Where ease of doing business trumps environmental protection

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The proposed EIA Notification- in its early draft- fails to evolve from the 2006 Notification, and disappointingly, tries to further weaken environmental safeguards imposed on polluting industries.

Reams of paper (made by felling healthy trees) are being spent on reports (some of questionable quality) reinforcing the wisdom that school textbooks tell us- that our environment and natural resources are precious, and we need to nurture them to sustain us. And yet, it is sadly these lessons that seem to need periodic reiteration, even among our lawmakers and the executive.

The recent past in the country has seen a deliberate weakening of protections to the environment, issued through subordinate legislation or by the judiciary. Think of the Coastal Regulation Zone Notification (CRZ), 2019, a watered-down version of the poorly implemented CRZ 2011. Or the pollution control norms that were issued in 2015, and are yet to be implemented, albeit weaker than they originally were.

Add to this the Environment Impact Assessment Notification of 2006, set next for an overhaul. The existing legislation of 2006 has been mutilated and marred beyond recognition by over 21 amendments and several Office Memoranda over the years. These numbered 41 in total in the last five years alone, meriting a compendium published by the Ministry of Environment, Forest and Climate Change (MoEFCC) in early 2019.

The overhauled version- which was leaked out in May when India went to polls- has been sent to the states seeking response from the Environmental Impact Assessment Authorities (bodies created by this Notification). Another iteration of the 2019 Notification is being readied, and is expected to be put out for public comment soon.

This piece of subordinate legislation is being rewritten to improve transparency, efficiency, effectiveness and in the spirit of decentralisation, the introduction to the zero draft mentions. A closer look at the draft will explain how skewed the interpretation of these concepts is, in effect.

Post-Clearance Compliance gets the short shrift

What has for long been seen as the weakest sections of the existing Notification, in terms of ensuring compliance of Environmental Clearance (EC) conditions after clearances are issued, prevails in the draft law. The Principal Bench of the National Green Tribunal had, in April this year, observed that there was flagrant violation of

the EC conditions, and that 92% of the projects requiring state-level clearances, and 33% of the big projects that are under the ambit of the MoEFCC, were not being monitored at all for compliance. The tribunal had asked for such monitoring of compliance to be carried out at least once a quarter. Criticising the proposal of the MoEFCC to empanel institutions to carry out such monitoring, the Bench observed that such primary and statutory functions have to be carried out by the regulatory authority only, although validation can be outsourced. 'Wholesale outsourcing may make it difficult to have any accountable mechanism,' the bench observed. In response, MoEFCC conceded in July 2019 with the NGT that primary monitoring would be done by expanding capacity of SPCBs and the Regional Offices of the MoEFCC, and only smaller projects (Category B) would be assigned to third party institutions. However, in the zero draft, it has only been proposed that the Ministry will empanel government institutions of national repute for carrying out monitoring of compliance. These checks, it is proposed, will be conducted in a random manner. It is hoped that the final version of the Notification stays true to the MoEFCC's process delineated in its affidavit to the NGT, and ensures thorough, periodic and effective monitoring.

DEIAAs make a backdoor entry

The most reviled part of the zero draft is the provision to create and empower District level Environment Impact Assessment Authorities (DEIAA), to look over small mining projects and medium sized enterprises coming up in the district. This is done in the name of decentralisation but is problematic for several reasons.

For more context, let's revisit the Supreme Court decision on sand mining in February 2015, which mandated Environmental Clearances for all mining projects, irrespective of size. Up until then, the EIA Notification of 2006 mandated prior ECs only for projects bigger than 5 HA. In response to this, an amendment was proposed to the Notification bringing smaller mining projects of minor minerals- up to 25 hectares- under the ambit of these DEIAAs, chaired by the District Collector. This amendment was quashed by the NGT late 2018, when it made an observation that the District Expert Appraisal Committee was bureaucratic, and not possessing the required expertise to handle these cases.

What has been rejected by the green court has now been snuck in, by rewriting the law. Several states, including Tamil Nadu, Mizoram, Uttarakhand and Bihar have rejected and expressed apprehensions about the DEIAA. State responses to the zero draft can be accessed here.

These DEIAAs are chaired by the District Collector. In several states, it is the District Collector who enters into mining leases with the leasees on behalf of the government, promoting the industry for revenue. The District Collector in Tamil Nadu heads the committee to promote Micro Small and Medium Enterprises. And

the DEIAA is proposed to check and award clearances to Medium Enterprises and sand mining projects under the draft law- clearly requiring the Collector to divide his loyalties in assuming these two mutually exclusive roles.

Environmental Protection subordinated to Ease of Doing Business

In the name of improving efficiency, read time taken to award clearances (which is sadly what the EC is being reduced to), there are harder timelines for the bodies appraising projects to adhere to. As against 60 days, project proponents now only have to wait a month after submitting their application for a project, to be listed for the Terms of Reference (TOR) for its EIA from the Expert Appraisal Committee for the sector. If it isn't listed by then, the proponent is free to use a standard TOR and proceed with the EIA. Provisions such as these tie-in with our zeal to promote Ease of Doing Business, forsaking a thorough deliberative process for assessing the Environmental Impact Assessment of projects.

Industry gets more exemptions

The new draft, which should ideally evolve to address the weaknesses of the existing law, is surprisingly allowing further slack and exemptions in Environmental Impact Assessment- railways, renewable energy projects (utility scale), e-waste processing, automobile manufacturing- whose exemption from the 2006 Notification was questioned, continue to escape regulatory oversight, while oil and gas exploratory drilling- which has been included so far- is now proposed to be exempted. In another worrisome development, Building and Construction projects, which required prior ECs from 20,000 sq metres of built up area, now require ECs only from 50,000 sq metres. For projects with a built up area between 20,000 sq metres and 50,000 sq metres, local bodies (District Panchayats, Development Authorities and Municipalities) will stipulate environmental conditions, while granting building permission. While this is perhaps being done in the name of decentralisation (and facilitating quicker approvals), it should be noted that these bodies to do not possess the expertise to understand the environmental impacts of these projects, and ensure adequate mitigation measures are in place.

When the draft finally opens to the public for comments, it is hoped that these ill-advised modifications, omissions and oversights- intentional or otherwise- are addressed, and that the MoEFCC respects its mandate to create an effective law which truly and uncompromisingly serves to protect the environment.