CAG
Citizen consumer and civic Action Group

Attachment

Introduction

The report takes a one-sided Coasean bargaining view of the environment and seeks to create administrative smoothening to give priority to economic development matters while leaving environment and communities on the way side.

- Under this situation, the Executive/Administration (affected party) accepts that the development activity will result in pollution and environmental damages.
- The executive/administration places *'utmost good faith'* in the information given by the project proponent and the level of damages it is expected to cause the environment.
- The legal principle of 'utmost good faith' has been introduced in the report, where in the project proponent will act in 'utmost good faith' to ensure that he will act as promised and seek to undertake compensatory actions to conserve the environment, during the construction and operation of the life-cycle of the development activity undertaken by him and beyond.
- For this purpose, the potential polluter is asked to pay ex-ante or upfront compensation to the administration for the damages that he will cause to the environment. In other word, it is ex-ante 'polluters pay principle'.
- Essentially, the report states that as long as the project proponent is willing to pay an ex-ante compensation for the expected damages that he will cause to the environment, the proponent is allowed to undertake developmental activities.
- The level of compensation is pre-determined through various administrative mechanisms such as Environmental Reconstruction Cost (ERC), trading schemes – cap and trade, Environmental Reconstruction Fund (ERF), compensatory afforestation and incentive schemes.
- Ex-post compensation mechanisms, such as penalty in the event of environmental damages, are mentioned. But it is unclear how the penalty system will work with compliance being made a 'voluntary' initiative, with penal action on the part of the project proponent. Monitoring, on the other hand, is ICT Driven.
- The institution mechanisms mentioned in the report - 'single window' clearance, resulting public participation, seeks to envelope and hasten the compensatory principle and environmental clearance process.

Specific Comments

1. **Terms of Reference (ToR)**

The Terms of Reference for the project are very vague nature and has not been expanded in detail by the Ministry of Environment Forest and Climate Change (MoEF&CC).

This, specifically, pertains to the third point namely,

"(iii) To recommend specific amendments needed in each of these Acts so as to bring them in line with current requirements to meet objectives;" **(Emphasis added)**

It alludes to the *'current requirement'* which has not been elaborated by the MoEF&CC, and, as a result the TSR Committee has created its own scope of work and sub-terms of reference, potentially going beyond the mandate set out in the Terms of Reference – creation of a new Act – Environmental laws (Management) Act (ELMA), NEMA, SEMA etc.

Further, it seems that the ToR has not been consulted within the Ministry as CAG notes that 'Indian Forests Act, 1927 (IF Act)' has been added 20 days after the committee's ToR has been firmed up.

- It is submitted that the ToR is potentially incomplete and should be firmed up further to make a more comprehensive study and another report be submitted.

2. Chapter 1, 2 & 3 : Preamble, Executive Summary and Introduction

CAG agrees with the various lacunae in the chapters on the drawbacks in the environmental processes, including the failure of the executive in terms 'arbitrary, opaque, suspiciously tardy or in-express-mode at different times, along with insensitivity' and pervasive nature of 'inspector raj'. Further, CAG accepts that due to this judicial interventions frequently have supplanted legislative powers, and are occupying the main executive space.

CAG agrees with the assessment of law and policies and the need for integrated and harmonious development. The present assessments are correct and revealing – 'institutional failures include lack of enforcement, flawed regulatory regime, poor management of resources, inadequate use of technology; absence of a credible, effective enforcement machinery; governance constraints in management; policy gaps; disincentives to environmental conservation, and so on'

We agree with the Chapters on the need to make a 'systemic, comprehensive, non-arbitrary, transparent and accountable procedure for environmental conservation and management practices aimed at demonstrable and empirical enhancement in the quality of forest cover, air and water quality standards, through credible technology aided mechanisms'.

However, the tone and structure of the preamble and introduction focuses on the need for economic development, especially energy intensity and poverty alleviation, in the first instance, and moves on to environmental related issues. This gives the feeling that the succeeding chapters will be skewed toward the former rather than the environmental improvement and environmentally sensitive governance.

Again it should be pointed out that report seeks to find a 'dynamic equilibrium between environment conservation and development for inter-generation equity is the need of hour'.

- It is submitted that the focus should not only lie on conservation and development but also 'environmental improvement' & 'protection' which has intuitively narrowed and side lined.

- It is submitted that environmental governance requires a people and community sensitive and centric approach to development which has effectively been left out.

3. Chapter 4: Approach and Methodology

I. The principles applied by the Committee are skewed towards economic development due to the wordings.

The following underlined words raise red flags and creates grey areas in the overall formulation of the report.

a. Primacy to conservation of the environment. Wherever possible, to enhance the quality of environment, including in the forest, air and water pollution contexts.

Comment: The words 'where possible' create a grey area and also denote that where conservation or improvement of the environment is impossible.

b. Transparency, to the extent feasible in all aspects of management of the environment, particularly in the context of providing approvals and clearances.

Comment: The words 'to the extent feasible' also have the opposite meaning of where it is transparency and accountability become unfeasible.

c. To provide more freedom to private actors to function within well-laid down boundaries but subject them to close monitoring; and severe exemplary punishment for deliberate mis-statement/ transgression/ suppression of material facts.

Comment: Providing more freedom to private actors also gives the impression that an optimal monitoring and compliance regime should be and will be in place.

d. Ease the process of approvals, without compromising the sanctity of the environment.

Comment: Ease the process of approvals implies that the ease of doing business is better but the environmental governance regime that should be put in place is strict, impartial and immune to capture by stakeholders project proponent.

Sections 4.9 and 4.10

"II. Points 4.9 and 4.10 state that the Committee could not address all the laws, regulations, rules and executive instructions comprehensively within the timespan available to it…

4.10 Due to paucity of time, the Committee could not visit more States, and have more field visits; however, all State Governments were addressed to give their suggestions, which many did – these have been taken into account."

Comment: It is surprising to note that the Committee, in charge of such an important report having wide environmental ramifications for future generations, has not engage wider consultations across the country. It is necessary, given its importance, that the Committee undertakes consultation on a wider scale and with more stakeholders to assess its efficacy of its suggestions.

4. **Chapter 5: Forest**

5.4 Notification of 'no go' areas: The Committee has recommended identification and pre-specify 'no go' forest areas, mainly comprising PAs and forest cover over 70% canopy.

CAG agrees as to the demarcation of no-go areas comprising 'protected areas', in addition to forest with over 70% canopy. It will also help project proponent and administration to locate project outside this belt.

Comment: However, it is unclear as to how the Committee arrived at the figure of '70% canopy' cover and under what basis have they arrived at it. Why not 80% or even 90% when the main aim of the report is for environmental improvement and protection? The boundaries of the 70% canopy cover are also unclear.

Further, the sanctity of the environment has been compromised explicitly and the 'no-go' concept. The Report states that the remaining 30% canopy cover can be used for development activities – 'only when there is an overwhelming advantage in terms of economic development'. The Committee does not mention what constitutes overwhelming advantage in terms of economic development. The Committee also fails to consider the impact on the surrounding environment and its ecological balance that may potential affect the 100% 'no-go' area. The impact on wildlife and exotic species must be considered.

5.5. Formulating a statutory definition of 'forest'

CAG agrees that a statutory definition of forest should be given. However, CAG would like to point out that there are several parameters which go into defining the term 'forest'. The definition must be progressive taking into account current climate change, carbon stock, mitigation, adaptation criteria.

There are three broad categories of forest definition: administrative, land use, and land cover.[1] Below passages are reproduced from Intergovernmental Panel on Climate Change (IPCC) special report.

Administrative: Forests have been defined in terms of legal or administrative requirements. Typical examples follow: "Any lands falling within the jurisdiction of the Department of XYZ" or "any lands so mapped in the ordinance survey of XYZ."

Land use: For example, the Swedish Forest Act of 1994 gives the following land use definition of forest: "For the purposes of this Act, forest land is defined as: (i) land which is suitable for wood production,

[1] Intergovernmental Panel on Climate Change (IPCC) Special Report on Land Use, Land-Use Change, and Forestry (SR-LULUCF), 2000 http://www.ipcc.ch/ipccreports/sres/land_use/index.php?idp=46

and not used to a significant extent for other purposes; and (ii) land where tree cover is desirable in order to protect against sand or soil erosion, or to prevent a lowering of the tree line. Land that is wholly or partially unused shall not be regarded as forest land if, due to special conditions, it is not desirable that this land be used for wood production."

Land Cover: "An ecosystem characterized by more or less dense and extensive tree cover." Typically, the cover is assessed as percent crown cover. Distinctions may be made between open- and closed-canopy forests (FAO, 1999). Other variants include the use of basal area, wood volume, proportion of land with trees above a minimum height, or proportion of land with tree biomass exceeding a minimum threshold, with no distinction made between single-stem or multi-stem tree forms. Different elements may be combined in the definition of forest - minimum canopy cover, minimum height, and minimum biomass."

Further, the minimum criteria for a forest - area, tree height, tree growth, type of forest must be considered. An example of definition of forest is placed below.

"Forest" is a minimum area of land of 0.05-1.0 hectares with tree crown cover (or equivalent stocking level) of more than 10-30 per cent with trees with the potential to reach a minimum height of 2-5 metres at maturity in situ. A forest may consist either of closed forest formations where trees of various storeys and undergrowth cover a high proportion of the ground or open forest. Young natural stands and all plantations which have yet to reach a crown density of 10-30 per cent or tree height of 2-5 meters are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest; [FCCC/CP/2001/13/Add.1]" [2]

5.6 Farm and social forestry

CAG agrees that an economic incentive for increased community participation in farm and social forestry programmes this will help increase tree cover and also reduce the biotic pressure on forests for timber, fodder and fuel wood.

Comment: The report has not sought a definition as to what constitutes 'treeland' and how is it different from a 'forest' or 'forest land'.

The Report has only considered commercial plants and tree in its Report which has many environmental effects. Thrust should be given on indigenous plants specific to the region as it will also help wildlife and local vegetations to thrive and re-generate.

[2] Till Neeff, Heiner von Luepke & Dieter Schoene, "Choosing a forest definition for the Clean Development Mechanism Forests and Climate Change", Working Paper 4, FAO, 2006 http://www.fao.org/forestry/11280-03f2112412b94f8ca5f9797c7558e9bc.pdf

The report should have taken a scientific opinion before incorporating invasive trees such as poplar or eucalyptus which will suppress the growth of indigenous plants and dependent wildlife.[3]

5.7 Trading of Treelands

CAG agrees that private land should be used for afforestation initiatives for a specified set of approved species.

Comment: However, this should not, in any way, be made a tradeable unit and also not be part of compensatory afforestation. This has the potential to impact agricultural land use and its productivity, as farmers may be incentivized to switch over to community forestry.

Further, tradeability also creates a limited pool of afforestation initiatives and limits 'treeland' cover. For this reason, industrial growth can saturate in a region, thus making such tradeability mechanisms redundant. This also has the potential to create patchy and skewed forest/treeland areas, disturbing balanced green growth. This depends very much on the alignment of each state's respective State Forest Policy with that of its Industrial Policy - for this efficacy of such trading mechanisms to develop.

The market that comes closest to such tradeability mechanism in India is the ***Renewable energy certificates (REC)*** market. The efficacy of REC market in India should be studied before taking up tradeability mechanisms.

5.11 & 5.12 Compensatory Afforestation (CA)

Compensatory afforestation is certainly a good suggestion. However, there are several problems in the way the Report has envisioned the concept and has made it favourable to the project proponent.

Comments:

a. Compensatory afforestation must be a mandatory initiative and not linked to EC and project development and not be viewed a trade-off.

b. The Net Present Value (NPV) of the land should be considered taking into ecological sensitivity of the region and perceived environmental impact of the proposed project. For example, if a high intensity polluting plant is to be set up then the NPV and resulting compensatory afforestation should be equally high to create optimal trade-offs.

c. The report does not consider the need and importance of contiguous forest to protect wildlife, flora and fauna. In plain language, the way the community afforestation scheme has been envisioned is that a project proponent, without consideration for wildlife or local communities, can start a project in the middle of a forest land. To compensate for the forest cover, the project proponent can engage in community afforestation in another part of the forest on degraded revenue land.

[3] Conservation India, To chop, or not to chop? The issue of exotic invasive trees in the Western Ghats, March 2014 http://www.conservationindia.org/articles/to-chop-or-not-to-chop-the-issue-of-exotic-invasive-trees-in-the-western-ghats

d. The result of this exercise should not lead to the patchy forest cover, leading to destruction of wildlife and flora. The migratory pattern of animals, their need for vegetative cover and other basic requirements will have to be considered before venturing into such an exercise.

5. **Chapter 6: Wildlife**

6.3 Depredation of standing crops by wild animals

Comment: The report takes the view of preventing wild animals from entering into agricultural land and destroying crops. It should also consider the need to prevent agricultural land from encroaching into forest land and trespassing on animal pathways.

6.4 Giving statutory recognition in the WLP Act to Wild Life Management Plans

CAG agrees that Wild Life Management Plans are absolutely necessary to manage and preserve and protect wildlife

6.5 Alteration in the boundaries of protected areas

CAG agrees that permission from the Central Government would only be necessary when the State Government proposes to reduce the boundaries of an existing PA.

6.12 Delineation and demarcation of Eco-sensitive Zones –

Comment: However, keeping in line with the earlier points raised on no-go areas and protected areas, there needs to be ban on development activities in the eco-sensitive regions, keeping in line with wild life patterns and migratory nature of the species to the region. There needs to be more scientific analysis on the efficacy of the buffer zone and should take into consideration all stakeholders.

6. **Chapter 7: Environmental Governance**

7.3 "The Committee noted that the current administrative structure suffers from infirmities, inconsistencies and inefficiencies as listed below:"

CAG agrees with inconsistencies and inefficiencies

7.4 "…The existing procedure has the following limitations:"

"a. Multiplicity of agencies for processing the applications and according clearances for same projects

b. Absence of a robust system to ensure Compliance and Monitoring

c. Existing Monitoring Agencies viz. CPCB and SPCB have no role to play in the Environmental and CRZ Clearance,Compliance and Monitoring.

d. Ministry has made it compulsory to have compliance report as pre-requisite for project expansion applications, without any substantive ground verification and without adequate infrastructure."

Comment:

CAG agrees that the EIA process suffers and negative environmental impacts are felt mainly because of lack of compliance and monitoring provisions coupled with weak enforcement activities.

However, it is not correct to say that the multiplicity of agencies have created drawback in the EIA process. It is, in fact, coordination and information sharing problems that have created delays and red-tape in the EIA and environmental decision making processes and procedures.

Use of technology, such as a centralized database using web-based applications together with Enterprise Resource Planning (ERP) systems could easily solve the coordination problem.

Given Indian circumstances, multiple agencies are required to effectively prevent project proponent from capturing and indulge in rent-seeking activity. Further, the documentation and files act as cross-verification tools to check the veracity of statements made by the project proponent.

Most importantly, EIA process and environmental administrative decision making is delayed due to the lack of transparency and accountability. As a result, local communities approach the courts, making it necessary for judicial intervention which inordinately extends the time frame for the project into months, if not years. This is mainly due to fact that the administration and project proponent are unwilling to engage with local communities.

7.7 The Committee had noted that the following key areas need to be effectively addressed, among others, in formulating a new approval procedure

"The need for a national GIS enabled environmental information data base which would assist both a project proponent and the scrutinising agency in obtaining authentic data vital for decisionmaking on an application."

Comment: The suggestion seems to state that the database will not be put on the public domain for the benefit of the larger public. For the purposes of transparency and accountability in decision making, it is necessary that the public have access to the information to understand the ramifications of the project in their backyard. The GIS enable environmental information database will also enable effective public participation in the EIA process.

While the provisions of the Acts do not pose any great difficulty, it is the operative instructions which need to be reviewed because of the inordinate time taken in clearing project proposals especially when composite approvals are required.

Comment: It is necessary to evolve the operative process with the passage of time to make it more transparent and accountable. For this purpose, the Report should consider the International Standard

Organisation (ISO) related process specific for public sector - ISO documents giving ISO 9001:2008 guidelines for the public sector: ISO 18091 for local governments.[4]

The punishment required under the Acts does not always act as a deterrent to violators. Where charge sheets are filed these rarely come to successful fruition because of lack of manpower and adequate capacity to pursue them effectively. The Committee has made some suggestions in this regard.

Comment: CAG agrees with the comments

There is need for a single window clearance mechanism; this is not a new suggestion. Admittedly, an operational mechanism for this would require some effort in the beginning but it would certainly pay dividends. The Committee has made a recommendation in this.

Comment: CAG does not agree with the single window clearance, but agrees with the fact that a single authority can be in place to give environmental clearance. This is nothing but an attempt to fast track development projects, overriding environmental and community concerns. This is already in place with State Environmental Impact Authority and Ministry of Environment Forest & Climate Change (MoEF & CC).

7.8 & 7.9 National Environment Management Authority (NEMA) & State Environment Management Authority (SEMA)

The report states "standing technical organizations, manned with professionals, supported by appropriate technology, which will have the primary responsibility for processing all environmental clearance applications, in a strictly time-bound manner."

Comment:

- The proposed NEMA and SEMA should be made environmental regulators rather than technical organizations - balancing the economic development / environmental protection. This implicitly make them toothless bereft of any powers – an advisory and administrative organization.
- This is in keeping with Larfarge case – Relevant Section pasted below
    - Section 3 of the Environment (Protection) Act, 1986 confers apower coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy, 1988.
    - (i.2.) The difference between a regulator and a court must be kept in mind. The court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the power conferred upon it to frame statutory rules and regulations.

[4] ISO 9001 and the public sector: Two new documents, one big benefit and millions of happy citizens, 28 February 2014 http://www.iso.org/iso/news.htm?refid=Ref1825

  - The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions…
  - (i.4.) Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters."[5]
- Therefore the decision to set up an authority over a regulator is selective reading of the Lafarge Decision. Creation of NEMA and SEMA is judicial unfeasible.
- One example is the Scottish Environmental Protection Agency (SEPA) –placed below[6] which may be followed.
    - "The Scottish Environment Protection Agency (SEPA) is Scotland's environmental regulator. Our purpose is to protect and improve the environment, including the sustainable management of natural resources. We also contribute to improving the health and wellbeing of people in Scotland and to achieving sustainable economic growth. We do this by being an excellent environmental regulator, helping business and industry to understand their environmental responsibilities, enabling customers to comply with legislation and good practice and to realise the many economic benefits of good environmental practice. We protect communities by regulating activities that can cause harmful pollution and by monitoring the quality of Scotland's air, land and water. The regulations we implement also cover the keeping and use, and the accumulation and disposal, of radioactive substances.
    - SEPA is a non-departmental public body, accountable through Scottish Ministers to the Scottish Parliament. SEPA has been advising Scottish ministers, regulated businesses, industry and the public on environmental best practice for over a decade."
- Being environmental regulators, they can evolve rules and directives on various agencies – such as Pollution Control Board (PCBs). Being 'environmental regulators' give them effectiveness in decision making and also enforce compliance and create effective monitoring mechanisms on project proponents.
- Another case in point is the copying the regulatory structure of the electricity sector that exists in India - State Electricity Regulatory Commissions (SERC) and Central Electricity Regulatory Commission (CERC). This approach may be followed.
- The proposed NEMA and SEMA follow the Central Electricity Authority (CEA) which is a technical organization, with limited enforcement powers.
- The lack of research on various models of environmental agencies and authorities to evolve an optimal regulator or authority is revealing.
- The report has purely focused on creating an enabling Authority for economic development.

[5] http://supremecourtofindia.nic.in/outtoday/WC2021995.pdf
[6] http://www.sepa.org.uk/about_us.aspx

7.9 – Covering sub-sections 1 to 3 Proposed composition, functions and responsibilities of NEMA.

7.9.1 – Comment

There should be Parliamentary Committee and Judicial Committee monitoring the selection/ nomination process. Civil Society representation should be incorporated mentioned. In addition, the terms of selection and nomination should be transparent. The process should be placed in the public domain for scrutiny for general public as the profile and knowledge of the members - affect the environmental and communities alike.

7.9.3 Functions and responsibility of NEMA –

Comment – The functions and responsibilities show that NEMA is a toothless organization without enforcement power. The other functions and responsibilities are largely technical in nature – amalgamation of Pollution control Boards and other organizations.

7.10 State Environment Management Authority (SEMA)

7.10.1/ 7.10.2 SEMA

Comment - There should be Parliamentary Committee and Judicial Committee monitoring the selection/ nomination process. Civil Society representation should be incorporated mentioned. In addition, the terms of selection and nomination should be transparent. The process should be placed in the public domain for scrutiny for general public as the profile and knowledge of the members - affect the environmental and communities alike.

7.10.4 & 7.10.5 Functions of SEMA

Comment – SEMA should act as the environmental regulator and not function as the implementation arm of the State Government. It can easily be capture by the state government and skewed towards politically influential project proponents, leading to environmental degradation. The salaries and other expenses of the office should be covered under the Constitutional - Consolidated Fund of India. The Separation of power principles should apply. Enforcement powers should be given to the Authority or regulator.

7.12.6 The assets and liabilities of CPCB shall stands vested in NEMA. The assets and liabilities of SPCB shall stand vested in respective SEMA.

Comment – It is not possible to combine pollution control boards to be combined with the above entity. NEMA and SEMA are envisaged as regulators. There should separation of regulatory and administrative bodies to enable NEMA and SEMA to carry out its functions effectively and impartially.

The functions and responsibilities of the NEMA and SEMA may be similar to the PCB but it should act in a more regulatory rather than administrative capacity.

7.14 Project Approval process

Comment - The entire EIA process has been reworked and repackaged into a project friendly approach and development approach, keeping in mind administrative simplification rather than ensuring environmental preservation/improvement/conservation aspects while maintain the sanctity of the EIA process. It should be noted that the entire EIA process takes an administrative perspective to cut red tape, and leaves the affected community out of the picture. Further, it makes the assumption that local communities are technical sound and technologically savvy to understand ICT tools and EIA documents.

i. *An applicant seeking approval for one or more clearances should submit an integrated web-based online application which should be communicated through IT-enabled system to the designated authorities as vested with the powers for approval in the matters of forest diversion, wildlife clearance and environmental clearance for concurrent processing.*

Comment – These documents should be placed on the public domain, the instance the project proponent submits the application to initiate the EIA process

ii. *At the preliminary stage itself, NEMA or SEMA should take a decision on rejection of the application dependingon geo-coordinates of the project utilising the master database, if the project is found located in 'no go' area or inviolate area in terms of pollution load, forest cover, pristine eco-sensitive zone or wildlife protected area.*

Comment – This is a welcome step and indicates where the project proponent should not set up development activities. However, the no-go areas should be 100% of the canopy cover.

iii. *There should be sector-specific model TOR for EIA study. The model TOR should have a component for incorporating relevant information-sharing with the local area/ people where the project is proposed to be located. The project proponents upon submission of application should begin EIA study.*

Comment – The model ToR indicates that the NEMA/SEMA has to undertake the preliminary visits to ascertain the project location/people/wildlife to assess its ecological sensitivity. This is a welcome step. However, the onus is on the project proponent furnish these detail – in FORM – 1 and Pre-feasibility. A matching of the two will indicate the veracity of the documents.

iv. *NEMA/ SEMA should carry out a preliminary scrutiny of the application and within 10 days should prescribe a location specific requirement in the terms of reference of a project, failing which the project proponent will develop the EIA/ EMP on model TOR.*

Comment: This relates to the scoping aspect. It is also a welcome step as the NEMA and SEMA are essentially have to scope the location for themselves before ascertain the location specific ToR. There should be interaction with the local communities. A pre-public hearing should be conducted by the local administration along with NEMA/SEMA officials to gauge the interest/opposition in the project. This will connect the local administration with the people.

v. *At the initial application stage itself, the project proponent is expected to furnish all relevant information about the project, including likely environmental impact as well as scope*

ofutilisation of local resources in terms of land, water, agro resources along with likely waste generation and disposal methods.

Comment: The Form 1 and Pre-feasibility study should be thorough in every aspect as it should match the EIA and Draft EIA. This shows thorough understanding of the project proponent at the start of the EIA process. ***The requirements of information in Form -1 and PFS should be considerably enhanced.***

vi. The method of public consultation prescribed in the existing notification should continue with the modification that only environmental, rehabilitation and resettlement issues are captured in the public hearing. A mechanism should be put in place to ensure that only genuine local participation is permitted

Comment: This is an unacceptable provision as public participation is vital. Curbing of freedom of expression, speech is a fundamental right under the Constitution of India, especially in a democratic country like India. This does not give a level playing field to the community to participate especially in the public hearing process. This shows that the environmental sensitive and their livelihood aspects of the communities into account are not considered. The public participation mainly focuses on resettlement and rehabilitation.

Further, it pertinent to add that public participation rules according to the EIA Notifications 2006 has international underpinnings. This is especially related to Aarhus Convention 2001[7], followed by global donors and international agencies and European Union. Any dilution of the EIA process, particularly public participation will have international ramifications. The EIA 2006 notification on public hearing should be followed.

The gist of Aarhus Convention 2001 is given below:

“the right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making");”

vii. The extant provision of dispensing with public hearing should be continued only in respect of situations when it is reported that local conditions are not conducive to the conduct of hearing, or in the matters of projects of strategic importance and national importance.

Comment: This suggestion is unacceptable and seeks to dilute the public participation process. If the situation is not conducive, then the public hearing should be postponed for another date.

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viii. *The public hearing may be dispensed within the locations where the optimum pollution load or the cumulative pollution load is pre-determined, such as in a planned industrial zone or manufacturing zone.*

Comment: This suggestion is not acceptable as it is very well known that pollution loads especially air and water has the ability to carry for a long distance, affecting hundreds of miles. This suggestion does not carry any scientific basis and should be discarded.

ix. *There is no necessity for public hearing in locations where settlements are located away from the project sites.*

Comment: This suggestion is also not acceptable as the environmental impact, air, water land, socio-economic impacts of the project can easily be felt across several hundreds of miles. At every stage, community must be allowed to participate irrespective of distance.

x. *The projects along with EIA and EMP should be appraised in NEMA by designated sub-groups of accountable and professional officials. The project approval unit of NEMA/ SEMA should have sub-groups comprising officials, vested with varied expertise. There should be a provision to avail the services of external experts by co-opting them asmembers in such groups as and when required to seek their technical advice. The project approval unit of NEMA/ SEMA should have designated sub-groupsfor each major sector. There should be a separate sub-group for considering projects of national importance, strategic importance, inter-state projects.*

Comment: This shows that the NEMA and SEMA will do their work in house. There is a question of transparency and accountability in their operation which needs to fleshed out. All decision must be put in the public domain. The SEMA and NEMA officials should allow interaction with the public during this time to allow fair hearing and impartial decision making.

xi. *The appraisal sub-group of NEMA should fix the environmental reconstruction cost and prescribe the method of payment into Environmental Reconstruction Fund.*

Comment: This appears to be an enabling mechanism for project proponents. This provision basically enables the proponent to undertake environmental degradation to promote economic development. For this purpose, a compensatory mechanism has been put in place.

However, the valuation of the ERC should be considered taking into account negative externalities and environmental/social value of the location and expected project profits. For example, a high level sensitive zone will ideally attract a very high cost that the project proponent will leave the pristine environment untouched, creating administrative 'no-go' environmental areas. This should be internalized by making the project put the highest compliance machinery to reduce pollution and other aspects.

xiv. All decisions in the appraisal process, including ongoing interim findings and approval should be placed in public domain, within 24 hours of finality.

Comment: This is a welcome suggestion as the respective environmental regulator will be forced to be transparent and accountable in their decision making process. Further, the decision should also be disseminated to the communities in the project location.

xvi. The entire clearance process should be through a web-based ICT tool to enable the project proponent to file and track their application as well as obtain the decision online.

Comment: Although the web-based process is an effective mechanism. The Report should also make provisions for the local community to access all the information. It should be noted that the local communities may not be tech-savvy, therefore publicity of the documents should be made available for them to scrutinize.

7.15 Certain types of projects would require special treatment as listed below :-

Comment: This provision of creating a separate club of sectors which need not undergo the EIA process is not acceptable. All sector should necessarily come under the EIA process, although the treatment in some cases in terms of people to people interaction and minimal effects on the environment may vary.

7.16 Division of responsibility and authority

Comment: If NEMA and SEMA are meant to be regulatory authorities, then the NGT or Environmental Courts should dictate the terms

7.18 The monitoring process of the conditions of approved project should be put in place by NEMA, to be followed by SEMA, in the following manner:-

Comment: The entire compliance suggestion appears to be oxymoronic. One hand the project proponent is supposed to voluntarily disclose the compliance and monitoring reports. Whilst, on the other hand, the project proponent would be penalized if he does not voluntarily disclose the project activities.

The disclosure and compliance mechanism should be made mandatory and placed on the public domain.

7.19 Administrative mechanism for project approval process

Comment: CAG agrees that most of the EIA strengthening orders have remained office orders and not been gazette notified. As a result, state agencies do not take into consideration. All remaining orders should be immediately gazette notified and compliance reports sought from environmental agencies.

7. CHAPTER 8: LEGAL FRAME WORK

Comments: There is a need for an overarch act for environmental protection and improvement and also to manage the environment. This Act should be comprehensive and not a piece-meal legislation - Environmental Laws (Management) Act (ELMA).

Moreover, the Terms of Reference does not give any indication of a new act but for amendments to the existing legislation.

Further, the entire proposed act stands on two shaky legs – legal principle of 'utmost good faith' which has its underpinning in insurance law and administrative efficiency criteria of 'single window clearance'.

The other judicial principles of principles of sustainable development, doctrine of proportionality and margin of appreciation, polluters pay principle -mentioned are operationalised on a backdoor approach which is the compensatory mechanisms such as - Environmental Reconstruction Cost (ERC), trading schemes – cap and trade, Environmental Reconstruction Fund (ERF), compensatory afforestation and incentive schemes. Legal fairness and balance cannot be equated to economic and financial efficiency principles.

It is submitted that concept of utmost good faith or 'uberrima fides' is not suitable for environmental situation, as environmental clearance and compliance relates to a process with a series of obligations falling at several institutional levels mainly through the various documents and process. Any failure in the obligation in one institutional layer will lead to failure in compliance and enforcement in other layers.

Comment: Some amendments, especially grievance redressal mechanisms, to the existing EPA can be made from the suggestions.

- Setting up special environmental courts at the local level is a welcome addition.
- Additionally setting up of an Environmental Ombudsman should also be taken into consideration to deal with local environmental issues issues and specific cases of non-compliance.
- There is no need to create an Appellate Board as the power of NGT will be diluted.

8. CHAPTER 9: INSTITUTIONAL REFORMS

Sections 9.1 to 12 Environment Research Institute, Creation of a new All India Service – Indian Environment Service, Expertise in the Indian Forest Service, Need for enhancing the quality of forest cover, and periodical review of quality of forest management, Issue of new Notification to replace the EIA Notification, 2006, Environment Reconstruction Fund, Repositioning federal relationship in the matters of environmental management

These suggestions are valid as it will strengthen the federal institutional environmental mechanism needed to enhance quality environmental data and better the intervention.

9.12 Project consultants- The central database available with NEMA can be used on payment basis, by the project proponents in preparation of EIA report/ EMP through the accredited consultants.

Comment – NEMA database should be available to the public for accountability and transparency. There is no necessity to keep it a secret database – only to be shared between project proponent, consultants and NEMA.

9.13 – 17, 20 Generation of awareness of ecology and environment among the general public, Environmental Remediation of polluted sites, Municipal Solid Waste (MSW), Air Pollution-Vehicular emission, Application of science and technology, Trained manpower development

Comment: These suggestions appear to be an add-on to the rest of the document and hence do not cover the subject in totality. More discussion is required around these points and take a purely suggestive nature. These points do not take concrete shape within the overall ambit of the document.

9.19.2 Regular reliable power supply

Comment – Prioritising and fast-tracking power projects at the cost of environmental protection is not acceptable.

9.21 Incentives for compliant units

Comment: This suggestion should be integrated with Bureau of Energy Efficiency Schemes such as **'Perform Achieve and Trade (PAT) Scheme'**.[8] Perform, Achieve and Trade (PAT) is a market based mechanism to enhance cost effectiveness of improvements in energy efficiency in energy intensive large industries and facilities, through certification on energy savings that could be traded. It is essentially a market based mechanism that seek to penalize non-compliant units, reward units that are environmentally compliant

[8] http://beeindia.in/schemes/schemes.php?id=9