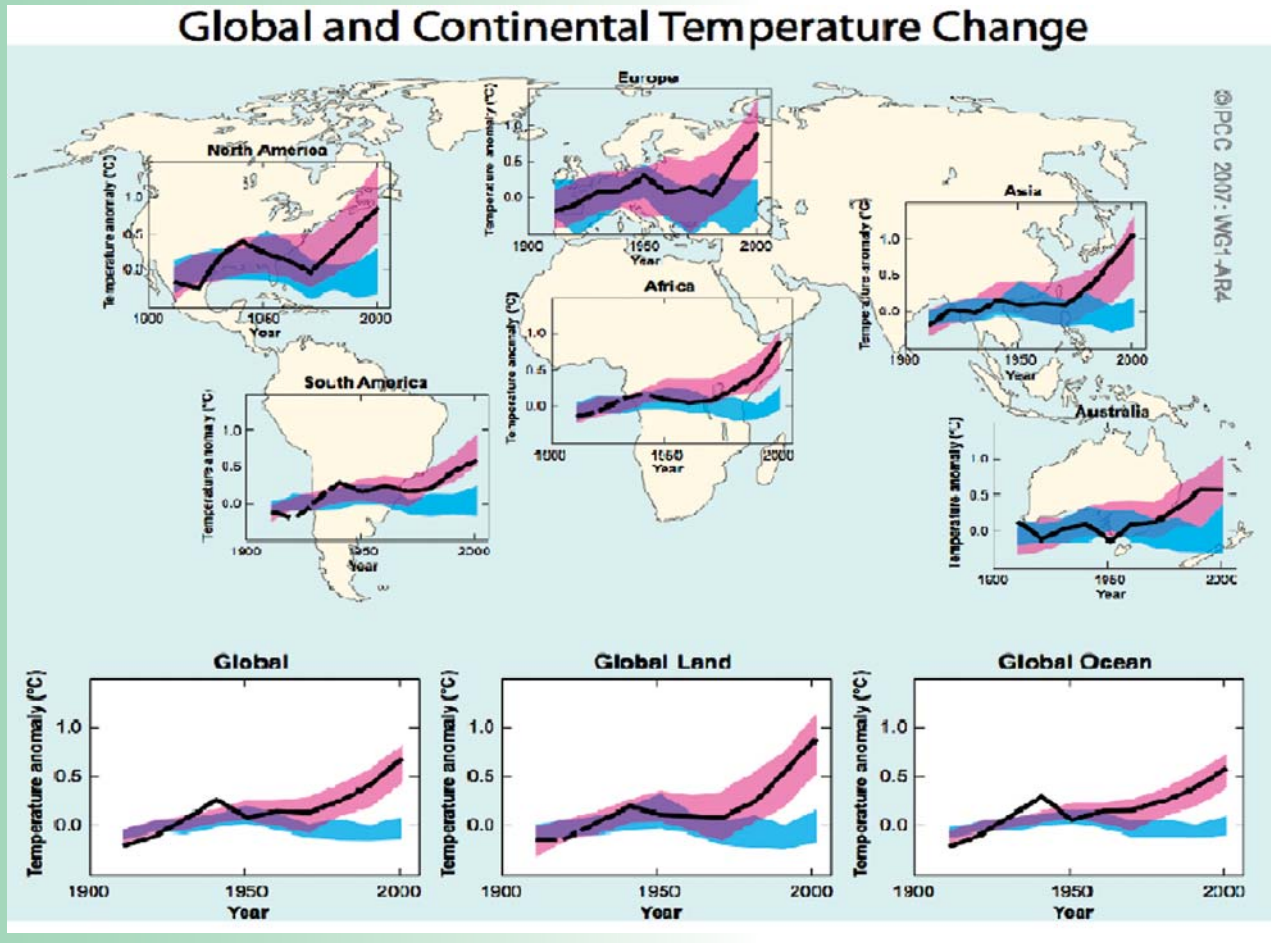
* *Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.*

* *For the next two decades a warming of about 0.2°C per decade is projected for a range of SRES (Special Report on Emission Scenarios) emission scenarios. Even if the concentrations of all greenhouse gases and aerosols had been kept constant at year 2000 levels, a further warming of about 0.1°C per decade would be expected.*

* *Continued greenhouse gas emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st century that would very likely (90%) be larger than those observed during the 20th century."*

The catastrophic changes that will result from the climate change in the decades to come demands urgent action from Governments to develop laws and policies that press ahead with measures that limit the output of carbon to the atmosphere. The EIA Notification – 2006, in contrast, is aggressively pro-investment and does not demonstrate any concern over the implications of promoting a carbon intensive form of development in exacerbating climate change. It infact promotes lax regulatory standards and is clearly out of step with growing global concerns on the need to strongly regulate the impact of industrialization and infrastructure development on our climate!

See also the recent American Supreme Court decision in *Massachusetts, et al* v. *Environment Protection Agency et al*, 549 U.S._(2007)-[April 2, 2007].



Source: Intergovernmental Panel on Climate Change

environment resulting in climate change,[36] a carefully considered approach is essential to the "re-engineering" of the EIA process in India.[37] (*See Box 7: Who Cares about Climate Change?*)

Given the circumstances in which the MoEF issued the EIA Notification 2006, and the highly questionable rationale justifying its enactment, it is critical to examine whether the Notification conforms to the various judicial pronouncements on environmental law in India. In this review, we argue that the EIA Notification – 2006 violates the preeminent rule for implementation of environmental legislation as laid down by the Supreme Court of India – **that the power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defeat the object of the law.**[38]

In contrast, it is pertinent to note that the EIA Notification 1994 was created in the spirit of the Environment (Protection) Act, 1986. The new Notification claims that some of its provisions are in keeping with the 'objectives of National Environment Policy as approved by the Union Cabinet on 18th May, 2006'.[39] The NEP has been widely criticised for setting weak standards for environmental conservation and regulation. The EIA Notification 2006 sets even lower standards for regulation and conservation. Together, these two instruments promise a race to the bottom for environmental regulation in India.

As we reveal in this document, the EIA Notification – 2006 has significantly weakened environmental regulatory systems in India in its efforts to be "*consistent with the Govindarajan Committee recommendations*". This process of "re-engineering" has been almost entirely negotiated by Dr. Ghosh, with tacit support from Union Minister for Environment and Forests, Shri. A. Raja. In the process, many critical concerns raised from various parts of the country have been rubbished, the considered opinion of parliamentarians (arguing for widespread debate on the issue) have been ignored, and MoEF seems to have overstepped its authority in issuing this Notification under the Environment (Protection) Act, 1986.

We argue that the scrapping of the EIA Notification – 2006 would truly uphold the importance and spirit of the Environment (Protection) Act, 1986. Presented below are some critical concerns arguing why it is in the best interest of our country to annul the EIA Notification – 2006, and start afresh the process of developing a comprehensive law to govern environmental clearance decision-making in India.

1. EIA Notification – 2006 finalisation based on demands from industrial and investor lobbies:

The opportunity for the public to engage in the reform or amendment of any rule or Notification under the Environment (Protection) Act, 1986 is laid out in Rule 5 (3) (c) of the Environment (Protection) Rules:

> *"Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the Notification in the Official Gazette."*

The Preamble to the EIA Notification - 2006 states that the Notification was finalised after "*all objections and suggestions received in response to the above mentioned draft Notification have been duly considered by the Central Government*." A very large number of submissions from wide ranging constituents were indeed made to the MoEF. However, the finalisation of the Notification was essentially driven by and based upon inputs received exclusively from industrial lobbies and industrial associations.

MoEF has admitted as much in response to an application by the Campaign for Environmental Justice – India (CEJ-I) under the Right to Information Act, 2005. In its letter dated 20 June 2006 MoEF admits that a draft of the final Notification had been circulated to '*Apex Industry Associations and Central Ministries/ Departments*" and that a "*discussion for finalization of EIA Notification had been convened on 22nd May, 2006 with Apex Industry Associations namely CII, ASSOCHAM, FICCI and CREDAI*."

This position has been further reaffirmed in another response from MoEF to the Chairman, Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests. The Chairman had forwarded to MoEF a representation from CEJI (dated 26th July, 2006) seeking intervention from the Parliamentary body against ongoing efforts to manipulate environmental policies and regulations to

36. For a detailed analysis of how Earth is undergoing climate change cause by human action, refer to recent documents of the Intergovernmental Panel on Climate Change, accessible on-line at (last visited on 15th March, 2007)<http://www.ipcc.ch>.
37. In this regard, see Annexure K: UNECE Principles for Meaningful Implementation of the EIA Process.
38. See Bangalore Medical Trust v B. S. Muddappa, AIR 1991 SC 1902, at 1911, 1924; Virender Gaurav. State of Haryana, 1995 (2) SCC 577, at 583; and Indian Council for Enviro-Legal Action v. Union of Indian (CRZ Notification Case), 1996 (5) SCC 281, at 299, 302, as discussed in Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India, 2nd Ed., OUP, 2002.
39. It is reiterated that the National Environment Policy itself has a history of having been created out of a non-participative process even though it claims that "(t)he policy also seeks to stimulate partnerships of different stakeholders, i.e. public agencies, local communities, academic and scientific institutions, the investment community, and international development partners, in harnessing the irrespective resources and strengths for environmental management."

advantage investors. In its response to the Chairman of this Parliamentary Standing Committee, MoEF responded in early August 2006 as follows:

> *"the Ministry has circulated the final revise draft Notification to the Apex Industry Associations and Ministries including the Planning Commission. The revised Notification was discussed at length in the meeting with the Apex industry Associations held on 22nd May 2006 under the Chairmanship of Secretary (E&F). Subsequent to the meeting, the written comments/views on the Notification were obtained from the Associations. Another round of discussions exclusively with CREDAI and the representatives of the Apex Industry Associations followed this. The Ministry has also circulated the final revised draft Notification to the Central Ministries/ Departments and the Planning Commission on the 5th May 2006 seeking their comments/views…."* and *"[t]he comments of the Apex Industry Association and the Central Government Ministries and the Planning Commission have been received and have been examined in the Ministry. Accordingly, necessary amendments have been made in the revised draft final Notification."*

Nowhere in MoEF responses on this matter is there any evidence of similar consultations being held with any Parliamentary Committees, any Legislatures at the Central or State levels, any local body, State Departments of Environment and Forests, or civil society networks. In fact Shri. Raja in his letter to Shri Yechury underscores the minimal regard MoEF has for such wider democratic debates when he states: *"a parliamentary debate prior to the issue of the Notification is not considered as necessary"*. When such was the treatment meted out to Parliamentary bodies, the position of civil society organisation and the public at large can be appreciated.

2. Inadequate decentralisation and devolution in environmental decision-making:

We argue that the EIA Notification – 2006, through its detailed provisions, guarantees MoEF an excessively central role in the environmental clearance process. Some of these instances are the manner in which MoEF arrogates to itself powers for setting procedures and standards for public involvement, for developing ecological and environmental standards for projects, and even in the appointment of members in the newly proposed State Environmental Impact Assessment Agency (SEIAA).

The EIA Notification - 2006 does not in any manner - meaningful or otherwise - provide any role for lower tiers of government. Further, the Notification eliminates the participation of Panchayats in public hearing panels - a role that was available under the 1994 EIA Notification.

A simple mechanism in broad-basing public involvement and in integrating all views on an investment would have been to tie in the environmental clearance reforms with the provisions of the 73rd (Panchayat Raj) and 74th (Nagarapalika) Constitutional Amendments, Panchayats (Extension to the Scheduled Areas) Act 1996, Right to Information Act, 2006 and other such legislations. Institutional mechanisms created by these legislations, including representative bodies to interface with affected communities, would have ensured the inclusion of local bodies in the environmental decision-making process.

The legitimate role of local self-government institutions in participating in environmental clearance decisions has never been a priority for MoEF, a position evidenced by the complete absence of a role for such constitutionally empowered bodies in the process defined by the EIA Notification - 2006.

3. Wasteful creation of new technical bureaucracies and other structural issues:

The EIA Notification - 2006 fundamentally rearranges the institutional matrix of environmental regulation in India. To make the EIA Notification - 2006 fully operational, the following regulatory and recommendatory authorities will have to be created:

(1) State/Union territory Environment Impact Assessment Authority (SEIAA),
(2) the State or Union territory level Expert Appraisal Committee (SEAC),
(3) the Expert Appraisal Committee (EAC) at the central level,
(4) and a body equivalent to SEIAA at the Centre, which has not yet been definitively created nor provided for.[40]

Having given birth to these new institutions, the Notification completely neglects the need for defining or clearly articulating their roles and responsibilities.

While the states and union territories are required to separate clearance decision-making from normal executive functions, such a separation is non-existent at the Union Government level. This is because MoEF has promoted itself as a regulator of its own decisions - by failing to define or clarify on the technical bureaucracy at the Centre (equivalent to the SEIAA at the regional levels).

40. In contrast, under the 1994 Notification, an Impact Assessment Agency (IAA) was formed within the MoEF for evaluating applications and submitting recommendations.

Further, the EIA Notification - 2006 does not in any manner clarify what would be the role of existing regulatory agencies (such as Pollution Control Boards and the Forest Departments) in the overall environmental clearance systems. Of course a minor role for the State Pollution Control Boards is provided in organising Environmental Public Hearings - but clearly this does not justify such gross under-utilisation of the administrative, financial and technical capacity that has been invested in such agencies over the decades.

4. Process deficiencies in the new environmental clearance system:

The EIA Notification – 2006 creates environmental clearance processes for scheduled projects / activities on the basis of stipulated conditions or criteria. The clearance process itself is divided into four stages - Screening, Scoping, Public Consultation and Appraisal - with a strong emphasis on delivering the final decisions to the investor in a strictly time-bound manner. Many obvious deficiencies are present in each of the stages involved in the environmental clearance process.[41]

The public's right to information is seriously undermined by the procedural stipulations and provisions built into the environmental clearance process. Far from ensuring meaningful public participation, the EIA Notification 2006 is also rife with instances clearly aimed at stifling the ability of the public to contribute to, and participate in, the environmental decision-making process. To cite an example from the Public Consultation stage, public hearings can be done away with entirely and essentially at the whims of subjective and bureaucratic discretion.

Additionally, the EIA Notification - 2006 (at each stage) delegates powers to administrative authorities (and on occasions to the project proponent) without invoking appropriate principles or prescribing guidelines to guide such exercise of power. This approach heightens misuse of power, administrative inefficiency, uneducated decision-making at the lower levels, and the high likelihood of promoting bias, rampant corruption etc. Such un-guided discretionary powers are present at almost every level, including the classification of projects as Category A, B1, or B2; the meaningful implementation of the public consultation process; the actual principles guiding the granting or rejection of the environmental clearance, and so on.

5. Unwarranted exemptions, exclusions and other loopholes:

The EIA Notification 2006 allows a large number of potentially devastating activities to escape rigorous scrutiny of their environmental and social impacts. Many industrial activities and projects simply find no mention in the Schedule to the EIA Notification 2006. In the result, a large number of potentially polluting activities remain squarely outside the purview of the country's EIA framework.

Glaring flaws include the fact that the Notification unjustifiably permits the acquisition of land for projects even before an application for environment clearance is made! Another glaring deficiency is that 'pre-construction' activities of hydroelectric projects are wholly unregulated. Such shocking relaxations for high impacts projects are similarly evident in the fact that sectors such as mining, river valley projects, building and construction projects, Special Economic Zones, Export Processing Zones, Biotech Parks, Leather Complexes, etc. can easily circumvent the safeguards of the EC process on account of numerous loopholes, exemptions, and vague terminology.

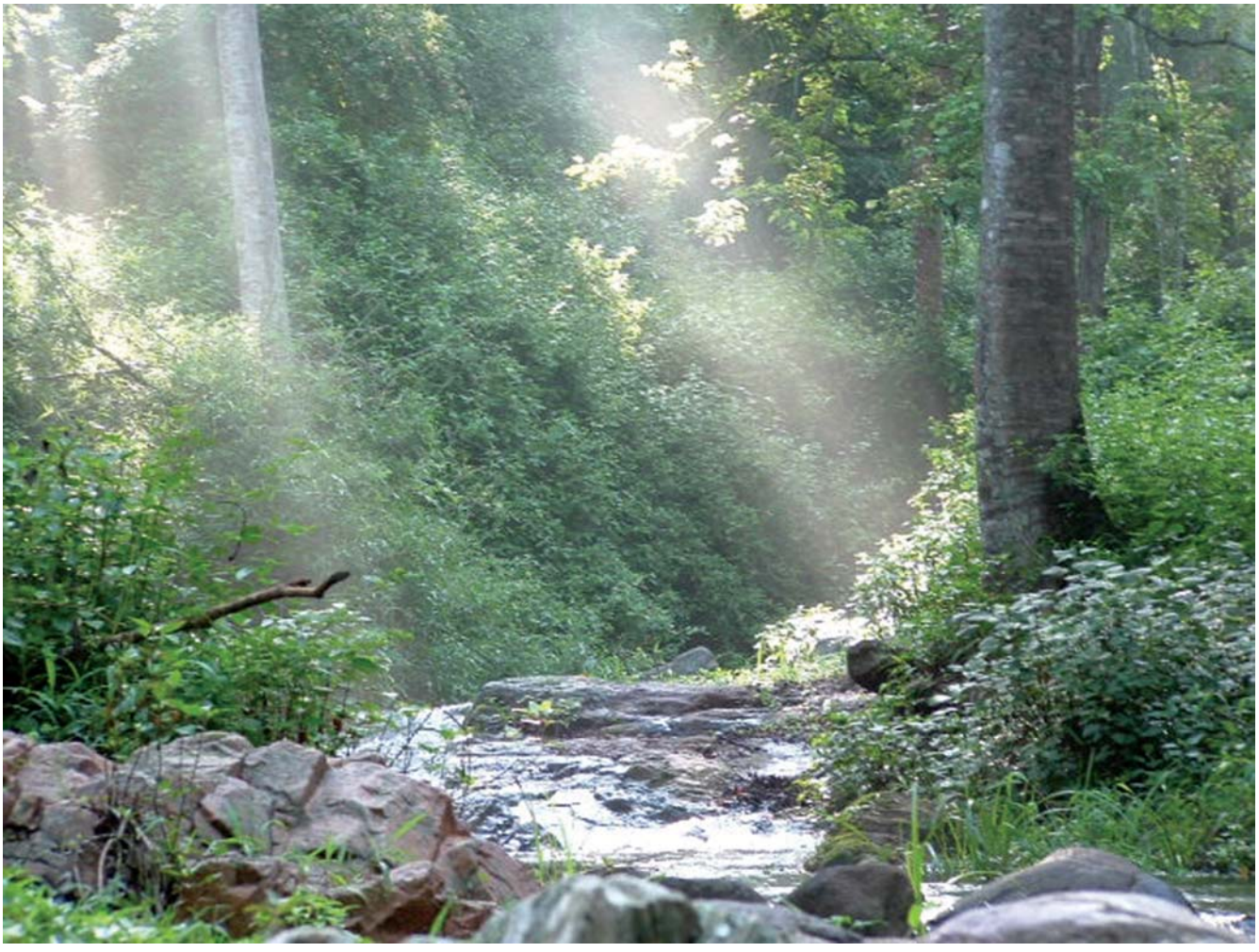
Other pivotal issues include – absolute indifference towards the environmental clearance process for expansion and modernization of industries (with particular carte blanche benefits resulting for the expansion of mining projects), no safeguards relating to transfer of environmental clearances, a sharp hike in the validity of the environmental clearances of several

Railways excluded from EIA norms.

41. In this context, see Annexure J: EIA Stages Recommended by UNESCAP.

high-impact projects (without deeming as necessary any safeguards or review possibilities), and extreme haziness relating to the application of the 'General Conditions', threshold limits, and other critical criteria.

This absence of independent monitoring and enforcement of clearance conditions seriously undermines the regulatory potential of the EIA Notification – 2006.



6. Inadequate monitoring and enforcement regime:

The EIA Notification – 2006 does not in any way strengthen the monitoring and enforcement of clearance conditions. Despite the dismal compliance record under the EIA Notification – 1994, the new Notification does not require any independent monitoring of the project's compliance with clearance conditions and relies solely on half-yearly reports furnished by the project proponent. Moreover, the new Notification completely ignores the need for effective enforcement of clearance conditions. For example, there is no mention of when penalties should be imposed or when and how clearance may be revoked.

7. Total confusion regarding applicability of the new Notification:

To clarify the confusion that results from this poorly drafted Notification, MoEF has already had to issue a number of circulars, circulations, and guidelines (about ten at last count) since the issue of the Notification.[42] One major area of confusion that still remains pertains to the continued relevance of the EIA Notification 1994.

The concluding paragraph of the EIA Notification 2006 attempts to specify the situations under which the 1994 EIA Notification continues to have some applicability. However, the poorly worded paragraph offers very

42. See Annexure D: Additional Circulars, Memos, Corrigendum and Clarifications Issued by MoEF to the EIA Notification – 2006 (Updated till 15 April 2007).

little clarity in the matter. The net result is that MoEF is vested with enormous discretionary powers to interpret this provision in whatever way it pleases, possibly to the detriment of environmental health and conservation and thereby causing significant damage to coherent norms and policy imperatives. This trend has already been foreshadowed in some of the circulars issued over the last few months by the MoEF.

The new EIA Notification - ready to be discarded?

The EIA Notification - 2006 is very poorly drafted and is replete with numerous flaws as elaborately detailed in this review report. The Notification seems to have been issued in great haste and without any evident concern for legal requirements and precedents, careful planning, or logical consistency. A matter of significant concern is that many of the loopholes (as detailed extensively in this report) will have major repercussions once the full effects of the Notification begin to be felt. They will serve to derail the very purpose of the Notification - that of ensuring rigorous environmental regulation in a country that is in urgent need of such. Other errors, including several grammatical and syntactical inconsistencies, contribute to the overall complexity and muddled outlook of a seriously flawed piece of subordinate legislation.[43] Written in a language that is quite clearly dreadful for the most part, the Notification, we suspect, will make environmental decision-making processes in India a very messy affair. In addition to the serious infirmities outlined above, the Notification is also full of errors, inconsistencies, and inadequacies - all of which could have easily been avoided with a little care for detail.[44]

Besides coming across as a shoddy piece of legislation meant to confound the investor and confuse the general public, the EIA Notification – 2006 also fails in complying with progressive constitutional provisions and Indian environmental jurisprudence. At the outset, it cultivates unnecessary confusion about the continued relevance of the EIA Notification – 1994, as is clearly evident by the innumerable circulars, clarifications, and guidelines being issued by MoEF since September 2006. Further, it promotes a highly unclear matrix for environmental decision-making in India. Consequently, we fear that the new Notification is likely to compromise environmental protection measures in the country.

In this review report, we argue that it is because of the strong nexus between MoEF and industrial lobbies that India's key environmental impact assessment regulation has been substantially weakened in favour of investor interests. We find the Notification to be in abject violation of the spirit and import of Section 3 of the Environment (Protection) Act, 1986, Rule 5 (3) (c) of the Environment (Protection) Rules, 1986 and well-entrenched constitutional and judicial precepts. As a result, the EIA Notification – 2006 is unlikely to stand up to any serious judicial scrutiny and is a case of a poorly formulated subordinate legislation that is best repealed or withdrawn.

43. Take for instance the unclarified use of expression 'required' in relation to construction of new projects/activities. Interestingly, the Preamble uses the words 'required construction of new projects or activities' to indicate that the procedure for environmental clearance under the new Notification is to become applicable. No further guidance is provided as to what this expression means or indicates. The rationale behind using the word 'required' is unclear.

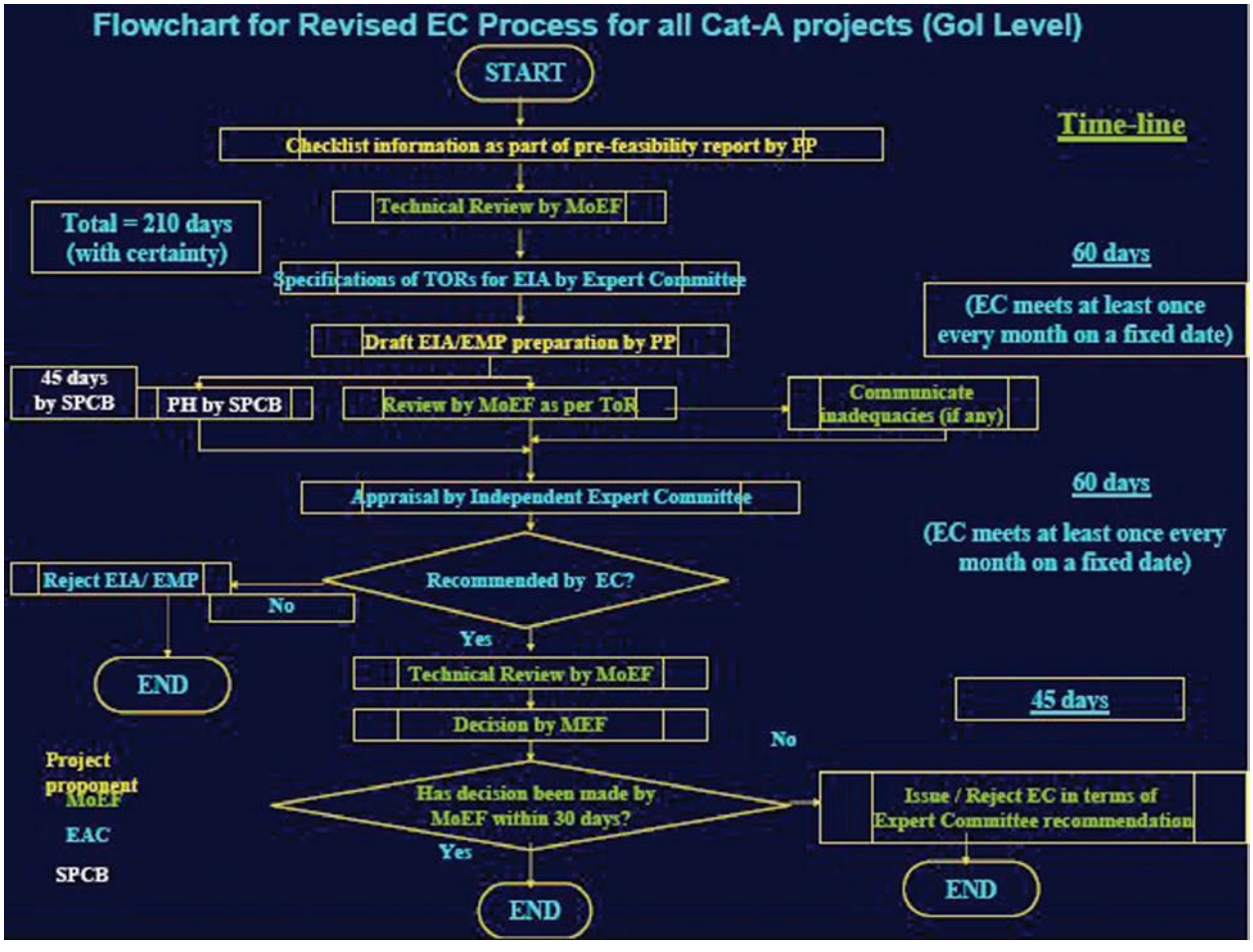
44. A Corrigendum (S.O.1939(E)) dated 13th November 2006, was published by the MOEF in the Gazette of India to clarify and correct five errors within the New Notification. Apart from this corrigendum, at the time of writing, MoEF has already issued nine additional documents to supplement, clarify or correct the EIA Notification - 2006: a) Interim Operational Guidelines till 13 September 2007 in respect of applications made under EIA 1994. (13th October, 2006); b) Order - Expert Committees (November 9, 2006); c) Interim Operational Guidelines till 13th September, 2007 in respect of Categories of Projects which were not in EIA Notification, 1994. (21st November, 2006); d) Interim Operational Guidelines till 13 September 2007 in respect of River Valley and Hydro-Electric Power Project applications made under EIA 1994.(8th December, 2006); e) Clarification regarding EIA Clearance for Change in Product-Mix. (14th December, 2006); f) Clarification on Environmental Clearance sought for construction of Bulk Food Grain Handling facility at Daund, Dist.. Kaithal, Haryana. (26th December, 2006); g) Clarification regarding consideration of Integrated Projects. (6th February, 2007); h) Clarification regarding process of any developmental project costing less than Rs. 5.00 Crores in-house internally. (15th February, 2007) and; i) Interim Operation Guidelines till 13th September, 2007 for grant of Temporary Working Permission (TWP) in terms of EIA Notification, 1994, as mentioned on 4th July, 2005. (2nd March, 2007).

Decentralisation and Devolution

At the outset, it is important to recognise that the EIA Notification - 2006 does not in any manner - meaningful or notional - provide any role for lower tiers of government. Instead, the Notification eliminates the participation of Panchayats in public hearing panels - a role that was provided for under the EIA Notification 1994.

MoEF has attempted to pitch the new Notification as a decentralization of decision-making. A process that truly decentralises decision-making would have incorporated meaningful participation at all stages of the process, at multiple levels, and for all projects.[1] However, the Notification retains with MoEF the power to clear Category A projects, and completely devolves responsibility to States in clearing Category B projects - and in both cases, local governments have no role. The basis for such a forced division of responsibilities is not discernible and the Notification makes no attempt to explain the division. Such a division may also amount to a violation of the 11th and 12th Schedules to the Constitution elucidating inherent powers of local governments.[2] The new Notification effectively reduces the meaningfulness of decision-making levels across all projects: in the case of category A projects, the role of the state and local governments is eliminated, and in the case of category B projects, the role of the central and local governance structures is eliminated.

While a role for the Centre in inter-state projects and high-impact projects (category A) is understandable, a truly decentralised process would have provided a role for the States in whose territorial boundaries the projects are sited, and on whose immediate environment the projects would have an impact. It would have also involved local governments, be they state-cleared (category B) or centre-cleared (category A) projects, as



Source: Presentation of Ministry of Environment & Forests at Promoting Excellence for Sustainable Development, Sustainability Summit: Asia 2006

1. See also Annexure F.

2. The 11th and 12th Schedule list out the areas of competence for Panchayat and Nagarpalikas in light of provision under Part IX and IXA of the Constitution of India.

it is at that level of governance that impacts can be most accurately assessed. A decentralised process would have also provided a role for the Central government in state-cleared (category B) projects. Decentralisation does not amount to identifying a decision taker in isolation and then washing one's hands of all responsibilities in entirety.

By no stretch of the imagination can what is proposed in the EIA Notification – 2006 be considered decentralisation or responsible devolution. The claim of MoEF that the new Notification is an effort in decentralisation is hollow and stands exposed.

The rest of the sections of this chapter elaborate on these arguments in greater detail.

Box 8: No Safeguards against Administrative Coercion

In February 2007, Action Committee Against Tipaimukh Project (ACTIP, Imphal) accused the Prime Minister's Office of deliberately and illegally exerting pressure on MoEF Expert Committees reviewing river valley and hydroelectric projects to clear the highly controversial Tipaimukh Project.[a]

According to ACTIP, MoEF's expert committee had sought a variety of details and raised many concerns over the proposed dam in a letter written to the Government of Manipur and North Eastern Electric Power Corporation (NEEPCO) during December 2006. The letter had sought explanations why statutory environmental public hearings held in Churachandpur were reportedly not in compliance with standards prescribed. In addition, the government and the project authority was asked to justify its cost benefit analysis and provide more details on site specific studies relating to seismic design for the project. In addition various discrepancies in official figures and reports were highlighted relating to number of affected villages, biodiversity loss, etc. The committee also had brought to the attention of the government and project authorities that they were being guided by the draft National Policy of 1998 on Resettlement and Rehabilitation, unaware of the final Policy framed in 2003, which was further revised in 2006.

The Government of Manipur and NEEPCO were to provide clarifications on all these issues. ACTIP claims that the PMO was involved in pressurising the Expert Committee without pressing for these clarifications or for the availability of such critical information.

There are no safeguards built into the EIA Notification – 2006 to prevent such coercive pressures from influencing the outcome of a decision. In fact, a number of provisions in the Notification seriously compromise and impair the ability of the expert committees to deliver their recommendations in an objective, fair, and unbiased manner.

Source: <http://ccddne.net>

a. "ACTIP accuses PMO of violating environment laws", The Imphal Free Press, 17th February 2007.

Failure of proportionate allotment in Centre-State-Local Government responsibilities

1. Excessive centralisation of environmental decision-making:

The EIA Notification - 2006 displays a muddled approach to the division of responsibilities between the Centre and State governments. By classifying projects into Category A, for clearance by the Centre, and Category B for clearance at the State and Union Territory Levels, the Notification ostensibly presents itself as an effort at ensuring decentralisation of the environmental clearance process. However, a careful reading reveals that the Notification centralises powers, with the MoEF retaining the exclusive prerogative of according clearances for inter-state and most high impact projects. While involvement in inter-state projects is understandable, the Centre exclusively holding powers to clear or reject high impact projects does not find any legal or technical basis. The past three decades (during which the Centre has had exclusive powers to clear high impact projects) has also been a

period during which India has witnessed extensive and irreparable damage to its environment and natural resources.[3]

The centralisation of powers is so all encompassing that it leaves States and Union Territories with absolutely no role in decision-making on major projects within their territorial boundaries (except the peripheral role of organising Environmental Public Hearings through their Pollution Control Boards). Such arrogation of power militates against constitutional provisions for decentralisation and meaningful federated governance.[4] This is likely to result in situations where state governments may have no role in mitigating adverse impacts of large projects that the Centre deems as necessary.[5] When occasionally, MoEF does reject projects, it may be exposed to needless criticisms from the relevant State, especially aggressive investment-inducing states, that the rejection decision violates federal precepts. It is to avoid all such possibilities that the EIA Notification – 1994 had envisaged a two step process of clearance involving both State and the Centre.[6] Under the present Notification, the possibility of political expediency and potential differences between the Centre and individual State Governments could play a major and detrimental role in influencing environmental clearances decisions. (*See Box 8: No Safeguards against Administrative Coercion*)

An opportunity to integrate the environmental clearance mechanisms with progressive features of the Constitution of India, in particular the 73rd and 74th Constitutional Amendments (resulting in the Panchayati Raj and Nagarpalika Acts respectively), has also been lost. For instance, the involvement of representative District or Metropolitan Planning Committees (bodies required to be created to oversee all activities at the district level) in the decision-making process and in enabling widely acceptable decisions has been entirely and illegally ignored.[7]

The EIA Notification - 2006 thus comes across as an effort not merely in sidestepping constitutional obligations of integrating various rungs of governance in decision-making, but also as an effort in completely ignoring and excluding the legitimate roles of local governments in decision making. Such blatant centralisation of power to the total exclusion of State and local governance bodies for deciding on all Category A projects is unwarranted and illegal.[8]

2. All projects are Category A until SEIAA and SEAC are set up:

In Paragraph 4 (iii), the EIA Notification - 2006 observes that *'(i)n the absence of a duly constituted SEIAA or SEAC, a Category 'B' project shall be treated as a Category 'A' project'*. Effectively all projects are Category A presently, and will continue to be so until the requisite authorities and committees are constituted. The process of constituting SEIAA or SEAC is dependent on the development of guidelines/Notifications/orders by the

3. The Centre's incapacity in effectively administering environmental clearance mechanisms is best revealed through a variety of judgments by the Supreme Court and various High Courts which have incessantly taken the MoEF and the Government of India to task for failing to discharge statutory obligations to secure environmental justice in India. Some examples include: Indian Council for Enviro-legal Action v. Union of India, 1996 (5) SCC281; Vellore Citizens' Welfare Forum v. Union of India, AIR 1996 SC 2715; MC Mehta v. Union of India, AIR 1997 SC 734; TN Godavarman Thirumulkpad v. Union of India, 1997 (3) SCC 312. See also, Upendra Baxi,"Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 29 The Review (International Commission of Jurists), 1982.

4. Under the Concurrent List (List III of the Seventh Schedule of the Constitution of India), both Parliament and the State Legislatures have overlapping and shared jurisdiction over more than fifty subject areas including forests, the protection of wildlife, mines and mineral development not covered in the Union List, population control and family planning, minor ports and factories, etc. On the division of legislative authority in the federal framework, see generally Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, OUP, 2002, pp. 42 – 44, 47 – 49. See also, Article 246 and Part XI of the Constitution of India.

5. In recent months, the Union Power Ministry has been frustrated by active opposition to its proposals to set up super thermal power stations (2,000 - 4,000 MW projects) along the environmentally sensitive west coast of India. Communities resisting these projects have demonstrated scientific and technical reasons why siting of such massive coal fired projects would devastate their local environment and also their health. Given the lack of a role for local and state governments in integrating and resolving such concerns, as such projects are accorded a Category A status and are to be dealt with only by the Centre, it is plausible that the Ministry of Power may exert pressure through the Central Cabinet on MoEF to grant environmental clearances. There are many instances in the past where MoEF has succumbed to such pressures, and this problematic behaviour could worsen with the absolute centralisation of such clearance powers with MoEF.

6. See Annexure A for a detailed comparison of the 1994 and the 2006 norms.

7. For the status of district planning committees in India, see "Status of district planning committees", available at (last visited on 10th February, 2007) < http://rural.nic.in/Panchayat/sdpc.pdf>.

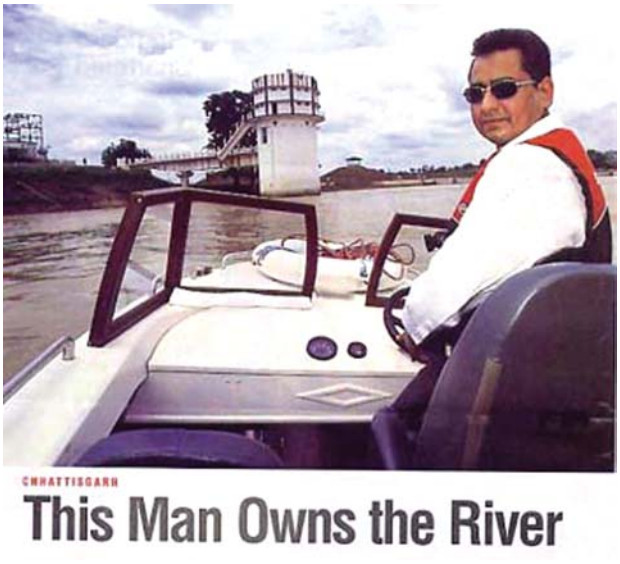
8. See in particular Part IX and Part IX-A of the Constitution of India.

Central Government that define the manner by which these expert review bodies are to be constituted.[9]

It is shocking that despite creating a complex and labyrinthine new bureaucracy and implementation mechanism, the "*distinction*" between Category A and Category B projects is obliterated on account of Paragraph 4 (iii) of the EIA Notification – 2006, and due to non-constitution of the requisite implementing agencies. The interim period will witness an untrammelled, excessively centralized, and 'closed' regulatory overview by the MoEF, where even the minimum safeguards created by the EIA Notification, 1994 have been conveniently done away with.

3. Untrammelled State overview for Category B projects:

With regard to the dubious past history of some state governments, a serious deficiency also arises when one considers that State governments are given absolute and non-reviewable powers with regard to environmental clearance for all Category B projects. This is worrisome,



Indian water baron Kailash Soni who 'bought' the Sheonath River from the Chattisgarh government. Credit: Jitendar Gupta / Outlook

since the current context of prioritising economic imperatives over other aspects, has many State governments intent on promoting investment, particularly when faced with competition from other investment seeking states. It is plausible that decisions may be induced in favour of clearing investments merely to remain competitive, even if this could result in serious environmental and social impacts.[10] The Notification seems to have entirely missed conceiving of environmental and social good as being common objectives and shared heritages, whether at the local, state, or national levels.

A system whereby the Centre functions as a check on the untrammelled exercise of power/discretion by the State (only in situations and on grounds that should be clearly stipulated and provided for) would have been more appropriate (and progressively efficient) to the federal character of the Indian State. This would also have helped universalise standards to integrate environmental considerations in economic decision-making. Therefore, many questions about the Notification's constitutional, legal and ethical validity remain starkly posed.

Role for Local Governance Bodies completely ignored

Not too surprisingly, the EIA Notification - 2006 makes no provision accommodating for the due role of local governance bodies in any stage of the environmental decision-making. This is no trivial exclusion since such an approach fundamentally violates the legitimate role of local governments in economic and social planning, as enshrined by the Panchayat Raj Act, 1992 (Constitutional 73rd Amendment Act), Nagarpalika Act, 1992 (Constitutional 74th Amendment Act), Panchayat (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (which came into force on January 2, 2007), amongst others.

When constitutional amendments were proposed to ensure that the role of Local Governments in planning was secured by law, the rationale articulated in the Statement of Objects and Reasons appended to the Panchayat Raj Act, 1992 was as follows:

> *"Though the Panchayati Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged super sessions, insufficient representation of weaker sections like*

9. Clause (v) of Paragraph 3 makes some mention of the procedure to be adopted in the appointment of experts to these review bodies. The Notification presents the view that States will "forward" the names of experts even though it does not define the process by which these experts are to be selected. Such a situation compromises transparency and the role of competency in the functioning of these bodies. In this context, see "Greens slam MoEF over eco clearances", Times of India, Pune, 11 April 2005.

10 The classic case being the sale of a part of the Sheonath river in Chattisgarh state to Radius Water Limited, a private sector company, with a fairly dubious history in construction and engineering works. See generally Gaurav Dwivedi et al, Water: Private, Limited, 2nd Edition, Manthan Adhyayan Kendra, 2007; Arun Kumar Singh, Privatization of Rivers in India, Vikas Adhyayan Kendra, Mumbai, 2004.

Scheduled Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources."[11]

The EIA Notification – 2006 feeds the degeneration of our Panchayat and Nagarpalika institutions by obliterating their legitimate role in environmental decision-making.

1. Key provisions of Nagarpalika and Panchayat Acts ignored:

To overcome gross shortcomings in decentralisation efforts, the 73rd and 74th Constitutional amendments were introduced to correct the imbalance and mandated a direct role for Local Governments in all aspects of social and economic planning and environmental management at the District Level.[12]

To ensure that these provisions were operationalised in actual decision-making, it was mandated that District Planning Committees (DPCs) would be constituted in every district across the country and that such committees would draw their membership from elected representatives of both urban and rural Local Governments of the district and from other officials, experts and NGO representatives.

Relevant extracts from Article 243ZD of the Constitution of India, highlighting the purpose of the District Planning Committee (DPC) are:

> *"243ZD. Committee for district planning:*
>
> *(1) There shall be constituted in every State at the district level a District Planning Committee to consolidate the plans prepared by the Panchayats and the Municipalities in the district and to prepare a draft development plan for the district as a whole.*
>
> _____
>
> *(3) Every District Planning Committee shall, in preparing the draft development plan,—*
>
> *(a) have regard to—*
>
> *(i) matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation;*
>
> *(ii) the extent and type of available resources whether financial or otherwise;*
>
> *(b) consult such institutions and organizations as the Governor may, by order, specify.*
>
> *(4) The Chairperson of every District Planning Committee shall forward the development plan, as recommended by such Committee, to the Government of the State."*

It is evident from this provision that the creation of DPCs was to ensure a direct role for the public in shaping the economic and social future of the district through local elected bodies. The constitutional emphasis on considered planning is clear by the insistence on the preparation of a "*draft development plan for the district as a whole*" keeping in view "*matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation*".

The EIA Notification - 2006 cannot militate against such guiding constitutional directives. The Notification should have recognised the constitutionally prescribed and due role of DPCs in overseeing developments. An illustrative example would have been in vesting some responsibility in these bodies for the conduct of public consultations for all projects.

One weak defence that could be advanced, and may well be resorted to, is that the EIA Notification – 2006 was constrained from involving DPCs in environmental decision making since some States are yet to constitute DPCs.[13] Clearly, is an escapist argument. For, if the Government of India was intent on making this constitutional body functional in environmental decision-making, it had the opportunity while developing EIA norms. To affirm its commitment to the true devolution of authority and powers to local government bodies, the Government of India could have, in the least, ensured and required a role for DPCs. This would have had the added salutary effect of pressurizing a few recalcitrant State Governments to constitute these vital bodies and thereby fulfil key constitutional and legal obligations. Another valuable opportunity in genuinely empowering our local governments has thus been senselessly ignored.

2. No involvement for Gram Sabhas as required under PESA:

The folly of ignoring the role of local governance structures is further highlighted by Section 4 of the Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA) which prioritises the involvement of Local

11. Available at (last visited on 7th February, 2007) <http://panchayat.nic.in/>.
12. See Part IX and Part IX-A of the Constitution of India.
13. For the status of district planning committees in India, see "Status of district planning committees", available at (last visited on 10th February, 2007) < http://rural.nic.in/Panchayat/sdpc.pdf>.

Governments at the Panchayat level on issues of economic development and social planning thus:

> *"Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:-*
> ---
> *(d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution;*
> *(e) every Gram Sabha shall-*
> *i. approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level;*
> ---
> *(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;*
> *(j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;*
> ---
> *(m) while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with-*
> ---
> *(iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;*
> ---
> *(vii) the power to control over local plans and resources for such plans including tribal sub-plans;"*

Even on this count, the EIA Notification – 2006 militates against constitutional guarantees to local governance.

3. Minimal compliance with Forest Rights Act:

Even as India's diminishing forests face the onslaught of environmentally destructive developmental activities, the EIA Notification - 2006 ignores the rights, role, and authority of forest dwelling tribes and communities. It is quite shocking that the EIA Notification envisions no role or responsibility for traditional forest dwelling communities in deciding on clearance applications that have a direct bearing on forest lands.

Gowli tribals in Dandeli, Karnataka

The Notification's approach is in stark contrast to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, which yokes the diversion of forest land (only for certain permitted activities and subject to several stipulated conditions) to the requirement that "*the clearance of such developmental projects shall be subject to the condition that the same is recommended by the Gram Sabha*."[14]

Clearly, forest dwellers and communities have been accorded clearly enunciated rights for involvement with decision-making relating to forest lands. Once more, the limitations (perhaps even illegality) of the EIA Notification – 2006 are exposed - in this case for failing to integrate with provisions of a primary legislation that the Ministry had a direct role in shaping.

False claims of devolution of power

It is striking that the EIA Notification 2006 ignores legal imperatives for involvement of local governance bodies in the decision-making process. Further, the role of Panchayats and Nagarpalikas in environmental decision-making is significantly fortified by the express inclusion of items relating to environmental management and conservation in the 11th and 12th Schedules of the Constitution. Very clearly, the due role of the DPCs, Panchayats, Gram Sabhas and other bodies of rural and urban local governance cannot and should not be ignored by any statutory or executive instrument proposing norms of Environment Impact Assessment. The total exclusion of local governance bodies in the environmental clearance framework contemplated by

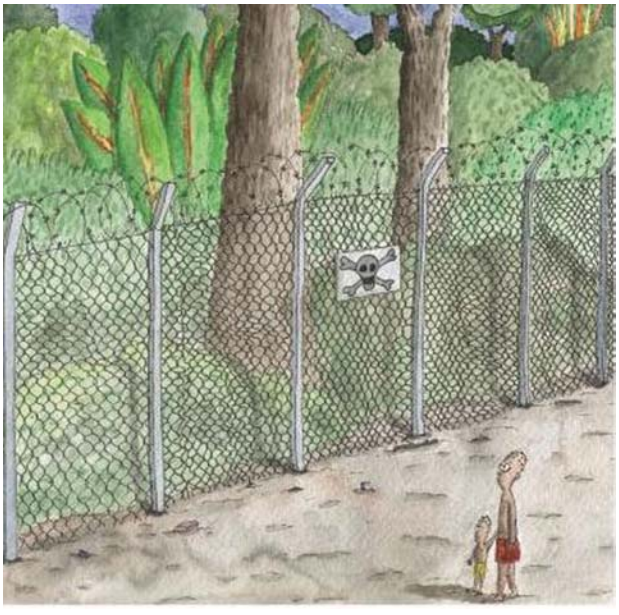
14. Proviso (ii) to Section 3(2), Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

the EIA Notification - 2006 thus raises vital questions about the Notification's commitment to constitutional and legal imperatives of meaningful devolution and local governance.

In this context, it is essential to recognise that the EIA Notification's treatment of the role of local governance bodies also vitiates the claim of the Notification, as discerned from the Preamble, that environmental clearances and clearance processes must be in accord with the '*the objectives of National Environmental Policy* ***as approved by the Union Cabinet on 18th May 2006"***. (emphasis added)

Extracted below are some policy precepts from the National Environmental Policy (NEP) exhorting for a meaningful role for Local Governments in environmental decision making which the Notification does not seem to fulfil:

> "*The National Environment Policy is intended to be a guide to action: in regulatory reform, programmes and projects for environmental conservation; and review and enactment of legislation, by agencies of the Central, State, and Local Governments*." (Preamble, NEP, p. 3)
>
> "*Action plans would need to be prepared on identified themes by the concerned agencies at all levels of Government Central, State/UT, and Local. In particular, the State and Local Governments would be encouraged to formulate their own strategies or action plans consistent with the National Environment Policy. Empowerment of Panchayats and the Urban Local Bodies, particularly, in terms of functions, functionaries, funds, and corresponding capacities, will require greater attention for operationalising some of the major provisions of this policy.*" (Sec. 5, NEP, p. 15)
>
> "*Take measures, including capacity development initiatives to enable Panchayati Raj Institutions and urban local bodies to undertake monitoring of compliance with environmental management plans*." (Sec. 5.1.3(v), NEP, p. 20)
>
> "*The Panchayat (Extension to the Scheduled Areas) Act, 1996 and the relevant provisions of Part IX of the Constitution may provide a framework for restoration of the key traditional entitlements*." (Sec. 5.2.3(i), NEP, p. 24)
>
> "*Give legal recognition of the traditional entitlements of forest dependant communities taking into consideration the provisions of the Panchayat (Extension to the Scheduled Areas) Act, 1996*." (Sec. 5.2.3(i), NEP, p. 25)
>
> "*Implementing and policy making agencies of the Government, at Central, State, Municipal, and Panchayat levels; the legislatures and judiciary; the public and private corporate sectors; financial institutions; industry associations; academic and research institutions; independent professionals and experts; the media; youth clubs; community based organizations; voluntary organizations; and multilateral and bilateral development partners, may each play important roles in partnerships for the formulation, implementation, and promotion of measures for environmental conservation*." (Sec. 5.6, NEP, p. 48)



Source : http://www.cartoonstock.com

STRUCTURAL ISSUES RELATING TO DECISION-MAKING

The EIA Notification - 2006 fundamentally rearranges the institutional matrix of environmental regulation in India.[1] Rather than build synergistically on existing institutional strengths and resources, the new Notification promotes decision-making that wastefully warrants creation of entirely new and complex institutions. As these new institutions will have to deliver a high volume of work regularly, their administrative expenditure alone is likely to be a major burden on the meagre financial allocation set aside for the MoEF and its equivalent agencies at the State levels.[2]

To make the EIA Notification - 2006 fully operational the following regulatory and recommendatory authorities will have to be created:

(1) State/Union territory Environment Impact Assessment Authority (SEIAA),
(2) the State or Union territory level Expert Appraisal Committee (SEAC),
(3) the Expert Appraisal Committee (EAC) at the central level,
(4) and a body equivalent to SEIAA at the Centre, which has not yet been definitively created nor provided for.[3]

Having given birth to these new institutions, the Notification completely neglects the need for defining or clearly articulating their roles and responsibilities.

It is difficult to accurately appreciate the budgetary implications of the creation of these regulatory institutions in the present scenario of inadequate information. However, if one assumes that there would be 35 regional Environment Impact Assessment Authorities (corresponding with 28 States and 7 Union Territories), and that each authority comprises a 3 member board with all attendant infrastructure and staffing, there could be as many as 400 persons to be additionally supported from the limited resources of MoEF. In addition to this, resources would have to be allocated for supporting the Expert Committees in both the Centre and the State level review mechanisms.

Such additional expenditure is fully unwarranted – especially because the Notification provides no role for nor makes any use of, in general, the widespread infrastructure, technical capacity and resources that have been built over the past three decades in the State and Central Pollution Control Board. The Notification expands the bureaucratic content of environmental decision-making by creating an entirely new technical bureaucracy apparatus (in addition to that which already exists). This problem is compounded by the fact that MoEF will hold the reins in the functioning of all of these bodies (as they are largely constituted and controlled by this Central Ministry), thereby expanding the roles and rituals of the Ministry's bureaucrats.[4]

The outcome is a deeply problematic institutional structure for regulation that could well exacerbate the pollution levels in the country, even as it does little to mitigate environmental and social impacts of *'development'* projects.

Creating a whole new hierarchy of authorities for environmental assessment and clearance could also result in:

1) indirectly reducing or interfering with powers granted to the Local Governments by the Constitutional 73rd and 74th Amendments,

2) creating unwanted friction and conflict between these new authorities and the Local Governments, as in Nandigram, for instance,

3) encouraging of patronage appointments to these authorities by the State and Union political leaderships, thereby resulting in adverse impacts on systems of fair democracy.

Some major structural issues relating to the institutional matrix of the new regime are discussed in this section.

1. See also Annexure A.

2. In 2006, the Indian government allocated 12.35 billion Rupees to the Ministry of Environment and Forests. This accounted for 0.58% of India's total government spending. In contrast, the Department of Atomic Energy was provided 68.89 billion Rupees, Ministry of Coal 40 billion Rupees, and the Ministry of Commerce and Industry 19 billion Rupees. See "Central Plan Outlay by Ministries/Departments." Government of India: Union Budget & Economic Survey, available at (last visited on 09 February 2007) <http://indiabudget.nic.in/ub2005-06/bag/bag4-2.pdf>.

3. In contrast, under the 1994 Notification, an Impact Assessment Agency (IAA) was formed within the MoEF for the final clearance process. See Annexure A.

4. Perhaps a more sensible option could have been to assign certain functions of environmental clearance, such as in scoping and assessments, to Local Governments under their planning powers as outlined by the 73rd and 74th Constitutional Amendments. Clearance sanctioning powers could have been appropriately distributed while involving Centre, State and Local Government organisations. Such an effort would have helped develop Constitutionalism and would also be in keeping with the directives enshrined by the Fundamental Duties and Rights of the Indian Constitution.

Nandigram: Road to conflict induced by centralised planning without ascertaining local views. Credit (main insert) : Subrata Ghosh

Environment Impact Assessment Authorities

1. No accountability or clarity regarding the central regulatory authority:

Paragraph 1 of the EIA Notification - 2006 proposes the creation of regulatory authorities at the Central and State levels to process and monitor environmental clearance decisions. While there is an explicit statement that all Category B projects will be cleared "*at State level [by] the State Environment Impact Assessment Authority (SEIAA)*", an equivalent clarity is missing for Category A projects that have to be cleared by the Centre. All that the Notification states is that a project or activity falling under Category A will be cleared by the "*Central Government in the Ministry of Environment and Forests.*"[5]

The absence of specifically mentioning the regulatory authority at the Centre is no trivial omission since it defeats the very purpose of allocating the Centre with the authority to review all Category A projects (Category A projects, by and large, comprise very high impact projects or projects involving inter-state jurisdiction).[6] This provision is likely to be interpreted as according MoEF with the power to be the regulatory authority at the Centre.[7] Further, it may be noted that while the Notification ensures a clear separation of decision-making and regulatory mechanisms at the state/union territory levels, there is no such congruent measure of accountability introduced at the central

5. Categorisation of projects was first introduced in the Draft EIA Notification 2005. Category A, A/B and B were formed to differentiate between projects which were to be cleared by the Centre and the State. Category A/B projects would, on scrutiny, be further classified into A or B. Category A projects were to be considered by the Centre, and B by the State. Category A/B has been removed from the final Notification and Category B projects are further classified into B1 and B2, with the former requiring full environmental clearance with Public Consultation, while the latter is not required to fulfil these requirements. For detailed elaboration, see Annexure B.

6. Interestingly another addition to the EIA Notification 2006 is the inclusion of 'territorial waters' for the applicability of the EIA norms. While the Draft EIA Notification 2005 mentioned the jurisdiction of the SEIAA as 4 nautical miles, no such clarification is given in the final 2006 version of the document. It also remains unclear as to which body (specifically, which state pollution control board) would be responsible for providing Air and Water Act clearances for such projects within territorial waters offshore more than one state. See also Annexure B.

7. The EIA Notification – 1994, had explicitly provided for the creation of an Impact Assessment Agency (IAA) as a regulatory body (backed by a variety of Expert Committees within MoEF) in shaping clearance decisions. See also Annexure A.

level.[8] As a result, MoEF is a regulatory institution, a policy formulating body, an administrative agency and also a body that proposes reforms in legislation. Clearly this represents an unhappy situation transgressing the dictates of separation of powers, accountability, and legitimate authority.

2. Time lines and procedures for creation of regulatory authorities not prescribed:

Paragraph 3 of the Notification stipulates that the SEIAA and its MoEF equivalent shall be the regulatory authorities for environmental clearance. However, there is absolutely no time line prescribed for when these authorities should be constituted and become operational.[9] Additionally, no procedure is proposed on how candidates are to be selected for such committees. The fallouts of such a half-baked implementation approach are indicated by the spate of circulars, clarifications, and guidelines hurriedly issued by the MoEF over the past few months.[10]

3. SEIAA decisions must be unanimous:

Paragraph 3 (7) of the Notification requires that "*all decisions of the SEIAA shall be unanimous and taken in a meeting*". But no rationale has been provided for why decisions need to be unanimous. It is quite likely that even after detailed consideration there may not be unanimity within the SEIAA. The stipulation for unanimity could unnecessarily result in silencing those holding a view critical or in variance to that of the majority. It is likely that this provision will constrain the evolution of healthy debate and the generation of diverse opinions – factors that are fundamental to forming good decisions. Such provisions, over time, will increase the likelihood of coercion becoming a determinant in ensuring that decisions are "*unanimous*".[11]

That dissent must be encouraged and that such views be formally recorded is a widely acknowledged administrative and judicial practice. What is the need for an issue to be seen as necessarily requiring only exclusive "assent" or "dissent"? Such a framework biases the process of thinking in favour of the establishment that proposes or supports the project. It is wrong to think of every project proposal as delivering the social good and of being in the public interest. That decision ought to be made by the public/people and in accordance with a public process of hearings under the law. Merely the fact that someone sits as the Chairperson of an authority does not make any one disagreeing with her/him a "dissenter" (with the term being used in an almost pejorative fashion). This kind of thinking is neither logical nor democratic.

Coercive Unanimity!

8. In this context, the words of Bittu Sahgal, Editor of Sanctuary Magazine who has been an expert advisor to MOEF, bear mention: "there is actually no mystery about the manner in which environmental concerns are converted to cash by the nexus between businessmen, politicians and bureaucrats. Such people have learned to milk the system (especially in the age of liberalisation) for all it is worth by twisting laws, covering up scams and hoodwinking the public. The Prime Minister's Office has often been directly involved in such shenanigans, with special 'messages' being sent to the MOEF to pass mega-projects that benefit politically well-connected people … I have worked with the Ministry of Environment and Forests … and I speak with authority when I say that it is a virtual puppet (now) in the hand of profiteers." See Bittu Sahgal, "Green Talk: The Mystery of Environment", The Deccan Herald, July 19, 1998.

9. It appears that MoEF is waking up to such glaring omissions and attempting a process of correction by issuing a variety of clarificatory orders, guidelines, corrigendum and the like. Such a piece-meal approach is only further confounding the problem and increasingly obfuscating the applicable law, besides making the EIA legislative instrument a very voluminous and messy one. See Annexure D: Additional Circulars, Memos, Corrigendum and Clarifications issued by MoEF to the EIA Notification – 2006 (updated till 15 April 2007).

10. See Interim Operational Guidelines till 13 September 2007 in respect of River Valley and Hydro-Electric Power Project applications made under EIA 1994. (8th December, 2006); Clarification regarding EIA Clearance for Change in Product-Mix. (14th December, 2006); Clarification on Environmental Clearance sought for construction of Bulk Food Grain Handling facility at Daund, Distt. Kaithal, Haryana. (26th December, 2006); Clarification regarding consideration of Integrated Projects. (6th February, 2007); Clarification regarding process of any developmental project costing less than Rs. 5.00 Crores in-house internally. (15th February, 2007) and; Interim Operation Guidelines till 13th September, 2007 for grant of Temporary Working Permission (TWP) in terms of EIA Notification, 1994, as mentioned on 4th July, 2005. (2nd March, 2007), available in Annexure D.

11. For a detailed exposition of such an argument in an analogous scenario, see Meredith K. Lewis, "The Lack of Dissent in WTO Dispute Settlement: Is there a "Unanimity" Problem?", Paper 1286, Berkeley Electronic Press, 2006, available at (last visited on 9th February, 2007) <http://law.bepress.com/expresso/eps/1286>

Such an undue and unsubstantiated emphasis on unanimity is also seriously flawed from the point of view of jurisprudence.[12] Interestingly, when such a stipulation for unanimity is not mandated of the regulatory authority at the central level, it is inexplicable why it is considered necessary at the State level.

Expert Appraisal Committees

1. Flawed composition of the Committee:

The Notification, in Paragraph 4 (ii) and (iii), proposes review of Category A and B projects by recommendatory Expert Appraisal Committees at the Central and State/Union Territory levels respectively. Appendix VI to the Notification explains the qualifications demanded for candidates to be on such expert committees, but does not delineate the process by which such bodies will be constituted.[13]

At the outset, it must be highlighted that the composition of such expert committees is significantly different when compared with the requirements of expertise under the earlier Notification of 1994. The previous Notification thought it essential to include social science/rehabilitation experts, NGO representatives and persons concerned with environmental issues, etc. in the expert committees. The current Notification projects an expert as a technocrat, while ignoring the need for representation of expertise from the ecological and social sciences, and also from grass-root work. As a result, it constrains the possibility for inter-disciplinary review focused on environmental conservation and protection of livelihoods.[14]

Further, Paragraph 5 (a) requires that *"(t)he SEAC at the State or the Union territory level shall be constituted by the Central Government in consultation with the concerned State Government or the Union territory Administration with identical composition"*. In a scenario where MoEF Expert Committees are often filled with "experts" proximal to political or bureaucratic leadership, have very poor regional representation, and are not representative of a range of disciplines as is necessary for comprehensive review, the provision that SEAC's will be constituted by the Centre in consultation with State Governments is more likely than not to be guided by demands of political expedience.[15]

In this context it is important to realise that we are a nation of people, citizens; we are not a nation of social scientists, environmentalists, technologists, management analysts and experts of various kinds. The role of professionals is to sensitize people to various issues, ramifications, etc., and help them make better decisions. The final and substantive decisions ought to be made by the local community within the framework of constitutionalism and socially meaningful criteria. (*See Box 9: The Not So 'Expert' Committees*)

Box 9: The Not So 'Expert' Committees

Participation, which is inclusive of all sections of society, is a vital aspect of decision-making. In context of the growing global recognition of this factor, India too has been taking steps to ensure that various representative stakeholders are a part of committees, taskforces, etc that engage in critical decision-making. For instance, the last few years has seen the Indian government benefit tremendously from involving NGOs in the environmental conservation movement – one needs to only cite the Tiger Taskforce as a positive example of such an approach.

In such a scenario, MoEF's recent treatment of researchers, the NGO sector, community workers, social scientists, grassroots workers, etc requires

12. Across jurisdictions, dissenting opinions have often been hailed as suiting the interests of justice or ascertaining the legal position more accurately than the majority judgement in that case. See for example, US Supreme Court Justice John Marshall Harlan's famous dissenting opinion in Plessy v. Ferguson (1896) or Indian Supreme Court Justice Sam Piroj Bharucha's dissenting judgement in Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3715. In this context, Justice Khanna's courageous closing words while dissenting in the infamous case of ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521, bear quotation: "Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes (Prophets' with Honor by Alan Earth 1974 Ed. p. 3-6) judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a court of last resort to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

13. Such expert committees, professionals or consultants who are appointed ought to be accountable. Their work ought to be transparent, pursued professionally in accordance with transparent criteria, local planning goals, and open models. They also ought to be reviewed by independent reviewers of academic and professional standing with open public hearings and the fullest possible participation of the local population. Otherwise, expert committees will have no meaningful existence, role or credibility.

14. On 9th November 2006, an Order passed by the MOEF stated that the Expert Committees created under the EIA Notification – 1994 would now continue as the Expert Appraisal Committee (EAC) under the EIA Notification 2006 till further orders were made in this regard. The 6th February 2007 Clarification issued by MoEF seeks to further clarify on the scope of the expert committees (created under the 1994 Notification) with regard to the EIA Notification 2006. See Annexure D.

15. In this context, see "Greens slam MoEF over eco clearances", Times of India, Pune, 11 April 2005.

careful scrutiny. Schedule III of the EIA Notification 1994 (Composition of Expert Committees for the Environment Impact Assessment) included almost fifteen different types of experts (from various fields of study relating to environment and ecology and with varying but widely representative expertise). The recently released Notification however engenders some very regressive changes with regard to the notions of 'expert' and 'expertise'.

Appendix VI of the EIA Notification 2006 first defines a 'professional' and then goes on to define an 'expert'. In both cases, the Notification seems to be guided solely by the number of academic degrees that a person possesses. Consequently, individuals who have crucial field experience (but might not necessarily have the specified academic credentials) no longer qualify as experts. Such an approach is particularly problematic, given that the new 'expert committees' may well all be at sea with regard to the practical and ground-level implications of many projects. In similar vein, the Notification also completely removes the need for NGO-sector representatives and social scientists in these expert committees. As a result of these changes, the true expertise of these new expert committees remains highly specious. Of course, these regressive changes will also make their effect felt on the quality and content of the appraisal process and on the recommendations submitted to the regulatory authorities on all clearance applications.

While multinational consultancies, investor lobbies, international financial institutions, etc. have had a free hand in defining the very structure and content of India's environment norms, it is indeed woeful that representatives of the commons have been fully cut out of the environmental clearance mechanism.

2. No prescribed time line for creation of expert bodies:

While guidelines for composition of the EAC and the SEAC have been provided, the EIA Notification - 2006 does not mention the time frame within which these bodies are to be constituted. In light of the considerable time involved in calling for applications, evaluating and processing the same, and then announcing the chosen candidates, it seems likely that a considerable time delay is inevitable before the EAC and SEAC will even begin to become operational. In such a context, it would have been appropriate to bring the new Notification into effect only after these procedural requirements had been resolved. The MoEF has conveniently and short-sightedly attempted to skirt these thorny issues vide its 9th November, 2006 Order that effectively '*retains*' the set-up of expert committees under the EIA Notification 1994 until "*further orders*".[16]

The provision in Paragraph 12 of the Notification - '*Operation of EIA Notification, 1994, till disposal of pending cases*' - is not in the least helpful in clarifying such operational issues of environmental clearance in the absence of expert clearance bodies for review, as elaborated in Chapter 7 of this review Report. This uncertainty is likely to result in extensive confusion in environmental decision-making in India and will most likely undermine the possibility of mitigating the adverse consequences of projects cleared.[17]

In addition, there is no clarity on the continuing existence of such expert committees as all that the Notification does is to state in Paragraph 5 (c) that the expert committees will be reconstituted "*after every three years*". This could create incongruity in the decision-making set-up that necessarily requires the continual existence and functioning of such expert committees.

3. Capacity and composition of EAC disproportionate to scale of review demanded:

The maximum composition of the EAC is defined as involving 15 sitting members and 1 special invitee, per Appendix VI of the EIA Notification - 2006. In such a large and diverse country where thousands of projects are proposed every year, the existence of only one Expert Committee at the Centre which meets "*once every month*" to process all applications for clearances of very high impact or inter-state projects (Category A) in the prescribed time is clearly problematic.[18]

The centralized environmental and forest clearance system per the EIA Notification 1994 involved 9 expert committees in the environmental clearance division that together engaged about 90 experts (this system continues to indefinitely operate despite the new Notification coming into effect on account of a

16. See Order - Expert Committees (November 9, 2006), available in Annexure D.

17. In a patchwork attempt to hold up the collapsing environmental clearance mechanism resulting from the implications of the language of the EIA Notification 2006, the MoEF has hurriedly issued three additional documents - Interim Operational Guidelines till 13 September 2007 in respect of applications made under EIA 1994 (13th October, 2006), Interim Operational Guidelines till 13 September 2007 in respect of River Valley and Hydro-Electric Power Project applications made under EIA 1994 (8th December, 2006), and the Interim Operational Guidelines till 13th September, 2007 for grant of Temporary Working Permission (TWP) in terms of EIA Notification, 1994, as mentioned on 4th July, 2005 (2nd March 2007). See Annexure D.

18. The seriousness of such a problem has been recognized and admitted to by MoEF itself! See MoEF, "Good practices in Environmental Regulation", 12 May, 2004, available at (last visited on 10th February, 2007) <http://envfor.nic.in/mef/goodpractices.htm>.

November 2006 order issued by MoEF). The Forest Clearance Division at the central level engages 7 experts. Therefore, under the 1994 EIA regime, therefore there were 100 experts at the service of MoEF for the appraisal of project impacts. Even so, MoEF has found it difficult to clear or reject projects in due time and has often been accused of inefficiency and of causing excessive delays to investors - while also not paying enough attention to details of impacts. It needs to be highlighted that several, if not most, projects do not get reviewed in just one sitting of the committee. In recent times, in order to deal with increased volumes of work in reviewing clearance decisions of projects from the construction and the mining sectors, MoEF has been compelled to constitute separate committees for these sectors.[19]

In this background, it is utterly surprising, and worrying, that with the new Notification, MoEF proposes to do away with all such sectoral expert committees and telescope their functions to be dealt with by just one Expert Committee consisting of 15+1 members. Needless to state, each Category A project review demands a careful reading of voluminous submissions and ideally a site visit – which clearly cannot be handled by 16 members alone!

Placing such a huge responsibility on the EAC without sufficient (wo)man-power will also have several serious negative repercussions. This situation could result in cursory and weak review of environmental clearance applications and the sanction of clearances in a rushed manner due to excessive workload on the EAC. [20]

Even though serious review of a high-impact project might require a site review, the Notification, vide Paragraph 5(d), makes a site visit by the EAC purely discretionary. If one reads this with the earlier problem of limited human resources available with the EACs, and given the nature of India's diverse terrain and the demands placed by extensive site visits - it is hard not to conclude that most high impact projects will not undergo any site review at all! Of course, since SEACs have not been constituted yet (nor has the MoEF deemed it necessary to issue any further orders in this regard), the effective review of Category B projects also remains highly suspect.

In this context, the primary information on Category A projects (that is available to the EAC) would be supplied by the investor. Even though the possibility of the EAC sourcing other types of information exists on paper, this likelihood is limited in light of the logistical limitations of the EAC. In the result, critical review of applications and independent survey of impacts to enable good decisions are sidelined by design and perhaps also by administrative convenience. This then begs the question: why have these "expert" committees at all if they cannot conduct any meaningful and independent investigation?

4. EAC/SEAC opinion hampered by 'collective responsibility':

Paragraph 5(e) of the Notification requires that the EAC and the SEAC "*shall function on the principle of collective responsibility*". Further the Chairperson "*shall endeavour to reach a consensus*" on decisions. Besides appearing coercive, such terms are more than likely to curtail healthy dissent and disagreement, both of which are pre-requisites for the democratic functioning of any forum. In fact, such terms while being common in

'Collective Responsibility'
Source :http://www.cartoonstock.com

19. For an overview of composition of these committees, see the MoEF website at (last visited on 07 February 2007) <http://164.100.194.13/allied_envclr/htmls/displayallcomposition.asp>.

20. In accord with the reasoning advocated in the preceding few paragraphs, the MoEF order of November 9, 2006 seeks to return to the position under the EIA Notification - 1994 by providing that the sectoral expert committees shall be deemed to be the EAC 'until further orders.' However, this order is in direct contravention of Appendix VI of the EIA Notification 2006 that provides for the maximum capacity of the EAC as 15+1!

political parlance are quite unprecedented in Indian regulatory law.

An expert compelled to form views on the basis of "*collective responsibility*" is quite likely to be constrained from speaking his or her mind about an issue. The notions of 'expertise' and the giving of 'collective opinions' have differing rationales and logic. Expertise comes from special knowledge, perception, and specialised assessment on particular issues. Collective consensus logically involves a reduction to the common denominator when several differing views are involved – this often works in a manner contrary to the guiding imperatives of expert logic. If only the commonalities amongst several expert views are picked and relied upon, then the final 'product' more often than not will have serious logical and contextual asymmetries. A better practice would be to collect and record all expert opinions (at whatever variance they may be with one another) before arriving at a moderated decision in an absolutely transparent manner.

Such clear thinking is critical to the success of environmental decision-making in India, as MoEFs decisions have often been clouded under a climate of suspicion. There have been many cases involving the deliberations of Expert Committees of MoEF, where dissenters have been removed or forced to resign. In this context, the whole notion of "*collective responsibility*" in the new EIA norms retains bureaucratic or partisan control over Expert Committees, which is antithetical to the very purpose for which such committees are formed. Such an emphasis could in time result in experts holding back their independent and considered opinions out of the compulsions of "*collective responsibility*". In Indian contexts, it is not very difficult to expect situations where those who dissent are eased (or forced) out of expert committees.[21]

5. Diminished efficacy of expert site visits:

Paragraph 5(d) of the EIA Notification - 2006 relating to site visits involves a strong dilution from equivalent provisions in the EIA Notification 1994.[22] The new Notification makes a site visit discretionary through the use of the words '*may inspect*' and "*wherever the same is considered as necessary*". This holds true even for large projects like dams, thermal power projects, nuclear power plants, mining, etc., where a site visit should be a critical and primary component of the decision of whether a project should be granted environmental clearance or not.[23] Precautionary steps such as site visits prevent the unnecessary loss of investments where the site is deemed to be unsuitable or where the project could result in irreversible loss of biodiversity or irreparable displacement of local communities. Equally importantly, site visits limit the possibility of the project

The Silent Valley in Kerala – Habitat of the endangered Lion Tailed Macaque.
Macaque photo by Tim Knight, Primate Gallery

21. On this point, see Justice Khanna's famous dissenting opinion in ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521. See also, Anil Divan, "Cry Freedom", The Indian Express, March 15, 2004.

22. Paragraph 2(II) of the EIA Notification 1994 specifically mentions that the following activities need to obtain site clearances from the MoEF: a) mining; b) pit-head thermal power stations; c) hydro-power, major irrigation projects and/or their combination including flood control; d) ports and harbours (excluding minor ports); e) prospecting and exploration of major minerals in areas above 500 hectares. See Annexure A and Annexure E.

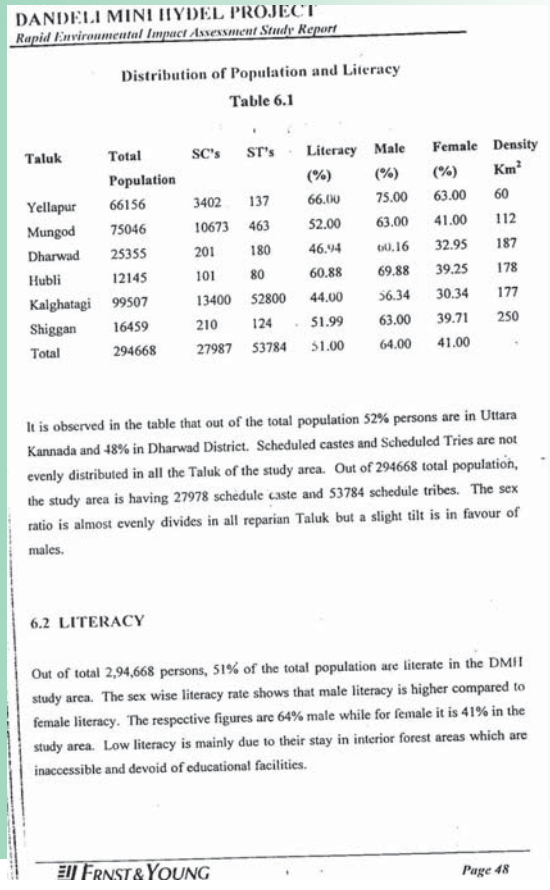
23. There are many examples in India where high impact projects such as dams and mines have been rejected as a developmental necessity when the ecological or social consequences have proven to be too significant to justify continuation of the project. The rejection of the proposal to build a dam in Silent Valley in Kerala - as it was a significant habitat for the highly threatened Lion Tailed Macaque - is well known. The recent case of Nandigram, where the West Bengal government was forced to withdraw its proposals to develop a massive SEZ-chemical complex due to staunch resistance from local communities (which could not be suppressed despite brutal attacks by the CPI-M and police cadres) is a tragic reminder of the consequences of not carefully appreciating such issues. According to a recent BBC report "Tiny animals stop Australian mine", accessible at (last visited on 30 March 2007) −<http://news.bbc.co.uk/go/em/fr/-/2/hi/asia-pacific/6508103.stm>, Australian environment authorities stopped development of a multi-billion dollar mine by Rio Tinto due to the discovery of tiny, cave-dwelling animals. Such instances highlight the critical importance of considered site assessments, which are simply not possible without a thorough and transparent site visit that also enables engagement with the public in order to appreciate their true concerns and opinions relating to the proposed project.

24. It may well be argued that there is no need to make a law or a rule if it is to be subjectively exercised only when thought necessary by the wielders of power. Several provisions in the EIA Notification – 2006 are reminiscent of old imperial coteries around the English King who would empower themselves in the name of the Crown and give themselves a lot of leeway with clauses such as, "as the case may be", "as and when thought necessary", "as may be decided from time to time", and the like. Such terminology is often referred to as "gobbledygook" in public administration literature. Such terminology has often been used to insulate the ruling classes and the bureaucracy from public priorities and from accountability.

developer later arguing (before courts or other adjudicatory forums) that the project must be permitted to go on in light of the significant investments that have been made in pre-construction activity. Such *fait accompli* situations urging for the project to be permitted to go ahead often places regulators (and the judiciary which may be called on in resolving disputes) in quite a moral predicament.[24] International practice has

Box 10: Dismal Quality of EIA Reports to Continue

Under the provisions of the EIA Notification - 2006, the draft EIA Report is prepared on the basis of the Terms of Reference (TOR) developed during the 60-day scoping period. While the TOR constitutes the binding framework for preparation of the EIA report under the present Notification, the standards for TOR developed across the country may vary considerably. This is particularly so in the absence of a prototype document highlighting minimal TOR for particular types of investment. The EIA Notification - 2006 does not provide any principles that may guide and safeguard the meaningfulness of the TOR prepared for different projects.



DANDELI MINI HYDEL PROJECT
Rapid Environmental Impact Assessment Study Report

Distribution of Population and Literacy

Table 6.1

Taluk	Total Population	SC's	ST's	Literacy (%)	Male (%)	Female (%)	Density Km²
Yellapur	66156	3402	137	66.00	75.00	63.00	60
Mungod	75046	10673	463	52.00	63.00	41.00	112
Dharwad	25355	201	180	46.94	60.16	32.95	187
Hubli	12145	101	80	60.88	69.88	39.25	178
Kalghatagi	99507	13400	52800	44.00	56.34	30.34	177
Shiggan	16459	210	124	51.99	63.00	39.71	250
Total	294668	27987	53784	51.00	64.00	41.00	

It is observed in the table that out of the total population 52% persons are in Uttara Kannada and 48% in Dharwad District. Scheduled castes and Scheduled Tries are not evenly distributed in all the Taluk of the study area. Out of 294668 total population, the study area is having 27978 schedule caste and 53784 schedule tribes. The sex ratio is almost evenly divides in all reparian Taluk but a slight tilt is in favour of males.

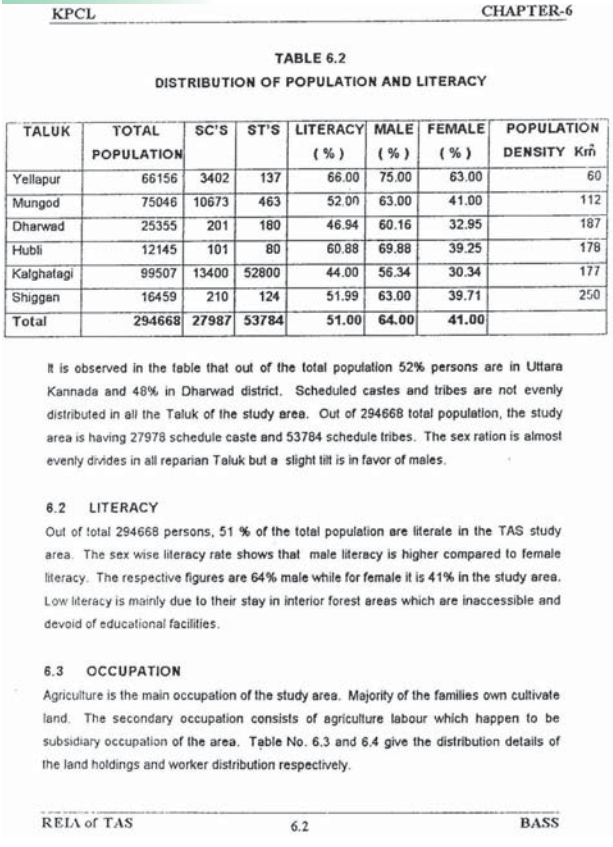
6.2 LITERACY

Out of total 2,94,668 persons, 51% of the total population are literate in the DMH study area. The sex wise literacy rate shows that male literacy is higher compared to female literacy. The respective figures are 64% male while for female it is 41% in the study area. Low literacy is mainly due to their stay in interior forest areas which are inaccessible and devoid of educational facilities.

ERNST & YOUNG Page 48

The Notification also prescribes no standards whatsoever for vital issues governing the quality of the EIA. No explicit requirements are included about the period over which an EIA has to be prepared - whether the EIA is to be based on all season data or single season data.[a] Considering that the Draft EIA forms the primary information source for the Public

Ernst & Young plagiarized the KPCL's Tattihalla Dam EIA Report in a failed attempt to secure clearance for the Dandeli Mini-Hydel Project



KPCL CHAPTER-6

TABLE 6.2
DISTRIBUTION OF POPULATION AND LITERACY

TALUK	TOTAL POPULATION	SC'S	ST'S	LITERACY (%)	MALE (%)	FEMALE (%)	POPULATION DENSITY Km²
Yellapur	66156	3402	137	66.00	75.00	63.00	60
Mungod	75046	10673	463	52.00	63.00	41.00	112
Dharwad	25355	201	180	46.94	60.16	32.95	187
Hubli	12145	101	80	60.88	69.88	39.25	178
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It is observed in the table that out of the total population 52% persons are in Uttara Kannada and 48% in Dharwad district. Scheduled castes and tribes are not evenly distributed in all the Taluk of the study area. Out of 294668 total population, the study area is having 27978 schedule caste and 53784 schedule tribes. The sex ration is almost evenly divides in all reparian Taluk but a slight tilt is in favor of males.

6.2 LITERACY

Out of total 294668 persons, 51 % of the total population are literate in the TAS study area. The sex wise literacy rate shows that male literacy is higher compared to female literacy. The respective figures are 64% male while for female it is 41% in the study area. Low literacy is mainly due to their stay in interior forest areas which are inaccessible and devoid of educational facilities.

6.3 OCCUPATION

Agriculture is the main occupation of the study area. Majority of the families own cultivate land. The secondary occupation consists of agriculture labour which happen to be subsidiary occupation of the area. Table No. 6.3 and 6.4 give the distribution details of the land holdings and worker distribution respectively.

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25. See generally, Commission for Environmental Impact Assessment, "Further Experiences on EIA in the Netherlands – Process, Methodology, Case Study", The Netherlands, April 2001, available at (last visited on 7th March, 2007) <http://www.eia.nl/mer/commissie/img/text2001.pdf>.
26. See Aruna Murthy and Himansu Sekhar Patra, "Environment Impact Assessment Process in India and the Drawbacks", Vasundhara, September 2005, available at (last visited on 10th February, 2007) <http://www.freewebs.com/epgorissa/ENVIRONMENT%20IMPACT%20ASSESSMENT%20PROCESS%20IN%20INDIA%20AND%20THE%20DRAWBACKS-1.pdf>.

Hearings, the quality of the draft EIA prepared is of critical import.

In the past, investors have generally supplied poor, irrelevant and rapidly prepared EIAs due to the weak regulations in force. The EIA Notification - 2006 sustains such a weak regulatory approach, thereby heightening the acute possibility of very poor assessments of the environmental and social impacts of development projects in India. Since the base document for informed decision-making will not in any manner match up to warranted scientific and objective standards, the objective of fully comprehending environmental and social impacts of projects is also seriously hindered.

a. In this context, MoEF's response to the Chairman of the Parliamentary Standing Committee on Science, Technology, Environment & Forests in early August 2006 explicitly states that the time frame for the EIA report is entirely at the discretion of the project proponent!

employed ploy – and this trend has been encouraged by the fact that MoEF has not taken one single action to check or proceed against such crimes.[27] Considering that the new Notification also allows for the foregoing of public consultation for certain types of projects, it is plausible that such obvious loopholes are being sustained to facilitate an elastic regulatory framework that will expedite 'favoured' investments.

In addition, the EIA Notification - 2006 has also introduced the highly problematic requirement that there shall be "*prior notice of at least seven days to the applicant, who shall provide necessary facilities for the inspection*" to the site assessment team.[28] Such a requirement completely erodes the efficacy and utility of a surprise check, which may possibly uncover serious environmental and social impact issues relating to the project in question.[29] In addition, such a requirement would defeats the very purpose of independent objective verification – since it gives the investor time to 'cover up' local resistance and other possible relevant factors. The requirement on the part of the investor to "*provide necessary facilities for the inspection*" opens up serious issues of the potential for inducing corruption and bias in the decision-making and verification processes.

Most countries that have developed an independent and robust environmental regulatory mechanism have ensured that surprise checks and regulatory independence in the verification of information form an integral part of the overall decision-making process.[30] India thus seems to have evolved a system that is not only regressive but is also highly susceptible to coercion, manipulation and outright corruption.

6. SEAC representing several states contrary to federalism:

Paragraph 5(b) of the EIA Notification - 2006 provides the Central Government with the power to '*constitute one SEAC for more than one State or Union territory for reasons of administrative convenience and cost*'. Clearly, this provision could result in the objectives of decentralisation being compromised significantly - merely on discretionary bureaucratic decisions citing '*administrative convenience and cost*.' Given that the MoEF is amongst the least funded Ministries at the Centre, a situation that has existed for several decades now, this scenario is more than likely to impact the careful consideration of environmental and social impacts that are specific to each state.[31] A similar problem arises when '*administrative convenience and cost*' are submitted as reasons for not carefully considering impacts within different ecological regimes of the same state.

27. The most shocking such incident perhaps is the plagiarized and fraudulent EIA reports submitted with regard to a proposed Dandeli Mini-Hydel Project by M/s Murdeshwar Power Corporation Ltd. on the Kali River in Karnataka. See for example, "Consultants plagiarise report to get Karnataka power project cleared", Newindpress.com, August 28, 2000; Nirmal Ghosh, "Copycat dam study puts Ernst & Young in a spot", Strait Times, August 29, 2000; John Vidal, "Eco soundings", Guardian, September 6, 2000; Ajith Pillai, "Numbers do lie", Outlook, August 29, 2000. All of these articles and other documentation on the fraudulent EIA report are archived at (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/dandeli/press/dandart.html>.

28. In contrast, the EIA Notification – 1994 states 'The said Committee of Experts shall have full right of entry and inspection of the site or, as the case may be, factory premises at any time prior to, during or after the commencement of the operations relating to the project.' See Annexure A and Annexure E.

29. The value of such site visits are underscored by the recent MoEF decision to refuse forest clearance to the Dandeli Mini Hydel Project proposed by M/s Murdeshwar Power Corporation (MPCL) - on the basis of a site visit to the proposed location that uncovered overwhelming "adverse implication on the Ecology, Wildlife and Ecotourism and on socio economic considerations" along with the fact that the project proponent had submitted misleading information about the proposed impacts. For more on this, see ESG, "Forest Clearance for Dandeli Dam rejected once again by GOI", Press Release, 23 December 2006, available at (last visited on 10th February, 2007) <http://www.esgindia.org/campaigns/dandeli/press/PressRel_23dec06.html>.

30. For example, additional information about the US Environmental Protection Agency's powerful clearance, compliance and enforcement mechanisms may be accessed at (last visited on 10th February, 2007) <http://www.epa.gov/ebtpages/complianceenforcement.html>.

31. See "Central Plan Outlay by Ministries/Departments." Government of India: Union Budget & Economic Survey, available at (last visited on 09 February 2007) <http://indiabudget.nic.in/ub2005-06/bag/bag4-2.pdf>.

A common SEAC for Tamil Nadu and Kerala will compound the imbroglio over Mullaperiyar Dam

With no imminent clarity on when budgetary allocations to the MoEF are to improve, it can be easily perceived that such notions as "*administrative convenience and cost*" could be the reason to club Goa with the SEAC of Maharashtra, Pondicherry with the SEAC of Tamil Nadu, or to group the North Eastern States under one SEAC. Besides the lack of concern for ecological and social detail and specificity, such groupings are very likely to result in diminishing fair justice delivery across the country. This provision could also induce politicking on issues and may lead to conflicts and allegations of favouritism amongst the affected states.[32] Most fundamentally, this provision defeats the very purpose of a genuine federated decision-making system, besides running contrary to well-established judicial decisions that have warned the Government against pleading "*non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws*"[33]

32. Hypothetically speaking, if one SEAC was to be constituted for the states of Kerala and Tamil Nadu, then the issue of increasing the height of the Mullaperiyar Dam could well result in that SEAC becoming dysfunctional due to coercive pressure from both states and a seemingly irreconcilable conflict of interest. On this topic, see "SC asks Kerala, TN to settle dam row", Economic Times, November 28, 2006.
33. See Dr. B. L. Wadehra v. Union of India (Delhi Garbage Case), AIR 1996 SC 2969, at p. 2976.

DEFICIENCIES IN THE VARIOUS STAGES OF THE EC PROCESS

The new EIA Notification - 2006, has substantially transformed the EIA process in India. The EIA Notification of 1994 followed a simple and understandable clearance process divided into two time frames for regulatory action. Sixty days were set aside for the purpose of securing clearance from the Pollution Control Boards, which included a thirty-day period of public consultation. On securing the Consent for Establishment (CFE) from the Pollution Control Board (which is also known as No Objection Certificate [NOC]), the investor would submit an application for final Environmental Clearance along with the CFE, report of the Environmental Public Hearing, and other documents to the Impact Assessment Agency (IAA) of MoEF. From that time onwards, the IAA had thirty days to take a final decision to accord or reject clearance for the project.[1]

In contrast, the process under the EIA Notification - 2006 is divided into four stages - Screening, Scoping, Public Consultation and Appraisal with a strong emphasis on delivering the final decisions to the investor in a strictly time-bound manner. While the four-stage process corresponds to current international practice on EIA based decision-making, what takes away the efficacy under the new Notification is the excessive emphasis on time-bound decision-making. (*See Box 11: UNESCAP Principles for Environmental Clearance Process*) Such urgency could seriously damage the potential for decisions to be in consonance with the Precautionary Principle. The urge to ensure a quick turnaround in the decision making process has been such that the Notification provides no substantive role even to the Pollution Control Boards in the review mechanism - except in conducting the public consultation process. For such technically competent agencies (deriving their legitimacy from the Environment (Protection) Act, 1986, Water Act, 1974 and the Air Act, 1981) to be excluded from playing an integral role in shaping the outcome of a technical decision is a deeply disturbing aspect of this Notification.

The absurdity of this approach is highlighted by the fact that PCBs continue to have a direct role in reviewing projects (for clearance or rejection) under the Water Act, 1974 and Air Act, 1981, amongst others. The Notification provides no scope whatsoever to integrate these aspects of project clearance with the clearances to be secured

Box 11: UNESCAP Principles for Environmental Clearance Process

United Nations Economic and Social Commission for the Asia and the Pacific (UNESCAP) was established in Shanghai, China in 1947 and currently comprises of 62 member countries. It is the largest of the UN's five regional commissions in terms of population served and area covered. India has been a member state of UNESCAP since its inception.

One of UNESCAP's stated goals is to advance greater private sector involvement in infrastructure development. In recent years, UNESCAP has been trying to develop 'good practice' modules promoting sustainable development in project development. As a part of this endeavour it has developed manuals that prescribe 'good practices' for EIA based planning processes. The general principles given in one of these manuals - based on the recommendations of the Regional Expert Group Meeting held in Bangkok in 1998 - are as follows:

1. Participation: An appropriate and timely access to the process for all interested parties.
2. Transparency: All assessment decisions and their basis should be open and accessible.
3. Certainty: The process and timing of the assessment should be agreed in advance and followed by all participants.
4. Accountability: The decision-makers are responsible to all parties for their action and decisions under the assessment process.
5. Credibility: Assessment is undertaken with professionalism and objectivity.
6. Cost-effectiveness: The assessment process and its outcomes will ensure environmental protection at the least cost to the society.
7. Flexibility: The assessment process should be able to adapt to deal efficiently with any proposal and decision-making situation.
8. Practicality: The information and outputs provided by the assessment process are readily usable in decision-making and planning.

Source: United Nations Economic and Social Commission for the Asia and the Pacific (UNESCAP) manual on the EIA, available at (last visited on 14th April 2007)<http://www.unescap.org/drpad/vc/orientation/m8%5F1.htm>.

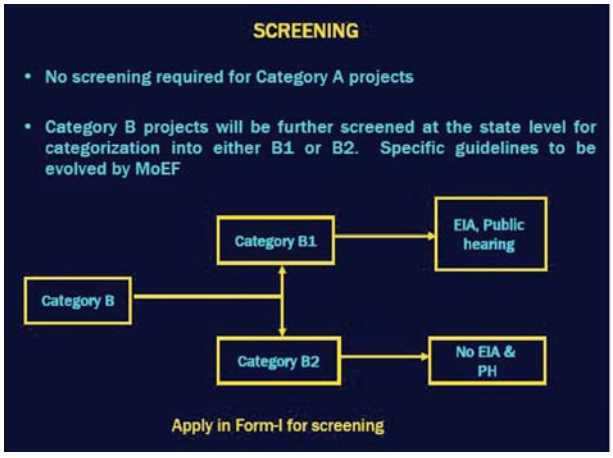
1. See also Annexure A.

under the EIA Notification - 2006. In fact, Paragraph 8 (v) of the Notification forecloses the need for integration by stating that *"(c)learances from other regulatory bodies or authorities shall not be required prior to receipt of applications for prior environmental clearance...."* This is clearly demonstrative of the Notifications' capitulation to investor demands for expeditious clearances. Such a stipulation is devoid of regulatory logic that should be geared towards improving assessments with the objective of preventing or mitigating social and environmental impacts.[2]

The process under the EIA Notification 2006 is also seriously flawed from the perspective of access to information. The right of public access to information held by government bodies has been widely interpreted as being derived from Article 19(1) (a) of the Constitution of India - the right to the freedom of speech and expression.[3] This position has been fortified and explicitly reiterated through the recent Right to Information Act, 2005 [RTI Act, 2005],[4] specifically S. 3 that states: "*Subject to the provisions of this Act, all citizens shall have the right to information*". S. 4(2) of the RTI Act, 2005 further casts upon every public authority the obligation to provide information *suo motu* to the public at regular intervals through various means of communication.[5] The provisions of the EIA Notification - 2006 however reflect a very poor approach in securing and advancing citizens' right to information.[6] Poor drafting of the Notification, insensitivity to the needs of public access to information, irrational exclusions and exemptions, etc. militate against the very spirit of the RTI Act, 2005. To further exacerbate the situation, several provisions in the Notification brazenly subject information access by the public to the economic interests of investors.[7]

In the section that follows we highlight problems that are latent to the four-stage review mechanism as prescribed in the Notification.[8]

Stage 1 – Screening



Source: Presentation of MoEF at CII organised seminar on Promoting Excellence for Sustainable Development" Sustainability Summit: Asia 2006

1. No safeguards in Screening process:

Paragraph 7 (i) (I) of the Notification elucidates the Screening stage as follows:

> *'In case of Category 'B' projects or activities, this stage will entail the scrutiny of an application seeking prior environmental clearance made in Form 1 by the concerned State level Expert Appraisal Committee (SEAC) for determining whether or not the project or activity requires further environmental studies for preparation of an Environmental Impact Assessment (EIA)….. The projects requiring an Environmental Impact Assessment report shall be termed Category 'B1' and remaining projects shall be termed Category 'B2' and will not require an Environmental Impact Assessment report'.*[9]

2. On this point, see also Annexure K for relevant UNECE principles.

3. The right to know, 'receive and impart information has been recognized within the right to freedom of speech and expression.' See SP Gupta v. President of India, AIR 1982 SC 149, at p. 234; Secretary, Ministry of I & B, Govt. of India v. Cricket Association of Bengal, (1995) 2 SCC 161. The fundamental right to freedom of speech and expression is enumerated as: "19. Protection of certain rights regarding freedom of speech etc.- (1) All citizens shall have the right-(a) to freedom of speech and expression;"

4. The full text of the legislation and additional information regarding the right to information in India is available at (last visited on 01, February 2007) <http://righttoinformation.gov.in/>.

5. The provision reads: "(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information."

6. In this regard, India's international obligations in ensuring right to information, especially environmental information, may be sourced to Principle 10 of the Rio Declaration on Environment and Development, 1992 which states: "States shall facilitate and encourage public awareness and participation by making information widely available."

7. For an informative account highlighting the importance of access to information in the environmental context, see Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, OUP, 2002, pp. 157 – 166.

8. As a suitable reference point, see also Annexure J for UNESCAP recommendations regarding the EIA stages.

9. The stage of screening undergoes change from the process under the draft Notification. Under the draft Notification, the screening stage involved perusal of the applications for classifying projects under Category A/B. Another noticeable change in the finalised Notification is the wide exemption given to the construction industry from preparing any EIA reports. See also Case Study 1: Construction Projects - the Athashri Paranjape Project, Bangalore.

"Screening" is amongst the most shocking features of this Notification. The stated definition of screening implies that the investor's application is the only information available to the SEAC to decide whether a project must undergo a comprehensive EIA or not! In a country where there has not been even one case of criminal action initiated (by environmental regulatory agencies) against the widespread practice of investors' supplying fraudulent information to secure clearances, this provision essentially opens the doors for such abuse. Since the Notification provides no principled guidance for "*scrutiny*" of applications, the basis for classifying projects, as Category B1 or B2 is more often than not likely to be guided by investor induced pressures for weaker environmental review. As a result, there is the high likelihood of many projects getting categorised as B2 to avoid the need of preparing an EIA report. The objective, therefore, of ensuring competent and transparent environmental clearance decision-making is severely compromised at its very inception. (*See Box 12: Components of Screening*)

Box 12: Components of Screening

b) Rapid assessment checklist for criteria which establish need for EIA.
c) Local demographic data - identify vulnerable human communities.
d) Local environmental data - identify vulnerable eco-systems.
e) Assessment of potential global impact of proposals.
f) Rapid assessment of public interest and/or concerns.
g) Communication networks between community and developer.
h) Relevant inter-sectoral policies.

Source: Diane Wiesner, *EIA - the environment impact assessment process, what it is and what it means to you*, Prism Press, 1995.

2. No clarification on 'Pre-Feasibility Report' and 'Conceptual Plan':

Paragraph 6 states that:

> *"The applicant shall furnish, along with the application, a copy of the* ***pre-feasibility project report*** *except that, in case of construction projects or activities (item 8 of the Schedule) in addition to Form 1 and the Supplementary Form 1A, a copy of the* ***conceptual plan*** *shall be provided, instead of the pre-feasibility report*." (emphasis supplied)

The Notification does not in any manner define what a 'pre-feasibility report' or 'conceptual plan' should comprise of. No clarification is also provided on the procedure to be followed in the preparation of such documents. Thereby, the Notification seems to allow submissions of absolutely any document(s) (not necessarily addressing environmental and social impacts of a project) as either a 'pre-feasibility report'[10] or a 'conceptual plan'.

Such disregard for securing clear and unambiguous information from a project proponent is particularly worrying. This is especially so when considered in the backdrop of the past decade's experience where innumerable EIA Reports and other requisite documents submitted by investors have been found to be fraudulent or comprising of irrelevant information.

The unqualified introduction of the 'conceptual plan' as an information requirement exclusively for building and construction projects and townships and area development projects (Item 8 of the Schedule), is also fraught with potential for misinterpretation. The clarity in use of such a term could easily have been enhanced if the Notification had pointed to provisions in architectural guidelines or land use laws or National Building Code prescriptions or the Bureau of Indian Standards Act, 1986 and so on.

Since the 'pre-feasibility report' and 'conceptual plan', along with Form 1 and Form 1A constitute the primary information basis in the initial environmental review (screening and scoping stages) of the project, the unqualified introduction of these terms has a direct impact on enlightened decision-making.

Stage 2 – Scoping

1. No public participation in 'Scoping' process:

'Screening' is followed by the 'Scoping' process, and this is introduced by Paragraph 7 (i) (II) of the EIA Notification - 2006.

'Scoping' is defined here as the process by which the Expert Appraisal Committee (EAC) will "*determine detailed and comprehensive Terms Of Reference (TOR) addressing all relevant environmental concerns for the preparation of an Environment Impact Assessment (EIA) Report in respect of the project or activity for which prior*

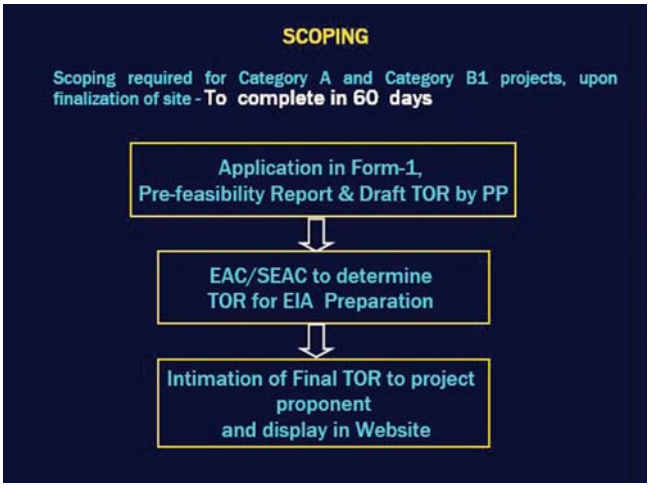
10. While no mention of a 'pre-feasibility report' is found in UN modules, the UNESCAP module on EIA under the topic of "Environmental Impact Assessment Project Cycle and Project Management" mentions 'Pre-feasibility' as a stage within the EIA process. It says-"The main EIA activities, at this stage, are identification of issues/impacts for investigation and, formulation of the Terms of Reference (TOR) for the EIA. The term used for this activity is "scoping"". See (last viewed on 15th February 2007) <http://www.unescap.org/drpad/vc/orientation/M8_2.htm>. The term 'pre-feasibility report' is used usually in context of the financial feasibility of a project for the proponent.

environmental clearance is sought."[11] If the expert committees fail to finalize and convey the Terms of Reference to the applicant within the stipulated time period of 60 days from the receipt of the application, then the Notification provides that the '*Terms of Reference suggested by the applicant shall be deemed as the final Terms of Reference approved for the EIA studies*'. In effect, this amounts to the government abdicating its public responsibility.

The Notification presumes that 'scoping' is an expert driven exercise and that all issues that need to be considered in developing an EIA would be captured through the inputs of the expert committee. As argued earlier in this report, comprehensively reviewing the potential environmental and social impacts of projects is a task that demands expertise in various disciplines. At the same time, relevant inputs from members of the public who are knowledgeable about the proposed location and/or impacts of the proposed project is also vital for a comprehensive review.[12] Clearly, the expert bodies contemplated under the Notification cannot be fully representative of the wide range of issues and concerns that should ideally guide the 'scoping' objective.

Scoping, as is widely practised, is a methodical exercise based on various social and applied sciences along with a strong public input component. Scoping is also the stage for formal engagements with the communities likely to be affected, amongst others, in order to fully appreciate their concerns and to effectively determine meaningful Terms of Reference for the EIA. A deeper appreciation of the potential impacts of a proposed project on the landscape of the proposed site is possible only where public involvement in the scoping exercise has been meaningful. Unless the objectives of scoping are determined through such public consultation, thereby enabling a meaningful selection of items to be studied from the point of view of impact, its utility is lost. In this context, the Notification's emphasis on "scoping" as being an expert driven exercise militates against the central idea of how scoping has been traditionally understood.

In the literature related to 'scoping', and in practice in many countries around the world, 'scoping' is a deliberate consultative mechanism wherein researchers preparing an EIA visit the proposed site and ensure that their interactions with the local communities are



Source: Presentation of MoEF at CII organised seminar on "Promoting Excellence for Sustainable Development" Sustainability Summit: Asia 2006

Box 13: What is Scoping?

Scoping according to UNESCAP

Scoping is to determine what should be the coverage or scope of the EIA study for a project proposal as having potentially significant environmental impacts. It also helps in developing and selecting alternatives to the proposed action and in identifying the issues to be considered in an EIA.

Aims of scoping:

- identify concerns and issues for consideration in an EIA;
- ensure a relevant EIA;
- enable those responsible for an EIA study to properly brief the study team on the alternatives and on impacts to be considered at different levels of analysis;

11. The process remains the same as in the draft but with one additional line, which adds that "if the TOR are not finalised and conveyed to the applicant within 60 days of the receipt of Form 1, the TOR suggested by the applicant shall be deemed as the final TOR approved for EIA studies". An undue and unjustified advantage is given to the applicant instead of ensuring that the process of clearance is strengthened and the TORs are indeed finalised on time. See Annexure B.

12. The Policy Statement for Abatement of Pollution (26 February 1992) of the Government of India, in Paragraph 11.1 states: "The public must be aware in order to be able to make informed choices. A high government priority will be to educate citizens about environmental risks, the economic and health dangers of resource degradation and the real cost of natural resources. Information about the environment will be published periodically. Affected citizens and non-governmental organisations play a role in environmental monitoring and therefore allowing them to supplement the regulatory system and recognising their expertise where such exists and their commitment and vigilance, will also be cost effective. Access to information to enable public monitoring of environmental concerns, will be provided for."

13. See for example, Environmental Resources Management, Guidance on EIA – Scoping, June 2001, available at (last visited on 7th March, 2007) <http://ec.europa.eu/environment/eia/eia-guidelines/g-scoping-full-text.pdf>.

* determine the assessment methods to be used;
* identify all affected interests;
* provide an opportunity for public involvement in determining the factors to be assessed, and facilitate early agreement on contentious issues;
* save time and money; and
* establish terms of reference (TOR) for EIA study.

Scoping is not an isolated exercise. It may continue well into the project planning and design phase, depending on the new issues that may arise for consideration.

Methods for involving affected interests and for collecting information include:

* securing written submissions from relevant government agencies and the public;
* holding community meetings and public hearings;
* conducting preliminary field study observation of sites; and
* conducting workshops/seminars and establishing an inter-sectoral task force.

Source: United Nations Economic and Social Commission for the Asia and the Pacific (UNESCAP) manual on the EIA, available at (last visited on 14th April 2007) <http://www.unescap.org/drpad/vc/orientation/m8%5F15.htm>.

Defining Scoping:

Scoping is used to identify the key issues of concern at an early stage in the planning process. Scoping should be carried out at an early stage in order to aid site selection and identify any possible alternatives. The scoping process should involve all interested parties such as the proponent and planning or environmental agencies and members of the public. The results of scoping will determine the scope, depth and terms of reference to be addressed within the Environmental Statement.

Source: Richard Hamilton, "What is EIA?", available at (last visited on 4th April, 2007) <http://www.gdrc.org/uem/eia/whatiseia.html>.

recorded for later reference.[13] (*See Box 13: What is Scoping?*)

Seen in such light, the EIA Notification - 2006 has completely misconstrued and distorted the objective of 'scoping'. It has treated this critical stage in the EIA process merely technically and as an exercise to develop "Terms of Reference" by the EAC primarily on inputs from the investor. In fact the Notification envisages the need for a "site visit by a sub-group of Expert Appraisal Committee or State level Expert Appraisal Committee concerned **only if considered necessary** by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned"(emphasis provided).

Given that there is no scope for public consultation in the *'scoping'* exercise as proposed in the Notification, and that site visits are entirely based on the discretion of the EAC or SEAC, the result is an exclusivist approach that denies the wide public its due role in the shaping of the "*Terms of Reference*". In addition, the 60 days time limitation to finalize and convey the "*Terms of Reference*" to the investor significantly stifles the possibility of the expert committees carrying out a comprehensive and meaningful analysis of the potential impacts of the project with due attention being given to public inputs. Expert committees would inevitably be pressurised to finalize the "*Terms of Reference*" hastily on the basis of information largely supplied by the investor - or else face the possibility of investor supplied "*Terms of Reference*" driving the entire EIA process. The approach adopted in the EIA Notification - 2006 to 'scoping' is extremely restricted and is biased in favour of securing favourable Terms of Reference for the investment. Apart from this, the very relevance and validity of the investor-supplied information guiding

BOX 14: MoEF Plagiarises from European Union EIA Formats!

In June 2001, the international consulting firm Environment Resource Management (ERM) brought out a manual entitled "Guidance on EIA Scoping" as part of a contract with the Directorate General for Environment of the European Commission. This document is available at (last visited on 14th March, 2007) <http://ec.europa.eu/environment/eia/eia-guidelines/g-scoping-full-text.pdf>.

The manual has three parts: Screening in EIA, Scoping in EIA and the EIS Review. Of particular interest to the Indian situation is the section relating to Scoping.

The preface of the document begins with the recognition that the EIA is a key instrument of the overall framework of environmental decision-making for the European Union. To assist the Scoping exercise, a Checklist of Questions on Project Characteristics is provided keeping in view the bio-geographical and ethnic diversities of countries within the European Union (which falls largely within the temperate zone).

MoEF has completely copied this Checklist as Appendix 1 Form 1 in the EIA Notification 2006! This forces tropical India, which has a much more varied biodiversity and diversity of people when compared to Europe, to comply with information requirements

that suit (and were drafted exclusively for) the European context.

It has to be stressed that Form 1 of the EIA Notification – 2006 is one of the most critical information gathering components of the EIA process within the Notification. It is in fact the primary document through which the proponent gives details of the project's environmental and social impacts. For considering environmental clearances of construction and building industries, Form 1 also serves as the main source of information to guide clearance/rejection decisions (along with Supplementary Form 1 and the undefined 'Conceptual Plan').

There is absolutely no explanation for how (or why) a checklist prepared keeping in mind the conditions, resources, institutional frameworks, and principles applicable within the European Union has been directly (without even a single change!) utilised as the key source of information collection in the Indian context. Of course, MoEF has not acknowledged the source of the plagiarised Form 1 in the EIA Notification 2006 or elsewhere.

This is a blatant example of the 2006 EIA Notification's hurried approach, shallow level of research, and lack of commitment to serious environmental protection. Equally importantly, this exposes ERM as an agency that conveniently duplicated its earlier European efforts to India without even attempting to adapt the information seeking formats to local conditions. Of course, they got well paid for this kind of work by our MoEF! Of course, the Indian people will now have to suffer the negative ramifications of European information frameworks being the basis for Indian environmental clearance decisions.

the Scoping process remains highly suspect. (*See Box 14: MoEF Plagiarises from European Union EIA Formats!*)

2. Limited access to information in scoping process:

No meaningful access to EIA Terms of Reference

Paragraph 7(i) (II) (ii) of the EIA Notification - 2006 dealing with scoping states: "*The approved Terms of Reference shall be displayed on the website of the Ministry of Environment and Forests and the concerned State Level Environment Impact Assessment Authority.*"

There are several limitations with this provision. It is a widely accepted practice world-wide that Terms of Reference (TOR) of an EIA are always in the public domain and open to public comment, both in the drafting stage and also when finalised. Since the TOR fundamentally defines the depth of investigation and shapes the features of the EIA Report to be prepared, both the investor supplied TOR and the finally approved TOR need to be widely disseminated to the public. Providing access to only the "*approved*" TOR limits the possibility for evaluating the extent to which there has been independent review of the scoping process.[14]

In addition, mere availability of the approved TOR in English, possibly on the websites of MoEF and the concerned SEIAA, is unlikely to make such information available to the public in any meaningful manner. In a country that is largely illiterate, non-English speaking, and where the reach of the Internet is minimal, such heavy reliance on English documents available only on-line does not guarantee or genuinely promote access to environmental information.[15] Such an insensitive approach towards the information needs of a large part of the public is reflected time and again in the EIA Notification – 2006, and this issue has been elaborated in greater detail subsequently in this Chapter.

Preliminary rejection of project not public

When the regulatory authority rejects the project at the scoping stage itself, Paragraph 7(i)(II)(iii) requires that *"[i]n case of such rejection, the decision together with reasons for the same shall be communicated to the applicant in writing within sixty days of the receipt of the application."*

Given that this is a final decision on the terms of the investment proposed, it is surprising that the Notification does not require this decision of rejection to be made public. Surprisingly, the Notification seems to assume that the only person who needs to be

14. See in this regard the Brundtland Report, World Commission on Environment and Development, Our Common Future (1987), at pp. 63-64, which states: "Free access to relevant information and the availability of alternative sources of technical expertise can provide an informed basis for public discussion. When the environment impact of a proposed project is particularly high, public scrutiny of the case should be mandatory and…."

15. Internet usage is concentrated in large cities in India with villages (roughly 70 percent of the population) being almost completely un-served. For detailed studies on this aspect, see Peter Wolcott and Seymour Goodman, "Is the Elephant Learning to Dance? The Diffusion of the Internet in The Republic of India," Center for International Security and Cooperation (CISAC), Stanford University and Georgia Tech University, 2002, available at (last visited on 1 February 2007) <http://mosaic.unomaha.edu/India_2002.pdf>; Larry Press et al, "The Internet in India and China", First Monday, Volume 7, Number 10 (October 2002), available at (last visited on 01 February, 2007) <http://www.firstmonday.org/issues/issue7_10/press/>.

16. Ironically, this provision will have adverse implications for projects that are considered beneficial in the view of the public and/or the local community. The regulatory agency's power to reject proposals in de facto secrecy also infringes on tenets of the_"due process" and "legitimate expectations" doctrines.

informed about the rejection of the proposed project is the applicant.[16]

Stage 3 - Public Consultation

The right of the citizen to constructively engage in the dialogic process of decision-making at any and all levels is an implied value of any democratic society.[17] In affirmation of this objective, the National Environment Policy states that equity in environmental policy includes "***both equity in entitlements to, and participation of, the relevant publics, in processes of decision-making over use of environmental resources***" (emphasis supplied).[18]

The EIA Notification 1994 was the very first legislative initiative that made statutory Environmental Public Hearings a mandatory requirement before any environmental clearance could be accorded.[19] The EIA Notification - 2006, in contrast, stifles even this aspect of participative democracy as the Notification at Paragraph 7 (i) III (v) states that "*owing to the local situation, [if] it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed…… the concerned regulatory authority…..[can] decide* ***that the public consultation in the case need not include the public hearing***" (emphasis supplied).

Use of such delusory expressions as "*owing to the local situation*" to qualify parameters for holding Public Hearings fundamentally compromises the scope for public participation and subordinates it to the whims and discretion of a possibly biased executive. Notably, nothing in the Notification qualifies the expression "*owing to the local situation*"! Such a provision is fraught with the possibility of abuse resulting in curtailment of the freedom to express one's opinion - a danger that is amplified by the widespread non-adherence to the rule of law in public administration in India.[20]

As citizens across the world increasingly demand a greater role in environmental decision-making[21], the scant respect accorded to public participation and access to information in the EIA Notification - 2006 (which is

17. Principle 10 of the Rio Declaration on Environment and Development, 1992 states: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Incorporating public input into the decision-making process helps manage and minimize social conflict even as it strengthens the decisions that emerge from the process. See Elena Petkova et al, Closing the Gap: Information, Participation, and Justice in Decision-making for the Environment, World Resources Institute, 2002. See also Sherry R. Arnstein, "A Ladder of Citizen Participation", JAIP, Vol. 35, No. 4, July 1969, pp. 216-224, which argues that: "citizen participation is a categorical term for citizen power. It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future. It is the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated, and benefits like contracts and patronage are parcelled out. In short, it is the means by which they can induce significant social reform which enables them to share in the benefits of the affluent society."
18. Principle 7, NEP, 2006, p. 12.
19. See also Article 14 of the Convention on Biological Diversity, 1992, which states: "Article 14. Impact Assessment and Minimizing Adverse Impacts
1. Each Contracting Party, as far as possible and as appropriate, shall:
(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;"
20. The World Commission on Dams after conducting a detailed survey of 105 dams across the world stated: "The WCD Knowledge Base shows that the most unsatisfactory social outcomes of past dam projects are linked to cases where affected persons played no role in the planning process, or even in selecting the place or terms of their resettlement. In addition, governments have frequently committed themselves unquestioningly to large infrastructure projects, whose merits have not been tested by public scrutiny, without hearing alternate views on the choice of development objectives for a village, region or country." See Dams and Development – A New Framework for Decision-Making, The Report of the World Commission on Dams, Earthscan Publications Ltd., 2000.
21. See for example, Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention).
22. The process of Public Consultation has undergone drastic changes from the 1994 Notification (See Annexure A). Yet what is even more appalling is the obvious manner in which the process has regressed from the Draft Notification stage to the finalized version of the Notification. The representative panel for the hearing has been completely done away with and the panel now includes only government officials. Clauses relating to the need for a quorum have also been removed. Time frames for pubic engagement have been reduced, and clauses provided for greater access to information have been removed. For a greater elaboration, see Annexure B.

Box 15: The Access Initiative (TAI) Perspective

The Access Initiative (TAI) is a global coalition of public interest groups collaborating to promote national-level implementation of commitments to access to information, participation, and justice in environmental decision-making. It is led by six organizations namely Corporación PARTICIPA (Chile), Thailand Environment Institute (Thailand), World Resources Institute (United States), Environmental Management and Law Association (Hungary), Advocates Coalition for Development and Environment (Uganda) and Iniciativa de Acceso-México (México) and the coalition includes over 50 countries from across the world. Environment Support Group coordinates the TAI India Coalition, and a report of the last collective meeting held in Bangalore during November 2004 can be downloaded from (last visited on 4th April, 2007): <http://www.esgindia.org/projects/tai_india/TAI.html>.

The main purpose of the TAI coalition is to promote national-level implementation of commitments relating to access to information, participation, and justice in environmental decision-making, arising out of Principle 10 of the Rio Declaration, 1992. The Access Initiative (TAI) seeks to ensure that people have a voice in the decisions that affect their environment and their communities

TAI partners promote transparent, participatory, and accountable governance as an essential foundation for sustainable development. To achieve this goal, partners form national coalitions, assess government progress using a common methodology, raise public awareness, and set priorities for improvements in policy and practice.

TAI coalition's key guiding principles are:

Access to Information – The ability of citizens to obtain environmental information in the possession of public authorities. "Environmental information" could include information about air and water quality, for example, or information about whether any hazardous chemicals are stored at a nearby factory.

Public Participation – The opportunity for citizens to provide informed, timely and meaningful input and to influence decisions on general policies, strategies and plans at various levels and on individual projects that have environmental impacts. Individuals may, for example, engage in electoral processes, testify at hearings and meetings, serve on advisory committees, have direct contact with public officials, express views and opinions through the media or engage in some form of protest action.

Access to Justice – The ability of citizens to turn to impartial arbiters to resolve over access to information and participation in decisions that affect the environment. Such impartial arbiters include mediators, administrative courts and formal courts of law, among others.

Clearly, any law shaping environmental decisions should conform to the broad framework presented by the TAI principles. The Indian EIA Notification 2006 not only fails to uphold these principles, but also promotes the potential for limiting access to information and public participation in environmental decision-making.

Source: The Access Initiative website (last visited on 4th April, 2007)*: <http:www.accessinitiative.org>*

supposedly a reformative legislation) is an extremely disconcerting legal development.[22] (See Box 15: The Access Initiative (TAI) Perspective)

Some specific areas of concern highlighting how the EIA Notification - 2006 suffers from a democratic deficit are illustrated below:

1. Democratic Deficit in 'Public Consultations':

Narrow scope for public participation

Hooliganism and police intimidation at the BMIC Public Hearing in Bangalore, 5th July, 2005.

Paragraph 7 (i) (III) of the EIA Notification - 2006 describes that Public Consultations involve engagement "*with local affected persons and others who have plausible stake in the environmental impacts of the project or activity*". Interestingly, neither the term "*local affected persons*" nor "*plausible stake*" have been defined. The implications of the term "*plausible stake*" are in sharp contrast to (and

are retrograde measures when compared with) the inclusive terminology of the EIA Notification 1994, which used the words *'public'* and *'all persons'* to refer to those who could participate in the *'public consultation'* process.[23]

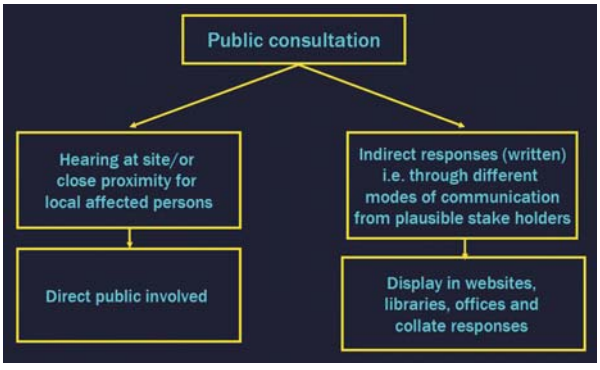
According to Paragraph 7 (III) (ii) of the EIA Notification - 2006, the 'Public Consultation' processes *'shall ordinarily have two components'* where:

a) *'a public hearing at the site or in its close proximity – district wise'* would be held *'for ascertaining concerns of local affected persons';*
b) *'other concerned persons having a plausible stake'* may only submit *'responses in writing'*.

The inclusion of the word *'ordinarily'* could easily be misused to relax the procedure of public consultation and selectively do away with either the public hearing or the written responses component, or even both components. Given past experiences where the presence of the word *'may'* in Schedule IV of the EIA Notification 1994 was misused to limit the representative-ness of the public hearing panels, this expression - *'ordinarily'* - could as easily be similarly misused to limit the procedural rigour of the public consultation process.[24]

Another vexatious issue is that any person or group who is not a *'local affected person'* cannot raise concerns about a proposed investment in a *'public hearing'*.[25] Such

Public meeting opposing dam on the Chalukady River, Kerala. Public hearings are now being restricted to project affected persons', thereby affecting the participation of the wider public.



Source: Presentation of MoEF at CII organised seminar on "Promoting Excellence for Sustainable Development" Sustainability Summit: Asia 2006

23. Paragraph 2(ii) of Schedule IV, EIA Notification 1994, states: **"**All persons including bona fide residents, environmental groups and others located at the project site/sites of displacement/sites likely to be affected can participate in the public hearing. They can also make oral/written suggestions to the State Pollution Control Board."
24. The manner in which the public hearing process may be corrupted has been well documented, with regard to the proposal to establish the Cogentrix/Mangalore Power Company (MPC) power plant in Dakshina Kannada district, Karnataka, India. As Saldanha, Fernandes and Mathai have observed: *'On 22nd July, 1995, a private gathering including the State Minister for Environment, Board officials and a film actor representing 'environmentalists' (sic), along with other local elite, were claimed to be the public and a hearing was claimed to have been held on that day. When there was public hue and cry over the matter, the immediate reaction was that another hearing would be held a month later. However, the NOC was accorded without waiting for the promised hearing on 25th July, 1995. As the state wide criticism of such subversion caused deep embarrassment to the authorities concerned, MPC started distributing copies of its Rapid Environmental Impact Assessment (REIA) in private meetings with various local schools, colleges, associations, etc., claiming such distorted processes to be public hearings.'* See Leo F Saldanha, Jason K Fernandes, and Manu Mathai (2000),'Cogent Tricks Against People's Rights: A Case Against Mangalore Power Company, a Joint Venture Initiative (until recently) of Cogentrix of USA and CLP of Hong Kong' - For Consideration by the Permanent People's Tribunal on Global Corporations and Human Wrongs, University of Warwick, March.
25. "*For others, let them submit their views/concerns in writing.*" See FICCI representation to the MoEF – 'Objections/Suggestions on the Proposals in the Draft EIA Notification no. S.O. 1324 (E) of 15/9/05', available at (last visited on 29th March, 2007) <http://www.ficci.com/media-room/speeches-presentations/2005/oct/eia-representation.pdf>. The exclusionary effects of this provision are already being felt in public hearings. See "Public Hearing on Posco's EIA", *New IndPress*, April 16, 2007, available at (last visited on 16th April, 2007) <http://www.newindpress.com/NewsItems.asp?ID=IEQ20070415103516>.

a distinction is antithetical to the very objective of public consultation and ridicules constitutional approaches to the involvement of the wide public in decision-making.[26] The Notification's silence on who exactly constitute people with a *'plausible stake'* strongly raises possibilities of such terminology being misused by regulatory authorities to exclude wider participation. This is particularly so where investor-induced pressures for expeditious clearance are operative.[27] The use of such limiting terminology also militates against the spirit of Article 51A (g) of the Constitution of India, which provides that every citizen has a fundamental duty to protect and improve the natural environment.[28] A variety of judicial decisions have held that every person enjoys the right to a wholesome environment as a part of the right to life guaranteed under Article 21 of the Constitution of India.[29]

Further, Paragraph 6.2 of Appendix IV of the EIA Notification - 2006 states that *'there shall be no quorum required for attendance for starting the proceedings'*. This allows for public hearings to be conducted without members of the public being present at all! There have been numerous instances when project proponents in cahoots with police and administrative officials have threatened and harassed people who oppose a project, with the intention of thwarting their participation in statutory public hearings.[30] By doing away with the quorum requirement for Public Hearings, the Notification effectively bolsters the unhealthy possibility of silencing dissent. A reasonable quorum requirement for attendance (unless unequivocally demonstrated as impossible, in which case a fresh hearing would have to be called) is of utmost importance to safeguard the integrity of the public hearing process.

Limited consultation in public hearing

Paragraph 7(i) (III) (i) states that the purpose of the public consultation process is to ascertain all '*material concerns in the project or activity design as appropriate*'. Besides the ambiguity in language, there is no attempt to define what 'material' concerns are. This could limit the range of issues that could be raised in the process of 'public consultation'. Further, this provision unnecessarily vests in the regulatory agency the power to define the scale and appropriateness of 'material concerns'. Similarly, the expression '*ascertaining*

26. Magdolna Toth Nagy's succinct words bear quotation: "The legal base for public participation can be divided into two parts. First, there are basic constitutional rights including rights to free expression, to information, of free assembly, of association, of petition, and also the right to a healthy environment. These are basic human rights and important elements of an open and democratic society. Second, there are specific legal mechanisms that provide substantive and procedural rights for the three basic principles of public participation in environmental decision making: (1) access to relevant information, (2) the right to participate, and (3) the right to complain, appeal, and sue. These legal mechanisms can be built into general laws (for example, administrative law, civil code, penal code), as well as into specific environmental legislation or other specific laws (for example, EIA, land use law, construction permitting, and media-specific (water, air, waste) laws). This can be done through concrete provisions for procedures." See "Public participation in the Region: An interview with Magdolna Toth Nagy", The Bulletin, Autumn 1994, available at (last visited on 02 February 2006) <http://greenhorizon.rec.org/bulletin/Bull43/pubpart.html>.

27. The likelihood of such a scenario is well illustrated by the experiences surrounding the proposed pigment-manufacturing unit of US chemical major Engelhard Inc. in the remote Kadandale village in Dakshina Kannada. In this case, the factory construction began without sharing any project information or consulting with the local authorities and the regulatory agencies. Despite widespread protests and repeated harassment and bullying of the local communities by the project proponent (using the political and police machinery), the Karnataka State Pollution Control Board accorded the project a No Objection Certificate. Public consultation, at all stages, was sought to be stifled by the project proponent - often using the authority of the police and the regulatory authority! For a detailed treatment of this case, including the story of the subsequent successful resistance by the local communities, see Leo F Saldanha, "Public Participation in Environmental Decision Making", presented at a workshop on "Judicial Enforcement of Environmental Law in Karnataka", 3rd and 4th August 2002, organised by Environment Support Group, Environmental Law Institute and Karnataka Judicial Academy. More recently, the public hearing at Dandeli on 20th February, 2007 regarding the proposed expansion by West Coast Paper Mills Limited, also illustrates how the public hearing process can be subverted with the active support of administrative and governmental agencies. In this case, anyone who sought to raise any concerns about the impacts of the proposed expansion was shouted down, harassed and intimidated by a large crowd of hooligans, with what looked like the full complicity of the police personnel present there. Anyone who opposed the project was simply shouted down as a meddlesome 'outsider'. For more details, see (last visited on 7th March, 2007) <http://www.esgindia.org>.

28. The relevant provision states: "51A. Fundamental duties.- It shall be the duty of every citizen of India-
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"

29. Subash Kumar v. State of Bihar, AIR 1991 SC 420; MC Mehta v. Union of India (Delhi Stone Crushing Case), 1992 (3) SCC 256; Virendar Gaurav. State of Haryana, 1995 (2) SCC 577.

30. For a detailed study of one such example, see PUCL, "Police Firing at Kalinganagar", PUCL Bulletin, April 2006, available at (last visited on 03 February, 2007) <http://www.pucl.org/Topics/Dalit-tribal/2006/kalinganagar.htm>. The recent public hearing at Dandeli on 20th February, 2007 regarding the proposed expansion by West Coast Paper Mills Limited, also illustrates how the public hearing process can be subverted with the active support of administrative and governmental agencies. For more details, see (last visited on 7th March, 2007) <http://www.esgindia.org>.

31. For one example of the serious problems with the regulatory approach to public hearings, see Gopal Krishna, "Mockery of public Hearing in India", Independent Media Center, 3rd May, 2002, available at (last visited on 03 February, 2007) <http://india.indymedia.org/en/2002/05/1140.shtml>.

Perhaps as an afterthought, the provision in Paragraph 1.0, Appendix IV states that public hearings *'shall be arranged in a systematic, time bound and transparent manner ensuring widest possible public participation'*. This offers little consolation since this provision is constrained by the limiting provisions in Paragraph 7(i) (III) of the main Notification.

The term *'material'* finds mention again in Paragraph 7(i) (III) (vii) which states:

> *"(a)fter completion of the public consultation, the applicant shall address all the material environmental concerns expressed during this process [i.e. the Public Consultation]…"*, and *"make appropriate changes in the draft EIA and EMP"*.

Clearly, the substantive scope of the *'material'*[32] concerns that shape critical decisions on the environmental, social and economic viability of a project are left to the absolute discretion of regulators or investors.

This is a troubling indicator of the facetious approach that the Notification adopts towards appreciating public concerns. The Notification's pro-industry stance is plainly evident, given that the project proponent/ investor is given full discretion to decide what is *'material'* in making *"appropriate changes in the draft EIA and EMP"*. This is certainly a disturbing trend, given that a prevalent objective of most investors is to secure clearances expeditiously, and thereby to minimise the need for rigour in detailing and assessing a project's environmental and social impact. In fact, no mechanism has been contemplated to monitor, verify or ensure that the applicant will respond to the concerns expressed, and that the concerns expressed are appropriately incorporated in the EIA and EMP. The Notification's excessive conferral of discretionary powers and encouragement of conflicts of interest situations, clearly militate against an approach that values independent and principled environmental and social regulation of economic activities.

Public hearing process easily undermined

a) Regulatory authority can cancel public consultations:

Paragraph 7(i) (III) (v) of the EIA Notification - 2006 provides immense discretionary powers to the regulatory agencies to do away with the whole stage of public consultations "*owing to the local situation*". This represents a major regression from the EIA Notification 1994. It also constitutes perhaps the most significant legal infirmity in the new Notification - a power that is exercised with absolute and un-canalised discretion by the regulatory authority.

The EIA Notification - 2006 does not state the grounds on which such discretion may be exercised nor does it require reasons for exercise of such discretion to be recorded at all. This position appears to be in direct contravention of judicial precedents and in possible infringement of Article 14 of the Constitution of India, which guarantees non-arbitrariness in decision-making.[33]

b) Exemptions galore in public consultation process:

Paragraph 7 (i) III (i) of the EIA Notification - 2006 allows the following projects to forego the whole public consultation process:

> *"(a) modernisation of irrigation projects (item 1 (c) (ii) of the Schedule).*
> *(b) all projects or activities located within industrial estates or parks (item 7 (c) of the Schedule) approved by the concerned authorities, and which are not disallowed in such approvals.*
> *(c) expansion of Roads and Highways (item 7 (f) of the Schedule) which do not involve any further acquisition of land.*
> *(d) all Building /Construction projects/Area Development projects and Townships (item 8).*[34]
> *(e) all Category 'B2' projects and activities.*
> *(f) all projects or activities concerning national defence and security or involving other strategic considerations as determined by the Central Government*."

Absolutely no justification has been provided for waiving of consultations with the public, which represents a fundamental democratic safeguard in environmental decision-making. It is deeply troubling that projects that cause extensive environmental and social impacts are the ones that have been picked for exclusion from the public consultation mechanism. (*See Box 16: How CREDAI 'manipulated' the EIA Notification 2006?*)

32. The web-based lexicon service <http://dictionary.law.com> (last visited on 13 April 2007) provides the following legal definition for the word 'material': "material adj. relevant and significant. In a lawsuit, "material evidence" is distinguished from totally irrelevant or of such minor importance that the court will either ignore it, rule it immaterial if objected to, or not allow lengthy testimony upon such a matter. A "material breach" of a contract is a valid excuse by the other party not to perform. However, an insignificant divergence from the terms of the contract is not a material breach."

33. See in this regard, Delhi Transport Corpn. v. DTC Mazdoor Congress, AIR 1991 SC 101; Harminder Singh Arora v. Union of India, (1986) 3 SCC 247; Ramana Dayaram Shetty v. International Airport Authority, (1979) 3 SCC 489.

34. The Draft Notification mentioned that building and construction projects with a built up area of less than 1 lakh square metres did not require the process of Public Consultation. In the final version Item 8 (all building/construction/area development projects and townships) have been exempted from undergoing a public consultation. See Annexure B.

Box 16: How CREDAI 'manipulated' the EIA Notification 2006?

As detailed in this review, the drafting of the EIA Notification 2006 was vitiated by claims of non-transparency, inadequate public consultation, and bias towards industrial/investor lobbies and foreign funding organizations. The Ministry of Environment and Forests subsequently admitted - brazenly - that it did consult industrial lobbies such as CREDAI, ASSOCHAM, FICCI, CII, etc. repeatedly - well after the permissible period for 'public commenting' had elapsed.

CREDAI is the apex body of private real estate developers in India, claiming to represent over 3500 developers spread over 17 states across the country. CREDAI's agenda for re-fashioning of the draft Notification can be discerned from its letter (dated 10th November, 2005) submitted to the MoEF.[a]

CREDAI's 10th November, 2005 letter to MoEF, *inter alia*, states:

> ***"The real estate sector needs to be excluded from the new environment notification."***
>
> "Hindrances and delays in development projects, especially in real estate and urban infrastructure will put India in the danger of falling behind in the race with its competitor countries."

While what transpired in MoEF's subsequent closed-door and 'exclusive' meetings with CREDAI representatives is anyone's guess, CREDAI's influence on the finalized EIA Notification 2006 is all too evident. Under the draft Notification, all construction projects (including new towns, townships and settlement colonies), with the exception of construction projects with built-up area less than 1,00,000 square metres, were required to undertake the Public Consultation process [Paragraph 6(III)(i)(d) of the draft Notification].

Despite several civil society representations submitted to MoEF urging that the safeguards imposed upon the construction industry in the draft Notification (given the particularly egregious environmental history of the construction sector) were extremely inadequate and needed to be strengthened, the final EIA Notification 2006 further diluted the weak standards present in the draft notification. Shockingly, the EIA Notification 2006 completely does away with the 'Public Consultation' component for 'all Building/Construction projects/ Area Development projects and Townships (item 8)'. No rationale or justification for such a wide exemption - that too for the construction industry with its well-documented history of environmental violations and damage - has been provided.

Consequently, the construction industry is no longer accountable to the public, in any manner whatsoever, for its environmental and social impacts. CREDAI's lobbying, it would seem, has been successful.

a. Available at (last visited on 1st April, 2007) <http://www.credai.com/pdf/

exclusion from the public consultation mechanism. (*See Box 16: How CREDAI 'manipulated' the EIA Notification 2006?*)

Such loose exemptions, for instance '*all Building / Construction projects/Area Development projects and Townships*', contrasts with the Karnataka State Pollution Control Board issuing orders bringing 'Building/ Construction projects' under the 'red' category[35] of investments under the Water and Air Acts.[36] Additionally, in July 2004, MoEF had introduced an amendment to the EIA Notification 1994 (vide S.O. 801(E) on 7/7/2004) to include 'Building/ Construction projects' under Schedule 1 (in recognition of the significantly high environmental and social impacts of these sectors and in acceptance of concerns raised by the Supreme Court[37]), thus making Environmental Public Hearings and comprehensive environmental clearance process mandatory for them. The EIA Notification - 2006 totally sidesteps these concerns, does away with safeguards built against careless construction activities and leaves many affected communities voiceless in airing their concerns against

Box 17: Why have Construction Projects been Excluded?

Large-scale urban construction projects were brought within the ambit of the EIA Notification 1994 through an amendment issued on 7th July 2004. MoEF justified this amendment claiming

35. It is well understood that 'Red Category' investments demand the highest and most rigorous compliance and regulation norms.

36. KSPCB/MS/1268 dated July 19 2006 notifying Construction Projects as 'Red' Category, available at (last viewed on 15th February 2007) <http://pdfdownload.bofd.net/pdf2html.php?url=http://kspcb.kar.nic.in/noti_const_proj.pdf>.

37. News Item Hindustan Times A.Q.F.M. Yamuna v. Central Pollution Control Board and Ors., 1999 (5) SCALE 418.

38. The controversy over the destruction of Queen Mary's College in Chennai for the construction of a new secretariat complex highlights the numerous complications and violations that could arise from an unregulated 'building/construction' industry that is exempt from public consultations. See generally, Asha Krishnakumar, "The end of a women's college?", Frontline, Vol. 20, Issue 08, April 12 – 25, 2003.

compliance with directions of the Supreme Court in *News Item Hindustan Times A.Q.F.M. Yamuna* v. *Central Pollution Control Board and Ors.*[a] This judgment drew the attention of the Government to the extensive environmental and social impacts of unregulated urban growth. In response, the July 2004 amendment brought into effect the need for large urban projects to undergo a comprehensive review of their environmental and social impacts as part of the environmental clearance process.

The same concern against unregulated urban growth seems to be lost in the new EIA Notification – 2006. Under the new Notification, large urban construction projects can now secure a clearance merely by filing some forms. No public scrutiny of any sort is required or possible - as these projects have all been classified as Category B-2. This has significantly diluted the rigour expected in reviewing such high impacts projects per judicial directions. In a letter to the Parliamentary Sub-Committee on Science, Technology, Environment and Forests, MoEF has admitted that this dilution is based on discussions "exclusively with CREDAI and the representatives of the Apex Industry Associations".

The Confederation of Real Estate Developer's Associations of India (CREDAI) is the apex body of the organized real estate developers/builders across India. CREDAI strongly lobbied the Prime Minister's Office to intervene in weakening the new EIA Notification's coverage of the construction and building sector, a fact admitted to by MoEF in its letter to the Parliamentary Sub-Committee. On succeeding in minimising environmental compliance requirements, Pradip Chopra of CREDAI stated to the *Telegraph*: "*The new norms mean that around 90 per cent of the projects will not require any green clearance now*".[b]

The Karnataka State Pollution Control Board had classified all construction projects (satisfying the criteria under the relevant EIA norms) as 'red category' investments: projects with high capacity to pollute and causing significantly large environmental and social disturbances. The relevant directive of KSPCB reads as follows:

KSPCB Memorandum Ref: KSPCB/MS/1268 dated July 19 2006 notifying Construction Projects as 'Red' Category

Sub: Construction projects

Ref: MoEF Notification dated 07.07.2004

In the Notification dated 07.07.2004, the Ministry of Environment and Forest, Government of India have included construction projects under Schedule-1 of EIA notification where public hearing is mandatory. Karnataka State Pollution Control Board (KSPCB) so far was considering construction projects under green category and the consent fee was collected accordingly. There is adequate proof that all the projects falling under schedule-1 of the Notification results in large environmental ramification. Therefore, it has been reviewed and decided to consider construction projects also under red category. This memorandum is issued for information and advise to the officers in the Board and Regional Officers to henceforth treat the construction project under red category and collect the consent fee. However, if the project is not falling under EIA notification, such projects still remain under green category only. This order will come into force with immediate effect.

a. 1999 (5) SCALE 418.

b. "Green and Red: The Roadmap", The Telegraph, Kolkata, 03 November 2006

such high impact projects.[38] (*See Box 17: Why have Construction Projects been Excluded?*)

The need for making construction and building projects undergo mandatory Public Consultation is highlighted by **CASE STUDY 1: CONSTRUCTION PROJECTS - THE ATHASHRI PARANJAPE PROJECT, BANGALORE.**

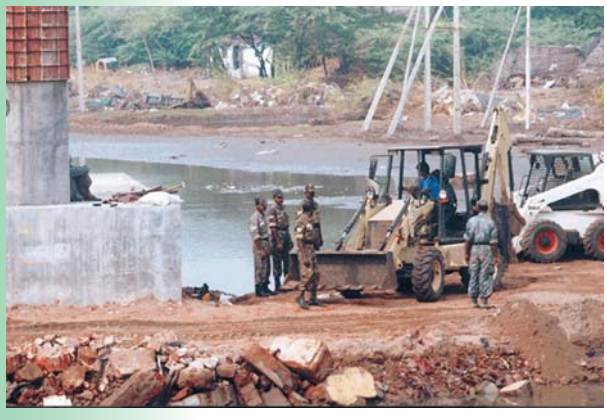
Similarly, the exemption of 'projects or activities concerning national defence and security or involving other strategic considerations' from the environmental clearance process is clearly unjustified given the growing global emphasis that such projects need to be subjected to environmental impact assessment (including public consultations).[39] It must be pointed out that the interpretation of expressions such as "*national defence and security*" is often problematic and susceptible to exploitation and could be misused to escape public consultation mechanisms. For example, in the prevailing political climate, construction of all dams and roads in the North East could easily be labelled as 'projects or activities concerning national defence or security', thereby obviating the need for any

39. For a good introduction to this aspect, see Laurent R. Hourcle, "Military Secrecy and Environmental Compliance", 2 NYU ELJ 316 (1993). On this aspect, the National Forest Commission has recommended that the Indian armed forces play a greater role in protecting the environment and wild life. See Rajesh Sinha, "Armed forces may now offer protection to wildlife", Daily News & Analysis, April 23, 2006, available at (03 February 2007) <http://www.dnaindia.com/report.asp?NewsID=1025778>.

40. See generally, the articles in Ecologist Asia's special issue on dams in the North East, available at (last visited on 03 February, 2007) <http://www.kalpavriksh.org/f1/f1.3/ed%20ecologist%20folder/>

Box 18: Highways and Environmental Clearances

The Shillong Statement on Roads and Highways was issued on 9th February 2007 at the Second North East Council Sectoral Summit.[a] It states that the "high priority to be accorded to the development of roads in the North-East Region is well reflected in the Union Government's intention to invest nearly Rs.50,000/- crores on the roads sector in the North-East over the Eleventh Plan period. This amounts to an almost 16-fold increase in the physical quantity of road works to be undertaken, compared to the immediate past period." According to the journal *India Defence*, this project is to "...build and refurbish 7,603 km of roads in the strategic north-eastern region by 2013 to increase connectivity for civilian and military traffic and to promote trade with China and Myanmar."[b] The road network will interconnect national highways with state highways, district and village roads, and advance the construction of "small" hydroelectric power projects across the region - to generate a total of 30,000 MW of energy.



Unregulated road construction by the BRO may devastate some of India's most ecologically sensitive regions.

The expansion of existing roads and the construction of new ones will involve cutting through a region that is hilly, forested and drained by hundreds of rivers and streams. In addition, it is a region with a very high density and diversity of ethnic communities. Expectedly, such extensive road building activity will significantly contribute to the opening up of forests, with resultant decimation of biodiversity and the erosion of cultural practices of tribal communities. In such a scenario, project activity must be preceded based on extensive and carefully developed environmental and social impact surveys and deliberate consultation with local communities.

The Shillong Statement also confirms that: "[s]tate Governments will address problems of land acquisition, forest issues, encroachments and security-related questions to facilitate the expeditious implementation of road development projects." But the emphasis is on "... strengthening of institutional mechanisms within State Governments to achieve these ends" as it is an "... indispensable requirement of very high priority".

In the EIA Notification – 2006, Item 7(f) of the Schedule requires all new National and State Highway projects more than 30 kilometres in length, or those that involve additional right of way of 20 metres or more to undergo environmental clearance. This provision, by implication, assumes that projects that are less than 30 kilometres length or 20 metres expansion, do not involve environmental and social impacts. The Notification, incidentally, also exempts defence projects from the public consultation requirement.

India Defence reports that a significant component of the North Eastern road project is likely to be developed by the Border Roads Organisation which is "under the operational command of the defence ministry but is funded by the ministry of road transport and highway". The project also envisages extensive private sector participation under the Build-Own-Transfer scheme. Now given that BRO is a defence related organisation, all the roads under its command could well be treated as defence projects and thus be exempt from public involvement in decision making. However, private sector projects would necessarily have to seek clearance for the project under the EIA Notification.

a. Accessible on the website of the Ministry of Development of the North Eastern Region at (last visited on 05 April 2007) <http://www.mdoner.gov.in/newsdetails.asp?nid=99>.

b. See "Rs.120 Billion Allotted for Improving Road Infrastructure in North East India", India Defence, dated 20 November 2006 accessible online at (last visited 05 April 2007) <http://www.india-defence.com/reports/2682>.

public consultation.[40] (*See Box 18: Highways and Environmental Clearances*)

Further, the presence of the words "*involving other strategic considerations as determined by the Central Government*", an expression that is not qualified anywhere in the Notification, allows for extensive manoeuvring by the Centre to exclude any project from public consultation on the ground of "*strategic considerations*". It is pertinent to remember that many defence projects have been stalled in the past simply because the views of local project affected communities had not been taken into account. A case in point is the Sea Bird Naval Base at Karwar, Karnataka, which was delayed for over a decade due to local resistance and protracted litigation on rehabilitation and other related issues.[41]

Are all nuclear projects in India civilian facilities?

A peculiar ambiguity arises over the status of defence related nuclear facilities in the EIA Notification – 2006. This is because the Notification excludes defence facilities from the ambit of environmental regulation, simply by not including this category in the Schedule. However, it does require "all" nuclear installations to undergo Category A clearance (Item 1(e) of the Schedule to the EIA Notification - 2006). This would imply that even defence related nuclear installations would be subject to comprehensive environmental clearance process. If this is an effort in catching up with world standards in impact assessment where defence related nuclear facilities also undergo comprehensive environmental clearance, this indeed is a laudable step. One wonders at the rationale (if any) why defence

Kaiga Nuclear Power Plant: Defence secrecy laws have shielded India's nuclear stations from public scrutiny. Source : http://npcil.nic.in

Box 19: Defence Projects and Environmental Impacts

The Schedule to the EIA Notification 2006 does not include defence or military facilities – quite simply, military/defence projects (unless included within the ambit of one of the Items listed in the Schedule) are exempt from the necessity of seeking environmental clearances. This would hold even if the particular project has exceptionally serious environmental and social impacts. From available information, the MoEF does not, in any manner, oversee or regulate the environmental *bona fides* of any activities of the Indian armed forces. It is also unclear whether Indian military/defence institutions have any internal mechanism to ensure that environmental conservation priorities (which are also – or should also be - Indian priorities) are indeed paid adequate attention to in military projects. While it is indeed common (and understandable) to exclude sensitive military and defence activities from the ambit of regulatory oversight in India, it is also necessary to acknowledge that military/defence institutions do have responsibilities towards the environment – our common heritage - and if necessary, must be held accountable to fully discharge such responsibilities.

Defence, Security or other Strategic Considerations

The Notification expressly provides [in Paragraph 7 (i) III (i) (f)] that "projects or activities concerning national defense and security or involving other strategic considerations as determined by the Central Government" are not required to undertake Public Consultation. The broad nature of the wording in Paragraph 7 (i) III (i) (f) of the Notification can, and most often will, be exploited to unwarrantedly exempt a large number of projects from the requirements of Public Consultation - even when no defence, security or 'other strategic considerations' are involved! This of course, will happen at the cost of possibly widespread environmental damage.

Such potential may be highlighted through one example - roads constructed by the Border Roads Organisation (BRO).

The BRO was created in 1960 for providing civil (construction) engineering support to the Indian

41. See for example "Naval base evacuees stage protest march", Times of India, 26 December, 2002, available at (last visited on 07 February, 2007) <http://timesofindia.indiatimes.com/articleshow/32498769.cms>.

42. While the inclusion of defence related nuclear facilities in the environmental regulation process undeniably represents a positive scenario, it is more likely than not that such a scenario has resulted from drafting oversight rather than conscious intent. It is likely that defence related nuclear installations will also be excluded (either expressly or through executive interpretation) from the environmental clearance mechanism in the coming days. On this aspect, see generally Murray Feshbach, The Toxic Archipelago: In the Former U.S.S.R., an Empire of Deadly Waste, WASH. POST, July 11, 1993, at C1 (dealing with contamination at the former Soviet Union's secret military- nuclear cities).

armed forces, during times of war and peace. It currently operates a network of over 34,306 kilometres of roads and 16,601 meters of permanent bridges in the country. Most areas where the BRO operates are situated in mountainous regions (including Kashmir and large parts of the North-East) and border areas. The BRO network of roads passes through some of the most ecologically sensitive terrain in the country, be it vital mountain passes such as Changla and Khardungla in the Ladakh plateau or the Blue Mountains in Mizoram.

Construction of highways is included as Item 7(f) of the Schedule to the EIA notification 2006, and will usually have to undergo a public consultation component before obtaining environmental clearance. However, all roads constructed by the BRO can simply be included under "*projects or activities concerning national defense and security or involving other strategic considerations as determined by the Central Government*" and thereby will be exempt from the requirement of Public Consultation. There is no worthy rationale for why all highways constructed by the BRO must be exempt from the public consultation requirement. In fact, in light of the high ecological wealth and biodiversity of the regions in which the BRO operates, it would make eminent sense for all relevant issues and concerns to be thoroughly investigated – which is exactly what the Public Consultation would help with. However, the shoddy drafting of the EIA Notification 2006 will, more likely than not, be moulded to exempt as many projects as possible from the 'troublesome' requirement of public consultations.

projects, *per se*, are then exempt. [42] (*See Box 19: Defence Projects and Environmental Impacts*)

2. *Procedural and prescriptive infirmities in public consultation process:*

Time period for public consultation process reduced

On the question of the duration available for conducting a Public Hearing, the EIA Notification - 2006, Clause (iii) of Paragraph 7(i) (III), states:

> "*the public hearing at, or in close proximity to, the site(s) in all cases shall be conducted by the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) concerned in the specified manner and forward the proceedings to the regulatory authority concerned within 45 (forty five) of a request to the effect from the applicant*."

This is further qualified in Paragraph 3.1 of Appendix IV that:

> "*a minimum notice period of 30 (thirty) days shall be provided to the public for furnishing their responses*."

Furthermore, Paragraph 7(1)(III)(iv) states:

> *'in case the State Pollution Control Board or the Union territory Pollution Control Committee concerned does not undertake and complete the public hearing within the specified period, and/or does not convey the proceedings of the public hearing within the prescribed period directly to the regulatory authority concerned as above, the regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority to complete the process within a further period of forty five days.'*

It follows therefore:

> a) That Public Hearings have to be conducted within "*45 (forty five)*[43] *of a request to the effect from the applicant*", which includes the commenting period of 30 days for the public.
> b) That if the Pollution Control Board fails to adhere to this strict time frame, then the "*regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority to complete the process within a further period of forty five days*."

Clearly there is no argument against ensuring that Public Hearings are held in a timely and organised manner. An effective Public Hearing presupposes various factors including availability of comprehensive information on the project, dissemination of this information to the affected public in a language of their understanding, and the capacity of the Pollution Control Board to effectively conduct the Hearing.[44]

After the investor submits a "request" for Public Hearing to the "*regulatory agency*", the request is forwarded to the Pollution Control Board. The Board will then have to publicise the Public Hearing, including issuing advertisements, make documents available to the public for commenting, receive these comments, hold the Hearing and then "forward the proceedings

43. We assume that this period syntactically refers to days, as the Notification fails to mention appropriate units, such as days or minutes or hours or years!

44. Jona Razzaque has pointed out the strong need for environmental agencies in South Asia to formulate the guidelines for an effective mechanism of public participation to ensure that public involvement in the decision-making is not merely a hollow promise. See Jona Razzaque, "Environmental Human Rights in South Asia: Towards stronger participatory mechanisms", presented at the Roundtable on Human Rights and the Environment (Geneva, 12 March 2004), organised by Geneva Environment Network, available at (last visited on 07 February, 2007) <www.cleanairnet.org/caiasia/1412/articles-58293_Jona.doc>.

In contrast, the EIA Notification 1994 under Schedule IV (5) provided that "….. *The public hearing shall be completed within a period of 60 days from the date of receipt of complete documents*". Yet, there have been many instances when this period was found to be inadequate, particularly when documentation had been inappropriately filed, or the issues were too complex to be resolved in just one hearing.

While the objective in the EIA Notification - 2006 of not inconveniencing the investor due to systemic inefficiencies is a laudable goal, the manner in which this is achieved should not defeat the purpose of the Hearing itself. Expecting State Pollution Control Boards to conduct the hearing under pressure and paucity of time is not tenable. It must also be recognised that there have been many instances in the past where further Hearings have been necessitated due to investors failing to produce adequate information, or because Public Hearings were held in contravention of norms.[45] The EIA Notification - 2006 does not accommodate for the correction of such procedural lapses due to the rushed time frame of completing the entire Hearing process in forty five days.

The Notification further envisions 'Public Hearing' as merely a one off event, and not a process that possibly could involve repeat or additional Hearings in fulfilment of the principle of securing of "*prior and informed consent*".[46] What is likely to result, therefore, is that Public Hearings are likely to be conducted in a perfunctory and ritualistic manner and thus defeat the very purpose of this stage in the overall process.[47]

Another important concern as highlighted above is that the State Pollution Control Board or Union Territory Pollution Control Committees are tacitly encouraged to abdicate their statutory responsibilities. This is because the Notification does not even require the failure of the SPCB or UTPCC in carrying out the public hearing to be restricted to very specific reasons/ grounds such as *force majeure* or owing to litigation. This gives room for possibilities where the SPCB or UTPCC might simply not conduct the public hearings within the stipulated period on untenable grounds including organisational apathy, political expediency and so on.[48]

Rather than make room for such administrative inefficiencies, the EIA Notification should include penal provisions and other punitive measures if the SPCB or UTPCC, or any other regulatory authority for that matter, fails to discharge its obligations without valid reasons. Of relevance here are Supreme Court judgements that have expressly held that government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws.[49]

<u>No criterion for alternate public agency to conduct public hearing</u>

Paragraph 7(i) (III) (iv) of the EIA Notification - 2006 states that in situations where "*the State Pollution Control Board or the Union territory Pollution Control Committee concerned does not undertake and complete the public hearing within the specified period, and/or does not convey the proceedings of the public hearing within the prescribed period directly to the regulatory authority concerned as above, the regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority, to complete the process within a further period of forty five days*".

Sethusamudram Ship Canal hearing: The tight 45 day limitation on Public Hearings makes a mockery of dealing with massive and controversial projects such as the Sethusamudram Ship Canal. Source : http://sethusamudram.gov.in

45. One prime example is the public hearings of the Tipaimukh Multipurpose Hydel Project in Manipur. See "Fissured land", Down to Earth, October 15, 2006; "Public Hearings on Tipaimukh project a farce", Down to Earth, December 31, 2006.

46. The notion of 'prior and informed consent' forms a critical component of the UN Convention on Biodiversity, 1992 and is also enshrined in the Indian legislation on biodiversity. This concept requires that the prior consent of all potential stakeholders (obtained following adequate and effective information dissemination) be obtained before any action that affects the biodiversity in question be taken.

47. The MoEF standards to enable effective public participation are nowhere near the formula set out in the 1998 Aarhus Convention. See J. Ebbesson, "The Notion of Public Participation in International Environmental Law", YbIEL (1997) Vol. 8 at p. 86.
The environmental public hearings and subsequent clearance of the multi-purpose Polavaram project in Andhra Pradesh illustrate how such public hearings have been reduced to a mere formality. See K. Venkateshwarlu, "'Speedy' clearance for Polavaram baffles greens.", The Hindu, Andhra Pradesh, October 28, 2005.

48. In this regard, see Kanchi Kohli, "Expanding steel maker skirting enviro-law", India Together, 3rd August 2005, available at (last visited on 07 February, 2007) <http://www.indiatogether.org/2005/aug/env-jindal.htm>.

49. Dr. B.L. Wadehra v. Union of India (Delhi Garbage Case), AIR 1996 SC 2969.

regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority, to complete the process within a further period of forty five days".

The implications of this provision are not as innocuous as they seem. This is because:

* The criterion to employ another equivalent regulatory agency to carry out the public hearing process has not been defined at all.
* There is also no clarity if the new agency or authority selected is bound by the procedural requirements of the EIA Notification - 2006.

The lack of resolution of such fundamental aspects of this provision has opened up the process to murky and litigious interpretation.

Public hearing panel non-representative

Paragraph 4.1 of Appendix IV of the EIA Notification - 2006 mentions that the composition of the Public Hearing panel shall consist of the "*District Magistrate or his or her representative not below the rank of an Additional District Magistrate assisted by a representative of SPCB or UTPCC.*" This represents a significant erosion of the representative nature of the panel when compared with the EIA Notification 1994 that required the involvement of '*the District Collector of the region, representatives of the state dealing with the subject, representatives from the panchayats, senior citizens from the area, a representative from the SPCB and a representative of the department of the State Government dealing with environment.*'

Public Hearing Panel for the Athashri Paranjape project, Bangalore - Questionable Government Orders have ensured that Environmental Public Hearing Panels in Bangalore are composed of only State officials.

A Public Hearing panel consisting only of officials from the State and the regulatory agency concerned is a truly worrisome aspect of the EIA Notification - 2006. The lack of a representative panel involving elected members and eminent citizens, seriously impairs the potential for raising diverse issues related to project impacts and does away with the assistance that such representatives render in ensuring that the public is duly and fully heard.[50] Previous experiences have shown that bureaucracy led consultations are highly vulnerable to political subjugation and influence.[51] To safeguard the independence of Public Hearings, which are a critical component of environmental decision-making, it is essential that a widely representative panel must compulsorily be involved.[52]

Constituting panels involving subject experts, ecologists, geologists, social scientists, eminent citizens, local NGOs, representatives from local elected bodies, in addition to the District Commissioner, a representative of the concerned Pollution Control Board, a representative of the State Environment Department and the department dealing with the project, will ensure a broad-based and sensitive

50. "The Public consultation process has now been fully politicised by the induction of the MLA, women and SC/ST representatives in the panel for PH. This must be deleted." See FICCI representation to the MoEF – 'Objections/Suggestions on the Proposals in the Draft EIA Notification no. S.O. 1324 (E) of 15/9/05', available at (last visited on 29th March, 2007) <http://www.ficci.com/media-room/speeches-presentations/2005/oct/eia-representation.pdf>.

51. The Gujarat High Court has recognized that public hearings are very often conducted despite the public hearing panel not having adequate or qualified members, which results in the public hearing being illusory and not achieving its desired objective. See Centre for Social Justice (Jan Vikas) v. Union of India, AIR 2001 Guj 71. See also Kanchi Kohli, "Expanding steel maker skirting enviro-law", India Together, 3rd August 2005, available at (last visited on 07 February, 2007) <http://www.indiatogether.org/2005/aug/env-jindal.htm>.

52. See in this regard, "Another Farcicial Public Hearing", The Southasian, 21st October, 2006, available at (last visited on 07 February, 2007) <http://www.thesouthasian.org/archives/2006/another_farcicial_public_heari.html>.

53. The most appropriate approach provided per the Constitutional 74th Amendment (Nagarpalika) Act for integrating public views in economic and social planning at the district level is by way of District Planning Committees. How the Notification ignores this aspect of the Constitution of India has been detailed earlier in Chapter 1 of this report.

the proceedings are conducted in a transparent manner.[54] Public Hearings held in this manner would also enrich the prospect for scoping of issues in consonance with globally accepted practices.[55]

Additionally, the EIA Notification 2006 has absolutely no safeguard to ensure that Public Hearings are held only when the requisite quorum in the Public Hearing panel is satisfied.[56]

No clarity on venue for public hearing:

Both Paragraph 7(i) (III) and Appendix IV provide that the public hearing be held at the site or in its '*close proximity*'. The expression '*in close proximity*' has potential for misuse and confusion as it could be interpreted to the disadvantage and inconvenience of the public intent on participating in the public hearing process. A categorical stipulation that the public hearing must be held at the proposed project site or within a particular stipulated distance from the site (say 3 kilometres, or the closest accessible venue based on the area's topography) will easily clarify this provision and limit the potential for misuse and confusion.[57]

Additionally, the mention in Paragraph 1 of Appendix IV that public hearings must be held "*at the project site or in its close proximity District-wise*" does not make it clear that public hearings must be held in every affected district in the case of trans-district projects. Such a requirement existed in the EIA Notification 1994.[58] In dropping this important provision, the EIA Notification - 2006 comes across as an exercise to whittle down the scope for, and importance of, warranted public involvement in environmental decision-making.[59]

Environmental Public Hearings in Orissa have generally been held far from project sites or habitations to limit participation.
Source : Environment Protection Group, Orissa.

54. In this context, see generally, Andrea Cornwall, "Engaging citizens: Lessons from Brazil's experiences with participatory governance", Infochange News & Features, December 2006, available at (last visited on 07 February, 2007) <http://www.infochangeindia.org/features402.jsp>. See also, "Abandon proposals to set up new units: panel", The Hindu, Tamil Nadu, October 03, 2006.

55. For a useful case study of public hearings (including a fairly representative constitution of public hearing panels) under Ghana's EIA procedures, see Ebenezer Appah-Sampong, "Public hearing within the environmental impact assessment review process", UNEP EIA Training Resources Manual – Case studies from developing countries, available at (last visited on 07 February, 2007) <http://www.iaia.org/Non_Members/EIA/CaseStudies/PublicHearingEIA.pdf>. See also Case Study 1 of this Report.

56. See Centre for Social Justice v. Union of India, AIR 2001 Guj 71: "As far as the quorum of the Committee is concerned, for the Committee to hold valid hearing, at least one half of the members of the Committee shall have to remain present and at least the following members of the Committee shall also have to remain present for the hearing to be considered as valid public hearing: —1. The officer from the GPCB 2. The Officer from the Department of Environment & Forest of the State Government. 3. One of the three senior citizens nominated by the Collector."

57 The environmental public hearing for South Korean POSCO's proposed steel complex at Orissa was boycotted by most affected villagers because it was held at Kujang, which was 15 kilometres from the project site. See "Posco hearing gets lukewarm response", Business Standard, April 16, 2007, available at (last viewed on 16th April, 2007) <http://www.business-standard.com/common/storypage_c.php?leftnm=10&autono=281326>. The public hearing for the expansion of the Nalwa Sponge Iron Limited (NSIL) operations in Taraimal village was scheduled 20 kilometres away from Taraimal at Gharghoda. "The dubious practice of selecting distant sites for public hearings has now become very common throughout the country….." See Kanchi Kohli, "No public, no hearing", India Together, 16 March, 2006, available at (last visited on 07 February, 2007) <http://www.indiatogether.org/2006/mar/env-sponge.htm#continue>.

58. See Proviso to Paragraph 2 (I) (a) of the EIA Notification 1994. See Annexure E.

59. This is in stark contrast to recent trends that argue that centralisation of decision-making at any level greater than the taluk would effectively render the role of the public in shaping decisions as meaningless. On this point, see also Centre for Social Justice (Jan Vikas) v. Union of India, AIR 2001 Guj 71, which acknowledges the importance of the taluk as the basis for decision-taking in the environmental sector.

dropping this important provision, the EIA Notification - 2006 comes across as an exercise to whittle down the scope for, and importance of, warranted public involvement in environmental decision-making.[59]

3. Access to Information in the Public Consultation Stage:

Limited access to EIA Summary, Draft EIA, Final EIA, etc.

Paragraph 7(i) (III) (vi) of the EIA Notification - 2006 states:

> *"For obtaining responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity, the concerned regulatory authority and the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) shall invite responses from such concerned persons by placing on their website the Summary EIA report prepared in the format given in Appendix IIIA by the applicant along with a copy of the application in the prescribed form, within seven days of the receipt of a written request for arranging the public hearing . Confidential information including non-disclosable or legally privileged information involving Intellectual Property Right, source specified in the application shall not be placed on the web site. The regulatory authority concerned may also use other appropriate media for ensuring wide publicity about the project or activity. The regulatory authority shall, however, make available on a written request from any concerned person the Draft EIA report for inspection at a notified place during normal office hours till the date of the public hearing."*

This Paragraph is another representation of the flaws regarding the issue of public access to information in the EIA Notification – 2006. Considering that the EIA Notification is one of the few executive instruments meant to explicitly implement public involvement in environmental decision-making, one expects the Notification to be clear and specific on how public participation would be facilitated in such processes. Instead the Notification's provisions obfuscate and generalise operational measures to such an extent that the very purpose of guaranteeing public access to decision making is trivialised. Some critical concerns are addressed below.

a) Undue reliance on summary EIA report and application:

The Notification assumes that the Summary EIA report and the application will be adequate for the public to consider, evaluate, and respond to the project in question during the public consultation process detailed in Stage III of Paragraph 7(i) of the Notification. Consequently, the Notification only requires that the Summary EIA Report and the application be placed on the websites of the concerned regulatory authority and the SPCB/UTPCC for public access.

b) Limited access to Draft EIA report:

The EIA Notification - 2006 states that the draft EIA report is only available for 'inspection', thereby implicitly suggesting that copies of the draft EIA report cannot be made public. Further, the draft EIA Report:

* is only available at a notified place during office hours,
* requires a written request, and
* is only available until the date of the public hearing.

Such efforts in controlling access to a draft EIA document are clearly unprecedented and not

60. For example, none of the people who were to be displaced by the inundation due to the Mansi-Wakal project (intended to meet Udaipur's water requirements) were given basic information about the project. It was only after wide protests and demonstrations that officials agreed to part with the project report. See Centre for Science and Environment, The State of India's Environment: The Citizens' Fifth Report 149 (1999).

warranted. Such complex requirements (coupled with entrenched systemic inefficiencies) in accessing what is clearly a public domain document may altogether put such information out of reach of the concerned public.[60]

Such provisions are also in direct contravention of the tenor of S. 4(2) of the RTI Act, 2005. In keeping with the approach advocated by the RTI Act, 2005, the Summary EIA Report, the draft EIA report, and the final EIA Report should be made readily available on relevant websites and also in notified places for public access. But MoEF pretends a lack of awareness of such important information dissemination requirements.

Another infringement on the spirit of the RTI Act, 2005 is contained in Paragraph 2.2 of Appendix IV of the EIA Notification - 2006 (Procedure for Conduct of Public Hearing). This provision requires the applicant to submit the draft EIA Report along with "the Summary Environment Impact Assessment report in English and in the local language" at the time of making a request for the public hearing. This seems to suggest that only the Summary EIA needs to be translated into one local language for genuine and effective dissemination. Clearly, there is an acute need for an explicit provision requiring the translation of all the relevant documents (including draft EIA and Summary EIA) into regional and local languages so as to facilitate wide and meaningful public access to information.[61] Undue emphasis on electronic media and websites is not

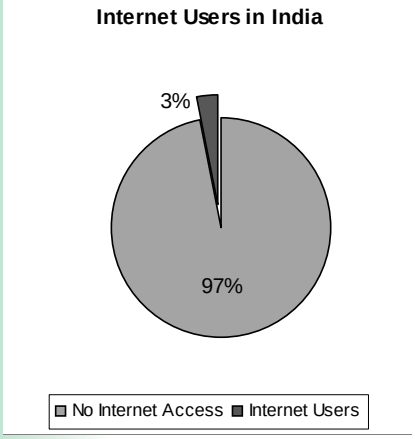
Box 20: Poor Choice of Media for Information Dissemination

The EIA Notification – 2006 displays a marked emphasis on dissemination of information through the Internet. The Notification makes dissemination of information through other formal systems of communication subject to regulatory discretion – by stating that such communication strategies 'may' be carried out by the regulatory authorities.

While making information accessible through the Internet is indeed a welcome development, it is wrong to assume that this will suffice in meeting the information demands of the wide public, particularly those who are directly affected by the project/activity in question. It is a simple matter of fact even today that the reach of the Internet across India is marginal. Further, the mere availability of some documents on the Internet does not guarantee the effective communication of important information relating to the project.

According to some estimates, only 37 million people used the Internet in India in some form or the other as of September 2006. Of these, 25 million people constituted active Internet users (*Indian Express*, 20th September, 2006).

When viewed in terms of overall percentages, this would mean that around 3% of India's population has access to Internet, and an even smaller percentage constitutes active users of the Internet. Moreover, most Internet users are from large cities or towns, and the percolation of Internet technology at the rural level of villages and small towns is negligible and often non-existent.



Undue emphasis on dissemination of information through the Internet is not sensitive to the needs of the larger public, given the high levels of illiteracy and lack of access to the technology in rural areas and among low-income urban groups. The problem of relying exclusively on the Internet as a communication tool accentuates the lack of access to information amongst project-affected communities who are largely from rural areas and/or low-income groups. Consequently, MoEF's excessive reliance on the Internet to disseminate information will ensure that those with the greatest need to appreciate project impacts will have the least access to such information.

This skewed emphasis on the Internet also weakens the promotion of more reliable forms of electronic media such as radio and television. Clearly, in the Indian context, radio and TV are far more powerful in spreading the word - given their extensive reach all over the country and ease of access to communities almost everywhere. In *M.C. Mehta* v. *Union of India*,[1] the Supreme Court observed with concern that while environmental concerns were increasing globally, the electronic media was not being put to effective use in promoting environmental education. The Court directed the

61. For an analysis of the linkages between the Bhopal Union Carbide disaster and the issue of access to information, see I Jasanoff, "The Bhopal Disaster and the Right to Know", 27 Social Science and Medicine 1113 (1988).

Government of India to ensure that:

"All India Radio and Dooradarshan will take steps to make and broadcast interesting programmes on the environment and pollution. The Attorney-General has said that five to seven minutes can be devoted to these programs each day on these radio/TV stations."

This aspect of the judgement should have guided MoEF in insisting on the innovative use of electronic media and other forms of cultural media to disseminate EIA related information. However, this opportunity has been lost given the overbearing reliance on the Internet as a medium of communication, and somewhat conveniently. Such an approach defeats the very purpose of public communication, which is central to effective environmental decision-making in India.

convenient to the interests of the larger public, given the large percentages of illiterate populations and the non-percolation of technology and Internet facilities in rural areas and among low-income groups. (*See Box 20: Poor Choice of Media for Information Dissemination*)

c) Limited information disseminated before public hearing:

Appendix IV of the EIA Notification - 2006 has many further shortcomings with regard to the issue of access to information. Paragraph 2.3 of Appendix IV pointlessly states that the authorities mentioned in Paragraph 2.2 *'shall arrange to widely publicize'* the draft EIA Report without explicitly stating how they are to go about this. The Notification also fails to categorically state or set standards on exactly how this wide publicity is to be effectuated. Such a broadly worded requirement, without clarifications on terms of implementation and operability, will more often than not result in minimal and unsatisfactory dissemination of information.[62]

The Notification illogically seems to assume that it is simply not possible to make accessible the full draft EIA report on websites, when the Internet is a technology available for exactly this kind of purpose. Furthermore, Paragraph 2.4 of Appendix IV unnecessarily complicates the issue of location of the documents, including the draft EIA Report, for public inspection. It is common practice to categorically state that documents are available at designated offices such as public libraries and local bodies like panchayats and municipalities.[63] But the Notification fails to make such a mention and thus leaves this crucial detail (in guaranteeing public access to information) to the vagaries of bureaucratic interpretation across the country.

More operational problems are latent in implementing the public consultation mechanisms:

* Paragraph 5.1 of Appendix IV provides for videography of the public hearing proceedings, but the Notification simply does not mention how or where these video recordings can be accessed, especially at the local level.[64]

* While comments on the public hearing proceedings are to be sent to the concerned regulatory authorities, Paragraph 6.6 of Appendix IV does not state that these comments are to be public documents, and the manner in which they are to be accessible.

* Finally, Paragraph 7(i) (III) (vi) states that the regulatory authority merely '*may*' and not '*shall*' use other appropriate media (apart from the website of the regulatory agency) for ensuring wide publicity of the project prior to the public consultation process. Broadcasting such an important component of decision-making, in order to ensure the widest engagement with the public, ought not to be perceived as an optional exercise.

Given past experiences with similar weak provisions in the EIA Notification – 1994, it is more than likely that administrative apathy or claim of lack of resources could well defeat the purpose of this provision that suggests the use of other appropriate media.[65]

<u>Broad exemptions to information access in EIA documents</u>

62. "The responsibilities of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.", per Justice Mathew in State of Uttar Pradesh v. Raj Narain, AIR 1975 SC 865, at p. 884.

63. In Dinesh Trivedi v. Union of India, 1997 (4) SCC 306, at p. 314, the Supreme Court of India reiterated the vital importance of open governance in a truly participative democracy.

64. Interestingly, the representation from CII to the MoEF, on this point, stated: "Videography may be permitted to control and focus the public hearing, but prints should either be returned to the project proponent or destroyed to avoid future misuse." A summary of these recommendations is available on file with ESG.

65. Divan and Rosencranz aptly contextualize the potential for limited access to information in India when they state: "Non-disclosure of information is the norm in India; openness is the exception." See Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, OUP, 2002, p. 160. In Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd., AIR 1989 SC 190, at p. 202, Justice Mukharji states: "Right to know is a basic right which citizens of a free country aspire under Article 21 of the Constitution. That right has reached new dimensions and urgency. The right puts greater responsibility upon those who take upon the responsibility to inform."

Paragraph 7(i) (III) (vi) also contains one of the truly problematic and probably unnecessary exemptions with regard to access to information contained in the Summary EIA. The Notification states:

> *"Confidential information including non-disclosable or legally privileged information involving Intellectual Property Right, source specified in the application shall not be placed on the web site."* [66]

These un-defined terms - "*confidential information*", "*non-disclosable*", and "*legally privileged information*" - have particularly dangerous implications wherein practically any information can be removed from public scrutiny.[67] The provision has serious potential for misuse since proponents can conveniently include material under the catch-all head of '*confidential information*', thereby escaping public scrutiny. The present wording would often lead to the excessive concealment of information either deliberately or due to lack of training. It is very likely that the investor will seek to include non-confidential (but damaging) information within the scope of the broad exception created by the new Notification.[68] Clearly, this entire provision needs to be clarified and clearly defined if it is creating exceptions to a constitutionally and legally enshrined right![69]

The RTI Act, 2005 clearly provides for analogous situations through S. 8(1) (d) that reads:

> *"Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, — (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party,* ***unless the competent authority is satisfied that larger public interest warrants the disclosure of such information****;"* [emphasis supplied].

Further, the proviso to S. 11 (1) of the Act reads:

> *"Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party."*

In this light, it is clear that the EIA Notification - 2006 militates against the rights and minimum standards guaranteed under the RTI Act, 2005. The potential for access to information being defeated through investor misuse and administrative oversight looms large in the days to come.[70]

a) No guarantee of public access to final EIA Report:

Paragraph 7(i) (III) (vii) of the EIA Notification - 2006 states:

> *"After completion of the public consultation, the applicant shall address all the material environmental concerns expressed during this process, and make appropriate changes in the draft EIA and EMP. The final EIA report, so prepared, shall be submitted by the applicant to the concerned regulatory authority for appraisal. The applicant may alternatively submit a supplementary report to draft EIA and EMP addressing all the concerns expressed during the public consultation."*

The Final EIA, the most fundamental document to enable monitoring and for compliance, is not public.

66. *The draft Notification 2005 did not mention Intellectual Property Rights at all. This 'exemption' finds a mention only in the finalised Notification. See also Annexure B.*
67. *An analogy is found with the archaic and often misused Official Secrets Act, 1923, which proscribes the disclosure of any 'secret' official information, without defining the word 'secret'.*
68. *"Claims concerning trade secrecy present a high threshold barrier against any attempt to broaden the right to know. However, numerous statutes in the industrialized countries support the principle that health and safety considerations can override claims of confidentiality…." See I Jasanoff, "The Bhopal Disaster and the Right to Know", 27 Social Science and Medicine 1113 (1988).*
69. *The Supreme Court's directions in Bombay Environmental Action Group v. Pune Cantonment Board, SLP (Civil) No. 11291 of 1986, emphasize the narrow-minded approach of these provisions in the EIA Notification 2006 which create exceptions to the right to information: "We would also direct that any person residing within the area of a local authority or any social action group or interest group or pressure group shall be entitled to take inspection of any sanction granted or plan approved by such local authority in construction of buildings along with the related papers and documents if such individual or social action group or interest group or pressure group wishes to take such inspection, except of course in cases where in the interests of security such inspection cannot be permitted."*
70. *"The implementation of RTI Act is, therefore, an important milestone in our quest for building an enlightened and at the same time, a prosperous society." Prime Minister of India's Valedictory Address at the National Convention on the First Year of Right to Information, New Delhi, October 2006. The diluted standards of the right to information under the EIA Notification 2006 run counter to the Prime Minister and the Government's avowed commitment to the meaningful implementations of the RTI regime.*

The emphasis on making the Notification investor friendly to the exception of all else involved is once more evident here. This provision permits the investor to address all the concerns expressed by adding on information to the original submissions made, including clarifications through a "supplementary report". But the importance of cogently presenting these bits and pieces of information for the benefit of the public and the decision makers, and also in ensuring compliance in the post clearance scenario, has been wholly abandoned. Given that this provision does not require that the final EIA Report should be permanently made a public document and that it should remain easily accessible, it militates against the very essence of the need for a holistic interpretation of all relevant factors in taking a decision, and on following up on such in the compliance phase.

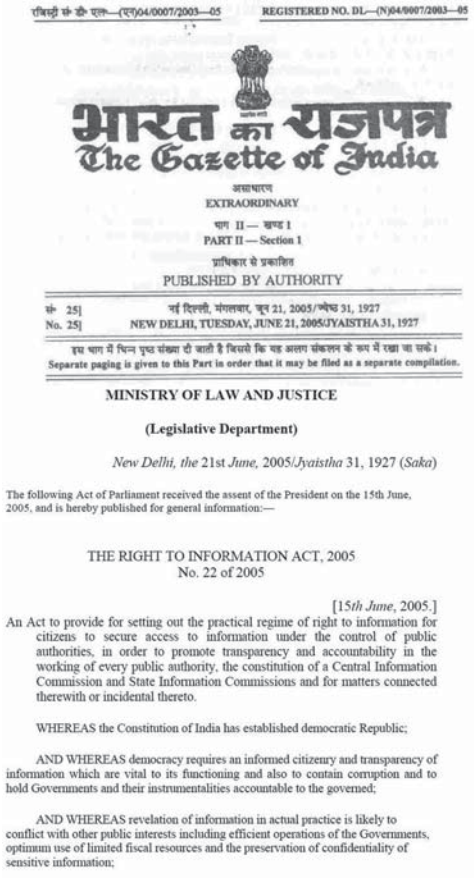
If the final EIA Report was termed as a document that included all supplementaries, clarification, comments, etc. and if this were to be made easily accessible, this would enhance the quality of public responses that could constantly be submitted to the EAC or SEAC, which in turn would enhance the quality of the appraisal process. Further, this would definitely assist in the verification and monitoring processes. The approach suggested in the Notification, where the final EIA Report itself is not made accessible to the public, strikingly illustrates the public participation deficit in decision-making and environmental conservation process.[71]

Arguably, the present scheme under the Notification also violates S. 4(2) of the RTI Act, 2005, which obligates public authorities to *suo motu* make information available to the public by a wide variety of means. Under the procedure of the RTI, 2005 the concerned office would have one month's time to provide information to the applicant (following an application for the information). It would have been sensible to integrate such pre-commitments to information access into the EIA norms.

Ideally, the EIA Notification - 2006 should have provided for the regulatory authority to promptly and genuinely disseminate information including - the Draft EIA, Final EIA, the responses received during the public consultation process, the Terms of Reference proposed by the project proponent and the regulatory authority, and the recommendations of the SEAC/ EAC to the regulatory authority during appraisal.[72]

<u>Skewed information access during public consultation stage</u>

The language of Paragraph 7(i) (III) (vi) is just one indication of the distinction between the access 'rights' given to concerned citizens vis-à-vis the project proponent. The Notification expresses a sense of urgency in promoting the applicant's cause and requires the investor to be intimated with comments received during the public consultation through the



रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—05 REGISTERED NO. DL—(N)04/0007/2003—05

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 21st *June*, 2005/*Jyaistha* 31, 1927 (*Saka*)

The following Act of Parliament received the assent of the President on the 15th June, 2005, and is hereby published for general information:—

THE RIGHT TO INFORMATION ACT, 2005
No. 22 of 2005

[15*th June*, 2005.]

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

The Right to Information Act, 2005 – Law of the Land!

71. In this regard, the Brundtland Report, World Commission on Environment and Development, Our Common Future (1987), at pp. 63-64 states: "Public inquiries and hearings on the development and environmental impacts can help greatly in drawing attention to different points of view. Free access to relevant information and the availability of alternative sources of technical expertise can provide an informed basis for public discussion. When the environmental impact of a proposed project is particularly high, public scrutiny of the case should be mandatory and, wherever feasible, the decision should be subject to prior public approval, perhaps by referendum."

72. "The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing." See State of Uttar Pradesh v. Raj Narain, AIR 1975 SC 865, at p. 884. In this context, one must note the growing international experience with affirmative public reporting obligations. In the US and several other countries, environmental laws and regulations require the active dissemination of information on environmental performance by regulators, industries and other sources of pollution. One well-known example is the Toxics Release Inventory, a database on the release of hazardous chemicals from thousands of facilities in the US over the years. See Opportunities for Public Participation in Environmental Decision-Making, Report of the CSE-ELI Workshop, April 22-23, 1999, p. 6.

Stage 4 – Appraisal

1. Non-transparent, non-participatory appraisal process:

Paragraph 7 (i) (IV) of the EIA Notification - 2006 states that:

> *"Appraisal means the detailed scrutiny by the Expert Appraisal Committee or State Level Expert Appraisal Committee of the application and other documents like the final EIA Report, outcome of the public consultations including public hearing proceedings, submitted by the applicant to the regulatory authority concerned for grant of environmental clearance. This appraisal shall be made by Expert Appraisal Committee or State Level Expert Appraisal Committee concerned in a transparent manner in a proceeding to which the applicant shall be invited for furnishing necessary clarifications in person or through an authorised representative."*

In addition this provision clarifies that where:

> *"(t)he Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall make categorical recommendations to the regulatory authority concerned either for grant of prior environmental clearance on stipulated terms and conditions, or rejection of the application for prior environmental clearance, together with reasons for the same."*

It follows therefore that this is a stage when the conditions of environmental clearance, or the rejection of a project, are finalised. That such a crucial meeting on shaping of key decisions involves no public participation - exposes the Notification's ostensible commitment towards making the Appraisal stage *'transparent'* as mere rhetoric. Public involvement at this stage also helps in fine-tuning the terms and conditions for clearances granted, while also building awareness on the terms of compliance (on the basis of applicable environmental laws and regulations).[73] This would also have fulfilled one of the key recommendations in the *'National Guidance Manual on Environmental Impact'* prepared by National Environmental Engineering Research Institute at the behest of the MoEF in April 2003, which strongly encourages greater public participation at the Appraisal stage. (*See Box 21: NEERI's EIA Manuals Wasted*)

Box 21: NEERI's EIA Manuals Wasted

One of the components within the Environment Management Capacity Building (EMCB) project was to develop a National Guidance Manual on EIA practice, with support manuals on high impact sectors such as petrochemicals complex, hydroelectric power projects etc. This task was undertaken by National Environmental Engineering Research Institute (NEERI), which produced a comprehensive manual on the EIA process in 2003. While the EIA process recommended by NEERI was not in tandem with global standards, the EIA Notification – 2006 has further weakened the standards for India. An illustration of how MoEF fails to meet even the NEERI manual standards is evident in the chapter on Stakeholder Consultation where NEERI advocates public inputs at both scoping and appraisal stages of the environmental clearance process:

> ** "Develop a dialogue between the project proponents and stakeholders allowing issues of interest and/or concern to be discussed.*
> ** Provide a mechanism for feedback and dialogue on how these concerns and wishes can (or perhaps cannot) be addressed by the project.*
> ** Demonstrate openness and transparency.*
> ** Develop a constructive, mutually supportive relationship with all stakeholders over the long term.*
> ** Avoid potential conflict, delays and unforeseen costs, by addressing issues of concern promptly.*
> ** Mutual sharing of information and learning."*

Source: NEERI, *Guidance Manual Environmental Impact Assessment*, 2003

In the EIA Notification – 2006, the scoping and the appraisal stages do not involve any public participation. The only consultation that takes place is after scoping and before appraisal. In fact certain high impact projects such as Building /Construction projects/Area Development projects and Townships, modernization of irrigation projects, etc, are completely exempted from the whole process of consultation altogether. So trivial is the importance of public involvement to MoEF that the Notification even provides regulatory authorities with the unilateral power to cancel public consultation altogether.

73. Paragraph 11.1 of the Policy Statement for Abatement of Pollution (26 February 1992) of the Government of India, in Paragraph 11.1 states: "The public must be aware in order to be able to make informed choices…... Affected citizens and non-governmental organisations play a role in environmental monitoring and therefore allowing them to supplement the regulatory system and recognising their expertise where such exists and their commitment and vigilance, will also be cost effective."

would also have fulfilled one of the key recommendations in the *'National Guidance Manual on Environmental Impact'* prepared by National Environmental Engineering Research Institute at the behest of the MoEF in April 2003, which strongly encourages greater public participation at the Appraisal stage. (*See Box 21: NEERI's EIA Manuals Wasted*)

Finally, the Notification also remains vague on whether the applicant or his representative are merely invited *"for furnishing necessary clarifications"* or whether they are required to be present if the appraisal process is to progress at all.

2. Public in the dark while project proponent is privy to information during Appraisal:

Paragraph 8 of the EIA Notification - 2006, deals with the grant or rejection of prior environmental clearance (EC). Paragraph 8 (ii) provides that when there is disagreement between the SEAC or EAC and the regulatory authority, *'an intimation of this decision shall be* ***simultaneously*** *conveyed to the applicant.'* Evidently, the provisions in the Notification seek to keep the investor informed of all developments even as the decision-making process on the environmental clearance is progressing! However for the public, Paragraph 8(iv) indicates that the decision of the regulatory authority and the final recommendations of the EAC or SEAC concerned shall be public documents only after the time periods specified for the decision-making process have elapsed and the applicant investor has been informed of the final decision. Once more an indication of the Notification's skewed approach in guaranteeing access to information!

3. Grant or rejection of prior environmental clearance

Confusing time-frames for decision of regulatory authority:

Paragraph 7 (i) (IV) (iii) states that:

> *"The appraisal of an application be [sic] shall be completed by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within sixty days of the receipt of the final Environment Impact Assessment report and other documents or the receipt of Form 1 and Form 1 A where public consultation is not necessary and the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee shall be placed* ***before the competent authority for a final decision within the next fifteen days.***" (emphasis supplied)

This needs to be read with Paragraph 8 (i) which states that:

> *"The regulatory authority shall consider the recommendations of the EAC or SEAC concerned and* ***convey its decision to the applicant within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned or in other words within one hundred and five days of the receipt of the final Environment Impact Assessment Report****, and where Environment Impact Assessment is not required, within one hundred and five days of the receipt of the complete application with requisite documents…."* (emphasis supplied)

Both these provisions relate to when a decision has to be finally conveyed to an investor about clearance or rejection of a project. When read together, the provisions have irreconcilable consequences on the objective of delivering a final decision in a clear and time bound manner.

Paragraph 8 (i) is categorical in committing to delivering a final decision within 105 days (a period inclusive of appraisal and the process relating to formulation of final decision) on receipt of documents by the regulatory agency. However, Paragraph 7 (i) (IV) (iii) provides 60 days for Appraisal and *"the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee shall be placed before the competent authority for a final decision within the next fifteen days"*. The discrepancy arises because Paragraph 8 (i) also mentions that the *"regulatory authority shall consider the recommendations of the EAC or SEAC concerned and convey its decision to the applicant within forty five days of the receipt of the recommendations"*.

a) 105 days [60+45] or
b) 75 days [60+15] or
c) 120 days [60+15+45]

Adapted from http://www.insurance broadcasting.com

Extremely shoddy drafting and a ridiculous neglect for logical and grammatically well-constructed presentation of the time flows involved in the environmental clearance process are clearly evident here. This has resulted in the possibility of three time frames becoming applicable for final decision to be ready, from the time of receipt of application documents from the investor:

Unguided regulatory hegemony over the final decision:

Paragraph 8 (ii) of the EIA Notification - 2006 states that:

> *"In cases where it disagrees with the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned, the regulatory authority shall request reconsideration by the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned within forty five days of the receipt of the recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned while stating the reasons for the disagreement. An intimation of this decision shall be simultaneously conveyed to the applicant."*

This provision seems to unnecessarily showcase the SEAC in poor light and as incapable of discharging its functions efficiently. In addition, this provision permits the regulatory authority to exert inordinate pressure on the expert body to toe a particular line of reasoning. This compromises the autonomy of expert bodies whose opinions should be based on independent and well-considered grounds (and without being subject to undue or extraneous pressures). In addition, since the Regulatory Authority is not bound by the recommendations of the expert body as provided for in Paragraph 8 (ii), what results is a Notification that signals utter contempt for the views of experts and unduly drags on the process - thereby resulting in an imprudent use of public resources and time.

Further, the requirement that *"(a)n intimation of this decision* [that is the decision of the regulatory authority's disagreement with the recommendations of the EAC or SEAC along with reasons] *shall be simultaneously conveyed to the applicant"* opens up an inherently internal review mechanism to extraneous pressures. All that was needed here is provision for a simple communication from the EAC or SEAC to the investor that the matter is under process and that a decision will be available in a designated period.

Interestingly, while expert bodies are required to explain reasons for their decisions, the same onus is not placed on the regulatory authority when giving a final decision on a project clearance.[74]

All of these deficiencies with regard to the final decision of the grant or rejection of prior environmental clearance are perturbing and could seriously impair the soundness of the environmental clearance mechanism.[75]

Troubling consequences of 'deemed clearance':

Paragraph 8 (iii) of the Notification states that:

> *"In the event that the decision of the regulatory authority is not communicated to the applicant within the period specified in sub-paragraphs (i) or (ii) above, as applicable, the applicant may proceed as if the environment clearance sought for has been granted or denied by the regulatory authority in terms of the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned."*

This provision of deemed clearance or rejection promotes the convenience of the investor over all other considerations, while compromising the obligatory roles of regulatory agencies involved.[76] Allowing an investor to decide that the project has been cleared or rejected based upon subjective interpretation of EAC or SEAC recommendations, particularly in light of the uncertainty of the time period involved (as highlighted before), is a very poor administrative precedent. This

*74. Interestingly, the MoEF's 'good practices' states: "**Giving Speaking Orders:** Quite often, while rejecting an application, the Regulator/ Expert Committee does not furnish reasons for the decision. This practice must be eschewed, and in all cases of rejection, the precise reasons for the same must be given in sufficient detail to enable the applicant, if s/he so wishes, to represent meaningfully against the same." See MoEF, "Good practices in Environmental Regulation", 12 May, 2004, available at (last visited on 10th February, 2007) <http://envfor.nic.in/mef/goodpractices.htm>.*

75. Suitable reference points and global standards may be found in the UNESCAP and UNECE principles in Annexure J and Annexure K respectively.

76 The political and economic origins of the notion of 'deemed clearances' have been traced in the Introduction section of this review report.

provision could result in serious environmental and social implications when the EAC or SEAC has recommended a project for clearance in very general terms, but the regulator has failed to come up with a final decision (including clear terms and conditions) within the due period – thereby advantaging the investor rather unnecessarily in assuming that the clearance has been granted and that project activities could commence based only on the EAC or SEAC recommendations.

An 'anti-corruption, right to information, accountability' demonstration in Rajasthan. Source: MKSS, Rajasthan

Recommendations, often times, are not guided by explicit language supported by empirically illustrated conditions. Given these lacunae, the effective clearance conditions to an investor who benefits from regulatory failure could well be weak and insufficient in addressing the project's environmental and social impacts. The probability of such an occurrence is alarmingly high given that the EIA Notification - 2006 has provided very poorly for the effective functioning of regulatory authorities.

This is the second such instance in the Notification where institutional integrity is weakened and apathetic implementation of obligatory duties are condoned.[77] Such provisions and the unwarranted pro-investor flexibilities they entail also cast regulatory agencies in very poor light while diminishing the regulatory strength of the Notification.

77. The other provision being Paragraph 7 (i) III (iv) where a different agency may be appointed to conduct Public Hearings in case the Pollution Control Board does not do so within the stipulated period.

UNWARRANTED EXEMPTIONS, LOOPHOLES AND LACUNAE IN THE EC PROCESS

EIA norms form the bulwark of the legislative and policy framework to address the environmental and social impacts of developmental activities. The EIA Notification 2006, however, allows a large number of potentially devastating activities to escape rigorous scrutiny of their environmental and social impacts.

Many industrial activities and projects simply find no mention in the Schedule to the EIA Notification 2006. In the result, a large number of potentially polluting activities remain squarely outside the purview of the country's EIA framework. (*See Box 22: Railways – Time to Draw the Line?*)

The Notification's *ad hoc* and seemingly indifferent approach towards categorization of projects, more often than not, results in seriously weakening the rigour and in-built safeguards of the environmental clearance process for several potentially polluting activities. This apart, the Notification also 'gifts' several industrial activities and sectors with unwarranted exemptions and procedural relaxations. As has been detailed subsequently, a number of sectors such as mining, river valley projects, building and construction projects, Special Economic Zones, Export Processing Zones, Biotech Parks, Leather Complexes, etc. can easily circumvent the safeguards of the EC process on account of the numerous loopholes, exemptions, and vague terminology.

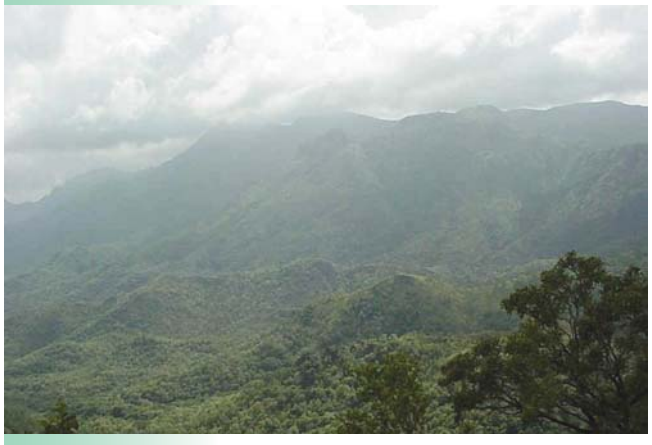
The Notification's ambiguities, along with extremely poor drafting in sections relating to the applicability of rigorous environmental clearance requirements, will undoubtedly also 'promote' widespread flouting of EIA norms across the industrial spectrum. To illustrate, pivotal issues include – absolute indifference towards the environmental clearance process for expansion and modernization of industries (with particular *carte blanche* benefits resulting for the expansion of mining projects), no safeguards relating to transfer of environmental clearances, a sharp hike in the validity of the environmental clearances of several high-impact projects (without deeming as necessary any safeguards or review possibilities), and extreme haziness relating to the application of the 'General Conditions', threshold limits, and other critical criteria.

Among the most serious problems with the environmental clearance norms, is that the EIA Notification – 2006 unjustifiably permits the acquisition of land for projects even before an application for environment clearance is made! In effect, the Notification makes a mockery of the notion of '*alternate*' (or the most appropriate) site for projects. Another

Box 22: Railways – Time to Draw the Line?

Item 7 of the Schedule to the EIA Notification 2006 lists out 'Physical Infrastructure' projects that are required to obtain environmental clearance. While highways, airports, harbours/ports, etc. find mention in this category, railway projects have been inexplicably left out. No rationale for this exclusion has been provided nor is one readily discernible. One is forced to ask – why have the environmental and social impacts of railway projects been excluded from the scope of the EIA Notification 2006?

This omission is particularly ominous when one considers that impact issues regarding railway lines are very similar to those raised by highway construction (while often having far more serious social and environmental repercussions).



Elephants are the worst casualties of the railway line through the Rajaji National Park, Uttarakhand

Source : http://www.gmvnl.com

The need and value of some kind of regulatory oversight over railway projects has been highlighted over the years through detailed studies and sustained protests that have accompanied several poorly planned railway projects.

One prime example is the railway line that passes through the Rajaji National Park in Uttarakhand. Several respected studies have indicated that this line has had serious negative impacts on the elephant populations within the park.[a]

Serious protests and concerns have also arisen regarding the Hubli-Ankola railway line (that has been proposed fairly recently). The estimated expenditure of this track was to be Rs.1153.08 crores. The total land requirement for the project was 1384.40 hectares, which included 965 hectares of reserve forest and 173 hectares of wetland. In effect, 120 kilometres (out of a total of 168 kilometres) of the railway track would pass through reserve forests. While the project has been denied forest clearance repeatedly, it is well known that construction on the project has begun. Reportedly, there has also been enormous political pressure to ensure that this project obtains the required clearances.[b] These represent just two of the many railway projects that have had very serious environmental and social ramifications.

In light of such situations, it defies common sense to exclude railway projects from the ambit of environment impact assessment norms. One would imagine that including railway projects under the EIA Notification 2006 would have multi-fold benefits: ensuring wiser and holistic planning of railway projects, providing safeguards against railway lines unstoppably cutting across and destroying highly sensitive and ecological rich areas, giving affected citizens a much-needed opportunity to contribute to, and participate in, the planning and execution of railway lines, and so on.

a. See AK Singh, A Kumar and V Mookerjee, "Mitigation of elephant mortality due to train accidents in Rajaji National Park, Uttaranchal, India", in Wildlife Society 11th Annual Conference, Calgary, Alberta, Canada, September 18-22, 2004; AK Singh and N. Gureja, "Elephant conflict issues: two resolution case studies from India", in National Symposium on Elephant Conservation, Management and Research, Rajaji National Park, Uttaranchal, 16-20 December 2001.
b. See Kanchi Kohli, "Railways violating forest conservation law", India Together, 7th November 2006, available at (last visited on 31st March, 2007) <http://www.indiatogether.com 2006/nov/env-ghatsline.htm>.

similar and glaring deficiency with the environmental clearance norms is that *'pre-construction'* activities of hydroelectric projects are left completely unregulated. A detailed analysis of these weak regulatory features has been addressed in detail below.

Land acquisition without environmental clearance

In Paragraph 2, the EIA Notification - 2006 requires prior environmental clearance "*before any construction work, or preparation of land by the project management* ***except for securing the land****, is started on the project or activity*" [emphasis supplied]. A major flaw of this provision is that a project proponent can actually start the process of land acquisition, even when the project has not been cleared. The eventual result of the environmental clearance review may well be to reject environmental clearance for the project. It therefore makes eminent sense for 'securing' of land to be permitted only after the environmental clearance has been obtained.

Paragraph 6 of the EIA Notification - 2006 states that "*prior environmental clearance in all cases shall be made …….after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant.*"

This is again particularly problematic in terms of the wording, the lack of clarity, and the possible implications.[1] This provision suggests that the applicant would have to identify *'prospective sites'* for the project/ activity before applying for prior environmental clearance. It thereby suggests that in processing the application for grant of clearance, various project sites would be evaluated before one of them is actually confirmed. The actual scope of this provision is grossly undermined because Paragraph 2 of the Notification categorically allows for land acquisition to commence (through the use of the word *'securing the land'* as has been detailed above), even when no application has been made for prior environmental clearance of the project.

In effect, the EIA Notification 2006 dangerously allows for large-scale acquisitions of land (even in densely populated, ecologically sensitive or protected areas) without at all considering alternate sites. Significantly the securing of land is permitted even as the potential environmental and social impacts of locating the project at that site, as well as the impacts of the land acquisition process itself, have not been assessed. Such provisions

1. For an exhaustive interpretation of the problematic usage of terminology in displacement or land acquisition related law and policy, see Walter Fernandes, "Draft rehabilitation policy charts no new courses: The latest draft on rehabilitation intends to help people, literally", Down to Earth, Jul 15, 2006, available at (last visited 05 March 2007) <http://www.downtoearth.org.in/ full6.asp?foldername=20060715&filename=news&sec_id=18&sid=35>.

also remain susceptible to official and investor-induced misuse, especially in the current political scenario that is replete with massive land scams and the like.[2]

Land acquisition as per the Land Acquisition Act, 1894, and related legislations, constitutes a comprehensive and irreversible legal action of taking over the ownership of land from the original owners. This has direct, largely irreversible and often very adverse consequences on the livelihood of the affected and displaced communities, which should be one of the salient aspects that need to be carefully assessed as part of the environmental and social impact assessment.[3] (*See Box 23: Legitimating the Land Grab?*)

Box 23: Legitimating the Land Grab?

Some recent observations of the Supreme Court of India in *Tamil Nadu Housing Board* v. *Keeravani Ammal & Ors*, Appeal (civil) 5928-5929 of 2004 (the relevant paragraph has been excerpted below) raises many worrying questions about the implications and the ethical basis of land acquisition as a process that sometimes unnecessarily deprives people of legitimate ownership and possession rights over their lands.

In effect, the relevant paragraph supports situations where land would initially be acquired for an ostensible 'public purpose' - and subsequently the avowed 'public purpose' would be discarded due to convenience, manipulation or other political dictates. In the resulting situation of absurdity – the original owner is fully deprived of all rights or recourse against the 'legalised' takeover of her/his land (for which she/he is paid 'compensation' that does not necessarily reflect the full market value of the acquired land), the unencumbered land vests fully with the State which can thereafter convey or dispose off the property to anyone at the prevailing market value, and industrial and corporate interests are legally facilitated with ready access to buy lands (agricultural or otherwise) that they might have not been able to get their hands on otherwise. One wonders whether notions of 'public purpose' in democratic societies (upholding the rule of law) exclude guarantees of unjust and unwarranted 'takeover' of private property by the State?

The fact that the judgment refers to the public trust doctrine (a principle stating that certain resources are preserved for public use, with the government as trustee required to maintain the same for the public's reasonable use) in an attempt to validate it's highly flawed reasoning and conclusion is highly ironic.

Tamil Nadu Housing Board v. *Keeravani Ammal & Ors*,
Case No: Appeal (civil) 5928-5929 of 2004
Date of Judgment: 15/03/2007
Bench: C.K. THAKKER & P.K. BALASUBRAMANYAN

Paragraph 11 of the judgment by P.K. Balasubramanyan, J. states:

> "We may also notice that once a piece of land has been duly acquired under the Land Acquisition Act, the land becomes the property of the State. The State can dispose of the property thereafter or convey it to anyone, if the land is not needed for the purpose for which it was acquired, only for the market value that may be fetched for the property as on the date of conveyance. The doctrine of public trust would disable the State from giving back the property for anything less than the market value. In State of Kerala & Ors. Vs. M. Bhaskaran Pillai & Anr. [(1997) 5 S.C.C. 432] in a similar situation, this Court observed:

Low income families are the worst affected by land acquisition.

> *"The question emerges: whether the Government can assign the land to the erstwhile owners? It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of*

2. The Bangalore Mysore Infrastructure Corridor Project in Karnataka illustrates this aspect only too well! Detailed documentation of this project may be accessed at (last visited on 10th February, 2007) <http://www.esgindia.org>.

3. For a more detailed analysis of land acquisition in the environmental context, see Shyam Divan and Armin Rosencranz, Environmental Law & Policy in India, OUP, 2002, pp. 422 – 473. For a detailed description of the consequences and extent of development induced displacement in India, see Biswaranjan Mohanty, "Displacement and Rehabilitation of Tribals", Economic and Political Weekly, March 26, 2005.

sale to the erstwhile owner, the land should be put to public auction and the amount fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution. In the present case, what we find is that the executive order is not in consonance with the provision of the Act and is, therefore, invalid. Under these circumstances, the Division Bench is well justified in declaring the executive order as invalid. Whatever assignment is made, should be for a public purpose. Otherwise, the land of the Government should be sold only through the public auctions so that the public also gets benefited by getting higher value.""

Land acquisition is often recklessly initiated for large and high impact projects, even when no assessment is undertaken to identify the social and environmental impacts. Because the land has been acquired even prior to securing environmental clearance for the project, the focus of the environmental clearance exercise becomes limited to considering the environmental and social impacts of the project on the acquired site.[4] As a result, the very idea of assessing alternative sites, which should be an integral part of the EIA process, remains abandoned. Concomitantly, the primary objective of minimising environmental and social impacts to the maximum extent possible is also effectively scuttled. The fact that land is in possession of the proponent, or is even in the process of being acquired for the project, often has the effect of influencing the outcome of the environmental clearance mechanism by creating a *fait accompli* of sorts.[5]

Un-regulated 'Preconstruction Activity' of Hydroelectric Projects

Hydro-electric projects are widely recognised as causing significant environmental and social impacts.[6] It is generally accepted worldwide that such projects must be carefully scrutinised and only those that are absolutely essential must be considered for clearance.[7] Clearly, such abundant caution is warranted given the widespread, significant and irreversible impact of many hydro-electric projects. India, however, is replete with cases where States and even districts within states compete to advance hydro-electric projects, often causing serious devastation of rivers, forests and villages in the process.[8] Seen in this sense, the provision in Paragraph 7 (II) (ii) of the EIA Notification - 2006 - stating that for *'Category A Hydroelectric projects' [Item 1(c) (i) of the Schedule], 'the Terms of Reference shall be conveyed along with the clearance for pre-construction activities'* - is a highly questionable and dangerous provision.[9] As the term 'pre-construction' has not at all been defined, this could well permit all kinds of high impact activities without any considering of their adverse consequences. Further, such a pre-emptive clause will also function as a *de-facto* clearance - as agencies will start changing the nature of the landscape and could well begin construction on the main project activity, while claiming it is merely pre-construction activity. Such a scenario, in effect, defeats the very

Polavaram Dam construction started without even an environmental clearance - justified as merely preparatory work. Credit. Prof. J. P. Rao

4. The Mangalore Power Company controversy and the succeeding struggle over the acquired land illustrate this aspect. See generally, Desmond Fernandes and Leo F Saldanha, "Deep Politics, Liberalisation and Corruption: The Mangalore Power Company Controversy", 2000 (1) Law, Social Justice & Global Development Journal (LGD).

5. A common recourse in correcting such anomalies has been to petition the courts. But the judiciary has often been reluctant to intervene positively (in favour of protecting local community rights and the environment) when faced with fait accompli factors.

6. For an analysis of one such potentially devastating project in Kerala that was eventually withdrawn, see MK Prasad, "Silent Valley Case: An Ecological Assessment", 8 Cochin University Law Review 128 (1984).

7. See generally, Patrick McCully, Silenced Rivers: The Ecology and Politics of Large Dams, Zed, London, 1997.

8. Bansuri Taneja and Himanshu Thakkar, "Large Dams and Displacement in India", SOC166, Submission to the World Commission on Dams, available at (last visited on 9th February, 2007) <http://www.dams.org/kbase/submissions/showsub.php?rec=SOC166>; E.G. Thukral (Ed.), Big Dams, Displaced People: Rivers of Sorrow, Rivers of Change, Sage Publications, New Delhi, 1992; Satyajit Singh, Taming the Waters: the political economy of large dams in India, OUP, New Delhi, 1997.

9. It is of vital importance to note that this clause finds mention only in the finalised Notification. No mention of such a provision was present in the Draft Notification that was released for public comments in 2005. See Annexure B.

objective of comprehensive and deliberate environmental and social impact assessment.[10]

Some of the other serious deficiencies, in terms of exemptions and exclusions from the environmental clearance process, have been detailed in the following pages.

Flawed categorization of projects and activities

1. Non-scheduled industries escape environmental clearance requirements:

Paragraph 2 (i) of the EIA Notification - 2006 makes environmental clearances mandatory only for projects/ activities listed in the Schedule to the Notification. Significantly, the Schedule itself is not drafted in an exhaustive, inclusive or comprehensive manner.[11] (*See Box 24: CDP Exempted from Environmental Clearance*)

Extensive illegal destruction of Turahalli forest, Bangalore - Yet no environmental clearance required for urban development projects despite extensive environmental damage.

Box 24: CDP Exempted from Environmental Clearance

Even as the EIA Notification 2006 was being finalized, the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) was launched in late 2005. JNNURM is the United Progressive Alliance (UPA) Government's ambitious mission to re-vitalise Indian cities and urban centres. Under JNNURM, in order to receive grants from the Central Government, each city needs to prepare a Comprehensive Development Plan (CDP). A CDP would require municipal bodies to analyse the past history and the present condition of a city. In effect, a CDP would also chart out and articulate the future ambitions for a city. CDPs would include details of how resources are to be utilised and what goals are to be achieved. Under JNNURM, once the CDP is approved, cities can request for funds for certain projects.

JNNURM divides its priorities into two areas – firstly, urban planning and infrastructure and second, to ensure a better quality of life for the urban poor. Interestingly, most initial projects that have been submitted for approval have related to infrastructure development.

In the past, CDPs has often been manipulated for political or economic reasons. For example, the recent Regional Development Plan for Goa would have transformed Goa into a concrete jungle (if it weren't for the strong and alert local protests that resulted in the Plan being eventually withdrawn). In cities like Mumbai, persistently strong lobbying and the powerful influence of builders/developers has already resulted in the city losing most of its lung spaces. In this scenario, and in light of the fact that Item 8(b) (Townships and Area Development Projects) finds mention in the Schedule to the EIA Notification 2006, CDPs should have been required to obtain prior environmental clearance. This would have made eminent sense from a regulatory perspective; especially so when considering the crucial significance of CDPs to land use patterns within cities. Integrating CDPs into the environmental clearance process would have also ensured that environmental and social concerns receive the due attention that they deserve when urban planners chart out ambitious plans for the future of our cities.

The EIA Notification 2006 seems to have completely missed the significance of JNNURM and the mechanisms that it has ushered in. Unpardonably so.

Citizen participation has been missing in Bangalore's latest CDP development exercise

10. An analogous illegal situation may be found in the case of the Polavaram Dam project (renamed as the Indira Sagar Project) where the Andhra Pradesh Government proceeded with construction activity to build this large dam (expected to cost over Rs. 16,200 crores) despite not having secured the requisite clearances. The actual component that was commenced without requisite clearances was the Right Bank Canal, based merely on administrative assent of the budget for this component – a whopping Rs.1,320 crores. For more information on this issue, see Rajendra Mohanty, "Mammoth Polavaram Dam draws mammoth Concerns", Asia Water Wire, available at (last visited on 7th February, 2007) <http://www.cgnet.in/W/polavaram>.

11. The Schedule of the final EIA Notification 2006 has omitted several high impact projects that were previously listed in the draft Notification 2005. These include: 1) Automobile manufacturing units 2) Common biomedical waste management facility 3) Mass rapid transport systems in metro cities 4) Flyovers, bridges, tunnels in urban areas 5) Lead acid battery manufacturing. See Annexure B.

Such loopholes violate the Precautionary Principle that has been affirmed by the country's highest judiciary, and defeat the very objective of EIA norms.[12] Further, the approach and language of the Notification limits, possibly prevents, the inclusion of investments and industrial categories that are not presently listed in the Schedule even when they may have significant environmental and social impacts. (*See Box 25: Manufacturers of Lead Acid Batteries Appeased? See also Box 26: Power Play by the Automobile Manufacturing Sector*)

Box 25: **Manufacturers of Lead Acid Batteries Appeased?**

The draft EIA Notification 2005 had classified all projects involving the manufacture of lead acid batteries as Category A.

The World Health Organization (WHO) estimates that some 120 million people suffer from overexposure to lead with 99 percent of the most severely affected to be found in the developing world. Batteries account for the largest portion of lead use — more than 75 percent. India is the one of the major global sites for lead acid battery manufacturing (for both internal and external consumption), with an annual lead requirement averaging a little over 500,000 metric tonnes.[a]

Shockingly, when the finalized EIA Notification 2006 was released – the manufacture of lead acid batteries has been removed from the Schedule to the Notification! No explanation or alternate regulatory overview has been provided. MoEF's *volte face* implies that the potential environmental, social and health impacts from the manufacture of lead acid batteries do not merit considered regulation under applicable EIA norms.

Tough German laws make recycling mandatory and special trucks are appointed for neighbourhood collection.

Interestingly, the representations (to the MoEF) from the Federation of Indian Chambers of Commerce and Industry (FICCI),[b] the Confederation of Indian Industry (CII),[c] and perhaps even that of the Associated Chambers of Commerce and Industry of India (ASSOCHAM) [despite best efforts, ESG has been unable to access any such ASSOCHAM representations to MoEF] categorically state that '[l]ead Acid batteries categorized under A should be deleted from the schedule.'

a. Thuppil Venkatesh, "Environmental Audit and Certification Programme for Lead Acid Battery Manufacturing in Developing Countries (India)", Knowledge Marketplace Reports, The 3rd IUCN World Conservation Congress, Bangkok, Thailand, 17 – 25 November, 2004.
b. Available at (last visited on 29th March, 2007) <http://www.ficci.com/media-room/speeches-presentations/2005/oct eia-representation.pdf>.
c. A summary of these recommendations is available on file with Environment Support Group.

Box 26: Power Play by the Automobile Manufacturing Sector

The EIA Notification 2006 seems to have been fully subverted by the long and powerful arm of the influential automobile manufacturing sector in India.

Analysts have predicted that sales of passenger vehicles in India are likely to grow at 14.9 per cent each year to reach the 2.1 million mark by 2010.[a] As production targets skyrocket across India's automobile manufacturing sector, a large number of manufacturers have been scrambling to hike their production capacities to gear up for the projected future sales.

Massive expansion plans are being announced almost on a daily basis, with a large number of Special Economic Zones (SEZ) for automobile and automobile-parts manufacturing coming up (or proposed) in different parts of the country. In hysterical euphoria over the massive expected economic returns from the Indian market, the automobile-manufacturing sector is flouting environmental, labour and social obligations with absolute impunity.

The ongoing agitations against the TATA SEZ at Singur in West Bengal, the illegal and aggressive

12. For some judicial decisions upholding the Precautionary Principle in India, see Vellore Citizens' Welfare Forum v. Union of India, AIR 1996 SC 2715; S. Jagannath v. Union of India (Shrimp Culture Case), AIR 1997 SC 811; AP Pollution Control Board v. Prof. MV Nayudu, AIR 1999 SC 812.

tactics employed by the Toyota management at its Bidadi factory in Karnataka, the protests against the automobile SEZ in the SIPCOT Industrial Area in Tamil Nadu, and so on – these are but a few examples of how automobile heavyweights, often with the full connivance of state governments and bureaucracies, continue to ruthlessly pursue their profit-maximising plans at the cost of critical environmental and social concerns.

Very significantly, Item 5 (l) of the Schedule to the draft Notification of 2005 required *"Automobile manufacturing units (Scooters, motorcycles, cars, trucks and other heavy duty vehicles)"* to undergo mandatory and comprehensive environmental clearance

Ford Chennai Plant: The Final EIA Notification dropped the requirement of environmental clearance for automobile manufacturing sector. Source : http://knowindia.net/auto.html

process. This would have ensured that environmental concerns, health impacts, issues of land acquisition, rehabilitation and resettlement, etc. arising from setting up and operating automobile manufacturing facilities would have received the full attention that they deserve.

Shockingly, this item has been excluded from the final Notification issued by the MoEF on 14th September, 2006! For unknown (but discernible) reasons, automobile manufacturing has received a complete exemption under the new Notification.

In this context, the Confederation of Indian Industries (CIII) recommendations submitted to MoEF in response to the draft EIA Notification 2005 included:[b]

> *"Automobile industry should be exempt from EC as it is more to do with assembly and engineering, and engineering companies are not subject to this requirement."*

Similarly, Annexure C (A Draft Proposal to revamp the EC Process) of the Federation of Indian Chambers of Commerce and Industry (FICCI) representation on the draft EIA Notification, submitted to MoEF, states:[c]

> *"We therefore, propose that the following projects – irrespective of size should always fall under the self-regulatory process…..*
>
> *5.(l) Automobile manufacturing unit"*

The MoEF certainly complied with these 'recommendations' in the final EIA Notification 2006!

a. See Chanchal Pal Chauhan, "On a fast track", Business Standard, Bangalore, 8th March, 2007.
b. A summary of these recommendations is available on file with Environment Support Group.
c. Available at (last visited on 29th March, 2007) <http://www.ficci.com/media-room/speeches-presentations/2005/oct eia-representation.pdf

In effect, a large number of industrial activities entirely escape the EIA process! These include projects with significant and widespread impacts such as – railways, power transmission grids and lines, automobile manufacturing units, hazardous waste disposal units,[13] manufacture of lead acid batteries, urban development projects including expressways, metros, elevated lines, etc. (*See Box 27: Urban Projects cause no environmental impact!*)

13. After an exhaustive state-wide study, the Karnataka State Pollution Control Board selected a site in Dobbspet Industrial Estate, north west of Bangalore, for a hazardous waste treatment and disposal facility. The Board justified the choice of site as the most appropriate - considering the soil, ground water aquifers, and also habitations. But villagers in Dobbspet were not convinced and were also annoyed that they were not in any manner involved in this decision. They argued that the choice had been guided solely by convenience, and that the long term impacts of this facility, including loss of fertile farmland and the livelihoods that depended upon them, had not been carefully considered. The KSPCB did not develop an approach to engage with the communities and proceeded to acquire lands. A massive backlash and rioting ensued, and the agitation was so strong that the Karnataka Environment Minister has cancelled the proposal recently. Consequently, the KSPCB now has to identify a new site for the facility, and repeat a process that has already taken the better part of a decade. This situation could have easily been avoided if the Board had actively engaged local communities in the decision-making process, been more transparent in it approach, and most importantly, involved District Planning Committees in the decision-making process. For reports on this issue and similar reactions elsewhere in the country archived on the Internet, visit <http://newsrack.in/rss//esg/Issues/Waste/landfills/rss.xml> (last visited on 13th April 2007). Existing documentation clearly underscores the importance of public involvement in decision-making, which the EIA Notification – 2006 unfortunately but deliberately omits for hazardous waste treatment and disposal facilities, and many other such high impact projects.

The shocking manner in which high-impact projects have been completely 'forgotten' by the EIA Notification 2006 is further elaborated in **Case Study 3: EIA Notification 2006 Ignores the Deadly Health and Environmental Hazards posed by Electronic Waste** and **Case Study 4: Bogibeel Project: Bridge to destroy rivers.**

Box 27: Urban Projects cause no environmental impact!

A critical change from the 2005 Draft Notification is the exclusion of the urban projects like mass rapid transport systems, flyovers, bridges and tunnels from the Schedule to the final EIA Notification - 2006. There is no justification for exclusion of these projects – especially so given that such projects have been the focus of protests from citizens and environmental groups in many Indian cities on account of their widespread environmental and social impacts (particularly displacement of people and wanton felling of trees).

One important aspect that has mobilized people to protest across various cities has been the serious rise in the number of trees being felled for the purpose of 'urban development' projects. While cities like Bangalore and Delhi were once known for their old grand trees and shady tree-lined streets, in recent times serious concerns have arisen concerning the diminishing green spaces across India's cities. In a classic case of the protector becoming the exploiter, urban municipalities are indiscriminately hacking away the 'lungs' of our cities. Classifying of priceless old trees as "renewable" resources and considering widespread tree-felling as a small but inevitable price to pay for the "management and development" of the city – these arguments are most often advocated as justifications for such tree-felling

Members of environment support group Hasiru Usiru protecting a tree likely to be axed for the the Metro project in Bangalore on Sunday—Express photo by N. Narsimha Murthy

Felling of big trees for Metro opposed

Express News Service

Bangalore, Feb 26: Environmental activists on Sunday protested against the felling of large trees in Jayanagar for the Bangalore Metro project.

Members of Hasiru Usiru, an environmental activist group, wrapped cut-outs in the shape of protective hands on trees along a stretch of R V Road in Jayanagar.

"The message on the cut-outs was that the trees were protected under a High Court ruling. The ruling was given in response to a PIL filed by Environment Support Group on behalf of Hasiru Usiru against the BMP last year," said Rohan D'Souza, member, Hasiru Usiru.

According to the High Court order, any felling of trees must be done as per the provisions in the Preservation of Trees Act and, before felling trees, an opportunity should be given to representatives of Hasiru Usiru to inspect the area.

"As part of the impending Metro rail construction work, trees on a large section of RV road and other areas in Jayanagar and other parts of the city face the axe. In this situation, an opportunity should have been given to Hasiru Usiru as per the High Court order, which has not been done.

Therefore the authorities (BMP, BMRC) stand in contempt of court," he said, adding that this tree wrapping action was done to bring out this fact as well as to make a point to the authorities that trees are indispensable in the larger development plans of the city.

This was also meant to create awareness among the general public on the issue, he said.

drives. Additionally, most of these urban projects are driven essentially by an engineering perspective and do not demonstrate any accommodation of the diverse interests involved.

Destruction of trees

Numerous initiatives and citizen responses have arisen across Indian cities in protest of such actions. One such initiative was the creation of *Hasiru Usiru* ("Greenery is life") - a collective of environmental groups, residents associations and individuals who responded strongly against the felling of the trees across Bangalore city (for the street widening exercises proposed during 2005). This collective has been active in advocating the cause of environmentally friendly urban policies, and has repeatedly urged for strong action to save Bangalore from a polluted and unsustainable future. In more recent times, Delhi has seen the emergence of a similar group called "Trees in Delhi" which is campaigning against the plan to axe more than 35,000 trees under various ongoing and planned development programmes of the Delhi Government.

Urban Projects and Displacement

A serious outcome of the non-inclusion of urban projects in the Schedule to the EIA Notification – 2006 is the complete neglect of concerns over displacement of hundreds of families, often the poor, for city beautification or infrastructure projects. Displacement is associated with serious social, psychological and occupational repercussions for the affected communities. The single most critical problem associated with urban displacement is the loss of employment, or of site related income sources. This is complicated further by the uncertainty of finding new employment in the relocation area. The distance of the relocation site from the original place of residence and livelihood often accentuates economic losses, particularly amongst the poor, and results in a large ratio of returnees who are more often than not hounded out again by brutal police action. The net result of this is a quick, and probably irreversible, deterioration in their quality of living. Ironically, such actions have more recently achieved the support of the Courts, despite the Supreme Court having recognised that the right to life includes the right to livelihood in *Olga Tellis* v. *Bombay Municipal Corporation*.[a]

Metro projects don't need environmental clearance!

No consultations with citizens have taken place while finalizing plans for major urban projects that involve thousands of crores of rupees and widespread displacement - like the Metro proposals,

or the expansion or building of roads and expressways in many cities in India. Such project decisions are taken exclusively within high political and bureaucratic circles, and citizen concerns are quite often sidestepped. A case in point is the proposed Metro in Bangalore, which has not gone through any Public Hearings during the process of developing the plan. When protests grew against the project, the State Government was constrained to set up Commissions to hear grievances, a move that has settled few issues and in any case, is seen as an effort at compensating losses rather than reviewing the validity, effectiveness and environmental implications of the project itself.

In view of such protests and in the backdrop of the fact that cities are sure to see an increasing number of such projects in the coming years, it seems irrational and utterly inexplicable that large urban projects have been kept out of the purview of the environmental clearance process. The draft of the EIA Notification – 2006 did include most urban infrastructure developments in the Schedule, but the same has been dropped in the final Notification.[b]

a. *Olga Tellis* v. *Bombay Municipality Corporation*, AIR 1986 SC 180. The court stated: *"Deprive a person of his right to livelihood and you shall have deprived him of his life. … The State may not by affirmative action, be compelled to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by the Art.21."*
b. See Annexure B.

Subansiri River in Assam stripped off its boulders to build the Bogibeel Bridge several miles away

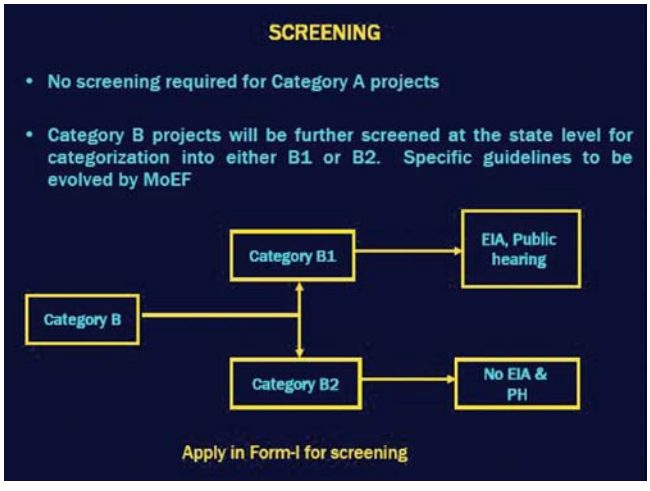
2. No rationale for classification of projects as Category A or Category B:

As has been detailed earlier in this review, Category A projects are reviewed by the Central institutional mechanism while Category B projects are reviewed at the State levels. While classification of inter-state projects as Category A is readily understandable, no basis or rationale or principles that have influenced the classification of other projects as Category A or Category B may be gleaned from the EIA Notification 2006.[14] Given the significance of such a categorization, a major shortcoming of the EIA Notification - 2006 is the failure to establish a consistent and rational basis for categorising projects under Category A or Category B. An arbitrary division of projects into Category A or B militates against well-enshrined constitutional guarantees (Article 14 of the Constitution of India) and meaningful environmental regulation.

3. No rationale for classification of projects as Category B1 or B2:

Paragraph 7 (i) (I), which refers to the screening of projects to establish their status as Category B1 or B2, once again provides no rationale or criteria to shape and guide such decisions. The provision merely states that – *"(f)or categorization of projects into B1 or B2 except item 8 (b), the Ministry of Environment and Forests shall issue appropriate guidelines from time to time."*[15]

The categorization of a project as B1 or B2 is of crucial import, since B2 projects are not required to submit an Environment Impact Assessment Report or undergo the process of public consultations under the EIA

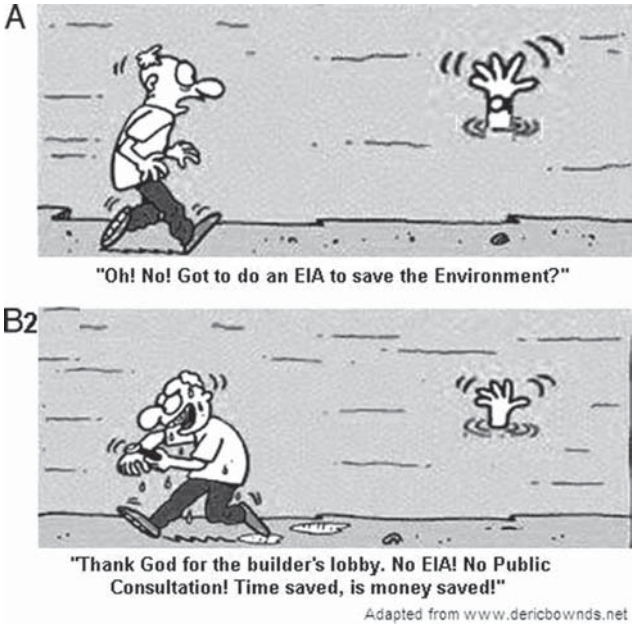


Source: Presentation of MoEF at CII organised seminar on "Promoting Excellence for Sustainable Development"

14. For a suitable reference point, see principles outlined in Annexure J and K.
15. The draft Notification mentioned Category A/B, which would consist of those projects that would have to undergo scrutiny and then be placed under Category A or B. This categorisation was finally rejected and categorisation of projects into B1 and B2 was instituted within the final Notification. See Annexure B.

Notification - 2006 (See Paragraph 7 (i) (I) read with Paragraph 7(i) (III) (i) (e) of the EIA Notification - 2006.) Despite the critical implications of these lacunae, no time frame has been provided for issuing such '*appropriate guidelines*'. There is also no requirement of regularity in reviewing such guidelines in reflection of the emergent needs of the country. Further, there is no clarity whatsoever whether the guidelines are to be binding or merely persuasive in nature.[16]

It is also highly problematic that the issuance of such '*guidelines*' from '*time to time*' is entirely at the discretion of MOEF. Clarity and unambiguous criteria are of fundamental importance in deciding how projects need



to be categorised for review. Past experience has revealed that the MoEF has been extremely lax in providing technical and specific guidance on many critical areas of concern, despite the Ministry being directly obligated to do so. Many a time, only judicial action has forced the Ministry to fulfil this obligatory role. In the present circumstances, while obviously abdicating the responsibility for laying down the technical criteria for review (which, as a technically competent Ministry, MoEF is expected to provide), MoEF also seems to have opened the floodgates for a rather confounding legal tangle. This is because of the high likelihood that a wide variety of interpretations may develop across the country (on the rationale or principles to distinguish between B1 and B2 categories of investments), either by States themselves or on the basis of legal proceedings. Such a chaotic scenario could easily have been precluded if the Notification was carefully evolved - with widespread consultations - that would have provided MoEF with inputs towards developing rationale and intelligent criteria for review. In the current scenario, such haziness in classifying projects as B1 or B2 can easily be manipulated to the detriment of the environment and affected communities - as investor induced pressures, bias, corruption, inefficiency, lack of capacity, etc. will all play a role in the evolution of such decisions. This could result in a situation where most industries are categorized as B2, particularly in States intent on wooing investments at any cost. In addition, the ease of categorising investments as B2 offers a convenient route for doing away with the need for public participation and for a comprehensive EIA Report – a major expectation of industrial lobbies who argue that environmental clearances should be based only on in-house review of the Ministry and its agencies.

4. Problematic categorization of Industrial estates parks/complexes/areas, Export Processing Zone (EPZs), Special Economic Zones (SEZs), Biotech Parks, Leather Complexes:

A plain reading of the Notification suggests that investments listed in the Schedule require comprehensive environmental clearance. However, careful scrutiny of Item 7 (c) of the Schedule reveals that certain high impact investments can easily wriggle out of the need to seek environmental clearance and/or limit the scope of a detailed enquiry into their impacts. Item 7 (c) of the Schedule is the relevant provision enumerating the environmental clearance requirement for "*Industrial estates/parks/complexes/areas, export processing Zones (EPZs), Special Economic Zones (SEZs), Biotech Parks, Leather Complexes*". However, the criteria for classifying these investments into Category A or B, as provided in the Schedule, use only the terms "*industrial estate*" and "*industrial area*" without any mention of the other distinct types of investments mentioned above. As a result, it could be easily argued that barring Industrial Estates and Industrial Areas, the other investments enumerated above (such as EPZs, SEZs, Boitech Parks, Leather Complexes, etc.) do not require environmental clearance - owing to the omission

16. In past litigation, MoEF has taken a position that its guidelines do not carry the power of a statute. For example, the affidavit filed by Dr. Nalini Bhat (then Additional Director, Environmental Clearances, MoEF) in defence of the decision permitting the location of the Mangalore Power Company's thermal power plant (a subsidiary of Cogentrix Inc.of USA and China Light and Power Company of Hong Kong) in variance to the Thermal Power Plant Siting Guidelines of MoEF (1997), argued that: "guidelines, are mere guidelines". Such an argument would well mean that a SEAC is not bound by any guidelines issued by the MoEF. The resulting situation of confusion and no clarity is clearly not conducive to rational and sensitive environmental regulation! For more about the Cogentrix issue and MoEF's involvement therewith, see Desmond Fernandes and Leo F Saldanha, "Deep Politics, Liberalisation and Corruption: The Mangalore Power Company Controversy", 2000 (1) Law, Social Justice & Global Development Journal (LGD).

of their specific nomenclature in the classification/ criteria columns (along with absence of definite stipulations on how to categorise them into A or B).[17]

Special Economic Zones (SEZs), which are currently causing widespread political and social discord, will also benefit based on such interpretative exclusion from the need to undergo comprehensive environmental clearance review. For detailed elaboration of some of the issues involved with SEZs, see **Case Study 5: Special Economic Zones with Special Exemptions.**

Protest by communities affected by Reliance's massive Maha Mumbai SEZ. Source : Frontline,Vol. 23-issue 12, June 17-30,2006

Similarly, this lacuna deviously allows Industrial Complexes, Industrial Parks, Export Processing Zones (EPZs), Special Economic Zones (SEZs), and Leather Complexes to legally sidestep the need to undergo environmental review.[18]

The potentially disastrous consequence of such drafting can be briefly illustrated by elaborating on one example – that of Biotech Parks.

<u>The highly flawed regulation of Biotech Parks</u>

The UN Convention on Biological Diversity defines biotechnology as:

> *"… any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use."*[19]

The operational imperatives of biotechnology involve manipulation (especially genetic) of organisms, their contained use, deliberate release into the environment, commercialisation, import, export and transportation of genetically modified organisms and products. The field also covers the modification of human genes and genome and the potential exploitation of protected organisms. While "*some first generation applications, such as tissue culture, are not controversial at all …..transgenic applications (where genes from one species are moved to another), …have raised a range of regulatory concerns over environmental issues (impacts on biodiversity) and health issues (allergenic and toxicity effects).*"[20] Clearly, therefore, the biotechnology sector and Biotech Parks in particular need to be carefully regulated from the environmental and public health perspectives. In this light it is particularly worrisome that Biotech Parks may easily wriggle out of or even completely escape rigorous environmental review per the EIA Notification – 2006 due to the drafting loophole described above.[21]

This is just one disturbing indicator of the highly problematic consequences resulting from the poor drafting of the Notification. Such drafting of the EIA Notification 2006 shockingly shields projects with very high social and environmental impacts from any accountability to India's environmental regulations, even as each of these investments remain highly controversial and continue to have a debilitating impact on protection of human rights and environmental

17. The legal maxim expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) would lend support to such an interpretation. For a detailed analysis of this legal maxim, including reference to numerous Supreme Court and High Court decisions where it has been referred to, see GP Singh, Principles of Statutory Interpretation, Wadhwa & Co., Nagpur, 2005, pp. 77, 568

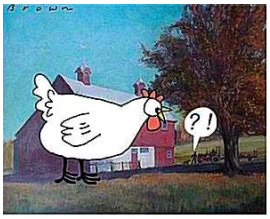
18. The recent statements of the Reserve Bank of India that SEZs and EEZs should be considered merely as 'real estate projects' would imply that such projects should fall within the category of industry under industrial licensing from an economic perspective. In effect, the foremost financial regulator of the country has categorically advocated against any special treatment for SEZs and EEZs in terms of financial clearance exemptions. Surely, the same logic should apply with regard to the environmental regulator's treatment of industrial estates, SEZs, EPZs, EEZs, etc! See "RBI frowns on revenue implications of SEZ policy", Hindu Business Line, August 31, 2006.

19. Article 2, Convention on Biological Diversity, 1992.

20. Ian Scoones, Science, Agriculture and the Politics of Policy – The Case of Biotechnology in India, Orient Longman, Bangalore, 2005, p.8

21. This loophole must also be addressed in acknowledgment of the complete omission of Genetic Engineering Approval Committee (GEAC) and its role in the environmental clearance mechanism, as the 2006 EIA Notification makes no provision for involvement of this body for such review. More information about the GEAC can be found at (last visited on 8th February, 2007) < http://www.envfor.nic.in/divisions/csurv geac/geac_home.html>.

conservation.[22] This dismal situation begs the question – was this a deliberate act of omission, or mere oversight?[23]



"No, I'm NOT a monster chicken ! I'm a genetically modified carrrot."

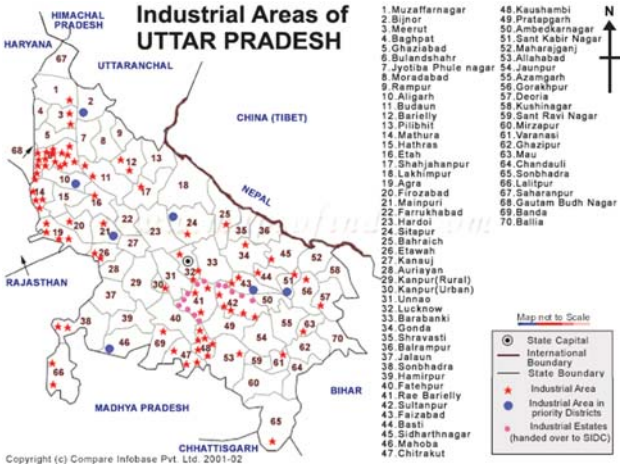
Source : http://www.cartoonstock.com

Similarly, the dangers of landfills not being expressly and adequately addressed by the Notification are highlighted through **Case Study 6: Illegal dumping of Solid Wastes at Mavallipura village, Bangalore.**

'Specific Conditions' create loopholes

Making the EIA Notification – 2006 operational as a regulatory instrument is further confounded by the 'Specific Conditions' that appear at the end of the Schedule. In the 'Specific Conditions' an attempt is made to clarify that "*Industrial Estate/Complex/Export processing Zones/Special Economic Zones/Biotech Parks/ Leather Complex with homogenous type of industries …. or those Industrial estates with pre-defined set of activities ….obtain prior environmental clearance, individual industries including proposed industrial housing within such estates /complexes will not be required to take prior environmental clearance, so long as the Terms and Conditions for the industrial estates/complex are complied with*".

Further, the '*Specific Conditions*' state that "*(s)uch estates/ complexes must have a clearly identified management with the legal responsibility of ensuring adherence to the Terms and Conditions of prior environmental clearance…*". The terminology of these qualifications is highly problematic since no rationale has been provided to define "*pre-defined set of activities*", which when loosely interpreted could possibly include any industry. What this would result in is that once an Industrial Estate/ Complex is cleared on certain *'Terms and Conditions*", the possibility of effectively regulating individual industrial activities within such Estates/Complexes is highly limited.[24]



Neither Industrial Areas nor industries in estates are rigorously monitored for environmental compliance in India

1. Polluting units shielded within Industrial Estates:

In a politico-economic scenario that is aggressively promoting industrial estates, the high likelihood of environmental clearance being accorded to such estates without fully comprehending the potential impacts of individual industrial units located within them, cannot be overemphasised. A regulatory approach that ignores this reality militates against the well-accepted Precautionary Principle, which demands an acute understanding of all consequences of an industrial activity prior to commencement of operations. As a result, the likelihood of a large number of Industrial Estates/Complexes across India nesting highly polluting individual industries looms large. This grim scenario is heightened by the lackadaisical approach to implementation of environmental laws, which could easily result in extensive pollution and heighten risk to life and environment.[25]

2. No priority for disaster management and liability:

From the perspective of risk assessment, the engagement of the wider community and the regulatory apparatus in responding to an industrial accident (within such an Estate/Complex) would be highly

22. See also Case Study 1, Case Study 3, and Case Study 4 of this report document.

23. Access to information on the environmental and social consequences of the biotechnology sector is extremely limited. This has been evidenced more recently by the denial of information about safety tests of genetically modified (GM) crops sought under the RTI Act, which "was rejected on the ground that disclosure could harm the competitive position of the third party — the company which developed the crops." For details, see "Greenpeace activist denied access to data on safety tests of GM crops", The Hindu, April 04, 2007, accessible online at (last visited on 04 April 2007) <http://www.thehindu.com/2007/04/04/stories/2007040400820900.htm>.

24. See generally, "A battle most hard", Advocacy Internet, Vol. VIII, No. 3, May-June 2006, available at (last visited on 8th February, 2007) <http://www.ncasindia.org/public/AdvocacyInternet/ai_may_june_06.pdf>. See also Case Study 5 of this report.

25. For an analysis of the potentially disastrous implications of SEZ and other industrial estates see "A battle most hard", Advocacy Internet, Vol. VIII, No. 3, May-June 2006, available at (last visited on 8th February, 2007) < http://www.ncasindia.org/public/AdvocacyInternet ai_may_june_06.pdf>.

constrained by the generic "*Terms and Conditions*" of the Industrial Estate/Complex. Such "*Terms and Conditions*", most often, will neither be exhaustive nor tailored towards emergencies resulting from a specific type of industrial activity – and will therefore be missing critical information for mitigating the adverse impacts of industrial disasters.[26]

The EIA Notification 2006 also damages the efficacy of any subsequent legal prosecution against those responsible for pollution or violation of environmental norms - since the vexatious possibility of the individual polluter escaping all forms of criminal and civil liability

Public protest against Union Carbide/Dow Chemicals on the 20th anniversary of the Bhopal Gas Tragedy

(merely by being located within an Industrial Estate/ Complex) is very probable. Here, the Industrial Estate/ Complex itself would become the '*clearly identified management with legal responsibility*' under the language of the '*Specific Condition*," thereby potentially shielding the actual polluter from prosecution.

Besides being in violation of law, such an interpretation of these provisions is also quite contrary to the impression (that is sought to be promoted) that the Government is keen to promote effective environmental regulation. In fact, it is providing for large-scale and entirely unjustified exemptions from the EIA mechanisms!

Unclear application of 'General Conditions'

The 'conditions if any' column in the Schedule spells out whether 'Specific Condition' or 'General Condition' apply to each Item of the Schedule. The 'General Condition' states:

> "*Any project or activity specified in Category 'B' will be treated as Category A, if located in whole or in part within 10 km from the boundary of: (i) Protected Areas notified under the Wild Life (Protection) Act, 1972, (ii) Critically Polluted areas as notified by the Central Pollution Control Board from time to time. (iii) Notified Eco-sensitive areas, (iv) inter-State boundaries and international boundaries.*"

It could well be argued that when '*Specific Condition*' is expressly mentioned as being applicable to an item (and the term '*General Conditions*' is not similarly expressly stated to apply), then the '*General Conditions*' are not intended to apply for those activities. Such a legal argument is strengthened by the legal maxim *'expressio unius est exclusio alterius'* (the expression of one thing is the exclusion of another).[27] The potential environmental and social implications of certain investments not being subject to the application of the '*General Condition*' cannot be overemphasised.

There are many entries in the Schedule that fall under Category B for which only the '*Specific Conditions*' are mentioned as applicable – for example, Chlor-alkali industry [Item 4(d)], Leather/skin/hide processing industry [4(f)], Petrochemical based processing [5(e)], Synthetic organic chemicals industry [5(f)], Industrial Estates/parks/complexes/areas, Export Processing Zones, Special Economic Zones, Biotech Parks and Leather Complexes [Item 7(c)]. Despite being highly polluting industries or sectors, such investors could automatically interpret themselves as excluded from the '*General Conditions*'. With the result that such investments can escape being treated as '*Category A*'

26. For a detailed study of the treatment of industrial risk in Indian law, see Usha Ramanathan, "Communities at Risk – Industrial Risk in Indian Law", 39/41 Economic & Political Weekly, 9 October 2004.

27. For judicial treatment and use of this maxim, see D.R. Venkatachalam v. Dy. Transport Commissioner, AIR 1977 SC 842; Mary Angel v. State of Tamil Nadu, AIR 1999 SC 2245.

projects despite triggering off the *General Conditions* and even though they are high impact, and could well be classified as *'Category B-2'* - thus allowing them to obviate the process of comprehensive public review and social and environmental impact assessment.

Further, Paragraph 4 (iii) of the Notification which states *"(a)ll projects or activities included as Category 'B' in the Schedule….. but excluding those which fulfill [sic] the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority"* does not in any manner expressly suggest that the 'General Condition' is applicable to all Category B projects.

It is also possible for Category B projects *"which fulfill [sic] the General Conditions (GC) stipulated in the Schedule"* to fully exploit such hazy terminology and creatively argue that they do not require prior environmental clearance from the SEIAA (since they fulfil the

requirements listed in the *General Conditions*), while also escaping the requirement of being treated as Category A projects (in light of the highly ambiguous applicability of the *General Conditions*). Such clever legal arguments could well be employed to attempt to entirely escape from the requirement of complying with the EIA Notification - 2006!

Another area of serious concern is that the *'General Condition'* is not comprehensively or adequately drafted and ignores mention of several other ecologically sensitive areas such as those notified under the Coastal Regulation Zone (CRZ) Notification, the Forest (Conservation) Act, 1980, and the Wildlife Protection Act, 1972. It also remains to be examined why densely developed areas, especially metropolitan areas where a large population would seriously suffer from environmental and social repercussions of large projects, are excluded from the scope of the 'General Conditions'.[28]

Explicit clarity and express stipulation on the applicability of the 'Specific Condition' and the 'General Condition' would greatly reduce the confusion that the present wording promotes.

Weak regulation of expansion, modernization and change in product mix

Paragraph 7(ii) of the EIA Notification - 2006 states that:

> *"All applications seeking prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this Notification or with increase in either lease area or production capacity in the case of mining projects or for the modernization of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this Notification through change in process and or technology or involving a change in the product-mix shall be made in Form I and they shall be considered by the concerned Expert Appraisal Committee or State Level Expert Appraisal Committee within sixty days, who will decide on the due diligence necessary including preparation of EIA and public consultations and the application shall be appraised accordingly for grant of environmental clearance."*

This provision essentially clarifies that prior environmental clearance is required for all existing projects where:

a) there is an expansion beyond the previously sanctioned production capacity,

b) there is an increase in either lease area or production capacity for mining projects,

c) there is an increase in total production capacity beyond the prescribed threshold limit,

d) there is modernisation involving increase in total production capacity beyond the threshold limit prescribed through a change in process or technology or possibly product-mix.[29]

However, isolated from this provision, Item 7 (f) of the Schedule specifically mentions expansion of Highways as requiring environmental clearance as either a category A or category B project depending on the specific facts. Similarly Item 4 (f) of the Schedule mentions expansion of leather/skin/hide processing industries as requiring prior environmental clearance. Clearly, all such provisions regarding expansion and modernisation need to be integrated, and their regulatory mechanisms provided for, in an orderly and

28. In this context, see FB Taporawala v. Bayer India Ltd., AIR 1997 SC 1846; MC Mehta v. Union of India, AIR 1997 SC 734 (Taz Trapezium case); MC Mehta v. Union of India, AIR 1987 SC 965 (Shriram Gas Leak Case).

29. The aspect of product-mix and its implications is difficult to understand on account of the manner and language with which this has been addressed in the Notification. The MoEF has subsequently attempted to clarify this position through a circular. See Annexure D

logical manner. But this coherence is somewhat expectedly absent in the Notification.

Significantly, issues relating to expansion and modernization were not part of the Draft Notification released in 2005 - an oversight that seems to have been shockingly 'glossed over' by the inclusion of a fully inadequate Paragraph 7(ii).

There are many serious problems in the provision relating to expansion and modernization, and these are highlighted below.

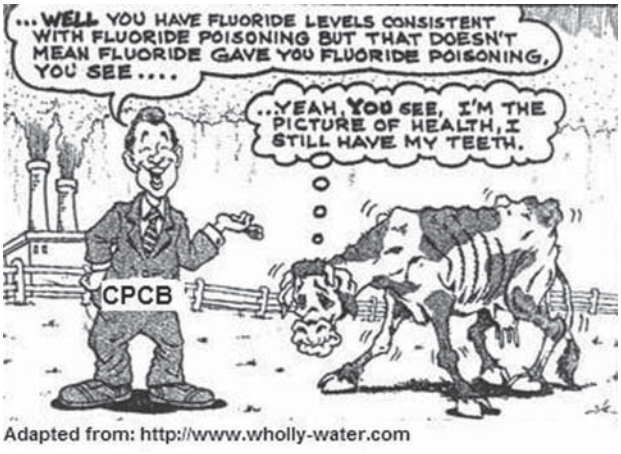
1. Unregulated expansion of mining projects:

For mining projects, prior environmental clearance is required where there is an increase in lease area or production capacity beyond the threshold limits prescribed in the Schedule. However, **threshold limits in the Schedule for mining units [Item 1(a)] are defined in terms of lease area only and make absolutely no mention of production capacity**. Mining projects therefore can sidestep the process for prior environmental clearance entirely while massively expanding production capacity but without any change in the mining lease area. The resulting environmental consequences of such unchecked expansion of production could be quite disastrous, especially in ecologically sensitive areas. [30]

Prospecting in Nellibeedu has devastated the mountain slopes in Kudremukh , Karnataka

2. Unclear applicability of threshold limits:

The concept of '*threshold limits*' determining which expansion or modernisation processes require prior environmental clearance is brought into focus in Paragraph 7(ii) and Paragraph 2(ii) of the EIA Notification - 2006. While the Schedule to the Notification provides for such limits in terms of volume-weight or area only, it fails to link the sectoral '*threshold limits*' with the standards that have been progressively evolved by the Central and State Pollution Control Boards for a whole variety of investments. The '*threshold limits*' in the Schedule to the Notification have also not been defined in any consistent or scientifically justified manner in view of potential environmental impacts. Instead, these threshold limits seem to be guided largely from the standpoint of production capacity (and by implication, investment input).[31]



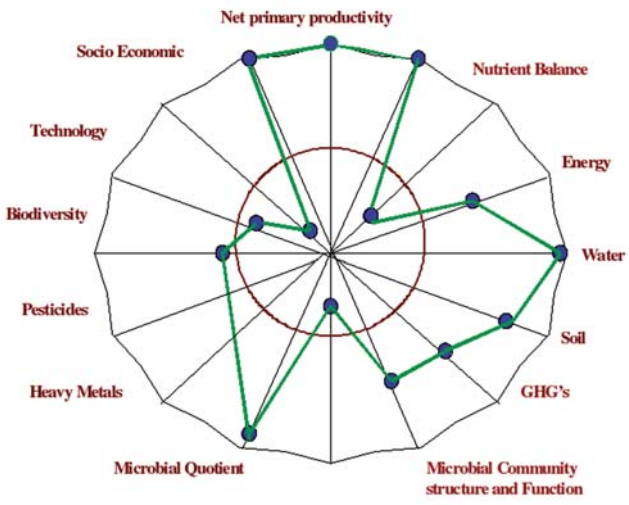
Adapted from: http://www.wholly-water.com

In addition to the new EIA Notification's tendency of being isolated from provisions and standards under other environmental laws in force in India, Paragraph 2(iii) of the Notification highlights the Notification's inconsistencies in the use of critical terminology. Here, the term '*specified range*' is used in contrast to '*threshold limit*' that has been used elsewhere. Such lax introduction of loaded terminology (possibly, with a strong bearing on actual regulatory implementation)

30. In 1999, the 30-year iron ore mining lease of the Kudremukh Iron Ore Company Ltd. (KIOCL) expired, and the company applied for a long term extension. The Union Ministry of Environment and Forests extended the lease by a year and made further extensions subject to the results of a comprehensive environmental impact assessment that would be completed in the interim period. The terms of the EIA were based on expansion of the lease area and completely omitted the implications of KIOCL increasing its production by going deeper to the primary ore in the Kudremukh forests of Western Ghats. Such a process would not have included expansion in lease area, per se, but would involve substantial increase in production of ore. Extracting primary ore would also have caused significant environmental damage. Even as KIOCL pursued on its expansion plans (regarding both lease area and increasing production within the existing area), the Supreme Court ordered that the mine had to be shut down due to the serious impacts it had caused on forests, rivers, wildlife and local populations. A scenario such as this, sans the Supreme Court intervention, but in light of the EIA Notification - 2006 would essentially allow a mining unit, say, to continue mining in the existing lease area (due to the careless omission of not accounting for increases in production capacity). More information about the impacts of KIOCL's mining in Kudremukh is available at (last visited on 10th February, 2007) <http://www.esgindia.org>. Also see Neeraj Vagholikar et al, Undermining India – Impacts of mining on ecologically sensitive areas, Kalpavriksh, 2003, available at (last visited on 14th February, 2007) <http://www.kalpavriksh.org/kalpavriksh/f1/f1.3/Undermining%20India.pdf>.

31. A contrary (but fallacious) claim is asserted by MoEF in 'Clarification regarding process of any developmental project costing less than Rs. 5.00 Crores in-house internally' (15th February, 2007), available at, (last visited on 13th March, 2007) <http://envfor.nic.in/legis/eia/eia 2006.htm>.

further reduces the clarity and consistency of interpretation of the Notification.



Source: www.iari.res.in/divisions/env_science/

3. No procedural safeguards for expansion and modernization:

Paragraph 7(ii) is extremely unclear about the procedure to be followed in the conduct of the environmental clearance process with regard to expansion or modernisation of projects. The present wording of Paragraph 7(ii) can possibly be interpreted to mean that apart from the submission of Form I, all other procedural requirements such as public consultations, submission of EIA Report, etc. can be dispensed with before the Appraisal stage. This has very serious implications on interpretation with the likelihood that many '*expansion*' or '*modernization*' projects might well be permitted to dispense with the need for public participation and detailed environment impact assessment in the environmental clearance process. Further, this provision militates against the very objective of the EIA Notification - as it allows many projects to avoid the need for conducting detailed environment impact assessments. The absence of clarity on defining fully the process of clearance for expansion and modernisation mocks at well-established legal principles such as the Precautionary Principle and the Public Trust Doctrine.[32] The potential ramifications of the careless treatment of expansion and modernization of industries by the EIA Notification 2006 are highlighted by **Case Study 7: Careless Expansion: West Coast Paper Mills.**

Untreated effluents from the West Coast Paper Mills flowing down the Halmaddi Nala to join the Kali River, Karnataka

Validity of environmental clearance

1. Unwarranted extensions in validity of clearance:

Paragraph 9 of the EIA Notification - 2006 states:

> *"The prior environmental clearance granted for a project or activity shall be valid for a period of ten years in the case of River Valley projects (item 1(c) of the Schedule), project life as estimated by Expert Appraisal Committee or State Level Expert Appraisal Committee subject to a maximum of thirty years for mining projects and five years in the case of all other projects and activities. However, in the case of Area Development projects and Townships [item 8(b)], the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer."*

Serious problems in review of River Valley and Mining Projects

This is a truly worrisome provision of the EIA Notification – 2006 and could significantly accelerate environmental degradation in the coming years. The grant of a 10-year clearance for river valley projects, and a 30-year clearance for mining projects, is an

32. The public trust doctrine provides that the state is the trustee of all natural resources which are by nature meant for public use and enjoyment. As per this doctrine, the public at large is the beneficiary of the sea-shore, running waters, air, forests and ecologically fragile lands, and these resources can therefore not be converted into private ownership. See MC Mehta v. Kamal Nath, 1997 (1) SCC 388; MI Builders v. Radhey Shyam Sahu, AIR 1999 SC 2468.

unprecedented step in the regulatory process.[33] It also stands in stark contrast to a growing global recognition of the need for constant and regular monitoring of environmental and social impacts of developmental activities.

Teesta Lower Dam project III, West Bengal: 10 year validity of clearance for river valley projects is fraught with risk. Photo credit : Souparna Lahiri

A reasonable and short validity period for clearances provides for regular review of compliance conditions. Such reviews mandate the regulator to constantly monitor project compliance while also exerting pressure on investors to comply, particularly given the threat of non-renewal on expiry of their current clearance.[34]

From this perspective, providing long term environmental clearances for river valley and mining projects definitely reduces the overall likelihood of compliance with environmental and social clearance conditions. Since long-term clearances represent a significant economic benefit to the project proponent, the likelihood of litigation to retain clearances secured is also high. As litigations often are a long drawn affair, the regulator is often precluded from intervening in *sub judice* matters while the investor continues to cause significant damage to the environment.

It is vital to note that the validity periods prescribed under the new Notification represent major concessions and dilutions from the modest five year period stipulated in the EIA Notification 1994.[35] The Notification also entirely ignores the high possibility of dramatic changes in environmental impacts of a project in the period following the grant of clearance - especially so in the case of mining and river valley projects where the issue of stabilisation of significantly altered landscapes continues to represent a major concern with unpredictable outcomes.[36]

Limited regulation of Area Development and Township Projects

The provision that *"in the case of Area Development projects and Townships [item 8(b)], the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer"* presents some very problematic possibilities. Clearly this does not explicitly clarify the duration of validity of environmental clearance accorded to 'Area Development Projects and Townships'. If one were to assume that these projects fall under the category of *'all other projects and activities'* as mentioned in Paragraph 9, then the validity of the clearance would be for a maximum of five years.

However, one literal meaning (without the benefits of the afore-mentioned purposive interpretation) of the provision that *'the validity period shall be limited only to such activities as may be the responsibility of the applicant as a developer'* could well result in some astounding and undesirable situations.

For instance, this provision possibly implies that the environmental clearance would be valid for the period for which the developer has contracted to implement

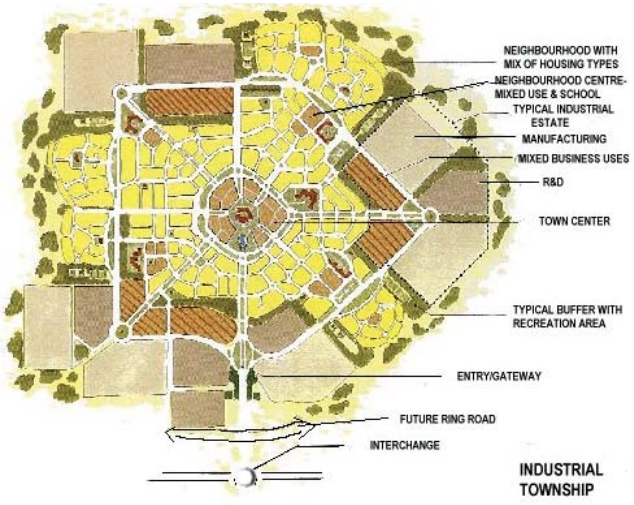
33. On the potential disastrous implications of unregulated mining, see generally Mining: Social and Environmental Impacts, World Rainforest Movement, 2004 available at (last visited on 05 March 2007) <http://www.wrm.org.uy/deforestation/mining/text.pdf>. Also see Neeraj Vagholikar et al, Undermining India – Impacts of mining on ecologically sensitive areas, Kalpavriksh, 2003, available at (last visited on 14th February, 2007) <http://www.kalpavriksh.org/kalpavriksh/f1/f1.3/Undermining%20India.pdf>. The ecological ramifications of big dams and hydroelectric projects have already been commented on earlier in this review report. The exemptions provided for the mining industry and area development projects were not mentioned in the Draft Notification 2005. These have been added only to the finalised copy of the Notification. See Annexure B.

34. The section regarding validity has undergone numerous changes from the draft Notification. Refer Annexure B for a detailed elaboration of these differences.

35. See Annexure A.

36. The issue of stabilising a closed mine is a highly contentious issue. Following the closure of the mines in Kudremukh, KIOCL has argued for highly reduced responsibility towards stabilising the excavated hills. "Expert" led reports have been supplied in support of this argument. The contrary argument - that the KIOCL measures adopted in stabilising the disturbed environment were very weak and could therefore devastate the forests - was highlighted in the Supreme Court, which then commissioned another study on the issue. This latter study has recommended significantly stronger measures to mitigate the potential adverse impacts on forests, rivers and human settlements. However, such fortuitous resolutions from the Supreme Court cannot provide the norm for a broad regulatory framework, and thus it is essential that the EIA Notification 2006 accommodates such concerns fully. For an elaboration of how the EIA Notification's approach represents a serious threat to rivers across India in a different context involving construction of a bridge across the Brahmaputra river, see Case Study 4 of this report.

and operate the project. If *'Area Development Projects'* are understood as referring to urban infrastructure projects such as metros or townships, then this ambiguous provision could have very serious ramifications. In these projects, the norm has been to offer developers contractual control over the execution and operation of the project for a period of 30 years at the least. Consequently would this mean that the environmental clearance is also valid for 30 years, i.e. the duration of the developers' rights (or responsibilities) over the project? The presence of such problematic provisions in a context where collusion between developers and regulatory authorities is not uncommon, guarantees a race to the bottom for India's environmental regulatory framework.[37]



The Bangalore Mysore Infrastructure Corridor (BMIC) Project is a prime example of the least regard for environmental compliance by developers. Source: http://www.nicelimited.com

The definitive interpretation of such provisions will be clarified only through highly litigated circumstances. Consequently, the objective of implementing India's environmental laws (and of punishing environmental clearance violators) seems destined to be vested with courts.

2. Typographical errors create confusion on period of validity of EC:

To add to the confusion is the following statement in Paragraph 9 of the Notification:

> *"The "Validity of Environmental Clearance" is meant [sic] the period from which a prior environmental clearance is granted by the regulatory authority, or may be presumed by the applicant to have been granted under* ***sub paragraph (iv) of paragraph 7 above****…"* (emphasis supplied)

The EIA Notification - 2006 does not have a Paragraph 7 (iv)!

A Corrigendum to the EIA Notification - 2006 issued by MoEF on 13th November 2006 makes no corrections to this Paragraph either.[38]

However, Paragraph 8 (iv) is probably what was intended to be referred to, as it explains that *"(o)n expiry of the period specified for decision by the regulatory authority under paragraph (i) and (ii) above, as applicable, the decision of the regulatory authority, and the final recommendations of the Expert Appraisal Committee or State Level Expert Appraisal Committee concerned shall be public documents."*

Transferability of environmental clearance

1. No safeguards in transfer of environmental clearance:

Paragraph 11 of the EIA Notification - 2006 states:

> *"A prior environmental clearance granted for a specific project or activity to an applicant may be transferred during its validity to another legal person entitled to undertake the project or activity on application by the transferor, or by the transferee with a written "no objection" by the transferor."*

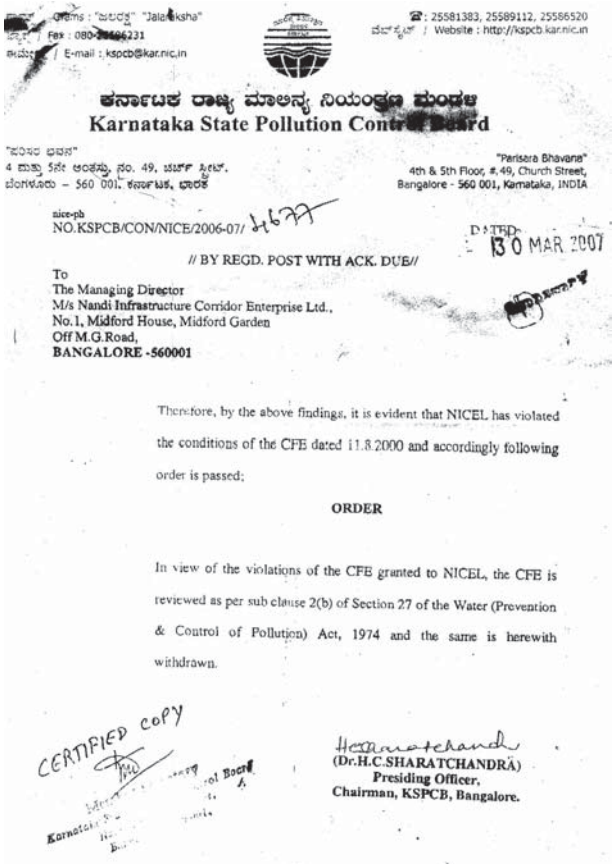
In transferring an environmental clearance, it is crucial that the transferee has an equal or better reputation or *bona fides* of environmental compliance. This will ensure that commitment to environmental protection is sustained, which is a major factor that helps in winning the confidence of local communities. Such an explicit assertion requiring positive review of the transferee's *bona fides*, in the EIA Notification – 2006, would enhance environmental compliance while being in consonance with the well-established precautionary principle.

37. Additionally, the Draft Notification mentions 'No extension of the validity period shall be granted beyond a total of fifteen years in the case of river valley projects and a total of ten years in the case of other projects and activities'. This line has been conspicuously omitted from the final Notification 2006. In effect, extensions on the validity period may be granted in perpetuity! See Annexure B.
38. Corrigendum (S.O.1939(E)) dated 13th November 2006 available in Annexure D.

Problems with the Enforcement of Environmental Clearances

It has been a common experience under the EIA Notification – 1994 that once a project has been cleared and has begun operation, the monitoring and enforcement of clearance conditions is extremely lax. Despite such a dismal compliance record under the EIA Notification – 1994, the new Notification does not require any independent monitoring of the project's compliance with the stipulated clearance conditions. Instead, it relies solely on half-yearly reports furnished by the project proponent.

Additionally, under the previous Notification, even when there was sufficient evidence of non-compliance, very little enforcement usually took place, despite the presence of adequate penal provisions under Indian law. Consequently, industries continued to pollute the environment. The new EIA Notification has taken a step backwards in terms of monitoring and enforcement when compared to the 1994 Notification. It fully ignores the need for enforcement of clearance conditions – shockingly, there is no mention of when penalties should be imposed or when and how clearances may be revoked!



ಕರ್ನಾಟಕ ರಾಜ್ಯ ಮಾಲಿನ್ಯ ನಿಯಂತ್ರಣ ಮಂಡಳಿ
Karnataka State Pollution Control Board

"Parisara Bhavana"
4th & 5th Floor, #.49, Church Street,
Bangalore - 560 001, Karnataka, INDIA

NO.KSPCB/CON/NICE/2006-07/ 4677

DATED: 30 MAR 2007

// BY REGD. POST WITH ACK. DUE//

To
The Managing Director
M/s Nandi Infrastructure Corridor Enterprise Ltd.,
No.1, Midford House, Midford Garden
Off M.G.Road,
BANGALORE -560001

Therefore, by the above findings, it is evident that NICEL has violated the conditions of the CFE dated 11.8.2000 and accordingly following order is passed;

ORDER

In view of the violations of the CFE granted to NICEL, the CFE is reviewed as per sub clause 2(b) of Section 27 of the Water (Prevention & Control of Pollution) Act, 1974 and the same is herewith withdrawn.

CERTIFIED COPY

(Dr.H.C.SHARATCHANDRA)
Presiding Officer,
Chairman, KSPCB, Bangalore.

When PCB's revoke consents against violators, the status of the Environmental Clearance is anybody's guess.

We believe that this absence of independent monitoring and enforcement of clearance conditions seriously undermines the regulatory potential of the EIA Notification – 2006. In the following sections, we specifically detail the weaknesses of the Notification vis-a-vis monitoring and enforcement of clearance conditions.

Monitoring weak after investor secures environmental clearance

Paragraph 10 of the EIA Notification - 2006 states that:

> *"(i) It shall be mandatory for the project management to submit half-yearly compliance reports in respect of the stipulated prior environmental clearance terms and conditions in hard and soft copies to the regulatory authority concerned, on 1st June and 1st December of each calendar year.*
>
> *(ii) All such compliance reports submitted by the project management shall be public documents. Copies of the same shall be given to any person on application to the concerned regulatory authority. The latest such compliance report shall also be displayed on the web site of the concerned regulatory authority."*

Quarterly reporting of financial compliance is a well-established norm that is scrupulously implemented by financial regulatory institutions across the world. This has enhanced transparency and accountability in financial reporting, and many corporations have effectively utilised this legal requirement to win over public confidence and build credibility.

As has been explained in the Introduction to this review report, the EIA Notification - 2006 draws its inspiration from the recommendations of the Govindarajan Committee on Investment Reforms. From the perspective of reform effectiveness, one would expect that environmental reporting should not be subordinate to financial reporting in any way – with periodicity and transparency being the vanguards of such a process. In this sense an opportunity to enforce discipline in reporting requirements and to enhance much needed accountability to clearance norms has been lost in this Notification - as it sustains the weak provision in the EIA Notification of 1994 (that required only half-yearly compliance reporting).

There is, of course, the improvement over analogous provisions in the previous Notification with regard to the making of compliance documents public. For the present Notification ensures that the *"latest .... compliance report shall also be displayed on the web site of*

the concerned regulatory authority" in contrast to the earlier Notification's provision that made these available only *"(s)ubject to the public interest"*, which effectively resulted in compliance reports never being made public or easily accessible on demand.[1]

Scandalously illegal mining is widespread in the Sandur forests of Bellary, Karnataka

Source: http://www.rsmm.com

While making compliance reports easily accessible to the public is important,[2] what is more critical is the need for an effective corrective mechanism to account for poor compliance or non-compliance with stipulated clearance conditions. The Notification is silent on this fundamental aspect of environmental regulation. Shockingly, the Notification is also entirely silent as to how, and under what conditions, clearances that have been granted may be revoked! This seems to suggest that the MoEF does not care at all whether clearance conditions (which are the final products of a fairly detailed and complex procedure) are followed or not. Obviously, if an industry egregiously (or repeatedly) violates the terms of the environmental clearance granted, there must be some procedure prescribed for revoking or suspending the environmental clearance. The EIA Notification 2006, however, seems to have fully missed the implications of this omission! The main circumstances under which clearance may be revoked under the EIA Notification 2006 - are when there has been deliberate concealment or submission of false data, as outlined in the subsequent section of this chapter. Effectively, all industries could argue that their clearance **cannot be revoked** on any other grounds (including total non-compliance with the clearance conditions), simply because the EIA Notification 2006 is silent in this regard.[3]

Another matter of significant concern is the absolute absence of mandatory (or even optional!) environmental audits. Additionally, it is indeed surprising that the Notification places no obligations on the regulatory agency or the SPCBs and the UTPCCs to independently monitor compliance with the conditions and stipulations of the environmental clearance. Ideally, the Notification should have stipulated periodic monitoring by regulatory authorities jointly with the public (particularly local affected communities) of the extent of compliance with clearance conditions. Such a mechanism could well serve as an effective means of ensuring effective monitoring and would also encourage greater compliance.

18/12/04 **Tehelka** *The People's Paper*

A team of youngsters visits factories and zeroes in on errant industries

Villagers go on pollution patrol

PC VINOJ KUMAR
Cuddalore, Tamil Nadu

FOR AN estimated 20,000 people living in the nearly 15 villages located in the vicinity of the State Industries Promotion Corporation of Tamil Nadu (SIPCOT) estate in Cuddalore, pollution has been a part of their lives for the last 20 years. They don't get enough drinking water as the groundwater level has fallen; the land they till has lost fertility; Uppanar river, once home to many species of fish and bread earner for hundreds of fishermen, now barely meets their needs; and the air they breathe stinks.

The toxic gases spewed by the industries bring more than just foul odour. Many of them cause deadly diseases. Most of the villagers complain of headache, watering of eyes, nausea, breathlessness, chest pain, skin diseases, and infertility. "Our children lack good health. They are often down with fever," says Indrani, a fisherwoman of Sonnachavadi. "The stench at night is the worst. Sometimes it becomes suffocating," says Parasuraman of Semmankuppam village. The villagers approached the authorities several times, but their pleas fell on deaf ears.

After having submitted themselves to the barrage of pollutants for so many years, the villagers are now getting back with the help of some NGOs. The NGOs — Federation of Consumer Organisations Tamil Nadu and Pondicherry (FEDCOT), Cuddalore District Consumer Organisation, Global Community Monitor, and The Other Media — roped in 12 village youth, and formed the SIPCOT Area Community Environmental Monitors (SACEM). They were then trained to describe and rate the odours they experienced.

"It is an accepted method of documenting air pollution. International agencies such as the US Environmental Protection Agency follow this method to monitor air pollution," says Shweta Narayan, coordinator, SACEM.

The team started to monitor odour levels from April. "Whenever there is an incidence of odour, we record the information," says S. Sivaskankar of Semmankuppam. Like the other volunteers, today he can walk blindfolded and identify the industry by sniffing. "If it is the smell of human excreta, it has to be SPIC Mitocon. The stench of decaying corpse or burning dead body comes from Pioneer Miyagi. Asian Paints lets out a *chikkoo* smell," he says.

The team also collected air using a simple device they call the 'bucket', developed at a cost of Rs 1,700. The air samples were then sent to the US for analysis by SACEM. In September, SACEM released its report 'Gas Trouble — Air Quality in SIPCOT', which reported the presence of 22 toxins in the air. "Eight of the 22 chemicals are known to cause cancer," stated the report. The NGOs are planning their next move. "The report has established the levels of air pollution in the area. Now steps have to be taken to find a solution," says M. Nizamudeen, general secretary of FEDCOT.

The industries contest the results of the study. "The report is factually incorrect. Out of the 22 chemicals they mention, nine are not used by any of the industries in SIPCOT," says K. Vijayaraghavan, director, Cuddalore SIPCOT Industries Association (CSIA).

The CSIA says the industries conduct regular air quality checks. They have also written to the National Environmental Engineering Research Institute (NEERI) to undertake an air quality survey in SIPCOT. The CSIA argues that odour is not an indication of pollution. "When there is a concentration of chemical factories, there is bound to be some odour," says MH Upadhyaya, president, CSIA. "The question is whether the chemicals are within permissible limits. None of the industries have violated the Tamil Nadu Pollution Control Board's norms," he argues.

Breathless: villagers collect air samples in Cuddalore for testing
PHOTO BY MEDIA RAHU/CAFS

Studies conducted by NGOs reveal that factories in SIPCOT complex are releasing eight cancerous toxins into air

MoEF's abysmal failure in post clearance monitoring has citizens now taking on statutory roles.

1. As a matter of fact, MoEF is not known to have shared a compliance report on any project since 1994 when the EIA Notification was first introduced, and despite demands from local communities and NGOs. The access to compliance reports was made possible only after the enactment of the RTI Act, 2005.

2. On this aspect, the possibility of requiring the project developer to share compliance reports with the public on demand has not been explored at all.

3 One of the principles of statutory interpretation - that penal provisions must be strictly interpreted – would support such an argument.

Given the troubling history of MoEF where environmental clearances have been accorded in innumerable cases on the basis of poor and false EIAs, and the consequent damage it has caused to human settlements and the environment, it is disquieting that the present Notification continues to ignore the importance of post-clearance monitoring. It is highly unlikely that this situation will improve (and may well deteriorate significantly) in light of the weak formulation of the current Notification.[4]

All these deficiencies with the monitoring of environmental clearance conditions are particularly vivid examples of how the EIA Notification - 2006 significantly violates the letter and spirit of the celebrated decision in *Indian Council for Enviro-Legal Action* v. *Union of India* (*CRZ Notification Case*),[5] which held that enforcement agencies are under an obligation to strictly enforce environmental laws in India.

On considering the longstanding deplorable state of affairs at the ship-breaking yard at Alang in Gujarat, the Indian government's commitment to implementation of applicable laws is fully suspect. This issue has been addressed in some detail in **Case Study 8: Ship-Breaking Yards and Units Brought Under Ambit of EIA Notification 2006.**

Disastrous growth of ship-breaking in Alang, Gujarat. (c) Greenpeace

Needless to state, the Notification's approach also fails to grasp that the Environment (Protection) Act, 1986 provides for imperatives and provisions to initiate criminal action against violators so that environmental laws are indeed strictly implemented (as has been detailed in the subsequent section).

Weak punitive measures against deliberate concealment and supplying of false data

Paragraph 8(vi) states that:

"(vi) Deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice."

Kali River stinks with West Coast Paper Mills' pollution, but CPCB has reported the river safe.

It is shocking that the EIA Notification - 2006 merely provides for very light punitive measures against the applicant for deliberate concealment or submitting false or misleading information. This flawed regulatory approach needs to be viewed in light of Section 15 of the Environment (Protection) Act, 1986 which states as follows:

> "15. PENALTY FOR CONTRAVENTION OF THE PROVISIONS OF THE ACT AND THE RULES, ORDERS AND DIRECTIONS
>
> *(1)" Whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued thereunder, shall, in respect of*

4. Contrast this with the US Environmental Protection Agency's powerful clearance, compliance, monitoring and enforcement mechanisms – details of which may be accessed at (last visited on 10th February, 2007) <http://www.epa.gov/ebtpages/complianceenforcement.html>.
5. 1996 (5) SCC 281.

each such failure or contravention, be punishable with imprisonment for a term which may extend to five years with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

(2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years."

Such stringent provisions in the Act have been provided to limit the possibility of wanton disregard for environmental regulation.[6]

In light of such strong provisions prescribing punitive action in the parent law, the rather weak provision in the Notification that offences *"shall make the application liable for rejection, and cancellation of prior environmental clearance granted"* appears to make light of the very purpose of the Environment (Protection) Act, 1986. This is also a clear indication of the inadequacy and complacency of MoEF's approach to environmental regulation in India. With such disregard (in the Notification) for invoking of statutory provisions for stringent punitive action against violators, some investors may even be encouraged to deliberately conceal information and/or submit false and misleading data.

This weak regulatory approach flies in the face of judicial precedents, which have directed that stringent action should be taken against "contumacious defaulters" and persons who carry on development activity in violation of environmental laws.[7]

Incidentally, the EIA Notification 1994 stated that "*Concealing factual data or submission of false, misleading data/reports, decisions or recommendations would lead to the project being rejected. Approval, if granted earlier on the basis of false data, would also be revoked*." In light of this stronger provision in the 1994 law, the EIA Notification - 2006 comes across as a Notification that lacks teeth to enforce its regulatory objectives.

Very significantly, the MoEF is also washing its hands off other integral components of the environmental clearance process, as highlighted by the ongoing 'outsourcing' of the registration of EIA consultants as well! (*See Box 28: Registration of EIA Consultants outsourced*)

In India, environmental criminals are rarely caught. Warren Anderson, former CEO of Union Carbide, at his door in Bridgehampton, Long Island, New York (c) Greenpeace

Box 28: Registration of EIA Consultants outsourced

A major lacuna in the EIA Notification - 2006 is that it provides no standards or quality control checks whatsoever for the consultants involved in conducting the EIAs. This deficiency has been carried over from the past, and may well serve in perpetuating the extremely poor quality of EIAs that have repeatedly been furnished for clearance.

MoEF has peculiarly attempted to fix this major lacuna by making available a link on its website to a prospectus for registration of EIA Consultants with the National Registration Board for Personnel and Training (NRBPT), a unit of Quality Council of India.[a] The role and validity of an autonomous, non-governmental body (NRBPT) in influencing the regulatory supervision and monitoring of EIA documents has not yet been explained, clarified or detailed in any manner whatsoever.

Quality Council of India (QCI), of which NRBPT is a part, has recently announced a series of workshops to popularise the consultant registration process and also to build awareness about the EIA Notification – 2006. QCI claims that "(t)he NRBPT registration scheme for EIA Consultant Organizations has been prepared in consultation with Ministry of Environment and Forests (MOEF) keeping in view the Re-engineered EIA Notification of September 14, 2006 and requirements of other regulatory bodies…. Awareness Workshops covering the details of the registration scheme and the New EIA notification are being offered in different cities …. These workshops will be addressed by representatives from MOEF, QCI and CII."[b]

a. See the MoEF website at (last visited on 10th February, 2007) <http://envfor.nic.in>.
b. "Registration of Environmental Impact Assessment (EIA) Consultant Organisations", accessible at (last visited 14th April 2007) <http://qcin.org/html/nrbpt/eia_advert/eia.htm>.

6. See also Sections 176 and 177 of the Indian Penal Code, 1860, which would be applicable in the case of submission of false fraudulent or misleading data.
7. Indian Council for Enviro-Legal Action v. Union of India (Bichhri Case), AIR 1996 SC 1446; Pratibha Cooperative Housing Society Ltd. v. State of Maharashtra, AIR 1991 SC 1453; Pleasant Stay Hotel v. Palani Hills Conservation Council, 1995 (6) SCC 127; MI Builders v. Radhey Shyam Sahu, AIR 1999 SC 2468.

Relationship with and continued relevance of EIA Notification 1994

The EIA Notification – 2006 has been hastily, untidily and shoddily drafted - as a quick glance through the text of the Notification would reveal. In an attempt to clarify the confusion that results from this poorly drafted Notification, MoEF has had to issue a number of circulars, memos and guidelines (about ten at last count) since the issue of the Notification.[1] Major confusion still remains relating to the continued relevance of the EIA Notification 1994.

Source: http://www.cartoonstock.com

The concluding paragraph of the EIA Notification 2006 attempts to specify the situations under which the EIA Notification 1994 continues to have some applicability. However, as we elaborate below, the poorly worded paragraph offers very little clarity in the matter. The net result is that MoEF is vested with enormous discretionary powers to interpret this provision in whatever way it pleases - possibly to the detriment of environmental health and conservation - and causing significant damage to coherent norms and policy imperatives.

Applicability of 1994 Notification undecipherable

Paragraph 12 of the Notification states:

> *"From the date of final publication of this Notification the Environment Impact Assessment (EIA) Notification number S.O.60 (E) dated 27th January, 1994 is hereby superseded, except in suppression of the things done or omitted to be done before such suppression to the extent that in case of all or some types of applications made for prior environmental clearance and pending on the date of final publication of this Notification, the Central Government may relax any one or all provisions of this Notification except the list of the projects or activities requiring prior environmental clearance in Schedule I, or continue operation of some or all provisions of the said Notification, for a period not exceeding one year from the date of issue of this Notification."*

As is evident, this provision is worded in an extremely convoluted and cryptic manner. It offers no clarity on the continued operation of the EIA Notification, 1994. This provision also mistakenly uses the word 'suppression' several times instead of the term 'supersession' used elsewhere in the Notification.[2] Further, the provision refers to both the EIA Notification 1994 and the EIA Notification - 2006 in terms such as "*this Notification*" and "*said Notification*", thereby completely confusing the reader as to which of the two Notifications is being referred to. Interestingly, the EIA Notification - 2006 has only a Schedule whereas the EIA Notification 1994 has a Schedule I, further adding to the confusion as to which Schedule is being referred to in Paragraph 12.

Consequently, Paragraph 12 of EIA Notification - 2006 conveys very little clarity on the applicable law for the disposal of pending or proposed cases. As mentioned earlier in this report, such confusing provisions have resulted in the belated issue of a flurry of circulars, orders, guidelines, etc. by MoEF to rectify, in some measure, the question of operation of the EIA Notification 2006.[3]

Concerns grow over the poor management of the ash ponds in Karnataka's Raichur Thermal Power Plant.

1. *See Annexure D.*
2. *Ironically, the draft Notification released on 15 September 2005 used the correct term "superceded" in the corresponding Paragraph 11.*
3. *See Annexure D.*

Confusing and vague wording becomes highly problematic since this provides the MoEF with the extraordinary discretionary power of relaxing provisions of "*this Notification*" and "*Schedule I*" projects, without even clarifying on how such relaxations are legal.

Evidence of such carte blanche relaxations benefiting all high impact projects across the country is available in the MoEF Circular F.No.J-11013/41/2006-IA-II (I) dated November 21, 2006, which states as follows:

> * "*Such projects for which NOCs issued before 14th September, 2006 will not be required to take Environmental Clearance under the EIA Notification, 2006.*
>
> * *Applications received for NOC by the State Pollution Control Boards before 14th September 2006 may be considered as per provisions of the said Acts. However, they will have to obtain the environmental clearance from the relevant Authority by 30th June 2007, if the category requires EIA Clearance as per the new Notification. In such cases, the unit can meanwhile carry on with the commencement of their project activities.*"

Protests against dam across Chalukady river (Athirapally falls) in Kerala. Credit : Amitha Bachan

Read with the provisions of the earlier circular issued by MoEF on 13 October 2006 (No J-11013/41/2006-IA.II (I)), the 21 November circular sanctions absolute violation of the norms and rationale underlying the environmental and regulatory jurisprudence of India.

This is for the following reasons:

* The 21 November 2006 circular explicitly exempts all projects that have received a NOC (from the Pollution Control Boards under the Air and Water Acts) before 14 September 2006 from the very need to secure environmental clearance or carry out environmental and social impacts. Such patently illegal provisions will promote widespread environmental destruction and violation of constitutionally guaranteed human rights. It is easily perceivable that many high impact projects, such as dams, highways through forests, ship breaking units, large manufacturing sectors, thermal power plants, nuclear power plants, refineries, biotech parks, mining projects, etc., will exploit (or possibly already have exploited) this illegal circular in order to commence operations even when the wider environmental and social impacts have not at all been considered.

* It is also conceivable that such an illegal circular has probably been deliberately introduced to allow for the 'legalisation' of many socially and environmentally unviable projects that may have received NOCs, but were not likely to secure an environmental clearance. The possibility of an investor-bureaucratic-political nexus having influenced the creation of such unjustified and illegal executive circulars cannot be ruled out.

* Even projects that have not yet received NOC, but have applied for the same before 14th September 2006, are permitted to go ahead unabated with their project activities, as long as they file an application seeking environmental clearance before 30 June 2007. Therefore, high impact projects that are admittedly required to undergo a comprehensive environmental and social impact assessment by law, are nonetheless irrationally permitted to "*meanwhile carry on with the commencement of their project activities*" until the final environmental clearance decision is taken by the regulatory authority. The final decision of granting or rejecting environmental clearance could well be taken a year or more after the last date for filing of the application, that is, 30 June 2007. Such a long unregulated period of unmitigated project activities could well have disastrous environmental and social consequences.

Source: http://www.cartoonstock.com

* Further, it is very likely that project construction would be complete (or almost complete) by the time the matter comes up for a final decision in the

environment clearance mechanism. In light of the massive financial, labour and time investments that would have been incurred by the project proponents (and implicitly endorsed by the Government through the circular of 21 November 2006) - if the clearance is indeed finally rejected this may well amount to violation of the doctrine of promissory estoppel. This situation also creates a strong *fait accompli* (for regulators, experts, and the judiciary if involved) to grant environmental clearance to the project. Consequently, most aspects of comprehensive environmental clearance, that include such highly complex issues as social impact and displacement, as well as downstream effects and long-term impacts, have all been completely abandoned in advancing the cause of 'development'. This circular undermines the very purpose and import of the Environment (Protection) Act, 1986, several related

Despite withdrawal of NOC by KSPCB, the BMIC project work continues, raising questions on the issues involved in SPCBs role in the environmental clearance process

provisions in national law and international treaties, and many important rulings of the Supreme Court upholding the importance of 'sustainable development'. In such a patently irrational and illegal scenario, the preservation of the environment and the protection of human rights will most certainly be compromised.

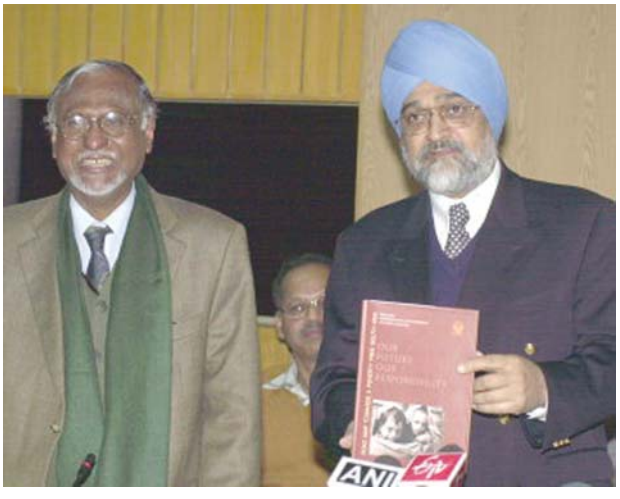
Concluding Remarks

A legislation governing the EIA process in any country must satisfy the twin requirements of being easily understandable and of setting clear standards for implementation. In addition, the legislation has to anticipate current and future trends of industrial and infrastructure developments and provide a framework for appreciating and minimising their adverse impacts on environment and society.

On all these grounds, the EIA Notification – 2006 fails completely.

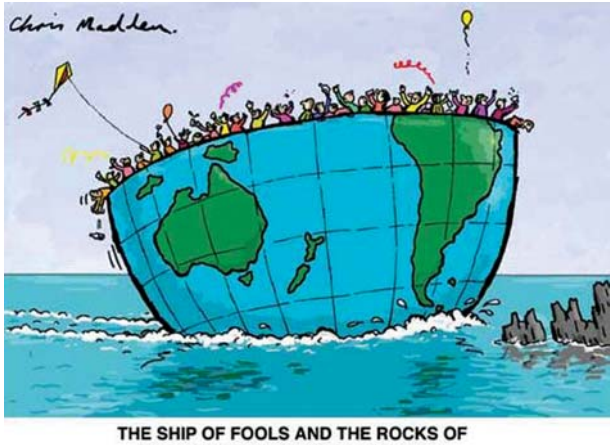
The entire process of planning of new EIA norms and related environmental regulatory systems in India has been marred seriously as has been elaborated in **Case Study 9: planning commision and the eia process.**

A simple reading of the Notification is clearly impossible given the convoluted structure of its various provisions. As exhaustively explained earlier, the Notification ostensibly promotes environmental conservation and regulatory concerns, while in reality, it creates a framework that promotes investment at any cost. In this sense alone, the Notification militates against one of the cardinal precepts for implementation of environmental legislations (as repeatedly reiterated by the Supreme Court of India) – that the power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defeat the object of the law.[1]



Dy. Chairman of Planning Commission, Montek Singh Ahluwahlia and Prodipto Ghosh, Secretary, MoEF have had a role in the EIA Notication 2006. © Hindu Group

The EIA Notification – 1994 was amended a little over a dozen times during its life of twelve years. Many have argued that most of these amendments were an effort to dilute the rigours of the environmental clearance process. It has also been argued that these amendments, besides being unnecessary, were responses to the dictates of political expediency. If MoEF was keen on fulfilling its mandate and in comprehensively addressing the emergent needs of investors and the wide public, it could have done so by strengthening the EIA Notification – 1994. Building on the widespread understanding of the content and structure of the 1994 Notification, the existing institutional regulatory systems (that have progressively evolved over the last decade or so) could easily have been employed efficiently to ensure the ecological security of India.



THE SHIP OF FOOLS AND THE ROCKS OF SHORT-TERM ECONOMIC PLANNING

Source : http://cagle.msnbc.com

In comparison, in less than half a year from the enactment of the EIA Notification – 2006, MoEF has already issued almost a dozen circulars, orders and guidelines in an attempt to clarify a variety of aspects that are unclear in the Notification. Such a spate of documents is only indicative of what will follow once the full import of the Notification is felt. Alarmingly, some clarifications have been occasioned to specifically address individual investors' concerns, thereby committing a serious infraction on the objective of advancing unbiased and fair environmental regulation. It is very likely that this Notification will soon turn out to be the basis for a variety of complaints, disputes, conflicts, and litigations. It is unlikely that the Notification will also stand the test of serious judicial

1. See Bangalore Medical Trust v B. S. Muddappa, AIR 1991 SC 1902, at 1911, 1924; Virender Gaur v. State of Haryana, 1995 (2) SCC 577, at 583; and Indian Council for Enviro-Legal Action v. Union of Indian (CRZ Notification Case), 1996 (5) SCC 281, at 299, 302.

Adapted from original : http://www.cpcml.ca/francais/lmlq/Q34044.htm

scrutiny. Consequently, MoEF and its agencies will be more involved in dealing with the administrative chaos that is bound to result rather than in discharging their obligations in protecting the environment. Clearly the much hyped re-engineering effort has failed, and miserably at that.

An India that plans to sustain a high economic growth rate cannot be bogged down by such seriously flawed legislations. Legal complications that will be the primary outcome of the EIA Notification are likely to adversely affect investment flows as well as defeat the objective of effective environmental regulation. It is imperative that a robust and clear set of norms, governing the social and environmental impacts of development, is available to assure both economic growth and environmental conservation.

We find that the problems likely to occur as a result of the new Notification are far too serious to be left unchallenged. Keeping all these concerns in view, it would be in the best interest of all to repeal the EIA Notification – 2006 and protect the country from the spiralling misery of dealing with a bad piece of legislation. Reinstating the EIA Notification - 1994, fully acknowledging its limitations, is an option worth considering as an interim measure. Such a move would provide us an opportunity to carefully evolve the truly satisfactory law on environment impact assessment that India indeed deserves.

Case Studies

1: Construction Projects - The Athashri Paranjape Project, Bangalore

The Athashri Paranjape Project (inaugurated by the Governor of the Karnataka in 2006) promoted itself as a project that fulfilled senior citizens' aspirations of self-reliance. As part of the environmental clearance procedure, a public hearing on the project was organized on 23rd August, 2006 at the project site - based on a notification issued by the Karnataka State Pollution Control Board (No. CFE-EIA/APSB/EIA-573/2006-2007/741).

Several disturbing facts came to light during the Public Hearing. The most glaring and obvious illegality was that project construction had been initiated without the requisite environmental clearance. This was in clear violation of the Environment (Protection) Act, 1986 and the EIA Notification 1994.

Only four members of the public hearing panel were present (these members too arrived one and a half hours late) and they insisted on beginning the hearing despite the absence of the District Collector (who is recognised as Chairperson of the public hearing panel), representatives from the community, representatives from local bodies, etc. When the non-representative nature of the panel was raised as an issue at the public hearing, the panel members present inexplicably dismissed this objection (despite being apprised about the decision in *Centre for Social Justice* v. *Union of India*,[1] which mandates a quorum for the public hearing to progress).

Mr. C. J. Singh, a senior citizen directly affected by the Athashri project continues to fight against this illegal development.

Mr. C.J. Singh, a resident of the area, then raised several issues about the legality of the project. Significantly, he pointed out that the conversion orders relating to the land area under consideration were faulty and were presently under judicial scrutiny. When the District Collector - Mr.Sadiq - had been informed about this earlier, he had written to the Member Secretary, Karnataka State Pollution Control Board (KSPCB) on 24th July 2006 itself, suggesting that the public hearing be postponed till the case was concluded in court. Despite this, the Public Hearing was nonetheless 'conducted' in direct contravention of the District Collector's opinion!

Subsequently, the Consent for Establishment (CFE) was denied by KSPCB under the applicable EIA Notification – 1994 and related legislations. Astonishingly, however, the company sought and obtained an environmental clearance under the new EIA Notification – 2006 - with the project now benefiting from its new status as a B-2 project under the new EIA norms. MoEF's utter disregard for law and the environment has been brought to the fore.

The above case highlights the need for mandatory Public Hearings for all building and construction projects. This requirement is amplified by the powerful influence of the building/construction lobby, which has a particularly negative history of relying on violence, bribes, intimidation, etc. to attain their ends.

The EIA Notification 2006 has exempted all construction/building projects from the need for public consultation.

1. *AIR 2001 Guj 71.s The relevant portion of the judgment states: "As far as the quorum of the Committee is concerned, for Committee to hold valid hearing, at least one half of the members of the committee shall have to remain present and at least the following members of the committee shall also have to remain present for the hearing to be considered as valid public hearing.*
   1. *The officer from the GPCB.*
   2. *The officer from the Department of Environment and Forest of the State Government.*
   3. *One of the three senior Citizen nominated by the Collector"*

2: Mockery of Environmental Public hearings

The process and conduct of public hearings in the EIA process in India have been truly troublesome. There exist numerous examples to support the view that public hearings (as part of the EIA process) have been reduced to a mere procedural formality, with 'staged' hearings being often conducted to claim compliance with legal requirements. Numerous public hearings do not display any genuine effort to elicit public views and concerns on the project in question. That apart, violence and intimidation (from project proponents in nexus with police and administrative officials) have become common facets of public hearings across the country.

The imperiousness of the Notification will diminish and deride citizen participation.

On 27th September 2006 the Orissa State Pollution Control Board held a token public hearing consisting of very few people in Munderkhet village - even as thousands of locally affected persons (and even a judge of the official public hearing panel) held a parallel (though legally 'unofficial') meeting close by. On the same day, another public hearing on the coal-mining project of M/s. Bhushan Steel and Power Ltd. in Sundergarh district of Orissa had resulted in violence.

The deliberate mishandling of an environmental public hearing on 27th July, 2005 for the Tata Steel plant at Kalinganagar, Orissa was a turning point in the events that subsequently unfolded. Not only did the Government fail to appreciate the importance of involving the public in decision-making, but also proceeded to acquire land in active collusion with Tata Steel, (despite the widespread resentment against the manner in which the environmental public hearings had been held). Tensions continued to build over the months and finally resulted in the senseless killings on 2nd January, 2006 - where 1 policeman and 12 protesting tribals were killed, while 41 others were injured. The protests that were brutally suppressed by the police hinged on the fact that land was acquired for the steel plant without any kind of consent from the local and affected populations.

The list of violence-marred and 'rigged' public hearings is almost endless. More recently, on 20th February 2007, a public hearing for the proposed expansion plans of West Coast Paper Mills Limited at Dandeli, Karnataka saw all those raising concerns about the expansion being intimidated, heckled and shouted down. The public hearings for the Bangalore-Mysore Infrastructure Corridor (BMIC) project in Mysore, Mandya and Bangalore during 2000 were similarly characterised by police violence (and subsequent unjustified arrests) against peaceful environmentalists, social activists and project affected persons.

In all of these hearings, the public was denied crucial access to information regarding the project even as the police and the public hearing panel mutely watched (or assisted) the project proponent's rowdy, drunken henchmen in heckling and harassing anyone who chose to criticise or oppose the project. Clearly, serious attention needs to be paid to the public hearing component of the EIA Process. It is indeed worrisome then, that the EIA Notification 2006 has significantly diluted the democratic standards and safeguards applicable to public hearings (from those contained in the EIA Notification 1994).

Some principles of the Rio Declaration (that was evolved in the UN Conference on Environment and Development held in Rio de Janeiro, 1992) are important pointers to why public involvement in environmental decision-making is critical.

> **Principle 10:**
>
> 'Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'
>
> **Principle 22:**
>
> 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.'

Read in the context of the Rio Declaration, the EIA Notification 2006 comes across as a regressive piece of legislation. Undoubtedly, if the EIA process in the country is to genuinely respond to the environmental and socio-economic impacts of proposed development projects, the public hearing component of the public consultation process needs to be respected, strengthened, and safeguarded. The EIA Notification 2006 unfortunately does not do any of these.

3: EIA Notification 2006 Ignores the Deadly Health and Environmental Hazards posed by Electronic Waste

As electronic product use intensifies, the widespread environmental damage due to the toxic materials that go into the manufacture of electronic goods is an area of significant concern. All electronic equipment used nowadays (be it the computers, TV sets, VCRs, CD players, cellular phones, stereos, fax machines, copiers, microwave ovens, etc.) use thousands of small electronic/electrical components for their manufacture - all laden with highly toxic materials. Manufacturers build in electronics obsolescence to keep sales growing, without at all worrying about the enormous and adverse environmental and health consequences that the poor management of electronic waste can cause.

It is estimated that electronic wastes from discarded computers and electronic components release more than 1000 different toxic substances harmful to human and animal life. Iron, lead, mercury, nickel, cadmium, chromium, copper and a variety of plastics are being released unchecked into the environment in large quantities, and the quantum disposed in this way is expected to increase tenfold in the next fifteen years. Compounding this problem is the increasing volume of e-waste being generated within the country.

Express Computers has this to say of the problem in an article published two years ago:[2]

> "The situation is alarming. According to a survey by IRG Systems, South Asia, the total waste generated by obsolete or broken-down electronic and electrical equipment in India has been estimated to be 1,46,180 tons per year based on select EEE tracer items…… End-of-life products find their way to recycling yards in countries such as India and China, where poorly-protected workers dismantle them, often by hand, in appalling conditions. About 25,000 workers are employed at scrap-yards in Delhi alone, where 10,000 to 20,000 tons of e-waste are handled every year, with computers accounting for 25 percent of it. Other e-waste scrap-yards exist in Meerut, Ferozabad, Chennai, Bangalore and Mumbai. About 80 percent of the e-waste generated in the US is exported to India, China and Pakistan, and unorganised recycling and backyard scrap-trading forms close to 100 percent of total e-waste processing activity. Many of India's corporations burn e-waste such as PC monitors, PCBs, CDs, motherboards, cables, toner cartridges, light bulbs and tube-lights in the open along with garbage, releasing large amounts of mercury and lead into the atmosphere."

Item 7(d) of the Schedule to the EIA Notification 2006 mentions 'common hazardous waste treatment, storage and disposal facilities (TSDFs).' The EIA Notification 2006 (that is supposed to promote a holistic attitude towards environmental conservation) - by not specifically providing for e-waste - perpetuates the indifferent attitude currently prevalent with regard to e-waste disposal and treatment. Given the negligible attention accorded to this issue by the government in recent times, it is also possible that the use of the wording 'common hazardous waste' might well be interpreted so as to exclude a large number of organized e-waste generating industries as well as many formal and informal e-waste disposal activities.

Currently, proper disposal systems for e-waste are sorely lacking. The electronic industry poses environmental threats at two stages, firstly during manufacture of small, tiny electronic components and second during the 'end of life disposal' of electronic goods. Recyclers sell most second hand parts for reassembly or burn them in illegal dump yards, in and near residential areas, across the country. It is also common for electronic waste to be disposed off along with municipal waste, thereby releasing contaminants

2. V. Vinutha, "The e-waste problem", Express Computer, 21 November 2005, accessible on-line at (last visited on 14 April 2007) <http://www.expresscomputeronline.com/20051121/management01.shtml>.

The environmental health significance of contaminants commonly found in electronic units:

Sl. No.	Contaminants	Organs Affected/ Health Effects
1	Lead	Brain, kidney and reproductive system, convulsions in later life.
2	Mercury	Heart, brain, central nervous system, kidney; known to have caused the Minimata disaster in Japan.
3	Cadmium	Kidney, flu like disorder, high blood pressure, sterility among males; known to have caused Itai-Itai disease in Japan.
4	Barium	Muscular and cardiovascular disorder, kidney damage.
5	Chromium	Skin disorder, liver damage, known to be carcinogenic.
6	Copper	Toxic to aquatic life and microorganisms.
7	Silver	Darkening of the skin and eyes.
8	Zinc	Bad taste.
9	Solvents	Mostly Carcinogenic.
10	Cyanide	Highly toxic.

into the environment in large quantities and in irrecoverable forms.

According to an estimate, the average generation of three such contaminants per computer is:

Sl. No.	Contaminant	Amount
1	*Lead*	1.75 kg/ computer
2	*Mercury*	0.57 gm/ computer
3	*Cadmium*	2.8 gm/ computer

In addition to the domestic production of electronic waste, a huge quantity of used (usually obsolete) electronic equipment, especially personal computers, are received from several developed countries under the guise of 'charity'. These soon end up as backyard e-waste. The cheap 'use & throw' electrical and electronic items, especially from China, are also compounding the problem of e-waste. Across the country there exist very few facilities employing environmentally conscious and scientific techniques for e-waste processing, treatment and disposal. One notable example that may be pointed out is **E-Parisara** – an environmentally sound and scientific private recycling facility for e- waste about 35 kilometres north of Bangalore city.

Most IT companies in Bangalore do not give their electronic waste to E-Parisara – the only legal and scientific processing unit.

In terms of regulatory frameworks, no comprehensive overall treatment of e-waste exists despite repeated calls for the same. Legal provisions that could be of some relevance with respect to e-waste include provisions in the Factories Act 1948, the Environment (Protection) Act, 1986, the Environment (Protection) Rules, 1986, the Public Liability Insurance Act, 1991, The Hazardous Waste (Management & Handling) Rules, 2003, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989, etc. Despite the existence of such relevant legal provisions, the necessity for holistically considering the issue of e-waste in terms of overall environmental impact has not received the urgent attention that it deserves.

In light of the significant health and environmental dangers posed by e-waste, it is indeed shocking that the EIA Notification 2006 does not even consider the need for impact assessments with regard to processes and activities that generate e-waste. Further, the general language dealing with common hazardous waste treatment, storage and disposal facilities in the Schedule of the present Notification might well exclude facilities and activities involved in re-cycling, re-assembly, and processing of electronics and electronic wastes. The non-inclusion of e-waste specifically (both in terms of generation of e-waste and end-of-life activities including disposal) remains a gaping omission in the coverage of the EIA Notification 2006. It also represents a vital opportunity missed at the cost of significant environmental and health impacts upon India's population.

4: Bogibeel Project: Bridge to destroy rivers

On 21st April 2002, then Prime Minister A.B. Vajpayee inaugurated the construction of the mega two-tier Bogibeel Rail cum Road Bridge over the river Brahmaputra connecting the North (Dhemaji District of Assam) with the South bank (Dibrugarh district of Assam) of the river.

Bogibeel bridge under construction across Brahmaputra.

While the project was initially perceived as a boon for the region (in terms of the potential improvements in communication, transportation and access to resources), deeper research regarding its feasibility soon brought to light some very serious concerns.

According to a study carried out by the UNESCO (under its International Hydrological Decade program), the Brahmaputra ranks fourth amongst the rivers of the world in respect of known maximum historic flood discharge. The Brahmaputra is also one of the major sediment transporting rivers of the world.

The breadth of Brahmaputra at the construction site (from extreme North bank to extreme South Bank) is 11 kilometres during the monsoon and 7 kilometres during the lean period. Official sources say that as per design lay out, the length of Bogibeel Rail cum Road Bridge is 4. 315 kilometres. The bridge is to be supported by 41 posts along its stretch. Critical concerns have been raised that during the Monsoon period at least a third of the flow in the Brahmaputra will be constricted due to the bridge. A point of concern for experts (including officials of Water Resource Department of Government of Assam) is that disturbing the natural flow regime of the River Brahmaputra to such a great extent could trigger havoc in terms of floods upstream of the Bridge and intensive erosion due to the flaring up effect downstream.

On the basis of previous experiences reflected in the case of the three other bridges over River Brahmaputra in Assam,[3] officials of Water Resource Department of Government of Assam state that if the construction of the Bridge follows the present design then serious repercussions would be seen downstream of the Bridge - which could lead to land loss and land alienation of a large population inhabiting the bank of the River Brahmaputra in Dhemaji and North Lakhimpur District of Assam. Serious concerns have also been raised regarding the impact of the Bridge on Manjuli - the largest river island of the world and a Vaishnavite heritage centre - which is less than 100 kilometres downstream of the Bridge. Experts say that there is every possibility of erosion escalating in Manjuli, which has already shrunk to a great extent from 1246 square kilometres in 1950 to 650 square kilometres currently.

Subansiri and other Himalayan rivers are destroyed by mining of boulders for stabilising the bridge.

In the face of such major environmental ramifications, it is shocking that projects such as the Bogibeel Bridge do not require environmental clearance! This is because bridges simply do not figure in the Schedule to the EIA Notification 2006. With the exception of 'River Valley Projects in Item 1 (c) of the Schedule, all other project that interfere with the natural flow of the water, and therefore might have serious downstream impacts, are simply not contemplated by the Notification.

(Source: Report of the Rural Volunteers Centre, Akajan, Assam)

3. Namely Saraighat (inducing intensive erosion on its downstream at Palasbari-Simin-Gumi), Kaliabhumura (inducing intensive erosion at Laharighat- Bhuragaon-Moirabari area of Morigaon District) and Narayansetu (inducing intensive erosion at Uttar Salmora).

5: Special Economic Zones with Special Exemptions

A national policy was first introduced on 1st April 2000 for setting up of Special Economic Zones (SEZ) in India with the view to provide for an internationally competitive environment for exports. The Union Ministry of Commerce and Industry, Government of India followed up on this policy with a special legislation, the Special Economic Zone Act, 2006. The Ministry explains the purpose of this Act as "drastic simplification of procedures and for single window clearance on matters relating to central as well as state governments ... in sectors like IT, Pharma, Bio-technology, Textiles, Petro-chemicals, Auto-components, etc.."[4] The SEZ Rules that followed focussed on "(s)implification of procedures for development, operation, and maintenance of the Special Economic Zones and for setting up and conducting business in SEZs. This includes simplified compliance procedures and documentation with an emphasis on self-certification." As of September 2006, the Board of Approvals committee had approved 267 SEZ projects all over the country, with areas ranging from 1000 to 14000 hectares.[5]

Within months of its implementation the SEZ Policy has turned out to be amongst the most ill-conceived and ill-planned approaches to 'boost' the economy. Besides causing considerable debate and controversy all across the country, conflict has spread to almost every site where an SEZ has been proposed.

Flashpoints – from the proposed SEZ in Kalinga Nagar (Orissa), the Tata automobile plant in Singur (West Bengal), the Anil Ambani's Reliance project in Dadri (Uttar Pradesh), the Devanahalli SEZ (Karnataka), the proposed Tata steel plant in Bastar (Chhatisgarh), the Reliance promoted SEZ in Raigarh (Maharashtra), the Mangalore SEZ (Karnataka), etc. have periodically raised serious concerns about SEZs and the manner in which they are being pursued. The shocking CPI (M) and state-sponsored violence at the Nandigram SEZ site in West Bengal on 14th March, 2007, has brought to a head the growing national distrust and resentment against unregulated, blindly profit-seeking, and often violent economic zones proponents. Clearly, things are set to change.

Widespread and sustained criticism continues to be levelled against the growing number of SEZ's (proposed and approved) and the shockingly weak legal regime (environmental, labour, fiscal, etc.) that governs such zones. In the past, the Commerce Ministry has paid scant attention to the environmental or social impacts of SEZs, and the evolving criteria for approval of SEZ proposals have, so far, reflected a scant regard for environmental, health and social concerns. This is shocking, particularly so when the direct negative impact of SEZs on fragile ecosystems and environments has been established and documented in different parts of the country.[6]

It is also relevant to note that most Indian cities are already facing a severe crisis of urban amenities. Scarcity of water, electricity and a chaotic transportation situation are regularly making headlines in Indian newspapers. SEZs in and around these cities (much against the guarantees that they would be set up in economically backward areas) will only ruin the already fragile water, power and infrastructure resource situation.

Necessarily, India's EIA norms must also incorporate a holistic and effective consideration of the social and environmental impacts of SEZs. The EIA Notification 2006 miserably fails on this count.

SEZ's currently find mention in Item 7(c) of the Schedule to the EIA Notification 2006. As detailed in this review, the Notification's treatment of SEZ's is so convoluted and unclear that it presents such zones with a large number of gaping loopholes to escape the environment clearance process. Unclear terminology provided in the 'Specific Conditions' of the Notification, could seriously limit the possibility of effectively regulating these zones in light of their potential social and environmental impacts. In light of the Ministry of Commerce's numerous statements on SEZs over the past few months, misconceptions abound that SEZs are completely exempt from the environmental clearance process. The EIA Notification's treatment of SEZs ignores the Special Economic Zones Act, 2005, the Special Economic Zones Rules, 2006 and the SEZ Policy, and sharp discontinuities and inconsistencies (especially with regard to the clearance process and decision-taking authorities under the EIA norms and the single window clearance process under the SEZ legislations) abound!

Following recent events and nation-wide protests and agitations, the Indian government's approach to SEZs has been thrown completely in flux. A growing number of voices across the country have (and continue to) echo

4. See the website of Union Ministry of Commerce and Industries, Government of India generally, and in specific (last visited on 15th April 2007) <http://commerce.nic.in/annual2005-06/englishhtml/Ch-6.htm>.

5. Amit Bhaduri, "Development or developmental terrorism?", Combat Law, March-April 2007. For more details on the formal and 'in-principle' approvals granted, see the Ministry of Commerce SEZ website at (last viewed on 29th March 2007) <http://sezindia.nic.in>.

6. For a recent example, see Sreenivas Janyala, "SEZs: Gujarat dept alarmed at forest loss", The Indian Express, March 27, 2007.

the need to 'walk away' from the SEZ mindset – especially so, in light of the unforgettable and unpardonable violence that SEZs have fostered in recent times. The absurdity of a situation where the coercive State apparatus (forcefully) takes land away from the people at the behest of profit-maximising companies (or alternately, gives away 'public lands' to such companies) can no longer be ignored. The need for a careful scrutiny of the environmental and social impacts of SEZs has never been on sounder footing. India's SEZ policy is set to undergo a comprehensive re-think in the coming days, and hopefully the full environmental and social impacts of such zones will be recognized and appropriately regulated. The new EIA Notification's 'attempt' to meet such objectives must be recognized for what it is – fully inadequate, and indeed, pitiful!

Minimum Land Area Requirement for setting up SEZs:

* 1000 hectare for multi-product SEZs;
* 100 hectares for sector specific SEZs; and
* 10 hectares with minimum built up processing areas of 100,000 sqm, 40,000 sqm and 50,000 sqm for IT, Bio-technology, gems & jewellery SEZs respectively.
* Most of applications for multi-product SEZs have been in the range of 1000 hectare to 2500 hectare – only two cases with 10,000 hectare.
* No maximum land area stipulated since it is the State Government, which is to decide upon the approval and land use stipulation.
* Lesser minimum area requirement in respect of special states viz., Assam, Meghalaya, Nagaland, Arunachal Pradesh, Mizoram, Manipur, Tripura, Himachal Pradesh, Uttaranchal, Sikkim, Jammu & Kashmir and Goa & union territories.

Source: Union Ministry of Commerce and Industries, Govt. of India, available at (last visited on 15 April 2007) <http://commerce.nic.in/April07_release.htm#h4>

Protest against Tata Motors plant in Singur, West Bengal

6: Illegal dumping of Solid Wastes at Mavallipura village, Bangalore

About 20 kilometres north of Bangalore city, close to Yelahanka town and the Yelahanka Air Force Base, is a village called Mavallipura. Every day from May 2003 to late 2006, with the tacit approval of Bangalore Mahanagara Palike (BMP), about 200 truckloads of municipal solid waste from Bangalore was dumped on 20 acres of land leased from a farmer at Mavallipura. On average, each truckload of waste weighs about 2.5 to 3 tons.

The dumping has been carried out next to a forest area and a eucalyptus plantation. Adjoining the dumping site are agricultural lands where crops like ragi (finger millet), avarekaalu (field beans) and flowers are cultivated. While cattle and dogs are in plentiful supply, kites and crows are also found in large numbers. The garbage has provided them with plentiful supply of food, contaminated as it may be. The soaring kites are easily and well within the flight path of IAF training planes, as they make sorties right over the dumping ground.

In the vicinity of Mavallipura, exist a few tanks (large surface water bodies created to harvest rain in an interlinked pattern) that are part of a chain of lakes/ tanks that join the Arkavathy river. Two of these tanks - the Mavallipura Tank and the Koramana Kunte tank - are situated downstream of the waste dump. The untreated leachate from the dump had been allowed to stagnate in a ditch next to the dump and has also slowly found its way into surface and ground water aquifers over time. Over the years, all drinking water sources in the vicinity have been adversely affected, and the threat of contaminating the Arkavathy river (a major

drinking water source of Bangalore) looms large. Also, the villagers of Mavallipura rely on the groundwater for their drinking water and cooking needs and they face serious health consequences as a result of the contamination.

A dump is different from a landfill due to the manner in which the waste is disposed off. A landfill is constructed by digging out the earth to form a very large ditch that is provided with an impermeable lining and a leachate collection system to prevent ground water contamination. An outlet for gases that are formed during decomposition of wastes is also provided for. A dump, in contrast, does not have any of these provisions and inevitably causes serious air, soil, and water pollution. Water pollution is the more serious problem since the leachates seep into the ground eventually reaching the groundwater aquifers (that are often used as a source of drinking water by people residing in the area).

In the new EIA Notification 2006, it is heartening to see the inclusion of Common Municipal Solid Waste Management Facility (CMSWMF) as Item 7 (i) in the Schedule. Due to the reasons and experiences detailed above, it is of vital importance that landfills also be included in the procedure of Environmental Clearance. This has a twofold effect. Firstly, illegal dumping by the Municipality is checked. This is a major problem in most urban areas in India, which are growing at such tremendous rates that often services are not able to match expectations. In the case of Bangalore, the volume of the waste has been so high that an inability to deal with it has resulted in widespread dumping in the outskirts of the city, especially on farm-lands and in water bodies (reportedly, the municipality admits that it does not have facilities to deal with almost 80% of Bangalore's waste). By including waste management under the purview of the EIA Notification, one hopes that pressure builds on bodies like the Bruhat Bangalore Mahanagara Palike (BBMP) to take serious and stringent steps in managing municipal waste. Secondly, it helps to ensure that landfills are created for solid waste management, with various aspects such as location, stability, etc. carefully considered to ensure that the communities living close to the landfill are not negatively affected by it.

7: Careless Expansion: West Coast Paper Mills

West Coast Paper Mills Limited (WCPM), established in Dandeli in the early 1950's, is located on the banks of river Kali in Uttara Kannada District (and less than 10 kilometres from the Dandeli Wildlife Sanctuary). WCPM draws water from the Kali River and discharges waste back into the river. If WCPM lived up to its environmental and clearance obligations, there should not be any pollution of the river. However, in reality, WCPM's effluent discharge has continually polluted the river and has had impact upon the health and livelihoods of communities that depend on the river.

For a long time, the company operated without an effluent treatment plant (ETP). The waste was simply released into the Kali River making it one of the four most heavily polluted rivers in Karnataka. However, due to strong public and civil society pressure (from Kali Bachao Andolan and ESG), KSPCB pulled up WCPM for failing to have a functioning ETP. While the letters were sternly and strongly worded, KSPCB never really acted to enforce the clearance conditions including refusing consent to discharge waste water into the river.

The Public Hearing on the expansion of WCPM in January 2007 witnessed strong opposition to the participation of NGOs from outside Dandeli.

Discharge of improperly treated effluents into the Kali River is just one of the several well-documented instances of WCPM's non-compliances with clearance

conditions. WCPM has routinely produced paper in excess of consented quantities, drawn water in excess of consented quantities, discharged waste water in excess of consented quantities. Yet, there has been very little enforcement either by the KSPCB or the MoEF.

If the MoEF were serious about safeguarding the environment and the people who depend on it, experience with WCPM and similar polluting industries around the country should have been reason enough to have strong monitoring and enforcement provisions with the EIA Notification – 2006. Yet the Notification does not provide for mandatory independent monitoring nor does it provide for rigorous enforcement of clearance conditions – it is silent on when penalties might be imposed or when clearance conditions might be revoked. This only goes on to suggest that the MoEF does not intend to interfere with the operation of an industry after it is cleared, irrespective of what it does to the environment.

8: Ship-Breaking Yards and Units Brought Under Ambit of EIA Notification 2006

Item 7(b) of the Schedule to the EIA Notification 2006 provides that 'all ship breaking yards including ship breaking units' are to be Category A projects requiring environmental clearance at the central level. The controversies over the French ship 'Clemenceau', the Danish ship 'Riky' and the Norwegian ship 'Blue Lady', have undoubtedly played a role in the Notification stipulating that ship breaking yards will have to seek environmental clearance at the central level. A brief look at some recent developments relating to ship breaking (particularly at Alang in Gujarat) proves helpful.

The Indian Supreme Court, vide its 14th October, 2003 order in Writ Petition No.657/1995, had directed the formation of a Supreme Court Monitoring Committee (SCMC) on Hazardous Wastes.[7] The Supreme Court order also considered the activity of ship breaking along the Alang coast of Gujarat, and in Paragraph 59, directs:

> *"The ship breaking operation referred to above cannot be permitted to be continued without strictly adhering to all precautionary principles, CPCB guidelines and taking the requisite safeguards which have been dealt extensively in the report of HPC* [Supreme Court's High Powered Committee on Management of Hazardous Wastes headed by Professor M.G.K. Menon] *which include the aspect of the working conditions of the workmen."*

Despite this progressive ruling from the highest judiciary, blatant violations of the Supreme Court's 2003 order continue time and again. In the past, the Government of India has repeatedly displayed its open support for the Indian ship-breaking industry at all costs, accompanied by a rather shocking apathy for the health and safety of the workers at Alang. Also in recent times, the Indian Government has publicly stated that it has no intention of adhering to the Basel Convention Guidelines on Environmentally Sound Ship Dismantling.

Ship-breaking is amongst the most controversial and un-regulated economic activities backed by the Government.

Clemenceau

The decommissioned French aircraft carrier Clemenceau was traded between many hands before being sent to India in a desperate attempt by French authorities to get rid of the liability that the ship had become. On December 31, 2005, Clemenceau left the French port of Toulon to be dismantled in Alang, Gujarat, India. The ship was host to a deadly array of toxic contaminants including, reportedly, at least 130 tons of asbestos. Despite concerted efforts by Indian and French NGO's, the French civil courts declined in providing relief on the technical ground that they were not competent to intervene in the matter (the legal basis relied on being that the contract related to "an administrative decision concerning the destination of war material.")

When Clemenceau's arrival in India was challenged before the Supreme Court, the court directed the SCMC to look into the matter. Although the SCMC first

7 More information about the SCMC including relevant judgments and reports can be found at (last visited on 15th April, 2007) <http://www.scmc.info>.
8 See generally, Kalpana Sharma, "Breaking ships need not break lives", Hindu, 21st August, 2006.

recommended that the ship be turned back, in its final report it was divided on the issue. This deadlock prompted the court to appoint another committee to assess Alang's capability of dealing with hazardous wastes on the ships sent for dismantling. In the meantime, the Clemenceau matter was resolved with the French Government recalling the ship, in consonance with the French Supreme Court (*Conseil d'Etat*) recommendation that the transfer to India be suspended.[8]

Riky

One of the most shocking cases highlighting the Government's lack of commitment relating to environmental and labour standards is that of 'Riky' - a highly contaminated Danish ship - which was eventually dismantled at Alang in 2005. Well before the Riky had reached India, the Danish environment minister Connie Hedegaard had written to her Indian counterpart A Raja informing him about hazardous substances aboard the ship and requesting the Indian minister to deny permission for the ship to land at, or be dismantled in, India.

This request was not heeded however, and the Riky beached at Alang in April 2005. While the SCMC initially recommended quite unequivocally that the '*Riky must be mercilessly driven out of Indian sovereign territory without any further loss of time*', this stance was later inexplicably reversed. The Riky was eventually dismantled at Alang under extremely controversial conditions, prompting allegations from several environmental groups that even the Supreme Court appointed authority was not free from vested interests.[9]

Blue Lady

A similar controversy arose more recently when the Norwegian ship "Blue Lady" headed to Alang to be dismantled. Environmentalists once again petitioned the Supreme Court protesting that the ship carried dangerous amounts of asbestos, heavy metals, and other contaminants. The petitions before that the court also prayed that the court direct that the Blue Lady not be allowed entry into Indian territory in light of the Supreme Court's directions of October 2003. On 5 June, 2006, Justice Arijit Pasayat and Justice CK Thakker of the Supreme Court, while dealing with a related application from the ship's owners, permitted the Blue Lady to anchor in Indian territorial waters on humanitarian grounds, while making it clear that this did not mean that permission for dismantling had been granted. The Technical Committee on Ship-breaking appointed by the Supreme Court on March 24, 2006 (chaired by Prodipto Ghosh, Secretary of the Ministry of Environment and Forests) appointed a five-member inspection team to physically inspect the SS Blue Lady. Despite the presence of a substantial quantity of hazardous waste aboard the ship (reportedly 1240 tons of asbestos, 108 lead acid batteries, unspecified amounts of polychlorinated biphenyl (PCB), etc.), the inspection team appointed by the Technical Committee concluded, "*No other hazardous material of any kind or quantity was found that cannot be safely removed, handled and disposed of at Alang.*"[10] Following a fresh application to the Supreme Court, the court decided that the scrapping was to be postponed, stipulating that the Technical Committee, which earlier approved the scrapping, were to write a new report to be submitted before the Court's final decision. The future of the vessel is still undetermined.

In light of a history of scant regard for the health of workers at Alang, and the resulting environmental damage due to the dismantling of toxic-laden ships, Item 7(b) of the Schedule to the EIA Notification 2006 is a welcome inclusion. If complied with in spirit, it will hopefully not allow any new ship-breaking yards (without adequate facilities) to exist anywhere in India. On questions regarding the fate of workers and possible environmental damage due to antiquated ship-breaking techniques at Alang, one can just remain in meditative silence. The EIA Notification 2006 and Item 7(b) will, of course, only apply to any new ship-breaking yards that are proposed in India.

9. See "Green groups expose regulatory failures: no more ships for scrap to India or Bangladesh", available at (last visited on 15th April, 2007) <http://www.greenpeaceweb.org/shipbreak/news108.asp>.

10 On this topic, see NGO Platform on Shipbreaking, "Comments on the Indian Committee Inspection Report on the Hazardous Materials onboard the SS Blue Lady", 31st July, 2006, available at (last visited on 15th April, 2007) <http://www.ban.org/Library/NGO_Platform_Critique_on_TC_Inspection_Report_Final.pdf>.

9: PLANNING COMMISION AND THE EIA PROCESS

The Planning Commission began the process of planning for the 11th Five Year Plan period (2007-2012) in 2006. Steering Committees, taskforces and groups were suddenly listed out on the website of the Commission, with no steps being taken to inform the general public in any manner about the nature of the exercise contemplated.

In order to gain insights into this process of planning, Environment Support Group (ESG), Bangalore filed an RTI application dated 6th November 2006 making the following queries:

* On what basis have the members of the Steering Groups and Taskforces been chosen?
* What has been the process for selecting the members of the Steering Groups and Taskforces?
* What has been the process for formulating the Terms of Reference for the various Groups and Taskforces?
* How is public participation and opinion being incorporated in the process of decision-making of the various Groups and Taskforces?
* How will the recommendations of the Groups and Taskforces be integrated in the framework of the 11th Five year Plan?
* Considering the importance of the recommendations in the formulation of the 11th Five Year plan, why has the time-span for creating reports been limited to only a few months?
* In many cases the deadline for submission of reports has expired even without the committees meeting. How is this anomaly being rectified?

The Planning Commission replied to the queries by sending ESG a sixteen-page document that indicated that the various Committees/ taskforces were mainly carried forward from the previously constituted Committees/taskforces for the 10th Five Year Plan. Even the Terms of Reference and issues to be raised were similar without any serious involvement from the various Ministries responsible. Unsatisfied with this response, ESG wrote back asking for more specific information on the unanswered questions that had been raised in the initial RTI application. Mr. P. C. Bodh (the Chief Public Information Officer) replied, vide a letter dated 15th December 2006, saying:

> *"…it is informed that whatever documents in the matter were available have already been given to you. We have no further documents to supply."*

It seems very surprising that while planning for important tasks such as the next five-year plan, the Planning Commission has had a discussion that is effectively contained within sixteen pages of documentation. No clear answers have been provided on the criteria by which the members were chosen to be on the committees/ taskforces/groups or how their reports are to be integrated into the actual Plan.

Another important issue it brings to light is the absolute dissonance between the working of the Ministries and the Planning Commission. An example is the Taskforce on EIA formed on 21st March 2006 (At a later date this taskforce was merged with the Taskforce on Governance, Transparency and Participation).

The following are the Terms of Reference for the EIA taskforce:

* Review the current laws, policies, procedures and practices related to the EIA regimes in India, and recommend correctives.
* Similarly review the institutional and individual capacities available for conducting and assessing EIAs, in consultation with the Task Force on governance, and recommend correctives.
* Specifically, assess the measures in position, and their effectiveness, for ensuring transparency and level of participation in the EIA process, in consultation with the Task Force on governance, and recommend correctives.
* Ministry of Environment & Forests will provide basic information and data input to the Task Force as and when required.

The Ministry of Environment and Forest (MoEF) during the same period of time had been independently reviewing the current laws and was involved in the process of formulating and finalising the National Environment Policy (NEP) and the new EIA Notification. While the NEP was finalized on the 18th May 2006, the EIA Notification was finalized on the 14th September 2006.

Before the EIA Notification was finalized, CEJ-I wrote a letter to Prof. Madhav Gadgil (Chairman) and Prof. V.L. Chopra (Co- Chariman) of the Taskforce. The letter outlined the non-participative methodology of formulating the Notification and the regressive nature of the Notification itself. It was mentioned that several members of the Parliament had reacted strongly against the proposed new Notification. Also mentioned was the case that if the proposed amendments were to go ahead then it would render useless the efforts of the Steering Committee and the various Working Committees appointed to study and strengthen the environmental

regulatory framework in India. No reaction or response was received at all from these gentlemen.

In December 2006, the merged Taskforce on EIA, Governance, Transparency and Participation finished their discussion and brought out new guidelines and ideas to the discussion relating to the EIA. Again, ironically, the process undertaken by the Taskforce was non-participatory. Promised discussions in the five Metropolises were abandoned due to which two members of the EIA Task Force, Sagar Dhara and R. Rajamani, the latter a former bureaucrat of MoEF, resigned. In a letter dated 10th February 2007 that they publicly circulated, the reason for their resignation was

> *"…*[i]*n its first meeting held on 13 October 2006, the TF decided to hold public hearings in 5 cities – Jorhat, Kolkata, Chennai, Mumbai and Delhi, one in each of the 5 major regions of India, to elicit public opinion on the subject. Subsequently the Planning Commission did not facilitate the holding of these hearings, so the two of us resigned from the TF as we felt that such hearings on these issues were vital."*

The draft report was circulated very briefly only within certain circles (on the cautionary note to take not more than a weekend to reflect and respond) and was then finalised. Interestingly, the report itself contains points and recommendations that are starkly critical of the current EIA Notification.

Clearly pitching for economic growth at any cost, the preparation of the 11th Plan has witnessed resignations of many Task Force members for adopting a non-consultative approach.

This experience was not limited to just the above-mentioned taskforce. Members have resigned from other taskforces and workgroups on similar grounds as well. One such example is the public resignation of Ms. Nandini Sundar from the working group on the Empowerment of Scheduled Tribes. In her letter to Mr. G.B. Panda (Advisor, Planning Commission) dated 19th March 2007, she writes-

> *"…since as I suspected, none of my views have been reflected in the report. Not only does the report lack any fresh perspective, being merely a compendium of issues as viewed by different departments, it is also low on specifics, such as how particular schemes have worked. The few concrete suggestions made amount to no more than tinkering with the existing system, which is patently failing."*

A hard-hitting question in such circumstances then, is on the effectiveness of such planning. The Planning Commission was set up in 1950 with the hope that it would holistically look into improving the standards of living in the country. Viewing the current planning trends, this hardly seems to be the case.