A FRAMEWORK OF PRINCIPLES FOR ENVIRONMENTAL REGULATORY REFORM

Submission to the High Level Committee's Review of Environmental Laws

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A High Level Committee constituted by the Ministry of Environment and Forests on 29. 08. 2014 has been given the task of reviewing six environmental laws that are several decades old now. During the time they have been in implementation, numerous exercises have been attempted by successive governments to amend their clauses.[2] For example, using the powers vested in it by the Environment (Protection) Act, the Central Government has made dozens of changes to Notifications issued under the Act.[3] However, these exercises have either been piecemeal and in the nature of "tinkering with the clauses", or have resulted in sweeping changes without any theoretical or empirical basis regarding their positive environmental and social outcomes.

The review by the HLC is an opportune moment to meaningfully assess the performance of environment regulation by examining the state of the environment itself. There are several studies that have come out in the past few years that have recommended major changes in the appraisal, decision making, monitoring and enforcement aspects of India's environmental regulation.[4] However, a comprehensive framework of principles for environmental regulation that guides the much-needed environmental regulatory reform has been missing so far.

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[1] This submission has been prepared by Pratap Bhanu Mehta, Manju Menon, Shibani Ghosh, Navroz K. Dubash, Kanchi Kohli and Namita Wahi

[2] MoEF. 2011. Report of the Committee Constituted for Development of Criteria and Formulation of Guidelines for Categorisation of Compliances into the Category of Serious and not so serious. September 2011, New Delhi; Parliamentary Standing Committee on Science and Technology, Environment and Forests Review of Wild Life Amendment Bill, 2013; MoEF. 2005, Report of Committee Chaired by M.S. Swaminathan to Review Coastal Regulation Zone Notification, 1991, February 2006, New Delhi. Eight Committees reviewed and recommended amendments to the CRZ Notification prior to the Swaminathan Committee.

[3] The EIA and CRZ Notifications have been amended several times. The EIA Notification was finally revised and a new Notification was introduced in 2006 and a new CRZ notification was introduced in 2011. Since then the EIA notification has gone through further amendments.

[4] Duflo et al. (2013) *Truth Telling by Third Party Auditors and the Response of Pollutiong Firms: Experimental Evidence from India*, NBER Working Paper No 19259; Dutta, R.2014. *Cleaning up the environment mess,* The Mint, 14th January, 2014; Dutta, R.2010. *Criminal Action for Uncivil Acts*, ERC Journal, Vol V, August 2010, New Delhi; Environment Support Group. 2007. *Green Tapism: A Review of Environmental Impact Assessment*, 2006, Environment Support Group, Bengaluru; Kohli, K and M. Menon. 2009. *Calling the Bluff: Revealing the state of*

In our view, legal or regulatory reform without an informed discussion of the overarching approach to environmental governance in India will remain a limited exercise. The specific conditions in India that are salient are a) a perceived uncertainty over environmental regulation b) effective implementation on the ground, and c) a broader set of governance challenges that are central to the first two issues, such as questions of authority, institutional capacity, incentive frameworks and so on.

To begin the conversation about the larger framework for environmental governance, which needs to inform any specific legal reform, our inputs to the Committee's review process consist of a framework of guiding principles for environmental regulation that draws and builds upon the observations made in recent studies of Indian environmental governance. We offer this framework in the hope that the Committee's review process can include a discussion on the larger vision of environmental governance. The specific recommendations for the amendment of clauses, introduction or reorganization of regulatory institutions and drafting of new notifications can then be made to cohere with such a framework.

In the following framework, the left column of the table characterizes the core features of the environment legislations under review by the Committee. We have illustrated them with some examples but these are by no means an exhaustive list of problems or issues with the laws under review. The right column describes a set of features that could be the foundational principles for a new set of legislations or amendments to existing laws.

FEATURES	PRESENT SCENARIO	PROPOSED SCENARIO
Formulation of Outcomes	**Abstract preambular objectives** Our environmental laws and related notifications have preambular objectives that are broad and abstract. Some laws have multiple objectives, which	**Qualitative outcomes framework** We need outcome based environmental legislations. Environmental laws need to clearly define positive, tangible, social and environmental outcomes rather

Monitoring and Compliance of Environmental Clearance Conditions. Kalpavriksh. New Delhi; Menon, M., S. Rodriguez, A. Sridhar. 2007. *Coastal Zone Management Notification '07 – Better or bitter fare? Economic and Political Weekly.* September 22-28 (2007), Vol. XLII (38), pp 3838-3840

	may even be contradictory or difficult to implement given the need for prioritization. Since the objectives of environmental laws are abstract concepts, regulatory actions are presently assessed in terms of outputs such as number of projects granted clearance, number of areas identified as Ecologically Sensitive Areas (ESAs), area of forest land diverted for non-forest use or number or coverage of Protected Areas. The design of environmental laws is such that *quantities* of outputs stand in for *qualities* of environmental outcomes. Since environment regulatory institutions operate on vague, negative statements such 'minimizing of impacts', or 'maintain pollution load with permissible limits' they create incentives for practices like concealing or fudging data on environmental parameters. There are enough examples of such data in EIA reports on the basis of which projects have received environment clearance. The government set up a quality control process for EIA consultants but it has not been effective in dealing the problem of poor quality of EIA reports.[5]	than negative and vague goals such as decisions with 'minimum environmental impact' or pollution load that 'does not exceed permissible limits'. Legal instruments tied to clearly stated outcomes can result in focused and progressive implementation as they offer clear directions to regulatory institutions engaged in environment regulation. Outcomes are clear positive statements regarding the tangible, measurable benefits such as higher diversity and incomes from local fisheries, better health of ecosystems and human beings in any region, toxic free products, greater biodiversity in urban areas and other such results that we would like to achieve through environment regulation. All other outputs related to routine regulatory practice such as number of projects cleared should be assessed against these outcomes. In short, it is not enough to regulate, it is important to realize the benefits of regulation. Currently the objective of the Air Act, 1981 is "… to provide for the prevention, control and abatement of air pollution" The Air Act can reach for better environmental outcomes only if it is reimagined as " An Act to initiate steps to improve quality of air".

[5] Juneja, Sugandh. 2012. *Accreditation Scheme on Hold*, Down to Earth, 31st March 2012

Division of powers	Centre's authority	State's custodianship
	Indian environmental laws were enacted when centralised authority was the order of the day in Indian politics. In the last two decades, the power relationship between the Centre and states has shifted in favour of the latter. As they fashion their own developmental aspirations, state governments increasingly perceive environmental regulation as an unnecessary intrusion by the Centre and as one that harms their economic, social and political interests. This is especially in the case of laws that create 'zones of exclusion' or areas that are to be kept free of people, infrastructure and development projects[6]. As a result, state governments have had little incentive to ensure effective implementation of such regulatory actions.	Upholding the spirit of federalism, environmental laws need to recognise state governments as custodians of the environment and empower them and the local institutions under them such as the gram sabhas and municipalities, environmental and other departments and agencies at all levels, appropriately to achieve environmental and social outcomes set out in the environmental laws. The state governments would be guided in their decision making by environmental and social outcomes clearly outlined in the laws and would adopt suitable indicators for periodic assessment. The outcomes and indicators for assessment should be in public knowledge so that decision-making bodies can be held accountable by the government and the public.
	The Environment Protection Act, 1986 (EPA) is the umbrella legislation under which several important Rules and Notifications have been issued that regulate different environmental issues. The EP Act gives all the powers to the Central Government to design and issue these secondary legislations. Two of the main notifications, the Environment Impact Assessment (EIA) Notification and the Coastal	The Centre could play a pivotal role in engaging the state governments in over-all planning; setting desirable environmental and social outcomes and ambitious environmental standards; and supporting zonal/cluster based regulatory measures like cumulative impact assessments and carrying capacity studies and conducting third party monitoring.

[6] In the case of Protected Areas (PAs), Ecologically Sensitive Areas or No-go areas for mining, exclusion of people or projects is only in the law and has almost never been fully implementable. Many PAs in the country have both people and projects and ESAs and No-go areas are also contested spaces.

	Regulation Zone (CRZ) Notification are in the middle of the Centre-State power negotiations. While state governments advocate for transferring the clearance granting authority for more and more projects to themselves under the EIA Notification, they have demanded successive dilutions in the clauses of the CRZ Notification. Ecologically Sensitive Areas proposed to be notified by the Central Government under the EPA have also faced stiff opposition from state governments as in the case of the declaration of ESAs in the Western Ghats following the setting up of the WGEEP.[7]	
Institutional structure	**Insular Institutions** Environmental institution building has lagged behind our regulatory needs. Our environmental institutions were designed for a time when the actors to be regulated were fewer besides being very different in terms of production, technology and size. The present institutions are thin, centralized (at state or national level), with insufficient capacity and no clear goals to work towards. These institutions are expected to perform a variety of roles – planning, advisory, decision-making, monitoring and enforcement. Their design does not support	**Multilayered Governance** Based on the outcomes sought from environmental laws, institutional structures need to be reconfigured at all scales, local, state and national. Multi-layered governance structures will make environmental decision-making more inclusive, and potentially, more socially acceptable. It could involve graded devolution of planning, decision-making, monitoring and enforcement to district or block level government agencies, with appropriate capacity enhancement and procedural safeguards to enhance accountability.

[7] Gadgil, Madhav.2014. *Western Ghats Ecology Expert Panel: A Play in Five Acts*. Economic and Political Weekly. Vol - XLIX No. 18, 38-50, May 03, 2014

	inclusive and participatory processes, and neither are they held accountable for the consequences of their actions. State Pollution Control Boards have been granted extensive powers under the pollution control laws to regulate industries. However, they discharge their functions with minimal engagement with local and/or affected people.	The Coastal Regulation Zone Notification, 2011 has institutionalized district level coastal committees (DLCC) comprising line departments and members of coastal communities for the first time thus paving the way for communities to be the regulators of these spaces rather than the regulated. However these committees are yet to be given the powers and support to perform regulatory duties in an effective manner.
Compliance Framework	**Poor results with coercion/command** Our environmental laws are focused on deterring violators through coercive measures rather than systemically enabling and encouraging agents of change who will help realize good environmental outcomes. The lack of clear outcomes and goals leaves space for considerable governmental discretion in project selection, implementation and enforcement, leaving scope for rent-seeking and perpetuating non-compliance. There are enough examples of the environmental regulatory system encouraging habitual violators by	**Incentives for realizing outcomes** Positive goals, clear outcomes of what we want to get from environment regulation and indicators of how they can be assessed for effectiveness are useful to create a more enabling environment and incentives for all to improve environmental outcomes. Braithwaite's *pyramid of regulation*[8] is a useful tool to move from a command and control model of regulation to an incentive based compliance model. However, this will work only if the system is not burdened with past violators and if the outcomes sought from environmental regulation are ones

[8] Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, Oxford University Press (1992); John Braithwaite, Responsive Regulation and Developing Economies, 34(5) World Development 884–898 (2006).

	giving them permits for new projects and expansions on the one hand and expecting to 'talk' them into compliance on the other. Monitoring of environmental parameters is a sporadic event rather than a continuous process. Collection of data on environmental impacts and non-compliance is reactive and *ad hoc* as it is mostly done by affected communities, and the data does not have any role in influencing future regulatory decisions. While granting an approval for diversion of forest land for non-forest activities under the Forest (Conservation) Act 1980, several conditions are imposed. The process of monitoring the compliance of these conditions is entirely non-transparent. For instance, compensatory afforestation is often not undertaken in accordance with the stipulated conditions. Yet, the absence of an actor external to the Forest Department in the approval process makes it impossible to gauge compliance. This does not, however, have any effect on the process of forest clearances, which is part of the same Act.	agreed upon by the regulators, the regulated and those likely to be affected by impacts. A compliance-based model should monitor environmental parameters as a part of the production/operational process. It should involve mandatory information disclosure in comprehensible and verifiable formats, third party/public performance audits, and use of past environmental record of a company as a factor (or even an (in) eligibility criteria) for future regulatory approvals. For Eg; Rule 7 of the FCA which lays down the factors to be considered by the Forest Advisory Committee while giving its recommendations, should include the past compliance record of the user agency.
Instruments of justice	It has been very difficult to hold persons accountable for environmental violations, and to afford justice to those who are victims of environmental damage. Cases filed in regular courts take a long time to reach any conclusion, and these are then subject to lengthy	Given the hurdles in the judicial system, environment regulations should proactively provide for speedy remedy at the administrative level closest to the site of violation/impact. Environmental offenders will be deterred if there is a high certainty

	appeal procedures in higher courts. Meanwhile, unless there is a stay order on the operations of a non-compliant company, the environmental damage could continue unabated. While the National Green Tribunal provides some relief, there are legitimate access-based concerns, which prevent it from being an effective, singular grievance redressal mechanism. For example, under the pollution control laws, violations are characterized as criminal offences. With high evidentiary burden, and more complex procedural requirements in criminal cases on the one hand, and weak institutional arrangements to support prosecution on the other, environmental offenders are rarely punished. The State Pollution Control Boards can restrict power and/or water supply of a non-compliant industry –which could be a disproportionate response with other undesirable results. But the Boards cannot impose fines for restitution of environmental damage or compensation. The deterrence effect of the few cases in which exemplary penalty has been imposed by the courts is limited given the very high improbability.	that immediate and proportionate consequences will follow violations. Local institutions should be empowered to act on complaints and enable compensation, repatriation, restoration, public apologies and other remedies, as the case may need. Section 3A of the FCA says that the penalty for contravention of the Act is imprisonment for 15 days - it is extremely low (for a criminal punishment), and certainly does not allow for restitution of damages. The penalty clause could be revised to make it proportionate to the impact of the violation and clauses for restoration of the damage could be introduced. Regulation should include the public services of an environmental Ombudsman at the district level to identify environmental impacts and help in their resolution. At the same time, those wishing to pursue environmental cases should have access to legal aid services and to credible evidence collection services along with easy access to data collected by environmental departments/agencies.