

# INTRODUCTION

On September 14<sup>th</sup> 2006, the Indian Ministry of Environment and Forests (MoEF) issued a new Environment Impact Assessment (EIA) Notification.<sup>1</sup> 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:<sup>2</sup>

- \* 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'.<sup>a</sup> EIAs



a. Shyam Divan and Armin Rosencranz, *Environmental Law & Policy in India*, 2<sup>nd</sup> 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 14<sup>th</sup> March, 2007) <<http://www.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.<sup>b</sup>

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.<sup>3</sup> (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.

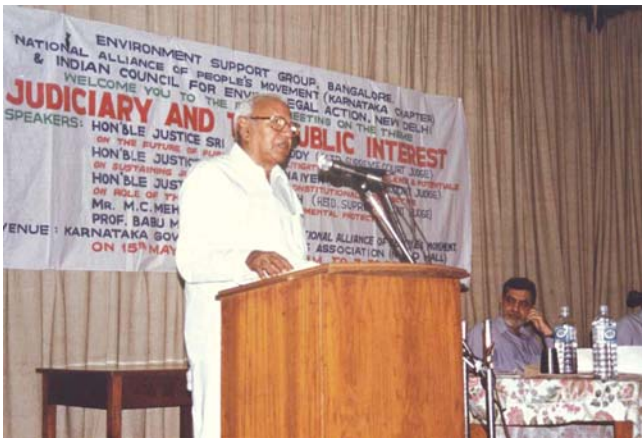
### Judicial determinants for environmental regulation in India

Delivering the keynote address at a workshop on “Judicial Enforcement of Environmental Law in Karnataka” in 2002,<sup>4</sup> 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 through 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. Venkatachaliah and B. P. Jeevan Reddy in the decision popularly identified as the *Sariska case*.<sup>5</sup> 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.<sup>6</sup>

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 pre-eminent 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."<sup>7</sup>

### 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,<sup>8</sup> and the National Commission for Exploitation of Natural Resources Bill, 2006,<sup>9</sup> 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".<sup>10</sup> 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 15<sup>th</sup> March, 2007) <<http://164.100.24.208/ls/Bills/26,2006.pdf>>.

9. Available on the Parliament website at (last viewed on 15<sup>th</sup> 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 pre-requisites 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.<sup>a</sup>

In this context, it helps to recall the deathly gas leak from the Union Carbide factory in Bhopal during the early hours of 3<sup>rd</sup> 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 legislations 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'<sup>a</sup>

"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 & non-ferrous); (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) Manmade 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 29<sup>th</sup> 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.”<sup>11</sup> 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,<sup>12</sup> 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<sup>13</sup> - 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*”.<sup>14</sup> 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](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 online at (last viewed on 14<sup>th</sup> 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 online at (last viewed on 14<sup>th</sup> 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 "(findings 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 he gave during the finalisation of the committee's



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>

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.”*<sup>15</sup>

### 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)<sup>16</sup> and harmonize it with the Govindarajan Committee recommendations.<sup>17</sup>

In a presentation that he made to Confederation of Indian Industry (CII) very recently,<sup>18</sup> 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 online at (last viewed on 14<sup>th</sup> 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 14<sup>th</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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



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 and objectively advance social, health, environmental, and scientific concerns.

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

considered debate and review of the changes proposed.<sup>21</sup>

Subsequent months saw widespread debate on the contents of the NEP and on the undemocratic manner in which it had been pushed through.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>



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 15<sup>th</sup> September 2005 inviting public comments and objections.<sup>25</sup> 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 13<sup>th</sup> 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.<sup>26</sup>

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 7<sup>th</sup> 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 18<sup>th</sup> 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 10<sup>th</sup> 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 10<sup>th</sup> February, 2007) [http://www.esgindia.org/campaigns/envt.decision.making/OpenLetter\\_PM\\_290605.htm](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 7<sup>th</sup> 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 10<sup>th</sup> 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*

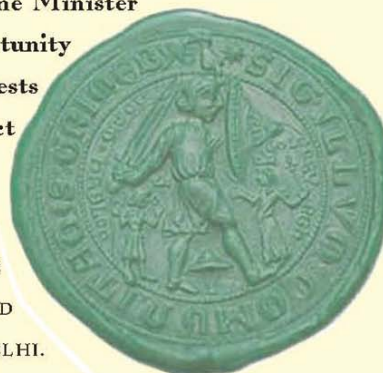
WE, THE PEOPLE REPRESENTING A WIDE RANGE OF TRIBAL, RURAL and urban communities, the rivers and forests, wildlife and coastal regions, deserts and mountains, declare the *Union Ministry of Environment and Forests* dead as it has failed to protect our environment.

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 occurred. 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 ecosystems 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*.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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 1<sup>st</sup> 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 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 10<sup>th</sup> February, 2007) <<http://www.esgindia.org/campaigns/nvt.decision.making/index.html#moefchalo>>.

28. Available at (last visited on 10<sup>th</sup> 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 'Death Certificate' Was Issued On Moef.

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

31. This has been extensively documented at (last visited on 10<sup>th</sup> February, 2007) <<http://www.esgindia.org/campaigns/nvt.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 18<sup>th</sup> 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 26<sup>th</sup> 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 22<sup>nd</sup> 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 5<sup>th</sup> 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, 14<sup>th</sup> 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.<sup>33</sup> (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 pre-eminent 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.<sup>34</sup>

### 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.<sup>35</sup> 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 socio-economic 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 Policymakers” 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.

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 online at (last visited on 15<sup>th</sup> March, 2007) <<http://www.ipcc.ch>>.

37. In this regard, see Annexure K: UNECE Principles for Meaningful Implementation Of The EIA Process.



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.

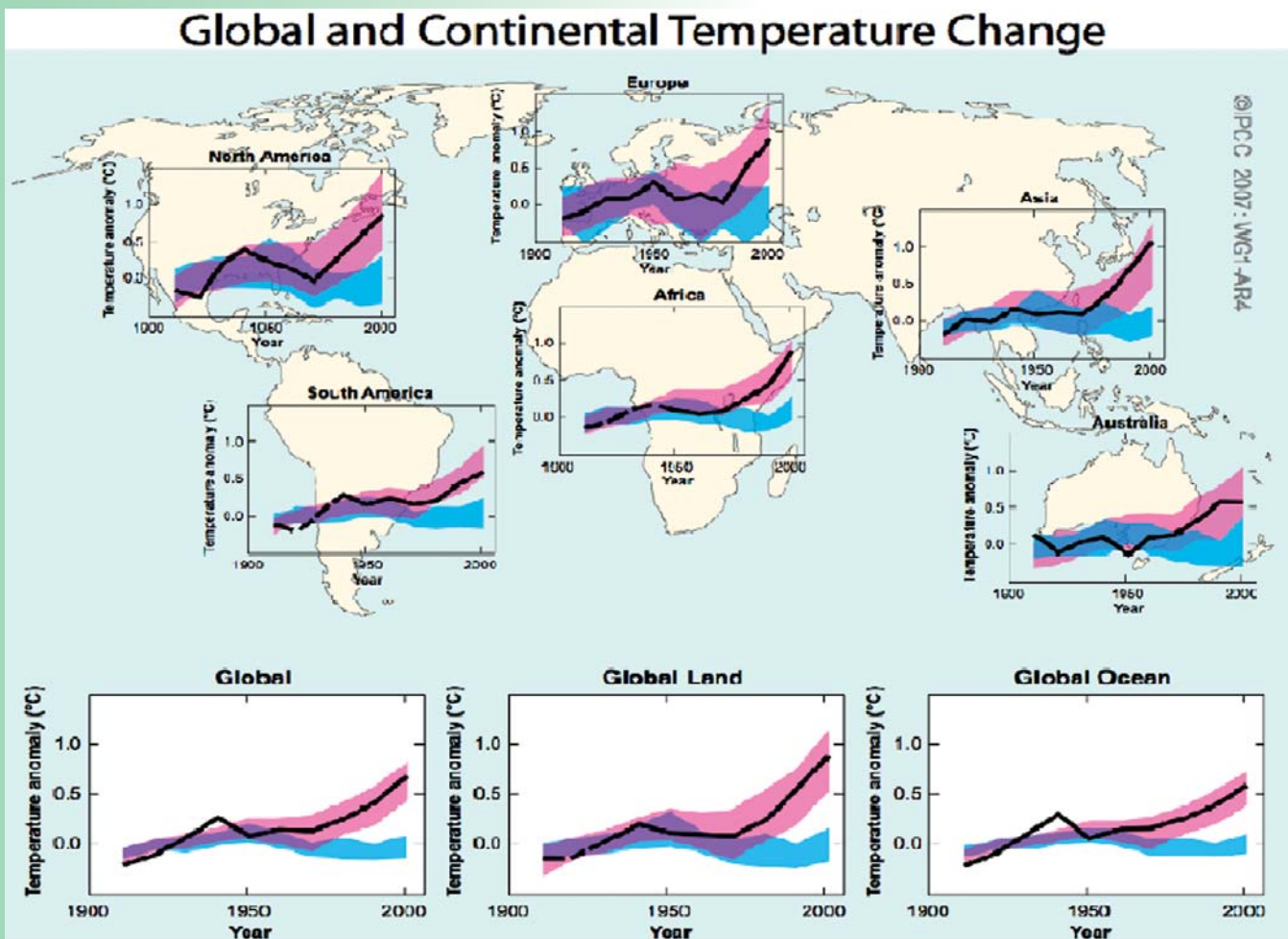
\* The understanding of anthropogenic warming and cooling influences on climate has improved since the Third Assessment Report (TAR), leading to very high confidence (9 out of 10 chance of being correct) that the globally averaged net effect of human activities since 1750 has been one of warming.

\* 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!



Source: Intergovernmental Panel on Climate Change

environment resulting in climate change,<sup>36</sup> a carefully considered approach is essential to the “re-engineering” of the EIA process in India.<sup>37</sup> (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 pre-eminent 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.**<sup>38</sup>

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’.<sup>39</sup> 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 22<sup>nd</sup> 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 26<sup>th</sup> July, 2006) seeking intervention from the Parliamentary body against ongoing efforts to manipulate environmental policies

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38. 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 India* (CRZ Notification Case), 1996 (5) SCC 281, at 299, 302, as discussed in *Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India*, 2<sup>nd</sup> 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 irrespctive resources and strengths for environmental management.”



and regulations to 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 22<sup>nd</sup> 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 5<sup>th</sup> 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 73<sup>rd</sup> (Panchayat Raj) and 74<sup>th</sup> (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.<sup>40</sup>

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

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

bureaucracy at the Centre (equivalent to the SEIAA at the regional levels).

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.<sup>41</sup>

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



*Railways excluded from EIA norms.*

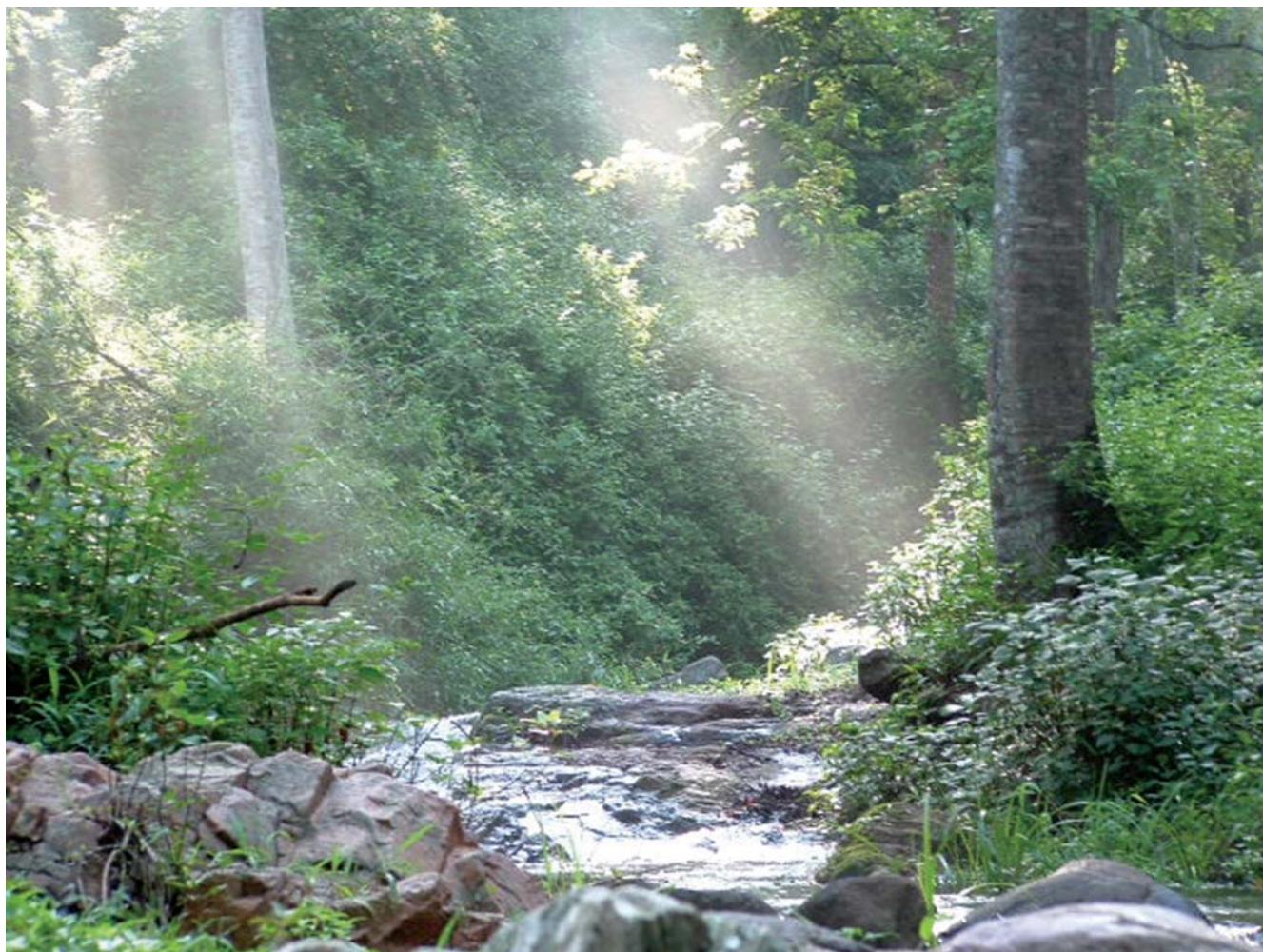
41. In this context, see Annexure J: EIA Stages Recommended by UNESCAP.



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.

mention of when penalties should be imposed or when and how clearance may be revoked.

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

#### **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.<sup>42</sup> 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.

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

However, 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 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.<sup>43</sup> 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.<sup>44</sup>

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, Distt. 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).