



## Regulatory Reforms to Address Environmental Non-Compliance

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In India, industrial, energy and infrastructural projects are legally mandated to seek environmental approvals under a range of central and state level laws such as the Environment Protection Act, 1986, Air (Prevention and Control of Pollution) Act, 1981, Water Prevention and Control of Pollution Act, 1981, and the Forest Conservation Act, 1980. Project approvals under these laws include environment and social safeguards or 'conditions', such as reducing the pollution load due to project operations, reforestation to make up for forest loss, and prohibition or limits on groundwater extraction. Projects are expected to comply with these safeguards during construction and through the period of operations. In case of mining projects, backfilling and ecological restoration of the land also form part of the safeguards. In effect, the purpose of conditional project approvals is to minimize and mitigate environmental and social harms caused by large projects.

During the first four decades of implementation of India's post-independence environmental laws, there was little or no emphasis on the status of compliance with conditions by projects. The focus was on the needs of the economy and national development on the one hand, and on the other hand, the social conflicts caused by land displacement. Even though legal clauses related to environmental compliance existed in these laws, projects operated with impunity, causing widespread degradation of the environment.

It is only in the last decade that environmental non-compliance by projects and the inability of existing institutions to enforce laws have come under the scanner. Since 2010, the office of the Comptroller and Auditor General (CAG) has produced environmental audit reports and reported on non-compliance. The courts have observed large-scale legal violations in spe-

cific sectors such as mining. Non-governmental studies have also recorded high rates of non-compliance.

Unable to brush the problem under the proverbial carpet, the government engaged in a series of hurriedly thought out mechanisms to deal with it. These include:

- Self-regulation through the use of pollution monitors or devices to capture and relay information on pollution and other performance indicators directly to pollution control board authorities
- Provisions for penalties, fines, bank guarantees and other financial disincentives based on the 'polluter pays' principle
- One-time amnesty schemes to violating projects and grant of short-term or temporary approvals to violators in an effort to bring them into compliance

But these measures have neither improved environmental performance of projects nor stemmed the flow of complaints and legal cases by affected people against polluting projects.

## Why Should Compliance Be Addressed Urgently?

Robust and well-thought-out environmental compliance mechanisms are hardly seen as a necessity for India's development. In fact, governments have approached the idea of regulating projects as a liability and a drag on economic growth. They have been slow to implement existing regulations and selective enforcement has earned them the reputation of creating a 'license raj'. This can be seen in the Supreme Court's ongoing efforts to enforce the mandatory emission standards on coal power plants. Even though the standards have existed for several years as part of the consent permits issued under Air and Water Acts, the central government systematically dragged its feet on getting projects to comply with the norms.

Today, the impacts of unregulated projects have made it politically unfeasible for governments to ignore their effects on the economy and on people. The recent conflict due to the operations and proposed expansion of the Sterlite Copper Smelter in Tamil Nadu is a case in point.<sup>1</sup> The project was India's largest copper production plant but also causing toxic emissions, soil and water pollution. Despite numerous complaints and legal cases against the project's pollution, the company was allowed to continue its operations for 20 years. Last year, when the company sought permissions to expand its operations, there were massive local protests for over 100 days; they finally turned violent when the local police shot down 13 protestors. Sterlite also became a political flashpoint with the opposition party making it an important issue in their 2019 election campaign in the state.

There are numerous cases that are being litigated in court for non-compliance with environmental safeguards. These have resulted in huge financial implications for projects and for related economic sectors as a whole. The Goa mining case led to the total state-wide ban on mining since 2012. The National Green Tribunal imposed penalties of over INR 873 crores as fines for environmental violations in the first quarter of 2019 – an amount that is close to the total fines imposed last year.

Poor compliance causes critical environmental blowbacks in the form of severe water shortages, productivity losses and toxic air. While these conditions have been building up in most parts of the country, climate change dynamics add to these local conditions, making their impacts far more acute and complex. For example, areas already affected by large-scale water extraction for industrial purposes, coal washeries and thermal power plants could also face frequent and more lasting droughts. The visible effects of environmental impacts in eroding the positive gains of development have already caused a shift in mainstream economic thinking that traditionally ignored the economic cost of

degraded and damaged habitats. It is accepted that crisis management is hardly possible any more, and that there is a need to plan reforms and strategies for economic and environmental transformation. Environmental compliance systems will form a key part of these reforms.

The case for compliance as a bulwark of environmental regulation has never been more compelling than in the time of climate change. So far, the success or failure of compliance has revolved around the compulsions of domestic politics, but it is now tied to the geopolitics of climate change. After years of wrangling over who should do what to check global warming, nations finally thrashed out the Paris Agreement, which obliges every signatory to put in place, by 2020, a set of measures to meet their respective carbon mitigation targets. However, without a systemic and robust protocol to ensure compliance, India runs the risk of falling short of its targets. Therefore, it is imperative, not to mention politically expedient, for the political party coming to power after the 2019 general elections to set up, in the first place, a credible and effective mechanism of compliance with domestic regulations before it goes about honouring its Paris commitments.

## Who Should Regulate Projects and How

Successive governments have emphasized the quantitative aspects of economic growth. They have focused on increasing the number of projects approved during their tenure and reducing the time needed for impact assessment and granting approvals. These projects have been accompanied by severe impacts as pollution and environmental degradation are viewed as the trade-off for growth. However, with over 16,000 centrally approved large projects operational and several others promised or in the pipeline, the scale of the problem has today expanded exponentially in both industrial and 'greenfield' or less industrialized areas. The government can neither ignore nor delay tackling this problem. Compliance with environmental and social safeguards is a necessary if not sufficient condition

to improve the quality of our economy's growth. The question, therefore, before the new government, will no longer be 'if' projects need to be regulated but of how to regulate and who will regulate. Given below are three sets of policy reforms with the potential to shift the government's approach to the problem of environmental compliance of projects and achieve better results.

### Compliance-based approvals

Agencies implementing environmental laws view the procedures for grant of approvals as linear systems rather than cyclical ones. This problem is best illustrated by the number of flowcharts put out by them explaining these procedures. Compliance comes downstream in these processes and there is little room for feedback. Project performances on compliance almost never influence government decisions on project expansions, extensions or applications for permission by violating companies to set up projects in new areas. For example, the Kulda opencast mine operated by Mahanadi Coalfields in Sundargarh district of Odisha has violated several conditions of its approvals. Yet, it received approval for expansion and capacity addition twice in two years, for a period of one year each. The validity of environment clearances for mining projects is otherwise 30 years. This decision of the Expert Appraisal Committee (EAC) set up under the Environment Impact Assessment (EIA) notification, 2006, to review such projects was ad hoc, with no precedence and legal basis.

The lack of systemic mechanisms to address non-compliance in recent years has also created huge pressure on the bureaucracy to show legal compliance without affecting the financial status of ongoing operations. For this they have offered one-time amnesty to violating projects under the EIA, Coastal Regulation Zone and biodiversity laws. But these measures only improve the record of compliance on paper and not in reality. Now with so many projects already operational, it is crucial to place a very high bar on projects being granted approvals. The basis of regulatory procedures should shift from approvals

to compliance. Only those projects that have an established record of high compliance or which can surpass the compliance performance of others in the field, and certainly meet the legal standards, should be granted permits and approvals. The permissible standards for pollution are already pending major reforms. But these changes will prove futile if projects are not held to the highest compliance standards.

### **Third-party monitoring**

The present practice of monitoring a project's compliance in effect involves two parties: the project proponent and the regulatory authority. This system has so far not been able to address the problem of non-compliance and has instead led to concerns of collusion and corruption. A review of this practice has resulted in recommendations that monitoring should be done by an independent third party. The environment ministry proposed an amendment to the EIA notification in September 2018 to include this recommendation. This is yet to be finalized. The 'third party' proposed in this amendment is expert government institutions.

In reality, the genuine 'third party' in this context is the communities who experience effects of non-compliance such as loss of livelihoods, poor living conditions and displacement. Although they have the greatest stake in remedying the damages caused by non-compliance, they are nowhere in the picture when project monitoring is done. This is contradictory to the participatory turn in environmental governance in several countries since the 1970s and the constitutional mandate for it in India. Data from our research on cases of environmental non-compliance in four states shows that when communities have been involved in collection of evidence, reporting of violations and official monitoring by regulators, environmental compliance can improve significantly. Their participation also helps regulators understand community priorities for remedial actions. Regulatory bodies in these states are beginning to recognize the benefits of community participation and are more open to including communities in procedures such as site visits conducted by them for monitoring.

But practices that foster community participation — such as social audits of projects (which provide access to monitoring data and formal spaces for interaction with affected people) — are yet to be systematized in environment regulation.

### **Integrated regional networks for compliance**

India's environment regulations have largely been implemented with a project-centric approach. Approvals are granted to projects after their impact studies, cost-benefit analysis and environment management plans are assessed by regulatory bodies. These assessments routinely understate the potential impacts of projects, making them seem benign or operations whose impacts can be easily mitigated. Such assessments also generate quicker approvals from regulatory bodies, thus helping to meet the government's economic growth targets. For long, activists and experts have demanded cumulative impact studies so that the full range of project impacts can be ascertained prior to the grant of approvals. But such comprehensive studies have been done only in a few cases. Cumulative studies are needed not just at project levels but also for regions that are affected by environmental degradation.

Similarly, a project-based monitoring system is resource intensive and not very effective in terms of the overall outcomes. But if regulators could be reorganized as integrated regional networks, they could use the resources available to them more efficiently to improve environmental standards regionally. Multiple regulatory agencies within the concerned region could pool their expertise and human resources towards coordinated responses. Such a mechanism can bring an inter-disciplinary approach to compliance monitoring. The regions identified for such integration could cut across administrative boundaries such as districts or states. It could be at the level of large industrial sites like Special Economic Zones (SEZs) with multiple projects operating within them, metropolitan regions, entire districts or geographical regions already identified as critically polluted, or entire airsheds or river basins.

Although envisaged by law, such a regional approach to environmental governance has only been used in a few cases. It has been used in emergency responses to environmental pollution, such as the moratorium on industrial activity in Vapi, Gujarat, or the ban on mining in Goa. But a regional approach to systematically improve post-approval compliance of projects has not been envisaged. This is mainly because compliance with safeguards has rarely been the focus of regulation and institutional reforms to improve environmental compliance have never been on the government agenda. The ministry could develop pilots to understand the optimum scale at which such integrated compliance networks could deliver the most effective results. Given that the scale of the effects of non-compliance is such that they are no

longer restricted to project areas, a regional approach is needed to improve the outcomes of regulation.

## Conclusion

Environmental compliance is a critical part of environment regulation. While regulatory actions have prioritized economic growth for several decades, the costs of environmental degradation due to industrial and developmental projects are no longer possible to ignore. These issues have become politically and economically salient in recent years. This paper makes three sets of recommendations for how environment regulation can approach the issue of persistent and pervasive non-compliance by projects. These reforms are critical to avoid the costly and harmful disruptions of development.

## END NOTES

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1. <https://www.firstpost.com/india/sterlite-protest-in-tuticorin-copper-co-has-faced-legal-battle-since-inception-over-environmental-concerns-4479191.html>. Land Conflict Watch and EJ Atlas have many cases of recorded land and environmental conflicts caused by operational projects.