A Structure for Environment Governance: A Perspective

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A report on a round table held in November 2009 on the proposed National Environmental Protection Agency.

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Governing India's environment in a way that strikes the right balance between sustainability, local livelihoods and developmental pressures has become an increasingly challenging task. Conflicts and controversies are emerging almost every week, what with projects reportedly being submitted for clearance at the rate of more than 150 per month. In this context, the move by the Ministry of Environment and Forests (MOEF) to restructure the environmental governance structure is welcome, as also the invitation for public comment on the specific idea of a National Environmental Protection Agency (NEPA) (MOEF 2009).

A round table was organised by the Centre for Policy Research, Ashoka Trust for Research in Ecology and the Environment, and Prayas Energy Group on 6 November 2009 to discuss this proposal with a cross section of activists, policy analysts and academics.[1] The objective of this note, which was prepared by some of the participants, is to share salient aspects of this discussion more widely with a view to furthering debate on environmental governance in the country. The intent is for this discussion to crystallise into more specific policy recommendations and proposals in the near future.

The wide-ranging discussion broadly covered three sets of issues. First, what are the core problems in environmental governance in India today, and which of these problems does NEPA provide a solution for? Second, in addressing whichever problems it focuses on, what design issues need to be considered? Third, how will action or inaction on other problems limit or enhance the usefulness of NEPA?

We summarise the ideas that emerged and also the points of divergence and ambiguity. The most important messages are that the problem to be solved needs to be better specified and matched with the institutional solution promoted, that the

institutional solution needs more detailing and be part of a wider package of reforms, and that broader consultation on all of the above would be essential to accomplish this.

Defining the Problem(s)

In proposing a new authority, the MOEF discussion paper suggests the problem is essentially with administrative structures. It explicitly states that a credible environmental policy and an adequate set of laws and rules are already in place, and the problem is with implementation. If the judiciary has stepped in, it is primarily because of a weak executive at both central and state levels, having limited capacity for environmental regulation. It further suggests that the weaknesses are principally located in a lack of clarity about roles, responsibilities and lines of control, and specifically, lack of independence of the regulatory arms from the policymaking functions of the MOEF. It, therefore, proposes a statutory body, autonomous of MOEF, with substantial budget and powers to make its own procedures, professionally managed with fixed tenure board and chief executive officer (CEO), adhering to the polluter-pays and precautionary principles.

Round-table participants, however, felt that this diagnosis of the problems of environmental governance was inadequate. At one level, the problem is with policy itself – the lack of a clear set of implementable guidelines which specify how choices between development projects, concerns of natural-resource-dependent communities, and broader environmental impacts are to be made. From a broad view that seeks deeper changes in environmental governance, the problem is one of environmental interests, and particularly local interests, being trumped by commercial interests due to their greater power. Improved environmental governance, therefore, demands that this underlying problem of unequal power be addressed, which, it may be argued, is a political rather than administrative matter. Administrative changes can only implement rules better; they cannot result in changes in the rules to protect the vulnerable. From this perspective, a NEPA will be a band-aid solution and, by creating an appearance of change, can even slow progress towards a broader solution.

From a pragmatic perspective, however, one may argue that one cannot second-guess the amount of political commitment that exists towards the environment, and one should evaluate the proposal for what it is and whether it will contribute to solving some of the major problems plaguing the regulatory dimensions of environmental governance. At that level, the proposed clearer separation of the regulatory functions from the policymaking functions of the MOEF may be of value. But even within this narrower context, the discussion paper could do a far better job of spelling out the problem and the diagnosis before seeking to provide a solution. For example, one of the four options in the discussion paper suggests creation of an agency focused on compliance and enforcement, but that leaves environmental clearances to the ministry. This implies that clearances are not a problem but enforcement is. Defining and understanding the problem to be solved much more clearly is necessary, if a NEPA is to be appropriately designed. The MOEF's framing the NEPA design question as a choice among the four options described in the concept note seems, therefore, premature and artificially constraining.

Given that the idea of separation of policymaking from regulation is borrowed from the broader regulatory literature, it should be noted that the experience with "independent regulatory authorities" in other sectors such as electricity and water has been quite mixed. Regulators often become part of a "shell game" with ministries where responsibility for decisions is passed back and forth, and the regulatory process becomes one more avenue to obfuscate and undermine political accountability. Avoiding this will require spelling out the boundaries between the MOEF and NEPA as well as the criteria on which NEPA will make its decisions much more clearly than has been done so far.

Design Issues

Regardless of which problem NEPA tries to address – monitoring and compliance, environmental clearance, independence from excessive political interference in the clearance process to name a few – and setting aside the question of whether the most important problem is being addressed, participants agreed that when it comes to functioning, the devil lies in the details of NEPA's internal design.

First, independence is strongly, if only partially, dependent on how the authority is created. The strongest basis for independence would be establishment of a NEPA as a constitutional body. But the MOEF's note sidesteps the question of whether a constitutional authority is being considered, or if not, why not. Indeed, the note is also unclear what "statutory" really means, because even an authority notified under the existing Environmental Protection Act (EP Act) would be, in theory, as statutory as one set up under a new law. There are examples of bodies of both kinds – the National Biodiversity Authority was set up under a new law while the Dahanu Taluka Environment Protection Authority was set up under the EP Act – and both have limited autonomy vis-à-vis the ministry. So perhaps the real question is what safeguards are built into the structuring of anybody to ensure its independence.

Second, there is the question of selection of NEPA's governing body. Experience from other regulatory bodies shows that a new authority could be undermined from the start if the individuals nominated do not bring the relevant degree of expertise and ability to function independently. Bringing in people from outside the bureaucracy might, therefore, be essential. The composition of the committee that selects appointees is also critical. There was also a suggestion that the composition should be broad and decentralised enough to ensure that representatives of affected communities are included. More generally, there is as of now a lack of clarity on the composition and process of selection that is being proposed, and the MOEF's ideas regarding the same need to be tabled and debated.

Third, of course, is the question of funding. If a NEPA's budget is subject to review and approval from the MOEF, it would undermine the authority. Ideally, there should be some kind of environmental cess that funds NEPA, and also its constituents or lower level agencies such as the pollution control boards (PCBs), which right now depend only on the water cess. Absent a major new cess, NEPA could be empowered to levy charges for its appraisal process in

ways that will enable it to augment its resources. The MOEF note only mentions "substantial budget" but does not spell out any mechanism for ensuring this systematically and for the spending to be autonomous of the ministry's procedures.

Fourth, the lack of trained professional staff and reach across the country to undertake the work of environmental clearances, scrutiny and monitoring is a major issue. Indeed, lack of capacity is a weakness that plagues the ministries of environment and the PCBs in most states, as many reports including a recent report from the Centre for Science and Environment exhaustively documents (CSE 2009). What steps will NEPA take to ensure that it does not suffer from this weakness and that it will redress this weakness in the PCBs, which in some sense will be its frontline agencies, is not clear.

Finally, there is a question of how the concept of a strong "national" authority meshes with the idea of a federal structure, political accountability, and decentralised governance. Some participants feared that, by creating a new central body and introducing a more technocratic dimension, a NEPA would centralise power. For example, affected communities may face obstacles to engaging in the technocratic discourse of regulatory hearings. Others held that while it may be centralising with regard to the state-centre relations, a properly structured NEPA could have the effect of providing more access to decision-making for local communities than the currently opaque executive decision-making processes at the state level. But this will critically depend upon the larger context within which NEPA has to function or the room NEPA has to influence the broader context.

Broader Issues

The lack of independence from political influence in environmental clearances or the lack clarity on who PCBs should report to is only one of the several core problems plaguing environmental governance in the country. Several other issues deserve attention not only for their own sake, but also because they would seriously constrain how effective the NEPA can be. In the context of environmental clearances, the major lacunae are clearly in the Environmental Impact Assessment (EIA) and public hearing processes, as has been documented in detail by many analysts (Kohli and Menon 2005). These processes are governed by the EPA and rules notified under it. Currently, these processes allow EIAs to be shoddy and public hearings to be increasingly stifled, rather than opening up spaces for participation by affected communities. If the EP Act and rules remain what they are, what could even an independent NEPA do? It would still have to give environmental clearances based on faulty EIAs and not-very-public hearings. A series of reforms in the entire EIA process, ranging from who commissions the EIAs, who is empanelled to conduct them, what they must contain, and the organisation of public hearings have been suggested over the past several years, and their implementation is critical to any meaningful environmental clearance process.

In the context of routine pollution monitoring and compliance, again, there are significant gaps and loopholes in existing legislation that will continue to constrain the NEPA and its constituent PCBs. For instance, it was pointed out that the EP Act does not clearly spell out the power of the PCBs to levy fines, and so courts have repeatedly struck down attempts by PCBs to impose punitive damages on polluters. The "polluter-pays" principle is sound, but it will be implemented by frontline agencies, not by NEPA. These agencies' hands will still be tied by existing legislation. Similarly, there are lacunae in how standards for point-source pollution are set, such as excluding certain pollutants, such as ground-level ozone, and setting limits on the concentration of pollutants rather than absolute amounts, encouraging dilution rather than pollution reduction as a response to regulation.

In other words, there will have to be serious consideration of whether NEPA will be effective without significant amendments to the EP Act and to the Air and Water Acts and their rules. At the same time, opening the law to revision may, under current circumstances, increase the risk of weakening these laws. These two risks of NEPA as a toothless tiger versus opening the door to a weaker legal framework, will have to be debated and considered.

On all these points, a useful comparison was made with the US Environmental Protection Agency (USEPA), which is frequently referred to in Indian discussions about a NEPA and which is explicitly mentioned in the prime minister's recent memorandum of understanding (MOU) with the US president. First, the USEPA is *not* intended to be independent of the executive but is, in fact, part of the executive structure. Second, the US has an Administrative Procedure Act which governs all administrative actions in that country and provides a high degree of administrative safeguards to citizens. In India, the framework of an administrative law is uneven and varies across sectors. Third, US citizens can sue industry and government agencies for damages. Such tort claims provide an avenue for redress in parallel with executive and other channels. By contrast, the Indian civil court system is impossibly slow and ineffective in offering such redress. Finally, the USEPA is embedded in a highly federal structure where state environmental protection agencies and state-level legislation have significant autonomy, thereby providing multiple channels for an environmental redressal. This is again missing in India. Thus, direct transplanting of institutional structures from the US seems likely to fail. If the experience of the USEPA is to be brought in, it should be done only after a thorough analysis based on the specifics of the Indian context has taken place.

Conclusions

The intent to take seriously the problems of environmental governance is welcome, and it is important to move forward on this recognition and act to improve the state of environmental governance in India. At the same time, there are several major ambiguities in the specific NEPA proposal as it stands today, which, if not addressed, could lead to an inadequate or even cosmetic change. The core problems with environmental governance in India are several and are all embedded in the larger debate on environment, local livelihoods and development. Attempts to revamp the structures and procedures of environmental governance cannot be oblivious to this larger debate. They must

clearly identify the problem in its multiple dimensions and put forward a somewhat comprehensive set of interlinked solutions. At minimum, the following questions need to be addressed:

(1) How do we diagnose the underlying problems of environmental governance, and what subset of these may be addressed through administrative solutions?

(2) How will critical design issues of any regulatory process, including independence, selection, funding and capacity be addressed?

(3) What other changes, in laws, regulations or practices, are necessary if the regulatory process is to be effective?

The setting up of an independent regulatory body covering environmental clearance, monitoring and enforcement could make a positive contribution to solving the problem if it addressed seriously these questions. The round-table participants strongly felt that more broad-based and informed discussions need to be held and a more radical, detailed and nuanced strategy needs to be put together by the MoEF to make this effort successful. Our hope is to promote a discussion that can quickly yield practical and useful suggestions towards improving environmental governance in India.

NOTE

1 Apart from the authors of this article, Shekhar Singh and Ramaswamy Iyer also participated in the round-table discussion. All participants were present in their individual capacity.

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