The exploitation of the Environmental Impact Assessment regulations in India by private consultants.

We seem resigned to our fate that India's environmental concerns have to be sacrificed at the altar of development. The definition of development itself is rather amorphous and so it seems rather myopic that we are sacrificing so much for the attainment of a skewed model of GDP focused development that most do not fully understand. Development and the environment have always been viewed as two didactic halves. Any industrial project or an infrastructural activity that has been construed as a "development project" requires a serious consideration of the detrimental impact of a proposed development project on the environment and an objective and detailed assessment of the same. Unfortunately our priorities have been to pursue GDP focused development model based purely on economic rationale to pursue a project without factoring in the actual cost to the environment and subsequently the secondary social impacts on local communities have been neglected in entirety. If the adverse effects of such a project outweigh the proposed benefits, it is obvious that the clearances should not be granted and the project needs to be relocated or terminated. The need for such an assessment resulted in the concept of an Environmental Impact Assessment (EIA).

The EIA process was conceptually meant to carry out a cost benefit analysis to assess the benefits of development activities in relation to their adverse impact on the environment. For the purpose of enforcement of EIA for projects and for standardization of environmental clearance, in 1994 when the "Environment Impact Assessment Notification 1994[1]" was issued under section 3 and rule 5 of the Environment Protection Act, 1986 by the Ministry of Environment and Forests. This Notification has allowed private consultants carry out EIA's which allows virtually any "consultant" that is recognized by the government to carry out an EIA assessment. There have been no restrictions on the consultant's relation to the promoters of the project that they will be assessing. This allows project developers to constitute a consultancy specifically for the purpose of carrying out their EIA's favourably. This would also allow consultants with no expertise and/or corrupt consultants to draft EIA's with no interest whatsoever in weighing the cost benefit analysis and merely passing EIA's to legalise any project.

There are several projects that may have significant environmental impacts that are exempted from the notification either because they are not listed in Schedule I of the EIA Notification, or their investments are less than what is provided for in the notification, or they can circumvent laws due to the lacunae in them. Moreover, several projects located in coastal zones covered by the Coastal Zone Regulatory Plan- Coastal Regulatory Zone Notification and the likes are exempted from the provisions of the EIA notification. Other projects such as defense and railway projects are explicitly exempted from the EIA notification altogether. The amendment in the EIA Notification, 1994[2] has provisions that any expansion or modernization project such a as a nuclear project, river valley, ports and harbours, thermal power plant and mining project may

---

[1] So 60(E) Dated 27th January 1994

[2] Amended on 4th July 2005 Gazette no.s.o.942(E)

obtain temporary working permission of up to two years till it gets environmental clearance. This is utterly useless as in Ecologically Sensitive Zones where two years of construction for any project would permanently obliterate indigenous ecosystems.
This paper examines the scope of abuse of the EIA process by allowing private consultancies and studies deviations from the original objective of the EIA.

Evolution of the EIA Concept

The European Council was one of the first to define EIA in their directive to the member states[3] highlighted the importance of EIA's as follows:
"The effects of a project on the environment must be assessed in order to take account of the concerns to protect human health, to contribute by means of better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the regenerative capacity of the ecosystem as a basic resource of life"[4]

Environmental Clearance from the State government basted on EIA has evolved into a mandatory provision for various developmental projects in India. It was introduced as an administrative measure in 1978-79, initially for submergence areas due to hydroelectric projects and later extending to all major projects with a potential impact on the environment. However conducting such an EIA was not mandatory till the Notification in 1994.

This notification that conferred powers on the Ministry of Environment and Forests to grant clearances to projects after reviewing the EIA's. This notification provided for a list of projects that needed clearances however, it exempted certain projects merely on the grounds of an investment threshold[5]. This was logically baseless as the larger projects such as reservoirs with massive investments had the largest impact on the environment. The absurdity continued till 2006 when it was done away with on the grounds that it was irrelevant, unscientific and illogical as the basis to decide the need for an assessment.[6]

Prior to the 1994 Notification, environmental issues were formally attended to by the Dept of Environment from 1980 In 1980, clearance of large projects from the environmental angle became an essential administrative requirement to the extent that the planning commission and the central investment board sought proof of such clearance before according financial sanction.
This task was later assigned to the specifically constituted Ministry of Environment & Forest in 1985. Five years later, the Dept of Environment and Forests, Government of India, issued guidelines for Environmental Assessment of river valley projects. These guidelines required various studies such as impacts on forests and wild life in the submergence zone, water logging

---

[3] ec.europa.eu/environment/eia/full-legal-text/85337.htm
[4] EEC Directives -ec.europa.eu/environment/eia/full-legal-text/85337.htm
[5]Initially INR 50 crores, revised to INR 100 crores
[6] Environmental Law in India, 2rd edition, P. Leelakrishnan Pg.347

potential, upstream and downstream aquatic ecosystems and fisheries, water related diseases, climatic changes and seismic activity.

The National Registration Board for Personnel and Training (NRBPT) gave some criterion for registration of EIA Consultant Organizations. This EIA Consultant Organisation Registration Scheme was implemented supposedly for the purpose of streamlining the process of EIA Clearances.[7]

The project proponents of new projects had to submit an application to the secretary, ministry of Environment and Forests, New Delhi in the standard format specified in the EIA notification.[8]

The application should be accompanied by a feasibility/ project report, including:
1. Environmental Appraisal questionnaire developed by MOEF.
2. Environment Impact Assessment Report.
3. Environment Management Plan and disaster Management plan
4. Details of public Hearing as in schedule IV of the notification (where ever necessary)
5. Rehabilitation plans (where ever necessary)
6. Forest clearance certificate (where ever necessary)
7. NOC from the state pollution control board (SPCB)

The importance of the EIA lies in the fact that the study serves as a baseline for post project environment management of issues. Due care and diligence must be taken to ensure that the data that is generated / collected reflects the most representative prevailing conditions. However no common yardstick or parameters have been established by the MoEF for this and it remains a subjective assessment with only a semblance of objectivity. There are 29 categories[9]of projects for which EIA is mandatory by the EIA Notification issued in January 1994 under the Environment Protection Act 1986.

The 1994 Notification was further amended 1997 which finally gave way to the 2006[10] Notification which eliminated the criterion of the quantum of investment as the basis of an EIA. EIA can be categorized into two parts,

a) Rapid Impact Assessment which is a preliminary assessment of the site with a survey of the possible foreseeable impacts according to anthropogenic parameters.

[7]envfor.nic.in/divisions/iass/Cir/Circulars.html
[8] moef.nic.in/modules/divisions/eia/
[9] EIA Notification 1994 (amended on 4/5/1994) Government of India Ministry of Environment and Forests , New Delhi
[10] Ministry of environment and Forests, Environment Impact Assessment Notification 2006.

b) Comprehensive Environment Impact Assessment which is a survey that studies the impact and environmental changes that may be induced by the implementation of the project and is conducted over one year with site surveys and Environmental Management Plan to mitigate or control the various impacts and bring them within the standard limits. The EIA report must be prepared by incorporation of data during all the four seasons of the year.

The Environment Protection Act, 1986 is unfortunately toothless and has no provisions that relate to justifiable environment clearances to projects. The 1997 amendment to the 1996 Notification, mandated public hearings, with detailed proceedings for the inquiry, however, it has become a statutory obligation that has rarely been complied with. Public hearings are a mere farce and a procedural norm, a public hearing has never had any legal say in the grant or rejection of a project. Further the only obligation of the Central and State Pollution control board is to hold a public hearing and an inspection of the facility is optional. There have been complaints that the inquiry is done in a perfunctory manner and the object behind the provisions is defeated as public opinion is disregarded. This has been highlighted in *Utkarsh Mandal vs. Union of India*[11] where the Delhi High Court has held that a public hearing must be respected. In Centre for Social *Justice vs. Union of India*[12], the Gujarat High Court held that the minutes of the public hearing must be disclosed to anyone seeking it and they have a right to appeal against the order granting environmental clearance under Section 11 of the National Environmental Appellate Authority Act 1997

The current stand of the law is that the project proponent is responsible for the preparation of the EIA statement, with the help of an external consultant or institution, which can be construed as any private body that conforms to the guidelines set out by the NRBPT.

The first step in seeking environmental clearance for a development project is to determine what statutory legislations apply to the particular project. The MOEF has brought out several notifications restricting the development of industries in specified ecologically sensitive areas.[13] Once the EIA clearance is given the project may commence without any further impediments. However the very classification of these ecologically sensitive areas is skewed and since such survey to ascertain these areas may be conducted by a private company, the areas may be re-categorised as non eco sensitive areas to facilitate a favourable EIA for any development project that may provide incentive to such a consultancy.

The projects that need clearance from the Central Government and are directly supervised by the MoEF are restricted to those industries where the effluent and chemical emissions could be anthropogenic and are limited to chemical and mineral manufacturing and purification plants[14]

---

[11] (1994) 3 SCC 651

[12] AIR 2001 Guj 71 per M.S. Shah J

[13] moef.nic.in/modules/divisions/eia/ moef.nic.in/downloads/public-information/Final_report_ICZM.pdf envfor.nic.in/divisions/iass/eia_cons_organ.pdf

[14] http://envfor.nic.in/legis/eia/so-60(e).html

With the possibility of a private consultants conducting an EIA, there is a possibility of the private consultants being paid off or even a subsidiary company being formed specifically for favourable EIA's being conducted. This also allows private consultants to conduct EIA's at their discretion and the government would presumably find it difficult to ascertain whether the EIA has been conducted impartially. Several EIA consultants have stated that they are under immense pressure to give pro-project assessments, as the assessments are funded by the project proponents themselves.[15] Moreover the committees constituted by the government such as State Level EIA Authority and the Expert Appraisal Committee, constituted by the MoEF are not empowered to investigate the impartiality of the EIA[16]

A glaring loophole in the legislation is that the EIA assessment is conducted solely by the Assessing private consultant and no governmental representative is required to be present during the conducting of the EIA survey. This private consultant is appointed by the company that proposes the project and there is no bar on this consultant being a subsidiary of the company undertaking the project. Secondly there is no check or measure to ensure that this consultant is not an interested party and thus it is absurd and decidedly myopic. This leaves subjective assessments with regard to submergence areas of dams and outflow area of sewage or effluents at the absolute discretion of the private consultant conducting the EEIA and not overseen or inspected by the Government. Such ancillary impacts that are not easily quantifiable and non point source pollutants are often excluded from the EIA by the consultants so as to grant a favourable assessment that gets passed by the government easily.

There has been a continuing trend in EIA reports that are decidedly unquantifiable and vague and have been conducted by incompetent authorities. Such procedural irregularities and lapses in the administrative process are faults that the courts need to take serious cognizance of. Prominent indicia of such defective reports include "conclusions that are sweepingly vague, unsupported in fact, scientifically indefensible, wholly unquantified, unexplained in comprehensive terms, incomplete, excessively cryptic or perfunctory, argumentative, genuinely preposterous, dependant in stale data of biased procedures, decidedly ignorant of important topics, delete telling information, exude arrogance, callousness…unresponsive to expert criticism or demonstrate reluctant or begrudging compliance. "[17]

Such incentivized negligence or begrudging compliance is often indicative of the presence of a vested or monetary interest of the consultant in providing a decidedly defective EIA assessment that is neither indicative of the impact of the project nor is it scientifically quantified. Secondly the lenient protocol of submission and resubmission of EIA rather than outright rejection,

[15] Lexis Nexis Student Series, Environmental Law Casebook, P. Leelakrishnan. Pg.360
[16] vide MoEF Notification S.O. 1533 ,New Delhi, September 14, 2006
[17] WH Rodgers Jr. Environmental Law 1977 Pg.731

facilitates incompetency in EIA report preparation which allows unqualified assessors to make EIA reports.

The division of projects that need MoEF sanction fall into two categories, A, those projects that need MoEF clearance from the Central Government, Category B, projects that require an EIA to be conducted and B1 projects that are considered too trivial for EIA to be conducted.

The blatant abuse of the EIA process in the case of Nirma Cement Manufacturing in Gujarat[18] that reached the Apex Court ratifies that EIA process can be circumvented. A three judge bench headed by Chief Justice S.H. Kapadia, in his ruling, directed the expert appraisal committee (EAC) of the ministry of environment and forests (MoEF) to study whether the plant was in the wetland area or water bodies.[19] This is a retrospective and remedial measure after the damage to the environment has already been done and hence it doesn't address the issue of preventing environmental damage by preventing the setup of such a project that would adversely impact the environment.

The Gujarat HC did not take into account their arguments regarding faulty environment clearance on part of the Gujarat Pollution Control Board as well as by the Ministry of Forest and Environment. Nirma had the option to challenge the MoEF order before it or the Green Tribunal but chose to appeal at the Supreme Court since the Gujarat High Court had given an adverse judgment. While obtaining clearance, the cement plant site was mentioned as barren land. The reservoir's status has been central to the conflict between Nirma and the area residents, the crux of which was the irresponsible granting of the EIA.

This matter was first raised in September 2008 during the mandatory public hearing (as specified by the MoEF) that precedes environmental clearance by the environment ministry. The ministry's record shows only 60 people attended the hearing, while residents claimed that close to 400 people were present and many people objected to the plant's construction in the water body. The ministry however, granted clearance based on a rapid environmental impact assessment (EIA) that described the site as barren land and thereby obtained clearance for the project.[20]

The MoEF has turned a blind eye to the provision that allows a private consultant to conduct an EIA.

Plagiarism is another plaguing issue that has undermined the objective of EIA's, Ernst and Young, had plagiarized one project's Rapid EIA report for another for a mini hydel project in Karnataka[21]

---

[18] Supreme Court order dated 09.09.2011 in SLP (Civil) No(s).14698/2010

[19] http://www.environmentportal.in/content/record-proceedings-supreme-court-india-petition-special-leave-appeal-civil-no-146982010-prop

[20] http://downtoearth.org.in/content/nirma-whitewash?quicktabs_1=1

[21] Dandeli Hydel Project EIA & Tatihalla Dam Project- Environmental Law Casebook, P. Leelakrishnan. Pg.360

There are no specifications as to the qualification of those members who are in the private consultancy nor does it specify that this consultant must be regulated or accredited to any National Body so as to ascertain the authenticity of the report and act as a watchdog for cases of undue influence or coercion being used to obtain a favourable EIA report from the agency.

Corporates and Industrial giants can also establish a subsidiary company that is a EIA consultancy, created solely for the purpose of clearing projects that the parent company wants to institute. No restriction has been imposed for such companies to clear projects of parent companies of make EIA reports for the same. The doctrine of *Nemo judex in causa sua* is seemingly subverted by this provision, since there has been no explicit provision forbidding the creation of a subsidiary consultancy agency for the purpose of carrying out EIA for projects.

Further the EIA Consultancy is in no way held liable for fabrication of reports. The maximum penalty levied on a consultant who has been negligent or malafide in conducting a report is from EIA consultancy.

As per press reports, the ex- minister of Union Environment Minister, Jairam Ramesh has said that a small percentage of the most sensitive projects will soon be subject to EIAs by government-appointed panels. Currently, EIAs are commissioned by the project proponents themselves, using paid consultants.
"The EIA is central to the clearance process. But between the manipulated EIA report and the fixed public hearing, the environment clearance has become a fait accompli," he admitted.[22]

In a feeble attempt to remedy the loopholes in the current EIA system a system of qualifications for EIA Consultants have been framed by the National Registration Board for Personnel and Training NRBPT. In its notification Criterion for Registration of EIA Consultant Organizations[23] This notification has stated the following reasons (inter alia) for a reappraisal of the EIA system and the addition of newer standards:

1. Inadequate and incorrect scoping of the EIA,
2. Consultants not having adequate understanding for development of EIAA
3. Poor quality of inputs to EIA's
4. Mostly "copy-cut-paste" jobs
5. No checks on the competence of EIA Consultants
6. No Liability of EIA Consultants

With such glaring loopholes in the law, it would be safe to assume that prior to this notification there were lacunae that had been decidedly left open for exploitation by interested parties and there have been embarrassing instances of abuse of the legislation that have left the MoEF and

---

[22] http://www.hindu.com/2011/04/07/stories/2011040763132400.htm
[23] NRBPT/EIA 105/October 06/Rev00

legislators red faced. Moreover it is surprising that the very politicians that seem very deft at creating a politico-industrial nexus and is yet decidedly inept at coming up with a comprehensive legislation that aims to protect the environment from lopsided development.
EIA Consultancies now need to conform to ISO 9001:2000 norms[24] and NRBPT acts as an ombudsman for the EIA consultants and regulates them to the extent of the guidelines laid down by it.

This has been a stop gap arrangement to plug the gaping loopholes in the legislation that leaves immense scope for abuse and circumvention. Unfortunately the government has decidedly taken a lenient stand on the matter. Both the initial legislation and this feeble attempt to remedy the legislation have been decidedly ineffective and there has been inexplicable leniency towards EIA consultants.
For the purpose of formulating a appellate body to which complaints against EIA compliance could be heard, the National Environment Appellate Authority (NEAA) was set up by the Ministry of Environment and Forests to address cases in which environment clearances are required in certain restricted areas. It was established by the *National Environment Appellate Authority Act 1997* to hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall or shall not be carried out, subject to certain safeguards under the Environment (Protection) Act, 1986. The Authority shall become defunct and the Act shall stand repealed upon the enactment of the *National Green Tribunal Bill* currently pending in Parliament.[25]
However the National Environment Appellate Authority is spineless in its functioning[26] and has been rendered toothless. It may be borne in mind that it is this NEAA that the National Green Tribunal (NGT) seeks to replace. The effectiveness, independence and success of the NGT in achieving the function of a national appellate body remain contingent on its implementation,

The legislators seem to have deliberately inserted lacunae into the legislation facilitated by malafide motives or vested interests. More often than not, local projects need the go ahead of political parties in their constituency and these political elements have an intrinsic interest in the commissioning of such projects. Current trends in lobbying for a shift to greater reliance on non governmental bodies along with functional autonomy and institutional freedom in assessment are policies that reek of malafide motive and are directed deliberately sabotaging the EIA process rendering it decidedly ineffective. Functional autonomy and institutional freedom have wide scope for abuse and unless it absolves the consultancy from external influence it is merely a garb to allow arbitrary discretion to EIA consultants to make whimsical or biased EIA reports.
Contrarily the concentration of power in a single agency like the MoEF has proven ineffective in the past and may have been compromised as proven in MC Mehta vs. Union of India on behalf

---

[24] moef.nic.in/divisions/iass/eia_cons_organ.pdf
[25] http://moef.nic.in/modules/rules-and-regulations/national-environment-appelate/
[26] As held in *Utkarsh Mandal vs Union Of India (1994) 3 SCC 651*

of Monitoring Committee[27] where the impact of the diversion of the Yamuna was not incorporated into any EIA and no proper study was conducted.

The cardinal fault with the EIA assessment is that even when conducted in concordance to the rules and without malafide intent, there is a gross incompetence of the surveyors and many parameters cannot be quantified precisely. Repeated concerns have been raised about the anomalies in data and analysis and as to whether the said anomalies are a mere oversight on the part of the consultants or whether the anomalies serve to facilitate the planned moves to justify the establishment of developmental projects in the said areas[28].

An illustration of this ambiguity is the difficulty and dismal record in gauging submergence areas of reservoirs. Inevitably the project's submergence areas is either grossly overestimated or underestimated depending on the leniency or incompetence of the assessment consultancy.

Lastly, the very concept of delegating the task of EIA to a consultancy is bizarre as there is no mechanism to ensure that the assessment is carried out objectively and using a common yardstick. Ensuring that the EIA is free of influence is almost impossible and punishments meted out to agencies that give flawed reports are of no deterrent value.
The EIA Notification of 2006 envisages expert professional people to constitute EIA appraisal agencies, relying on competence and maintenance of professional standards of ethics and integrity. If the nominations, to these agencies are made as envisaged, there would be probably be no contention as to the credibility of EIA's.
Amongst the few remedial measures that have been discussed in a public forum, the Law Commission Report states that "Opposition to centralization of EIA can be neutralized by establishment of environmental courts. The environmental courts will examine the impact and resolve disputes in appeal."[29] This may prove effective if it can reduce the red tape and form a preliminary redressal forum for disputes at the state level. The public hearing also needs to be considered in court as this would ensure that any opposition to the EIA is duly noted and heard out without prejudice or with any intention to stamp out opposition.

There are innumerable lacunae and these needs to be resolved by a separate tribunal or legislation that deals with the EIA process, with adequate enforcement measures. Since the abuse of the EIA undermines the very purpose of creating an assessment to weigh the environmental costs versus the benefit of industrial projects, we need an authority that consisting of an expert assessment panel that autonomously carries out these assessments. This will reduce the possibility of bias or prejudice being induced in these private consultants and also improve the quality and objectivity of the assessment.

---

[27] 2003 JT 1 SC 391(Supp)
[28] The Hindu, Survey of the Environment, 2002 , Pg 87-sKanchi Kohli and Manju menon
[29] lawcommissionofindia.nic.in/reports/186th%20report.pdf

The importance of creating a common yardstick for EIA body should not be undermined since subjective decisions are made as per the consultant's discretion and this allows arbitrary use of such power. A list of suggested reforms could be drawn up and incorporated into an amending Notification and be the creation of a national regulatory and vigilance body.

The public hearings should be carried out in a tribunal that is set up for this specific purpose and the assessment needs to be quantified so that a rating can be given to the project and on the basis of that rating, the MoEF can grant clearance to such a project. This tribunal should be both autonomous and must be empowered so that it does not meet the same fate as the National Environment Appellate Authority. Whether or not the National Green Tribunal is successful in fulfilling the aforementioned objectives will remain a question of how much discretionary power and autonomy is granted to it.

©Akash Karmakar 2012