

Whither the National Environment Appellate Authority?

ARMIN ROSENCRANZ, GEETANJOY SAHU, VYOM RAGHUVANSHI

While the National Environment Appellate Authority was set up as an independent body to address cases in which environmental clearances have been granted by the Ministry of Environment and Forests, it has failed to serve as an effective redressal mechanism to address the grievances of aggrieved citizens. This is primarily because of the faulty composition of the NEAA, alongside the non-appointment of the chairperson and vice-chairperson. The future of the NEAA looks bleak and its usefulness as a quasi-judicial authority must be in doubt.

Armin Rosencranz (*armin@stanford.edu*) is Visiting Fellow at Ashoka Trust for Research in Ecology and Environment, Bangalore; Geetanjoy Sahu (*geetanjoy@tiss.edu*) is at the Tata Institute of Social Sciences, Mumbai; and Vyom Raghuvanshi (*vyomraghuvanshi@gmail.com*) is with the Legal Initiative for Forest and Environment, New Delhi.

In February 2009, the Delhi High Court came down heavily against the union Ministry of Environment and Forests (MOEF) for its failure to implement the National Environment Appellate Authority (NEAA) Act. The NEAA Act, 1997, provides for appointing a chairman (a retired Supreme Court judge or a high court chief justice), vice-chairman and three members with expertise in matters concerning the Authority. It became functional on 30 January 1997, and was set up “to hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986, and for matters connected therewith or incidental thereto”.

1 Introduction

Since 2 July 2000, the office of the NEAA chairperson has remained vacant. The office of the vice-chairperson has remained vacant since 1 August 2005. There is no website or address through which people can access the Authority with their grievances. In 2005, following a public interest petition filed by Vimal Bhai and Others, the Delhi High Court asked the government to clear proposals related to the appointment of the chairman as well as other technical members and reconstitute the Authority within 45 days. However, the government has failed to take satisfactory steps to address the Delhi High Court’s concerns. A headless NEAA has thus been rendered ineffective by the government’s own omission. The objective of the Parliament in requiring the government to constitute an independent body for quick redressal of public grievances in relation to environmental clearances has thus been defeated. The Delhi High Court observed that it is a measure of

extreme apathy that the NEAA, appointed over 12 years ago in the wake of a Supreme Court order, is not fully constituted despite the Court’s order dated 29 September 2005, that all posts of the body should be filled up within 45 days of the ruling.¹ The high court was also critical of the manner of functioning of the NEAA during its 12 years of existence. The Court observed that

given the fact that all petitions have been dismissed by the NEAA, it is at present neither an effective nor an independent mechanism for redressing the grievance of the public in relation to the environment clearances granted by State or Central Government.

In the absence of both a chairperson and vice-chairperson, the NEAA has been hearing appeals challenging the clearance of projects by the MOEF and in the process of hearing, the NEAA has dismissed all but one case that have come before it. While the purpose of enacting the NEAA Act has been to address social and environmental impacts of large projects, the NEAA has been rejecting applications filed to address these problems by strictly adhering to procedural aspects of the applications rather than looking into the merits of each application. In such situations, it is worth reflecting on the NEAA’s functioning and composition over the last 12 years.

We begin by describing the rationale behind enacting the NEAA Act and the process that led to the formation of such a quasi-judicial authority to hear appeals against project clearances given by the MOEF. We then examine the composition of NEAA and the underlying flaws in selecting technical members. We discuss the process of hearing appeals in case-specific projects and the methods adopted by the authority. Finally, we question whether India needs such an authority to hear appeals against clearances given to projects by the MOEF.

2 Rationale of the NEAA Act

Over the last three decades there has been a flurry of environmental litigation both at the Supreme Court and high court levels addressing different dimensions of environmental problems across the country. The nature of these matters is such that they

require constant monitoring of the directions issued by the courts. The increasing environmental litigation at all levels has placed pressure on the constitutional courts to allocate adequate time for environmental cases. While the Supreme Court has been actively involved in dealing with environmental litigation, it has expressed deep concern about its inability to resolve environmental issues involving complex scientific and technical matters. The Supreme Court in the *M C Mehta vs Union of India* case² anticipated this problem: It suggested that environmental courts be set up on a regional basis with one professional judge and two experts drawn from the ecological science community. This would ease the initial burden of high courts and the Supreme Court, whose members have no scientific or technical expertise. The Law Commission's 186th report³ also suggested setting up an "environmental court" to deal with the increasing number of environmental lawsuits.

With the increased emphasis on the impact of large projects on the environment in general, the granting of environmental clearance for such projects has assumed significance. The decision to grant environmental clearance is made by the state and central governments. A need was felt to create a forum for questioning these decisions. In the environmental impact assessment (EIA) notification issued under the Environment Protection Act, 1986, a detailed procedure was outlined whereby public hearings are to be conducted to address objections that may be raised by communities and individuals to the grant of environmental clearance to a project. But what would happen if a local community or group of citizens disagreed with the grant of clearance, and wanted to challenge it? A clearance could be opposed on the grounds of an inadequate or incomplete impact assessment or that the mandatory public hearing was not conducted properly. These are not theoretical grounds; they exist in reality. Despite substantive and procedural violations, the MOEF has continuously granted clearances. Before the enactment of the NEAA Act, in 1997, there was no forum other than the high court or the Supreme Court where such clearances could be challenged.

The NEAA was intended to be an independent authority presided over by a former judge. The NEAA Act describes the functions, powers and jurisdiction of the Authority.⁴ The Authority, based in Delhi, is supposed to have three members, namely, a chairperson, vice-chairperson and a member. The Authority is available only to those challenging an environmental clearance. An applicant cannot challenge the denial of a clearance. The Act specifies that an aggrieved person must challenge the grant of an environment clearance within 30-days of the grant decision. If a person is unable to fulfil this requirement, an outer period of up to 90 days is allowed. But to qualify for this exemption, the petitioner must prove that there was sufficient reason for not being able to file the appeal within the 30-day time limit. Since the appeals before the NEAA challenge the decisions of either the central government or the state government, the NEAA is expected to function in an impartial and independent manner.

3 Composition of NEAA

The NEAA was formally constituted in 1997 with the appointment of former Supreme Court justice, N Venkatachala as chairman, Nirmla Buch as vice-chairman, and Ejaz Ahmad and Surinder Singh as other members of the Authority. The original composition of the NEAA did not meet the purpose of the enactment. Although the appointment of the chairperson and vice-chairperson conformed to the Act, the technical members appointed were not really technical – Ejaz Ahmad was a former member of the Indian Administrative

Service (IAS) and a senior officer in the Uttar Pradesh state government. Surinder Singh had been principal chief conservator of forests of the government of Jammu and Kashmir.⁵ There were no technical persons from the fields of conservation, environmental management or science, thus defeating the main purpose of the legislation.

The current composition of the NEAA also suffers from serious deficiencies. Pursuant to the order of the Delhi High Court, the MOEF appointed three members to the NEAA – Kushlendra Prasad (retired member of the Indian Forest Service (IFS) and former principal chief conservator of forests, Uttar Pradesh); I V Mannivannam (retired member of the IAS in Tamil Nadu); and J C Kala (retired member of the IFS and former director general of forests, MOEF). A former member of the IFS cannot be treated as a technical member under the provisions of the NEAA Act – the issues related to environmental clearances such as public hearings and environmental impact assessments are never dealt with by the members of the IFS. At the state level, IFS officers serve in various posts ranging from divisional forest officers to conservator. They are in charge of forest and wildlife protection and management activities.

At the central government level, the MOEF is divided into the environment wing and the forest wing. The approvals under the forest wing are administered by the Forest Advisor Committee (FAC), comprised largely of members of the IFS. By contrast, approvals under the environment wing are under the control of the



asci

ADMINISTRATIVE STAFF COLLEGE OF INDIA

Requires

CHIEF - DIRECTOR GENERAL'S OFFICE

To help in preparing research notes, draft minutes, correspondence and organising conferences etc., He/She, as appropriate, would scrutinise papers put up for D.G's approval. It is a senior position that calls for high level of integrity, an ability to write well, work to flexible times and advise the D.G on a confidential basis. The candidate could be around 35-45 years with a Post-Graduate Degree in Social Sciences. Gross salary Rs.31,860/- per month at the minimum scale of pay (8550-380-14325) including dearness, house rent, conveyance allowances and contributory PF. In addition, candidate will be entitled to LTC, Medical benefits, etc., as per the College norms. The contractual appointment will be for three years initially, and renewable.

Interested candidates may apply in confidence, giving three references, within two weeks to :

The Registrar & Secretary
Administrative Staff College of India
 Bella Vista, Raj Bhavan Road, Hyderabad – 500 082.
 Ph: 040 - 6653 3082 / 6653 3000
 E-mail: registrar@asci.org.in

Expert Appraisal Committee (EAC), whose members are generally scientists. Hence, a member of the IFS or the IAS has no competence in matters concerning environmental clearances.

It seems obvious that the posts of technical member(s) of the NEAA have become retirement jobs for superannuated officers from the MOEF and the state government. This is not only unseemly and corrupt; it also deprives the NEAA of expert members who could render careful and knowledgeable decisions on crucial ecological issues. Appeals before the NEAA generally challenge the merits of a MOEF decision or a recommendation of the EAC.⁶ Thus, the role of the technical members becomes very crucial in determining whether the decision arrived at by the MOEF based on the recommendation of the EAC is proper, and whether suggested safeguards satisfy norms of environmental management. Projects ranging from thermal power plants, dams, railways, airports, uranium and mining are subjects of appeal before the NEAA. The technical members are required to critically evaluate the scientific and technical aspects of the decision-making and suggest appropriate action. In such situations, if the technical members

are unqualified, they cannot perform their appellate function.

The present composition of the NEAA has failed to serve as an effective redressal mechanism for citizens aggrieved by the grant of environmental clearances. Appeals concerning legal aspects have not been addressed since there has been no chairperson/former judge for the last eight years. Scientific aspects have been decided by civil servants who have been trained as administrators and forest officers. Such people have no practical experience in the field of environmental protection. Since most of the important issues in the appeal are unaddressed, the aggrieved persons file writ petitions to the high courts, thus defeating the whole purpose of constituting specialised authorities.

The faulty composition of the NEAA, in addition to the non-appointment of the chairperson and vice-chairperson, totally denies access to justice for citizens aggrieved by grants of environmental clearances. This denial of access to justice also denies Indian citizens their right to a safe and healthy environment, part of the Right to Life under Article 21 of the Constitution. A number of appeals concerning dams on the Ganga in Uttarakhand,

thermal power plants in Maharashtra, a uranium mining project in Andhra Pradesh and steel factories in Chhattisgarh are pending adjudication in the NEAA. A qualified and independent Authority is essential to the appellate function.

4 Process and Method of NEAA

Between 1998 and 2008, 50 applications were filed before the NEAA against environmental clearances.⁷ In this section, we highlight selective cases that demonstrate the singular inadequacy of the NEAA, as currently constituted, in hearing appeals challenging project clearance decisions of the MOEF.

Loharinag Pala Case

The challenge against environment clearance for the Loharinag Pala project was dismissed on 20 May 2005 on the grounds that the applicant had delayed filing his petition beyond the 30-day window after the approval was granted, and there was no proven reason for this delay.⁸ The applicant, Vimal Bhai, along with the Matu People's Organisation and advocates Ritwick Dutta and Rahul Chaudhary took the issue before the Delhi High Court and invoked its jurisdiction

SAMEEKSHA TRUST BOOKS

Global Economic & Financial Crisis

Essays from *Economic and Political Weekly*

In this volume economists and policymakers from across the world address a number of aspects of the global economic crisis. One set of articles discusses the structural causes of the financial crisis. A second focuses on banking and offers solutions for the future. A third examines the role of the US dollar in the unfolding of the crisis. A fourth area of study is the impact on global income distribution. A fifth set of essays takes a long-term view of policy choices confronting the governments of the world.

A separate section assesses the downturn in India, the state of the domestic financial sector, the impact on the informal economy and the reforms necessary to prevent another crisis.

This is a collection of essays on a number of aspects of the global economic and financial crisis that were first published in the *Economic & Political Weekly* in early 2009.

Pp viii + 368

2009

Rs 350

Available from

Orient Blackswan Pvt Ltd

Mumbai Chennai New Delhi Kolkata Bangalore Bhubaneshwar Ernakulam Guwahati Jaipur Lucknow

Patna Chandigarh Hyderabad

Contact: info@orientblackswan.com

in this matter, as the NEAA is a body based in New Delhi. This petition argued first that the Loharinag Pala case needs to be reconsidered in the NEAA. Second, and equally important, the NEAA is operating only with a vice-chairman, and not with the duly qualified five-member body that it should have. Therefore its decision on the Loharinag Pala must be reconsidered.

Following this challenge, on 29 September 2005, the Delhi High Court upheld the arguments and prayers of the applicants and noted strongly that the NEAA order in the Loharinag Pala case:

overlooked that these petitioners deserve to be heard on merits as the order of clearance and setting up of the project was bound to affect a sizeable population in the area. As against this the Authority has adopted a very hyper-technical approach in rejecting the petitioners' application for condonation of 23 days delay instead of dealing with their plea on merit.

The high court quashed the NEAA order and reinstated the appeal to be heard by the NEAA. On 5 February 2007, the NEAA gave its final order in the case challenging the environment clearance given to the Loharinag Pala hydroelectric project in Uttarakhand. This 600 megawatt (MW) run-of-the-river project is being constructed by the National Thermal Power Corporation (NTPC) on the Bhagirathi river, which is an important tributary of the Ganga. The long course of the challenge, leading up to this verdict, has many lessons for regulation of large projects. For the NEAA itself, this verdict marks a small positive direction, in contrast to its otherwise unimpressive record.

Monnet Ispat and Energy Project

One of the most recent NEAA appeals concerns the clearance of the Monnet Ispat and Energy Limited plant in Raigarh, Chhattisgarh.⁹ The Authority, on 31 December 2008, ordered that the appeal against this plant must be dismissed because a small and active civil society group called Jan Chetana was not eligible to file an application before the NEAA. Jan Chetana members have regularly petitioned MOEF, participated in public hearings, filed and sought orders using the Right to Information. But all this was not enough. It took the NEAA seven hearings and an 11-page

order to declare that the Jan Chetana and its members are not aggrieved by the grant of clearance, and thus the petition cannot be heard on merit.

Aluminium Smelter Plant Case

In April 2007, Prafulla Samanthra, a local environmental activist in Orissa, filed an appeal against the MOEF's grant of clearance for setting up of an aluminium smelter plant at Jharsuguda, Orissa by the Vedanta Corporation.¹⁰ The NEAA dismissed the appeal on the ground, again, that the petitioner is not an aggrieved party. The NEAA declared that the appellant had sought to take advantage of clause (a) Section 11 of the NEAA Act by claiming that he is a social and environmental activist involved with issues concerning tribals as well as the environment. He also works with the affected communities of Brundamal and Bhurkamura district, Orissa on issues of development. The NEAA further said:

While his representations to Orissa Pollution Control Board and others on faulty EIA report, postponement of public hearing and not attending public hearing on personal reasons are not disputed, we could not find him affected in any manner so as to satisfy the criteria.

Borga Iron Ore Mining Case

In October 2007, Utkarsh Mandal, a local non-governmental organisation in Goa, filed an application against the environmental clearance given to Pariduranga Timblo Industries for renewal of the mining lease for the Borga Iron Ore Mine, in Rivona, South Goa.¹¹ The appeal was admitted for hearing on merit. The environmental clearance was challenged on the grounds that the participants at the public hearing and members of the public and the gram sabha of Rivona have totally opposed the project. The applicant also stated that the mining activity will affect the quality of soil, hamper the yield of fruit-bearing trees, pollute the groundwater and damage the surface water bodies. The applicant argued that the implementation of the project would violate the Precautionary Principle, which is part of the law of India; and the clearance granted would violate Article 21 of the Constitution of India which protects the right to life.

The NEAA, however, held that the Environmental Impact Assessment Report covered all the critical aspects of the mining project. It also held that the public hearing conducted by the state accorded with the provisions of the EIA notification dated 14 September 2006, which was duly considered by the EAC and the MOEF before issuing the environmental clearance for the project. The NEAA was convinced that the public hearing conducted by the state was not defective. The Authority did observe that in view of the increasing environmental awareness of the public, neither the MOEF nor any of its instruments like the EAC can afford to brush aside public opposition to the various development projects and schemes.

Iron Ore Plant Case

In September 2008, Sushant S Naik filed an appeal under Section 11(1) of the NEAA Act, 1997 against the MOEF's environmental clearance order for setting up a high grade iron ore plant in South Goa.¹² Naik's appeal was filed 46 days late. The Authority condoned the delay in filing the appeal and admitted it for hearing on merit by directing the iron ore plant's lawyers to file a rejoinder, if any. The applicant contended that the EIA report prepared by the MOEF does not conform to its own guidelines, and provides misleading data and false information. Village residents surrounding the plant opposed the setting up of the plant on environmental grounds. The applicant also argued that several issues raised during the public hearing were not recorded in the minutes of the meeting. And most importantly, the grant of environmental clearance was given without obtaining a "no objection certificate" from the village panchayat. After examining various reports with regard to environmental clearance, the Authority held that the EAC had examined pollution-related matters of the project and the ministry had issued the clearance with necessary safeguards. The Authority, therefore, held that the clearance was not defective. The Authority also observed that the panchayat's concurrence is not a mandatory requirement for environmental clearance under the EIA notification, 2006.

5 Is There Any Need for the NEAA?

The composition of the NEAA violates the rules of the Act that established it. The way it has been functioning over the last 12 years raises several questions about its usefulness as a quasi-judicial authority to deal with appeals against environmental clearance projects. The NEAA has not been consistent in its stand about the rules and guidelines that it should strictly follow in dealing with applications. The NEAA also lacks an able leadership to function in a consistent and democratic manner.

Another major issue regarding the NEAA has been the kind of treatment it gets from the MOEF – which has made this quasi-judicial authority dysfunctional by not extending any support. The MOEF, which has been harshly criticised by the Delhi High Court for its careless and lackadaisical approach, has come up with excuses at every NEAA hearing. Responding to the high court's direction for its failure to fill the vacant position for chairperson, the MOEF filed an affidavit saying that it had been unable to get hold of the phone numbers

of retired chief justices of the Delhi High Court or even Supreme Court judges in order to recruit them to serve on the NEAA. The only time the government did try in 2005 to approach a couple of judges, the latter refused the appointment because the pay and other terms of the office were well below the level of a sitting high court judge.¹³ Since this salary parity issue could have been corrected any time over the last two years, one must conclude that the MOEF prefers that the NEAA never functions with all the members in place.

6 Conclusions

The government has tried several tactics to scrap the NEAA, including a claim that a bill to create regional level “green tribunals” is underway and would replace the present structure.¹⁴ An authority to address and resolve public challenges to environmental clearance projects with an emphasis on equity and social justice has been rendered ineffective. The future of the NEAA looks bleak with the central government now apparently determined to abolish it.

NOTES

- 1 *Vimal Bhai and Others vs Union of India and Others*, CM No 15895/2005 in Writ Petition (C) 17682/2005.
- 2 For more details, see *MC Mehta vs Union of India*, AIR 1986 (2) SCC 176.
- 3 See Law Commission of India (2003), *186th Report on Proposal to Constitute Environmental Courts* (New Delhi: Law Commission).
- 4 For more details, see National Environment Appellate Authority Act, 1997 available at <http://envfor.nic.in/legis/others/envapp97.html>
- 5 See Vimal Bhai, supra n 1.
- 6 See Kanchi Kohli, “Another Anti-environment Ruling at the NEAA”, *India Together*, 16 February 2009.
- 7 See Vimal Bhai, supra n 1.
- 8 Ibid at 77.
- 9 Ibid at 79.
- 10 Appeal No 4 of 2007 before the NEAA, between *Prafulla Samantra and MOEF and Others*.
- 11 Appeal No 12 of 2007 before the NEAA, between *Utkarsh Mandal, Mukund N Nayak, Francisco A Fernandes, Santano Jose Lopes and Union of India*, MoEF, Goa State Pollution Control Board, M/S Panduranga Timblo Industries.
- 12 Appeal No 7 of 2008 before the NEAA, between *Sushant S Naik and MoEF*, Goa State Pollution Control Board, M/S Mandovi Pellets.
- 13 See “Salary Not in Sync, Judges Decline Green Panel Job”, Available at <http://www.indianexpress.com/news/salary-not-in-sync-judges-decline-green-panel-job/249638/0>
- 14 See “Green Tribunal Gets Cabinet Go-ahead”, *The Times of India*, 25 July 2009.

Centre for the Study of Developing Societies, Delhi Regular Faculty Positions

The Centre for the Study of Developing Societies invites applications for two regular faculty positions at the level of: **Associate Fellow** [8000-275-13500 (pre-revised)]

Areas of Specialisation:

Faculty positions are for scholars who work under the following rubrics that the Centre has specialized in:

- Culture, state and society
- History of ideas and social practices
- Political thought and theory

An additional preference would be for scholars who can contribute to the management and editing of a Centre journal.

Qualifications:

The *essential qualification* for these positions is a demonstrated capacity to undertake high quality, independent research. Evidence of published work of high quality shall be considered more important than formal academic record, degrees or experience.

In addition, the *desirable qualifications* for **Associate Fellow** is good academic record with doctoral degree or equivalent published work.

Preference:

The Centre will give preference to women scholars, scholars from the Scheduled Castes, Scheduled Tribes, Other Backward Classes and minority communities. If you belong to any of these categories, please mention it clearly in your CV.

Selection Procedure:

The candidates short-listed by the Centre will be asked to appear for an interview with the Selection Committee. The Selection Committee is free to consider scholars who may not have applied, may have applied for a higher position, or may not appear for the interview.

Application:

Applications on plain paper, specifying the position applied for, should be sent to the Director, Centre for the Study of Developing Societies, 29 Rajpur Road, Delhi 110054 in an envelop marked “Faculty Positions”. The application must be accompanied by:

- Two samples (chapters from the book or research articles) of published work
- A short statement (of about 500 words) of current and proposed research
- Names and addresses of three referees
- Curriculum Vitae including academic record and a full list of publications (*copies of certificates not required at this stage*)

Last date for receipt of applications:

September 11, 2009: E-mailed or faxed applications shall not be entertained.

Enquiries: Ms. Jayasree Jayanthan,
Administrative Officer

Phone: 23942199, 23951190 Fax: 23943450
E-mail: csdsmain@csds.in; jaya@csds.in