



## Restructuring the Environmental Governance Architecture for India

### SUMMARY

The Discussion Paper examines the current architecture of the main environment-related legislations, namely the Environment (Protection) Act, 1986; Forest (Conservation) Act, 1980; The Wild Life (Protection) Act, 1972; The Water (Prevention and Control of Pollution) Act, 1974; and The Air (Prevention and Control of Pollution) Act, 1981, in the context of the Constitutional provisions and the evolution of approaches to better environmental management, including those emanating from international conventions. The Discussion Paper concludes that the current approach has been unnecessarily and inappropriately centralizing in character and that is the main reason why the legislations have failed in achieving their stated aims and objectives.

In the context of forest-related issues, the Paper recommends the following:

- The more balanced and federal structure of the Wildlife (Protection) Act (after its amendment in 2002) should be used as an example to amend the Forest (Conservation [FC]) Act, create National and State Forest Conservation Boards, and make them more effective in achieving their objective.
- Provisions regarding levy of Net Present Value (NPV) and Compensatory Afforestation (CA) charges and their management and application and other guidelines issued pursuant to Supreme Court directions should be appropriately built into the FC Act rather than into a separate legislation (such as the recently enacted Compensatory Afforestation Act) and the National and State Forest Conservation Boards should manage the Funds for compensatory afforestation activities.
- The National and State Forest Boards and Wildlife Boards should be declared to be "Authorities" under the Environment (Protection) Act for the purposes of forest and wildlife conservation, and to enable coordination with impact assessment, identification of "go, no-go" areas, cumulative and regional impact assessments, etc.

The Paper recommends that where environmental issues are concerned:

- There is need for a single overarching legislation covering water, air, etc., for purposes of protection and improving the environment. The Air (Prevention and Control of Pollution) Act, 1981, also enacted under article 253, rather than the current EP Act would be a more appropriate starting point in so far as institutional structures and mechanisms are concerned, since it better reflects

#### Authors

**Mr S Vijay Kumar**, Distinguished Fellow, TERI

**Ms Nidhi Srivastava**, Consultant, TERI

#### With contribution from:

**Mr R K Bansal**, Former CEO, Sustainable Mining Initiative

#### Reviewers

**Dr Prodipto Ghosh**, Distinguished Fellow, TERI

**Dr Suneel Pandey**, Director, TERI

**Dr Ritu Mathur**, Director, TERI

**Ms Divya Datt**, Associate Director, TERI

the federal character of the governance framework of the country.

- The basic structure should comprise: (a) A State Environment Management Authority (SEMA) at State level, with accountability to the State legislature; and (b) A National Environment Management Authority (NEMA) constituted by the Central Government with accountability to Parliament.
- The powers under the legislation and in the various Rules thereunder should vest primarily with SEMA, with the State Government and Central Government (on advice of NEMA) having the power to issue directions.
- Similarly, SEMA should perform the functions presently performed by the State-level Environmental Impact Assessment Authorities (SEIAA), with the State Government setting up Expert Appraisal Committees (EAC).
- To ensure that the environmental governance systems in the States can evolve to acceptable standards, an All India Service: Indian Environment Service, should be created, along with mechanisms to encourage participation of academic and technical institutions in the management and policy making processes.

## Introduction

The environment is under stress for a variety of reasons the world over. In the case of India, high population density in certain areas has been putting pressure on natural resources and carrying capacity is a major reason. Poverty and the need to increase the rate of economic growth are other major reasons.

India's strong base in science and technology, liberal democratic values, including an active civil society, independent judiciary, and a well-developed administrative system enable a better understanding of the need for a fine dynamic balance and to put in place appropriate mechanisms for this purpose. However, many of the mechanisms were initiated in the 1970s and early 1980s, when systems were not as well evolved and the state of knowledge was also not as good. As a result, in several sectors, there is a perception that the framework of environmental laws are an impediment to economic growth and that the framework is also not achieving its intended objective of environmental protection.

The term 'environment', in this Discussion Paper, has been referred as defined in the National Environment Policy 2006 (henceforth NEP 2006),

namely, that "Environment comprises all entities, natural or manmade, external to oneself, and their interrelationships, which provide value, now or perhaps in the future, to humankind. Environmental concerns relate to their degradation through actions of humans". The relevant extracts from NEP 2006 are provided in the Appendix.

## The Constitutional Framework

It is important to bring to the fore the Constitutional scheme of things so as to analyse the extent to which this is aligned with current objective requirements, and is not a cause of the impediment.

Article 246 of the Constitution of India confers upon Parliament exclusive power to make laws with respect to any matter in List I (Union List) of the Seventh Schedule and provides the State Legislature the exclusive power to make laws with respect to any matter in List II (State List). Subjects in List III (Concurrent List) can be the subject matter of law by Parliament or a State Legislature, with the Central law normally prevailing in case of a contradiction (subject to the provisions of Article 254(2), which enables a State law to prevail in the State if assented to by the President).

"Environment" as a subject does not figure in the Seventh Schedule in any of the Lists. Article 48A, inserted into the Constitution as a result of the Constitution (Forty-second Amendment) Act 1976, provides, as a Directive Principle of State Policy, that the State shall endeavour to protect and improve the environment and safeguard the forest and wildlife of the country. The same Constitutional Amendment Act also moved "forests" and "protection of wild animals and birds" from the State List into the Concurrent List of the Seventh Schedule. One of the objects of the Constitution Amendment Act was in fact to "*remove the difficulties that have arisen in achieving the socio-economic revolution that would end poverty and ignorance and disease and inequality of opportunity*".

In this background, the position regarding the various Central legislations that are "environmental" in character are enumerated as follows:

- The Indian Forest Act 1927 was enacted before the concept of a "State List" of subjects was formalized initially in the Government of India Act 1935, and thereafter in the Constitution of India 1950.

- The Forest (Conservation) Act 1980, (in short FC Act 1980) passed by Parliament flows from entry 17A of List III (Concurrent List) of the Seventh Schedule. This was facilitated by the Constitution (42nd Amendment) Act 1976, which *inter alia* moved the subject from the State List to the Concurrent List.
- In the case of the Wild Life (Protection) Act, 1972, (in short the “Wild Life Act”), the legislation is based on a Resolution of the Legislature of 11 States, invoking Article 252 of the Constitution that provides for Parliament to pass a common law for two or more States making such a request by a resolution of the State Legislature. The preamble to the Act states, “AND WHEREAS Parliament has no power to make laws for the States with respect to any of the matters aforesaid except as provided in Articles 249 and 250 of the Constitution; AND WHEREAS in pursuance of clause (1) of Article 252 of the Constitution resolutions have been passed by all the Houses of the Legislatures of the States of Andhra Pradesh, Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, Manipur, Punjab, Rajasthan, Uttar Pradesh and West Bengal to the effect that the matters aforesaid should be regulated in those States by Parliament by law ..(Preamble omitted by the Amendment Act: 44 of 1991, presumably because wildlife became a Concurrent subject in 1976).
- In the case of the Water (Prevention and Control of Pollution) Act, 1974, (in short the “Water Act”) too, the legislation is based, as mentioned in the Preamble, on a Resolution of the Legislatures of 12 States, invoking Article 252 of the Constitution as in the case of the Wild Life Act (Unlike the Wild Life Act, the Preamble to the Water Act continues as Water remains a State subject).
- The Air (Prevention and Control of Pollution) Act, 1981, (in short, the “Air Act”) was passed by Parliament under Article 253 since this Article empowers Parliament to make laws for implementing any treaty, agreement or convention with other countries or at any international conference. The Air Act cites the decision of the Stockholm Conference 1972, with regard to “the need to take appropriate steps

for the preservation of the natural resources of the earth which among other things, include the preservation of the quality of air and control of air pollution”.

- While the proximate cause for enacting the Environment (Protection) Act 1986 may have been the Bhopal Gas tragedy, The Environment (Protection) Act 1986 (in short the “EP Act”) too was passed by Parliament claiming legislative competence under Article 253 of the Constitution. The Act cites the decision of the Stockholm Conference with regard to appropriate steps for “protection and improvement of the environment and the prevention of hazards to human beings, other living creatures, plants and property”.

From the above, it is clear that Parliament has so far not made any law in respect of the environment claiming legislative competence under Article 246; only the FC Act 1980 was made under this provision. The issue of how “environment” should be treated for purposes of legislative competence in a federal situation is a subject of some complexity. While to some extent the historical evolution of the federative forces will be an important factor, the scientific framework of what constitutes and directly influences the environmental and ecological processes must have primacy, and the law must harmonize itself with science and the natural scheme of things, particularly when responses of a mitigative and adaptive character are increasingly necessary.

At this stage it would be useful to list out some of the main subjects related to the environment and notice how these are distributed among the “Union”, “State”, and “Concurrent” Lists. Boxes 1, 2, and 3 provide the details for the Central, State, and Concurrent subjects, respectively.

It is apparent that the distribution of many of the subjects generally, though not explicitly, follows the “principle of subsidiarity”, doubtless as a result of the evolutionary process through the Government of India Act 1919 and 1935 to the Constitution of India, 1950. In particular:

- Subjects such as land are left to the States
- Subjects that require a national uniformity of approach like airways and railways are in the Central domain

### Box 1: Central subjects

- Participation in international conferences and implementing treaties, agreements, etc., with foreign countries (13);
- Railways (22), National Highways (23), National waterways (24), Airways (29)
- Industries (under Union control) (52)
- Regulation of oilfields (53)
- Fishing beyond territorial waters (57)
- GSI, BSI, and ZSI (68)
- Meteorological organizations (68)
- Inter-State migration and inter-State quarantine (81)
- Any other matter not enumerated in List II (State List) or List III (Concurrent List), including any tax (97)

(The number in brackets appearing against a subject is the serial number of the entry in the Union List in the Seventh Schedule.)

### Box 2: State subjects

- Land (18) and Water (17)
- Public health (6), agriculture (14), livestock (15), fisheries (21)
- Industries (other than Defence or under Union control by law) (24)
- Forests and protection of wild animals and birds was a State subject till 1976

(The number in brackets appearing against a subject is the serial number of the entry in the State List in the Seventh Schedule.)

### Box 3: Concurrent subjects

- Forests (17A), protection of wild animals and birds (17B)
- Regulation of Inter-State waterways and river valleys (56)
- Inter-State spread of infectious diseases (29)
- Mechanically propelled vehicles (35)
- Factories (36), boilers (37)
- Electricity (38)
- Mines and minerals (23) (actually State, but with the Central Government having power to legislate in public interest [54])
- Economic and social planning (20)

(The number in brackets appearing against a subject is the serial number of the entry in the Concurrent List in the Seventh schedule)

- Subjects which have an inter-state character like spread of infectious diseases are in the Concurrent List; and
- Subjects which may have elements of national interest are managed by a special formulation that provides for the subject to be in the State list, subject to the power of Parliament to carve out a portion for central control (e.g national highways and waterways, mineral development, industry etc). This is a stronger formulation than putting the subject in the Concurrent List, as it ousts State competence to make law to the extent that Parliament reserves to itself.

Clearly, addressing the issue of “environment” for purpose of environmental governance must be aligned, and in consonance, with this basic approach of the Constitutional framework, not only from a constitutional point of view but also because this would place it more conformably with a framework that has stood the test of time.

### Addressing the issue of “environment” as a subject in a federal situation

In many ways, the Constitution (42nd Amendment) Act 1976 was a watershed event. The amendments to the Constitution covered a wide scope, and one of the stated objects was to make the Directive Principles more comprehensive and give them precedence over Fundamental Rights so as to facilitate socio-economic reforms. Among other things, the amendment created a new Part to the Constitution, Part IV A, called “Fundamental Duties”. In respect of environmental matters, the Act made the following changes to the Constitution:

- A new article, article 48A was inserted in the Directive Principles that “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”.
- In the newly created Part IVA “Fundamental Duties”, a new article, Article 51A was inserted, making it the duty of every citizen of India to, *inter alia*, “protect and improve the natural environment including forests, lakes, rivers and wild life.”
- In List III (Concurrent List) of the Seventh Schedule, two new entries were inserted, namely: “17A Forests” and “17B protection of wild animals and

birds” and the corresponding entries 19 and 20 in List II (State List) were omitted.

It may be noted that though the subjects of “forests” and even “protection of wild animals and birds” were moved from the State List to the Concurrent List, the subject of “environment”, though mentioned in the newly inserted Articles 48A and 51A was not inserted into the Concurrent List at the same time, an omission which cannot be deemed to be either unintentional or insignificant. As evident from the discussion further ahead, the difficulties with attempting to incorporate “environment” as a subject in any of the three Lists was probably the reason for the omission.

In the 1970s, and even in the 1980s, sectoral governance systems in the States were not so well developed, and the Central Government had to take national ownership for an evolving subject whose nature and extent were not fully understood. As the body of knowledge grows, the multi-disciplinary and interdisciplinary linkages are becoming clearer. In some sectors, these linkages can be quite complex. Understanding the complexity and evaluating the nature and appropriateness of the response and identifying the best manner to deliver the response, both mitigative and adaptive, is key to being able to address the environmental issues.

To the extent that through the accumulation of knowledge and experience and the development of capacity, State-level governance systems now have better potential, and new local governance systems (Panchayats and Municipalities) have also been created, the question is whether applying federal (and subsidiarity) principles, the architecture for environmental management and governance can be improved in a context where there is a widespread feeling that the current architecture is inefficient and ineffective in balancing the needs of socio-economic development with the imperative of protecting the environment.

Some of the issues that need to be addressed in this process have been identified as follows:

- In Constitutional terms, what should be the overall framework in respect of Central and State (including Panchayat and Municipal) responsibilities?
- How should the governance and regulatory systems be designed so as to balance socio-

economic and environmental requirements in a democratic context and in a situation of regional as well as social disparities?

- How should the approach be made science-based as well as socially inclusive?.

Given that “environment” as a subject does not explicitly figure in the Seventh Schedule, an important consideration is to analyse the extent to which any such governance framework (including the current one) is aligned with the Constitutional provisions and the current distribution of subjects, and in particular, whether:

- For all intents and purposes, “environment” can and should be treated as a Central subject in terms of Article 248 (read with entry 97 of the Central List) which provides for Parliament to make law for any subject not mentioned in the State and Concurrent Lists;
- The provisions of Article 253 which provides for Parliament to make law in furtherance of international treaties and commitments are adequate as has been the experience in the past in respect of the Air Act and EP Act; and
- Given the deep links between “environment” and many of the subjects in the State list ( including land, water, industry, public health, agriculture and related activities), the architecture needs to be more layered, involving a combination of a Framework which meets international obligations and provides legislative teeth in respect of matters in the Central and Concurrent Lists, along with State level laws ( under Article 246(3) or even under Article 252 as has been done in respect of the Water Act) for matters in the State List.

Before proceeding further, it is clarified that for purposes of this Discussion Paper, the focus is more on the “environmental governance” aspect. Though “forests” and “wild life” are related to the environment, this paper does not go into depth (except with respect to the FC Act) for the reason that the approach to the governance framework here is already largely settled by the specific mention of the subject in the Seventh Schedule: initially in the State List, and now in the Concurrent List, and the body of laws going back to the Forest Acts of 1865 and 1878 and the current Act of 1927. As a caveat, it

must be added that issues of community ownership and management of forests including traditional rights may need a relook separately.

### The current governance architecture

The National Environment Policy 2006 includes in its Objectives “**vi. Environmental Governance:** *To apply the principles of good governance (transparency, rationality, accountability, reduction in time and costs, participation, and regulatory independence) to the management and regulation of use of environmental resources.*” This section of the Discussion Paper analyses the current legislative provisions with respect to their management, regulatory and accountability functions, and the extent to which they incorporate the principle of subsidiarity within a federal context, and address issues of transparency and reporting, and community and civil society involvement.

### The Forest (Conservation) Act 1980

FC Act 1980 flows from entry 17A of List III (Concurrent List) of the Seventh Schedule.

The main architecture of the Act is as follows:

- the State Government can dereserve or put forest land to non-forest use only with the prior approval of the Central Government (Section 2)
- an Advisory Committee is created in the Ministry of Environment & Forest (MoE&F [now MoEFCC]) to advise it on grant of clearance and also on matters of conservation of forests (Section 3)



- the Central Government is to frame Rules to operationalize the provisions of the Act, which shall be laid before Parliament (Section 4)

The Rules of 2003 (in supersession of the Rules of 1981, and as amended in 2004) made in pursuance of the FC Act 1980 provide that every user agency wanting to use forest land for non-forest use must apply to a Nodal officer of the State Government concerned. The State Government after being satisfied that it is justified, recommends the proposal to the Central Government for its prior approval. In respect of areas comprising 5 ha or less (other than for mining) the approval is given by the Regional office of MoE&F. In respect of areas from 5 to 40 ha (other than mining) the approval is accorded by a Regional Empowered Committee of MoE&F. In respect of areas measuring 40 ha or more and all mining proposals, the advice of the Forest Advisory Committee in the MoE&F is taken by the Central Government. The Rules provide that the Forest Advisory Committee shall consist of four senior officials of the Central Government and three non-official experts.

The MoE&F has also issued “Guidelines” from time to time relating to eligibility for grant of approval to different non-forest activities, including “general approvals” and “standard conditions”.

### Judicial pronouncements on the FC Act

In Writ Petition (Civil) 202 of 1995 titled **T.N. Godavarman Thirumulpad vs. Union of India & Ors**, on September 26, 2005, the Supreme Court made the following observation:

*“Natural resources are the assets of entire nation. It is the obligation of all concerned including Union Government and State Governments to conserve and not waste these resources. Article 48A of the Constitution of India requires the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Under Article 51A, it is the duty of every citizen to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures.”*

As an outcome of some proceedings during the case, MoE&F had issued a notification on April 23, 2004,

constituting a “Compensatory Afforestation Funds Management and Planning Authority (CAMPA)” as an authority under Section 3(3) of the Environment (Protection) Act, 1986. The Court in its judgement of September 26, 2005, affirmed that the payment to CAMPA under the notification dated April 23, 2004, is constitutional and valid, and the various clauses of CAMPA should be suitably modified in terms of the judgment within a period of one month.

To better regulate the matter, the Ministry of Environment and Forest drafted a legislation “**The Compensatory Afforestation Fund Bill, 2008**” to achieve the same general objective. As mentioned in the Preamble to the Bill: “NOW, THEREFORE, based on the above orders, directions and observations of the Supreme Court, it is proposed to create a Compensatory Afforestation Fund Management and Planning Authority by an Act of Parliament under Entry 17A of the Concurrent List of the Seventh Schedule to the Constitution, to implement the directions of the Supreme Court to create a Fund namely, Compensatory Afforestation Fund, to bring all the funds so far collected under this Fund, and to create the Compensatory Afforestation Fund Management and Planning Authority.”

The Bill was examined by the Department-related Parliamentary Standing Committee for Science & Technology, Environment & Forests, which in its Report dated October 22, 2008, concluded as follows:

*“19 The Committee is of the opinion that the establishment of such a fund, in the manner proposed in the bill, will allow the Central Government to exercise hegemony through concentration of financial power with the Central Government and encroach upon the normal powers and functions of the State governments. The Committee also expresses its serious concern over the fact that the Central Government may completely bypass the duly elected State Governments and the various state bodies and provide funds directly to the Joint Forest Management Committees, for the implementation of the afforestation programmes of the states, thereby undermining the very concept of federalism which is enshrined in our constitution. The role of local bodies such as Gram Panchayats/Gram Sabhas, etc., has been completely ignored in the Bill.”*

Keeping in view the observations of the Committee, the MoE&F introduced **The Compensatory Afforestation Fund Bill 2015** (“CAF Bill 2015” in short) in Parliament in May 2015 in place of the 2008 Bill which had lapsed. The 2015 Bill addressed many of the shortcomings of the 2008 Bill, particularly the perception of excessive centralisation, clearly inappropriate in the context of “forest” being a Concurrent subject. The Bill essentially sought to create Funds and institutional structures at both Central and State level. The Bill was referred to the Department-related Parliamentary Standing Committee (DRPSC) on Science & Technology, Environment & Forests soon after it was introduced in Lok Sabha in May 2015. The Standing Committee submitted its report in February 2016, proposing some changes to the Bill. The DRPSC suggested that the Fund should not be used for the Green India Programme, which has its own budgetary allocation. Other suggestions included making a list of environmental services inclusive; using native species in plantations; clear definition of infrastructure and allied activities to avoid any ambiguity and to ensure that money is spent for forest restoration, protection and management; facilitating voluntary relocation of people from protected areas through the fund; approval of the Annual Plan Operations submitted by the State Authorities in a definite timeframe; prior consultation with States before rules are framed; and reducing the share of funds (from 10% to 5%) into National Compensatory Afforestation Fund;

While most of these suggestions were incorporated in the revised Bill, two important recommendations were not included. These are with respect to leaving out Green India Programme from the scope of activities and reducing share of the National Fund. The revised Bill was passed by Lok Sabha and Rajya Sabha in May and July 2016, respectively. The main features of the **Compensatory Afforestation Fund Act, 2016 (CAF Act)**, are enumerated in Box 4. The draft CAF Rules formulated by the Government have not been finalized so far. It is beyond the scope of the present paper to look at the provisions of the draft Rules in detail; however it must be noted that the draft Rules provide that the Annual Report and audited accounts of the National Fund shall be presented in Parliament. There is a similar provision with respect to laying of the

Annual Report and audited accounts of the State Fund in the State Legislature.

### ***The Wild Life (Protection) Act 1972***

The legislation is based on a Resolution of the Legislature of 11 States, invoking Article 252 of the Constitution that provides for Parliament to pass a common law for two or more States making such a request by a resolution of the State Legislature. The Act initially applied to only those State Governments whose Legislatures passed the requisite resolution under article 252 of the Constitution, but was later extended to all States through the Wild Life (Protection) Amendment Act 1991, passed after the subject was brought into the Concurrent List. The original architecture of the 1972 Act was as enumerated in Box 5, and essentially provides for State as well as Central roles and empowered authorities, with the State Government being given operational powers and enough jurisdiction to frame Rules on operational matters:



#### **Box 4: The Compensatory Afforestation Fund Act, 2016 (CAF Act)**

- There shall be a National Compensatory Afforestation Fund at Central level and a State Compensatory Afforestation Fund at State level; along with a National Compensatory Fund Authority and a State Compensatory Fund Authority;
- All payments towards compensatory afforestation, additional compensatory afforestation, penal compensatory afforestation, net present value, catchment area treatment plan or any money for compliance of conditions stipulated by the Central Government while according approval under the provisions of the Forest (Conservation) Act, 1980, or due under the Wild Life (Protection) Act, 1972, as a consequence to be credited to the State Fund, and 10% transferred to the National Fund;
- State Fund to be used for artificial regeneration (plantation), assisted natural regeneration, forest management, forest protection, forest and wildlife related infrastructure development, wildlife protection and management, supply of wood and other forest produce saving devices, and other allied activities in the manner as may be prescribed; interest may be used for meeting the expenses of the State Authority. The National Authority will approve annual plan of operations of the State Authorities for the purpose within three months of receipt;
- The National Fund to be used for meeting the expenses of the National Authority or for a "scheme", including any institute, society, centre of excellence in the field of forest and wildlife, pilot schemes, standardization of codes and guidelines, and such other related activities for the forestry and wildlife sector;
- The Annual Report of the National Authority shall be laid in Parliament and of the State Authority in the State Legislature; the accounts shall be audited by the Comptroller and Auditor-General of India.
- The Central Government, in consultation with the State Governments, may make rules for the management of the National Fund by the National Authority and of the State Fund by the State Authorities. It may also make rules for the conduct of business by the National and State Authorities and their organs;
- The Central Government may, from time to time, by writing give such directions to the National Authority and each State Authority, as it may think necessary;
- In the Statement of Objects and Reasons, the Ministry has stated that the Honourable Supreme Court, in its judgment dated the September 26, 2005, in the case *T.N. Godavarma Thirumulpad vs. Union of India* [Writ Petition (C) No. 202 of 1995], observed that the fund generated for protecting ecology and providing regeneration should not be treated as a fund under Article 266 or Article 283 of the Constitution. The Funds are therefore kept outside the Consolidated Fund of India or Public Account of India.



The Amendment Act of 1991, passed after the subject became a part of the Concurrent List, made a number of changes, (including extending the operation of the Act to the whole of India except the state of J&K; and removing the preamble); none which affected the basic architecture laid out in the original Act, except in the case of reserved forest and territorial waters which were moved from section 18 to a new section 26A for technical reasons, with a proviso that in the case of territorial waters, the prior approval of the Central Government shall be taken for declaring a sanctuary. A significant change was the replacement of the phrase “wild animals and birds” by “wild animal, birds and plants” in the long title of the Act and the addition of a new chapter (Chapter IIIA) dealing with protection of specified plants.

The Wild Life Act was further amended in 2002 (Act no. 16 of 2003) to make important change in the governance structure including the following:

- Linking the legislation (through the long title) to the ecological and environmental security of the country;
- Creating a National Board for Wild Life (replacing a non-statutory Indian Board for Wildlife) chaired by the Prime Minister and for a Standing Committee of the Board chaired by the Minister in charge of Forest and Wild Life (section 5A and B of the main Act);
- Replacing the State Wild Life Advisory Board with a State Board for Wild Life chaired by the Chief Minister (replacement section 6 of main Act).
- Providing for “prior approval” by the National Board before the State Government can permit certain activities in sanctuaries and reserves. (proviso added to section 33 of the main Act)
- Providing for a recommendation by the National Board and for consultation in certain cases. (section 35(5) and (6) of the main Act as amended).

It may be noted here that the Supreme Court in WP (Civil) 337/1995 titled Centre for Environment Law, WWF-I vs. Union of India & Others, vide its order dated 9 May 2002 had directed that no permission for destruction, exploitation or removal of any wildlife (including forest produce) from a sanctuary under Section 29 of the Wildlife (Protection) Act, 1972, should be granted without getting approval of the Standing Committee of Indian Board for Wildlife. Subsequently, the Government enacted an amendment to the Wild Life (Protection) Act 1972 vide Act 16 of 2003 to inter alia give the Board and its Committee a statutory status. The relevant changes to the main Act consequent to the amendment are shown in Box 5 in italics.

### Box 5: The Wild Life Protection Act, 1972

- A Director of Wild Life Preservation in the Central Government (section 3)
- A Chief Wild Life Warden at State level, appointed by the State Government (section 4)
- A State level Wildlife Advisory Board, constituted by the State Government (section 6), entrusted with the responsibility for selection of areas to be declared as sanctuaries, national parks, and closed areas and their administration; and formulation of the policy for protection and conservation of wild life and specified plants (section 8). *Advisory Board replaced with a State Wild Life Board chaired by Chief Minister; and a National Board chaired by Prime Minister created by amendment of 2002.*
- Declaration by State Government of Sanctuaries (section 18), closed area (section 37).
- Declaration by Central Government of Sanctuaries in areas leased or transferred to it by State Government, and control exercised by Director Wild Life Preservation of such areas (section 38).
- Director Wild Life Preservation (or officer authorized by him), Chief Wild Life Warden (or officer authorized by him), etc., has power of entry, search, arrest and detention (section 50).
- State Government or Chief Wild Life Warden has power to compound (section 54), and Courts to take cognizance only on his complaint (section 56).
- Operation of other laws not barred (section 56).
- Central Government can make Rules under the Act with respect to licences for trophies and animal articles, and purchase of animals and Sanctuaries declared by Central Government (section 63); State Government to make Rules in respect of all other matters (section 64).

***The Water (Prevention and Control of Pollution) Act, 1974, (in short the “Water Act”)***

The Water Act is perhaps the first of the “environmental” legislations in India which deal explicitly with pollution and the need to prevent and control it. Significantly, the legislation is based on a Resolution of the Legislature of 12 States, invoking article 252. In fact in the preamble to the Act it is stated that “AND WHEREAS Parliament has no powers to make laws for any of the matters aforesaid...” The fact that “environment” was not a subject in the Seventh Schedule, and that the object of the environmental regulation was “water”, a State subject, was presumably the reason for this statement. Equally significant is the fact that despite the fact that this Act was passed in 1974, the 42nd Constitutional Amendment Act, passed soon after, in 1976, did not seek to insert the subject of “environment” in the Central or Concurrent list, even though “forests” and “wildlife” were being moved from the State List to the Concurrent List through the amendment.

The architecture of the Act, no doubt influenced by these circumstances, is as given in Box 6 and essentially envisages a Central Pollution Control Board under the Central Government consisting of Central Government representatives, as well as five representatives of State Boards; and State Pollution Control Boards under the State Governments, with Members being appointed by the State Governments. Importantly, the functions of the Central Board and the State Boards are laid out in detail, providing for operational responsibility for the State Boards and the responsibility of the Central Board being of advising and coordinating activities. Rule-making powers are also vested with the respective governments.

The Central Government also enacted the Water (Prevention and Control of Pollution) Cess Act 1977, leveraging the earlier-mentioned Resolution of the 12 States under Article 252, to provide for a cess on consumption of water by industries and local authorities to augment the resources of the Central Board and State Boards constituted under the Water Act, 1974. The cess is collected by the States, remitted to the Consolidated Fund of India, and distributed by the Central Government to the States, having regard in part, to the collection made by the State (the implementation of the Goods and Services Tax (GST) from July 2017 has resulted in the cess being

abolished (along with 12 other cesses) through the Taxation Laws (Amendment) Act 2017. It is however beyond the scope of the present paper to discuss the impact on the Central and State Boards).

***The Air (Prevention and Control of Pollution) Act 1981 (in short, the “Air Act”)***

At the United Nations Conference on the Human Environment held in Stockholm in June 1972 (known as Stockholm Conference in short), decisions were taken “to take appropriate steps for the preservation of the natural resources of the earth which among other things, include the preservation of the quality of air and control of air pollution”. The Air Act was conceived to implement the decisions of the Conference in so far as they relate to the preservation of the quality of air and control of air pollution. The Statement of Object and Reasons appended to the Bill introduced in Parliament referred to the need for an integrated approach to tackle environmental problems relating to pollution as the reason for proposing that the Central Board and, where constituted, State Boards under the Water Act 1974, should perform the functions under the Air Act.

Since the Central Board and State Boards (where they stood created) under the Water Act were adopted as institutions in the Air Act, the overall architecture and federal relationship emanating from the Water Act was imported into the Air Act, even though it was enacted pursuant to Article 253 of the Constitution (giving effect to international agreements) rather than Article 252 (common law for two or more States on a State subject). Box 7 provides the details. The fact that



### Box 6: The Water (Prevention and Control of Pollution) Act, 1974

- The Central Pollution Control Board under the Central Government, consisting of Central Government representatives, as well as five representatives of State Boards (Section 3)
  - State Pollution Control Board under the State Government, with Members being appointed by the State Governments (section 4)
  - Two or more contiguous States can have a Joint Board (section 13), with the Central Government being empowered under section 15 to give directions to such a Joint Board in case of only matters relating to jurisdiction of two or more states.
  - The main functions of the Central Board consist of the following:
    - Advising the Central Government
    - Coordinating activities of State Boards
    - Providing technical assistance and carrying out and sponsoring research and investigations
    - Planning and organizing training and mass media activities
    - Collecting, compiling, and publishing technical data and preparing manuals, codes, and guides
    - Laying down standards in consultation with the concerned
- State Government**
- Establishing or recognizing laboratories for analysis of samples, etc. (section 16)
  - The main functions of the State Boards comprise:
    - Planning and securing execution for prevention, control, and abatement of pollution of streams and wells
    - Advising the State Government
    - Collecting and disseminating information
    - Encouraging and conducting investigations and research
    - Collaborating with the Central Board in organizing training of persons engaged in prevention, control or abatement of water pollution.
    - Inspections in connection with consent to operate, etc.
    - Laying down technical standards
    - Making orders for prevention, control or abatement of discharge, etc.
    - Advising the State Government on location of industry likely to pollute.
    - Establishing or recognizing laboratories for analysis of samples, etc. (section 17)
  - Central Government is empowered to give directions to the Central Board. The Central Board as well as the State Government are empowered to give directions to the State Board. Where a State Board defaults in complying with the directions of the Central Board and a grave emergency arises, the Central Government may direct the Central Board to perform the functions of the State Board for such area, period and purpose as may be specified (section 18)
  - The State Board has the power to obtain information, under section 20; to take samples, under section 21 and to get them analysed; powers of entry and inspection under section 23; to give (or refuse) consent to establish or to operate, under section 25;
  - No Court shall take cognizance of an offence under the Act except on a complaint by the State Board (with the exception of a complaint of a person who has given a 60 day notice to the Board of his intention to make a complaint) (section 49).
  - Appeals against the orders of the State Board lie to a State Appellate Authority under section 28; and the State Government may exercise revisionary powers under section 29.
  - The Central Government shall provide funds for the functioning of the Central Board and the State Government shall provide funds for the functioning of the State Board (sections 34 & 35) (*Separately, Parliament passed The Water (Prevention and Control of Pollution) Cess Act 1977, which provides for a levy of a cess by the central Government. The cess is collected by the State Government and remitted to the Consolidated Fund of India. The proceeds of the cess can be paid by the Central Government to the Central and State Boards for being utilized under the Water Act 1974.*)
  - The Annual Report of the Central Board shall be laid before Parliament and the Annual Report of the State Board shall be laid before the State Legislature (section 39).
  - The Central Board is required to furnish to the Central Government, and the State Board to the State Government and the Central Board, reports and returns as may be required (section 57).
  - The Central Government can supersede the Central Board or a Joint Board for default in performance of functions (section 61).
  - The State Government can supersede a State Board for default in performance of functions (section 62).
  - The Central Government may make Rules under the Act for the Central Board and the State Government may make Rules under the Act for the State Board (sections 63 and 64).

“air”, unlike “water “ was not specifically mentioned in any of the Lists in the Seventh Schedule was not of any relevance in the circumstances, though of course, air has many properties similar to water and therefore the approach was not inappropriate on its merits.

### *The Environment (Protection) Act 1986 ( in short the “EP Act”)*

The EP Act, like the Air Act 1980, is enacted under Article 253 of the Constitution, and cites the decision of the Stockholm Conference 1972 with regard to

**Box 7: The Air (Prevention and Control of Pollution) Act, 1981**

- The Central Board and State Boards under the Water Act to exercise functions under the Air Act (Sections 3 and 4).
- States who have not constituted State Boards shall constitute State Boards (Section 5) (Since the law is under Article 253, it allows the Act to make a mandatory provision). There is however no provision for Joint Boards under this Act, the functions of the Central Board and State Boards for improving the quality of air and to prevent, control, and abate air pollution, are very similar to the provisions under the Water Act. (Sections 16 and 17).
- As in the case of the Water Act, the Air Act provides for the Central Government to give directions to the Central Board, and for the Central Board as well as the State Government to give directions to the State Board (Section 18).
- Specific to air, Section 19 empowers the State Government to notify areas as “air pollution control” areas and ban use of fuel or burning of other material.
- Also specific to air, Section 20 empowers the State Government to issue instructions to Motor Vehicle Registration authorities regarding enforcement of emission standards laid down by the State Board.
- The State Board has the power of giving consent to establish or operate an industry in an air pollution control area (Section 21).
- The State Board has the power of entry and inspection, under Section 24; to obtain information, under Section 25; to take samples, under Section 26; for analysis of samples under Section 27;
- Provision for appeal, in a manner similar to the provisions in Water Act (Section 31). However there is no power of revision with the State Government.
- State Board (subject to directions of the Central Government, if any) empowered to give directions for closure, regulation, operation, etc., and stoppage or regulation of electricity, water or any other service (Section 31-A).
- The Central Government contributes to meet the expenses of State Boards set up under the Air Act (Section 32). It may be noted that this is different from the provisions in respect of Boards set up under the Water Act where the Central Government has levied a cess on behalf of the States to meet the expenses of the Central Board and of the State Boards, perhaps because “water” is a State subject, and “air” is not explicitly so. However, the Central Government does not meet the expenses under the Air Act of State Boards set up under the Water Act performing functions under the Air Act; Article 258(2) of the Constitution allows Parliament to make laws which confers powers and imposes duties on a State even in respect of matters not in the Concurrent or State List, but Article 258(3) provides that the Central Government shall pay the State Government for the extra cost of administration.
- As in the case of the Water Act, the Air Act provides that the Annual report of the Central Board shall be laid before the Parliament and of the State Board before the State Legislature (Section 35).
- As in the case of the Water Act, the Air Act in Section 43 provides that no Court shall take cognizance of an offence under the Act except on a complaint by the State Board (with the exception of a complaint of a person who has given notice to the Board of his intention to make a complaint).
- As in the Water Act, the Air Act provides for the State Government to supersede a State Board for defaulting in its performance (Section 47)
- As in the Water Act, the Central Government may make Rules under the Act for the Central Board and the State Government may make Rules under the Act for the State Board (Sections 53 and 54).

appropriate steps for “protection and improvement of the environment and the prevention of hazards to human beings, other living creatures, plants and property”, and states that “it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of the environment and the prevention of hazards to human beings, other living creatures and property”.

The EP Act restricts the scope of its direct application to the Central Government, and envisages a role for State agencies only through delegation under Section 23. The Act gives the Central Government

the “power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution” (Section 3[1]).

The general architecture of the EP Act (see Box 8 for more details) empowers the Central Government to coordinate actions by State Governments under this Act and other law relating to the objects of this Act; to ensure planning and execution of programmes for prevention, control, and abatement of environmental pollution; laying down standards; restricting areas for

operation of industries; laying down procedures and safeguards; inspection for prevention, control, and abatement of environmental pollution; establishment and recognition of laboratories; collection and dissemination of information; and preparation of manuals, codes, and guides, etc. It may be stated that these powers are similar, in respect of all environmental issues, to what the State Boards exercise under the Air and Water Acts, and to the extent that these powers are exercised in respect of the environmental aspects of water or air, may possibly constitute infringement in the domain of the States.

The EP Act empowers the Central Government to constitute one or more Authorities for exercising the powers of the Central Government. The Central Government has created “State level Environment Impact Assessment Authorities” (SEIAA) through a notification under the Rules under the Act, but unlike the State Boards of the Air Act or Water Act, they are in fact creatures of the Central Government. (The SEIAAs have in any case, not been created in the Act itself, as was the case with the Central

Pollution Control Board [CPCB] and State Pollution Control Board [SPCB]. As such the Authorities are not independently and separately accountable to Parliament or the State Legislature.)

In terms of the provisions of the EP Act, only the Central Government can make Rules under this Act and every such Rule shall be laid before Parliament (and there is no corresponding obligation with respect to accountability to State legislatures); the States have no direct powers but the Central Government may delegate its powers to the State Government. The provisions of this Act shall have effect notwithstanding anything inconsistent with any other enactment.

#### Creation of Environment Protection Authorities under the EP Act

The Central Government has created several “Authorities” under Section 3(3) generally to implement “the precautionary principle” and the “polluter pays’ principle” by adopting the procedure described in the Supreme Court order dated 11-12-1996 in WP (Civil) no. 561 of 1994. These include:

### Box 8: The Environment (Protection) Act 1986

- The measures that can be taken by the Central Government under the Act include:
  - Coordination of actions by State Governments under this Act and other law relating to the objects of this Act
  - Planning and execution of programmes for prevention, control and abatement of environmental pollution
  - Laying down standards
  - Restricting areas for operation of industries
  - Laying down procedures and safeguards
  - Carrying out and sponsoring investigation and research
  - Inspection for prevention, control and abatement of environmental pollution
  - Establishment and recognition of laboratories (also section 12)
  - Collection and dissemination of information
  - Preparation of manuals, codes, and guides, etc. (Section 3(2)).
- The Central Government may constitute one or more Authorities for exercising the powers of the Central Government. (Section 3(3)).
- The Central Government can give directions including ordering the closure, prohibition and regulation of any industry and stoppage or regulation of supply of electricity, water or other service (Section 5)
- The Central Government can make Rules to prescribe the standards of quality of water, air and soil for various areas and purposes (Section 6)
- The Central Government has the power to enter and inspect (Section 10); and to take samples and analyse them (Section 11)
- The State Governments and other authorities are required to furnish reports and returns (Section 20)
- No court can take cognizance of an offence except on a complaint by the Central Government (except a person who gives 60 days’ notice of his intention) (Section 19)
- The Central Government can make Rules under this Act (Section 25) and every such Rule shall be laid before Parliament.
- The Central Government may delegate its powers to the State Government, etc. (Section 23)
- The provisions of this Act shall have effect notwithstanding anything inconsistent with any other enactment (Section 24).

- *Central Ground Water Authority 1997* (conferring the power on an existing organization, the Central Ground Water Board, CGWB) for regulation and control of ground water, for one year, with powers under Section 5(1) to issue directions with respect to matters in section 3(2); The members are same as the Members of CGWB
- *Aquaculture Authority* in 1997 to demolish shrimp farms in CRZ, Pulicat, and Chilika for a period of one year to issue directions under Section 5 w.r.t issues in Section 3(2)(v)-(ix), (xii); The members are to be nominated by various Ministries and the Agriculture Ministry is the administrative Ministry
- *Water Quality Assessment Authority* in 2001 under Section 3 (1)&(3), for a period of 3 years to exercise powers under Section 5 for issues in Section 3(2) (ix)-(xiii), and powers under Section 19.; The members are to be nominated by various Ministries and the Ministry of Water Resources is the administrative Ministry is to create a Cell to assist the Authority
- *Environment Pollution( Prevention and Control) Authority* for the NCR in 1998 for 12 years with powers under Sections 5, 10, 11 and 19 , and to monitor the progress in the Action Plan of MoE&F on vehicular pollution; The members are from the Central and State Government and experts
- *Taj Trapezium Zone Pollution (Prevention and Control) Authority 2003* (covering areas of Agra and Bharatpur Divisions) for 4 years and 8 months with powers under section 5 and 19; The members are from the Central and State Government, including the Vice Chairman of the Agra Development Authority.
- *The Loss of Ecology (Prevention and Payments of Compensation) Authority 1996* for a period of 11 years with powers under Section 5 for items in Section 3(2)(v)-(x), (xii); Headed by a retired High Court Judge, the members are drawn from the State and Central Government
- *National Ganga River Basin Authority 2009* headed by the Prime Minister, with Chief Ministers as members and State Ganga River Conservation Authority constituted under the Chief Minister in Uttar Pradesh, Jharkhand, West Bengal, and Bihar in 2009 (with State level Executive Committee under Chief Secretary).

#### Environment(Protection) Rules 1986

- The Central Government has framed Rules in 1986 under Sections 6 and 25 which allow the setting and enforcing of standards for emission and discharge of pollutants
- The Central Government may, following the procedure laid down in Rule 5(3), impose a prohibition or restriction on location of an industry or carrying on of operations

Note: There are other Rules under the EP Act, such as the Hazardous Wastes Rules, Bio-Medical Waste Rules, Municipal Waste Management Rules, under which except to the extent that the issue is administered by SPCBs as entities under the Water and Air Act, the subject is administered by the SPCB, etc., as entities under the EP Act accountable to the CPCB).

#### Notifications under the Act and Rules

Section 3(1) of the EP Act gives the Central Government the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. The Central Government has issued, among others, a Notification under Section 3(1) and (2) and Rule 5(3) on 14 September 2006 for accord of prior environmental clearance in accordance with the objectives of the National Environmental Policy 2006 for the following activities (specified in a Schedule to the Notification):

- Mining, extraction of natural resources, power generation
- Primary processing
- Materials production and processing
- Manufacturing and fabrication
- Service sector
- Physical infrastructure
- Construction and area development

The Notification lays out the detailed process for accord of “prior environmental clearance” for new projects, expansion or modernization in respect of the activity categories specified in the Schedule. The architecture for the process is as follows:

- State-level Environmental Impact Assessment Authorities (SEIAA) constituted by the Central

- Government under section 3(3) of EP Act (para 3)
- Expert Appraisal Committees (EAC) set up at State level and Central level (para 4)
- All projects classified as Category A or B on spatial extent and nature of potential impacts.
- Category B projects to be approved by SEIAA on basis of State EAC recommendation
- Category A projects to be approved by MoE&F based on Central EAC recommendation

#### Judicial Pronouncements relating to environmental governance

The two main judicial pronouncements governing the issue are the **Lafarge Judgement** of 6 July 2011 (*Lafarge Umiam Mining Pvt. Ltd ... Applicant in T.N. Godavarman Thirumulpad vs. Union of India & Ors.*); and the **Godavarman Order** of 6 January 2014 (*T.N. Godavarman Thirumulpad vs. Union of India & Ors.*):

- In the Lafarge Judgement, the Court said: “Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.”
- In the Godavarman Order, the Court said: “Hence, the present mechanism under the EIA Notification dated 14.09.2006, issued by the Government with regard to processing, appraisals and approval of the



*projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States ... (which) while exercising such powers under the Environment Protection Act will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 of this Court in the case of Lafarge Umiam Mining Private Limited.”*

#### The National Environmental Policy 2006

Before proceeding further it is appropriate to notice some of the provisions of the Policy itself in relation to environmental governance reforms. The Policy itself, in **para 5.1 headed “Regulatory Reforms”**, states: “The regulatory regimes for environmental conservation comprise a legislative framework, and a set of regulatory institutions. Inadequacies in each have resulted in accelerated environmental degradation on the one hand, and long delays and high transactions costs in development projects on the other....”.

In **Para 5.1.1 “Revisiting the Policy and Legislative Framework”**, the Policy undertakes that the following specific actions would be taken:

- a) Institutionalize a holistic and integrated approach to the management of environmental and natural resources, explicitly identifying and integrating environmental concerns in relevant sectoral and cross-sectoral policies, through review and consultation, in line with the National Environment Policy.
- b) Identify emerging areas for new legislation, due to better scientific understanding, economic and social development, and development of multilateral environmental regimes, in line with the National Environment Policy.
- c) Review the body of existing legislation in order to develop synergies among relevant statutes and regulations, eliminate obsolescence, and amalgamate provisions with similar objectives, in line with the National Environment Policy. Further, encourage and facilitate review of legislation at the level of State and Local Governments with a view to ensuring their consistency with this policy.
- d) Take steps to adopt and institutionalize techniques for environmental assessment of sector policies and programmes to address any potential adverse impacts, and enhance potential favourable impacts.
- e) Ensure accountability of the concerned levels of Government (Centre, State, Local) in undertaking the

*necessary legislative changes in a defined timeframe, with due regard to the Objectives and Principles of National Environment Policy, in particular, ensuring the livelihood and well-being of the poor by ensuring improved access to the necessary environmental resources.”*

### **The High Level Committee (HLC) Report**

Keeping in view the above mentioned pronouncements, the Ministry of Environment, Forest and Climate Change (MoEF&CC) constituted a High Level Committee (HLC) under the Chairmanship of Shri T S R Subramanian, former Cabinet Secretary, on August 29, 2014, to review the six major Acts that protect the country's environment and suggest appropriate amendments to bring them in line with their objectives. These Acts are listed as follows:

- (i) Environment (Protection) Act, 1986;
- (ii) Forest (Conservation) Act, 1980;
- (iii) Wildlife (Protection) Act, 1972;
- (iv) The Water (Prevention and Control of Pollution) Act, 1974;
- (v) The Air (Prevention and Control of Pollution) Act, 1981; and
- (vi) Indian Forest Act, 1927

The Terms of Reference (ToR) of the High Level Committee were as follows:

- (i) To assess the status of implementation of each of the aforesaid Acts vis-à-vis the objectives;
- (ii) To examine and take into account various court orders and judicial pronouncements relating to these Acts;
- (iii) To recommend specific amendments needed in each of these Acts so as to bring them in line with current requirements to meet objectives; and
- (iv) To draft proposed amendments in each of the aforesaid Acts to give effect to the proposed recommendations

While the recommendations of the Committee, which submitted its Report in November 2014, covered a wide swathe as envisaged in the ToR, the recommendations relating to “environmental governance”, enumerated in brief, are as follows:

- A National Environment Management Authority (NEMA) should be created to process applications

for environmental clearance (EC) and recommend them for approval of MoEF &CC.

- A State Environment Management Authority (SEMA) should be created for each State (replacing the SEIAA), with 15 members (including five ex-officio members to be nominated by the State Government), and the remaining appointed by MoEF&CC based on the recommendations of the State Government (p. 53).
- NEMA should have power to give directions to SEMA, except in matters of project clearances; and State Government should have powers to give directions to SEMA, except in matters of project clearances. The Central Government should have powers to give directions to SEMA and NEMA in respect of project clearances.
- NEMA and SEMA may replace the CPCB and SPCB, respectively, and that NEMA should have control and superintendence over SEMA (p.63). The Report recommends that the Water Act and the Air Act be subsumed in EP Act (p.82).
- The Model law in the Report suggests that NEMA should be a recommendatory body, with MoEF&CC taking the final decision on environmental clearance (para 6.1). The decision would be appealable to an Appellate Board presided over by a retired High Court Judge.
- Creation of a new “umbrella” law: The Environmental Laws (Management) Act (ELMA) to give legal status to NEMA and SEMA. The Report in para 8.3 states: “..Even if the law may incidentally deal with “water”, in “pith and substance” the subject matter of the new law is “environment” and it comes in the residuary powers of the Centre. In addition the subject of environment has been part of many decisions at international conferences and conventions to which India was a party (Article 253) hence power of the Parliament to enact the law is beyond reproach”.
- The draft ELMA provides for levy of compensatory afforestation charges and to create a fund for the purpose. The Draft also enables imposition of an environmental (“environmental reconstruction fund”) levy, also to be deposited in a fund.
- The Report recommends creation of an All India Service: Indian Environment Service, on the pattern of the Indian Forest Service (p. 78).



- The Report recommends that Central Government should be responsible for environmental legislation; State Government should supervise the functioning of SEMA, and collect the environmental levy. Every District should have an environmental management plan and capacity of local bodies should be built up (pp. 83–84).

It would appear that some of the recommendations of the Committee are not well considered. For instance, “water” is clearly a State subject; under the Water Act, the SPCB is a body under the State Government, whereas its proposed replacement, the SEMA is proposed as a body under the Central Government. Similarly, the draft ELMA attached to the report (pp. 66–77) does not require an Annual Report either to Parliament or State Legislatures; whereas under the Water Act, the CPCB is required to submit an Annual Report which is tabled in Parliament and the SPCB is to submit an Annual Report to be tabled in the State legislature. In some of its provisions, the Report is clearly in favour of further centralization, despite the fact that in the case of CAMPA, the Government Bill of 2008 was turned down by the Parliament Committee for not following the principle of subsidiarity.

### *The Report of the Parliamentary Committee examining the HLC Report*

In this backdrop, the Department-related Parliamentary Standing Committee on Science & Technology, Environment & Forests, decided to take up the Report of the High Level Committee (HLC) for examination and report. The Committee invited memoranda from various stakeholders on the recommendations of the High Level Committee and heard the views of the experts/Civil Society Organisations/NGOs on the issue at its meeting. In its Report dated July 21, 2015, the Committee recommended that “the Ministry of Environment, Forest & Climate Change, instead of proceeding with the implementation of the recommendations contained in High Level Committee Report, should give due consideration to the views/opinion and objections raised by stakeholders including environmental experts.”

### **Analysis of the current framework for environmental governance**

- Analysis of the existing framework and its operational impact reveals the following:
    - Analysis of current legislative frameworks: The current laws fall into 3 distinct categories:
      - Laws under Article 246: such as the Forest (Conservation) Act
      - Laws under Article 252: such as the Wildlife Act and the Water Act; and
      - Laws under Article 253: such as the Air Act and EP Act.
- These laws, analysed from a structural perspective in the federal context reveal the following:
- A Federal Structure: As in the Water Act, Air Act, and Wild Life Act, the primary functions are to be performed by State-level bodies accountable to the State Legislature; and Central institutions to provide policy and technical support and perform central functions.
  - A Quasi-federal Structure: As in the FC Act where any proposal for diversion of forest land for non-forest purpose has to come from the State Government only, however “prior approval” of the Central Government is needed before the State Government can divert the land. Rule-making power rests with the Central Government. Accountability under the Act lies to Parliament but the State Government has strong institutional structures and resources and accountability to State Legislature through alternative means (such as the Indian Forest Act 1927). However, the provisions relating to CAMPA had a strong centralizing character for several years. The Compensatory Afforestation Fund Act, 2016, has endeavoured to restore the federal flavour to some extent. However, the Annual Plan of Operations for execution of activities funded out of State Funds are still subject to final approval by the National Authority.
  - A Centripetal Structure: As in the EP Act where all the statutory institutions are of the Central Government (including the SEIAA and authorities created under Section 3(3)) though composed partly of State-nominated members. Powers to State-level institutions are by delegation (with power to withdraw), precluding the creation of proper institutional and supporting capacity at State level and alignment of other State institutions (including Panchayati institutions) in accordance with the legislative architecture. The rule making

power is with the Central Government and accountability of the institutions is to Parliament and not to State Legislatures.

- Analysis of the Operational Impacts: The gap analysis of the current regulatory regime and environmental governance structure can be summarized as follows:

- Lack of ownership and buy-in at the level of State Government
- No integration of environmental considerations into sectoral policies and working with the result that environmental issues remain only partly addressed and are mostly 'add-ons'
- The primary focus is on granting clearances and not on broader environmental issues facing the country
- With respect to the 'clearance' system, the personnel/authorities or committees handling the clearances work in isolation (separate appraisals for forest, wildlife, and environmental clearances), and the quality of appraisal is routine and suboptimal. This leads to delay in approval of projects and without any value addition towards environmental protection or forest/wildlife conservation.
- Public consultation process is widely seen as being ineffective and inadequate in addressing their environmental and social concerns. There is a perception of environmental decisions being made on extraneous considerations. Also, there is no statutory provision for addressing social impacts of development projects.
- The appraisal processes and consequent decisions are project-specific and do not look at the big picture (regional/cumulative/strategic assessment based on carrying capacity, climate change, sustainable development goals, etc.).
- Monitoring of conditions stipulated in the clearances is grossly inadequate with negligible participation of the State government or local bodies. Multiple agencies are involved piecemeal in inspections and monitoring without any coordination and without any attention on regional aspects
- Requirement to obtain multiple clearances for the same project/activity, mostly sequentially, is resulting in delays and duplication and/or overlaps

- The process does not really address the environmental challenges posed by these projects
- A reliable data repository accessible to all involved parties involved is lacking.

In fact the HLC report mentions that “..the approval processes for project clearances are largely non-transparent, involving multiple approvals with overlapping processes, based on insufficient application of technology and reliable information, significantly dependent on data provided by the project proponent..... the present system is procedure-oriented, with insufficient focus on the need to safeguard environment.....the average time taken for clearances works out to significantly longer than specified in most cases, whereas most projects sooner or later obtain approval; clearly focus is not on substance.”

- **Applicability of Article 248 (residuary subject):** Under Article 248, Parliament has the exclusive power to make law in respect of any matter not in the Concurrent List or State List. This provision was not invoked earlier when the EP Act was enacted and invoking it now (as was suggested by the HLC) could be termed colourable. In case “environment” is treated as a residuary matter for this purpose, some climate change issues may well be seen by States as a central responsibility, with an obligation to substantially fund State-level climate change action plans.

The basic question is how to address the issue of “environment” and “pollution” within the Constitutional framework. In the case of “forest” and “wildlife”, the matter is simple since they are included in the Concurrent List in the Seventh Schedule, and so Parliament can make law. In the case of “environment” and “pollution”, given that “water”, “industry”, “land”, “public health”, “agriculture”, “livestock”, “fisheries”, etc., are all State subjects, any law must harmonize the various Constitutional provisions; for instance, Article 48A makes “improving the environment” as a Directive Principles of State Policy, and given that most of the constituent subjects are State subjects, this is clearly a developmental function of State Governments. Interpreting “environment” as a residuary subject under Article 248 would clearly be untenable in these circumstances. Distinguishing between the “developmental” and

“regulatory” functions would also be difficult, since regulatory functions ought to support the developmental functions.

Treating “environment” as a residuary Central subject may also not be compatible with the objective of providing a role for Panchayati Raj Institutions (PRIs) and Urban Local Bodies (ULBs). As it is, the Eleventh and Twelfth Schedules to the Constitution may need to be amended to provide for a role for PRIs and ULBs in “improving the environment” consistent with the Directive Principles of State Policy to that effect. PRIs and ULBs would obviously have powers and duties only in respect of matters in which the State Government has jurisdiction to make law under the Seventh Schedule.

Compared to the option of treating “environment” as a residuary subject, certainly categorizing it as a subject in the Concurrent List would be a preferable option, though as has been mentioned, the 42nd Constitutional Amendment chose not to do so; possibly because it may open the door to other similar amendments to accommodate cross-cutting subjects, thus destroying the division of responsibilities between the Central and State Governments. It may be more judicious to leave the distribution of items in the Seventh Schedule of the Constitution undisturbed for now as the omission of “environment” as a distinct subject has not really resulted in lack of laws in the environmental domain.

### *Desirable features of a governance framework for the FC Act and CAF Act*

Currently, Wildlife and the Forest Conservation though similarly placed, are treated differently. This is particularly evident now since “wild plants” have been included in the Wild Life Act through the amendment of 2002. Moreover, compensatory afforestation, which addresses the issues arising out of the FC Act is seen as a separate process and are dealt with in a separate legislation, (the CAF Act).

- In the case of “forest” and “wildlife” covered, respectively by the FC Act and Wild Life Act, both of which cover subjects in the Concurrent List, there is no reason why the more federal structure of the Wild Life Act (which, after the amendment of 2002 based on a Supreme Court order now

finely balances the Central and State functions) cannot be used as an example to amend the FC Act and make it more effective in achieving its objective. Currently, the Act provides for a Forest Advisory Committee (FAC) in the MoEF&CC and for Regional Empowered Committees. These institutions however cannot advise the States on planning forest conservation strategies. The workload in complying with the requirements also imposes significant demands on the time and capacity of the Forest Divisions of the State Government, but in the absence of a stake and a sense of ownership, this is not being addressed adequately. Creation of State Forest Conservation Boards (SFCBs) on the lines of the State Wildlife Board (but with a wider range of stakeholders to make it adequately effective) can help redress this situation, and it would be expedient to provide explicitly for financial support for State-level capacity building by allowing the use of a percentage of CA and NPV funds accruing to the State for the purpose (as will be clearer later, the strategic creation of sectoral and State-level Boards and sectoral regulatory institutions is part of a larger framework for better environmental governance, by empowering them as “Authorities” under the EP Act).

- The FC Act needs to provide for the levy of NPV and CA rather than rely on the *Godavarman* Judgement for the purpose. Institutional arrangements created by the CAF Act need to flow from a similar structure in the FC Act itself. While the Act provides for National and State Authorities only for the purpose of managing the CA and NPV accruals, a far better formulation would be to incorporate all the provisions in the FC Act itself. A State level Forest Conservation Board, as discussed above, can be tasked to oversee and manage the State Fund. A similar National Forest Conservation Board can oversee the implementation of the provisions of the FC Act at the national level, with specific mechanisms to manage the National Fund on the one hand, and consider proposals for diversion of forest for non-forest purposes on the other ( in the manner that the FAC was doing).
- The current structure of the FC Act, and to an extent the CAF Act, 2016, is premised partly on the

perception that the States lack the capacity to plan and manage the process; since the Indian Forest Service is an All India Service, actually the sector has a higher capacity than other sectors to transfer knowledge and best practices from the Central to the State Governments. In tandem with capacity building at the State level as mentioned above, the current architecture of high centralization can be replaced with a “loose federal” structure, with a greater use of latest technology; internet and computer databases; transparent reporting; institutionalized participation of civil society; and post-facto audit systems to provide the requisite assurance to the MoE&F. These can include the following, which can be specified in the Act or the Central Rules thereunder:

- FC proposals are being received and processed online on the MoEF Portal (<<http://forestsclearance.nic.in/>>). The details of CA and the CAF are hosted at (<<http://egreenwatch.nic.in/>>). Geospatial and geo-referencing technologies for data collection, transmission, management, and visualization, including mobile technologies for geo-referenced data collection, should be employed. Suitable outputs in searchable databases should be provided for all stakeholders, including civil society institutions.
  - Compensatory afforestation works must provide for civil society organizations (such as JFM groups and Panchayati Raj Institutions) to participate in the execution and social audit processes.
  - The Act may also provide for delegation, on the basis of a transparent evaluation, of the “prior approval” powers (e.g. those exercised by the Regional Empowered Committees) to States with proven track record of proper management of the regulatory process under the FC Act as well as of effective use of Compensatory Afforestation funds, so as to incentivize good governance.
- need to be leveraged to their potential, as well as negative features which need to be remedied:
- Of the three important environmental legislations, the Water Act and the Air Act follow a fairly federal structure, with State institutions accountable to the State legislature and Central institutions providing enabling and supporting frameworks. The EP Act enacted under Article 253 and the Rules and Notifications thereunder bring in distinctly centralizing elements through the provisions of Section 3 of the EP Act, which enable the Central Government to take all measures to protect and improve the environment, and also to create Authorities for the purpose. This is evident particularly where it involves “water”, clearly a State subject. The tendency to perpetuate the centralization (even when it has outlived its utility) is evident in the HLC recommendation that NEMA and SEMA (both intended to be creatures of the Central Government) should replace the CPCB and SPCB, respectively (the latter currently a creature of the State Government) and that NEMA should have control and superintendence over SEMA.
  - Given the distribution of subjects in the Seventh Schedule, with land, water, industry, etc., being included in the State List, environmental governance clearly requires cooperative federal collaboration, rather than exclusive and top-down centralization. A clear pointer to this is the manner in which several “Authorities” have been created under Section 3(3) of the EP Act. The “*Aquaculture Authority*”, created for a period of one year and composed of members nominated on part time basis by various Ministries with the Ministry of Agriculture as the administrative ministry is an example; so is the *Water Quality Assessment Authority* created for a period of 3 years with members nominated part time by various Ministries with the Ministry of Water Resources as the administrative ministry. Clearly, in such cases, there will be little opportunity to create or build institutional capacity. A far more sustainable model is the declaration of the *Central Ground Water Board* as an Authority under the Act for regulation and control of ground water with members who are the Members of CGWB. The CGWB as a permanent expert body, coordinating

### *Desirable features of a governance framework for the EP Act*

In view of the preceding discussion on the Water Act, Air Act, and EP Act, it is possible to identify some positive features of the current framework which

with State-level counterparts clearly has a higher credibility as an Authority. The conclusion is that except in emergent or exceptional circumstance, powers under Section 3(3) are better used to empower existing sectoral institutions (including the regulatory institutions) at Central and State levels; this will enable such Authorities to leverage their existing capacity; it will internalize environmental issues into their business practices and strengthen the preventive aspects rather than having to engage in mitigative measures in a fire-fighting mode. For example, the proposed “State-level Forest Conservation Boards” and the existing “State-level Wildlife Boards” (or their Standing Committees) could be conferred powers of an “Authority” under the legislation.

- The fact that “environment” does not find mention in the Seventh Schedule should be seen in the proper perspective. With the growth of knowledge and technologies, many subjects of a cross cutting nature are now emerging. Simplistically treating them as new subjects and applying the residuary powers in article 248 will, over time, destroy the federal principles underlying the distribution of subjects in the Seventh Schedule. It is necessary to analyse the patterns of the Seventh Schedule in so far as such new “subjects” cut across, and structure the legislative provisions suitably for a “best fit”. Failure to do so may have unintended consequences: in the case of “environment” for instance, in the context of “climate change”.
- The centralizing features in the current EP Act and the inclination to further centralise perhaps relies on a misreading of the intention of Article 253. The power under the Article needs to be used within the federal structure wherever possible and when elements of such a structure are already available, in this case in the form of the Water and Air Acts, the appropriate course would be to build on this rather than seek to dismantle and replace them with a centralized formulation. Thus, while there is a need for a single overarching legislation covering water, air, etc., for purposes of protection and improving the environment, the Air Act also enacted under Article 253, rather than the current EP Act would be the appropriate starting point in so far as institutional structures and mechanisms are concerned.
- The EP Act 1986 was conceived at a time when the state of knowledge and the capacity to manage environmental issues was limited. The experience gained over the last 30 years of operation of the Act, particularly the last 10 years of the EIA Notification, has created substantial knowledge and capacity among the stakeholders and there is now a need to re-tune the mechanism to better address the scientific and management aspect of environmental impacts in a wider context, including climate change, and this calls for a clear, direct, and substantial role for State-level institutions and mechanisms. National-level institutions may provide oversight while State-level institutions must be in a position to take greater ownership and responsibility of the state of environment within their jurisdictions.
- One oft-cited criticism of decentralized environmental decision-making is the race to the bottom thesis. However, empirical evidence to support this thesis has been insufficient, both in India and other countries. Besides, there could be positive effects of competitive federalism. This can happen only when national level institutions allow State level institutions to be more empowered in matters of environmental governance. Any concern with respect to a race to the bottom can be addressed through proper oversight mechanisms. These can be internal as well as via courts and tribunals. Courts and the National Green Tribunal (NGT) have been proactive in intervening where environment has been subject to poor governance and they are likely to continue to do so.
- In the light of the above, the suggested architecture for an EP Act incorporating the Water Act and Air Act is as follows:
  - The EP Act must provide for adoption of an integrated appraisal approach (encompassing forests, wildlife, biodiversity, climate change, and all other environmental aspects). The methodology of integration with forest and wildlife is elaborated in the section on the subject.
  - A State Environment Management Authority (SEMA) may be constituted by the State Government, replacing SPCB; with accountability to the State legislature in a

- manner similar to the SPCB under the Air Act.
- A National Environment Management Authority (NEMA) may be constituted by the Central Government, replacing CPCB, with accountability to Parliament in a manner similar to the CPCB under the Water Act.
  - The functions of the SEMA and NEMA should be on the general principles applied to the SPCB and CPCB in the Air Act or the Water Act, namely that:
    - » The NEMA shall advise the Central Government; coordinate the activities of the SEMAs; provide technical assistance; organise mass media campaigns; perform the functions of a SEMA in special circumstances; collect, compile and publish data; lay down standards etc.
    - » The SEMA shall plan programmes for prevention, control and abatement of pollution; advise State Government; collect and disseminate information; conduct inspections, investigations and research; lay down standards; evolve cost effective treatments for wastes and resource recovery;
    - » An environmental cess on the same lines as the earlier water cess should be leviable for the funding of the legislative provisions.
    - » The powers in the nature of Sections 3(1) and (2) of the current EP Act would vest primarily with SEMA and the State Government and Central Government (on advice of NEMA) having the power to issue directions. This would be subject to SEMA meeting institutional standards set by the Central Government in consultation with NEMA under the Act; if SEMA fails to meet these standards at any time, the Central Government should be empowered to entrust the powers under the section to NEMA till SEMA satisfies the requirements of the standard. To ensure expertise as well as credibility, the qualification and expertise for the posts under SEMA may be devised by NEMA, and the recruitments may be carried out by using independent expert third parties constituted by SEMA in consultation with NEMA.
- » The powers under Section 3(3) of the EP Act to *constitute* Authorities to carry out the specific purposes of the Act are clearly not well conceived. A preferable formulation is to confer powers under the EP Act on *existing (preferably statutory) Authorities* of the Central and State Government (by whatever name they may have been designated). Such a modified provision will ensure that the Authorities have legitimacy, capacity, and specific jurisdiction, and Central or State Government has ownership, and there is accountability to Parliament or State Legislature. As such the powers may be conferred by the Central Government, and in respect of State institutions, in consultation with or at the instance of the State Government. In all cases where powers are conferred, the environmental cess must be used to defray the additional cost incurred by the institution in performing the functions under the Act.
  - » Powers of entry and inspection, taking samples, and having them analysed, and register complaints, seek information, etc., would clearly have to be aligned with the structure as has been contemplated in the Air Act;
  - » As in the case of the Air Act, the State Government may have powers to notify areas as “pollution control” areas and ban specific practices; and in fact to address the inter-State character of certain pollution trends, the Central Government may on the request of an affected or potentially affected State, or suo-moto, after affording due opportunity, issue directions to a State Government or a SEMA in serious cases of pollution.
  - » With respect to motor vehicles, the Central Government may issue directions on minimum emission standards and the State Government shall be bound to issue

instructions to Motor Vehicle Registration authorities regarding enforcement of emission standards which may be laid down by the SEMA but shall not be lower than the national standards.

- » SEMA would perform the functions presently envisaged for the SEIAA, with the State Government setting up Expert Appraisal Committees (EAC). This would be subject to SEMA meeting institutional standards set by the Central Government in consultation with NEMA under the EP Act; if SEMA fails to meet these standards at any time, the Central Government should be empowered to entrust the work to NEMA, till SEMA satisfies the requirements of the standard.
- » SEMA would also suo moto or on the direction of the Central Government (on the advice of NEMA), conduct regional appraisals and regional impact assessment so as to enable issue guidelines (including "go no-go" advisories) for various purposes, as well as declaration of eco-sensitive zones and protected areas. As mentioned earlier, the EP Act should provide for integrated appraisals (encompassing forests, wildlife, biodiversity, climate change, and all other environmental aspects)
- » EP Act should also provide for a *summary* Social Impact Assessment to be carried out simultaneously with Environmental Impact Assessments, since the two are closely linked and are best resolved in an iterative manner. The combined assessment would be a Socio-Environmental Impact Assessment (SEIA).
- » Provision should be made for District SEIA to be prepared for districts/basins/environmental units identified as being vulnerable/sensitive or likely to experience substantial environmental impacts of development activity. The assessments may be done by the State Government or an agency identified by it, so as to provide a baseline and enable

cumulative/regional level assessments and carrying capacity estimations. It may be noted here that the NEP 2006 in para 5.1.3 states that EIA will continue to be the principal methodology for appraising and reviewing projects and that the Policy would "*..encourage regulatory authorities, Central and State, to institutionalize regional and cumulative environmental impact assessments (R/CEIAs) to ensure that environmental concerns are identified and addressed at the planning stage itself*".

- » Individual projects would normally be appraised by SEMA, perhaps in consultation with NEMA for the identified districts/basins/environmental units. The only individual projects to be appraised/cleared by NEMA should be those strategic in nature (nuclear, defence, space, etc.) or projects located near or having potential impacts on sites of national/international heritage or economic/ecological/cultural value and mega projects or projects spanning more than one State, e.g., river-linking, cross-country pipelines, rail links, etc. To provide a greater level of comfort, particularly in the initial period when expertise will be evolving, operational oversight could be provided to SEMA in the form of accord by NEMA of "prior approvals" to the ToR for environmental impact assessments in specified categories of cases where the potential impacts are perceived as being significantly higher.
- » SEMA, like SPCB, should continue to grant consents in a manner similar to consent under Air and Water Acts. SEMA (subject to directions of the State Government) may be empowered to give directions for closure, regulation, operation, etc., and stoppage or regulation of electricity, water or any other service.
- » The Annual Report of NEMA shall be laid before Parliament, and the Annual Report of SEMA shall be laid before the State Legislature.

- » NEMA may be required to furnish to the Central Government, and the SEMA to the State Government and to NEMA, reports and returns as may be required.
- » The Central Government can supersede NEMA for default in performance of functions.
- » The State Government can supersede SEMA for default in performance of functions.
- The Central Government may make Rules under the Act for NEMA as well as Model Rules for SEMA.
- The HLC had recommended the creation of an All India Service: Indian Environment Service, on the pattern of the Forest Service to improve the effectiveness of the process and bring environmental regulation onto predictable, transparent and scientific lines. The fact that “environment” is a large and complex cross-cutting subject makes the issue far more complex than “forests”. However, the idea of an All-India Service is very attractive as it can provide a reliable national framework which institutionalises environmental management and policy formulation, ensures coordination, helps systemically internalise environmental concerns in institutions contributing to or otherwise influencing environmental impacts and also ensures a structured interchange of knowledge, best practices and concerns between the Central and State Governments. Special mechanisms may need to be incorporated to ensure that the diverse specialisations find adequate recognition and incorporation in some form, and that the structured approach does not create a rigid and exclusive framework. Mechanisms to ensure a dynamic and vibrant academia-Government collaboration at State and Central levels would be key to the solution.
- The role of NEMA and SEMA should be well differentiated: NEMA should generally appraise/clear only regional SEIAs. The only individual projects to be appraised/cleared by NEMA should be those strategic or sensitive in nature, mega projects or projects spanning more than one state e.g., river-linking, cross-country pipelines, rail links, etc. All other individual project clearances to be granted by SEMA.
- Forest and Wildlife clearances: Wherever forest land and/or wildlife clearances are required, SEMA should make recommendations (including conditions to be imposed, CA provisions, etc.) to a State Forest Conservation Board (SFCB) or its Standing Committee after (integrated) appraisal of the project (whether or not the individual project needs environmental clearance) and SFCB/Committee may make recommendations to the State Government who will finally grant the clearance in case the power is delegated, or recommended to the Central Government in other cases.
- Amendments in individual Acts: The concept of regional and integrated appraisals needs to be incorporated in the FC Act for the purpose of diversion as well as conservation of forests and wildlife. The SBWL and NBWL may be merged with SFCB and NFCB by having a single forest and wild life conservation legislation to enable taking an integrated view on forests, wildlife, ecological and biodiversity related matters. (Merging them respectively with the State Biodiversity Boards and the National Biodiversity Authority under the Biological Diversity Act may also be considered.) The concept of Eco-Sensitive Zones (ESZs) around Protected Areas should be incorporated in the FC Act and also in the EP Act. NFCB and SFCBs should be empowered to consider and recommend to the concerned governments regarding the extent of such ESZs.
- Appraisal processes should endeavour to integrate all aspects of environment, viz., forests, wildlife, environment (air, water, soil, land, noise, biodiversity, etc.), climate change, Sustainable Development goals, etc. and further ensure integration of social issues with environmental assessment. This requires building of multi-

### *Other issues for consideration*

To ensure proper support to the architecture proposed, the following issues also need to be incorporated into the framework:



disciplinary capability both internally and through institutionalisation of coordination mechanisms.

- The issue of ‘no go’ (or inviolate areas) has been raised in HLC report as well as in the report of the Parliamentary Committee. In fact, the best tool to handle ecological sensitivity is through the EIA route. If regional EIA is used as a tool and with good quality of appraisals, it will be a potent instrument to identify areas of ecological importance, assess impacts and ensure that a proper decision is taken. A provision could be made to have special identification of areas of higher ecological sensitivity and obtain a pre-approval for such sites before considering those for siting of developmental projects. NEMA/SEMAs would recommend to NFCB/SFCBs for consideration of such sites to be notified by the concerned Governments.

### Conclusion on improving environmental governance frameworks

- Forest (Conservation) Act
  - The more federal structure of the Wild Life Act should be used as an example to amend the FC Act and make it more effective in achieving its object. As in the case of the Wildlife Act, there should be Boards at National and State level for forest conservation. The Forest Advisory Committee (FAC) in the MoE&F should be subsumed into proposed National and State Forest Conservation Boards (NFCB and SFCB). The proposed State Forest Conservation Board (in fact a Standing Committee of the Board) should be given powers to recommend forest clearances based on SEMA’s integrated appraisal and considering the guidelines of NEMA and NFCB (a similar arrangement of a State level Standing Committee may be incorporated for the State Wildlife Board as well). In fact, as in the case of the Wildlife Act, in recognition of the concurrent nature of the subject, the power to “recommend” should be replaced with the power to “accord clearance subject to prior approval”.
  - The National and State Boards should be structured and incentivized to operationalize conservation-oriented provisions of the Act,
- Environment (Protection) Act
  - There is a need for a single overarching legislation covering water, air, etc., for purposes of protection and improving the environment. The Air Act, also enacted under Article 253, rather than the current EP Act, would be a more appropriate starting point in so far as institutional structures and mechanisms are concerned, since it better reflects the federal character of the governance framework of the country.
  - The basic structure should comprise: (a) A State Environment Management Authority (SEMA) at State level, constituted by the State Government and replacing SPCB; with accountability to the State legislature in a manner similar to the SPCB under the Air Act; and (b) A National Environment Management Authority (NEMA) constituted by the Central Government and replacing CPCB, with accountability to Parliament in a manner similar to the CPCB under the Water Act.
  - The functions of the SEMA and NEMA should be on the general principles applied to the SPCB and CPCB in the Air Act or the Water
- Provisions regarding levy of NPV and CA and their management and application and other guidelines issued pursuant to Supreme Court directions should be appropriately built into the FC Act rather than into a separate legislation or left as executive guidelines, and the National and State Forest Advisory Boards should manage the Funds for compensatory afforestation and wildlife protection activities.
- The Standing Committees of the National and State Forest Conservation Boards (and of the Wild Life Board as well) should be declared to be “Authorities” under Section 3(3) of the EP Act for purposes of forest conservation, and to enable coordination with impact assessment, identification of “go, no-go” areas, cumulative, and regional impact assessments, etc.
- Given the obvious synergy, the respective Wildlife and Forest legislations may be combined into a single legislation.

Act. The concept of integrated appraisal by SEMA/NEMA will have to be built into all individual Acts, namely, FC Act, Wild Life Act, and EP Act.

- The powers in the nature of Sections 3(1) and (2) of the current EP Act and in the various Rules thereunder should vest primarily with SEMA, the State Government, and Central Government (on advice of NEMA) having the power to issue directions. The concept of “prior approval”, already available in the Wildlife Act, may be incorporated into the legislation to deal with issues of an exceptional nature; or where potential impact is likely to be widespread or replete with national or transnational implications.
  - SEMA would need to meet institutional standards set by the Central Government in consultation with NEMA under the Act and each of the specific Rules; if SEMA fails to meet these standards at any time, the Central Government should be empowered to entrust the powers under the section/Rules to NEMA till SEMA satisfies the requirements of the standard.
  - To ensure that the environmental governance systems in the States can evolve to acceptable standards, an All India Service: Indian Environment Service, should be created to help internalize environmental concerns in State and Central institutions who have the potential to significantly impact the environment or contribute to environment-related policy making. This needs to be complemented by a strong government–academia partnership to provide for adequate multi-disciplinary expertise to enable science and evidence-based decision-making.
2. Forest (Conservation) Act 1980  
<http://envfor.nic.in/legis/forest/forest2.html>
  3. Wild Life (Protection) Act 1972  
<http://envfor.nic.in/legis/wildlife/wildlife1.html>
  4. Water (Prevention and Control of Pollution) Act 1974  
<http://www.moef.nic.in/legis/water/wat1.html>
  5. Air (Prevention and Control of Pollution) Act 1980  
<http://www.envfor.nic.in/legis/air/air1.html>
  6. Environment (Protection) Act 1986  
<http://envfor.nic.in/legis/env/env1.html>
  7. Environment (Protection) Rules 1986  
<http://envfor.nic.in/legis/env/env4.html>
  8. Writ Petition (Civil) 202 of 1995 titled T.N. Godavarman Thirumulpad vs. Union Of India & Ors, on 26 September, 2005  
<http://indiankanoon.org/doc/1026316/>
  9. Compensatory Afforestation Fund (CAF) Bill 2008  
[http://www.prsindia.org/uploads/media/Compensatory%20Afforestation/1211455621\\_The\\_Compensatory\\_Afforestation\\_Fund\\_Bill\\_2008.pdf](http://www.prsindia.org/uploads/media/Compensatory%20Afforestation/1211455621_The_Compensatory_Afforestation_Fund_Bill_2008.pdf)
  10. Department related Parliamentary Standing Committee Report on the CAF Bill 2008  
[http://www.prsindia.org/uploads/media/Compensatory%20Afforestation/scr1226033277\\_The\\_Compensatory\\_Afforestation\\_Fund\\_Bill\\_2008.pdf](http://www.prsindia.org/uploads/media/Compensatory%20Afforestation/scr1226033277_The_Compensatory_Afforestation_Fund_Bill_2008.pdf)
  11. Compensatory Afforestation Fund (CAF) Bill 2015  
<http://www.prsindia.org/uploads/media/Compensatory%20Afforestation/Compensatory%20afforestation%20fund%20bill,%202015.pdf>
  12. Lafarge Umiam Mining Pvt. Ltd. ... Applicant in T.N. Godavarman Thirumulpad Versus Union of

## References

(last accessed August 28, 2017)

1. National Environment Policy 2006, Ministry of Environment and Forest, Government of India <http://www.moef.gov.in/sites/default/files/introduction-nep2006e.pdf>

- India & Ors. Supreme Court Judgement dated 6 July 2011  
<http://indiankanoon.org/doc/1725193/>
13. T.N. Godavarman Thirumulpad Versus Union of India & Ors. Supreme Court Order dated 6th January 2014  
<http://supremecourtfindia.nic.in/outtoday/WC2021995.pdf>
14. Report of the High level Committee (HLC) to review various Acts administered by Ministry of Environment, Forest & Climate Change, Government of India  
[http://envfor.nic.in/sites/default/files/press-releases/Final\\_Report\\_of\\_HLC.pdf](http://envfor.nic.in/sites/default/files/press-releases/Final_Report_of_HLC.pdf)
15. Department related Parliamentary Standing Committee Report on the HLC Report  
<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20S%20and%20T,%20Env.%20and%20Forests/263.pdf>
16. “Environmental Federalism and Forest Governance in India”: Project Brief (TERI:2015)
17. The Compensatory Afforestation Fund (CAF) Act 2016 <http://www.ukcampa.org.in/Docs/CAMPA%20Act%202016.pdf>
18. Taxation Laws( Amendment) Act 2017 [http://www.prsindia.org/uploads/media/Taxation%20Laws/Taxation%20Laws%20\(Amendment\)%20Act,%202017.pdf](http://www.prsindia.org/uploads/media/Taxation%20Laws/Taxation%20Laws%20(Amendment)%20Act,%202017.pdf)
19. Draft: The Compensatory Afforestation Fund (CAF) Rules 2017 [http://www.mahaforest.gov.in/fckimagefile/The%20Compensatory%20Afforestation%20Fund%20Rule,%202016-24\\_04\\_2017.pdf](http://www.mahaforest.gov.in/fckimagefile/The%20Compensatory%20Afforestation%20Fund%20Rule,%202016-24_04_2017.pdf)

## Appendix

### EXTRACT FROM THE NATIONAL ENVIRONMENT POLICY 2006

#### Chapter 3: Objectives of the National Environment Policy

The principal objectives of this policy are enumerated below. These objectives relate to current perceptions of key environmental challenges. They may, accordingly, evolve over time:

Xxx

- vi. Environmental Governance:

To apply the principles of good governance (transparency, rationality, accountability, reduction in time and costs, participation, and regulatory independence) to the management and regulation of use of environmental resources.

#### Chapter 4: Principles

This policy has evolved from the recognition that only such development is sustainable, which respects ecological constraints, and the imperatives of justice. The objectives stated above are to be realized through various strategic interventions by different public authorities at Central, State, and Local Government levels. They would also be the basis of diverse partnerships. These strategic interventions, besides legislation and the evolution of legal doctrines for realization of the objectives, may be premised on a set of unambiguously stated principles, depending upon their relevance, feasibility in relation to costs, and technical and administrative aspects of their application. The following principles, may accordingly, guide the activities of different actors in relation to this policy. Each of these principles has an established genealogy in policy pronouncements, jurisprudence:

Xxx

- (x) Decentralization:

Decentralization involves ceding or transfer of power from a Central Authority to State and Local Authorities, in order to empower public authorities having jurisdiction at the spatial level at which particular environmental issues are salient, to address these issues.

- (xi) Integration:

Integration refers to the inclusion of environmental considerations in sectoral policymaking, the integration of the social and natural sciences in environment-related policy research, and the strengthening of relevant linkages among various agencies at the Central, State, and Local Self Government levels, charged with the implementation of environmental policies.

#### Chapter 5: Strategies and Actions

- 5.1 Regulatory Reforms:

The regulatory regimes for environmental conservation comprise a legislative framework, and a set of regulatory institutions. Inadequacies in each have resulted in accelerated environmental degradation on the one hand, and long delays and high transactions costs in development projects on the other. Apart from legislation which is categorically premised on environmental conservation, a host of sectoral and cross-sectoral laws and policies, including fiscal regimes, also impact environmental quality (some of these are discussed in the succeeding sections).

- 5.1.1 Revisiting the Policy and Legislative Framework:

The present legislative framework is broadly contained in the umbrella, Environment Protection Act 1986; the Water (Prevention and Control of Pollution) Act, 1974; the Water Cess Act, 1977; and the Air (Prevention and Control of Pollution) Act, 1981. The law in respect of management of forests and biodiversity is contained in the Indian Forest Act, 1927; the Forest (Conservation) Act 1980; the Wild Life (Protection) Act, 1972; and the Biodiversity Act, 2002. There are several other enactments, which complement the provisions of these basic enactments.

The following specific actions would be taken:

- a) Institutionalize a holistic and integrated approach to the management of environmental and natural resources, explicitly identifying and integrating environmental concerns in relevant sectoral and cross-sectoral policies, through review and consultation, in line with the National Environment Policy.
- b) Identify emerging areas for new legislation, due to better scientific understanding, economic, and social development, and development of multilateral environmental regimes, in line with the National Environment Policy.

- c) Review the body of existing legislation in order to develop synergies among relevant statutes and regulations, eliminate obsolescence, and amalgamate provisions with similar objectives, in line with the National Environment Policy. Further, encourage and facilitate review of legislation at the level of State and Local Governments with a view to ensuring their consistency with this policy.
- d) Take steps to adopt and institutionalize techniques for environmental assessment of sector policies and programmes to address any potential adverse impacts, and enhance potential favourable impacts.
- e) Ensure accountability of the concerned levels of Government (Centre, State, Local) in undertaking the necessary legislative changes in a defined timeframe, with due regard to the Objectives and Principles of National Environment Policy, in particular, ensuring the livelihoods and well-being of the poor by ensuring improved access to the necessary environmental resources.

#### ■ 5.1.2 Process Related Reforms:

##### **(i) Approach:**

The recommendations of the Committee on Reforming Investment Approval and Implementation Procedures (The Govindarajan Committee) which identified delays in environment and forest clearances as the largest source of delays in development projects will be followed for reviewing the existing procedures for granting clearances and other approvals under various statutes and rules. These include the Environment Protection Act, Forest Conservation Act, the Water (Prevention and Control of Pollution) Act, the Air (Prevention and Control of Pollution) Act, the Wild Life (Protection) Act, and Genetic Engineering Approval Committee (GEAC) Rules under the Environment Protection Act. The objective is to reduce delays and levels of decision-making, realize decentralization of environmental functions, and ensure greater transparency and accountability.

In addition, the following actions will be taken:

- a) In order to ensure faster decision making with greater transparency, and access to information, use of information technology based tools will

be promoted, together with necessary capacity-building, under all action plans.

- b) In order to realize greater decentralization, State-level agencies may be given greater responsibility for environmental regulation and management. Such empowerment must, however, be premised on increased transparency, accountability, scientific and managerial capacity, and independence in regulatory decision making and enforcement action. Accordingly, States would be encouraged to set up Environment Protection Authorities on this basis.
- c) Mechanisms and processes would be set up to identify entities of "Incomparable Value" in different regions. It would be ensured that all regulatory mechanisms are legally empowered to follow the principles of good governance.

##### **(ii) Framework for Legal Action:**

The present approach to dealing with environmentally unacceptable behaviour in India has been largely based on criminal processes and sanctions. Although criminal sanctions, if successful, may create a deterrent impact, in reality they are rarely fruitful for a number of reasons. On the other hand, giving unfettered powers to enforcement authorities may lead to rent-seeking.

Civil law, on the other hand, offers flexibility, and its sanctions can be more effectively tailored to particular situations. The evidentiary burdens of civil proceedings are less daunting than those of criminal law. It also allows for preventive policing through orders and injunctions.

Accordingly, a judicious mix of civil and criminal processes and sanctions will be employed in the legal regime for enforcement, through a review of the existing legislation. Civil liability law, civil sanctions, and processes, would govern most situations of non-compliance. Criminal processes and sanctions would be available for serious, and potentially provable, infringements of environmental law, and their initiation would be vested in responsible authorities. Recourse may also be had to the relevant provisions in the Indian Penal Code and the Criminal Procedure Code. Both civil and criminal penalties would be graded according to the severity of the infraction.

■ *5.1.3 Substantive Reforms:*

**(i) Environment and Forests Clearances:**

Environmental Impact Assessment (EIA) will continue to be the principal methodology for appraising and reviewing new projects. The assessment processes are under major revision in line with the Govindarajan Committee recommendations. Under the new arrangements, there would be significant devolution of powers to the State/UT level. However, such devolution, to be effective, needs to be accompanied by adequate development of human and institutional capacities.

Further, in order to make the clearance processes more effective, the following actions will be taken:

- a) Encourage regulatory authorities, Central and State, to institutionalize regional and cumulative environmental impact assessments (R/CEIAs) to ensure that environmental concerns are identified and addressed at the planning stage itself.
- b) Specifically assess the potential for chemical accidents of relevant projects as part of the environmental appraisal process.
- c) Give due consideration to the quality and productivity of lands which are proposed to be converted for development activities, as part of the environmental clearance process. Projects involving large-scale diversion of prime agricultural land would require environmental appraisal.
- d) Encourage clustering of industries and other development activities to facilitate setting up of environmental management infrastructure, as well as monitoring and enforcing environmental compliance. Emphasize post-project monitoring and implementation of environmental management plans through participatory processes, involving adequately empowered relevant levels of government, industry, and the potentially impacted community.
- e) Restrict the diversion of dense natural forests and areas of high endemism of genetic resources, to non-forest purposes, only to site-specific cases of vital national interest. No further regularization of encroachment on forests should be permitted.
- f) Ensure that in all cases of diversion of forests, the essential minimum needed for the project or activity is diverted. The diverted area must not be cleared until the actual construction starts.
- g) Ensure provision for environmental restoration after decommissioning of industries, in particular mine closure in all approvals of mining plans, and institutionalize a system of post-monitoring of such projects.
- h) Formulate, and periodically update, codes of “good practices” for environmental management for different categories of regulated activities.



**S Vijay Kumar** was a member of the IAS and has worked in the Central Ministries/Departments of Environment & Forests, Land Resources, Mines and Rural Development. He now works on policy issues related to the SDGs and natural resources including land and minerals. He is also a member of UNEP's International Resource Panel.



**Nidhi Srivastava** is a Consultant with TERI. She is a lawyer by training with specialisation in energy and environmental law. She has worked on legal and policy issues around environment, minerals, forests, other natural resources and technology governance. Her research interests include federalism and multi level governance.

This is one in a continuing series of policy briefs and discussion papers by TERI based on its research work in specific areas. These briefs and papers are made available to Members of Parliament, policymakers, regulators, sectoral experts, civil society, and the media. They are accessible at <http://www.teriin.org/policybrief/>. The purpose is to focus on key issues and list our policy recommendations to encourage wider discussion and debate. We would very much value your comments and suggestions.

#### Papers and Policy Briefs Related to Environment and Sustainable Development

- |   |               |
|---|---------------|
| 1. Sustainable Urban Development: Necessity of Integrating Water-Energy-Food Dimensions in Developmental Policies | October 2016  |
| 2. Sustainability Dynamics of Resource Uses and Economic Growth   | August 2015   |
| 3. Towards a Policy for Climate Resilient Infrastructure and Services in Coastal Cities                           | June 2015     |
| 4. Climate Proofing Indian Cities: A Policy Perspective   | March 2014    |
| 5. India and Sustainable Development Goals  | November 2013 |
| 6. Engagement with Sustainability Concerns in Public Procurement in India: Why and How                            | August 2013   |

#### Other Policy Briefs and Discussion Papers of TERI

- |  |                |
|--|----------------|
| 1. Why we need a New Mineral Exploration Policy for National Mineral Security                              | June 2017      |
| 2. Designing a Business Model for Sustainable Management of End-of-Life Vehicles (ELVs) in India           | March 2017     |
| 3. Charging Power - Understanding Electricity Pricing and the Willingness to Pay for Electricity in India  | February 2017  |
| 4. Water Neutral Electricity Production in India: Avoiding the Unmanageable                                | December 2016  |
| 5. Solar PV for Enhancing Electricity Access in Kenya: What Policies are Required?                         | July 2015      |
| 6. Moving Forward with a World-class Mineral Policy for National Mineral Security                          | June 2015      |
| 7. Organic Agriculture: An Option for Fostering Sustainable and Inclusive Agriculture Development in India | June 2015      |
| 8. Supply-side Financing of Improved Biomass Cookstoves in India   | May 2015       |
| 9. Selecting the Appropriate Improved Cooking Technology: What Matters?                                    | May 2015       |
| 10. Can Subsidies be a Tool for Strengthening the Improved Cookstoves Market?                              | April 2015     |
| 11. Capacity Needs of Government Officials for Integration of Energy and Human Developments                | April 2015     |
| 12. Mainstreaming Gender in Improved Cookstove Value Chain   | March 2015     |
| 13. Bundling Improved Cooking and Lighting Technology for Energy Access                                    | March 2015     |
| 14. Biofuel Promotion in India for Transport: Exploring the Grey Areas                                     | February 2015  |
| 15. The Mineral Development and Regulation Framework in India  | January 2015   |
| 16. Crisis in India's Electricity Distribution Sector: Time to Reboot for a Viable Future                  | January 2015   |
| 17. What would India Need for Moving to a 100% Renewable Energy Scenario by 2050?                          | December 2014  |
| 18. Perspectives on a Water Resource Policy for India  | October 2014   |
| 19. Advancement of Fuel Quality and Vehicle Emissions Norms to Improve Urban Air Quality in India          | September 2014 |
| 20. Tax Regime for Improved Cookstoves and its Implications  | September 2014 |
| 21. Proliferation of Cars in Indian Cities: Let Us Not Ape the West  | June 2014      |
| 22. Shale Gas in India: Look Before You Leap   | June 2013      |
| 23. Petroleum Product Pricing Reforms in India: Are We on the Right Track?                                 | March 2013     |
| 24. Enhancing Water Use Efficiency of Thermal Power Plants in India: Need for Mandatory Water Audits       | December 2012  |
| 25. Governance of Mining in India: Responding to Policy Deficits   | June 2012      |
| 26. Don't Tinker with the Clock to Save Energy   | August 2011    |
| 27. India's coal reserves are vastly overstated: is anyone listening?                                      | March 2011     |
| 28. Critical non-fuel minerals security: Why India urgently needs to have a policy in place                | December 2010  |
| 29. Strengthening Agricultural Biotechnology Regulation in India   | September 2010 |

