SHIELDING TREES AGAINST GROWING INFRASTRUCTURAL GREED

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INTRODUCTION

India is undergoing journey of economic liberalization and revolutionary growth and one of the most important aspect of economic development is – Infrastructure. However, most of the times the cost of these development and infrastructure growth is substantial negative impact on the environment. The infrastructural development has huge potential of having great negative impact in the environment. Land, Air, Water, everything is polluted because of these infrastructural projects. A lot of these negative impacts, however, may be either mitigated or minimised by presence of robust regulations to safeguard the environment. But at the same time there is an apprehension in the minds of investors, and even governments, that stringent economic policies and regulations may hinder infrastructure development.

There are quite a few regulations in India to safeguard the environment and they have detailed procedures to assess the impact of the proposed infrastructure projects such as the Environmental Protection Act, 1986, Forest Conservation Act, 1980, Water Prevention and Control of Pollution Act, 1974, Biological Diversity Act, 2002, Public Liability Insurance Act 1889 and National Green Tribunal Act, 2010. Even the Constitution of India vide Article 48A and 51A (g) includes provisions related to protection of environment. But how properly these legislations are being complied with has to be analysed. Typically, in countries where compliance is low, projects meant for development have also resulted in substantial environmental and social costs. Governments and investors fear the implementation of environmental policies and claim that these are bottlenecks or speed breakers to growth. Several new studies show that stringent compliance of environmental policies will neither affect competitiveness nor slow down GDP growth. On the contrary, it may result in bottom line benefits at the level of projects as well as sustain economic growth by enhancing efficiency and innovation.[1]

Certain compliances and conditions are also mentioned in these legislations which have to be followed before approval of the Infrastructural projects. But the efficacy of these regulations in the present times is something which has to be analysed. Proper implementation and enforcement of these regulations, especially after the project is approved, i.e. in later stages is

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[1] Green Tape: Environmental Regulations may not cost as much as governments and businesses fear, Jan 3, 2015, The Economist; Albrizio. S, Botta.E, Kozlu. T, and Zipperer. V. (2014).; Do Environmental Policies matter for productivity growth? Insights from new cross-country measures of environmental policies. Organisation for Economic Cooperation (OECD). Economics Department Working Papers No. 1176; Kathleen Dechant, Barbara Altman, Robert M. Downing, Timothy Keeney, Mark Mahoney, Abigail Swaine, . . . Post, J. (1994). Environmental Leadership: From Compliance to Competitive Advantage [and Executive Commentary]. The Academy of Management Executive (1993-2005), 8(3), 7-27. Available at: http://www.jstor.org/stable/4165201

needed to be stretched upon. Critical analysis of all these regulations will be done while comparing it with similar regulations in different countries. The paper also aims at discussing what all new regulations are needed and suggest amendments and additions to the existing laws in order to facilitate better environmental policies without affecting infrastructural growth in the country.

Objective of Research

- To discuss legal framework related to environment protection vis a vis Infrastructure in India.
- To discuss various approvals required under different environment related laws for Infrastructure development.
- To analyse monitoring and compliance protocols and discuss their effectiveness.

LEGAL FRAMEWORKS FOR ENVIRONMENT REGULATION AND COMPLIANCE IN INDIA

There are various environmental legislation in India has been promulgated to respond to the impacts of land use change, infrastructure development and industrialisation. While major acts are legislated in the Parliament at both the central and state level, India has several executive led rules, guidelines and other orders that are passed by the central and state authorities, which have governed how environment and related social impacts can be assessed, regulated and managed. These authorities are given delegated powers through the Acts to frame rules within the framework of the legislation.

There is a range of laws and subordinate legislations that lay down procedures and conditions under which approvals have to be taken on environmental parameters. Some of these present upfront restrictions for areas where no approvals can be granted and others present the requirement of detailed appraisals and public consultations based on which expert bodies would need to take considered decisions. In this section we present some of these to understand the range of regulatory approvals that industrial and infrastructure projects need to go through prior to initiating any construction activity. They also directly speak to the subsequent sections which identify the monitoring and compliance protocols as well as the institutional maps that show how these processes take place within respective institutions.

DIFFERENT LEGISLATIONS DEALING WITH ENVIRONMENT AND INFRASTRUCTURE

Environment Protection Act, 1986

The Environment (Protection) Act was passed in 1986. The overall objective of this legislation is driven towards the protection and improvement of the environment. It is the umbrella legislation that extends to water, air and land and how they inter-relate with both the human and natural environment. The Act vests with the Central Government through the Ministry of Environment, Forests and Climate Change (MoEFCC) the powers to take any

measure to control pollution and protect and improve the environment. The Central Government also has the power to direct closure or stoppage of any activity or cut the electricity, water or any supply to it as per Section 5 of the Act. Violation of any of the provisions under the EPA can lead to punishment under Section 15.

The legislation has also been brought to life through rules and notifications. Some of these include Environment Impact Assessment Notification, 2006 (EIA 2006), Coastal Regulation Zone (CRZ) Notification, 2011 and Hazardous Wastes Rules, 2016, which are discussed further in this section. There is a range of institutions and processes both for approval as well as compliance that have been created under specific notifications or rules.

Environment Impact Assessment Notification, 2006 (Eia 2006)

The EIA Notification 2006 lays out a detailed process for obtaining Prior Environment Clearance for any new projects or activities, or the expansion or modernisation of existing projects and projects seeking capacity addition with change in process or technology. Projects or activities are categorised as A and B, depending upon the extent of their capacity and size. For example, River valley projects of more than 50 MW hydroelectric power generation are Project A while river valley projects whose power generation is between 25 and 50 MW are Project B, as per the Notification.

Category A projects acquire their clearance from the MoEFCC while category B projects apply for clearances to the State Environment Impact Assessment Authority (SEIAA). The environment clearance process consists of four steps of screening, scoping, public consultation and appraisal. Expert Appraisal Committees (EACs) are constituted at the Central Government and the State Government or Union Territory level (called the State Expert Appraisal Committee), which screen, scope and appraise applications for Category A and Category B projects respectively. Category B projects can be further broken down to B1 and B2, thereby determining which projects and activities will require an EIA before approval. Since January 2016, institutions have been created at the District level as well and they too have been included in the EIA Notification for approving certain instances of mining of minor minerals. These are the District Environmental Impact Assessment Authority (DEIAA) and District Level Expert Appraisal Committee (DEAC)

Coastal Zone Regulation Notification, 2011 (Crz 2011)

The CRZ Notification regulates the setting up and expansion of any industry, operations and processes in the coastal stretches and water area upto the territorial limits of the country called the coastal regulation zone (CRZ). The CRZ is defined as:

- the land from the High Tide Line (HTL) to 500m on the landward side along with the sea front,
- the land between the HTL and 100m or width of the creek (whichever is less) on the landward side along the tidal influenced water bodies,

- the land between the hazard line and 500 from the HTL,
- the land between the HTL and the LTL, water area of the tidal influenced water body and
- the water and the bed area between the LTL and the territorial water limit.

The CRZ is further classified in to 4 sub zones and regulates the use of these different sub zones differently. Under each area, a list of activities that are permissible and not allowed is given.

CRZ-1 It includes the area between the High Tide Line and Low Tide Line. It also includes areas that are ecologically sensitive and that have geomorphological features that play a role in maintaining the integrity of the coast and lie in the CRZ. For example mangroves, mudflats, salt marshes, turtle nesting grounds.

CRZ-2 It includes developed and urban areas, which are substantially built-up and have been provided with drainage and approach roads and other infrastructural facilities, such as water supply and sewerage mains.

CRZ-3 It includes underdeveloped and rural areas, which do not belong to either CRZ-I or II. It includes the coastal zone in the rural areas (developed and undeveloped) and also areas within municipal limits or in other legally designated urban areas, which are not substantially built-up.

CRZ-4 It includes territorial waters from the LTL to 12 nautical miles out to the sea and water area of the tidal influenced water body from the mouth of the water body at the sea upto the influence of tide.

Any application seeking CRZ clearance is appraised by the concerned State/Union Territory Coastal Zone Management Authority (CZMA). If the project seeking clearance is covered under the EIA Notification, 2006, the SCZMA forwards its recommendations to either the MoEFCC or SEIAA, as the case may be.[2] Other projects that are examined by the MoEFCC based on recommendations of the concerned SCZMA, are construction and operation of lighthouses, laying of pipelines, mining of rare minerals and construction projects of the Department of Atomic Energy and Defence requirements. The SCZMA forwards the recommendations on projects that are not listed under the EIA Notification to the respective SEIAA, except for construction projects of less than 20,000 sq m of built up area. Construction projects of less than 20,000 sq m of built up area are approved by the concerned State Planning Authority. Validity of the CRZ clearance is the same as the environment clearance or permission from the State Planning Authority, within which the CRZ clearance is also included.

The District Level Coastal Committees (DLCCs) are also consulted by the CZMAs in some

[2] Category A projects are examined at the national level by the MoEFCC. Category B Projects are granted clearance by the State Environment Impact Assessment Authority (SEIAA)

states like Karnataka and Tamil Nadu, as the CRZ Notification states that DLCCs will 'assist' the State CZMAs

Hazardous and other Wastes Rules, 2016

The Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 lays down the rules for management and transportation of hazardous wastes.

Authorisation or approval: Every occupier who is engaged in handling, generation, collection, storage, packaging, transportation, use, treatment, processing, recycling, recovery, pre-processing, co-processing, utilisation, offering for sale, transfer or disposal of the hazardous and other wastes obtains an authorisation from the State Pollution Control Board. The SPCB after scrutiny of the application, grants an authorisation which is valid for five years.

Establishment of a Treatment, Storage and Disposal Facility (TSDF): The state government, occupier, operator of a facility or any association of occupiers is responsible individually or jointly, or severally for identifying sites for establishing a facility for treatment, storage and disposal of the hazardous and other waste in a state. This is done as per the guidelines issued by the CPCB and after obtaining approval from the SPCB, on the design and layout of the facility.

Solid Waste Management Rules, 2016

The Solid Waste Management Rules 2016 was promulgated in supersession of the Municipal Solid Wastes (Management and Handling) Rules 2010. It lays down the regulations for handling solid waste. There are two aspects of these Rules which are elaborated further.

These rules lay down the conditions for setting up a solid waste processing and disposal facility. As per the rules, the setting up of a solid waste processing and disposal facility is to be facilitated by the District Magistrate/District Collector/Deputy Commissioner. Suitable land for the same is to be identified and allocated to the local authorities in co-ordination with the Secretary-in-charge of State Urban Development Department.[3] The performance of the local bodies is reviewed on waste segregation; processing, treatment and disposal, once in a quarter and corrective measures if necessary are taken. The local authorities and the village panchayats are responsible for facilitating the construction, operation and maintenance of solid waste processing facilities on their own or with private sector participation or through any agency.

The rules also prescribe procedure for authorisation under which application is to be given by these authorities to the State Pollution Control Board or the Pollution Control Committee for the grant of authorisation for setting up waste processing, treatment or disposal facility, if the volume of waste is exceeding five metric tonnes per day including sanitary landfills.

[3] Section 12, Solid Waste Management Rules 2016

Water (Prevention and Control of Pollution) Act, 1974

This Act was promulgated with an aim to prevent and control water pollution. It provides for setting up standards for discharge of effluents and sewage in the water bodies. The Water Act also provides for the formation of a Central Pollution Control Board and a State Pollution Control Board, which are given powers and functions to enact the provisions given under the Act. The PCBs are supposed to ensure that no surface water body is contaminated by industrial effluents or sewage.

Approvals related to Consent to Establish (CTE) and Consent to Operate (CTO): CTE is procured from the SPCBs before establishing or taking steps in establishing any industry, operation or process, or any treatment and disposal system or an extension or addition which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land. The consent letter contains conditions regarding outlet of discharge, nature and composition, temperature, volume or rate of discharge, period of consent etc.

While CTE is taken before actual commencement of work to establish, CTO is procured before actual commencement of work of production. Usually CTEs are valid for a period of 5 years. CTOs are renewed periodically. The period for which it is valid, is set by the concerned SPCB.

Air (Prevention and Control of Pollution) Act, 1981

This Act was promulgated to prevent, control and reduce air pollution including noise pollution. The Act also has a provision for declaring Air Pollution Control Areas, in which industrial plants cannot be set up without due permissions. It also provides for putting in place air pollution emission standards for industries.

Approvals related to Consent to Establish (CTE) and Consent to Operate (CTO): CTO and CTE are required to be taken from the SPCBs to establish or operate any industrial plant in an air pollution control area. Conditions given in the consent are concerning installation and operation of control equipment of said specifications, alteration or replacement of existing control equipment in, the conditions accordance with directions of the SPCB, running condition of the control equipment etc.

The Forest Conservation Act, 1980

The Forest Conservation Act, 1980 lays down the provisions that regulate the diversion of forestland for non-forest purposes. This is with the stated objective of ensuring long-term conservation of the forests in India, and reducing forest degradation. Any user agency (both government and non-government) has to seek prior permission from the Central Government before de-reserving any forest land, felling of trees or before diverting any forestland for non-forest use. The application for the same is moved through the Forest Department of the State Government, which is the final point of approval for forest diversion under this legislation. Non-forest use implies the breaking up or clearing of any forest land for the cultivation of tea,

spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants and for any purpose other than re-afforestation

Permission is sought by applying for 'Forest Clearance'. The Forest Clearance will consist of an approval along with certain conditions that try to minimise the impact on forest land. The forest clearance consists of general conditions like that of compensatory afforestation, rehabilitation of project affected families (if any) and also has specific conditions depending on the type of project it is. Proposals involving forest land upto 40 hectares (not including activities related to mining and encroachments) are handled by the Regional office of the MoEFCC. Proposals involving forest land above 40 hectares and those related to mining and encroachments are handled by the MoEFCC.

INTERFACE WITH FOREST RIGHTS

Following the passage of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, forest land cannot be diverted and trees cannot be felled until the process of recognition of rights is determined and approval of the gram sabha (village assembly) is taken. The details of this are prescribed under the FRA, 2006. According to the MoEFCC Circular (dated 3/8/2009), the state government has to provide evidence of initiating and completing the process of settlements while sending the proposals for the diversion of forestland. It also has the requirement of the consent of the gram sabhas prior to any permission for diversion. This consent however applies only to non-linear projects (as per MoEFCC circular in 2013).

FINDINGS AND CONCLUSION

After analysing the above laws and provisions relating to Infrastructure development several conclusions can be drawn upon an understanding of the framework of the regulations.

Firstly, there is inconsistency in Information provided to understand compliance. Different regulatory institutions discussed in this paper, publicly disclose information about action taken against non-compliance through periodic disclosure, annual reports or while responding to parliamentary questions. However, there is no clear pattern or consistency that can be observed in these disclosure mechanisms. The public data on both approvals and monitoring is of different time periods and has no sectoral parity. Many of the regulatory institutions have been in existence for decades and are aware of their jurisdictional overlaps. E.g. Effluent discharge into rivers and streams is monitored both by the PCBs and the MoEFCC under different laws. Approvals under each of these laws refer to the protocols of other related legal clauses.

However, there needs to be collaborative effort to collate and present a comprehensive picture of enforcement and compliance of environment regulations rather than scattered disclosure. Since most of these legislations are under the jurisdiction of the MoEFCC, the ministry can take proactive steps towards ensuring this.

Secondly, merely issuing Notices cannot be considered adequate remedy. Analysis of different law in this paper reveals that the regulatory system is focused on issuing notices and giving directions against non-compliance. There are two issues which emerge from this practice. First, the number of notices highlighted by the PCBs or the government monitoring reports uploaded on the MoEFCC's website does not give clarity of whether the complaints were actually addressed after the notice was issued. The second and related issue is that of remedies. The issuance of notices, either proactively or against a complaint does not necessarily result in impacts being addressed. The case studies highlight that additional and much more nuanced effort is required to ensure that the show cause notices actually result in clean ups, or long term compliance to environmental safeguards. For instance, a notice on a complaint on municipal solid waste does not necessarily mean the village is relieved of living next to a municipal garbage dump.

Third most important concern which continues to affect the effectiveness of regulation is the basic implementation challenge, which has been highlighted through several studies before. Shortage of staff, large geographical areas under jurisdiction, difficulty of gathering evidence and ascertaining attribution are a few concerns that regulators themselves point to while highlighting the various difficulties faced in making compliance effective. There is a limited number of officials dealing with a large number of projects and monitoring their safeguard requirements. As approval rates are increasing each month and the enforcement and monitoring mechanisms of existing regulatory institutions remain weak, the burden of environmental and social impacts is borne by citizens.

Fourthly, it can be observed that there are confusions about what a regulation is meant to achieve. Due to fear of the law, affected communities could reject the use of an environmental regulation that can otherwise help address impacts that they face. This was brought out in the case study on the CRZ discussed in this study. The regulation which was enacted for protection of ecologically fragile coastal areas and coastal livelihoods was feared by communities who had heard that the law was meant to displace them from their homes. Other than this misinformation, confusion about institutional jurisdiction may result in an inability to seek action against an impact. For instance, the decision-making framework on groundwater extraction has remained a puzzle for those seeking an enforcement action. Outreach by regulators through training, community education, other than their own enforcement actions can actually bring violators into compliance.

Lastly, analysis of different regulations shows that none of the regulations have a formal mechanism of including compliance data into decision-making. Example, where compliance data could be used are project expansions, approvals for additional components of an existing project, approvals for new projects being proposed for an already impacted area or a fresh proposal by a proponent who has had a history of violations. It becomes imperative that the status of compliance in a geographical area, or the performance of the project proponent on compliance with mandatory environmental conditions is taken into consideration during decision making by regulators. Good record keeping on show cause notices, directions, action taken and compliance report records can only make this decision making more robust.