

UPDATE COLLECTIVE

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Mining Laws vs. Public Hearing

Mining: Undermining peoples participation

In August 2001, it was the fifth time that the Environment Impact Assessment (EIA) Notification 1994, was amended, waiving the need for public hearings as a part of the environmental clearance procedure for a certain section of projects. As per the new notification, "Public Hearing is not required in respect of (i) small scale industrial undertakings located in (a) notified / designated industrial areas / industrial estates or (b) areas earmarked for industries under the jurisdiction of industrial development authorities: (ii) widening and strengthening of highways: (iii) mining projects (major minerals) with lease area up to 25 hectares, (iv) units located in Export Processing Zones, Special Economic Zones and (v) modernisation of existing irrigation projects." Neeraj Vagholikar argues here on this issue.

While certain development projects in India have required environmental impact assessment and clearance since the late 1970s under the directives of the Central Government, the first comprehensive legislation for environmental impact assessment and clearance for a listed

category of projects was the EIA notification, 1994, under the Environment (Protection) Act (EPA), 1986. This not only applies to new projects, but also to the expansion and modernisation of certain categories of existing projects.

The process entails the submission of an application form with a certain set of documents, including the Environment Impact Assessment report, to the Impact Assessment Agency (IAA) by the project proponent. The IAA is the Ministry of Environment and Forests (MOEF), which may consult a committee of experts to evaluate the proposal for environmental clearance.

The process of Environmental Public Hearing as a part of the EIA notification was earlier optional but was made mandatory in 1997 and since then it has served as a crucial legal platform for environmental and social groups and local residents to voice their concerns about a project. Besides actually raising environmental concerns about the projects, this process has enabled to bring to light the shoddy quality of environmental impact assessment being done by many of the consultants hired by project proponents. This includes inadequate information, very often inaccurate information and sometimes even plagiarized EIAs! For instance 'renowned' consultants Ernst and Young while conducting the environmental impact assessment for the Dandeli Minihydel Project in Karnataka, copied an EIA report of another hydel project close by! This was brought to light by environmental groups during the environmental public hearing for the project after which the EIA document was withdrawn. The EIA notification clearly states that the application for environmental clearance

would be rejected if it is found that data has been concealed, is not factual etc. But the quality of EIA reports still remains largely abysmal.

This is a serious issue. Environmental decision making is very often being made based on inadequate and inaccurate information. It was not as if individuals/groups were unaware of the quality of EIAs or gaps in the clearance procedures before the era of public hearings. But the public hearing space has enabled more citizens to be involved in the demand for greater environmental accountability and given more visibility to the obvious violations of both the letter and spirit of environmental legislation in India. But increasing demands by citizen groups for environmental accountability has led to a lot of discomfort within project proponents and for some time now there have been very intense efforts to undermine the space for peoples participation in the environmental clearance procedures.

The January 2001 draft notification

The MoEF issued a draft notification on 3rd January 2001, proposing the amendment to the EIA notification. This said: ".....it has been found that Small Scale Industrial Units, **Mining Projects with lease area up to twenty five hectares**, widening and strengthening of Highways, and modernization of existing Irrigation Projects cause minimal impacts, both on the environment and people living in the vicinity..... the environment impacts of such projects can be assessed on the basis of the information provided by the project proponents to this Ministry even without a public hearing". Using this justification it proposed the following insertion in the EIA notification: ""However, public hearing is not required in respect of Small Scale Industrial Units (as defined in the Industrial Policy from time to time), widening and strengthening of highways,

mining projects (major minerals) with lease area up to twenty-five hectares and modernisation of existing irrigation projects".

It is not clear on what basis the MOEF has decided that the projects mentioned above have 'minimal impacts' and that the impacts of these projects can be assessed without a public hearing. Even if the environmental impacts were to be 'minimal' in a particular case, it is the right of communities and citizens groups to have a say on developmental activities which affect them. While one can counter the MoEF argument for each of the projects mentioned above, (the issue of mining has been briefly touched here.)

As mentioned earlier, only mining leases for major minerals above 5 ha require environmental clearance under the EIA notification and now public hearings are required for only those leases amongst these which are above 25 ha. While looking at the ecological impacts of mining, "where mining" and "how mining" are questions which should come before "how much area under mining". Leases below 25 ha can cause tremendous damage in ecologically and culturally sensitive areas and under no circumstances can we make assumptions that these have "minimal impacts" and that public hearings are not required.

This is especially true for us in India as we have a considerable overlap between biologically rich areas and areas where our mineral wealth is found. These areas are also home to traditional communities, which are dependent on these ecosystems for their livelihoods. 25 ha is large if one is to consider the impact which could be caused to an area which is a biologically-rich pocket or has cultural or religious significance (such as a sacred grove). Depending on the mining process a mine could have tremendous impacts on the surrounds and downstream/downwind

(waterways, agricultural lands etc.), which is independent of the actual size of the mining lease. Besides small mining leases in 'clusters' can also be very environmentally destructive. Thus it is crucial that citizens have an opportunity to participate in the environmental decision making process and voice their concerns.

There are umpteen examples of leases under 25 ha for both minor and major minerals from around the country which have caused or will cause significant social and ecological impacts. We have the marble mines in the Alwar district of Rajasthan, the iron ore mines in Sundur in the the Bellary district of Karnataka, the bauxite mines in the Adivasi areas of Anantagiri in the eastern ghats in Andhra Pradesh, the coalmines in the Jaintia Hills of Meghalaya etc. We also have examples of both the Doon Valley and the Aravallis where smaller leases have caused extensive environmental damage and mining activities have now been regulated by both the judiciary and the MoEF. Infact it is important that public hearings are held for all mining leases irrespective of size of lease or classification of the mineral as major or minor.

A recent Indian Bureau of Mines publication² gives a vital piece of information: "It is interesting to note that though there are over 9,000 mining leases for major minerals with a cumulative lease area of over 0.7 million hectares (as on 01.01.95) excluding notified minor minerals for civil and construction purpose, a little less than 50% of them have individual lease area of 25 hectares in size and less."

So, in effect, we are excluding almost 50 % of mining leases of major minerals from the purview of the public hearing process. In addition to this all the leases for minor minerals do not require environmental clearance under the EIA notification and hence no public hearings. This gives a rather good idea about how serious we as a

country are in involving people in environmental decision making, atleast as far as the mining sector is concerned.

Groups respond

The January draft 2001 notification gave a period of sixty days for people to respond. Individuals, environmental and social groups, sent in their written submissions. On April 23rd the MOEF called for a meeting in New Delhi to discuss this notification and all those who had sent in written submissions were invited for the meeting. The NGOs highlighted the fact that the public hearings are the only legal space within the environmental clearance process in which people can participate and raise their concern and it is very important that this forum remains available to people. A key issue raised was the fact that the impacts of projects are so crucially dependent on their siting and one cannot merely remove the need for public hearings based on an argument that a project is smaller in scale. A serious concern was raised about the moves to dilute the environmental legislations rather than strengthen them.

On the other hand the industry representatives, larger in number, focussed on various aspects which according to them made public hearings undesirable: caused time delays in environmental clearance, were a burden on small scale investors etc.

The NGOs present were concerned with the effectiveness of this process conducted by the MOEF and it was decided to additionally give in a joint memorandum on behalf of groups/individuals from around the country to the MOEF. On May 10th members of three environmental and human rights groups (which included the author of this article) met up with the Joint Secretary (Impact Assesment), MOEF and submitted a memorandum on behalf of 38 individuals/organisations from around the country. The memorandum principally dealt with three aspects:

The Balco Case: A fatal Blow to Fundamental Rights

The Supreme Court decision on Balco (of 10th December 2001) has far-reaching implications for every sector that affects people's fundamental rights and basic needs.

The Court has firstly upheld the Balco privatisation which in effect subverts Schedule V, which was the ground for challenge to privatisation of Balco by the Chattisgarh Government. Schedule V makes the tribal rights to land inalienable, except for public good and public purpose. Since privatisation is narrowing down the benefit to private gain, the privatisation of Balco is an undermining of the tribal land rights. The land being given to Balco as a public sector concern is entirely different from the land now being controlled by Balco as a private concern. Therefore, contrary to Justice Kripal's judgement, the challenge by the Chattisgarh Government does not amount to taking 'a somersault and challenge the correctness of its own action'.

Since Schedule V guarantees absolute right of tribal land to tribals, the building of the public sector Balco plant was an instance of the government using tribal resources as a trustee. The change in ownership through privatisation should constitutionally involve a re-negotiation with the tribals on whose land Balco exists. The issue is not just between a private company Balco and the State of Chattisgarh. It is an issue in which tribal land rights and natural resource rights are absolute under Schedule V of our Constitution. By ruling against the Constitution, the Court Judgement should therefore be considered constitutionally illegitimate. The court has also undermined other fundamental rights of the citizens of India by stretching the implications of the judgement and ruling that no court in India should intervene in matters of justice related to economic policies based on privatisation and liberalisation. This in fact implies that privatisation of water, privatisation of forests, cannot be challenged. Nor can policies undermining workers' rights, health rights, food rights and education rights be challenged.

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- the need for processes such as the public hearing held for discussing the EIA notification amendment to be more participatory and allowing scope for debate

- concerns over the status of implementation of the EIA notification - the poor quality of EIAs, procedural shortcomings in the public hearing process etc.
- specific objections with respect to the 3rd January draft notification.

When the amended version of the EIA notification came through in August 2001, it was obvious that the viewpoint of NGOs had been totally ignored. The notification had come through with a few minor changes to the proposed amendments, unrelated to any of the NGO response. No explanation was given as to why serious points of concern raised have not been considered and is again indicative of the level of transparency in such processes. Some groups have sent in letters protesting this amendment, but there is a need for a larger campaign on this.

The privatisation of all these sectors related to people's survival is on the board, both through World Bank driven Structural Adjustment Programme and through the WTO rules, especially the Doha Declaration which has clearly introduced free trade in natural resources under the para 31 on Trade and Environment. These global treaties are signed and implemented by the executive without ratification by Parliament, the subject which has been agitating the Parliament in the previous and current session,. The Parliament therefore has been bypassed in economic policy and decisions on privatisation and liberalisation. The Court judgement says 'It is not for the Courts to consider the relevant merits of the different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate form is Parliament and Not the Courts'. In the absence of Parliamentary powers in economic treaty making and ratification, this judgement in effect robs Indian citizens of any forum for the defence of their fundamental rights guaranteed by the Constitution.

The primary duty of the Supreme Court is to defend the integrity of the Constitution and the people's rights enshrined in it, each time these rights are abused and violated by the executive or private interests. The Supreme Court ruling in the Balco case has given absolute power to the executive are of the government and to the global interests that today rule the Indian government. The ruling, in effect killed the Constitution.

Afsar H. Jafri

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The larger picture

The undermining of spaces available to citizens to intervene in the developmental planning process is an issue of serious concern. Since the early 1990s we have seen two parallel processes working in opposite directions with respect to people's participation in developmental planning. On the one hand are the following positive developments:

- the 73rd amendment of the Constitution which came in 1992 and seek to move towards more decentralised governance by empowering village panchayats.
- the 74th amendment of the Constitution, 1992, which seeks to empower urban communities.
- the Panchayat (Extension to Scheduled Areas³) Act, 1996, which is one of the most revolutionary laws independent India and seeks to considerably empower Adivasi communities in some parts of India and give them greater control over their natural resources. The village Gram Sabhas have to be consulted for developmental activities in the area.
- provisions such as the environmental public hearings which became a mandatory part of the EIA notification in 1997.
- a significant circular under the FCA, 1980, was circulated by the MoEF in 1999. This circular⁴, now an annexure under the FCA, amongst other things states:

" 5. It has been observed that in respect of a large number of proposals the Central Government is receiving representation from NGOs/ local public bodies against the diversion of forest land on environment and ecological grounds. Therefore the Central Government feels that it is essential to have the opinion of the local people whenever a project is coming up in that area. Therefore, it has been decided that whenever any proposal for diversion of

Mining and the EIA notification

- *The EIA notification specifies the following clearances for the mining sector:*
 - a) *Site clearance* for prospecting and exploration of major minerals in areas above 500 ha*
 - b) *Site clearance for mining projects involving major minerals with leases in excess of 5 ha in area*
 - b) *Environmental clearance for mining projects involving major minerals with leases in excess of 5 ha in area.*
- *Mining projects also require consent under the Water (Prevention and Control of Pollution) Act and the Air (Control and Prevention of Pollution) Act from the State Pollution Control Boards (SPCBs). The forms under the above acts are to be submitted to the SPCBs prior to the environmental public hearing.*
- *From April 1997 to August 2001 public hearings were compulsory for all mining leases requiring environmental clearance under the EIA notification. ie. Major minerals with leases more than 5 hectares. After the recent amendment of August 2001, public hearings are only required for mining leases of major minerals above 25 ha.*
- *Environmental clearance and public hearings are not required for leases of major minerals below 5 ha and for all leases of minor minerals.*
- *A Committee of Experts has been appointed by the MOEF specifically to assist it in the evaluation of mining projects for environmental clearance.*
- ***For mining projects requiring environmental clearance under the EIA notification, separate clearance is also required under the Forest (Conservation) Act (FCA), 1980, if diversion of forest land is involved. In fact all mining projects involving diversion of forest land (irrespective of size of lease or classification as major or minor mineral) require clearance under the FCA. For projects requiring clearances under both the EPA and the FCA, a project is deemed cleared only after receiving clearances under both Acts. For a mining project being considered under the FCA but not coming under the list of projects requiring environmental clearance under the EIA notification, the MOEF can still consider it for environmental clearance if it feels necessary.***

forest land is submitted, it should be accompanied by a resolution of the 'Aam Sabha' of Gram Panchayat/ Local Body of the area endorsing the proposal that the project is in the interest of people living in and around the proposed forest land."

While there may be problems with the effective functioning and implementation of the above mentioned provisions, the important fact is that a space has been provided. Communities and citizens groups need to recognise the potential of these spaces and lobby for the improvement and effective implementation of the provisions which have created these. On the other hand, the post-1991 liberalisation scenario has seen the opening up of various sectors to corporate interests (both Indian and global) through several policy and legal changes. In such a situation the 'spaces' for people are being seen as a hindrance which are holding up investments and 'development'. The National Mineral Policy, 1993, has brought with it a lot of changes, facilitating increased participation of the private sector and also foreign investment. While the mining interests are happy about this, they are of course being intolerant of anything holding up their possibilities of mining anywhere they wish. The most illustrative example of this is the tremendous pressure to amend the fifth schedule of the constitution, as it has come in the way of the reckless opening up of these areas for mineral exploitation. These areas which are home to significant Adivasi populations, also house a considerable amount of mineral wealth and the moves to amend the fifth schedule were prompted because of a historic Supreme Court judgement in 1997 in a case filed by the group Samatha⁵, which was a victory for Adivasi rights in the fifth schedule areas, but affected mining interests. Amongst other things the implications of this judgement were that both governmental and non-governmental lands in scheduled areas cannot be leased out to non-Adivasis or private industries

for mining purposes. Hence the vested interests are keen to amend the very constitutional basis which provided this victory!

As far as the recent amendment in the EIA notification goes, an examination of some of the published material and events after public hearings became mandatory in 1997, gives us an idea of how opinion within the mining industry has been shaping up on 'public participation' and how it has led to the recent amendment.

The Annual Review 1998 of the Journal of Mines, Metals & Fuels has a piece on the "Status of environment in Mining Industry in India" and has the following to say about public hearings: "This is a good idea, wherein the views of the local people and administrators will be taken into account by the Impact Assessment Agency (MOEF), whereas in earlier system there was no such arrangement. However, it will cause delay and additional cost to the lessee." It is important to note that the "delay" and "additional cost" have been the chief arguments against the public hearings.

Two specific events are significant to look at in this respect:

- 1) The National Workshop on Environment and Forestry in Mining Areas, held on 21-22 August 1998, in Jaipur. This workshop was jointly organised by the MOEF and the Federation of Indian Mineral Industries, with the active support of 27 mining companies/ associations from around the country. Besides several members of various ministries and departments of the central government and many state governments, participants included over 100 representatives from mining companies/ associations/consultants, and only one member of an environmental NGO (WWF-India, Rajasthan State Office)

The proceedings of this workshop indicate the mood of the industry with respect to public hearings. There is a repeated focus on the non-feasibility of public hearings and the fear of involving people in decision making is reflected in the presentations of one of the participants in which he says: "What happens if the project is rejected at public hearing stage?"

The Conclusions and Recommendations of the workshop were called "The Jaipur Declaration" and some of the recommendations on the EIA notification were as follows:

"2.6 (c) Project clearance

The Ministry of Environment and Forests may consider raising the project threshold limit for obtaining clearance under EIA notification of 1994 to 50 hectares."

"2.6 (e) Mandatory public hearings

The National Workshop suggests that with regard to new leases, the requirement of public hearing should be insisted upon only in the cases covering larger areas. For smaller mining leases upto 50 ha., the requirement of public hearing is not feasible from logistical and economic point of view and therefore unnecessary."

While there is certainly a need for a debate on the procedural aspects of how public hearings are conducted and the importance to work on issues such as "who bears the cost" in the case of small investors, it is illogical to thereby conclude that public hearings are "therefore unnecessary"!

2) In April 1998 the Ministry of Mines (MoM) set up a committee whose terms of reference are: " It will be the apex Advisory Committee for monitoring and reviewing the environmental aspects of mining activities." The committee consists of the Secretary, MoM, as chairman and Secretary, MOEF, as co-chairman. Its members include seven representatives of mining

related bodies (official and private), the chairperson of the Central Pollution Control Board, Principal Secretaries of several states and members of three environmental NGOs

The agenda notes for the first meeting circulated in 1999 had the following "suggestions for consideration" under the "measures for simplifying procedures and reducing delays" :

"(i) No environmental clearance be mandatorily insisted upon in case of mining projects upto 50 hectares.

(ii) Public hearings be made mandatorily only for mining leases of major minerals covering an area of 500 hectares or more."

This is shocking and totally unacceptable. The IBM document I have referred to earlier states that out of the over 9000 mining leases for major minerals only 20% have an area over 100 ha. A much smaller percentage will have areas over 500 ha. Thus the MoM wants to virtually eliminate public hearings! Fortunately this committee, though setup in 1998, has not had any meetings as yet and one must wait and watch whether it will become functional.

The future?

It is very clear what industry and certain sections of the establishment want. We will need to be as organised and networked as they are if we want to protect our 'spaces' from being undermined. There is an urgent need for communities and groups around the country to rally together and respond to this latest amendment of the EIA notification. It was not as if all was well before this amendment happened....there are problems with the EIA procedures, the effectiveness of the public hearing process etc. There is a considerable amount of work to be done to make the environmental provisions more

meaningful and effective. But what amendments such as the recent one do is to make that step forward that much more difficult by taking us two steps back. One will have to of course consider the genuine problems some of the procedural aspects of environmental legislation have created for project proponents and work towards streamlining procedures so that nobody bears an unfair cost. But we need to make it very clear to both the industry and the government that diluting environmental provisions and the space for citizens' participation is unacceptable. We have a fight on our hands and the future of many of our ecologically and culturally sensitive areas depends on how we take this up in a strong and sustained manner.

Neeraj Vagholikar is a member of the environmental action group, Kalpavriksh, and is currently documenting mining threats to India's wildlife habitats.

¹ All minerals other than those notified as "minor minerals" by the Central Government are major minerals. In Indian mining law "minerals" includes all minerals except mineral oils (natural gas and petroleum). The Mines and Minerals (Development & Regulation) Act, 1957, defines "minor minerals" as:

" 3 (e) " minor minerals" means building stones, gravels, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette declare to be a minor mineral."

Apart from the minerals already listed in the above clause the Central Government has declared 15 other minerals as minor minerals. No exhaustive definition of minor mineral which states the criteria for declaring any mineral as minor mineral has been given in any law. But minor minerals have generally been minerals used for building and construction purposes. The State governments has considerable powers to regulate the mining of minor minerals, including grant of mining leases. Generally these minerals are somewhat of local importance and can be developed on the small

scale. After the 73rd amendment of the Constitution in 1992, Panchayats too have a greater role to play with respect to the minor mineral sector.

² Indian Bureau of Mines, 2000. Reclamation/ Restoration – Techniques & Strategy for Mined Out Areas

³ The "scheduled areas" here refers to the "fifth schedule" of the Indian constitution. Article 244 (i) provides for Adivasi dominated areas in the country to be declared as fifth schedule areas (except the North East which has a separate provision in the sixth schedule of the constitution). The Governors of the concerned states have been given extensive powers and may prevent or amend any law enacted by Parliament or the State assembly that could harm the Adivasi interests. It is a tool of "positive discrimination" to protect the interests of Adivasi communities which have been exploited over the years. One of the most significant provisions for these areas are the prevention of land transfer to non-Adivasis in these areas. The Panchayat (Extension to Scheduled Areas) Act, 1996, applies to these areas and seeks to give the communities greater control over their natural resources and developmental planning in the area. This also makes it mandatory to consult the Gram Sabha/ Panchayat prior to grant of prospecting licenses/ mining leases/ concessions by auction for minor minerals.

⁴ Circular No. 11-30/96-FC (Pt.) dated 26.02.1999

⁵ The Civil Appeal Nos. 4601 and 4602/97 in the Supreme Court were filed by the group Samatha working on Adivasi issues in Andhra Pradesh. The litigation was pertaining to the grant of mining leases to private parties in the scheduled areas of Vizag district in Andhra Pradesh. Besides the social impacts and the violation of Adivasi rights which this mining would have caused, it also had tremendous environmental implications, as this area falls in an ecologically fragile portion of the Eastern Ghats

Update Collective
F-10/12, Malviya Nagar,
New Delhi – 110017.
Tel : 011-6680883, Telfax : 011- 6687724
Email : delforum@vsnl.com