



# Communities And Legal Action

TEN ESSAYS BY  
**Kanchi Kohli**  
(2014 - 2016)



## FOREWORD

India's strong environmental protection norms were meant to reduce the imbalance in negotiating positions between the promoters of industrial projects and those likely to be affected by them. Judged on that metric alone, they have largely met with failure. The effects of the violations of these norms have tended to fall disproportionately on people who suffer from several other forms of deprivation that limit their access to the tools of governance and justice. There remains a vast gap between law and practice, one that often looks insurmountable.

While much can be done to reduce the complexity of governance and make it more accessible, the lasting impact of environmental degradation requires affected communities to take immediate steps. If they wait for law and governance to match the constitutional aspirations of transparency and popular participation, they are likely to suffer irreparable damage to their lives and livelihoods. As successive governments underline the importance of rapid industrialisation, it is vital that affected communities use the tools of law to monitor compliance with environmental norms and also prevent and counter the damage caused by them.

That said, barriers to engagement with environmental governance cannot be wished away. A level of paralegal training may be needed before the tools of environmental law can be effectively used. And given the number of industrial projects coming up all over India, a cadre of people with legal and paralegal training may need to mediate with environmental governance on behalf of affected communities. More than a rigorous knowledge of the black letter of environmental law, this requires a practical understanding of how to use it. Avenues for such practical training in environmental law and governance are unfortunately limited, even for those who are pursuing a law degree full time.

At myLaw, we aim to create scalable solutions to address such gaps that law students and legal practitioners face in their learning. This series of essays by Kanchi Kohli, published on [www.myLaw.net](http://www.myLaw.net) between 2014 and 2016, distills her enormous experience of effectively moving the levers of environmental governance while working with affected communities. For those who want to work to secure environmental justice, it contains important lessons that can be used to make the best of the system of Environmental Impact Assessments, compensatory afforestation law, and the land acquisition law, to name just a few. With the release of all the essays together in this document, we are excited that many more people will be able to access and use them to bridge the gap between the law and practice of environmental law.

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# 1.

## Are my forests going to be cut? Responding to moves to divert forests for “non-forest use”

APRIL 2014



PHOTO CREDIT Rohit Varma, CC BY 2.0

Recently, I received a query from Madhya Pradesh about whether a mining company was allowed to lop off branches and demarcate trees in a forest area. Such queries are common in many parts of the country



where forest land is sought for “non-forest use” like industries, dams, roads, mines, and ports.

Confusion reigns, both among community organisers and affected people, about where the buck really stops, especially on what constitutes a “final” diversion of forest land and how the legality of some particular activity on forest land can be questioned. Legal aid practitioners (both formal and voluntary), affected people, and government agencies need to come out of this lack of clarity, illustrated in this case from Madhya Pradesh. The villagers, who had organised themselves into a *sangharsh samiti* (struggle committee) and had been resisting coal mining operations in the area, had seen the representatives of a mining conglomerate enter the Sal forests typical of this area. When asked by the villagers if they had permission to lop branches off and demarcate trees, these representatives reportedly responded that they had the approval of the Divisional Forest Officer (“**DFO**”) to enter the forest for such work. They also said that they had recently received permission from the Ministry of Environment and Forests (“**MoEF**”) to divert the forest land. The villagers should also be aware that it was only a matter of time before the company would be allowed to start mining activity.

On the other hand, local social activists had informed the protesting villagers that the MoEF’s approval was not enough for any mining company to start operations. With this information in hand, the villagers asked the *companywallahs* whether they had the permission in writing to enter the forest, and they were not able to provide any.

## Laws applicable to diversion of forest land for non-forest use

The *Indian Forest Act, 1927* (“**IFA**”), its corresponding state laws, and the *Forest Conservation Act, 1980* (“**FCA**”) apply to the issue of diversion of forest land for non-forest use. In the Indian constitutional scheme, both the Union government and the state governments can make law on the subject of forests.

Anyone who wants to use the forest, whether it is a government department, or a private agency, or an individual, needs the permission of the relevant forest department, and the DFO in particular, to divert the forest land. The DFOs need to inspect the site, prepare a report based on a series of criteria, and forward their recommendation on whether the forest should be given away for non-forest use. Based on the DFO’s

recommendation, the Principal Chief Conservator of Forests ("**PCCF**") should forward the proposal to the MoEF. This practice of taking prior approval from the MoEF by the state government was institutionalised through the FCA in 1980, when the Union government felt that the country's uncontrolled and unprecedented rates of deforestation required central regulation.

At the MoEF, for cases like this, a Forest Advisory Committee ("**FAC**") reviews the proposal and gives its recommendations. During this process of review, the FAC can call upon experts, take additional site visits, and seek any amount of additional information. In this case, the FAC had (as documented [here](#)) already reviewed the proposal thrice and had refused permission on the grounds that diversion would cause the loss of forests of a very good quality and that the coal from mining coal in the area would only last for fourteen years.

After extensive political and bureaucratic lobbying however, this company received approval in two stages — first in October 2012 and then in February 2014. In accordance with the MoEF's practice, they received the first (in-principle) approval with a wide list of conditions [including](#) the recognition of the rights of tribal and forest dwelling communities under another critical national law, ensuring land is made available for compensatory afforestation, and carrying out a whole range of studies related to the cumulative impact of the

Diversion of forest land for "non-forest use" cannot be done without the permission of the relevant state government, that is, the forest department of that state government. Since 1980 however, every state government has had to take prior permission from the Ministry of Environment, Forests and Climate Change before taking a final decision diverting forest land for non-forest use, de-reserving a forest, or allowing the felling of trees.



mines on water and other resources. The approval at the second stage came amidst even more [controversy](#).

Through this period, the affected community and local activists protested against the fact that the due procedures of law had not been followed, especially those related to forest rights under the [Scheduled Tribes and Other Traditional Forest Dwellers \(Recognition of Forest Rights\) Act, 2006](#) ("**FRA**"). Before the final diversion takes place, the process under the FRA, including taking the necessary permission from the Gram Sabha (village assembly), needs to be complete.

The villagers, now armed with the relevant legal provisions with some help from local and national activists and legal empowerment practitioners, complained to the District Collector and the Minister of Tribal Affairs. Tools such as the [Right to Information Act, 2005](#) were important for them to be able to procure *panchayat* records and verify the signature of the villagers. The company had and government had claimed that the process under FRA was complete as villagers had signed on their claims at a gram sabha meeting. Information accessed using the RTI Act revealed that many of the signatures were forged. What the company had hoped would be behind them, is now an issue that [remains unresolved](#) and open to a formal enquiry.

With the final approval from the MoEF, the coal mining company had entered the area to initiate the lopping and demarcation work. They still did not have the approval of the state government. They had applied to the State Forest Department for diversion, but without the permission required from the state government under Section 2 of the FCA and the corresponding provisions of the IFA, they cannot move ahead, especially if the forest is a "Reserved Forest". At the time of writing this article, there is no information in the public domain that the state government has given its approval. The state government is waiting for the release of compensatory afforestation land in Sagar district of Madhya Pradesh before giving its permission. At the same time, the District Collector, based on the complaints of the villagers, has set up an enquiry on the process under the FRA and has been quoted in the media saying that his enquiry will only be completed after the national elections of 2014.

Now, the villagers have also filed a complaint with the MoEF and the state forest department. In their letter, they have said that the activity carried out by the company's representatives was in contravention of the law and that action should be taken. While they are yet to receive any formal reply,

the complaint has deterred the company from carrying out any further activity.

It is only a matter of time before the land required for compensatory afforestation is found and the collector's report is finalised. The legal action might then move from the administrative and regulatory arena to the wisdom of the judiciary. All the build up till now, will then be the evidence, which is critical in any such situation to prove and illegality. In some of the future articles in these series, we will delve upon the nature of evidence in environmental law and challenges in being able to collect it and present it before a regulatory agency or judicial forum.

Many similar cases involving the issue of diversion of forest land for non-forest use may be developing across the country. Understanding the law and practice of forest diversion and recording illegalities will be critical for all concerned. Each case will be peculiar and as practitioners, we will need to delve deeper and work with the affected community to build evidence around it. Even when it comes to the environment, the law is best invoked when backed up with proof.



## 2.

# What communities can do to arrest biopiracy under the Biological Diversity Act

OCTOBER 2014



PHOTO CREDIT Raj, CC BY 2.0

"I am a traveler, just looking for a good hike up the mountains", the foreign-looking man said, and then to a bunch of local boys sitting at the village teashop, "Will one of you be able to come along? I'll pay you for your time. You would know these mountains better. I am fascinated by high-altitude mushrooms but I can't figure out which ones are edible." Two of them readily agreed.

Off they went the next morning. They would have to walk up the steep hill for half a day and perhaps camp for the night before going further. During the journey, the traveller kept pulling out strange implements from his backpack and enquiring about various mushrooms, their uses in medicine and food, and how the poisonous ones can be identified. He collected mushrooms in small bottles and labeled them with precise geographical information. He also took pictures and notes.

The two boys were beginning to get frustrated. The traveller seemed in no hurry and was completely focused on the mushrooms. At night, over some *chhang* (a fermented millet drink), they questioned him about this. "Is nothing else in our home important?" He evaded many of the questions and just said that he had been obsessed with mushrooms since he was a child. This collection, he said, was to show his wife, the mysterious lives of mushrooms. The boys were not convinced. While they did not say much immediately, they sent a message from a friend's house to the local forest department office where there was a friendly range officer. The third day, when they descended, the ranger was waiting at the teashop.

As a forest department officer, this ranger was empowered to file complaints under Section 61 of the [Biological Diversity Act, 2002](#) ("**BD Act**") read with [Notification S.O. 120\(E\) dated January 17, 2009](#) from the Ministry of Environment and Forests. He had complete authority to ask the traveller about his "collection", why he was collecting it, and whether he had necessary permissions.

Flustered, the traveller said he had permission from the Divisional Forest Officer ("**DFO**") to enter the forest for research, but not to collect mushrooms. On further enquiry, he revealed that he was not aware that a foreigner needed permission from the National Biodiversity Authority ("**NBA**") set up under the BD Act and based in Chennai, to collect mushrooms for research. Section 3(1) of the Act is clear. No non-citizen individual or company or research institution can "*obtain any biological*



*resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization."*

The traveller was jittery. If booked under the BD Act, the punishment is imprisonment up to five years or fine up to ten lakh rupees and where the damage exceeds that amount, the fine will be equal to the damage caused. He did not know what had hit him. He feigned ignorance of the law, pleaded not guilty, and finally persuaded the range officer and the two young boys to let him go. He handed over the mushrooms he had collected, deleted all the photographs, and requested that he be let off with a warning.

The range officer conceded but the young boys were not satisfied with the action taken. Feeling empowered by their partial understanding of the law, he asked the range officer some more questions.

### **What can communities do?**

"What if the traveller decides to go to the neighbouring block and collect the same mushrooms? We can't be sure he is an honest researcher and might take the mushrooms for commercial use."

The ranger took out a little booklet explaining the law. Sure the researcher can get the mushrooms from somewhere else, he said, and we should be vigilant. Before accessing any biological material, resource, or related knowledge, a foreigner needs to take the NBA's permission and an Indian

### **DID YOU KNOW**

Under the *Biological Diversity Act, 2002*, no non-citizen individual, or company, or research institution can "*obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.*" This approval from the National Biodiversity Authority (NBA) is required for research, commercial utilization, transfer of research results as well as seeking Intellectual Property Rights (IPRs). Indian citizens and entities, have to intimate State Biodiversity Boards (SBB). No approval either by the NBA or SBB can be granted without consultations with a Biodiversity Management Committee (BMC) to be set up at a village or urban ward level.

can inform the relevant state biodiversity board. But a foreigner may front an Indian person or company for circumventing the requirement of NBA permission. Unfortunately, much of the disclosure depends on what is claimed in the application form. "We are currently not fully equipped to regulate this", the ranger said, "and therefore need vigilant communities to assist the government, just like how you informed me."

"Its confusing" said the two boys, "but we want to know more. Especially because we have people coming to our village all the time wanting to collect plants, understand our medicinal practices, take away insects, and so on. As hosts, we just don't ask them questions. What could we have done if we did not know you or anyone authorised to take action? What could we have done as people living in the area without your intervention?"

### **Form a BMC and charge for access**

The range officer explained that the boys could have helped in two ways. If the community had a Biodiversity Management Committee ("**BMC**") under the law, they could have levied a fee from the researcher for access. This is after the researcher had taken permission from the NBA and the NBA mandatorily reaching out to the village BMC for a consultation. This is a necessary requirement before the permission is granted.

### **Become a "benefit claimer"**

"The only other way is if you call yourself a 'benefit claimer'". So when no permission has been sought, as in this case, the members of the community are authorised to take cognizance of the offence just like the ranger did. "You can file a case before the National Green Tribunal closest to you. Of course this is a long and tedious process" 'Benefit claimers' are conservers of biological resources and their byproducts and creators and holders of knowledge and information relating to the use of such biological resources, innovations, and practices associated with such use and application.



## Questions around functional BMCs

The BD Act became fully operational in 2004 when the [rules made under it](#) were notified. Such cases, often called “biopiracy”, are prevalent all across the country. It has been difficult for regulatory bodies to track offences, especially since communities or local self government institutions are not full empowered to check on offences and illegalities. Functional BMCs remain a distant dream, especially because many communities don’t find it particularly empowering to set up new committees. The BD Rules, don’t actually give BMCs too many powers except around creating biodiversity databases and levying access charges. At the same time the state biodiversity boards and the NBA, in spite their best efforts, have not been able to establish many strong village level institutions. The strength of every law lies both in its design and administrative implementation. With the BDA, both institutions and communities are finding the hike long and tedious.

*This article relies on the work carried out by the author along with Shalini Bhutani as part of the [Campaign for Conservation and Community Control over Biodiversity](#).*

### 3.

## “Under which law?” – A village responds when the gram sabha’s consent is sought for a mining project

FEBRUARY 2015

Late in the morning on an autumn day, a group of villagers had gathered under the shade of huge *Mahua* tree for a meeting called by Hemant, a community extension worker associated with a local NGO who had developed a great rapport with the villagers over the years. He was there to discuss the latest set of government schemes that had been declared specifically for tribal areas. Tea and biscuits arrived and he spelt out the details.

He was a bit confused. Otherwise a vibrant and spirited gathering, the villagers were pensive today. Keeping his papers aside, he asked if there was a problem. After a few murmurs, Laxmi, who was usually a quiet one, spoke up. The Sub Divisional Magistrate (“**SDM**”) had visited their village yesterday with a representative from a large mining company and other government officials from the revenue and forest departments.

“So”, asked Hemant, “what did they say, why were they here”? Restless, Laxmi got up from his seat and said, “Brother do you see that Jhirmiri hill range? Remember we have climbed it so many times to reach the origin of the Jhirmiri stream? Where we have eaten so many wild foods? The SDM said the mining company had received a contract to extract iron ore from there and that we need to call for a *gram sabha* (village assembly) to give our consent.”

## What is a *gram sabha*?

Hemant was puzzled and asked if the government officials had told them why they want the *gram sabha* to be called and if they had given any documents to explain the circumstances. Kishore promptly got on to the cycle and rode off to the *panchayat* office located about ten minutes away to get the document. While waiting for Kishore to return, Hemant began to explain what he knew from his understanding of the legal procedures.

Under the *Constitution of India*, a *gram sabha* is a “a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of a Panchayat at the village level.” He added that the tribal hamlet they were all part of was one of five hamlets that were part of the village *panchayat*, that is, the local self government.

In fact, the [Scheduled Tribes and Other Traditional Forest Dwellers \(Recognition of Forest Rights\) Act, 2006](#) (“**FRA**”) elaborates the definition of the *gram sabha*. It is “a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women.” So the full *gram sabha* of the *panchayat* is actually all the people who belong to that *panchayat*, including the hamlets, which are called by different names, like *padas* or *tolas*, in different parts of the country.

## Why was the *gram sabha* being called?

In recent years, the role of the *gram sabha* has been recognised under different laws, which have a bearing on the transfer of land for a mining operation, industry, or an infrastructure project. “It needs to be understood”, Hemant explained, “under what law the *gram sabha* is being called”. The villagers were clueless.

He knew at least three critical laws under which the consent of the *gram sabha* is prescribed. The SDM may have come to the village to satisfy any of these processes.

The first, he said, was the [Panchayat Extension to Scheduled Areas Act, 1996](#) (“**PESA Act**”). The Jhirmiri Hills are among the tribal areas that have been defined as Scheduled Areas under Clause (1) of Article 244 of the Constitution. In addition to the environment, forest, and land acquisition



related safeguards prescribed under specific laws, these areas have specific constitutional protections. Under Section 4(i) of the PESA Act, the *gram sabha* needs to be consulted “before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas.”

“But Hemant *bhai*”, remarked Kusum, “the SDM was mentioning something about a consent. He did not use the word consultation. So are you sure it would be under the PESA?” Even as Hemant was thinking about explaining the requirements under the FRA, Kishore returned with the sheet of paper, which the SDM had brought with him. A loud reading of this hand written notice revealed that the government officials and the mining company representatives had come to the village hamlet asking the residents to call for *gram sabha* to give their consent for the diversion of forest land for mining purposes.

“Ah!”, sighed Hemant, “this is how they are implementing the circular of the Ministry of Environment, Forests and Climate Change dated August 3, 2009.” He explained that the FRA is a law through which individual and community rights of people over an area of forest has been recognised. The process of diversion of the same forest land for a non-forest use such as mining however, is determined under another law, the [Forest Conservation Act, 1980](#). While the FRA is implemented under the Ministry of Tribal Affairs, the Ministry of Environment, Forests and Climate Change is the holder of the FCA and the August 3, 2009 circular.

“The SDM had come to you because your forest rights are still under process and the 2009 circular clearly states that the forest land cannot be given to this company till the process of recognition is complete and the *gram sabha* consent has been received.” “Oh Ho!”, said Kusum, she signaling to the hillock in the backdrop. “Looks like the hand written letter that they have given us is to reduce the consent process to a mere administrative tick off for Jhirmiri hills! This is totally unacceptable, Hemant Bhai”, she added.

### **So how should the village respond?**

“Yes. It is important for all of you together across the main revenue village and the five hamlets to understand the repercussions of this before you call the *gram sabha*.” He also told the villagers that the requirement for consent was also part of the [Right to Fair Compensation and Transparency](#)

*in Land Acquisition, Rehabilitation and Resettlement Act, 2013* which was recently diluted through an ordinance awaiting parliamentary approval. While this law did not mention *gram sabha*, it had required the consent of seventy to eighty per cent of the affected people in the case of acquisition of land for public-private partnership projects and private sector projects respectively. He promised that he would explain that procedure to everyone the next time he was in the village. However, he left behind the photocopies of the bare text of the law with Kusum, Laxmi, and Kishore who promised to try and read it.

All the villagers gathered there realised that the *gram sabha* was being called by the SDM to ensure that he can send a report to the MoEFCC, stating that the villagers have no objection for the mine to start, that they either stake no rights or claims on the forests or that would be agreeable to receive 'compensation' in return.

They were now clear what to say to the SDM when he returned the next day. None of them wanted to give up their thriving agricultural practice and the livelihoods dependent on the Jhirmiri Hills. Moreover, "this was

#### THE 3 LAWS UNDER WHICH THE COMMUNITY CONSENT OR CONSULTATION IS REQUIRED

1. Under the *Panchayat Extension to Scheduled Areas Act, 1996*, the gram sabha needs to be consulted "before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas."

2. The *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* recognises individual and community rights of people over an area of forest. Diversion of forest land cannot be done without the vesting of these rights and consent from the *gram sabha* (village assembly).

3. The *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013* required the consent of seventy to eighty per cent of the affected land owners in the case of acquisition of land for public-private partnership projects and private sector projects.

home”, as Kusum said. “Why would I want to just get up and leave just because someone want to dig underneath and around? Consent can’t be constructed like this!”

Hemant heard the discussion, smiled and decided to leave. The bag full of forms meant for a loan subsidy scheme did not seem to matter today. He knew he had a target to achieve, and would come back in a couple of days when the mood was different. Today, the people of Jondhia Pada of Kaskala Panchayat living around the Jhirmiri Hills had a different engagement with the state. When larger questions of constitutional powers, rights related to consent, and questions around displacement were at stake, an income generation scheme could surely wait.

# 4.

## Behind the pipeline – legal strategies to combat unknown sources of water pollution

JULY 2015



PHOTO CREDIT **Kanchi Kohli**

It was a hot summer afternoon in central India. Four of us had spent all morning taking a close look at an underground coalmine, its housing colonies, roads, transportation area, and other support infrastructure. We



stopped to chat with workers at a local teashop. Even though we were fascinated and moved by their stories, we had to move on.

We had come to this place to understand how an important river had been polluted and the impact of this pollution. For many villages, this river and its feeder streams were important sources of water for drinking and for irrigation.

Across the road from the boundary wall of the mine, visible under a muddy patch of the road where we stood, was the mouth of a metal pipe. It was discharging thick black slurry. The slurry was heading straight into a stream flowing along the road. It was difficult to ascertain the source of the slurry in the pipe. Instead of following the pipe, we decided to follow the slurry.

After walking along the stream till it was not possible to trek any further, we met a resident of the area. "This polluted stream meets our river", he said. "We are not able to use water from the river confidently any more. We are not even sure if it is fit for cattle. We have no clue what the black slurry is bringing with it."

It was true. When we drove down towards the main river, we saw that it had been contaminated. There was no way to tell whether the water was poisonous or not. But it was clear that the discharge from the pipeline had been collecting on the river bed and blocking the easy flow of the river. Other residents of the area told us that the water flow is much stronger on some days.

To me, the veracity of their apprehension was just as big a question as whether the discharge should have been allowed in the first place. Since no one really knew who was responsible for constructing the pipeline and getting away with the effluent discharge, we had to understand the possible legal options for two scenarios – one where we knew who was responsible for the effluent discharge and one where that was not the case.

Almost all industries, mines and infrastructure activities where there is possibility of water extraction or water contamination are regulated at least by two laws: the *Environment Protection Act, 1986* ("EPA") and the *Water (Prevention and Control of Pollution) Act, 1974* ("Water Act"). These industrial activities or processes would have also had to take approval

under the *Environment Impact Assessment Notification, 2006* ("EIA notification") and seek consent under the Water Act.

### **When the source of pollution is known**

If formal or informal sources indicated that the underground mine was indeed the source of the pollution, the course of action would be to immediately collect copies of the permissions granted under the EIA notification and the consent to operate letter from the relevant pollution control board.

Both the EIA-related permission ("environment clearance") and the "consent to operate" are likely to have conditions related to how the polluted water should be treated and where it should be discharged.

For instance, an environment clearance letter would say: "Mine water discharge and/or any wastewater should be properly treated to conform to the prescribed standards before reuse/discharge". If this was mentioned in the approval given to the underground mine, then the discharge of the slurry into the stream would constitute a legal violation.

Sections 25 and 26 of the Water Act would also specifically be applicable to the underground mine. The project owners would have had to seek an approval from the Pollution Control Board clearly indicating the quantum and place of discharge. In their "consent to operate" letter, it is likely that the Pollution Control Board would have mentioned that coal waste should not be released into the neighbouring stream.

Environment clearance is a one-time permission given either by the Ministry of Environment, Forests and Climate Change or a state environment impact assessment authority. On the other hand, the consent to operate needs to be renewed every year by the relevant pollution control board, in charge of checking water pollution. For industries, the validity of the approval is five years to initiate the operations. No renewals are required thereafter. It is these pollution control boards or their regional offices, which also monitor whether these conditions are being followed.

## When the source of pollution is not known

“But, there is no way we can find out the source of the pipeline. Only the discharge point is visible to us. However, we know that every 10-12 days, the discharge is much heavier than other days and the river is dark. Is there anyone we can complain to about this? , a teenaged schoolgirl, who had been overhearing our conversation, asked.

The Water Act has a clear objective of “prevention and control of water pollution and the maintaining or restoring of wholesomeness of water”. Pollution control boards (“PCBs”) set up under this law, have the responsibility for ensuring this. In fact, since 1974, these PCBs have been empowered by Section 17 (a) of the law to “to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells”

Section 24 of the Water Act relates to prohibition of the use of a stream or a well for the disposal of polluting matter, by anyone. It did not really matter therefore, if we did not know the source of pollution. The PCB or its regional office could be asked to take action. People could meet the relevant officials or, as environmental groups or people with the help of civil society organisations have often done, file a written complaint.

Not surprisingly, my explanation was dismissed by a few in the group. “Why should we take the headache of going through all this paperwork when it is the responsibility of the government”, said one of them who seemed to be visiting his village from the neighbouring town. “No one cares about our place, or river”, another remarked.

I did not have any strong reason to disagree with the second remark. It is true that many regulatory procedures related to the environment are yet to be implemented to their true potential. Close to forty years of water pollution law in India and our rivers are still being polluted.

But I responded to the former remark. There is much to be desired from our regulatory institutions and they hide behind the excuses of lack of personnel and “pressures” leading to inaction. The filing of complaints before them however, remains an option for those who are affected. By not filing any complaints, are we not accepting the inaction? Perhaps an increase in evidence-based complaints can push the institutions to respond?

The extent to which affected people are willing to take their chances is a big question.



# 5.

## Environmental Impact Assessment: The problem with public hearings

JUNE 2014



A public hearing underway for the Nalwa sponge iron plant. PHOTO CREDIT Kanchi Kohli

A stage with five chairs was set up some distance from an area where the crowd could assemble. A bamboo barricade demarcated the 'official' and 'public' spaces. Anyone from this crowd could address the five dignitaries who would preside over the events of the next few hours using a microphone set up near the barricade on the side of the public. Police functionaries surrounded this tented arrangement and a clerk was parked at an adjoining table on the official side. People could approach him through a fenced route and hand over their documents and other submissions.

Soon, men of stature filled the chairs on the stage. The member of legislative assembly ("**MLA**") of the region and the District Magistrate ("**DM**") sat next to each other. Two men, who seemed to be ones with a

Public hearings are part of the larger process of public consultation mandatory under the *Environment Impact Assessment Notification, 2006*. This is the third step in the process of seeking "environment clearance procedure" for a range of projects and activities including dams, mines, industries, and ports.

sense of purpose, joined them. One of them wore a well-creased shirt and another carried a bulky set of reports and maps. These two also looked the most stressed. Finally, there was a representative from the state pollution control board, who wore a very visible "been there, done that" expression.

After the DM opened the proceedings, the MLA took the mike. He declared that the proposed hydropower project was not just a progressive step for the economic development of the people of his constituency; it also allowed them to participate in a national drive for energy generation. He declared in no uncertain terms that he is an ally of the proponent of the project, who would be explaining their project design to all present at this public hearing.

Soon after, two trucks arrived, filled with people who walked straight to the clerk. With thumb impressions and signatures, they not only marked their presence but also recorded their approval for a large dam and powerhouse to be built around their homes, fields, and forests. This happened even before the man in the creased shirt had initiated an explanation of how much land the project would acquire, how much

forest would be cut, and whether the homes and livelihoods of people will be displaced.

But eventually, their presentation did get underway. It was followed by objections and suggestions from around fifty people. Some raised issues of displacement, others said they did receive documents in time, and many others were concerned about the cultural pollution that would be caused by an influx of labour. After about four hours, the DM called the meeting to a close, without reading out the minutes of what had transpired, something he was required to do.

This story is familiar to anyone who has attended a public hearing under the [Environment Impact Assessment Notification, 2006](#) ("**the EIA notification**"). Public hearings such as this one are a mandatory third step of the procedure for dams, mines, industries, and ports to receive environment clearance. It is part of a larger process of public consultation, which includes both written submissions and such face-to-face deliberation with the authorities, project proponents, and consultants.

## Violations of procedure

The public hearing I have described was ridden with violations of the legal procedure required by Appendix IV of the EIA notification. Community-based organisations, legal researchers, lawyers, and activists have been pointing out these concerns ever since this process was first introduced by an amendment to the 1994 EIA notification in 1997. Today, public hearings are to be conducted *"in a systematic, time bound and transparent manner ensuring widest possible public participation"* (Section 1 of Appendix IV). Barricading the public hearing space, the MLA making opening remarks in favour of the project, and the presence of police are all intimidating to say the least and clearly deter people from openly speaking their mind. There are also, as I have stated above, clear violations of the legal procedure.

The MLA sitting on the dais, for instance, violates the requirement in Section 4 of Appendix IV that the panel of the public hearing will comprise only of the DM or their representative along with someone from the Pollution Control Board. The MLA's presence therefore, is reason enough for the illegality of the public hearing.

Another problem with the events described above is that people indicated

their consent for the project even before the project authorities had presented a description of the project and a summary of the EIA report. It was as if none of the people who arrived in the trucks were even interested in understanding the impact of the project. It will not surprise those who know how public hearings are conducted across the country that they had been possibly “brought in” to record their attendance in favour of the project. The DM allowed people to sign their consent and leave without really engaging with the project proponents, consultants, or government representatives, which is what the spirit of the public hearing and the procedure laid out in Appendix IV require.

### **Opportunity to review the draft EIA report**

Among the fifty people who opposed the project, one had highlighted the problem that the project documents were not available the public hearing. The EIA notification (Section 2.2 of Appendix IV) requires that both hard and soft copies of the draft EIA report have to be available at designated locations - the offices of the DM, the Zila Parishad or the Municipal Corporation, the District Industries Office, and the regional office of the Ministry of Environment and Forests - thirty days before the public hearing takes place. A summary of the EIA has to be made available, both in English and in the local language of the place where the project is being set up.

This brings us to a fundamental flaw in the design of the public hearing process after 2006 when the EIA notification was amended. During this one-time event, people only have access to a draft EIA report. In the minds of regulators and project proponents therefore, the responses from people are to be used merely to finalise the EIA document. The only relevant comments are those that can be filtered into the final document, or are technical enough for the expert committee to take on board. Based on that they can ask project authorities for additional studies or clarifications.

### **Restricting the opposition to projects**

By restricting itself to ascertaining the “*concerns of locally affected people*” and those with a “*plausible stake in the environmental aspects of the project*” (Section III (ii) of the EIA notification), the presiding panel restricts the speaking of anyone who is not local. NGOs, scientists, and activists are

often told to make written submissions only. People have of course found creative ways to deal with this problem, with the local community backing them as representatives on technical and legal aspects. Often however, it is up to the DM whether to allow such an intervention or not.

Often, concerns that go beyond being purely “environmental”, go out of the window. When the project comes for appraisal to the MoEF, the reasons that the Minister may record for granting the approval would include the strategic, political, and energy needs of the country. The law however, lands up restricting people’s voices on these very issues.

Public hearings remain one of the most talked about spaces for law in discussions on environment and development. Despite their limitations and despite often being sham events, public hearings make the project authority visible to the community affected by the project. There have been demands that there be more than one hearing, one before the EIA is finalised, and one after. Policy researchers and activists have also demanded that the public hearings be given more teeth. Today, even complete opposition to a project at a public hearing is not decisive. That power lies, with a bunch of technical experts for their recommendation and finally with the minister himself.



# 6.

## Reacting to an environmental clearance – four essential steps

AUGUST 2014

One winter morning, news arrived that environmental clearance had been granted for a steel plant that had been contested for nine and half years. After the change of guard at the Ministry of Environment and Forests ("MoEF") ahead of the general elections, newswires had been abuzz that India's largest foreign direct investment would finally come in. Now, the grinding sounds of iron being converted to steel would soon replace thriving agricultural and fishing economies in ecologically fragile coastal Odisha.

Questions fluttered to all quarters. The movement resisting the plant had no access to the formal documents based on which the Minister had granted approvals and support groups began to put their minds to the next step.

Being up to speed on where and how fast files move within a regulatory agency is a test that community groups and interested individuals face all the time. Public disclosure is subject to the technical acumen of website managers, regular tracking through Right to Information applications, or simply through tip-offs from informal sources. But for all the actors who feel the impact of the grant of an environment clearance or who seek to legally challenge it in courts, the clock starts ticking once the approval has been granted.

What does this permission really mean? Environment clearance is the approval that a wide range of industries, mines, dams, or infrastructure projects receive after a process listed out under the [Environment Impact Assessment Notification, 2006](#) ("EIA notification") is completed. The MoEF is the granting authority for a set of Category A projects and for Category B projects, it is the State Environment Impact Assessment Authorities

("SEIAAs"). No construction activity can be initiated unless an environment clearance letter has been procured.

More often than not, social movements and civil society groups who have either been objecting to the grant of this permission or would like to do so at the time of the clearance, have to put together a lot of paperwork and information, if they are to stand any chance in a court of law. First of all, they have to access the clearance letter itself. Case law now requires that the environmental clearance is not just made available to the relevant *panchayat* and relevant information published in two newspapers, project authorities [now need to publish the full clearance letter in newspapers](#).

Once there is access to the letter, it needs to be backed up with hard evidence and analysis to help prepare the legal grounds of challenge. Who faltered and how? Why would anyone be aggrieved? Did the regulatory agencies play the part they were mandated to? Across the country, there are a range of experiences of how people go about gathering the necessary evidence or file in the required documents. The process starts from the time they lay their hands on the Environment Impact Assessment document to finding out what transpired at public hearings and how expert bodies reviewed baseline data presented in EIAs and independent critiques of EIA documents. The journey of many project clearances in the country is often a closely observed narrative. Unfortunately, they do not always stand up to robust judicial scrutiny.

Challenging an environmental clearance in a court or a tribunal requires covering a few basic grounds. The peculiarities of any specific case aside, the following are essential to understand whether 'there is a case' for aggrieved persons to challenge an environmental clearance.

#### WHAT IS AN ENVIRONMENTAL CLEARANCE?

Environment clearance is the approval that a wide range of industries, mines, dams, or infrastructure projects receive after a process listed out under the *Environment Impact Assessment Notification, 2006* is completed. This requires a project proponent to prepare an "EIA report", explain the project parameters and impacts at a public hearing, and go to an expert appraisal process before a project can be approved or rejected.

#### WHO GRANTS ENVIRONMENTAL CLEARANCE?

For Category A projects: The Ministry of Environment, Forests and Climate Change

For Category B projects: State Environment Impact Assessment Authorities

## Chronology of facts

The first is the bare chronology of facts from the time the project authority submits the application form (Form 1 or Form 1 A) under the EIA notification. Trace the trajectory of the environment clearance paperwork and events. When were the Terms of Reference ("**ToR**") for the EIA report approved and granted by MoEF or SEIAA? Did it match the draft ToR provided by the project proponent or was a model ToR used? When was the public hearing held? Finally, how did the file move within the regulatory agency, especially with the Expert Appraisal Committees ("**EACs**") reviewing the project?

One critical component of this chronology is the file notings and notesheets of the MoEF or the SEIAA indicating the process of decision-making.

Sometimes, the remarks made by a minister or a higher-level official approving or rejecting the project at any given stage can prove to be an important piece of evidence. Increasingly with inter-ministerial differences, officials and ministers have recorded their dissenting notes, to approve or reject a project's environmental clearance.

## Clear set of critiques of three documents

It is also important to prepare a clear set of critiques and analysis of three crucial documents that need to be reviewed, by themselves and in comparison to each other. They are (a) the application form (Form I and IA), (b) the ToR for the EIA, and (c) the EIA itself. For instance, is the baseline data in the application form correct and do the ToR do justice to the scope of the project? Does the EIA conform to both the application form and the ToR at the very least? A full critique of the EIA itself has stood many legal challenges in good stead. For instance, whether the EIA is a copy-paste of another and whether it hides or suppresses facts is an important basis to argue about the lack of rigour in the impact assessment.

### DID YOU KNOW

Pollution Control Boards set up under the *Water (Prevention and Control of Pollution) Act, 1974* are responsible for the "*prevention and control of water pollution and the maintaining or restoring of wholesomeness of water*". There are several empowering clauses of the Water Act by which PCBs can proactively take measures to control pollution/contamination as well as respond to complaints.

## Scrutiny of public hearings

Public hearings and other related submissions also require complete scrutiny. This third phase of an environment clearance, where the law requires a free, fair, and transparent process, usually [leaves much to be desired](#). The EIA notification mandates that a public hearing of the project be carried out in such a way that it ensures maximum amount of participation. To start with, some key questions that can be asked include whether or not the minutes of the public hearing reflect the actual objections that arose during the public hearing. For this, the law mandates a proper video recording of the public hearing. In many important decisions, the judicial body has asked for [fresh public hearings](#) if procedural lacunae are proved.

In an ideal scenario, it would be critical to record any objection to faulty minutes or process around the time the public hearing is held and bring it to the notice of the regulatory authority and any expert committee. It may not guarantee immediate redressal, but it would push the Expert Appraisal Committee ("**EAC**") to acknowledge these issues and ask the project authority to respond to them.

## Track EAC proceedings

The fourth set of proceedings to track is what transpired in the meetings of the Expert Appraisal Committees ("**EAC**"), both at the Union and the state when they appraised the application, the ToR, the EIA, the public hearing objections, and any other written submissions. At present there are nine thematic EACs for Category A projects and each SEIAA constitutes a separate State Level EAC ("**SEAC**") that appraises all documents, ascertains their impact, and takes a decision on whether or not to approve a project. If a project is approved, the EAC recommendations contain a list of conditions that the project authorities have to comply with during construction or operation of the project. There is clear [case law emerging from the Southern Zone bench of the National Green Tribunal](#) that EACs need to respond to all objections raised at the public hearing and record reasons for agreeing or disagreeing with them. How the EAC conducted itself and what they based their decision on, are important pieces of evidence in questioning the application of mind of this expert body, when a matter lands up in litigation.

When the courts or the NGT resume work each morning, many of the words referred to here, including 'appraisal', 'public', 'impact', and 'scrutiny', will be stated and redefined by judicial interpretations. These interpretations will establish an entirely new jurisprudence around EIAs and the notification that guides it. The fate of the farmers of small plots of *paan kheti* (beetle vine farming), which the Union Minister for Environment and Forests sought to seal on a winter morning, now hangs in the balance before the Delhi bench of the NGT.



# 7.

## What do recent changes to the environmental clearance process mean for us?

DECEMBER 2014

While many statutes are brought into existence through legislative processes, some, such as notifications, come about through executive action that does not require legislative approval. Notifications are designed to be issued and later modified and clarified through executive action alone, with public input or without. One significant notification lays out the procedure for what is popularly known as “environment clearance”. This is the [Environment Impact Assessment Notification, 2006](#) (“**the EIA notification**”), which has for long been in the eye of storm in the discussions around “balancing” environment and development.

Soon after the new government took office in May 2014, it announced a series of changes to the environment and forest regulations, some of which had already been rolled out during the previous regime. Since June 2014, there have been a quick series of draft amendments, internal ministerial notes, circulars, and office memoranda bringing in important changes to the EIA notification.

### Legal basis of the EIA notification

The government of India first issued this notification in 1994, exercising its power under Sections 3(1) and 3(2)(v) of [The Environment \(Protection\) Act, 1986](#) (“**EPA**”). The latter provision gives powers to the central government to place “*restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.*”

## THE 4 STAGES UNDER THE EIA NOTIFICATION

### 1. Screening

The applications are categorised into Categories A (central level) and B (state level). Category B projects can be further split into B1 (need EIA) and B2 (do not need EIA)

### 2. Scoping

The Terms of Reference for the EIA are finalised. The draft EIA report is prepared.

### 3. Public consultation

Includes public hearing and the seeking of written reports

### 4. Appraisal

Thematic Expert Committees review applications

Previously in this series of posts on [Communities and Legal Action](#), I have dealt with [public hearings](#) and the [steps that an affected community can take once an approval is granted for a project](#). Now, let us take a close look at the changes that have been made to the EIA notification and those that have been proposed. These will have a bearing on the applicability of this important piece of the regulatory structure.

They include the delegation of powers to state governments to make decisions, the creation of exceptions for project approvals, procedural relaxations, and adding new projects to the list of projects that require approval. All the circulars and changes described in this post are available [here](#).

### Projects that requiring environmental clearance – additions and clarifications

Some projects, such as coal tar projects, will now need to go through an “environment clearance” process, from which they had previously been exempt. Irrigation projects with a command area between 2000 and 10000 hectares will now need approval from the State Environment Impact Assessment Agency (“**SEIAA**”) and all irrigation projects above 10000 hectares will require approval from the Ministry of Environment, Forests, and Climate Change (“**MoEFCC**”), that is under Category A. Clearly, this means that all irrigation projects of capacity up to 2000 hectares of culturable command area are now exempt from an environmental clearance process, including any public consultation. River valley projects between 25 and 50 MW and with a command area between 2000 and 10000 hectares will now be appraised by the MoEFCC if the project falls in

more than two states. It would have otherwise been the SEIAA's responsibility.

## **Exemptions from any environmental clearance process or public consultation**

A significant area of focus of the changes has been to exempt some types of projects from any environmental clearance and this has implications on sectors such as irrigation projects and coal mining projects. Coal mining projects that require a one-time capacity expansion with the production capacity exceeding 16 MTPA have for example been exempted from any public consultation (Office Memorandum dated July 28, 2014). After clarification (Office Memorandum dated September 2, 2014) was issued, this exemption will now apply to coal mining projects with production capacity exceeding 20 MTPA, provided the ceiling of the expansion is towards mining for an additional production up to 6 MTPA and if the transportation of coal proposed is by means of a conveyor or rails. However in both these instances, the Expert Appraisal Committee has to apply "due diligence" and it needs to be subject to "satisfactory compliance with environmental clearance(s) issued in the past as judged by the EAC."

## **Restricting powers for appraisal at scoping stage**

An Office Memorandum dated October 7, 2014 restricting the powers of appraisal at the scoping stage is also crucial. It indicates that the Expert Appraisal Committees ("**EACs**") while reviewing the applications for environment clearance should only ask comprehensive sets of questions and studies at the time of issuing Terms of Reference for an EIA report to the project authority. The EACs review all documents related to the project including impact assessment submissions, videos recorded during the public consultation phase, and project reports and have to either recommend or reject approvals. They can ask project authorities to clarify issues, respond to queries raised at the public hearings, as well as carry out additional assessments.

With this clarification however, additional studies, especially "fresh issues", need to be added at the appraisal stage only if the EAC can clearly justify that these are inevitable and why they need to be added at a later stage. These have to be stated unambiguously in the minutes. The purpose of

this to address the complaints of project authorities that too many questions at the appraisal stage are causing delays. The very purpose of public scrutiny however, is to seek essential feedback to and address impact issues. Curtailing the powers of appraisal committees goes completely against the spirit of appraisal, which requires the EACs to do a “detailed scrutiny”.

## **Delegation to State Environment Impact Assessment Authority**

More projects have come within the jurisdiction of the SEIAA, that is, approvals at the state level. These include all biomass-based thermal power projects and synthetic organic chemicals industries if located outside a notified industrial area or estate, with specific caveats.

The most important manner, in which this delegation has happened however, is by limiting the applicability of the General Condition of the EIA notification. With this change, only those Category B projects (to be approved at state level ordinarily) located within five kilometres of a national park, sanctuary, critically polluted area, ecologically sensitive area or an inter-state boundary would need to be approved by MoEFCC. Prior to the amendment, this was 10 kilometres. So now, if a thermal power plant is coming up within 8 kilometres of a national park, it will only need to be appraised at the state level.

## **Other changes proposed to the EIA notification – linear projects, non-irrigation projects, and building and construction**

Many more changes are proposed to the EIA notification but in these cases, public opinion has been sought on whether such amendments should be introduced. On September 30, 2014, a draft notification was issued proposing some critical changes, including doing away with public consultations for “all linear projects such as Highways, pipelines, etc., in border States.” It is not clear whether this includes inter-state borders.

The draft notification also proposed the addition of non-irrigation projects such as drinking water supply projects to the purview of the EIA notification. These projects do not require environment clearance at this point of time. Projects less than 5000 hectares of submergence area have been proposed as Category B projects. Projects equal to and greater than

5000 hectares submergence area would need to be considered as Category A under the July 25, 2014 notification.

Under a September 11, 2014 draft notification, building and construction projects which cover an area greater than or equal to 20000 square metres and having a built-up area greater than 1, 50,000 square metres of built-up area need approval from the SEIAA. The same goes for townships and area development projects covering an area greater than or equal to 50 hectares and or having a built-up area of greater than or equal to 1,50,000 square metres. No other building or township projects need to get environment clearance.

### **Catching up with the notification**

The EIA notification now has to be read in line with all the clarifications and amendments, which are routinely put forward MoEFCC. It is far from easy to read the notification along with all the “ifs” and “buts” which play up when it needs to be ascertained whether an act is legal under the notification. Unraveling all of it can leave many people gasping. For affected communities, this legalese still remains distant, even as they engage with this process, counting on the hooks within the law and the support groups standing besides them and pointing their attention to it.



# 8.

## A railway line through a forest belt – environmental impact assessments and forest rights

NOVEMBER 2015

Sarita *tai* was worried about the construction of a railway line between the iron ore mine and the railhead located 30 kilometres from the village she worked at. At least 15 kilometres of this railway line would cut through an important part of the central forest belt. She called me with many questions: What was the process for taking permissions for using forestland for railway lines? Had this process been completed? What was the role of the *gram sabha*? What if the forest rights of people had not been fully recognised yet?

Some of these answers came easy but the others required the study of some recent circulars and directions of the environment ministry, the tribal affairs ministry, and the National Green Tribunal (“**NGT**”).

### EIAs for railway lines

Surprising as it may seem, the railway line and its related infrastructure are not in the list of projects that need to go through the procedure laid out in the [EIA Notification, 2006](#) issued under the [Environment Protection Act, 1986](#). We have long tried to find the logic behind it, but without success. Railway projects simply do not require an environment impact assessment and a public consultation for an environmental clearance. If the railway line is separated from the other components of the project like it was in the case of the mine that Sarita *tai* was worried about, it could easily avoid the environment impact assessment process. The mine had been up and running for the last year and the proposal for the railway line was only mooted much after the environment clearance was procured for the mine.

## Forest diversion and the felling of trees

All non-forest use requires the user agency to seek prior approval under the [Forest Conservation Act, 1980](#). There is a detailed procedure under Section 2, which remains away from public eye and only within negotiations between forest department officials; the Ministry of Environment, Forests and Climate Change (“**MoEFCC**”); and the user agency.

Until recently, no activity related to a project could be carried out for any non-forest use until the entire procedure, which includes a two-stage approval by the MoEFCC and an order by the government of the state where the forest is located, was completed. [Felling trees would be illegal](#) without it.

But during the last year, [the MoEFCC has allowed](#) the felling of trees to be carried out after a project receives “Stage 1 approval”, that is, the approval of the MoEFCC. This approval often contains conditions including additional studies related to hydrology, impact on wildlife, identification of compensatory afforestation land and others that have a bearing on whether the forest diversion should be approved or not. But in the case of linear projects such as railways, highways or transmission lines, the MoEFCC has attempted to create a “simplified procedure.”

In a set of [guidelines](#) issued on May 7, 2015 and subsequently updated on August 28, 2015, the ministry said that to allow for the speedy execution of these projects, the in-principle approval will be enough to allow for both tree cutting and commencement of work if all “compensatory levies” and a wildlife conservation plan are ready.

Sarita *tai* was livid. The last time she had seen an in-principle approval, it listed 27 important conditions including that of redoing some important assessments. What is the point going through the remaining procedure for this project if the work can commence and trees can be cut, she asked. It defeats the entire purpose of any safeguards or conditions levied.

### DID YOU KNOW

Pollution Control Boards set up under the *Water (Prevention and Control of Pollution) Act, 1974* are responsible for the “*prevention and control of water pollution and the maintaining or restoring of wholesomeness of water*”. There are several empowering clauses of the Water Act by which PCBs can proactively take measures to control pollution / contamination as well as respond to complaints.

I agreed and told her that these guidelines had been challenged before the NGT. In January 2015, the [NGT](#) first restrained the felling of trees after Stage 1 approval, but subsequently reviewed the order in the light of an affidavit submitted by the MoEFCC. In its direction, the NGT concluded that the while tree felling and commencement of work might be allowed for linear projects it would be treated as an order under Section 2 of the FCA and therefore can be challenged before the NGT. This is important to understand because the NGT had [previously ordered](#) that only those orders issued finally by state governments activating forest diversions could be brought before it. Till then no commencement of work or tree felling could be allowed.

The MoEF's May 7 and August 28, 2015 [guidelines](#) lay down that while the "simplified" procedure for the speedy execution of linear projects remains in place an "aggrieved person" now has the option to approach the NGT with an appeal against this order.

## Forest rights and linear projects

I knew that Sarita *tai* would also ask about the recognition of the rights of forest dwelling communities who have historically either lived or used the forest that is sought to be diverted. The [Scheduled Tribes And Other Traditional Forest Dwellers \(Recognition Of Forest Rights\) Act, 2006](#) mandates the recognition of individual and community forest rights of tribal and other forest dwelling communities.

On August 3, 2009, the MoEFCC issued an important circular, which, among other things, clarified that no diversion of forest land for non-forest use would take effect unless the process of recognition of rights had been completed. It also said that the consent of the *gram sabhas* would be required before the diversion process can be given effect. This has also been re-iterated and confirmed by the Ministry of Tribal Affairs ("**MoTA**"), which oversees the implementation of the FRA.

In the villages that Savita *tai* was working in, several of the community forest rights claims were still pending final approval and the grant of individual rights had been contentious as people had only received rights over a part of the forest land that had been claimed. In their view, their rights over the forests were yet to be recognised. So the first question that came to our mind was whether the forest diversion and tree cutting could have come into affect if the recognition of rights was pending. The *gram*

*sabha* (village assembly) had confirmed that their consent had not been sought.

This issue had been [a bone of contention](#) between the MoTA and the MoEFCC since 2013. While the MoEFCC had claimed through their February 5, 2013 circular that the requirement of the *gram sabha* consent could be dispensed for linear projects, the MoTA, the nodal ministry, said that the MoEFCC had no authority to make such an interpretation. All projects, linear or non-linear, had to be treated equally regarding forest diversions and consent provisions.

These different interpretations continue to operate and the MoEFCC has been approving proposals for forest diversion and allowing for tree felling for linear projects, interpreting that a *gram sabha* nod was not required, especially in cases where there has been an assurance from the state government that either the rights under FRA have been recognised or are in the process of being so.

### A worrying scenario

Thus, with no requirement of EIAs once a railway line is segregated from other aspects of a project; tree felling permitted after in-principle approvals; and tentative interpretations for *gram sabha* consent; the situation did not seem very encouraging to Sarita *tai* and the affected people that she was working with. They could however, still petition the concerned ministries. No doubt, the fate of the project and the forest dependent people could still lie in bureaucratic interpretations and the application of mind by expert committees.

With no court action on the anvil immediately and the affected communities clearly aligned to question both the FCA guidelines and the dilution of the consent provisions; its anyone's guess whether the railway line will be built or not. But it once again raises questions about why any project, which has a far-reaching impact on forests, wildlife, and people, should be granted exemptions from basic environmental scrutiny and stringent safeguards. Meanwhile, people like Sarita *tai* have to grapple with many interpretations of the law on a case-by-case basis.



9.

## A company came to buy land for compensatory afforestation – Here's how one woman learnt to respond

APRIL 2015



PHOTO CREDIT Kanchi Kohli



*"I know the Divisional Forest Officer of my area well. I will speak to him and get back to you", Kavita said to the company representative. "I cannot understand why have you come 200 kilometers away from where you are building a dam to tell me that you want to buy land to plant trees in my village. If you are cutting trees for the construction in one area should you not be planting them right there?"*

Kavita had recently been elected the Sarpanch of the Village Panchayat (elected representative of the village local self government). The man she was addressing represented a contracting company building a 2000 MW hydropower project. He tried to explain, *"You see, the problem is that we have got the first level permission to start constructing our dam, but we can't do much till we fulfill this painful condition of compensatory afforestation. The local forest and revenue offices tell us that they can't give us land in the same place, so we are having to move around all over the place looking for land."* "So", Kavita responded, *"you want the land that people of this village own to compensate for the lakhs of trees you are cutting or the acres of land you are using. The 50 hectares you want is not going to be enough for this."* He was also speaking to some other villages to negotiate similar deals. But Kavita was not fully convinced and she did not want to engage with the man till she had more information. She sought some more time and told him that she would respond to him only after she had fully understood what it meant and all that it implied.

The next morning, Kavita decided to visit the Divisional Forest Officer ("**DFO**") of her area. She had not sought a prior appointment and had taken the risk of not finding him at his seat. Unfortunately, she caught him just as he was leaving for a surprise inspection to a forest nearby. Since he was in a rush, he asked her to come back in the evening.

When he returned, he found Kavita waiting for him right where he had left her. She had spent the day talking to forest rangers over cups of tea and trying to understand the reasons why other citizens were visiting the forest department's office. Some were there for seeking compensation damages to crops caused by wildlife, others were trying to get offences written off, and some others had come to enquire about new proposals for forest diversion in the area.

But Kavita's mind kept drifting. Why did the company want to buy land in her village to plant trees to compensate for damage or loss that was taking place really far away from where she lived? After hearing her

questions, the DFO smiled and assured her that he might have most of the answers about what this meant, legally and administratively.

## **Diversion under the Forest Conservation Act**

He first explained to her that since 1980, every state government has had to take prior permission from the Ministry of Environment, Forests and Climate Change ("**MoEFCC**") before diverting forest land for non-forest use, de-reserve a forest, or allow for the felling of trees. This happened with the promulgation of the Forest Conservation Act. *"For the sake of our conversation", he said, "lets call all these instances as diversions of forest land."*

Now, when a DFO like him, who is also called the Deputy Conservator of Forests in some places, prepares a proposal for the diversion of forest land on behalf of a user agency, it is also his job to add the details of the compensatory afforestation scheme. This has to be done in accordance with the format provided in Part II of the *Forest Conservation Rules, 2003*. He decided to start by explaining how compensatory afforestation really worked.

## **Compensating for the change of land use**

Each time forest land is diverted, the change of land use has to be compensated for. The requirement for compensatory afforestation is considered one of the most important conditions stipulated when forests are 'diverted' for non-forest use, or when the felling of trees needs to be done, or when forests are to be de-reserved. It is part of almost every Stage I approval granted by the MoEFCC, be it for a dam, mine, industry, road, railway line, or even a rubber plantation. Only when compensatory afforestation and other conditions are complied with is Stage II approval is granted by the ministry. In most cases compliance means identification of the land in preparation for the afforestation scheme. Only after all this is done can an order issued by the state government granting the permission for diversion, dereservation, or felling of trees, under Section 2 of the *Forest Conservation Act, 1980*, come into effect.

The current legal regime requires compensatory afforestation to be carried out over an equivalent area of non-forest land. For example, for 200 hectares 'lost' to a non-forest purpose, another 200 hectares of non-

forest land has to be afforested. If non-forest land is not available, compensatory afforestation needs to be carried out on double the amount of degraded forest land, which is being used for a non-forest purpose. *"There are some exceptions which are part of the Compensatory Afforestation Guidelines. But this thumb rule is what you should remember",* said the DFO.

Usually, the DFO alerted Kavita, an effort is made to identify land which is contiguous to or in the proximity of an existing reserved forest or protected forest. This is to enable the Forest Department officials to effectively manage the "newly planted area". Looking for a distant site for afforestation outside the district or state should be done only if land in that particular state or district is not available. There are [clear guidelines issued by the MoEFCC](#) in relation to this requirement and user agencies and forest departments need to follow them.

*"Perhaps the neighbouring district does not have non forest land or degraded forest land to give for compensatory afforestation. It appears like the user agency, which is a dam construction company in this case, is looking to get this condition ticked off so that they can move the government offices for the next steps of the approval. They might want to buy your land and hand it over for compensatory afforestation",* he explained. Perhaps all the degraded forest land has already been earmarked for compensatory afforestation related to other instances of non-forest use, so even that is not available.

He looked at the Range Forest Officer ("**RFO**") working under him. Was buying land and then handing it over to the government for compensatory afforestation becoming a trend with new industries and builders, he wondered aloud. The RFO returned a thoughtful glance. He had heard about some enquiries from villagers who farmed and used forest land for specific produce but he was not sure.

#### DID YOU KNOW

The requirement for compensatory afforestation is part of almost every Stage I approval granted by the MoEFCC, be it for a dam, mine, industry, road, railway line, or even a rubber plantation. Only when compensatory afforestation and other conditions are complied with is Stage II approval granted by the ministry. This at the very least includes identification of "CA land" and transfer of money required for compensatory afforestation to a concerned institution, which in most cases is the forest department.

## Poor quality of afforestation

The conversation turned to a larger question as the DFO asked for some *chai*. What might appear to be a simple administrative practice, the DFO told Kavita, had become one of the important policy issues of our time. While we have approved diversions, the practice of compensatory afforestation has hugely suffered. Land is often unavailable and where it is available, the quality of the afforestation has been dismal. At the same time several user agencies had not paid up all that they had to, for carrying out the compensatory afforestation. He told her not to quote him on what he was saying and Kavita agreed.

He asked the RFO to bring out the report of the Comptroller and Auditor General ("**CAG**") on compensatory afforestation. Since 1998, several audited reports had pointed to the lacunae in the utilisation of the funds for carrying out compensatory afforestation. The latest, [a report from 2013](#), brought out fresh figures.

Kavita was baffled. "*Why has no one taken this to court?*", she asked. Well there had been some discussion in court, the RFO said. The Supreme Court's resolution of the issue, informed by the recommendations of its Central Empowered Committee, was to direct the setting up of a [Compensatory Afforestation Fund Management and Planning Authority \("\*\*CAMPA\*\*"\)](#) in 2002. It was finally notified in 2004 but actually began to function only in 2009 and that too as an *ad hoc* authority.

Following this, state governments now submit plans to the CAMPA and get the money released for compensatory afforestation as well as other conservation activities related to the payment of an amount of money, that is called the NPV. He was deliberately not telling her more about NPV, he said, as it would confuse her. There was news that not all the money for compensatory afforestation and NPV had been paid up and there remained huge problems with the quality of the plantations and that there had also been mis-utilisation of funds. In September 2014, he said, the Union Minister for Environment, Forests, and Climate Change even said that his ministry was keen on releasing the Rs. 33,000 crore accumulated in the CAMPA to state governments.

While all this seemed like too much information, Kavita understood one thing - even if she and other villagers decide to sell their her land with the good intention of recreating a forest, such a forest might never set the

light of day. Maybe she was better off doing her own farming and ensuring that some part of her land adjoining forests remained uncultivated so that there could be some natural regeneration there.

Leaving the forest department's office, she was ready to face the representative of the dam building company. *"Go looking for land elsewhere, sir"*, she smiled and thought to herself, *"ours is not available to fulfill your administrative formality."*

# 10.

## **My land is lying unused. Can I have it back? How to initiate repatriation under the 2013 land acquisition law**



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Even as presentations were underway at a meeting on land rights somewhere in the capital, a lady seated next to me craved some specifics. *“What is the latest with the land acquisition process in the country? Someone told me that I could actually get my land back? It had been taken away a*



*decade ago.*" Pushpa behan was among several people who had come for the meeting from the eastern part of the country and had lost her land to the expansion of a government-owned iron ore mine.

I pulled out the latest version of the [Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013](#) ("**The RFCLARR Act**"). I knew that some of its clauses would apply to the question that she had raised.

We were temporarily distracted by a voice from the dais that informed the audience that the RFCLARR Act had replaced an 1894 land acquisition law under which the government had the power to acquire land for public purposes. A notice and a short time frame to move out of your home is all that people had. The RFCLARR Act had faced criticism but it had come a long way from the 1894 law and had linked the process of land acquisition with corresponding resettlement and rehabilitation obligations.

#### DID YOU KNOW

If (1) an award had been made in relation to the land that had been acquired, (2) but no compensation has been paid, and (3) physical possession of the land has not taken place for over eight years; then under Section 24(2) of the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*, the proceedings of land acquisition undertaken so far would be deemed as lapsed and a fresh process would now need to be initiated under the 2013 law.

During a short tea break, we decided to step out to the canteen to talk at length. Our discussion soon revealed that about 20 families had lost about 100 hectares of agricultural land when the state government had issued them notices for evacuation. While their homes remained with them, the loss of their land had an impact on their source of livelihood. While she did not have many details, she also knew of others who had faced similar issues in neighbouring areas.

When we sat down to look at the Hindi version of the law together, I read out the two relevant clauses. Since the legalese was difficult to fathom, we broke it down. Just as we were talking, a few others from her village joined us. It was turning out to be an impromptu study session.

Section 101 is clear and simple. It says that "*when any land acquired under this Act remains unutilised for a period of five years from the date of taking over the possession, the same shall be returned to the original owner or*

*owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government.*" This however, applies only to land acquired under the 2013 law. That was not the case with Pushpa *behan's* land. I asked Pushpa and the others if they had received any "award" or been paid compensation following the notice that their land was being acquired. Under the 1894 law, an award had to be issued by a District Collector or District Magistrate (depending on the state). Such an award would include details such as the true area of the land, the amount of compensation due, and the list of people among whom the compensation would be apportioned. Three scenarios could have emerged:

- (1) no award was issued;
- (2) an award was issued; and
- (3) an award was issued but the physical possession of land was not taken and no compensation was paid.

### Is repatriation possible?

Clauses (1) and (2) of Section 24 of the RFCLARR Act deal with these three scenarios. When no actual award was issued pursuant to a land acquisition notice under the 1894 law, then all the provisions related to compensation in the 2013 law would apply under Section 24(1)(a). The compensation available under the 2013 law is much higher and has to be determined using a range of criteria including market value of the land and damages incurred by standing crops or trees.

But this was not the case with Pushpa *behan* and the others from her village. They fell into the third category. Even though an award had been made in relation to the land that had been acquired, no compensation had been paid and physical possession of the land had not taken place for over eight years. Under Section 24(2), in such a situation, the proceedings of land acquisition undertaken so far would be deemed as lapsed and a fresh process would now need to be initiated under the 2013 law. This includes a detailed process of social impact assessment and the seeking of the consent of 70 per cent of the landholders in case the project is a public sector project or 80 per cent if there is private sector involvement.

*"Does this mean that we have a chance to say no to this acquisition and possibly get back our land?"* one person in the group enquired. In principle, yes, I said, but we still had to test it out. The 1894 law had no provision for social impact assessment or any provision about seeking consent and that

is why many project authorities feel that the 2013 law would make it [impossible](#) for land to be [acquired](#).

He asked, *"if the compensation had been paid and physical possession taken in the last 5 years, then this possibility would not arise, right?"* That's what the law says as of now, I replied.

## What next?

Several groups across the country have taken steps with the help of lawyers to get better compensation or to restart land acquisition processes under the 2013 law. In fact there is [recent news](#) that Reliance Industries has challenged this legal provision in the Gujarat High Court in response to a case filed by farmers.

But the 2013 law does not say that these processes need to be initiated through the courts alone. It is perhaps even possible to do so by approaching the departments that had first initiated land acquisition proceedings and where the records lie.

It would have been useful to have a set of executive rules to enable these provisions but the two and half years of the existence of this law has seen such resistance from the government that little attention has been paid to issue enabling rules. The clauses we had discussed were at the heart of a series of ordinances promulgated to amend the 2013 law and which were [allowed to lapse](#) last year.

For now, we know that these provisions are in place and are open for all to use. Pushpa smiled, took the copy of the Hindi text of the law from me and said, *"Well, we have the clause in our favour for now and we have to try and use it. Get our paperwork in order and get going."* The half and hour we spent discussing what was and what could be had opened many doors.

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