Part IV

Safeguards and Resettlement

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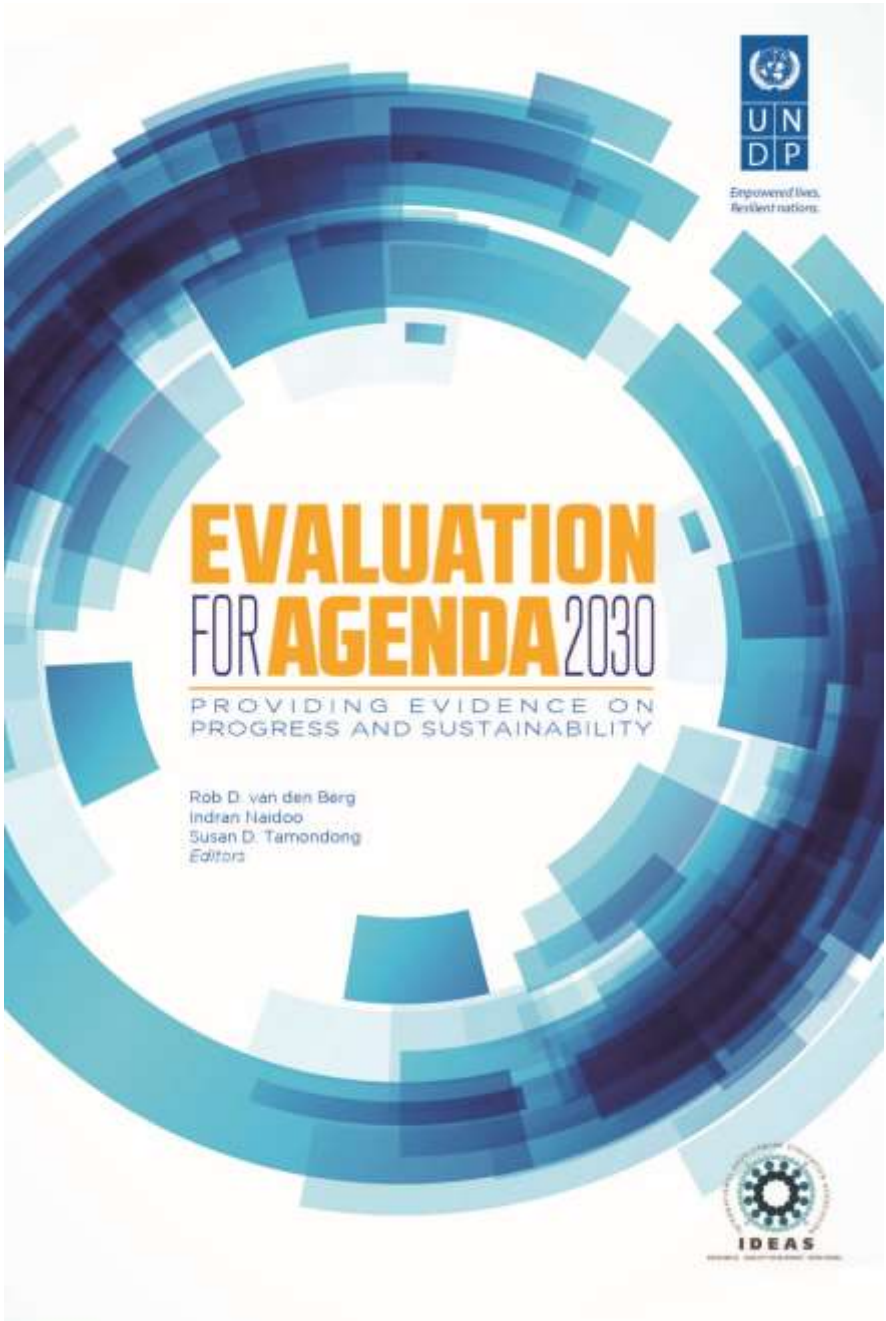

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Chapter 14

Environmental and Social Safeguards in India – A Critical Assessment

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Abstract. *This chapter describes the state of environmental and social safeguards in India, as applicable to development projects and activities. A theoretical framework and a brief historical background is provided to contextualize the contemporary situation. Though traditional human activities were for the most part environmentally sustainable, the development of technology and the growth of human population is putting increasing pressure on the natural environment. Skewed economic and social development, perhaps as a result of selective access to natural resources and technology, have also begun to show trends of inequity. This has resulted in human interventions that sometimes benefit the few at the cost of the many. In response, most countries have set up environmental and social safeguard regimes designed to assess the possible environmental and social impacts of human activities, to disallow those that are not viable, and to establish and monitor measures for minimizing and mitigating the adverse impacts of those judged to be viable. Unfortunately, in many countries—as, for example, in India—these measures have not been very effective because of vested interests both within and outside of the government, whose own objectives are better served by undermining, or rendering ineffective, all such safeguards.*

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ENVIRONMENTAL SAFEGUARDS

Conceptual Framework

The proposition that most contemporary human activities disrupt the natural environment and its processes is widely accepted today. However, there is much dispute about which impacts are acceptable, and to what extent. The stress here is on *contemporary* human activities, as many argue that traditional rural and tribal societies lived in harmony with nature, and in some cases still do.

In India, two traditional groups that come to mind are the isolated tribes of the Jarawas and the Sentinelese, in the Andaman and Nicobar Islands. There is no evidence to believe that the presence of these groups has in any significant way degraded the ecosystem they inhabit. Apart from the fact that their numbers have been stable over many years, they reportedly have many rituals that ensure that they do not adversely affect their natural environment. One such ritual is the reported practice of hunting parties half-breaking a prominent branch in a prominent tree in the area where they have recently hunted a wild pig. This hanging branch serves as a warning to other hunters who might venture there, that a pig has been recently killed in the area, and therefore they should hunt elsewhere. In a few weeks, the half-broken branch dries up and falls to the ground, once again opening the area to other hunters.[1]

Such practices of the Jarawas—and presumably of the Sentinelese, about whom much less is known—ensure that their footprint on nature is kept to a minimum and does not have a permanent adverse impact. However, most other rural communities in India cannot rightfully claim that their survival strategies are in harmony with nature. The conversion from hunting-gathering to shifting or settled agricultural practices alone has transformed natural ecosystems all over India.

Whether historical natural processes are the best, or the only, way forward is now a somewhat moot philosophical question. The time when the answer to this question would have been relevant has long since passed. However, the limits of change and manipulation of the natural environment, and the consequences of getting them wrong, are still very relevant.

Environmental Safeguards and the Government

Governments have the unenviable task of determining how much use and disturbance of nature is permissible, and how to meet the basic needs and growing aspirations of their people without overstepping these boundaries.

[1] This story was told to me by Samir Acharya, founding president of the Society for Andaman and Nicobar Ecology (SANE) while I was holding hearings in Port Blair, as the Supreme Court of India appointed the commissioner for forests and related matters of the Andaman and Nicobar Islands (2000). Many such stories describing the conservation practices of tribal and indigenous people can be found in Bharucha (2016).

Most, perhaps all, governments have adopted policies whereby a certain proportion of the nation's area, representing various types of ecosystems, is conserved in its natural state. In India, these are the national parks, set up under the Wildlife Protection Act of 1972.

Other areas are classified such that only certain types of activities can be permitted there. In India these are identified as wildlife sanctuaries, reserved forests, conservation reserves, community reserves, notified ecologically sensitive areas and wetlands, and coastal zones, among other classifications: and they are protected under a host of laws and regulations. The proportion of area that a country protects in this way is mostly dependent on three factors: the richness and diversity of ecosystems and species found in the country, the demand for land and other natural resources for human use, and the way these are balanced against the political will of the government to conserve nature and to sustainably use natural resources. Unfortunately, most countries in the world seem to be struggling to get this balance right.

For the remaining areas, most countries have restrictions on the types of land or water use permitted and regulations concerning the extraction of resources, the destruction of natural habitats, and the release of effluents. These standards vary from country to country and from ecosystem to ecosystem, and are a function of the cost and availability of "green" technology; the levels of environmental awareness and activism among the populace; the commitment and ability of the government to ensure long-term sustainability of growth and development; and the inclination and ability of the nation to transfer its environmental costs onto others.

Evaluating Programs

In 1950, the government of India set up a Planning Commission modeled after the planning infrastructure in the then-USSR. As a part of the Planning Commission, a Programme Evaluation Organisation (PEO) was created to evaluate the various programs being undertaken by the government and supported by the Planning Commission. Over the last 60 years or so, many of the important programs of the government of India and the various state governments were evaluated by the PEO.[2] For many years, most of the evaluations focused on economic and social outcomes, and on cost and time efficiency. Gradually the scope of the evaluations expanded and new aspects were introduced, including environmental aspects. However, these evaluations were mostly ex post facto, or at best carried out midterm, and dealt with only a few specifically selected programs. They therefore were not adequate for assessing the social and environmental impacts of programs, projects, and activities in advance of their being initiated, nor for assessing their social and environmental viability. They did perform the important role of influencing the design and implementation of new and ongoing programs. Unfortunately, the Planning Commission, and along with it the PEO, were terminated in 2014.

[2] For details, see http://planningcommission.gov.in/reports/peoreport/index.php?repts=peobody.htm.

Regulating Use and Disturbance

Experience has shown that in matters related to the environment—because once damage is done, it might not be easily undone—it is not prudent to simply declare standards enforceable by law and hope that the deterrent effect of stringent penalties would adequately protect the environment. Therefore, most governments have adopted an environmental safeguards regime that requires projects and activities to be subject to prior assessment and clearance.

In India, the environmental safeguards regime was initiated in 1974 through an administrative order. In 1994, the requirement of prior environmental clearance for most projects was made legally binding under the Environmental Protection Act of 1986.

To appraise projects and recommend environmental clearance, various environmental appraisal committees (EACs) were set up at the national level under the Ministry of Environment and Forests,[3] separately for different types of projects. These EACs were chaired, and had as members, independent experts from outside the government. Officials from various of the concerned departments were ex officio members. Though the EACs still function, in 2006 powers were delegated to the state governments to appraise and grant clearance for certain categories of projects, essentially the smaller and less problematic ones.

The basic process of carrying out appraisal, granting clearances, and monitoring compliance essentially involves an environmental impact statement being prepared by an expert body hired by the project proponents for that purpose. The regulating ministry has guidelines concerning the preparation of these impact statements. The statement is then appraised by the appropriate EAC of the ministry.

The EACs recommend to the ministry whether a proposed project or activity should be given environmental clearance, with or without certain conditions, or if it should be rejected. These recommendations are based on an examination of the impact assessment statement; other relevant documents and information; and discussions with experts and concerned stakeholders.

For most types of projects, there is also a statutory requirement to hold public hearings involving interested and affected members of the public. In these hearings, the public is given an opportunity to express its views on the possible impacts of the proposed project; the suitability of the proposed preventive and mitigative measures; and the consequent viability of the project. EACs also sometimes carry out field visits to monitor and verify the situation on the ground.

Based on the recommendation of the EAC, the ministry issues a clearance, a conditional clearance, or a rejection. Legally, since the EAC is only an advisory committee, the ministry is not bound by its recommendations.

[3] The Ministry of Environment and Forests was renamed, in 2014, the Ministry of Environment, Forests and Climate Change (MoEF&CC). In order to avoid confusion, it is here consistently referred to as the environment ministry.

Apart from this environmental clearance, projects that have any liquid or gaseous effluents must also get clearances from the relevant pollution control boards. Where forestland is involved, either in the location or in the impact zone of the project or activity, a separate procedure for forest clearances is mandated, involving the Forest Advisory Committee. Where the project or activity is located in, or likely to impact, a wildlife protected area, or a protected species of fauna or flora, clearance is required from the National Board for Wildlife.

Once accorded, an environmental clearance can be suspended or revoked if the conditions for clearance are not complied with. Each project proponent is required to submit a report to the regional office of the environment ministry, under which it is located, every six months. The regional office has the responsibility of ensuring that the various conditions prescribed in the clearance are complied with. They are expected to do this based on these reports and on their own monitoring.

Major Challenges

On paper, India has a stringent and elaborate system of checks and balances with multiple authorities, professional bodies, committees, scientists and other professionals, and institutions, all of them identifying, appraising, assessing, and monitoring environmental impacts. However, internal contradictions within the government, and the machinations of external vested interests, have made this elaborate system ineffective, and often corrupt.

Internal contradictions within the government. The environmental safeguards regime, though initiated in the 1970s, was fully institutionalized only in the 1980s. At least in part, this institutionalization seemed to be the result of both direct and indirect international pressure, to which India had become susceptible.[4] There was also growing domestic media and judicial pressure, and a vocal environmental movement. Countering these pressures were domestic economic imperatives, the push for short-term gains that is the bane of a five-year election cycle, and the consequent demand for a rapid expansion of industrial and commercial activity, and of infrastructure. Growing human populations and aspirations created pressure to convert natural habitats into agricultural lands and human habitations.

India's political strategy relating to environmental safeguards seems to have evolved out of these opposing pressures. The 1980s saw the emergence of strong environmental policies and laws, and an expansion of environmental institutional structures. But it also saw the emergence of a plethora of strategies that effectively negated the effects of these strengthened laws and institutions and allowed "business as usual" to continue. It allowed the Indian government and political leaders, even while they were showcasing to the country and to the world the progressive safeguard measures they had put

[4] For a more detailed discussion on this point, see Singh (2011).

into position, to simultaneously escape the adverse political consequences of a slowdown in economic growth, albeit a temporary one.

The process of undermining the environmental safeguards regime seems to have been spearheaded by four distinct yet interrelated strategies. Initially, there was a tendency to bypass or ignore the newly established regulatory regime. This, however, led to extensive litigation relating to various projects in which litigants challenged the legality of the government, ignoring the regulatory agencies that they themselves had statutorily created.[5] A second, related strategy was to make sure that these regulatory agencies did the bidding of the government, and to refrain from setting up independent and objective regulatory agencies, despite orders from the Supreme Court of India to do so.[6] The third strategy was to make even these "controlled" regulatory agencies functionally ineffective by starving them of resources and personnel; and the fourth was to roll back the safeguards themselves.

Vested interests. Apart from internal contradictions confronting the Indian establishment, almost from the start there were various vested interests opposed to the proper implementation of environmental safeguards. At least four such interest groups emerged.

Perhaps the most benign of these were those who saw many of the environmental safeguards, especially those seen as imposed by Western nations, as unnecessary and unfair, and an impediment to the urgent need for providing shelter, livelihood, and food to millions of impoverished Indians. To them, natural resources had to be made available, on a priority basis, in order to meet the immediate survival needs of the poor, and not be diverted or earmarked for long-term conservation imperatives, many of which seemed to them to be based on principles that were unproven, or inappropriately applied to Indian conditions.

While acknowledging the primacy of the needs of the poor, conservationists argued that there were enough resources in the country to meet everyone's basic needs, while ensuring environmental sustainability. But to do this, the existing resources needed to be more equitably used and distributed. There was, according to them, no justification for compromising the future of the people of India, especially the poor, just because the government was not able, or willing, to redistribute resources, especially land, water, and forest resources, so that they could support the survival needs of the poor rather than the luxurious lifestyles of the rich.

The second, far less benign, interest group militating against environmental safeguards held that the safeguards inhibited national economic

[5] Perhaps the two best cases from that period are those against the proposed Tehri Dam and the Narmada project. For details about the Tehri Dam controversy, see the Supreme Court of India 2003 judgment on *ND Jayal and Shekhar Singh vs Union of India and others*, https://indiankanoon.org/doc/1875824/; and Warrier (2016). For details on the controversy surrounding the Narmada dams, see, e.g., Peterson (2010).

[6] *T.N. Godavarman Thirumulpad vs Union of India and Others*, 2011, https://indiankanoon.org/doc/1725193/.

growth and thereby prevented, or at least delayed, India's transformation into a world economic power. The fact that India is now among the fastest growing economies in the world has further reinforced this belief among many. This group ignored all concerns about the impact of an economy that was growing rapidly, but inequitably, on the poor and marginalized segments of the society. They also ignored the inevitability of a façade of rapid economic growth and expansion soon collapsing, if it was achieved in a manner that was not sustainable.

A third interest group that opposed the environmental safeguards regime, sometimes very aggressively, was comprised of the powerful lobby of Indian, foreign, and multinational corporations, who saw environmental restrictions as impediments to their growth and profitability. The efforts of the Indian government to attract foreign investment, recently spurred by the launch of the "make in India" campaign, has exacerbated this conflict. This interest group argued that the availability, in India, of cheap and plentiful skilled labor was not enough to attract foreign investment, and the deal needed to be "sweetened" with weakened environmental regulations.

The fourth, and perhaps the most pernicious, of the vested interests opposing the proper implementation of environmental safeguards are the rent seekers. Much money stands to be made, and is being made, by allowing the violation of environmental norms in exchange for hefty political "donations" and personal bribes. Many political parties, functionaries, bureaucrats, scientists, and other professionals, benefit from this system. Ironically, these interests are best served if there are, on paper, strong regulations and safeguards, but a systemic inability to ensure that the regulators do their jobs effectively and honestly.

The rent seekers also include public servants who are involved in granting contracts and clearing payments to builders and suppliers for government projects. These public servants seek, and often receive, pay-offs from the contractors who are hired to build the project, and from other suppliers. For this to happen, the projects have to be initiated and constructed, and therefore environmental and social safeguards have to be bypassed.

Safeguarding the interests of the "weaker." Apart from the above four vested interests, many countries around the world successfully transfer their own environmental costs onto other countries, both by dumping pollutants and by unsustainably exploiting their minerals and other natural resources. This represents another powerful vested interest that works against the safeguard regimes of victim countries.

The tendency to exploit the "weaker" by forcing them to absorb the environmental costs of the "stronger" does not occur only among countries, but also happens within countries. In India, the location of environmentally destructive activities (such as mines and dams), and of hazardous and polluting activities (such as chemical industries and coal-based power plants) is often influenced by the amount of economic and political clout held by the adversely affected communities. Certainly, the efficacy of the application of safeguards is profoundly influenced by the amount of political and economic power those likely to be adversely affected possess.

As a counterbalance to these interests and pressures, India is also host to strong environmental movements, a sympathetic media, and a supportive judiciary. Nevertheless, the combined interests that have rallied against the effective implementation of a strong regulatory regime seem to be winning, as described below.

Subversive Strategies

Bypassing or ignoring the regulatory agency. From the beginning, for reasons discussed above, the regulating ministries often came under pressure from other departments and ministries of the national government, from state governments, and even from the prime minister's office, to accelerate the process of environmental appraisal, and in some cases to grant undue environmental clearance to favored projects. In some cases, as will be discussed later, the concerned ministry succumbed to pressure. In others, they did not. In some of these latter cases, the central and state governments decided to ignore the regulating ministry and start work on the project before it had been granted environmental clearance and, in some cases, even before the environmental studies had been carried out.

These half-completed projects were then presented to the regulatory ministry as a fait accompli. The fact that much of the anticipated environmental damage had already occurred, and as such could not be prevented or minimized, even if the project had now been abandoned, strengthened the arguments in favor of granting it *ex post facto* clearance. The fact that a huge amount of public money had already been invested in the project created further moral and political pressure on the regulating ministry, despite the utter illegality and immorality of a project being initiated and half completed before the mandatory clearances were received.

In a few high-profile cases, the refusal of the regulatory ministry to grant clearance was overruled by the prime minister's office, and the regulatory ministry was directed to accord clearance. Perhaps the most famous example of this was the granting of environmental clearance, in 1987, to the Narmada Sagar and Sardar Sarovar dams, which were two of the largest dams on the Narmada River. Despite the environment ministry categorically stating that the projects were not yet ready for appraisal, let alone clearance, the prime minister's office overruled the ministry and directed that the projects be cleared, with a curious *pari passu* clause that mandated that studies and assessments be carried out concurrently with the construction. Following this logic, the projects would be ready for assessment only when they were fully constructed.

Many of the efforts to bypass or ignore the regulatory ministry were challenged in the courts of law and caused serious embarrassment to the government, and much adverse publicity. Perhaps because of this, there was a gradual shift to other strategies, as described below.

In 2013, there was a qualitative change in the efforts of the government to bypass the environment ministry. In January 2013, the government of India set up a Cabinet Committee on Investments (CCI) as a part of its

proposed National Investment Board.[7] The CCI was designed and empowered to intervene in instances where different approval processes, particularly those related to the environment, were thought to be impeding the economic growth of the country. The CCI had the power to review decisions taken by ministries in which projects had been refused approval, or there had been "undue" delays. It was also empowered to direct statutory authorities to discharge functions and exercise powers under the relevant laws and regulations within the prescribed time frames, for "promoting investment and economic growth."

This was widely seen as a strategy to gain political advantage in the forthcoming general elections of 2014. The mandate of this committee was essentially to bypass the environment ministry and other regulators, and to provide speedy, even almost automatic, clearances to proposed projects and activities that were pending with the ministry for more than three months, regardless of the fact that in many cases the required studies and assessments had not been completed and submitted by the project proponents. The CCI then proceeded to ensure environmental clearance to these projects without conducting any scientific appraisal, or even having access to any professional expertise (Press Information Bureau 2013). Going into the general elections of 2014, the Congress party claimed that it had granted environmental clearance to a large number of projects in the previous year.[8]

This was perhaps the most blatant and direct effort to bypass the environmental regulatory mechanisms and safeguards, obviously necessitated because the environment ministry was not fully compliant with the wishes of the government, despite being headed by a minister from the ruling party. It was also an unprecedented obfuscation of the responsibilities of various ministries and levels within the government.

Though there has been no other comparably blatant effort at bypassing the regulatory mechanism (and in effect dismantling it), the new government, which took office in 2014, has not shown greater concern for the environment than the previous one.

Compromising the scientific objectivity and integrity of the assessment process. Despite demands for an independent statutory body to appraise projects and activities, and to grant and monitor environmental clearances, this process continues to remain within the government. This is also despite the fact that in a ruling given in the case of Lafarge Umiam Mining Pvt. Ltd on July 6, 2011,[9] the Supreme Court of India emphasized the need for such an independent regulator. In another judgment, in the case of T.N. Godavarman Thirumulpad, the Supreme Court further reiterated that the central

[7] For details on the CCI, see http://cabsec.nic.in/writereaddata/cci/english/1_Upload_989.pdf.

[8] See, e.g., Sharma (2013).

[9] *T.N. Godavarman Thirumulpad vs Union of India and Others*, 2011, https://indiankanoon.org/doc/1725193/.

government was required to set up a regulator at the national level, which would have offices in all of the states; which could carry out an independent, objective, and transparent appraisal and approval of the projects for environmental clearances; and which could also monitor the implementation of the conditions laid down in the environmental clearances.[10]

The refusal to set up an independent regulatory mechanism was adversely commented upon by the Comptroller and Auditor General of India (CAG) in its report of 2016, which was prepared for submission to the President of India under Article 151 of the Constitution of India, to be presented to the Parliament:

> A National Regulator to oversee the entire process of grant of Environmental Clearance and monitoring is yet to be appointed despite directions of the Hon'ble Supreme Court. Environmental Clearances were granted to the Project Proponents without checking the compliance of the conditions mentioned in the previous Environmental Clearances and recommendations of the Regional Office. (CAG 2016, viii–ix)

Unfortunately, a high-level committee set up by the new government in 2014 recommended against the setting up of an independent authority for granting environmental clearances, citing the very reasons that had made such an independent authority desirable, as arguments against its creation.

> While all technical aspects of an application/proposal for clearance would be examined on merits by the NEMA, it was felt that the final approval or rejection powers should be retained by the MoEF&CC. This is because there may be many other factors, relating to relationship with neighbouring countries, need to address regional disparity issues, dealing with areas and regions with special problems and issues, and need to take national security issues into account etc. etc, which may singly or in combination add a further politico-economic-strategic dimension in the decision making process. (HLC 2014, 59)

Delegating powers to the state government. To make things worse, in 2006 a decision was taken by the government of India to delegate the power to grant environmental clearance for certain types of projects to the state governments.[11] This was a controversial decision for at least two reasons. First, there is a well-founded belief that state governments by and large are much less committed to implementing safeguards, especially environmental safeguards, than the central government is. It was this conviction that led the government of India, in 1980, to promulgate the Forest Conservation Act, which stipulates that no designated forestland can be diverted for non-forest use by the state government without prior clearance of the central

[10] *T.N. Godavarman Thirumulpad vs Union of India and Others*, 2014, http://courtnic.nic.in/supremecourt/temp/20219953612014p.txt.

[11] For details, see http://www.envfor.nic.in/legis/delegation.htm.

government. Statistics suggest that subsequent to the enforcement of this law, the amount of forest land being diverted drastically shrank.

There are many reasons for the seeming indifference of state governments to environmental damage. Usually the performance of the political parties that are in power in a state is judged by its ability to enhance jobs and incomes, to provide basic services, and to distribute "freebies" and concessions. Environmental conservation, primarily because of its long-term returns, is usually not a significant factor affecting the re-electability of the ruling political party.

Also, state governments usually function in a more unified manner, in which the head of the state, the chief minister, invariably exercises total power and control over all departments. There is little scope for environmental departments within a state to oppose or even delay and modify projects and activities that are politically important and that have the full support of the chief minister.

Evaluating the Performance of Government-Controlled Regulatory Authorities

Ignoring violations of the law. The regulating agency is mandated, under the Environmental (Protection) Act of 1986, to: "direct (a) the closure, prohibition or regulation of any industry, operation or process; or (b) stoppage or regulation of the supply of electricity or water or any other service" for any violation of the conditions of environmental clearance.

However, despite this, and despite there being numerous such violations, the regulating ministry has rarely taken action against projects and project proponents that were in violation of the conditions of clearance. The CAG, as part of its sample assessment, identified numerous violations in the two years under review:

> MoEF&CC had stipulated certain specific conditions in the EC either relating to sectors or to the project which were to be followed by PPs. It was observed that the monitoring agencies were not able to ensure compliance to the EC conditions. (CAG 2016, 69)

Furthermore:

> ...there was shortfall of 43 to 78 per cent (with reference to compliance reports of June 2015) in submission of half yearly compliance reports. Further, it was observed in audit that most of the PPs did not submit half yearly compliance reports timely and regularly and there was delay ranging from one month to 48 months in submission of the compliance reports. We noticed that the ROs did not issue reminders regularly for submission of compliance report to PPs. Also, no action was taken by the MoEF&CC against the PPs under the provisions of the Environment Protection Act, 1986 for non-submission of compliance report by PPs. (CAG 2016, 84)

The CAG went on to observe that despite numerous violations, no action was taken by the regulating ministry.

> In reply to a Parliament question, the Ministry submitted (July 2016) that no penalty was imposed by the MoEF&CC for violating conditions of EC in the last two years. We observed that MoEF&CC did not have a compiled database of cases/projects received by it from the ROs where the violations were reported by ROs after their monitoring/inspection. Data register with year wise breakup of such cases was also not maintained. (CAG 2016, 88)

Ignoring the recommendations of the EACs. A popular strategy to undermine the environmental safeguards regime that evolved in the 1980s was for the environment ministry to overrule the recommendations of the EAC. The fact that the EAC was only an advisory body allowed the ministry to adopt this strategy.

Ordinarily, given that the EAC is appointed by the environment ministry, the final decision should have been in conformity with the recommendations of the EAC. Where the ministry had additional technical inputs or findings that were contrary to those of the EAC, these should have been sent back to the EAC for consideration and comment. However, this was not done, and usually the ministry gave no reasons for rejecting or modifying the recommendations of the EAC.

Perhaps the most well-known of such cases was that of the Tehri Dam in the Himalayas. At 260.5 meters, the Tehri Dam is the highest dam in India, and among the highest in the world. Located in the Himalayas in what is known to be one of the most seismically active zones in the world (Category V), the EAC had unanimously determined, in 1989, that the environmental impacts and the safety concerns related to the project were such that it was not ecologically viable. Despite this, the environment ministry proceeded to grant environmental clearance to the project and gave no reasons why it chose to overrule the EAC.[12]

Another high-profile case was the first of the coal-based superthermal power stations in India, at Kayamkullam, Kerala. This power station was located adjacent to the ecologically fragile creeks of the coastal region of the state of Kerala. In 1991, the EAC rejected the location because of its ecological fragility, and suggested alternate locations that were ecologically less sensitive, and economically and logistically preferable. However, allegedly because the initial site was within the political constituency of a powerful political leader, the environment ministry overruled the EAC and cleared the project, without giving any reasons.

[12] For further details, see the Supreme Court of India 2003 judgment on *ND Jayal and Shekhar Singh vs Union of India and others*, https://indiankanoon.org/doc/1875824/. Also see Narrain (2003), IRN (2002), and IUCN, https://portals.iucn.org/library/sites/library/files/resrecfiles/GA_18_REC_057_Tehri_Dam_Project_India.pdf.

In a similar case, a proposed coal-based thermal power station located adjacent to a crocodile sanctuary in Dholpur, in the Indian state of Rajasthan, was rejected by the EAC in 1992, but cleared by the ministry, again without giving any reasons. In this case also, the EAC recommended shifting the location to a less ecologically fragile area, but the suggestion was rejected, allegedly because the original location was within the political constituency of the then chief minister of the state.[13]

Fortunately, in all these cases the triumvirate of people's movements, a sympathetic media, and a supportive judiciary, helped. A case filed in the Supreme Court of India ensured that the environmental safeguards related to the Tehri project were strengthened.[14] Unfortunately, the Supreme Court declined to take a view on the safety concerns, indicating, perhaps correctly, that this was less a legal issue than a technical one, for which they did not have the requisite expertise.

In both Kayamkullam and Dholpur, public and media pressure, and the threat of legal action, resulted in the projects being converted from being coal-based to naphtha-based and gas-based respectively, thereby reducing the adverse environmental impact on their surroundings.

Undermining the independence of the EACs. The EACs are functionally dominated by the chairperson, who is responsible for making all final decisions after considering the views and advice of the members of the committee, and of invited experts. Decisions in the EAC are not taken in a democratic manner, in which each member has a vote. This is in keeping with how most official committees function, with decisions made mostly by the senior-most functionary, and with other members operating more as advisers than as co–decision makers. Therefore, it is critical to ensure that the chairperson of an EAC is competent, independent, and of impeccable integrity.

The experience with EACs during the 1980s and early 1990s taught the environment ministry that overruling the EACs would attract much public and media criticism, and would give opponents a good legal basis to move the courts. Therefore, it quickly revised its strategy and started replacing the independent experts who had initially chaired the EACs, with retired civil servants, or others who were either sympathetic to the concerns of the project lobbies, or were pliable and could be pressured.

Compromising the independence of environmental consultants. The EACs were primarily dependent on the environmental impact statements provided to them by the project proponents. As these statements were prepared

[13] The Kayamkulam and Dholpur projects were appraised in the early 1990s, before the web became functional in India. Therefore, documentation regarding these and other such projects is not available on the Internet. However, the author was the chairperson of the EAC that appraised both these projects and has a copy of all relevant documentation. A relatively recent publication that describes many other such cases is Chainani (2007).

[14] For details, see Narrain (2003).

by consultants who were hired by the project proponents, there was always an inherent danger of conflicts of interest.

This situation was aggravated by the fact that the EAC had neither the resources nor the mandate to carry out fresh assessments, or even to empirically test some of the claims made in the environmental impact statements. At best, it could visit the site of the proposed project, make observations, and require additional studies to be done, or studies to be done again. However, usually these studies would be carried out by the same consultants. Occasionally there was a possibility of getting independent studies done, but only in high-profile projects.

The necessity of introducing a system in which the initial environment impact assessment could be carried out by a competent professional body that was independent of the project proponent, was stressed from time to time.[15] It was suggested that a panel of consultants and professional institutions could be maintained by the environment ministry, or by the Planning Commission, which could commission them for the task and pay them from funds recovered from the project proponent. Unfortunately, these recommendations have never been accepted, and no reasons have been given for the failure to accept them.

Compromising the functional efficacy of the regulatory agency. Most projects and activities were granted conditional environmental clearance, in which the clearance was based on adherence to certain conditions, especially preventive or mitigative strategies. There were also various statutory standards that such activities and projects had to comply with.

The responsibility of monitoring these projects to ensure that they were complying with the conditions of clearance was assigned to the 10 regional offices of the regulating ministry. Unfortunately, these offices were very inadequately staffed, and continue to be so. As a result, there is hardly any monitoring of compliance of the conditions of clearance. According to the CAG:

> There were only 15 scientists available for monitoring of Environmental Clearance conditions against sanctioned strength of 41. Regional Offices have not been delegated the powers to take action against the defaulting PPs and they had to report the violations of the Environmental Clearance conditions to the Ministry. (CAG 2016, 85)
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> 24 State Pollution Control Boards/Union Territory Pollution Control Committees did not have in place sufficient infrastructure and manpower for monitoring despite having sufficient funds. (CAG 2016, 94)
>
> As per the information provided by MoEF&CC and its ROs, a total 9,878 Category A projects and 12,657 Category B projects were to be monitored by the ROs which had been given ECs since the inception of the EIA process, following the notification of 1994. (CAG 2016, 85).

[15] See, e.g., Singh and Banerji (2000) and Planning Commission (2007).

> As per MoEF&CC norms (July 2015) each scientist was to monitor at least five projects per month. Therefore, minimum 60 projects were to be monitored every year by each scientist…it may be seen that MoEF&CC/ ROs would not be able to monitor all projects under their jurisdiction even in a period of five years. (CAG 2016, 86-87)

Diluting standards. As described earlier, the initial strategy seemed to be to bypass or ignore the regulatory regime. This was followed by an effort to make the regulatory mechanism and the safeguards subservient to the whims of the government, and without any functional and scientific independence. The safeguards regime was also progressively made increasingly ineffective, so that it did not even have the ability to perform the required functions.

Essentially the dilution of the safeguards regime is being achieved by lowering the standards required; shortening the time available for conducting impact studies and assessments; and redefining the parameters that determine which projects qualify for prior assessment, and to what level, thereby excluding an increasing number of projects.

Commenting on the environmental impact assessment (EIA) notification and the amendments issued by the environment ministry, a joint committee of experts from the various Indian Institutes of Technology observed:

> In exercise of the powers conferred by the Environmental Protection Act, 1986 (GoI, 1986) Government of India (GoI) on 27th January 1994 made it mandatory for expansion and modernization of existing projects to have prior environmental clearance (EC) (MoEF, 1994). Thirteen amendments were made to it during 1994 to 2005…and then, in 2006 principle notification was replaced with a new one. The initial notification is no longer in effect, but it is our opinion that in comparison with the principle notification, the new one is weak in some of the areas, at least. (IIT 2011, 15)

With the installation of the new government in 2014, there now seems to be an added focus on the fourth strategy, that of dilution of the safeguards themselves, and of the processes involved in implementing them.

Soon after taking charge, the new government set up at least two committees to examine the ways and means by which environmental regulations could be "rationalized." The first of these was constituted in August 2014, and submitted its report in November 2014 (HLC 2014).

This committee recommended, among other things:

> …the identification of "no go" areas, which are in forest areas or inviolate zones—primarily with the criteria of over 70% canopy cover and "Protected Areas" which should not be disturbed except in exceptional circumstances, and that too only with the prior approval of the Union Cabinet. (HLC 2014, 11)

The disastrous implications of this recommendation can be judged by the fact that only about 3 percent of India's forests have canopy cover of over

70 percent (Forest Survey of India 2015). At present, all the legal forest area plus other areas that have tree cover (a total of nearly 30 percent) have legal restrictions on their diversion for nonforest uses. If the recommendations of the high-level committee are accepted, most of India's forested area, which in any case is well below the required 33 percent, would be opened up to industrial and other nonforestry uses.

Under the current regulatory regime, where forestland is allowed to be diverted for nonforest use, an equivalent area of nonforest land has to be brought under forest cover. In exceptional cases, compensatory afforestation can be permitted on degraded forestland where appropriate nonforest land is not available, and the overall forest cover of that state is at least 33 percent (the prescribed national minimum). This condition has ensured that the overall extent of forestland that either has tree cover, or has the legal protection that would allow regeneration of tree cover, does not decrease in the country.

Unfortunately, the high-level committee has recommended that this clause be dropped:

> The Committee recommends that this condition that there must be at least 33% forest cover in a State before approval is given for CA on degraded forest land should be done away with. (HLC 2014, 36)

The high-level committee has also recommended that:

> All the strategic border projects (border roads, fencing, Border Out Posts, floodlighting, surveillance infrastructure, power infrastructure) falling within 20 km. from the International Border, Line of Actual Control, Line of Control; and the projects in power sector and coal mining which are the growth engines for national economy may be given a fast-track treatment through special procedures. (HLC 2014, 57)

SOCIAL SAFEGUARDS

Unlike with environmental safeguards, until recently there were no social safeguards that were statutorily required for development projects and activities. For most large projects where human populations were being physically displaced, there was invariably a scheme or policy to manage the displacement and to minimize adverse consequences on the affected population. By and large, the focus of social safeguards was limited to the physical displacement of families and individuals.

When, in the mid-1970s, environmental appraisal processes were set into motion at the national level, along with various environmental parameters, human displacement was also mentioned. Therefore, while seeking environment clearance, projects also had to describe any human displacement that would take place, and lay out plans for rehabilitation. This became a precondition for getting environmental clearance, even though technically the regulation of human displacement did not come under the purview of the environment ministry.

It was only in 2007 that the government of India finally came out with the National Rehabilitation and Resettlement Policy.[16] It took another six years for this policy to get a corresponding statute. In 2013 the Parliament finally enacted The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (known as the R&R law).[17] This law, though not very strong, does provide a statutory basis for regulating the adverse social impacts of the acquisition of land for development purposes. The overall responsibility for enforcing this act lies with the national Ministry of Social Welfare.

Perhaps any R&R law can be assessed on the basis of at least four tests:

- Does it discourage forced displacement?
- Does it comprehensively define affected families/displaced persons?
- Does it provide for a just and humane compensation package and process?
- Does it provide for effective implementation?

Discouraging Forced Displacement

India's R&R law stipulates that forced displacement can only be done when it is in the public interest. It defines the public interest as including security concerns, infrastructure projects, the resettlement of project-affected persons, housing for specified disadvantaged groups, and the resettling of disaster-affected populations. It further stipulates that the social costs should be justified based on a prior social impact assessment (SIA). However, it does not establish any norms to guide or regulate the conduct of an SIA, and it exempts irrigation projects where an EIA is being conducted from also conducting an SIA.

The law bans the acquisition of multicropped irrigated lands, except as a last resort, though it exempts linear projects from this prohibition. It also stipulates that acquisition must be for the least displacing alternative, and of the minimum required area. Private companies can acquire land only if at least 80 percent of the affected families consent to it. The law does not make it mandatory to do either an accumulative impact assessment in an area, or on a community or an SIA of the overall development model and its components.

[16] Copy available at http://www.dolr.nic.in/NRRP2007.pdf. For a critique of the draft policy, see Singh (2006).

[17] Copy accessible at http://lawmin.nic.in/ld/P-ACT/2013/The%20Right%20to%20Fair%20Compensation%20and%20Transparency%20in%20Land%20Acquisition,%20Rehabilitation%20and%20Resettlement%20Act,%202013.pdf.

Defining Affected Families and Displaced Persons

The law defines an affected family as one whose land or other immovable property has been acquired. Members of scheduled tribes and other forest dwellers who are losing forest rights are also classified as affected families. It includes as displaced persons those residing in the area being acquired even though they might not own any land or property, and those whose primary source of livelihood will be affected. It includes the landless, tenants, share-croppers, artisans, agricultural laborers, usufruct rights holders, gatherers of forest products, fishers, hunters, and boatmen and women–provided they have been involved in these activities for at least three years prior to the acquisition.

Adult unmarried daughters and sons, widows, divorcees, and women deserted by their families who are residing in the affected area, are considered separate families. The law includes dependent minor sisters and brothers in its definition of family.

Providing a Just and Humane Compensation Package

Though various types of compensation are provided under the law, the major problem is that the law does not mandate that land must be given in exchange for land. This means that when poor farmers are displaced, they are not provided with other land where they can again take up farming. Though they are financially compensated, the expectation, if indeed there is any, that they could then use this money to buy equivalent or an even greater amount of land of equal or better quality, is not well founded.

Bitter and long experience has shown that land prices shoot up in areas where there is a sudden demand for land from displaced farmers, making it impossible for them to replace the land that they have lost, let alone improve on it. Also, most poor farmers have no experience of handling large sums of money, and are either cheated out of it, or spend it on immediate needs and wants rather than saving it to replace their productive assets. This leaves the farmers with no option but to go into some other profession, for which they are not trained, and are often not suited.

Effective Implementation

As with environmental safeguards, there are powerful interests opposed to the establishment and effective implementation of a progressive R&R regime. These include, in the main, the corporate lobby that sees its profits being eaten away when huge expenses have to be made to provide relief and rehabilitation for displaced populations. It also includes ministries and departments of the government, especially those charged with infrastructure development, who find it difficult to justify the overall economic benefits of the project (the cost/benefit ratio), if the costs of relief and rehabilitation are high.

There is also often unresolved tension within host communities, who are forced to share their resources with resettled populations. This is aggravated when populations are relocated in distant, or culturally antagonistic, locations. All of these factors have combined to inhibit the proper design and implementation of an effective social safeguard regime in India.

The R&R law does not, unfortunately, envisage an independent and statutory appellate body and monitoring authority to ensure that the process of rehabilitation is fairly and properly executed. This responsibility lies with the government which in most cases is neither willing nor able to carry out this function.

Though the law was enacted in 2013, the almost identical policy statement has been in force since 2007. Unfortunately, initial assessments reveal poor implementation. This can be seen from the observations of the CAG, which has surmised that "in over 80% of the projects sampled, the R&R conditions required to be followed were not specified in the environment clearance, despite there being a statutory requirement to do so" (CAG 2016, 60).

Unfortunately, the R&R law does not make the provisions of the law binding, as a fundamental right under the Constitution, nor does it make individual entitlements of project-affected people legally binding through contracts. Nor are officials charged with the responsibility of implementing provisions of the law made personally liable for any violations. The R&R law is somewhat unique among laws Indian laws, in the sense that it mandates no punishment or penalty for any functionary involved in infractions of the law: in fact, the only penalties envisaged are for members of the public who might knowingly supply false information to the authorities,

FUTURE DIRECTIONS

One lesson that emerges from the experiences described in this chapter is that for environmental and social safeguards to be effectively implemented, there is a critical need for regulators who are functionally, administratively, and financially independent of the government.

The experience of the past 40 years or so has also demonstrated that unless there is constant pressure from people's groups and movements, supported by a sympathetic media and a sensitive judiciary, the executive on its own is unlikely to pay much attention to either of these two sets of safeguards.[18]

It is also critical, in order for both the independent regulators and for people's movements to have increased credibility and impact, that there be periodic independent assessments by constitutional and statutory authorities in the assessment of the CAG. Assessments by independent scientific institutions, and by people's organizations would also be invaluable, so that the findings of all of these can be linked back to the initial appraisals of both ongoing and completed programs and activities, and can also be used to ensure that future ones are better designed and implemented.

[18] For a detailed set of recommendations relating to implementation of environmental safeguards, for which there is now experience of over 40 years, see Planning Commission (2007), 7–12. Though somewhat dated, most of the recommendations therein are still relevant today.

ACKNOWLEDGMENTS

I am grateful for inputs from Raman Mehta, Vishaish Uppal, and Misha Bordoloi Singh, while writing this paper.

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