

DEMYSTIFYING THE ENVIRONMENTAL CLEARANCE PROCESS IN INDIA

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In recent years there have been several controversies regarding projects being granted (or denied) environmental regulatory approvals. While many civil society groups and those adversely affected believe that legal procedures are being bypassed for commercial gain at immense cost to the environment and the larger public interest; the corporate sector, and at least sections of the government, perceive the regulatory processes to be a road-block in the country's growth trajectory. This paper maps out the process to be followed before projects are granted one such regulatory approval – the environmental clearance under the EIA Notification 2006 – and presents an analysis of some of the problematic aspects in its design and implementation. Several stakeholders with a variety of interests, often conflicting, are involved, and the process is deeply contentious with significant implications for a range of rights. This paper aims to bring some clarity to our understanding of this complex process through a critical examination of the Notification, related documents and judicial pronouncements.

I. INTRODUCTION

Contestation over natural resources in India is not a new phenomenon. Deterioration of environmental quality on various indices, reduced access to natural resources for significant sections of the population, increasing numbers of project affected persons – these are not issues of recent origin; nor is environmental legislation. Post-independence, India enacted its first environmental statute in 1972 and the next two decades witnessed the passing of several central environmental laws. India has been witness to many robust grass-roots level environmental movements over the decades,¹ and some of these have found a voice in judgments of the higher judiciary. Yet, evidently, this rich discourse on environmental issues and the considerable experience in fighting for environmental causes has not made protection of the environment a

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¹ RAMACHANDRA GUHA, *THE UNQUIET WOODS: ECOLOGICAL CHANGE AND PEASANT RESISTANCE IN THE HIMALAYA* (2010); Madhav Gadgil & Ramachandra Guha, *Ecological Conflicts and the Environmental Movement in India* in ENVIRONMENTAL ISSUES IN INDIA: A READER (Mahesh Rangarajan ed., 2007); AMITA BAVISKAR, *IN THE BELLY OF THE RIVER: TRIBAL CONFLICTS OVER DEVELOPMENT IN THE NARMADA VALLEY* (1997).

more palatable subject – politically, socially or economically. Conflicts are only deepening; adverse environmental impacts of economic development intensifying; and policy makers are even more irresolute than before when it comes to environmental issues, particularly when framed in the ‘environment versus development’ construct.

This paper will focus on one of the most significant executive decision making processes affecting the environment in India today – the granting of regulatory approvals under the Notification of September 14, 2006 issued under the Environment (Protection) Act, 1986 (‘EP Act’). This Notification is commonly referred to as the Environment Impact Assessment Notification 2006 (‘EIA Notification’), as environmental impact assessment of projects prior to approval forms the core of the notification.

At the time the draft EIA Notification was being circulated, and when it was finally issued, the text came under sharp criticism both for the lack of consultation and transparency in its introduction, as well as for the inadequacy of its substantive provisions.² Many of the problems and loopholes highlighted with regard to the Notification remain till date, while some have been remedied through subsequent amendments and judicial interpretation.

The motivation to write this paper is to contribute to the literature on environmental regulation in India – specifically from a legal perspective. The EIA Notification, and its implementation, has been critically analysed by various commentators.³ This paper aims to take the analysis a step further by looking at recent amendments and orders under the EIA Notification issued by the Government of India and considering judicial pronouncements on the provisions of the EIA Notification by the Supreme Court, various High Courts and the National Green Tribunal (‘NGT’).⁴

The paper is divided into five sections. Part II gives an introduction to the EIA Notification, and the categories of projects to which it applies. Further, Part III identifies the main actors in the process and discusses their roles. Part IV describes the process laid down in the notification to obtain regulatory approvals. Part V is an analysis of some of the important aspects of the design and implementation of the process. Part VI concludes the paper with certain overarching observations.

² Manju Menon & Kanchi Kohli, *Environmental Decision-Making: Whose Agenda?*, XLII ECONOMIC AND POLITICAL WEEKLY 2490-2494 (2007); LEO F. SALDANHA ET AL, GREEN TAPISM : A REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT NOTIFICATION 2006 (2007); Staff Reporter, *Greens Allege Dilution of Key Notifications on Environment*, THE HINDU August 30, 2006; Padmaparna Ghosh, *Draft EIA Notification Favours Industry Over Environment*, DOWN TO EARTH September 30, 2006.

³ Manju Menon & Kanchi Kohli, *From Impact Assessment to Clearance Manufacture*, XLIV ECONOMIC AND POLITICAL WEEKLY 20-23 (2009).

⁴ The National Green Tribunal has been set up under the National Green Tribunal Act, 2010.

II. INTRODUCTION TO THE EIA NOTIFICATION

The EIA Notification is the third in the series of notifications issued by the Central Government under the EP Act to regulate new projects or expansion/modernization of existing projects based on potential environmental impacts.⁵ Under § 3(1) of the EP Act, the Central Government has the power to take “all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution”. Further, it has the power to notify areas in which any industry, operation or processes or class of industries, operations or processes shall not be carried out or shall only be carried out subject to certain safeguards.⁶ This power to restrict or even bar projects has been the foundation for the Central Government to institute a system for grant of environmental clearances (‘EC’), which projects are required to obtain before commencing construction work.⁷ The Ministry of Environment and Forests (‘MoEF’), as the nodal agency of the Central Government for the EIA Notification, is responsible for the implementation of the notification.

The crux of the EIA Notification is that it requires a pre-determined set of projects to obtain *prior* environmental clearance before undertaking construction – in the case of new projects – or initiating expansion or modernization activities – in the case of existing projects.⁸ The Schedule to the Notification details the categories of projects or activities which require prior environmental clearance. This includes *inter alia* thermal, hydro and nuclear power projects, mining projects, oil and gas exploration projects, industries, infrastructure projects and construction projects. These project categories are defined by different criteria such as area, capacity, product mix and location. The proposed construction of any project listed in the Schedule; or the expansion or modernization of any existing project in a manner that would cross the limits set out in the Schedule; or any change in the product-mix in an existing manufacturing unit included in the Schedule beyond the specified range,

⁵ EIA Notification, S.O. 1533, September 14, 2006, available at <http://www.moef.nic.in/legis/eia/so1533.pdf> (Last visited on February 19, 2014). The first two were Notification, S.O. 85(E), January 29, 1992, available at http://www.ceeraindia.org/documents/lib_c3s2_EIAnoti_160300.htm (Last visited on February 19, 2014) and Notification, S.O. 60(E), January 27, 1994, available at [http://www.envfor.nic.in/legis/eia/so-60\(e\).pdf](http://www.envfor.nic.in/legis/eia/so-60(e).pdf) (Last visited on February 19, 2014); See also KANCHI KOHLI & MANJU MENON, ELEVEN YEARS OF THE ENVIRONMENT IMPACT ASSESSMENT NOTIFICATION, 1994, HOW EFFECTIVE HAS IT BEEN? (2005).

⁶ Environment (Protection) Act, 1986, § 3(2)(v) (The Central Government can exercise this power by issuing a Notification under Rule 5(3)(a) of the Environment (Protection) Rules, 1986).

⁷ From April, 2012 to January, 2013, the MoEF granted ECs to 411 projects. See MoEF, *Annual Report 2012-2013*, available at http://envfor.nic.in/sites/default/files/annual_report/ar-2012-13.pdf (Last visited on February 19, 2014).

⁸ EIA Notification, *supra* note 5, ¶ 2.

would require a prior environmental clearance in accordance with the EIA Notification.⁹

The Schedule further divides each category into Category A and Category B projects “based on the spatial extent of potential impacts and potential impacts on human health and natural and man-made resources”.¹⁰ For example, river valley projects with capacity greater than 50 MW fall under Category A, and those between 25 and 50 MW fall under Category B. Certain categories of projects fall under only one category and not the other, notwithstanding size or capacity.¹¹

This classification of projects is on account of decentralization of the regulatory powers under the EIA Notification. Proponents of Category A projects have to approach the Central Government (i.e. the MoEF) for an EC, while applicants of Category B projects have to approach a State-level body – State level Environment Impact Assessment Authority (‘SEIAA’) of the State in which the project is situated.

There are exceptions to this clear-cut division of regulatory roles between the MoEF and the SEIAAs in the form of ‘General Conditions’ applicable to most projects. These conditions stipulate that if a Category B project is proposed within 10 km of any of the following, it would be treated as a Category A project and the proponent would have to approach the MoEF - (i) protected areas such as National Parks and Wildlife Sanctuaries notified under the Wild Life (Protection) Act 1972; (ii) Critically polluted areas as notified by the Central Pollution Control Board from time to time;¹² (iii) Notified eco-sensitive areas;¹³ or (iv) Inter-State boundaries or international boundaries.¹⁴ If

⁹ Projects that are not included in the Schedule do not require an EC. For instance, an Area Development Project [Item 8(b) of the Schedule] covering an area less than 50 hectares does not require an EC. See T.N. Godvarman v. Union of India, (2011)1 SCC 744 (Construction of Park at NOIDA near Okhla Bird Sanctuary).

¹⁰ EIA Notification, *supra* note 5, ¶ 4(i) (The EIA Notification, 1994 classified projects primarily based on the amount of investment).

¹¹ For instance, nuclear power projects and airports are exclusively Category A projects and Common Effluent Treatment Plants (CETPs) are exclusively Category B projects.

¹² MoEF, *Office Memorandum dated September 17, 2013 in No. J-11013/5/2010-IA.II(1): Consideration of Projects for Environmental Clearance Based on Comprehensive Environmental Pollution Index (CEPI) (2013)*, available at <http://moef.nic.in/sites/default/files/om-ia-moratorium-reimposing-170913.pdf> (Last visited on February 19, 2014).

¹³ The MoEF has declared several areas such as Doon Valley, Matheran and Matheran as eco-sensitive zones. See generally MoEF, *Eco-Sensitive Zone*, available at http://moef.nic.in/eco-sensitive_zone (Last visited on February 19, 2014).

¹⁴ In 2009, the EIA Notification was amended to allow states to reduce or completely do away with the distance of 10 km from inter-state boundary through an agreement between two neighbouring states. However, such an agreement is only possible if the proposed site is not within a 10 km radius of the other three categories of areas.

this jurisdictional division is not adhered to carefully, and the EC is granted by an authority without jurisdiction, the EC is illegal and consequently void.¹⁵

The Schedule to the EIA Notification also lists 'Specific Conditions' for five categories of projects. According to these conditions, if certain industries are being set up within an industrial estate/complex, export processing zone, special economic zone, biotechnology park or leather complex and such estate/complex/zone has itself been granted a prior EC then each industry is not required to obtain a separate EC. The caveat is that when the EC is sought for the estate/complex/zone, the application should mention the class of industries that are likely to be housed in it.¹⁶ If an industry not listed in the application is proposed to be built in the zone, it would require a separate EC and would have to go through the entire process.

Despite a mandatory requirement for a prior EC, there have been several instances wherein project proponents have started work at the project site before the EC has been granted.¹⁷ In August 2010, the MoEF, taking note of such instances, issued an Office Memorandum clarifying that the only activities permitted before an EC is granted are fencing of the land (to prevent encroachment) and construction of a temporary shed for guards.¹⁸ No construction work (including civil construction) is permissible before the EC is granted. Work at a project site before the EC has been granted constitutes a violation of the EIA Notification and therefore, of the EP Act.

¹⁵ See *V. Srinivasan v. Union of India & Ors.*, Appeal No. 18 of 2011 (T), National Green Tribunal, February 24, 2012, available at [http://www.greentribunal.gov.in/judgment/18-2011\(T\)_24thFeb2012_final_order.pdf](http://www.greentribunal.gov.in/judgment/18-2011(T)_24thFeb2012_final_order.pdf) (Last visited on February 19, 2014) (In this case an EC granted to a Municipal solid waste processing plant was set aside as it was within 10 kms of the Guindy National Park and yet had been granted clearance by the Tamil Nadu SEIAA); See also *Prof. KP Sharma v. Union of India*, D.B. Civil writ (PIL) Petition No.6039/2011, High Court of Rajasthan (Jaipur Bench) (The High Court declared an EC granted to a tourism project by the Rajasthan SEIAA as illegal and void as it was within ten kilometers of the Nahargarh Wildlife Sanctuary).

¹⁶ EIA Notification, *supra* note 5, Schedule.

¹⁷ For instance, Vedanta Aluminium Ltd. started construction work at the expansion of its Alumina Refinery in Orissa while its application for EC for expansion was still pending with the MoEF. The company admitted this fact before the High Court of Orissa during the hearing of a petition instituted by it challenging the withdrawal of ToRs by the MoEF. The High Court held – "since the Petitioner has undertaken construction activities for expansion of the project without adhering to the provisions of EIA Notification, 2006, the same is held to be illegal". See *Vedanta Aluminium Ltd. v. Union of India & Anr.*, W.P. (C) No. 19605 of 2010, High Court of Orissa (Cuttack); See also *Gajubha (Gajendrasinh) Bhimaji Jadeja & Ors. v. Union of India & Ors.*, W.P. (PIL) No. 21 of 2013, High Court of Gujarat.

¹⁸ MoEF, *Office Memorandum dated August 19, 2010 in No. J-11013/41/2006/-IA.II(1): Activities Which Can Be Undertaken Without Prior Environmental Clearance - Regarding (2010)*, available at <http://www.moef.nic.in/downloads/public-information/Act-prior-EC.pdf> (Last visited on February 24, 2014).

III. ACTORS INVOLVED IN THE EIA PROCESS

A. AT THE CENTRE

The manner of implementation of the EIA Notification depends on several actors at the Central and the State level. At the Centre, the Central Government through the MoEF plays a key role. It has several responsibilities as the primary policy-maker and regulator under the Notification. As a policy maker, the MoEF is expected to ensure smooth implementation of the EIA Notification across the country by issuing office memoranda, clarifications, circulars etc. to other actors involved in the process when necessary. It is responsible for granting (or rejecting) applications for EC for Category A projects;¹⁹ appointing Expert Appraisal Committees at the Centre and State level; monitoring the implementation of the EIA Notification and compliance with EC conditions. The monitoring functions of the MoEF are typically performed by the six regional offices of the MoEF.²⁰

The Expert Appraisal Committees ('EACs') constituted by the MoEF under the EIA Notification play a crucial role in the process of considering applications for EC for Category A projects. Each category of project is dealt with by a different EAC.²¹ The EACs meet once a month for two-three days to discuss and assess projects.²² The EACs' role is entirely recommendatory in nature. They do not have the power to grant or reject an application for EC as this power rests with the Government of the day through the MoEF. EACs are constituted for a term of three years and consist of professionals and experts with experience and expertise in areas such as environmental quality, EIA process, sectoral experts, risk assessment, environmental economics etc.²³ The EACs are expected to work independently of the MoEF and there is only one official of the MoEF appointed to it as its Member Secretary.

¹⁹ For the sake of convenience, hereinafter reference to Category A projects would include Category B projects which on application of the General Conditions have to be cleared by the MoEF (and not by the SEIAA).

²⁰ These regional offices are located at Bangalore, Bhopal, Bhubaneswar, Chandigarh, Lucknow and Shillong. The MoEF has recently filed an affidavit before the Supreme Court indicating that it is planning to open four more regional offices at Chennai, Dehradun, Nagpur and Ranchi. See Anonymous, *4 More Centres to Monitor Environment Projects*, DECCAN HERALD January 19, 2014.

²¹ EACs have been constituted for the following categories of projects – Coal Mining, Industrial Projects, Industrial Projects - 2, Infrastructure and Miscellaneous Projects & CRZ, Mining Projects, New Construction Projects and Industrial Estates, Nuclear Projects, River Valley and Hydroelectric Projects, and Thermal Projects.

²² The Agenda and Minutes of Meetings of EACs are available at <http://environmentclearance.nic.in/Report/Default3.aspx> (Last visited on February 24, 2014) and <http://environmentclearance.nic.in/Report/minutes.aspx> (Last visited on February 24, 2014).

²³ See EIA Notification, *supra* note 5, Appendix VI, as amended by Notification, S.O. 1737 (E), October 11, 2007, available at <http://moef.nic.in/legis/eia/so1737.pdf> (Last visited on February 24, 2014).

The Central Pollution Control Board ('CPCB') does not have a direct role to play in the EC process. However, some of its activities are relevant to the EC process. For instance, the CPCB has identified a list of critically polluted areas/ industrial clusters and a moratorium has been declared on grant of ECs for projects proposed in these areas/clusters.²⁴ Furthermore, in accordance with the General Conditions in the Schedule, Category B projects located within ten kilometers of critically polluted areas as identified by the CPCB, have to be considered as Category A projects.

A recent entrant to the EC process at the Centre is the Cabinet Committee on Investment ('CCI') which was set up in January 2013.²⁵ The CCI, headed by the Prime Minister, has been set-up to identify projects involving investments of more than 1000 crore rupees in sectors such as infrastructure and manufacturing and, *inter alia*, to prescribe time limits within which approvals are issued to them.²⁶ The CCI can also review processes adopted by the concerned Department or Ministry while granting or rejecting an approval.²⁷ As an EC is a mandatory approval for many infrastructure projects, the CCI has the jurisdiction to make decisions relating to the grant of EC to proposed projects. However, its relationship with the existing regulatory and accountability mechanisms is unclear.²⁸

B. AT THE STATE-LEVEL

At the State-level, the regulatory function is performed by the SEIAA, which is responsible for granting (or rejecting) applications for EC for Category B projects. These authorities are constituted by the MoEF in each State and Union Territory based on the nomination by the respective State Governments/ Union Territory administration.²⁹ The state governments provide the financial and logistical support to the SEIAAs.³⁰ The SEIAA consists of a Chairperson, a Member and a Member Secretary. The first two are required to have professional expertise similar to those of EAC members, with a term of three years. The Member Secretary is ordinarily a serving officer of the State Government or Union Territory administration familiar with environmental

²⁴ See MoEF, Office Memorandum dated September 17, 2013, *supra* note 12.

²⁵ Government of India Cabinet Secretariat, *Order dated January 2, 2013 in No. 1/22/2012-Cab (2013)*, available at http://cabsec.nic.in/showpdf.php?type=cci_notification (Last visited on February 24, 2014) (The CCI is said to be modeled on an earlier proposal for a National Investment Board, which was opposed by many including the then Minister of Environment and Forests); See Ashish Kothari, *National Investment Board*, XLVII ECONOMIC AND POLITICAL WEEKLY 10-13 (2012).

²⁶ *Id.*, Government of India Cabinet Secretariat.

²⁷ *Id.*

²⁸ See Kanchi Kohli, *Is CCI a Bypass Lane for the Laws?*, available at <http://www.indiatogether.org/2013/oct/env-cci.htm> (Last visited on February 24, 2014).

²⁹ EIA Notification, *supra* note 5, ¶ 3.

³⁰ The sitting fees, travel allowance etc. of the Chairperson and the members are paid for by the state government.

laws. It was not unusual for states to appoint the Member Secretary (or any other official) of the State Pollution Control Board as a member of the SEIAA. However, the NGT has directed the MoEF “to ensure that the Member Secretary or any other officer of the State [Pollution Control] Board should not be a Member in the SEIAA, in order to facilitate independent assessment of the projects at the SEIAA level”.³¹

The SEIAA decides on EC applications based on recommendations made by the State Expert Appraisal Committees (‘SEACs’). These authorities are constituted by the Central Government in consultation with the state governments, and their composition is along the same lines as the EACs at the central level.³² Most states have only one SEAC to appraise all categories of projects, unlike the EACs at the central-level. The number of members in the SEAC varies across states. As in the case of the SEIAA, the SEAC is provided with financial and logistical support by the concerned State Government. The SEAC, like the EAC, has a recommendatory role to play, with the SEIAA being the final decision making authority for Category B projects.

The State Pollution Control Boards (‘SPCB’) or UT Pollution Control Committees³³ are the third set of bodies at the state-level which play a crucial role in the EC process. The SPCBs are constituted by State Governments under § 4 of the Water (Prevention and Control of Pollution), Act 1974. They are responsible for facilitation and conduct of the public consultation component of the EC process for both categories of projects, and for reporting the proceedings to either the MoEF or the SEIAA, as the case may be. While the primary monitoring functions are performed by the regional offices of the MoEF, the SPCBs are also involved to a certain extent.

IV. THE ENVIRONMENTAL CLEARANCE PROCESS

The EIA Notification divides the EC process (till the final decision) into four stages: screening, scoping, public consultation and appraisal.³⁴ The process is initiated by the project proponent submitting an application for a prior environmental clearance to either the MoEF or the SEIAA (‘appropriate regulator’) – as the case may be. The application is made in Form 1 – a format

³¹ Rayons-Enlightening Humanity & Anr. v. Union of India & Ors., Application No. 86, 99 and 100 of 2013, National Green Tribunal, July 18, 2013, available at [http://www.greentribunal.gov.in/judgment/862013\(App\)_18July2013_final_order.pdf](http://www.greentribunal.gov.in/judgment/862013(App)_18July2013_final_order.pdf) (Last visited on February 24, 2014).

³² EIA Notification, *supra* note 5, ¶ 5(a).

³³ For the sake of convenience, hereinafter these bodies will be collectively referred to as SPCBs.

³⁴ A schematic representation of the process is available in Jitendra K. Panigrahi & Susruta Amirapu, *An Assessment of EIA System in India*, 35 ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 23-36 (2012).

provided in the EIA Notification.³⁵ Form 1 covers basic information about the project including alternative sites that are under consideration for the project, the nature and extent of physical changes the project is likely to cause, use of natural resources (area of land, water requirement, forest cover etc.), nature and amount of wastes and pollutants likely to be produced/ released, risks of contamination and accidents, and potential cumulative impact due to proximity to other existing or planned projects with similar effects.³⁶

As part of Form 1, the project proponent has to propose a set of Terms of Reference ('ToRs') for the EIA studies that it would undertake for the project and a copy of a pre-feasibility project report.³⁷ The EIA Notification originally did not contain any guidance on the nature of information required to be contained in the pre-feasibility report. As a result, and as the MoEF observed, the pre-feasibility reports submitted to the MoEF were sometimes 'sketchy' and did not contain all the relevant information necessary for the EACs and SEACs to complete the scoping process, and to issue ToRs.³⁸ The MoEF issued Guidelines for the preparation of pre-feasibility reports in December 2010 to remedy this situation. Besides a general description of the project, the Guidelines require the report to include information such as the need for the project, the alternative sites considered, the basis for selecting the proposed site and 'non-environmental' factors such as direct and indirect employment generated, rehabilitation and resettlement ('R&R') plan, the project schedule and cost estimates.³⁹

Project proponents have to submit documents such as those mentioned above in hard as well as in soft copy; otherwise the application is considered incomplete.⁴⁰ Member Secretaries of EAC and SEIAAs are expected to upload these documents on the official website.⁴¹ These requirements were introduced in the EC process in response to directions by the Central Information

³⁵ EIA Notification, *supra* note 5, Appendix 1.

³⁶ *Id.* (The project proponent is also required to provide details of the environmental sensitivity of the proposed project area including information such as the distance of the proposed project site from protected and ecologically sensitive areas (such as wetlands, watercourses, coastal zones, forest etc.), areas containing important, high quality or scarce resource like ground or surface water, forests, minerals etc., and areas which are highly polluted or are susceptible to natural calamities also has to be included).

³⁷ For construction projects, project proponents have to submit a completed Form 1A (EIA Notification, *supra* note 5, Appendix II) along with Form 1, and a conceptual plan, instead of a pre-feasibility report.

³⁸ MoEF, *Guidelines for Preparation of Pre Feasibility Report for Obtaining Prior Environmental Clearance in Terms of the Provisions of the EIA Notification, 2006*, December 30, 2010, available at <http://moef.nic.in/downloads/public-information/guidelines-pre-feasibility.pdf> (Last visited on February 24, 2014).

³⁹ *Id.*

⁴⁰ MoEF, *Order dated March 20, 2012 in No. J-11013/19/2012-IA.II(I) (2012)*, March 20, 2012, available at <http://moef.nic.in/downloads/public-information/order-20032012-a.pdf> (Last visited on February 24, 2014).

⁴¹ *Id.*

Commission ('CIC'). The CIC observed that such *suo moto* disclosures were "crucial to ensure transparency and accountability in institutions".⁴² The following discussion of the EC process attempts to demystify various parts of the process, and to identify the gaps in the regulatory space.

A. FOUR STAGES OF THE EC PROCESS BEFORE THE FINAL DECISION

1. Screening

While all Category A projects are required to undertake EIA studies as part of the EC process, only certain Category B projects have to do so. This short listing of Category B projects takes place during the first stage of the EC process – the screening stage.⁴³ The SEAC scrutinizes the application and determines, based on the 'nature and location specificity'⁴⁴ of the project, whether further EIA studies need to be undertaken before appraising the project for the grant of EC. Projects that require EIA studies before appraisal are referred to as Category B1 projects and the rest are referred to as Category B2 projects.⁴⁵

The act of screening determines the extent of impact assessment that will be undertaken before a project proposal is considered, and whether there will be any public consultation before the project is appraised. The EIA Notification requires the MoEF to provide guidance for this categorization between B1 and B2. It was only in December 2013 that the MoEF finally issued an Office Memorandum providing guidelines for categorizing certain types of projects into Category B1 and B2.⁴⁶ Category B projects for which no guidelines have been provided in this Memorandum, are to be treated as Category B1.⁴⁷

⁴² Shibani Ghosh v. Ministry of Environment and Forests, Decision No.CIC/SG/C/2011/001398/16936, Order of the Central Information Commission, January 18, 2012, available at http://www.rti.india.gov.in/cic_decisions/CIC_SG_C_2011_001398_16936_T_74418.pdf (Last visited on February 24, 2014).

⁴³ See T. Rajaram & Ashutosh Das, *Screening for EIA in India: Enhancing Effectiveness through Ecological Carrying Capacity Approach*, 92 JOURNAL OF ENVIRONMENTAL MANAGEMENT 140-148 (2011).

⁴⁴ EIA Notification, *supra* note 5, ¶ 7(i)(I).

⁴⁵ Townships and Area Development Projects are not subject to the screening process and are always treated as Category B1 projects. See EIA Notification, *supra* note 5, Schedule, Item 8(b).

⁴⁶ MoEF, *Office Memorandum dated December 24, 2013 in No. J-13012/12/2013-IA-II(I): Guidelines for Consideration of Proposals for Grant of Environmental Clearance Environmental Impact Assessment (EIA) Notification, 2006 and its Amendments - Regarding Categorization of Category 'B' Projects/Activities into Category 'B1' & 'B2'*, December 24, 2013, available at <http://moef.nic.in/sites/default/files/ia-24122013.pdf> (Last visited on February 24, 2014).

⁴⁷ *Id.*

2. Scoping

‘Scoping’ requires the concerned EAC or the SEAC to issue “detailed and comprehensive Terms of Reference (TOR) addressing all relevant environmental concerns”,⁴⁸ for the preparation of the EIA report. This is done for all Category A and B1 projects, with a few exceptions.⁴⁹ Determining the appropriate ToRs for each project is an important part of the EC process. Impact assessment studies undertaken by the project proponent, and the subsequent appraisal of the proposal by the EACs/SEACs and the regulator, are based on these ToRs.

In case the proposed project is an integrated or an inter-linked project (for example, a steel plant along with a captive port), the project proponent has to submit a separate application for EC for each component comprehensively describing the entire project. Then the relevant EAC for each component will consider the application and issue a separate set of ToRs (or reject the application).⁵⁰

The ToRs are typically drafted by the relevant EAC or the SEAC after considering the information provided by the project proponent in Form 1/1A and the draft ToRs proposed by it. The MoEF provides a set of model ToRs on its website for various sectors – which the EAC and the SEACs can rely on.⁵¹ However, these are only generic sector-specific ToRs, and the EACs and SEACs are expected to issue project specific ToRs,⁵² presumably based on the proposed project, its location and potential environmental impact.⁵³ It may also decide to undertake a site-visit to the proposed project site and refer to any other relevant information that may be available to it (while framing the ToRs).

⁴⁸ EIA Notification, *supra* note 5, ¶ 7(i)(II)(i).

⁴⁹ Category B2 projects, projects listed as Item 8 of the Schedule (building and construction projects, townships and area development projects) and all Highway projects other than new National Highways are exempt from this stage. *See* EIA Notification, *supra* note 5, ¶ 7(i)(II) (i), as amended by Notification, S.O. 2559 (E), August 22, 2013, available at <http://moef.nic.in/sites/default/files/21-270%282008%29.pdf> (Last visited on February 24, 2014).

⁵⁰ MoEF, *Office Memorandum dated December 24, 2010 in No. J-11013/41/2006-IA.II(1): Consideration of Integrated and Inter-linked projects - Procedure Regarding* (2010), December 24, 2010, available at http://envfor.nic.in/sites/default/files/integrated-interlinked-prjt_0.pdf (Last visited on February 24, 2014).

⁵¹ The model ToRs are part of sector-specific EIA manuals that have been prepared by the MoEF and two external consultants engaged by the MoEF. The project proponent while proposing the ToRs in the Form 1 can also refer to these. *See* MoEF, *Standardization of TORs for Identified Categories of Projects - reg.*, December 4, 2012, available at <http://moef.nic.in/assets/ia-tor-standardization.pdf> (Last visited on February 24, 2014).

⁵² *Id.*

⁵³ In a recent amendment to the EIA notification certain highway projects have been exempted from the scoping process. These projects are required to prepare the EIA report based on the model ToRs of the MoEF. *See* EIA Notification, as amended by Notification, S.O. 2559 (E), *supra* note 49.

A decision at the end of the scoping stage has to be issued within sixty days of the Form 1 being submitted by the project proponent. EACs and SEACs can recommend the rejection of a project proposal at the scoping stage. Subsequently, if the appropriate regulator decides to accept such recommendations and reject the project, the project proponent would have to be informed about the decision, along with reasons. If ToRs are recommended by the EAC/SEAC, then these have to be conveyed to the project proponent by the appropriate regulator and displayed on the regulator's website.⁵⁴ If the ToRs are not finalized within sixty days, the ToRs suggested by the project proponent in Form 1/1A are deemed to be the final ToRs.⁵⁵

The EIA Notification itself does not specify a time limit for which the ToRs are valid. As ToRs are issued based on information which is site-specific and which may change over time, the MoEF issued an Office Memorandum in March 2010 placing a time limit on the validity of the ToRs.⁵⁶ The ToRs are valid for two years, for the submission of EIA report and/or Environment Management Plan ('EMP'), after the public consultation is over.⁵⁷ This period can be extended to three years, if appropriate reasons are provided.

The effectiveness of the scoping stage in the EC process is affected by one major factor – the time spent by the EAC/SEAC members and the quality of discussions in the EAC meetings while considering a project proposal prior to determining the ToRs. EAC meetings are held once a month for two-three days during which time several projects (at various stages in the EC process) are considered. The time that the committee members spend discussing each project is fairly limited. For instance, the agenda for EAC (non-coal mining) meeting in August 2013 reveals that the EAC is scheduled to spend fifteen minutes per project before issuing ToRs, and over forty projects are listed for discussion for ToRs over three days.⁵⁸ The limited time spent per project during a meeting coupled with the fact that the members of the EAC do

⁵⁴ In case of hydro-power projects of more than 50 MW capacity, the ToRs have to be accompanied with a clearance for pre-construction activities. Pre-construction activities have not been defined in the EIA Notification. No clarification has been issued by the MoEF with regard to the same. This was confirmed by the MoEF in response to an RTI Application dated November 8, 2013 filed by the author. It is also not clear how the MoEF's Office Memorandum listing activities permissible before the grant of EC is applicable to hydro-power projects.

⁵⁵ EIA Notification, *supra* note 5, ¶ 7(i)(II)(ii).

⁵⁶ See MoEF, *Office Memorandum dated March 22, 2010 in No. J-11013/41/2006/-IA.II(1): Timelimit for Validity of Terms of Reference (TORs) Prescribed under EIA Notification, 2006 for Undertaking Detailed EIA Studies for Development Projects Requiring Environmental Clearance (2010)*, March 22, 2010, available at http://moef.nic.in/divisions/iass/Cir/TOR_EC.pdf (Last visited on February 24, 2014).

⁵⁷ *Id.*

⁵⁸ See MoEF, *Agenda for 10th Meeting of the Reconstituted Expert Appraisal Committee (Non-Coal Mining), Being Held During August 21st -23rd, 2013*, available at http://environment-clearance.nic.in/writereaddata/Form-1A/Agenda/2013_8_81114121612131Agenda.pdf (Last visited on February 24, 2014).

not necessarily visit the proposed project site, raises serious questions about the quality of scrutiny of individual project proposal.

3. Public consultation

Once the impact assessment studies are completed by the project proponent, the EC process enters its third stage. The third stage of the EC process introduces the crucial component of public consultation in the decision of whether clearance should be granted. The EIA Notification defines public consultation as “the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate”.⁵⁹

Public consultation is mandatory for all Category A and Category B1 projects. However, certain projects are exempted under the Notification.⁶⁰ The list of projects exempted from public consultation can be amended by the MoEF through an Office Memorandum. For instance, in February 2012, the MoEF issued an Office Memorandum to exempt units coming up in National Investment and Manufacturing Zones (‘NIMZs’) from public hearings, if a public hearing has been held for the entire Zone.⁶¹ Interestingly, the Office Memorandum exempts the units from public hearings and not from the remaining part of the public consultation process as per the EIA Notification. It remains unclear whether this is an oversight or a deliberate effort to limit the scope of the exemption.

In case of expansion or modernization or change of product mix in existing projects, the EACs and the SEACs have to decide, based on Form 1, whether it is necessary to prepare an EIA report and hold public consultation. The Notification therefore gives wide powers to the EACs and the SEACs

⁵⁹ EIA Notification, *supra* note 5, ¶ 7(i)(III)(i).

⁶⁰ *Id.* (Exempted projects include modernization of irrigation projects, projects or activities located inside industrial estates or parks which have been granted approval, expansion of roads and highways which do not involve land acquisition, all building/construction/ township projects, projects concerning national defence and security (as determined by the Central Government) and all Category B2 projects. In 2009 the EIA Notification was amended to provide that buildings, construction and area development projects which contain a Category A project have to undergo the public consultation process); See EIA Notification, as amended by Notification, S.O. 3067 (E), December 1, 2009, available at <http://moef.nic.in/downloads/rules-and-regulations/3067.pdf> (Last visited on February 24, 2014).

⁶¹ See MoEF, Office Memorandum dated February 14, 2012 in No. J-11013/41/2006-IA.II (I): National Manufacturing Policy - Measures for Implementation Pertaining to Ministry of Environment and Forests (2012), February 14, 2012, available at http://envfor.nic.in/sites/default/files/press-releases/nmp_measures.pdf (Last visited on February 24, 2014). See Department of Industrial Policy and Promotion, National Manufacturing Policy: Guidelines for Establishment of National Investment & Manufacturing Zones (NIMZs) (2012), available at http://dipp.nic.in/English/Policies/NIMZ_Guidelines_21032013.pdf (Last visited on February 24, 2014)(For information on the NIMZs).

to exempt expansion/modernization projects from the public consultation process. According to an Office Memorandum issued by the MoEF in June 2009, this power was not being properly exercised, as projects were often exempted from the public consultation process “without giving detailed justification”.⁶² These projects were considered too small with an insignificant pollution load. To increase transparency in the decision to exempt projects from public consultation, the MoEF directed the concerned officials to apply the exemption judiciously, keeping in mind the additional pollution load and use of natural resources due to the expansion plans, and to maintain environmental integrity.⁶³ The MoEF further directed that reasons for exempting a project from public consultation have to be specified in the minutes of the meetings of the EACs and the SEACs.⁶⁴

The public consultation stage has two components – public hearing/s and written responses – which are discussed below.

a. Public Hearing

The objective of a public hearing is to ascertain the concerns of the ‘local affected persons’.⁶⁵ Appendix IV of the EIA Notification details the process of conducting a public hearing and the SPCBs are responsible for facilitating and conducting such hearings. It has to be organised in a “systematic, time bound and transparent manner” with “widest possible public participation”.⁶⁶ The venue of the hearing could be either the project site or in ‘close proximity’ thereto. Procedural requirements for the public hearing process are discussed below in three parts: before the public hearing, during the public hearing and after the public hearing.

i. Before the public hearing

The process of public hearing commences with the submission of a letter by the project proponent to the relevant SPCB requesting it to arrange a public hearing.⁶⁷ The public hearing has to be completed within forty-five days

⁶² MoEF, *Consideration of Projects under Clause 7(ii) of the EIA Notification, 2006 - Exemption of Public Hearing - Instructions Regarding (2009)*, June 3, 2009, available at http://moef.nic.in/divisions/iass/offc_memo_instruction.pdf (Last visited on February 24, 2014).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ EIA Notification, *supra* note 5, ¶ 7(i)(III)(ii)(a).

⁶⁶ *Id.*, ¶ 1.

⁶⁷ The letter has to be accompanied with ten hard copies and ten soft copies of the draft EIA report including the summary of the draft EIA report in English and in the official language of the state or the local language. See EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 2.2.

from the date on which such letter is submitted.⁶⁸ If the proposed project site is situated in more than one district, a public hearing has to be held in every district in which the project is situated. If the project site lies in more than one state, separate letters have to be sent to the SPCBs of each state.⁶⁹ A draft EIA report and its summary have to be prepared in accordance with the ToRs issued at the end of the scoping process.⁷⁰ The project proponent has to also forward the draft EIA report and the Summary EIA report to the MoEF, the offices of the District Magistrate/ District Collector/ Deputy Commissioner, the Zila Parishad or the Municipal Corporation or the Panchayat Union, the District Industries Office, urban local bodies, Panchayati Raj institutions, development authorities and the concerned regional office of the MoEF ('designated offices').

Within seven days of receiving the draft EIA reports from the project proponent, the Member Secretary of the concerned SPCB has to finalise the date, time and venue for the public hearing. This information has to be advertised through a notice in one major national daily newspaper and one regional vernacular / official state language daily.⁷¹ The notice will also inform the public about the locations where the draft EIA report and its summary will be available.⁷² In 2009, in compliance with an order of the High Court of Delhi,⁷³ the EIA Notification was amended to include an obligation on the competent authority to inform the local public residing in areas where newspapers are not available by beating of drums and announcements on radio and television.⁷⁴ The public has to be informed about the public hearing at least 30 days in advance, so as to be able to furnish their responses.⁷⁵

The EIA Notification does not provide guidance with respect to scheduling of public hearings and sometimes SPCBs would schedule more than one public hearing at the same time and venue. In 2009, the High Court of Delhi highlighted the undesirability of scheduling public hearings for more than one project at the same venue and time.⁷⁶ In response, the MoEF issued an Office Memorandum to the SPCBs directing that public hearings for different projects

⁶⁸ If the concerned SPCB is not able to organise a public hearing within 45 days or does not convey the proceedings of the public hearing to the appropriate regulator within the time stipulated, the appropriate regulator has to appoint another agency to conduct the public hearing. See EIA Notification, *supra* note 5, ¶ 7(i)(III)(iii) and (iv).

⁶⁹ See EIA Notification, *supra* note 5, Appendix IV, ¶ 2.1.

⁷⁰ The general structure for a draft EIA report has been provided in Appendix III of the EIA Notification and the structure for a Summary EIA report is provided in Appendix IIIA.

⁷¹ EIA Notification as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 3.1.

⁷² *Id.*, Appendix IV, ¶ 3.2.

⁷³ *Utkarsh Mandal v. Union of India*, W.P. (C) No. 9340 of 2009, High Court of Delhi.

⁷⁴ EIA Notification as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 3.1.

⁷⁵ *Id.*, Appendix IV, ¶ 3.2.

⁷⁶ See *Utkarsh Mandal v. Union of India*, W.P. (C) No. 9340 of 2009, High Court of Delhi.

can be held on the same date and at the same venue only if there is sufficient time provided between two hearings.⁷⁷

All the designated offices, other than the offices of the MoEF, are required to 'widely publicize' the draft EIA report in their respective jurisdictions and to request people to send their comments to the appropriate regulator.⁷⁸ The draft EIA report has to be made available for inspection, electronically or otherwise, during office hours till the public hearing is over.⁷⁹ The SPCBs are also expected to publicize information about the project and make the summary of the draft EIA report available for inspection in select offices or public libraries or any other suitable location. They also have to provide copies of the draft EIA reports to the designated offices.

A public hearing, once announced, cannot ordinarily be postponed and the venue cannot be changed. The only exception is if an 'untoward emergency situation'⁸⁰ occurs and the District Magistrate (or District Collector or Deputy Commissioner) recommends the postponement. In such a situation a notice regarding the postponement has to be published in the same two newspapers in which the initial notice has been published. The notice for postponement has to be prominently displayed at all the designated offices by the concerned SPCB.⁸¹ The Member Secretary of the SPCB then has to decide on a fresh date, time and venue in consultation with the District Magistrate (or District Collector or Deputy Commissioner). All requirements relating to notice and publicity of the hearing mentioned above would have to be repeated in full.⁸²

⁷⁷ MoEF, *Office Memorandum dated April 19, 2010 in No. J-15012/29/2010-IA-II(M): Procedure for Conduct of Public Hearing by the State/Union Territory Pollution Control Boards/Committees (SPCBs/UTPCCs) under the Environmental Impact Assessment (EIA) Notification, 2006*, April 19, 2010, available at http://moef.nic.in/divisions/iaass/Cir/pub_hear_EIA.pdf (Last visited on February 24, 2014).

⁷⁸ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 2.3.

⁷⁹ The EIA Notification originally carried an obligation on the MoEF to display the summary of the draft EIA report on its website and to make the report available for reference at a notified place during office hours in the Ministry's office in Delhi. The 2009 amendment to the EIA Notification deleted this clause.

⁸⁰ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 3.3.

⁸¹ *Id.*

⁸² *Id.*, Appendix IV, ¶ 3.4. In an Office Memorandum issued in September 2011, the MoEF noted that public hearings were being postponed but adequate reasons for postponement were not being provided in the records of the proceedings and it directed the SPCBs to adhere to the letter and spirit of the law of the EIA Notification. However, it did not specify permissible reasons for postponement of the public hearing. See MoEF, *Office Memorandum dated September 28, 2011 in No. J-11015/387/2008-IA.II(M): Adherence to the Procedure for Conduct of Public Hearing as Prescribed in the EIA Notification, 2006 - Regarding*, September 28, 2011, available at <http://moef.nic.in/downloads/public-information/ia-28092011.pdf> (Last visited on February 24, 2014).

In case the SPCB reports to the appropriate regulator that it is not possible to hold a public hearing in which local people will be able to express their opinion freely, the appropriate regulator can decide that the public consultation for the proposed project need not include a public hearing component.⁸³

ii. During the public hearing

The District Magistrate, District Collector or Deputy Commissioner,⁸⁴ assisted by a representative of the SPCB, supervises the public hearing. There have been instances where public hearings have been presided over by officials other than those prescribed under the EIA Notification.⁸⁵ Noting this practice, the MoEF has directed the SPCBs to conduct public hearings in accordance with the Notification as clarifying procedural irregularities was one of the causes of delay in the EC process.⁸⁶

Although the EIA Notification states that the public hearing is held to ascertain the concerns of 'local affected persons', there is no restriction on who can attend a public hearing and the Notification does not contain any qualification (such as place of residence).⁸⁷ There is no quorum requirement during a public hearing⁸⁸ and, therefore, a hearing can commence with only a few participants and the presiding panel. The attendance of each person present during the hearing has to be marked.⁸⁹ The SPCB has to arrange for video recording of the entire proceedings.⁹⁰ A copy of the recording and the attendance sheet has to be sent along with the written record of the proceedings to the appropriate regulator.⁹¹

⁸³ EIA Notification, *supra* note 5, ¶ 7(i)(III)(v).

⁸⁴ A representative may also be sent instead to supervise the panel but he or she cannot be below the rank of an Additional District Magistrate.

⁸⁵ Aparna Pallavi, *Court Orders Fresh Public Hearing for Lanco Power Plant in Wardha*, October 20, 2011, available at <http://www.downtoearth.org.in/content/court-orders-fresh-public-hearing-lanco-power-plant-wardha> (Last visited on February 24, 2014).

⁸⁶ See MoEF, Office Memorandum dated September 28, 2011, *supra* note 82.

⁸⁷ In *Samarth Trust v. Union of India & Ors.*, W. P. (C) No. 9317 of 2009, High Court of Delhi. (The Court observed:

“From the terms of the Notification dated 14th September, 2006 it seems, *prima facie*, that so far as a public hearing is concerned, its scope is limited and confined to those locally affected persons residing in the close proximity of the project site. However, in our opinion, the Notification does not preclude or prohibit persons not living in the close proximity of the project site from participating in the public hearing - they too are permitted to participate and express their views for or against the project”).

⁸⁸ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 6.2.

⁸⁹ *Id.*, Appendix IV, ¶ 6.1.

⁹⁰ *Id.*, Appendix IV, ¶ 5.1.

⁹¹ *Id.*, Appendix IV, ¶¶ 5.1 and 6.1.

A representative of the project proponent begins the hearing by presenting the summary of the draft EIA report. All persons present during the public hearing have to be given an opportunity to present their views or seek clarifications on the project from the representative.⁹² At the end, the presiding panel has to prepare a summary of the proceedings “accurately reflecting all the views and concerns” expressed during the hearing.⁹³ To verify this, the summary has to be then read over to the audience explaining the contents in the local/ vernacular language.⁹⁴ The ‘agreed minutes’ have to be signed by the presiding officer on the same day and forwarded to the concerned SPCB.⁹⁵ Along with the minutes, a statement of issues raised by the public and the comments of the project proponent has to be attached.⁹⁶

iii. After the public hearing

Once the hearing is over, the proceedings of the public hearing have to be conspicuously displayed at the Panchayat office where the project is located, at the office of the Zila Parishad, the District Magistrate (or District Collector or Deputy Commissioner) and the concerned SPCB.⁹⁷ Additionally, the concerned SPCB has to display the proceedings on its website.⁹⁸ If there are any comments, the same can be sent to the appropriate regulator directly, and to the project proponent.⁹⁹ The SPCB has to forward the proceedings of the public hearing to the appropriate regulator within eight days of the completion of the public hearing.¹⁰⁰ The project proponent is also provided with a copy of the proceedings.¹⁰¹

b. Written responses

The second component of the public consultation process is that of written responses sent to the appropriate regulator by “other concerned persons having a plausible stake in environmental aspects of the project or activity”.¹⁰² The appropriate regulator and the SPCBs have to place the summary of the

⁹² *Id.*, Appendix IV, ¶ 6.4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*, ¶ 6.5.

⁹⁷ *Id.*, ¶ 6.6.

⁹⁸ *Id.* The MoEF issued an order in 2012 re-emphasising this requirement in response to the CIC’s order in *Shibani Ghosh v. Ministry of Environment and Forests*. See MoEF, *Order dated March 20, 2012 in No. J-II013/19/2012-IA.II (Regarding Proceedings of Public Hearing) (2012)*, available at <http://moef.nic.in/downloads/public-information/order-20032012-b.pdf> (Last visited on February 24, 2014).

⁹⁹ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 6.6.

¹⁰⁰ *Id.*, Appendix IV, ¶ 7.1.

¹⁰¹ *Id.*

¹⁰² EIA Notification, *supra* note 5, ¶ 7(i)(III)(ii)(b).

draft EIA report and the application submitted by the project proponent on their websites and seek responses from concerned persons.¹⁰³ Other than the internet, the authorities can also use other means to widely publicize the project.¹⁰⁴ If any person wants to access the draft EIA report, the authorities are obliged to make the same available during office hours at a notified office.¹⁰⁵ All the responses received from the public have to be forwarded as soon as possible to the project proponent.¹⁰⁶

The project proponent is expected to address concerns raised during the public hearing and in the written responses by submitting either a final EIA report or a supplementary report to the draft EIA report incorporating the concerns along with an action plan and financial allocation, item-wise.¹⁰⁷

The EIA Notification, in one place, uses the phrase ‘material environmental concerns’¹⁰⁸ indicating that the project proponent has to focus on a particular type of concern – that is, environmental – raised during the public hearing and not respond to other concerns (for example, social and economic impact). But at other places in the Notification the word ‘concerns’ has not been qualified.¹⁰⁹ The 2009 amendment to Appendix IV of the Notification (public hearing process) also does not qualify the word ‘concerns’.¹¹⁰ In light of this a fair argument may be made that people can raise concerns that are related to the project – even if they are not strictly environmental concerns – during the public consultation process. For instance, the extent of loss of livelihoods and the resettlement policy for project affected persons may not relate to the environment directly, but are certainly concerns arising from the impact of the project on the surrounding environment.

4. Appraisal

Once the project proponent has submitted the revised EIA report and the Environment Management Plan (‘EMP’) after the public consultation stage, the fourth stage of appraisal begins. During this stage the EACs/SEACs undertake a ‘detailed scrutiny’ of the EC application and other documents

¹⁰³ This has to be done within seven days of receiving a request for conducting the public hearing. The information placed on the website cannot include confidential information, including information to which the project proponent holds intellectual property rights. As mentioned earlier, the MoEF was required to place the summary of the draft EIA report on its website before the public hearing until the requirement was deleted *vide* the amendment to the Notification in 2009. However, this requirement remains with regard to written responses.

¹⁰⁴ EIA Notification, *supra* note 5, ¶ 7(i)(III)(vi).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 7.2.

¹⁰⁸ EIA Notification, *supra* note 5, ¶ 7(i)(III)(vii).

¹⁰⁹ EIA Notification, *supra* note 5, ¶ 7(i)(III)(i) and (ii)(a).

¹¹⁰ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Appendix IV, ¶ 7.2.

including the final EIA report and the proceedings of the public hearing.¹¹¹ While describing the role of the EAC, the High Court of Delhi has observed: “It is in essence a delegate of the MoEF performing an “outsourced” task of evaluation. The decision of the EAC may not necessarily be binding on the MoEF but is certainly an input into the decision making process. Considering that it constitutes the view of the expert body, its advice would be a valuable input”.¹¹²

The appraisal has to take place in a transparent manner and an authorized representative of the project proponent may be invited to provide information if necessary about the project.¹¹³ The EACs/SEACs may then recommend the project for grant of EC based on certain conditions or reject the same, along with reasons. An application placed before the EAC/SEAC has to be appraised within sixty days from the day on which it is received along with requisite documents/ details.¹¹⁴ The minutes of the EAC/SEAC meeting have to be prepared within five days and uploaded on the website of the appropriate regulator.¹¹⁵ If the EC has been granted, the minutes of the meeting must provide the safeguards/conditions that have been imposed on the project.¹¹⁶ If the EC application is rejected, reasons for rejection have to be included in the minutes.¹¹⁷

The appraisal process, like the scoping process, is significantly affected by the nature and extent of consideration given to each project proposal by the EAC/SEAC. The problem is in fact magnified as the appraisal process is expected to be an independent, unbiased and technically sound assessment of the available information on the proposed project; and to weigh the justifications for the project against countervailing factors such as public opposition, potential environmental damage and lack of clear social benefits.

¹¹¹ EIA Notification, *supra* note 5, ¶ 7(i)(IV)(i).

¹¹² See *Utkarsh Mandal v. Union of India*, W.P. (C) No. 9340 of 2009, High Court of Delhi.

¹¹³ See EIA Notification, *supra* note 5.

¹¹⁴ EIA Notification, *supra* note 5, ¶ 7(i)(IV)(iii). Projects that are exempted from the public consultation process are appraised based on Form 1 and the EIA report (except projects falling under Item 8 of the Schedule and Category B2 projects). Projects falling under Item 8 of the Schedule (i.e. construction projects, townships etc.) have to be appraised based on the Form 1, Form 1A and the conceptual plan. In case of projects falling under Item 8(b), as these are Category B1 projects, the EIA report has to be considered as well. See EIA Notification, Appendix V, ¶ 3, as amended by Notification, S.O. 156(E), January 25, 2012, available at <http://moef.nic.in/legis/156.pdf> (Last visited on February 24, 2014). In case of Category B2 projects, as no EIA report is required, the appraisal is based on the Form 1/1A. See EIA Notification, *supra* note 5, ¶ 7(i)(IV)(ii).

¹¹⁵ See EIA Notification *supra* note 5, Appendix V, ¶ 6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

B. THE FINAL DECISION

Once the EAC/SEAC has given its recommendations, the appropriate regulator has to consider the recommendations and convey its decision within 45 days.¹¹⁸ The recommendations received are normally accepted by the appropriate regulator; but in case there is a disagreement, the appropriate regulator has to provide reasons for the same and request the EAC/SEAC to reconsider its recommendations within sixty days.¹¹⁹ After the second round of recommendations, the decision of the appropriate regulator is final and has to be communicated to the project proponent within the next thirty days.¹²⁰

An EC letter issued to the project proponent typically includes a list of conditions that have to be met by the project proponent during the various phases of a project. These are generally in the form of a requirement to comply with certain standards and implementation of mitigative and ameliorative measures. The EIA Notification states that other regulatory approvals are not a pre-requisite for prior EC to be granted, unless it is required by law or for any technical reason.¹²¹

In case the project proponent is not informed about the final decision on its EC application within the stipulated time limit, the project proponent can assume the final recommendations of the EAC/SEAC (rejecting or recommending the project) to be the final decision of the appropriate regulator.¹²² In *Vedanta Aluminium Ltd.*,¹²³ the project proponent relied on this provision to justify commencement of work before the grant of EC. According to it, as the regulator (MoEF) had not issued a final decision within forty-five days from the date of the EAC's recommendation, it assumed that the EC had been granted (in line with the EAC's recommendations). This was countered by the counsel for

¹¹⁸ EIA Notification, *supra* note 5, ¶ 8(i).

¹¹⁹ EIA Notification, *supra* note 5, ¶ 8(ii).

¹²⁰ *Id.*

¹²¹ EIA Notification, *supra* note 5, ¶ 8(v). In case of projects requiring forest land, the formal EC is not issued (except for linear projects) till Stage-I approval for use of forest land for non-forest activities under the Forest (Conservation) Act, 1980, has been granted. See MoEF, Office Memorandum dated September 9, 2011 in No. J-110 13/41/2006-IA.II(1): *Consideration of Projects for Grant of Environment Clearance under EIA Notification, 2006, Which Involve Forestland - Procedure to be Followed - Further Clarifications - Regarding (2011)*, September 9, 2011, available at <http://moef.nic.in/downloads/public-information/ea-091211.pdf> (Last visited on February 24, 2014); and MoEF, Office Memorandum dated March 19, 2013 in No. J.11015/200/2008.IA.II(M): *Consideration of Projects for Grant of Environment Clearance under EIA Notification, 2006, Which Involve Forest Land - Procedure to be Followed - Further Clarifications (2013)*, March 19, 2013, available at <http://moef.nic.in/assets/ia-200313.pdf> (Last visited on February 24, 2014).

¹²² EIA Notification, *supra* note 5, ¶ 8(iii). The issue of deemed environmental clearance was discussed in detail by the High Court of Gujarat in *Gajubha (Gajendrasinh) Bhimaji Jadeja & Ors. v. Union of India & Ors.*, W.P. (PIL) No. 21 of 2013, High Court of Gujarat.

¹²³ See *Vedanta Aluminium Ltd. v. Union of India & Anr.*, W.P. (C) No. 19605 of 2010, High Court of Orissa (Cuttack).

MoEF who stated that the appraisal had in fact not been completed. The Court did not rule on this point but the MoEF's position seems correct as unless the appraisal process is complete i.e. the recommendations are *final*, a deeming provision cannot come into action.

The final decision of the appropriate regulator as well as the recommendations of the EAC/SEAC, are public documents.¹²⁴ In case the project proponent has deliberately concealed, and/or submitted false or misleading information about the project which is material to screening, scoping, appraisal or decision on the application, the application for EC is liable to be rejected and if the EC has already been granted, the EC itself can be cancelled.¹²⁵ Before such a decision is taken, the appropriate regulator has to give the project proponent a personal hearing, following the principles of natural justice.¹²⁶

C. POST CLEARANCE

1. Validity of Environment Clearance

The validity of the EC refers to the time period from the date on which the EC has been granted to the date on which the production operations commence or in case of construction activities, all construction work is complete.¹²⁷ The EC is valid for ten years for river valley projects. For mining projects the EC is valid for the entire life of the project, as determined by the EAC/SEACs, subject to a maximum of thirty years. The EC is valid for five years for the rest of the categories of projects. In case of Area Development projects, the validity period has to be calculated from the date on which the EC is granted to the date on which the developer, as the project proponent, has completed all the activities it is responsible for.¹²⁸

¹²⁴ EIA Notification, *supra* note 5, ¶ 8(iv).

¹²⁵ EIA Notification, *supra* note 5, ¶ 8(vi). The MoEF cancelled the EC granted to M/s Sesa Goa Ltd. for iron ore mining in villages Pirna and Nadora in District North Goa, Goa due to "concealment of data in respect of vital parameters of the EIA study". See MoEF, *Order dated August 29, 2011 in F. No. J-11015/79/2009 – IA.II (M) (2011)*, August 29, 2011 (available on file with author). See also MoEF's order of revocation of EC issued to M/s Nirma Ltd. for a cement plant, coke over plant and captive power plant in Gujarat. MoEF, *Letter dated December 1, 2011 to M/s Nirma Ltd. (2011)*, December 1, 2011, available at http://moef.nic.in/downloads/public-information/EC_Nirma.pdf (Last visited on February 24, 2014).

¹²⁶ EIA Notification, *supra* note 5, ¶ 8(vi).

¹²⁷ EIA Notification, *supra* note 5, ¶ 9.

¹²⁸ This period of validity can be extended by the appropriate regulator for another five years. Application in this regard has to be made during the validity of the EC with an updated Form 1 and supplementary Form 1A, if applicable. The appropriate regulator may consult the relevant EAC/SEAC before taking this decision. See EIA Notification, *supra* note 5, ¶ 9.

2. Publicizing the EC

Originally, the EIA Notification did not contain any provision requiring the grant of the EC to be publicized in a time-bound manner either by the regulatory authorities or by the project proponent. In a significant amendment to the Notification in 2009, duties were cast on several actors to ensure that information about the grant of the EC is disseminated to the public.¹²⁹ The project proponent has to permanently display the EC that has been granted on its official website.¹³⁰ The appropriate regulator has to also place the EC on a government portal.¹³¹ For Category A projects, the project proponent has to advertise, at its own costs, the grant of the EC and the safeguards and conditions in two local newspapers of the district or state where the project is situated.¹³² In case of Category B projects, the project proponent has to advertise the grant of the EC in two local newspapers and provide a link to the MoEF website where information about the EC would be available.¹³³ The project proponent has to submit copies of the EC to heads of local bodies, panchayats and municipal bodies and other relevant government offices.¹³⁴ These bodies/offices have to display the EC for 30 days from the date of receiving the EC.¹³⁵ The date on which the EC is made available in the public domain is particularly important from the standpoint of a potential litigation challenging the decision.¹³⁶ A June 2009 circular issued by the MoEF states that the EC letter has to include a condition requiring the project proponent to also send the EC letter to local NGOs which may have sent suggestions/ representations, while processing the project proposal.¹³⁷

3. Compliance and monitoring

After the EC is granted, the project proponent has to submit half yearly reports to the appropriate regulator explaining how it has complied with the conditions and safeguards imposed on the project.¹³⁸ These compliance reports have to be submitted in hard and soft copies. These are public documents which can be made available to any member of the public.¹³⁹ The Notification

¹²⁹ EIA Notification, as amended by Notification, S.O., 3067 (E), *supra* note 60, ¶ 10(i)(a).

¹³⁰ *Id.*

¹³¹ *Id.*, ¶ 10(i)(c).

¹³² *Id.*, ¶ 10(i)(a).

¹³³ *Id.*, ¶ 10(i)(b). Interestingly, the requirement does not extend to providing a link to the SEIAA's website, even though the project may have been granted EC by the SEIAA.

¹³⁴ *Id.*, ¶ 10(i)(d).

¹³⁵ *Id.*

¹³⁶ See *infra* text accompanying note 158 - 162.

¹³⁷ MoEF, *Circular dated June 30, 2009 in No. J-11013/41/2006-IA.II(I): Increasing Transparency in Disposal of EC Cases - Regarding (2009)*, June 30, 2009, available at http://moef.nic.in/divisions/iass/cir_incr_trans.pdf (Last visited on February 24, 2014).

¹³⁸ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, ¶ 10(ii).

¹³⁹ *Id.*, ¶ 10(iii).

also requires the appropriate regulator to display the latest compliance report on its website.¹⁴⁰

EC letters include obligations on the project proponent to self-monitor its operations based on different parameters and submit regular reports to the regional office of the MoEF, CPCB, SPCB and/or any other relevant government agency. Information available on the website of the MoEF places the responsibility of monitoring the compliance of EC conditions on the regional offices of the MoEF.¹⁴¹ A circular issued by the MoEF states that certain conditions relating to compliance, such as placing results of monitoring data on the proponent's website, have to be included in the EC letter.¹⁴² The MoEF has also issued an Office Order laying down the procedure for issuing a show cause notice in case of violation of the EC conditions.¹⁴³

4. Transfer of EC

An EC can be transferred to another legal entity during its validity.¹⁴⁴ The transferor has to apply to the appropriate regulator for the transfer of the EC in the name of the transferee.¹⁴⁵ The transferee can also apply for the transfer with a 'no objection' from the transferor. The conditions in the EC and its validity remain the same. The EAC or the SEAC need not be consulted before such transfer is executed.¹⁴⁶ This is unlike the approval to undertake non-forest activities in forest areas under the Forest (Conservation) Act, 1980. This approval is granted to the concerned state government for a particular user agency¹⁴⁷ and cannot be transferred to another user agency.

The possibility of transferring the EC could give rise to a situation in which a company with a record of civil and environmental rights violations could 'buy' an EC from the company which was initially granted the EC. As a

¹⁴⁰ *Id.*

¹⁴¹ See MoEF, *Circular dated June 3, 2009 in No. J-11013/30/2009-IA.II(I) (2009)*, June 3, 2009, available at http://moef.nic.in/divisions/iass/Circ_mandate_instuction.pdf (Last visited on April 24, 2014); MoEF, *Introduction to Environment Impact Assessment (2013)*, March 5, 2014, available at <http://moef.nic.in/division/introduction-8> (Last visited on February 24, 2014).

¹⁴² See MoEF, *Circular dated June 30, 2009, supra* note 137.

¹⁴³ It states, *inter alia*, that a show cause notice proposing to close down a unit has to be issued with the approval of the Secretary, MoEF and a show cause notice without proposing to close down a unit has to be issued with the approval of the Additional Secretary in-charge of the Impact Assessment (IA) division. See MoEF, *Office order dated September 9, 2009 in F. No. J-11013/10/2009-IA-I: Follow-up of the Cases of Environmental Clearance - Revamping of Monitoring Mechanism - Reg. (2009)*, September 30, 2009, available at http://moef.nic.in/sites/default/files/follow-up-EC_0.pdf (Last visited on February 24, 2014).

¹⁴⁴ EIA Notification, *supra* note 5, ¶ 11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Forest (Conservation) Act 1980, § 2.

result, the transferee's poor record which otherwise could have been a pertinent factor in the appraisal process, would become irrelevant.

5. Consequences of violation

The requirements under the EIA Notification are often not met – either in letter or spirit. With the exception of Paragraph 8(vi) on concealment of information,¹⁴⁸ the EIA Notification does not specify the consequences of other violations. As the EIA Notification is issued under the EP Act, contravention of any provision of the Notification would attract § 15 of the EP Act.¹⁴⁹

The MoEF has issued Office Memoranda on the issue of commencement of construction/ expansion/ modernization activities before the grant of necessary EC.¹⁵⁰ Once a complaint is filed, the MoEF and EAC (or the SEIAA and the SEAC) have to verify the veracity of the complaint. If it is found that the complaint is valid, the project would be delisted and the project proponent would be required to submit a formal resolution of the Board of Directors (or equivalent management) stating that the violation would not be repeated.¹⁵¹ This has to be done within sixty days. If the project proponent does not respond within sixty days, the project file would be closed and future action would be taken only if the proponent applied *de novo*. At the same time, the State Government has to invoke its powers under § 19, EP Act to take necessary action under § 15, EP Act. It has to then submit evidence of credible action taken to the MoEF.¹⁵² Information about the project proponent and its written commitment would have to be placed on the website of the MoEF.¹⁵³

¹⁴⁸ See *supra* text accompanying note 125.

¹⁴⁹ §15 of the EP Act is a penalty provision and specifies that in case of any contravention, the punishment could be imprisonment for a term extending to five years or fine upto one lakh rupees or both. If the contravention continues even after conviction, a fine of rupees five thousand per day could be imposed and if the contravention continues for more than a year, the offender could be imprisoned for a term extending to seven years.

¹⁵⁰ MoEF, *Office Memorandum dated June 27, 2013 in No. J-11013/41/2006-IA.II(1): Consideration of Proposals for TORs / Environment Clearance / CRZ Clearance Involving Violation of the Environment (Protection) Act, 1986 / Environment Impact Assessment (EIA) Notification, 2006 / Coastal Regulation Zone (CRZ) Notification, 2011 - reg. (2013)*, June 27, 2013, available at <http://www.moef.nic.in/sites/default/files/om-270613.pdf> (Last visited on February 24, 2014); MoEF, *Office Memorandum dated December 12, 2012 in No. J-11013/41/2006-IA.II(1): Consideration of Proposals for TORs/Environment Clearance/ CRZ Clearance Involving Violation of the Environment (Protection) Act, 1986 / Environment Impact Assessment (EIA) Notification, 2006 / Coastal Regulation Zone (CRZ) Notification, 2011 - Reg. (2012)*, December 12, 2012, available at <http://moef.nic.in/assets/om-12122012-b.pdf> (Last visited on February 24, 2014).

¹⁵¹ *Id.*, MoEF, Office Memorandum dated December 12, 2012, ¶ 5(i).

¹⁵² *Id.*, ¶ 5(ii).

¹⁵³ *Id.*, ¶ 5(iii).

Directions will also be issued by the MoEF under § 5, EP Act to suspend activities till appropriate EC is obtained.¹⁵⁴ If such a direction is violated, action will be taken against the project proponent and the EC application will be summarily rejected.¹⁵⁵ Once these conditions are met, the project will again be considered at the appropriate stage. However, the factum of violation would be a material consideration during the decision making process.¹⁵⁶ Even if the project proponent has met the conditions for the project to be listed again, the project proponent cannot by right expect the project to be considered for grant of EC.¹⁵⁷ The MoEF or the SEIAA reserves the right to entirely reject the project proposal.

6. Grievance Redressal Mechanism

The grant of an EC or the rejection of an application for EC by the appropriate regulator may be challenged in an appeal before the NGT.¹⁵⁸ According to § 16 of the National Green Tribunal Act, 2010 ('NGT Act'), 'any person aggrieved'¹⁵⁹ by such an order – granting or rejecting an EC – can approach the NGT within thirty days from the date on which the order has been communicated to the person.¹⁶⁰ The NGT in *Save Mon Region Federation & Anr v. Union of India & Ors*,¹⁶¹ while relying on Paragraph 10(i) of the EIA Notification, held that the date from which the thirty day period would commence would be the earliest of the following three dates: 1) the date on which the full order could be accessed on, and downloaded from, the website of the MoEF; 2) the date on which the full order could be accessed on, and

¹⁵⁴ MoEF, Office Memorandum dated June 27, 2013, *supra* note 150.

¹⁵⁵ *Id.*

¹⁵⁶ The High Court of Bombay in *Gram Panchayat Navlakh Umbre v. Union of India & Ors.*, 2012 (114) BOM LR 2695 held –

“The issue as to whether an applicant for environmental clearance has acted in breach of the condition which prohibits work prior to the receipt of environmental clearance is a material consideration in determining whether environmental clearance should be granted. A project proponent who seeks an environmental clearance under the law must demonstrably act in accordance with law. ... That issue cannot be disassociated from the grant of an environmental clearance and a clearance could not have been granted without a definitive conclusion, arrived at in accordance with the principles of natural justice, on the issue of breach”.

¹⁵⁷ MoEF, Office Memorandum dated December 12, 2012, *supra* note 150, ¶ 7.

¹⁵⁸ National Green Tribunal Act, 2010, § 16(h) and § 16(i).

¹⁵⁹ The NGT has interpreted this phrase liberally and held that “any person can approach this Tribunal complaining environmental threat in the activities of the State or any organization or individual”, as long as it is not a frivolous petition. *See Vimal Bhai & Ors. v. Ministry of Environment and Forests & Ors.*, Appeal No. 5 of 2011, National Green Tribunal, December 14, 2011, available at [http://www.greentribunal.in/judgment/5-2011_\(Ap\)_14dec_final_order.pdf](http://www.greentribunal.in/judgment/5-2011_(Ap)_14dec_final_order.pdf) (Last visited on February 24, 2014).

¹⁶⁰ The period of thirty days can be extended to ninety days if sufficient cause for delay is shown to the Tribunal. *See* National Green Tribunal Act, 2010, proviso to §16.

¹⁶¹ M.A. No. 104 of 2012 in Appeal No. 39 of 2012, National Green Tribunal, March 14, 2013, available at [http://www.greentribunal.in/judgment/104-2012\(MA\)_14Mar2013_final_order.pdf](http://www.greentribunal.in/judgment/104-2012(MA)_14Mar2013_final_order.pdf) (Last visited on February 24, 2014).

downloaded from, the website of the project developer and was also published in the newspapers by the developer in accordance with the EIA Notification; and 3) the date on which local governmental authorities, such as the *panchayats*, displayed the entire EC order.¹⁶²

Issues relating to compliance with EC conditions may also be raised before the NGT. Under its original jurisdiction,¹⁶³ the NGT has the power to hear “civil cases where a substantial question relating to the environment” is involved, and which relate to the implementation of any of the seven legislations listed in Schedule I to the NGT Act. Schedule I includes the EP Act. Consequently the NGT has jurisdiction to adjudicate cases relating to the implementation of the EIA Notification.

Although the NGT Act provides a statutory appeal to the NGT against the grant or rejection of an EC application, it does not (and cannot) entirely exclude the jurisdiction of the High Courts. The writ jurisdiction of the High Courts under Article 226 of the Constitution of India may still be invoked for issues relating to the implementation of the EIA Notification, particularly in relation to the enforcement of the fundamental right under Article 21 of the Constitution.¹⁶⁴

V. ANALYSIS

In the previous section, this paper discussed the basic contours of the EIA Notification, the main actors and institutions involved and the process to obtain an environmental clearance. This section discusses some of the problematic aspects in the design and implementation of the Notification, particularly, the power dynamics between the Centre and the States, the poor quality of the assessment reports, problematic means by which public consultations are held and weak appraisal and monitoring mechanisms. The government has responded to some extent to calls for reform – some even arising from the judiciary. However, the adequacy of these responses is debatable.

A. POWER TO REGULATE AND THE FEDERAL SET-UP

The EP Act gives extensive powers to the Centre to regulate actions which have an impact on the environment and to initiate measures for the protection of the environment.¹⁶⁵ A fair question that then arises is – whether

¹⁶² See Shibani Ghosh, *Case Note: Access to Information as Ruled by the Indian Environmental Tribunal: Save Mon Region Federation v. Union of India*, 22 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 202-206 (2013).

¹⁶³ National Green Tribunal Act, 2010, § 14(1).

¹⁶⁴ See Gajubha (Gajendrasinh) Bhimaji Jadeja & Ors. v. Union of India & Ors., W.P. (PIL) No. 21 of 2013, High Court of Gujarat.

¹⁶⁵ Environment (Protection) Act, 1986, § 3.

the EIA Notification issued under the EP Act strikes an appropriate balance of power between the Centre and the states. There is no doubt that the regime of regulating the development and construction of projects through the EC process affects the interests of states – commercial and otherwise. To what extent, then, should states have a say in the process, i.e. how decentralised should the process be? Or are there countervailing interests that are served if the Centre controls the decision making?

When the EIA Notification was being drafted, one of the objections raised by environmental groups was the manner in which projects were categorized in the Schedule. According to some commentators, placing a large number of projects in Category B risked prejudiced decision making at the state-level, as states, keen to encourage investment, would clear projects indiscriminately.¹⁶⁶ Others found the Notification to reduce “the meaningfulness of decision-making levels across all projects: in the case of category A projects, the role of the State and local governments is eliminated, and in the case of category B projects, the role of the central and local governance structures is eliminated”.¹⁶⁷ Objections were also raised by various state governments which believed that the proposed EIA Notification did not devolve adequate powers to the states and made the process too cumbersome. Some of their objections lent credence to the apprehension that states would like the EC process to be expedited, and consequently less rigorous.¹⁶⁸

The division of powers under the EIA Notification has been discussed above. Category B projects are regulated at the state level by SEIAAs – unless they are subject to the general conditions. During the screening stage, the SEACs identify Category B projects which do not have to undergo Extensive

¹⁶⁶ See Manju Menon & Kanchi Kohli, *Equations' Critique on Environmental Impact Assessment Notification, 2006*, February 2007, available at http://www.equitabletourism.org/files/fileDocuments373_uid10.pdf (Last visited on February 24, 2014). This argument is, in a sense, ‘a race to the bottom’ argument which has often been applied to justify concentration of regulatory powers at the central level, to avoid sub-optimal standard setting by competing states. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 THE YALE LAW JOURNAL 1196-1272, 1213 (1977) (“Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards”); See also Kirsten H. Engel, *State Environmental Standard-Setting: Is There a ‘Race’ and Is It ‘To the Bottom’?*, 48 HASTINGS LAW JOURNAL 271-398 (1997).

¹⁶⁷ SALDANHA ET AL., *supra* note 2, 21.

¹⁶⁸ Kanchi Kohli, *States Unhappy with Centralised Clearances*, June 14, 2006, available at <http://www.indiatogether.org/2006/jun/env-eiastates.htm> (Last visited on February 24, 2014). For insights on the drafting process of the EIA Notification, particularly, on the issue of decentralization, see M. Rajshekhar, *A Process of Confrontation: The Drafting of India's Infamous Environmental Impact Assessment Notification, 2006* (Unpublished thesis, University of Sussex), available at <http://mrajshekhar.wordpress.com/on-the-drafting-of-the-environment-impact-assessment-notification-2006/> (Last visited on February 24, 2014).

Impact Assessment studies and therefore have a less cumbersome clearance process. SEIAAs and SEACs are constituted by the Central Government – but on the nomination/ recommendation of the relevant state governments. Moreover, these bodies are provided logistical and financial support by the respective state governments. Thus the state governments, through their nominees, do have a very critical role in the regulation of Category B projects.

But the Central Government can whittle down the state's powers by amending the Schedule to bring more projects under Category A.¹⁶⁹ It can also introduce various procedural requirements which increase the administrative burden on the state government machinery. For instance, pursuant to a judgment of the Supreme Court,¹⁷⁰ the Centre issued an Office Memorandum in May 2012 directing the SEIAAs to regulate all leases for minor minerals with lease area upto 50 hectares, including those with an area less than 5 hectares.¹⁷¹ Mining projects with lease area less than 5 hectares were previously excluded from the ambit of the EIA Notification.

At the same time, the Centre can also amend the Notification to increase the state governments' regulatory jurisdiction (and reduce the Centre's) by adding projects under Category B or to reduce the administrative burden on state governments. An amendment to the EIA Notification in December 2009 placed coal mining projects with lease area between 5 to 150 hectares in Category B. Originally all mining projects, including coal mining, with area above 50 hectares were Category A projects and required clearance from the Centre.¹⁷²

Another set of state-level bodies playing an important role is the state government constituted SPCBs which facilitate public hearings. However, the role of the SPCBs under the EIA Notification is essentially that of a moderator and to some extent that of a monitor – with limited regulatory powers. Therefore, while there are other ways in which SPCBs can regulate industries

¹⁶⁹ Environment (Protection) Act, 1986, § 3(2)(v)(1). Amendment to the EIA Notification is generally preceded by a notice to the public expressing intention to amend and the state governments could oppose an amendment affecting its powers. Further the Central Government would be expected to take into consideration such a representation.

¹⁷⁰ Deepak Kumar v. State of Haryana & Ors., (2012) 4 SCC 629.

¹⁷¹ MoEF, Office Memorandum dated May 18, 2012 in No. L-11011/47/2011-IA.II(M): Order of Hon'ble Supreme Court dated 27.2.2012 in I.A. no. 12-13 of 2011 in SLP (C) no. 19628-19629 of 2009 in the Matter of Deepak Kumar v. State of Haryana and Ors. - Implementation Thereof - Regarding (2012), May 18, 2012, available at <http://moef.nic.in/downloads/public-information/notif-18052012-4.pdf> (Last visited on February 24, 2014).

¹⁷² See EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, Schedule, Item 1(a); See also EIA Notification, as amended by Notification, S.O. 2559 (E), *supra* note 49 (removing the scoping requirements for all Highway projects, including Category B projects, thereby reducing the workload of the SEACs).

(such as, through approvals to be issued under the Water Act and the Air Act),¹⁷³ the EIA Notification provides limited avenues.

There is another concern of federalism in the EC process that has more to do with party politics than the design of the Notification. If the coalition parties in power at the Centre are not in power in the states, allegations of bias have been made. The Biju Janata Dal ('BJD') – the party in power in Odisha and not a coalition partner of the UPA – has accused the UPA of giving Odisha 'step motherly' treatment by denying clearances to two major infrastructure projects that are both Category A projects in the State.¹⁷⁴ According to the party, the Centre while stalling these projects in Odisha, has permitted the Polavaram dam project in neighbouring Andhra Pradesh, even though it would submerge many villages in Odisha.

Centre-state relations in India are often strained¹⁷⁵ and the EC process is no exception. State governments would like to retain as much regulatory control as possible on industrial and developmental projects within their jurisdiction. This is not surprising. But it could be problematic if the decision making process is faulty, biased and geared to run counter to the aims and objectives of the EP Act and the EIA Notification. If it is difficult to insulate state governmental institutions from external, particularly political, pressures then perhaps it is advisable to limit their discretionary powers and give Centre the final say, in the interest of protecting the environment. While Central regulatory institutions may be unaffected, in most part, by local pressures, and thus better placed to give an unbiased decision, it would be wrong to assume that they are altogether immune from extraneous factors.¹⁷⁶ It is also difficult to make the

¹⁷³ See Water (Prevention and Control of Pollution) Act, 1974, §25 and Air (Prevention and Control of Pollution) Act 1981, §19.

¹⁷⁴ PTI, *BJD Accuses Centre of Step-Motherly Approach to Orissa*, DNA September 18, 2010. The two projects which have been embroiled in litigation for some time now are the Rs. 52,000 crore iron and steel plant-cum-port project of the South Korean company POSCO and Rs. 5000 crore alumina refinery of the Vedanta Aluminium Ltd. The MoEF has recently revalidated the EC granted to POSCO for iron and steel plant with captive power plant. EC letter dated January 7, 2014, available at [http://environmentclearance.nic.in/writereaddata/Form-1A/EC/01152014IEC_to_POSCO\[1\].pdf](http://environmentclearance.nic.in/writereaddata/Form-1A/EC/01152014IEC_to_POSCO[1].pdf) (Last visited on February 24, 2014).

¹⁷⁵ Govinda M. Rao & Nirvikar Singh, *Natural Resources* in POLITICAL ECONOMY OF FEDERALISM IN INDIA (2005).

¹⁷⁶ While deciding to grant EC to the Jaitapur Nuclear power park in Maharashtra, the Minister of State (I/C), MoEF released a statement explaining the decision. He stated that while there were concerns relating to marine biodiversity, there were "weighty strategic and economic reasons in favour of the grant of environmental clearance now". See MoEF, *Press Release: NPCIL Jaitapur Power Park*, November 28, 2010, available at <http://moef.nic.in/downloads/public-information/press-release-npcil-jaitapur-power-work.pdf> (Last visited on February 24, 2014). One of the justifications given by the MoEF while proposing an independent environmental regulator was that "public interest is best served by insulating decision making from extraneous influences in critical and complex domains like environmental regulation". See also MoEF, *Discussion Paper: Workshop on Reforms in Environmental Regulation: with Specific Reference to Establishment of National Environment Protection Authority*, May 25, 2010,

claim that the institutions at the Centre are better equipped or have greater access to technical expertise than their State-level counterparts.¹⁷⁷

Given the regulatory experience thus far, I remain relatively agnostic on where the balance should lie between the Centre and the states. Perhaps the focus instead should be on adopting a strong regulatory ethic at both levels that is sufficiently robust to meet the objectives of the law (EIA Notification, in this case) and to merit stakeholder confidence. As the discussion below illustrates, there are several features of the EC process which require redesign or reinforcement in order to meet these parameters.

B. QUALITY OF ENVIRONMENT IMPACT ASSESSMENT

The EIA studies are a significant part of the information base in the EC process. An EIA report submitted by a project proponent must include an analysis of the potential impacts and benefits of the proposed project, proposed mitigation measures, possible alternative technology and sites for the project, and an environmental monitoring plan.¹⁷⁸ However, as the following discussion will illustrate, the quality and credibility of reports submitted by project proponents is often suboptimal, and reliance on information provided in such reports can lead to gravely erroneous decisions.

1. EIA report is paid for by the project proponent

The EIA reports are prepared by consultants engaged by the project proponents. There are many private and government agencies which provide such services at a fee paid by the proponent.¹⁷⁹ Herein lies perhaps the most crucial problem with the impact assessment process – an entity hired by the project proponent can hardly be expected to prepare an entirely unbiased impact assessment report. The EIA report is, for this reason, a less than credible source of data as the consultant may downplay the adverse aspects of the

available at http://moef.nic.in/downloads/public-information/NEPA_discussion.pdf (Last visited on February 24, 2014).

¹⁷⁷ For instance, the set of qualification for persons who may be appointed as chairperson and members of the EACs and the SEACs is the same. See EIA Notification, *supra* note 5, Appendix VI.

¹⁷⁸ See *supra* note 70.

¹⁷⁹ While the EIA Notification does not itself acknowledge this factual position, it is clear from subsequent official documents of the MoEF, including, MoEF, *Office Memorandum dated August 4, 2009 in No. J-11013/41/2006-IA.II(I): Instructions for the Project Proponents - Regarding*, August 4, 2009, available at <http://moef.nic.in/divisions/iass/ompp.pdf> (Last visited on February 24, 2014); and MoEF, *Office Memorandum dated December 2, 2009 in No. J-11013/77/2004-IA-II(I): Accreditation of the EIA Consultants with Quality Council of India (QCI)/ National Accreditation Board of Education and Training (NABET)*, December 2, 2009, available at http://moef.nic.in/divisions/iass/QCI_on_web.pdf (Last visited on February 24, 2014).

project.¹⁸⁰ This problem is particularly magnified in the Indian context as it is unlikely that any other stakeholder would have the wherewithal to commission an alternative impact assessment and even more unlikely that such an entity would have access to accurate information about the proposed operations.

The Supreme Court of India has also noted the undesirability of this arrangement. In *T.N. Godavarman v. Union of India* ('NOIDA Park case'), the Court in its judgment observed:

"We would also like to point out that the environmental impact studies in this case were not conducted either by the MoEF or any organization under it or even by any agencies appointed by it. All the three studies that were finally placed before the Expert Appraisal Committee and which this Court has also taken into consideration, were made at the behest of the project proponents and by agencies of their choice. This Court would have been more comfortable if the environment impact studies were made by the MoEF or by any organization under it or at least by agencies appointed and recommended by it".¹⁸¹

A report published by the Planning Commission of India in 2007 recommended – "it would be desirable for an independent agency, perhaps the MoEF, to select the consultant, sponsor the studies and pay for them".¹⁸² However, in 2009 and 2010, when there was a flurry of proposals from the MoEF to bring changes to the institutional set up under the EIA Notification, an independent regulator was proposed to improve the appraisal of project proposals and monitoring of projects, but not to undertake independent impact

¹⁸⁰ See *Sarpanch Gram Panchayat, Tiroda & Ors. v. MoEF & Ors.*, Appeal No. 3 of 2011, National Green Tribunal, September 12, 2011, available at [http://www.greentribunal.gov.in/judgment/3-2011\(Ap\)_12sept_final_order.pdf](http://www.greentribunal.gov.in/judgment/3-2011(Ap)_12sept_final_order.pdf) (Last visited on February 24, 2014) (The NGT held: "It is very surprising to notice that the EIA report is prepared by the project proponent through his own consultants at his own expenditure. In such case, there is every possibility of concealing certain intrinsic information, which may go against the proponent, if it is revealed. This is the area, the proponents take advantage"); See also *Him Privesh Environment Protection Society & Ors. v. State of Himachal Pradesh & Ors.*, CWP No. 586 of 2010 and CWPI No. 15 of 2009, High Court of Himachal Pradesh. The matter is now *sub judice* before the Supreme Court of India.

¹⁸¹ *T.N. Godavarman v. Union of India*, (2011)1 SCC 744. During the hearing of a case concerning illegal limestone mining by a French company in Meghalaya, the Supreme Court commented that the system was akin to "paying the piper to call the tune". See Krishnadas Rajagopal, *Cos Pay Experts for Favourable Green Impact Report: SC*, THE INDIAN EXPRESS March 5, 2011.

¹⁸² PLANNING COMMISSION OF INDIA, *Report of the Task Force on Governance, Transparency, Participation & Environmental Impact Assessment and Urban Environmental Issues in the Environment and Forests Sector for the Eleventh Five year Plan (2007-2012)*, 2007, available at http://planningcommission.nic.in/aboutus/committee/wrkgrp11/tf11_govnc.pdf (Last visited on April 24, 2014).

assessment.¹⁸³ This was an anomalous course correction suggested by the MoEF – improved appraisal and monitoring mechanisms may be a step in the right direction but the underlying problem of unreliable impact assessment data can hardly be ignored.

Then in 2011, the Supreme Court directed the Central Government to “appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters” under the provisions of the EP Act.¹⁸⁴ As the Central Government failed to comply with this direction, the Supreme Court on January 6, 2014 directed it to do so by March 31, 2014.¹⁸⁵ While the exact design of the proposed regulator is not yet known, the Court’s emphasis on the regulator’s appraisal and monitoring role appears to exclude the function of independent impact assessment – unless the term ‘appraisal’ is so broadly interpreted as to include first-level assessment of the project (and not merely second-level appraisal of the EIA studies submitted).

2. Preference for ‘rapid EIA’

A rapid EIA report involves impact assessment based on data of one season (other than the monsoon), and a comprehensive EIA report makes an assessment based on all seasons’ data. The two types of EIA reports are not mentioned in the EIA Notification but are defined by the MoEF in its 2001 EIA Manual.¹⁸⁶ According to the EIA Manual, a project proponent is permitted to submit a rapid EIA on the pre-condition that it does not compromise on the quality of decision making.¹⁸⁷ The Manual also states that a comprehensive EIA report would generally be a ‘more efficient approach’.¹⁸⁸ As the Manual is ambiguously worded, and the EIA Notification itself does not require a comprehensive EIA report, most project proponents choose to commission the

¹⁸³ See MoEF, *Discussion Paper for Comments: Towards Effective Environmental Governance: Proposal for a National Environment Protection Authority*, September 17, 2009, available at <http://www.moef.nic.in/downloads/home/NEPA-Discussion-Paper.pdf> (Last visited on February 24, 2014); MoEF, *Discussion Paper of May 25, 2010*, *supra* note 176; and MoEF, *Discussion Paper: Reforms in Environmental Governance: With Special Reference to Establishment of National Environment Assessment and Monitoring Authority (NEAMA)*, November 26, 2010, available at <http://moef.nic.in/sites/default/files/division/NEAMA-Establishment.pdf> (Last visited on February 24, 2014). See also Shibani Ghosh, *The National Environment Assessment and Monitoring Agency: A Step Forward?*, XLVI ECONOMIC AND POLITICAL WEEKLY 12-16 (2011).

¹⁸⁴ *Lafarge Umiam Mining Private Limited v. Union of India & Ors.*, (2011) 7 SCC 338.

¹⁸⁵ *T.N. Godavarman v. Union of India & Ors.*, W.P. (C) No. 202 of 1995, Supreme Court of India.

¹⁸⁶ MoEF, *Environment Impact Assessment- A Manual*, January, 2001, available at <http://envfor.nic.in/divisions/iass/eia/Cover.htm> (Last visited on February 24, 2014).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

less time-consuming rapid EIA report, which in many cases is an inadequate assessment.¹⁸⁹

The environmental impact of an activity often varies according to weather conditions.¹⁹⁰ For instance, the wind direction may change over seasons in a region. As a result, the spatial impact of an industry's emissions would naturally vary. A rapid EIA report does not capture such variations in impact. Unfortunately, project proponents continue to exploit this regulatory ambiguity by preparing EIA reports in the months most favourable to them. The 2007 report of the Planning Commission had identified the need to discourage 'quick EIAs' and recommended guidelines to require biodiversity profiles to be done over at least one year.¹⁹¹ Even the High Court of Himachal Pradesh was constrained to observe that it was time that the MoEF framed guidelines as to the projects which could be granted EC based on a rapid EIA and those which would require a longer term detailed study.¹⁹² However, the MoEF is yet to issue any order or guidelines in this regard.

3. Lack of cumulative impact assessment

EIA reports only look at the impact of the proposed project as a stand-alone entity, and not as one among many sources of environmental damage. A preferred approach is the cumulative impact assessment that looks at the aggregate environmental impact of multiple projects/ activities in an area.¹⁹³ The EIA Notification requires project proponents to provide information about the cumulative effects of the proposed project on account of its proximity to existing or planned projects – but only in a pro forma manner as a question in Form 1.¹⁹⁴ The question is often answered cryptically by project proponents without any substantive cumulative impact studies. At the appraisal stage, EACs can recommend such studies before considering the project for clearance. On the few occasions when the EACs have made such recommendations, they

¹⁸⁹ Menon & Kohli, *supra* note 2.

¹⁹⁰ See BARBARA CARROLL & TREVOR TURPIN, ENVIRONMENTAL IMPACT ASSESSMENT HANDBOOK: A PRACTICAL GUIDE FOR PLANNERS, DEVELOPERS AND COMMUNITIES 88 (2002); Department of Environment, *Guide on Environmental Statements for Planning Projects that Require Environmental Assessment*, available at <http://regulations.completepicture.co.uk/pdf/Planning/Preparation%20of%20Environmental%20Statements%20for%20Planning%20Projects%20That%20RequireEnviro.pdf> (Last visited on February 24, 2014).

¹⁹¹ PLANNING COMMISSION OF INDIA, *supra* note 182, 38.

¹⁹² See Him Privesh Environment Protection Society & Ors. v. State of Himachal Pradesh & Ors., CWP No. 586 of 2010 and CWPI No. 15 of 2009, High Court of Himachal Pradesh.

¹⁹³ For more information on Cumulative Environmental Impact Assessments, see Asha Rajvanshi et al., *Assessment of Cumulative Impacts of Hydroelectric Projects on Aquatic and Terrestrial Biodiversity in Alaknanda and Bhagirathi Basins, Uttarakhand*, 2012, available at <http://www.indiaenvironmentportal.org.in/files/file/SEA-Hydro-Report.pdf> (Last visited on February 24, 2014).

¹⁹⁴ EIA Notification, *supra* note 5, Appendix I, point 9.4.

have been in diluted form.¹⁹⁵ The lack of a mandatory requirement for cumulative impact assessment – particularly for projects proposed in dense industrial areas – is a serious lacuna in the EIA Notification.

The lack of cumulative impact assessment has been a concern agitated before the NGT on several occasions. In a case concerning an iron ore mining project in Maharashtra, one of the main issues raised was that there were four mining projects proposed in the same area and the mine in question was in close proximity to a school, a temple and human habitation. However, the impact of the four mines cumulatively had not been considered. The NGT, in its final judgment, directed the EAC to re-examine the project in light of a fresh impact assessment report of the cumulative environmental impact of all the mines.¹⁹⁶

In another judgment, the NGT struck down the EC granted to a thermal power plant project in Chhattisgarh. *Inter alia*, the Tribunal found that the MoEF, prior to granting the approval, had “failed to anticipate probable ill impact of the project, in conjunction with the pollution level caused due to the other projects already existing in the surrounding area”.¹⁹⁷ In this case, the proposed power plant was in close proximity to three other power plants, five ash ponds, and to the industrial town of Korba – which had been declared the fifth most critically polluted industrial cluster in India. Neither the EAC in its appraisal, nor the MoEF before granting approval, considered the cumulative impact of all these developments along with the proposed project.

The MoEF has recently acknowledged the significance of cumulative impact assessment. It has commissioned cumulative impact assessment studies for hydroelectric projects on certain river basins.¹⁹⁸ An Office Memorandum issued in May 2013 states that when a second project comes up on a river basin, “it should be incumbent on the developer of the second/other project(s) to incorporate all possible and potential impact of other project(s) in the basin to get a cumulative impact assessment done”.¹⁹⁹ It is further stated

¹⁹⁵ Shripad Dharmadhikary, *River Basin Studies: A Half-Hearted Attempt*, June 16, 2009, available at <http://www.indiatogether.org/2009/jun/env-basin.htm> (Last visited on February 24, 2014).

¹⁹⁶ Sarpanch Gram Panchayat, Tiroda & Ors. v. MoEF & Ors., Appeal No. 3 of 2011, National Green Tribunal, September 12, 2011, available at [http://www.greentribunal.gov.in/judgment/3-2011\(Ap\)_12sept_final_order.pdf](http://www.greentribunal.gov.in/judgment/3-2011(Ap)_12sept_final_order.pdf) (Last visited on February 24, 2014).

¹⁹⁷ Jeet Singh Kanwar & Anr. v. Union of India & Ors., Appeal No. 10 of 2011 (T), National Green Tribunal, April 16, 2012, available at [http://www.greentribunal.in/judgment/10-2011\(T\)_16April2013_final_order.pdf](http://www.greentribunal.in/judgment/10-2011(T)_16April2013_final_order.pdf) (Last visited on February 24, 2014).

¹⁹⁸ See Rajvanshi et al., *supra* note 193.

¹⁹⁹ MoEF, *Office Memorandum dated May 28, 2013 in No. J-11013/1/2013-IA-1: Streamlining of Process of Environment Clearance (EC) and Forest Clearance (FC) Cases by Expert Appraisal Committee (EAC) & Forest Advisory Committee (FAC) Respectively for Hydropower and River Valley Projects (HEP & RVP)-Regarding*, May 28, 2013, available at http://moef.nic.in/sites/default/files/om_ia_120813.pdf (Last visited on February 24, 2014).

that the requirement of conducting such a study has to be incorporated in the ToRs itself.²⁰⁰ It remains to be seen how rigorously this condition will be implemented.

4. Poor quality of draft EIA reports

The EIA Notification does not provide guidance regarding the required ‘quality’ of a draft EIA report and the extent to which a final EIA report can deviate from the draft version. As mentioned above, a draft version of the EIA report is presented to the public before the public consultation process commences. The project proponent is then expected to address the ‘material concerns’ raised during the consultation process and to submit a final report for appraisal to the regulatory authority. This course of action is deeply problematic for two related reasons – *first*, that the public forms an opinion about the proposed project based on an impact assessment report which may be incomplete and/or inaccurate; and *second*, since the final EIA report is not available to the public before appraisal, the information provided by the project proponent in the final EIA report is not independently verifiable. It is not uncommon for project proponents to introduce new information in the final EIA report. Sometimes, this could be in response to concerns raised during the public consultation process but in such instances, the public does not get an opportunity to review this information and consider the same in a meaningful manner.

In *Ossie Fernandes v. Union of India*,²⁰¹ the NGT found that the draft EIA report prepared before the public consultation for a thermal power plant in Tamil Nadu had ‘significant omissions’ when compared to the final EIA report. The Tribunal observed that the fact that the final EIA report was not available for public perusal could “allow all mischief to be done by the project proponent”.²⁰² A day after this judgment, in a different case, the NGT made certain suggestions to the MoEF regarding draft EIA reports, including evolving a system of verifying the correctness of a draft EIA report, ascertaining that there are no drastic variations between the draft and the final report and placing the final EIA report in the public domain before the EC is granted.²⁰³ Till date, the MoEF is yet to implement these suggestions.

²⁰⁰ *Id.*

²⁰¹ Appeal No. 12 of 2011, National Green Tribunal, May 30, 2012, available at [http://www.greentribunal.gov.in/judgment/12-2011\(AP\)_30May2012_final_order.pdf](http://www.greentribunal.gov.in/judgment/12-2011(AP)_30May2012_final_order.pdf) (Last visited on February 24, 2014).

²⁰² *Id.*

²⁰³ Ramesh Agarwal v. Member, SEIAA, Chhattisgarh & Ors., Appeal No. 20/2011(T), National Green Tribunal, May 31, 2012, available at [http://www.greentribunal.gov.in/judgment/20-2011\(T\)_31May2012_final_order.pdf](http://www.greentribunal.gov.in/judgment/20-2011(T)_31May2012_final_order.pdf) (Last visited on February 24, 2014).

5. Incidents of plagiarism and inaccurate impact assessment

EIA consultants hired to prepare EIA reports have been found to plagiarise material from EIA reports of other projects, including inaccurate and/or incomplete assessments.²⁰⁴ Needless to say, such actions are unethical and unprofessional and more importantly, deeply worrying as the value of the entire impact assessment process can justifiably be questioned.

In 2006, a bauxite mining project in Maharashtra was granted EC by the MoEF. It was later found that the EIA report submitted by the project proponent had portions copied from a report prepared for a Russian bauxite mining project.²⁰⁵ Several variables such as surface water quality, precipitation, bird and mammal densities, number of species and impacts of the project were copied verbatim from the earlier Russian report. In another instance, in 2011, it was found that parts of an EIA report for a bulk drug manufacturing plant in Andhra Pradesh were copied from an EIA report of a sponge iron plant.²⁰⁶ The plagiarism was not difficult to detect. The EIA consultant had not deleted certain references to a sponge iron plant in the drug manufacturing plant's EIA report.

After several such instances of plagiarism were brought to the notice of the MoEF, it has issued an Office Memorandum stating that if any EIA report is found to be copied, the project would be summarily rejected.²⁰⁷ If the EC has already been granted, it will be withdrawn.²⁰⁸ However, in the same document, the MoEF admits that it would be 'time consuming' for the MoEF and the EACs to identify possible plagiarism and therefore it places the onus on the project proponent to ensure that the contents of the EIA report are correct.²⁰⁹

²⁰⁴ Kalpavriksh, *Shoddy EIA Reports at a Glance*, 2007, available at <http://www.kalpavriksh.org/petitions-letters-action-alerts> (Last visited on February 24, 2014) See also EAS Sarma, *The Saga of Sompeta: Public Deception, Private Gains*, XLV ECONOMIC AND POLITICAL WEEKLY 38-43 (2010); Neeraj Vagholikar, *Dams and Environmental Governance in North-east India* in INDIA INFRASTRUCTURE REPORT 2011: WATER: POLICY AND PERFORMANCE FOR SUSTAINABLE DEVELOPMENT (2011).

²⁰⁵ Padmaparna Ghosh, *Are the Govt's Green Clearances a Farce?*, THE MINT December 17, 2007.

²⁰⁶ Letter dated August 29, 2011 to Special Secretary, MoEF highlighting the discrepancies (available on file with author); See also Anusha Subramanian, *The Great Indian Green Trick*, BUSINESS TODAY October 16, 2011.

²⁰⁷ MoEF, *Office Memorandum dated October 5, 2011 in No. J-11013/41/2006-IA-II(I): Ownership of EIA Report and Other Documents by the Project Proponent*, October 5, 2011, available at http://moef.nic.in/downloads/public-information/OM_IA_ownershipEIA.pdf (Last visited on February 24, 2014).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

6. Lack of accountability of EIA consultants

As the above discussion indicates, the quality of environmental impact assessment in India leaves much to be desired. The Quality Council of India has observed that EIA reports submitted by project proponents “do not measure up to the desired quality”.²¹⁰ What aggravates this situation is that there is no effective accountability mechanism under the EIA Notification for EIA consultants. The onus to provide factually correct information in an EIA report has been placed on the project proponent – and not on the EIA consultant.²¹¹ There is a requirement for EIA consultants to include an undertaking in the EIA report that the contents are factually correct, but the repercussions for providing false information are not clear.²¹²

Since December 2009, an accreditation process for EIA consultants carried out by the Quality Council of India (‘QCI’) and the National Accreditation Board of Education and Training (‘NABET’) has been initiated by the MoEF.²¹³ Consultants who are not accredited by the QCI/NABET are not eligible to prepare EIA reports for projects seeking an EC.²¹⁴ Although the accreditation process has been criticized for various reasons, including the fact that the QCI receives industry support,²¹⁵ it offers a possible avenue for accountability – an accredited consultant can be delisted if an EIA report

²¹⁰ National Accreditation Board for Education and Training & Quality Council of India, *Scheme for Accreditation of EIA Consultant Organizations*, 2011, available at http://nabet.qci.org.in/environment/Accreditation_EIA_Consultant_organizations.pdf (Last visited on February 24, 2014).

²¹¹ MoEF, Office Memorandum dated October 5, 2011, *supra* note 207.

²¹² MoEF, *Office Memorandum dated August 4, 2009 in No. J-11013/41/2006-IA.II(I): Instructions for the Environmental Consultants - Regarding*, August 4, 2009, available at <http://moef.nic.in/divisions/iass/omec.pdf> (Last visited on February 24, 2014).

²¹³ MoEF, Office Memorandum dated December 2, 2009, *supra* note 179. Till March 5, 2014, 166 consultants have been accredited (including provisionally) under this arrangement. See Quality Council of India, *List of Accredited EIA Consultant Organization*, February 5, 2014, available at <http://www.qcin.org/nabet/EIA/documents/Accredited%20consultants.pdf> (Last visited on February 24, 2014).

²¹⁴ MoEF, *Office Memorandum No. J-11013/77/2004-IA II (I) (2010)*, March 18, 2010, available at <http://moef.nic.in/downloads/project-clearances/environmental-clearances/qci-circular.pdf> (Last visited on February 24, 2014). The MoEF has proposed an amendment to the EIA Notification to introduce ¶ 11A to this effect. See Notification, S.O. 2204(E), July 19, 2013, available at <http://moef.nic.in/sites/default/files/QCI8-13-2013%2013-01%20PM.pdf> (Last visited on February 24, 2014). See *Can Accreditation Ensure Accountability?*, September 25, 2013, available at <http://indiatgether.org/2013/sep/env-eiareport.htm> (Last visited on February 24, 2014) (It critically analyses the proposed amendment at Kanchi Kohli).

²¹⁵ Sugandha Juneja, *Accreditation Scheme on Hold*, DOWN TO EARTH March 31, 2012; Kanchi Kohli, *Is MoEF’s Green List of EIA Consultants Good Enough?*, January, 2012, available at <http://www.civilsocietyonline.com/pages/Details.aspx?82> (Last visited on February 24, 2014); Kanchi Kohli et al., *Letter to Mr. Jairam Ramesh, Flawed Accreditation of EIA Consultants through the QCI Initiative*, April 1, 2010, available at http://sandrp.in/otherissues/Ltr_to_Env_Minister_RE_Concerns_on_QCI_registration_of_EIA_consultants_April_1_2010.pdf (Last visited on February 24, 2014).

prepared by it is found to have been plagiarized.²¹⁶ However, at present, there is no information on the MoEF's website about any process for such delisting.²¹⁷

C. EFFECTIVENESS OF THE PUBLIC CONSULTATION PROCESS

The public consultation component of the EIA process has been considered as “an embodiment of the principles of natural justice”.²¹⁸ It is the only stage in the entire process during which the people affected, directly or indirectly, by the proposed project can raise concerns and voice their opposition (or support) to the project.²¹⁹ The importance of public consultation in policy making generally, and in environmental decision making particularly, is well-documented.²²⁰ However, what requires to be emphasized is that it is imperative that the public consultation mechanisms are designed – and implemented – in a manner that encourages constructive deliberation and (potentially) for the public to have an impact on the final decision. Unfortunately, the EIA Notification fails on both accounts for many reasons, some of which are discussed below.

For a public hearing to have a substantial impact on the EC process, at least four conditions have to be satisfied. *First*, affected and interested persons should have access to accurate and comprehensible information about the proposed project, based on which they can formulate an opinion. *Second*, they should have an adequate opportunity to express their opinion and raise concerns. *Third*, their opinion and doubts have to be accurately recorded along with the response of the project proponent, if any. *Finally*, the decision making process should be designed in a manner that public consultation can potentially impact the outcome. It would seem that the EIA Notification – in letter – fulfills the first three conditions. But evidence from public hearings across the country suggests that public hearings are often not conducted in accordance with law,

²¹⁶ MoEF, Office Memorandum dated October 5, 2011, *supra* note 207.

²¹⁷ There has been one instance when the MoEF has barred an EIA consultant for three years for providing poor quality data. However, it reversed its decision on appeal by the consultant. See MoEF, *Letter to M/s RK Consultants*, May 30, 2011, available at <http://moef.nic.in/downloads/public-information/debarring-RK-Cons.pdf> (Last visited on February 24, 2014).

²¹⁸ S. Nandakumar v. The Secretary to Government of Tamil Nadu Department of Environment and Forest and Ors., W.P. Nos. 10641 to 10643 of 2009, High Court of Madras.

²¹⁹ See *Samarth Trust v. Union of India & Ors.*, W. P. (C) No. 9317 of 2009, High Court of Delhi:– “The advantage of a public hearing is that it brings about transparency in a proposed project and thereby gives information to the community about the project; there is consultation with the affected parties and they are not only taken into confidence about the nature of the project but are given an opportunity to express their informed opinion for or against the project. This form of a social audit, as it were, provides wherever necessary, social acceptability to a project and also gives an opportunity to the EAC to get information about a project that may not be disclosed to it or may be concealed by the project proponent”.

²²⁰ See e.g., Manjula Amerasinghe, et al., *Enabling Environmental Justice: Assessment of Participatory Tools*, 2008, available at <http://web.mit.edu/jcarmin/www/carmin/EnablingEJ.pdf> (Last visited on February 24, 2014).

and therefore the quality of public consultation is so poor that it may not even reflect the true views of the public. With regard to the last condition, it could be argued that the public should have a say in the project from an earlier stage (e.g. when the site is being selected) in the decision making process. There are at least five significant ways in which the public consultation process is undermined.

First, the blanket exemption from public consultation enjoyed by some categories of projects risks excluding projects with significant impact.²²¹ By way of example – buildings and development projects are exempt from public consultation. This is unfortunate as the potential impact of such projects on groundwater usage, sewage generation and disposal, ambient air quality (because of diesel-run generators) is immense.²²² Furthermore, if in case a *prima facie* need is felt, the EIA Notification does not even afford discretion to the relevant regulatory authority to initiate public consultation for the excluded projects.

Second, the public consultation process as designed in the EIA Notification does not provide adequate safeguard mechanisms to ensure that the local communities are effectively consulted. There is no quorum requirement for starting a public hearing, and even if affected/concerned persons are unable to participate on account of foreseeable reasons (distance of venue from village, lack of public transport,²²³ major religious events etc.), there is no duty on the SPCBs to reschedule the hearing. Moreover, panels are composed entirely of government officials. There was a provision in the EIA Notification 1994 to include members of the local community in the presiding panel of the hearing but this was subsequently removed in 2006.²²⁴

Third, the notice requirements are not adhered to in many cases – either in letter or spirit. The EIA Notification requires the summary of the EIA report and the EIA report to be available in English and the official/local language of the area where the proposed project site is located. The objective is to make the information in the EIA report accessible to the local community. But this is often not implemented. Furthermore, while a notice for a public hearing has to be issued at least thirty days before the date of the public hearing, there is no specified date by which the EIA documents have to be made publicly available. The High Court of Delhi has found this ambiguity to be legally indefensible and has held that the executive summary of the EIA report has to be made

²²¹ Menon & Kohli, *supra* note 166.

²²² See Centre for Science and Environment, *Green Building: Environment Impact Assessment*, 2012, available at <http://www.cseindia.org/userfiles/02%20ASSESSMENT.pdf> (Last visited on February 24, 2014).

²²³ B. Madhu Gopal, *Public Hearing Sans People*, THE HINDU October 4, 2008.

²²⁴ See EIA Notification, S.O. 60(E), *supra* note 5, Schedule IV, ¶ 4.

available at least thirty days in advance of the public hearing to allow people sufficient time to form an opinion on the matter.²²⁵

Despite this clear pronouncement from the Delhi High Court²²⁶ and the self-evident need to provide at least basic information about the proposed project to the public, this requirement was completely disregarded before the public hearing for the Jaitapur Nuclear Power Plant proposed on the coast of Maharashtra. Of the four villages potentially affected by the project (and which were notified about the public hearing), only one village received a copy of the summary draft EIA report in English two weeks before the hearing. It received the Marathi version four days before the hearing. The three other villages did not receive the draft EIA report or the summary.²²⁷

Strict directions must be issued by the MoEF to SPCBs to ensure that the notice requirements for the public hearing process are properly followed, and communities are made aware of the public hearing and have access to information about the project well in advance of the hearing.²²⁸ The MoEF should also put in place an accountability mechanism in case the SPCBs fail to do so.

Fourth, the arrangements made for the public hearing, and the manner in which it is conducted can influence the outcome significantly. The High Court of Madras while adjudicating the legality of allotment of 70 acres of land for a solid waste management plant, considered the adequacy of public consultation -

“Such public hearings should not be a make belief affair, just to comply with the requirements of the notification. It is the responsibility of the District Magistrate or officers of equal status to see that all the affected persons are given audience. The panel of officers conducting the public hearing must remember that such hearings are conducted only to record the

²²⁵ This loophole was relied upon by the respondents in a case to justify the non-availability of documents till only nine days before the public hearing. *See* Utkarsh Mandal v. Union of India, W.P. (C) No. 9340 of 2009, High Court of Delhi. *See also* T. Mohana Rao v. Ministry of Environment and Forests & Ors., Appeal No. 23/2011, National Green Tribunal, May 23, 2012, available at [http://www.greentribunal.gov.in/judgment/23-2012\(T\)_23May2012_final_order.pdf](http://www.greentribunal.gov.in/judgment/23-2012(T)_23May2012_final_order.pdf) (Last visited on February 24, 2014).

²²⁶ *See* Utkarsh Mandal v. Union of India, W.P. (C) No. 9340 of 2009, High Court of Delhi..

²²⁷ Meena Menon, *Protests Stall Public Hearing on Jaitapur Nuclear Project*, THE HINDU May 17, 2010; *See also* Praful Bidwai, *People vs Nuclear Power in Jaitapur, Maharashtra*, XLVI ECONOMIC AND POLITICAL WEEKLY 10-14 (2011).

²²⁸ The High Court of Himachal Pradesh has issued directions to the Himachal Pradesh SPCB to ensure that whenever a public hearing is organised, the public must be well-informed about the hearing as well as about the benefits and ill-effects of the project. *See* Him Privesh Environment Protection Society & Ors. v. State of Himachal Pradesh & Ors., CWP No. 586 of 2010 and CWPIL No. 15 of 2009, High Court of Himachal Pradesh.

views of the affected parties. The statutory panel should hear the views of the affected persons and not those who have assembled in the meeting hall at the behest of the developer with a hidden agenda to block or prevent the opposition to the project. ... the attempt should be to conduct the hearing in an open and transparent manner with opportunity to express even the dissenting views without fear. ... The minutes of the hearing should contain a true note of what has transpired in the meeting. Such positive steps on the part of the statutory authorities would inspire confidence in the affected people”.²²⁹

The location and capacity of the venue, accessibility of the venue (e.g. availability of public transport), presence of locally influential persons and the police force, who is allowed to speak and for how long – all these factors affect the quality of deliberation in a public hearing. If the conditions are unfavourable to free speech, members of the public may decide to not participate, or to not express themselves freely.²³⁰

Fifth, the process currently gives the project proponent undue discretion while responding to concerns raised in the hearing. The duty on the project proponent to “address all the material environmental concerns... and make appropriate changes in the draft EIA...”,²³¹ is not limited by any criteria to determine what is ‘material’. Furthermore, the amended/finalised EIA report is not made available in the public domain, making it difficult to ensure that the concerns raised during the public consultation process are, in fact, adequately accounted for.

The need for public participation in the decision-making processes cannot be emphasized enough, particularly when the final outcome of the processes potentially impacts, often irreversibly, the lives, livelihoods and beliefs of so many people. In that context, the design and implementation of the public consultation process in the EIA Notification leaves much to be desired.

²²⁹ S. Nandakumar v. The Secretary to Government of Tamil Nadu Department of Environment and Forest and Ors., W.P. Nos. 10641 to 10643 of 2009, High Court of Madras.

²³⁰ See Samarth Trust v. Union of India & Ors., W. P. (C) No. 9317 of 2009, High Court of Delhi: “The public hearing must be fair to all participants: There can be no doubt that a public hearing must be fair. This necessarily postulates that those who support the project should not be shouted down by those who oppose the project and vice versa. The whole purpose of a public hearing would be lost if a free and frank expression of views is stymied by a handful holding a particular viewpoint”.

²³¹ EIA Notification, *supra* note 5, ¶ 7(i)(III)(vii).

D. WEAK APPRAISAL MECHANISM

The appraisal mechanism is a vital opportunity for independent verification of the information provided by the project proponent. Unfortunately, the mechanism has not worked very well. To begin with, the composition of EACs, and particularly the chairperson appointees, has come under the scanner. The membership of the Committee often does not reflect the varied expertise that is necessary to assess projects of wide-ranging impact. Furthermore, instances have been brought to light where the appointed chairperson of a Committee did not have the appropriate qualifications and could potentially have a conflict of interest with respect to matters being considered by the Committee.²³²

The recently reconstituted Committee for hydel-power projects is a case in point.²³³ It has been criticized as it does not include any expert on biodiversity, rivers, climate change or disaster management.²³⁴ Given the issues relating to resettlement and rehabilitation that the EAC is expected to consider, the dominance of government officials and representatives from government-funded institutions and the corresponding lack of representations from non-government organisations, has been criticized. The Committee is headed by a former bureaucrat who does not possess any environmental credentials and is known to have demanded a speedier clearance process for coal mining projects.²³⁵

The EACs have also been criticized for the quality of deliberation in their meetings where recommendations are made to the MoEF. From the minutes that are prepared at the end of each meeting, it is often difficult to conclude that the EAC has adequately applied its mind to the issues at hand and particularly to the objections that might have been raised against the project.

²³² See *Utkarsh Mandal v. Union of India*, W.P. (C) No. 9340 of 2009, High Court of Delhi. The Chairperson of the EAC (Mining) which recommended approval of the mining project in this case was a Director of four mining companies himself. While remanding the matter back to the EAC (which was now headed by a new Chairperson) to reconsider, the Court held that this was an “unhealthy practice that will rob the EAC of its credibility since there is an obvious and direct conflict of interest”. See also *Sarpanch Gram Panchayat, Tiroda & Ors. v. MoEF & Ors.*, Appeal No. 3 of 2011, National Green Tribunal, September 12, 2011, available at [http://www.greentribunal.gov.in/judgment/3-2011\(Ap\)_12sept_final_order.pdf](http://www.greentribunal.gov.in/judgment/3-2011(Ap)_12sept_final_order.pdf) (Last visited on February 24, 2014); South Asia Network on Dams Rivers & People, *Press Release: Project Promoter is Chairing Environment Clearance Committee*, June 15, 2009, available at http://www.sandrp.in/hydropower/PR-Project_Promoter_is_chairing_Environment_Clearance_Committee_15June2009.pdf (Last visited on February 24, 2014).

²³³ See MoEF, *Order dated September 5, 2013 in No. J-12011/EAC /2010-IA-I: Re-Constitution of Expert Appraisal Committee (EAC) for EIA for River Valley & Hydro Electric Project –Regarding*, September 5, 2013, available at <http://moef.nic.in/sites/default/files/EAC-Order-05092013.pdf> (Last visited on February 24, 2014).

²³⁴ See Gargi Parsai, *Activists Oppose New Panel on Hydel Projects*, THE HINDU September 9, 2013.

²³⁵ See Jay Mazoomdar, *Gatekeepers With Baggage*, TEHELKA September 21, 2013.

Given the number of projects the EAC has to consider in every meeting, relatively little time is spent considering each individual project.²³⁶ The minutes are often cryptically written and fail to meaningfully deal with relevant issues.²³⁷ Finding the unrealistic burden on the EACs to be ‘an unsatisfactory state of affairs’, the High Court of Delhi has recommended that the MoEF seriously consider placing a cap on the number of projects that the EAC can consider in a day (five projects).²³⁸ The MoEF has not imposed such a cap till date and a large number of projects (at various stages of the EC process) are included in the agenda of various EACs every month.²³⁹

The significance of the appraisal mechanism and the crucial role played by the EACs and the SEACs has also been highlighted by the Bombay High Court. In the context of SEACs and the SEIAAs, the Court observed –

“The decision making process of those authorities besides being transparent must result in a reasoned conclusion which is reflective of a due application of mind to the diverse concerns arising from a project such as the present. The mere fact that a body is comprised of experts is not sufficient a safeguard to ensure that the conclusion of its deliberations is just and proper. That safeguard, particularly for the wider community, must be reflected in the manner in which the authority conducts its process and in the outcome of its process. In matters of environmental governance the only available safeguard for the community at large is that the process which the authority follows must adhere to fair and

²³⁶ See MoEF, *Agenda for 11th Reconstituted Expert Appraisal Committee (Industry) to be Held During August 26, 2013 to August 27, 2013*, 2013 (available on file with author) (The EAC (Industry) in its August 2013 meeting was scheduled to consider over 40 projects at various stages of the EC process in one day. Assuming the Committee sat for eight hours, the average time spent per project would be 12 minutes); See also Menon & Kohli, *supra* note 3.

²³⁷ In a case relating to a coal mining project in Chhattisgarh, the National Green Tribunal noted that the EAC had felt the need for the public hearing to be re-conducted, but in subsequent meetings, the EAC had made no mention of the lacunae in the public hearing process. See *Adivasi Mazdoor Kisan Ekta Sangthan & Anr. v. MoEF & Ors.*, Appeal No. 3/2011 (T) (NEAA No. 26 of 2009), National Green Tribunal, April 20, 2012, available at [http://www.greentribunal.in/orderinpdf/3-2011\(T\)_20Apr2012_final_order.pdf](http://www.greentribunal.in/orderinpdf/3-2011(T)_20Apr2012_final_order.pdf) (Last visited on February 24, 2014). See also *Him Privesh Environment Protection Society & Ors. v. State of Himachal Pradesh & Ors.*, CWP No. 586 of 2010 and CWPI No. 15 of 2009, where the High Court found that the EAC had not sufficiently considered the views expressed in the public hearing; *Samata & Anr. v. Union of India & Ors.*, Appeal No. 9/2011 (NEAA No. 10 of 2010), National Green Tribunal, December 13, 2013, available at http://www.greentribunal.gov.in/judgment/92011%28SZ%29%28Ap%29_13Dec2013_final_order.pdf (Last visited on February 24, 2014) (Where the Tribunal found the minutes of EAC meetings to be “very generic in their structure and the recordings appear rather routine and stereotyped”).

²³⁸ See *Utkarsh Mandal v. Union of India*, W.P. (C) No. 9340 of 2009, High Court of Delhi.

²³⁹ For instance the TORs issued by the MoEF for the reconstituted EAC (River Valley and Hydro Electric Projects) did not place any cap on the number of projects that the EACs could consider in one day. See MoEF, Order dated September 5, 2013, *supra* note 233.

transparent principles established by law and that the reasons which emanate from the public body must be suggestive of the decision maker having taken into consideration all relevant aspects and having borne in mind the need to preserve and protect the environment”.²⁴⁰

In a recent case before the NGT relating to a port in Gujarat, the Tribunal highlighted the poor quality of appraisal. According to the NGT, “the process of ‘Appraisal’ requires application of mind, independently, and evaluation of the material in order to find out whether it is a project worth grant of EC or for the purpose of refusal of the EC”.²⁴¹ Based on the facts before it, the NGT found that the EAC had accepted the project proponent’s statements as ‘gospel truth’ and failed to consider several important issues including the written representations made by the public. The EC was kept in abeyance and the MoEF was directed to reconsider the clearance given to the project.²⁴²

The quality of appraisal is also naturally affected by the quality of information available to the EAC members. While the project proponent or its representative is required to be present at the meeting to respond to queries, there is no requirement to invite civil society groups, not even those who objected to the project during the public consultation process.²⁴³ Site visits to verify information submitted by the project proponent are not mandatory, and often the only information about the proposed site accessible to the EAC members is that provided by the project proponent in its EIA reports. Furthermore, there have been complaints about delays in setting of the agenda and of interference by the government.²⁴⁴ As a result of all these factors, there is certainly a cloud over the efficacy of the process.

²⁴⁰ See *Gram Panchayat Navlakh Umbre v. Union of India & Ors.*, 2012 (114) BOM LR 2695.

²⁴¹ *Gau Raxa Hitraxak Manch v. Union of India & Ors.*, Appeal No. 47/2012, National Green Tribunal, August 22, 2013, available at [http://www.greentribunal.gov.in/judgment/47_2012\(Ap\)_22Aug2013_final_order.pdf](http://www.greentribunal.gov.in/judgment/47_2012(Ap)_22Aug2013_final_order.pdf) (Last visited on February 24, 2014).

²⁴² *Id.* The EAC for Infrastructure Development, Coastal Regulation Zone, Building/Construction and Miscellaneous projects during its meeting held on November 21-23, 2013 has recommended the project for clearance after reconsideration. See *Minutes of 128th Meeting of the Expert Appraisal Committee for Projects related to Infrastructure Development, Coastal Regulation Zone, Building/Construction and Miscellaneous Projects*, November 20-23, 2013, available at http://environmentclearance.nic.in/writereaddata/Form-1A/Minutes/0_0_12113121712151128minutesforuploading.pdf (Last visited on February 24, 2014) ..

²⁴³ See *Rivers & People South Asia Network on Dams, Analysis of MoEF’s EAC on River Valley Projects*, February 2013, available at http://sandrp.in/env_governance/TOR_and_EC_Clearance_status_all_India_Overview_Feb2013.pdf (Last visited on February 24, 2014).

²⁴⁴ Snehal Rebello, *Six Green Panel Members Resign Citing Interference*, HINDUSTAN TIMES July 18, 2013.

E. POOR MONITORING OF COMPLIANCE

The primary responsibility to monitor compliance with conditions listed in the EC lies with the MoEF. The EIA Notification requires project proponents to submit half-yearly compliance reports that are to be made available on the website of the appropriate regulatory authority.²⁴⁵ A subsequent circular issued by the MoEF also requires the project proponent to upload the status of compliance with EC conditions on its own website.²⁴⁶ However, it has a poor monitoring record. The EIA Notification does not separately identify a mechanism to monitor the compliance of the conditions in the EC and does not include a comprehensive protocol or guideline on how monitoring should be conducted, how frequently and through what process.

A Committee constituted by the MoEF to examine issues relating to monitoring found that “increasingly the effectiveness of the post project monitoring mechanism for ensuring an effective compliance to the stipulated conditions and environmental safeguards is a cause of concern”.²⁴⁷ It highlighted some of the shortcomings, such as inadequate infrastructure and trained manpower, procedural and administrative deficiencies, and deficiencies in the legal provisions.²⁴⁸ The MoEF does not have comprehensive data on the extent of compliance/non-compliance with clearance conditions and there is no analysis of compliance reports submitted by project proponents.²⁴⁹

If the Ministry does detect non-compliance with conditions, it can issue a direction under § 5, EP Act for closure, prohibition or regulation of the industry.²⁵⁰ The penalty for non-compliance with EC conditions is detailed in § 15 of the EP Act – the defaulting company/official can be fined an amount of upto one lakh rupees and/or be imprisoned for a term extending to five years. Subsequent failure to comply with the stipulated conditions could lead to a fine of five thousand rupees per day and imprisonment of upto seven years. Not only is the fine a paltry sum for most project proponents, but additionally the legal procedure to bring these cases to court is long and cumbersome. Therefore, the penalty provision has little deterrent effect in practice.

²⁴⁵ EIA Notification, as amended by Notification, S.O. 3067 (E), *supra* note 60, ¶ 10.

²⁴⁶ MoEF, Circular dated June 30, 2009, *supra* note 137.

²⁴⁷ MoEF, *Report of the Committee Constituted to Examine the Issues Relating to Monitoring of Projects*, March 11, 2011, available at <http://www.indiaenvironmentportal.org.in/files/montinoring-rept-11-03-2011.pdf> (Last visited on February 24, 2014).

²⁴⁸ *Id.*, 3.

²⁴⁹ See generally KANCHI KOHLI & MANJU MENON, *CALLING THE BLUFF: REVEALING THE STATE OF MONITORING AND COMPLIANCE OF ENVIRONMENTAL CLEARANCE CONDITIONS* (2009).

²⁵⁰ An industry may challenge such a direction before the National Green Tribunal. See National Green Tribunal Act, 2010, § 16(e).

VI. CONCLUSION

The EIA Notification is a complex procedural mechanism. Over the years, it has been modified in several ways – some diluting the process and making it less rigorous (for example, removing public consultation requirements for certain categories of projects); others intended to improve the quality of decision making (for example, measures to increase accountability for EIA reports). While the objectives behind these efforts vary – from complying with judicial pronouncements, to incentivizing ‘development imperatives’, to responding to public outcry, the efforts have been generally piecemeal. Little, if any, effort has been expended on introducing systemic changes that would make the decision making process robust, such that the process is, at least, procedurally acceptable to stakeholders (even if there is disagreement about the substantive outcome).

This paper explains the legal architecture of the EIA Notification and some of its most problematic aspects. It does so in the hope of informing public opinion and possibly future deliberation on the efficacy of the current EC process. It does not, however, set out specific solutions to the problems, and consciously so. Over time, numerous demands for reform have been raised. A wide range of suggestions have been mooted – institutional restructuring; improved public participation; better impact assessment; and even a complete overhaul of the process. Each of these proposals has its own merits – and demerits. Instead of scrutinizing these proposals in-depth (although that would certainly be a worthwhile exercise), it was considered more appropriate for the purposes of this paper to identify overarching principles that might guide the reform agenda and allow the EC process to operate in a more robust framework.

First, information symmetry across stakeholders at all levels has to be ensured. Be it the community, the project proponent, or the government – each stakeholder should be in a position to reach an informed opinion based on complete and accurate information. *Second*, at every step of the process, a reasoned decision has to be arrived at after proper application of mind and appropriate consultation. For instance, it should be possible for experts and interested persons to undertake an in-depth examination of an EC application and the accompanying documents. They should have sufficient time and access to resources, including independent and credible assessment, for such an examination to be meaningful. *Third*, adequate safeguards must be put in place to insulate the relevant actors, particularly the final decision maker, from extraneous factors or pressures. Often the commercial and strategic stakes associated with project proposals are so high that actors charged with making decisions under the EIA Notification may lose sight of the ultimate objective of the process, i.e. to protect the environment. While even the most carefully drafted legal instrument cannot prevent every violation, safeguards can certainly be built-in in a manner that minimizes such risks. *Fourth*, an effective

accountability mechanism has to be established to respond to deviations from the letter and spirit of the law. The mechanism in question could be an administrative process within the concerned department, or a judicial process (such as before the NGT).

In an age where our society and polity increasingly cries out for instantaneous solutions to complex social, economic and governance-related problems, a word of caution is in order. The (often times unhappy) experience with the working of the EIA Notification clearly demonstrates that there is no silver bullet – institutions are only as effective as the persons manning them are, and are allowed to be. A slow and steady strengthening of the institutions and processes underpinning the EIA Notification is, therefore, the only way forward.