

# Public Hearings in Environmental Clearance Process

## Review of Judicial Intervention

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A public hearing is the only medium in the environmental clearance process through which people can interact directly with government officials and the project proponents regarding project-related concerns. The relevance of public hearings—underlining principles of “democratic participatory governance,” “sustainable development” and “natural justice” for people—can never be undermined. However, this single procedural step is at the centre of so many legal disputes in the Indian courts (Supreme Court and high courts), and the National Green Tribunal had to repeatedly step in and clarify its importance in public policy and the environmental clearance process. This article reviews a series of judicial and quasi-judicial decisions on the question of the public hearing process in India.

A public hearing is a form of participatory justice giving a voice to the voiceless (particularly to those who have no immediate access to courts) and a place and occasion to them to express their views with regard to a project.

— *Samarth Trust v Union of India* (2009)

The Ministry of Environment, Forest and Climate Change (MOEF) is the nodal agency for making rules or regulations pertaining to environmental clearance (EC) to any project in India for which it regularly issues notifications. The first such notification was issued in 1992, then in 1994 and 2006 (so 1533, 2006 & so 60 [E], 1994). These notifications determine as to which projects require EC and also lay out the procedure for such a clearance. The 2006 notification made clearance a four-step procedure with screening, scoping, public consultation and appraisal (so 1533, 2006, para 7[i]) as mandatory steps to be followed by project proponents before clearance could be granted. The Environmental Impact Assessment report, Environment Management Plan and details of public consultations have to be submitted by the project proponents to the Expert Appraisal Committee (EAC) for appraisal of the project (Chowdhury 2014). After these four steps have been followed, the recommendation for acceptance or rejection of EC is sent to the regulatory authority, that is the MOEF for category “A” and State Level Environment Impact Assessment Authority (“SEIAA”) for category “B” projects (so 1533, 2006, para 2).

Public consultation is the third step in the process for environmental clearance. The 2006 notification (para 7[i] [iii] [3] [i] of so 1533) defines it as a process to ascertain the “concerns” of local affected persons, and others who have plausible stakes in the environmental impacts of the project, or activity.

It has two component steps (so 1533, para 7[i] [iii] [3] [ii]): public hearing at the site or in its close proximity and to obtain responses, in writing, from other concerned persons having a plausible stake in the environmental aspects of the project or activity.

The Rio Declaration (UNCED 1992) obliges its member states to seek public opinion and responses for environmental decision-making (Sands 2012: 64). It reflects the basic principles of wide publicity, access to information and opportunity to participate and speak for members of the public before the final decision is taken (Aarhus 1998). India first adopted these principles as mandatory for the EC process in 1997 (so 318[E]) by an amendment to the 1994 notification. With the latest 2006 notification (so 1533), it has been made mandatory for all projects, but with 7 exceptions<sup>1</sup> (so 1533, para 7[i] [iii] [3] [i] & so 3067, 2009).

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As a component of public consultation, a public hearing provides a “decentralised democratic space” (*Utkarsh Mandal v Union of India* 2009) in the clearance process where members of the public are given an opportunity to participate in the regulatory process. It is meant to give assurance to people by the government, through face-to-face interactions, to raise their concerns and provide them with all the information regarding the project, while seeking their opinions and hearing their grievances. At the same time, the opinions of the project proponents are also considered before a final decision is made. These face-to-face interactions fulfil the government’s commitment towards “sustainable development,” “environmental justice” (Bowen 2001 and US EPA), “empowered participatory governance” (Fung and Erik 2003) and “principles of natural justice” (*S Nandkumar v State of Tamil Nadu* 2010).

Besides, a public hearing is a platform to bring up relevant concerns on environment and other social facets of a project, such as, land acquisition, rehabilitation and resettlement, impact on livelihoods, compensation, pollution, employment, health considerations, etc, directly before the authorities and seek their redressal by project proponents (Reddy et al 2014). Here, the public can question development issues on grounds of social, cultural and environmental aspects of the project (Menon and Kohli 2009). The addressing of these issues by proponents ensures that authorities are aware of ground realities and the pros and cons of the project, which would contribute to effective decision-making (*M P Patil v Union of India* 2012). Seeking opinions and providing adequate response to issues could instil confidence in people about a project. Studies point out that people may welcome the project and try to make it a success by identifying probable pitfalls and proposing reasonable solutions (Mimi 2013; Earle 2006; Amerasinghe et al 2008). This would not only save time, money and energy of the proponents, but also help strengthen relationships with the local people, which would ensure smooth future functioning of the project (Fung and Erik 2003).

The involvement of people, and recording their concerns for consideration by the regulatory authority before a final decision of acceptance/rejection of EC would impart fairness to the public hearing process and give it a purpose (Dietz and Stern 2008). Importantly, public involvement would provide them a sense of ownership in decision-making, ensure accountability and transparency in governance (Earle 2006), and boost the efficiency and efficacy of the implementation of these decisions (Fung and Erik 2003).

The participatory nature of these hearings ensures a “two-way” flow of information (Baiocchi 2003; James 2004) and better quality decisions (Dietz and Stern 2008). Given its high relevance, it becomes very important that this step is performed with the utmost care and caution for “effective public participation” (*Samarth Trust v Union of India* 2009).

The Supreme Court identified public hearings as an opportunity for proponents to address public concerns related to projects and ensure their smooth operation with public support and assistance (*Alaknanda Hydro Power Co Ltd v Anuj Joshi* 2013), and the commencement of projects without obtaining EC

as a violation of the fundamental rights of the local people (*Association for Environmental Protection v State of Kerala* 2013).

The Supreme Court stated that it not only fulfils the government’s obligation to share information among the public and others (*Essar Oil Limited v Halar Utkarsh Samiti and Others* 2004) and seek their opinions on projects of public importance, but also acts as a medium to assess the projects’ likely damage to the environment and their ill-effects on the people whose livelihoods it seeks to take away (*T N Godavarma Thirumulpad v Union of India* 2002). This helps proponents address public concerns about a project and also takes them on board with respect to its benefits. The Supreme Court recognised the interconnectedness of national policies, economic growth, public opinion and sustainable development and thus called for the need to strike a balance between these, so that the affected people are not left unheard and at the same time economic growth is not stalled on account of the petty interests of a few individuals (*G Sundarajan v Union of India* 2013; *M C Mehta v Union of India and Others* 2004).

A review of the judicial decisions on the EC process reveals that “public hearing” has been a subject of many legal disputes and also a ground for the suspension of many ECs. Given its significance and controversies, this article discusses the manner in which the Indian judiciary has intervened and interpreted the procedural aspects of public hearings as laid down in the MOEF notifications. The focus is on the decisions of the Supreme Court, high courts and National Green Tribunal (NGT). This article analyses 31 judgments of all benches of the NGT between May 2012 and May 2016, where it has explained the crucial aspects of “public hearings.”

### Significance of Public Hearings

The Indian courts have the power to seek judicial review of all administrative actions by the executive. Since the decisions regarding ECs are executive actions of the environment ministry, they are also covered under this power. The Supreme Court (under Article 32, 136, Constitution of India [1950] and Section 22, National Green Tribunal Act [2010]), high courts (under Article 226, Constitution of India), and NGT (constituted under National Green Tribunal Act [2010]) have the power to adjudge the validity of ECs on the grounds of illegality or irregularity in public hearings. Even if the NGT Act does not provide powers to the NGT to suspend clearances granted to projects, it can be deemed to possess such powers as necessary for effective discharge of its functions, determining the rights of parties at dispute, or for interests of justice, unless stated otherwise in the act<sup>2</sup> (*Grindlays Bank Ltd v Central Government Industrial Tribunal* 1981; *Wilfred J v Ministry of Environment & Forests* 2014). Even if the act does not expressly provide for this power it does not rule it out either (*Maharashtra State Board of Secondary and Higher Secondary Education v K S Gandhi* 1991).

Generally, the courts’ consideration for such a review is based on whether the decision is consistent with the concerned legislative policy (or law) (Wooley et al 2008); the procedure has been followed; the decision is based on rational considerations; adequate and authentic information and responses have been

considered in the final decision or reasons for non-consideration have been provided (*Rudresh Naik v Goa State Coastal Zone Management Authority* 2013).

The Supreme Court, while dealing with the question of ECs granted to mining projects (Lafarge 2011; Sterlite 2013), clarified that although these grounds are at the judiciary's disposal whether to quash or set aside any decision of a public authority, the larger interests of the nation must not suffer on account of minor procedural lapses. Where the conduct of public hearings has not been mandated as per the provisions of the notification, causing substantial prejudice to those affected, the courts can question these proceedings and declare them invalid under the powers of a judicial review. To ensure that the procedure for public hearings has been effectively followed and not merely reduced to a farce, courts have often ordered the MoEF to reconsider the application after reconducting a public hearing. It can be stated that being a statutory right, it is a "legitimate expectation" of concerned members to be fairly treated, to be given reasonable opportunity to make representations or to have access to full and accurate information before it is arranged. These aspects have been reflected in clear and unambiguous procedures provided in the 2006 notification.

On the issue of the public's right of hearing, apart from the 2006 notification, the Supreme Court asserted, while disposing the Vedanta case (*Orissa Mining Corporation Ltd v Ministry of Environment & Forests* 2011), that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Panchayats (Extension to Scheduled Areas) Act, 1996 safeguards the public's right to protect their customs, traditions and thereby, mandate that their opinion be considered before forestlands are diverted for any non-forest purposes.

In this article, we have categorised the judgments on four grounds: procedural impropriety, adequate and authentic information, place of hearings, and adequate consideration.

### Procedural Impropriety

The MoEF notification (2006) clearly points out the necessity of public hearing notices, public access to draft EIA reports and executive summaries of EIA reports (online and print versions), wide publicity for the hearing, attendance of members present, opportunity to raise concerns and seek responses, recording of proceedings and consideration of responses by the EAC/MoEF. These are compulsory steps for authorities to make way for the hearings in letter and spirit. Certainly, a case of procedural lapse would not invalidate the public hearing unless it causes a gross violation of interests of local people by the proponents or any prejudice has been caused to them (*Samata v Union of India* 2011). Such prejudice would be a "mockery" of public hearings and thus liable to be set aside (*Adivasi Majdoor Kisan Ekta Sangathan v MoEF* 2011). Courts have often turned down those matters where petitioners could not either prove any violation of procedure (*Bhagat Singh Kinnar v Union of India* 2011; *North East Affected Area Development Society (NEADS) v Union of India* 2011; *Rajesh Kumar v Ministry of Environment, Forest and Climate Change* 2015) or any harm to public interests due to such violation (*Shri Thamme Gowda v Union of India* 2013). Deficiencies

that do not harm public interests or damage the environment would be curable deficiencies and thus, not a ground for the invalidation of the whole hearing (*Ossie Fernandes v Ministry of Environment & Forests* 2011).

While dealing with the petition challenging the EC granted to a Thermal Power Plant in Anand, the Gujarat High Court, in *Centre for Social Justice v Union of India* (2001), emphasised procedural fairness by stating that in order to ensure effective participation of people at the public hearing, a notice of the hearing should be published in newspapers that are "widely circulated in the concerned region" and copies of the notice must be sent to the gram panchayat/nagar panchayat/municipality of each affected village/town/district. Besides, copies of reports of the proponents must be provided to the public on demand at local offices of the pollution control board and the proponents (*M C Mehta v Union of India* 1985), and minutes of the public hearing should be provided to people on demand as expeditiously as possible or within a fortnight from the date these minutes are sent to the EAC.

In a writ petition related to an appeal against the order of the National Environmental Appellate Authority, New Delhi, about mining operations in Goa, the Delhi High Court, in *Utkarsh Mandal v Union of India* (2009), explained the objectives of public hearings and stated that the reason for furnishing a notice at least 30 days in advance of such hearings is to ensure "maximum participation" from local people. Further, the court observed that such participation would be meaningless if those present are not aware of the contents of the project, or its impact on their life and environment, or if the EIA reports are not available to them until the date of the public hearing. Thus, it is imperative that for "meaningful participation," the public notice of the hearing be repeated over a period of 10 days to attract maximum attention, and information about the project (draft EIA report, executive summary of EIA report or other relevant reports) be provided in the public domain through various sources (newspapers, notices at offices of authorities and on websites) at least 30 days before the hearing. This would ensure the "widest public participation" and safeguard the public's opportunity of an effective hearing. These were later incorporated in the procedure by an MoEF office memorandum (19 April 2010).

One of the questions regarding public hearings has been as to who all are eligible to participate and whether disruptions during the hearing make the process invalid. This question was addressed by the Delhi High Court in *Samarth Trust v Union of India* (2010). Here, the high court dealt with a public interest litigation (PIL) on the validity of a public hearing for a cement products project in Uttarakhand, where it observed that though a public hearing aims at hearing concerns of the "locally affected population," yet the notification (2006) nowhere excludes those not living in proximity of the site from participating in proceedings and seeking responses from the proponent. The court viewed such large involvement of the public in the nature of a *jan sunwai*, where not only the affected people, but the local population come together with the proponents and discuss serious and meaningful questions which might affect their life and future. Answering the question of legality of the proceedings that are marred by

disruptions or slogan shouting, the high court observed that where, despite such disruptions, the proceedings could continue and other members got adequate and reasonable opportunity to make their remarks, the hearing would be valid, for, the magnitude of disruptions was not such as to necessitate its reconduct.

Taking forward the initiative of the Gujarat High Court, the Delhi High Court, with respect to the conduct and scope of a public hearing, further stated that towards a meaningful public hearing, adequate notice should be given to every member (time for preparation, adequate publicity, and accessibility of relevant information), which is necessary to uphold the sanctity of the public hearing. Such notices and relevant documents should be provided on websites of the State Pollution Control Board (SPCB) and the proponents for consultation before hearing; the hearing panel must ensure that proceedings are carried out with the utmost care, caution and discipline; a definitive list of proposed speakers should be made by the authorities at least one day before the hearing; and, pandals should be constructed with adequate space for speakers to speak and other members to listen.

### Procedural Guidelines

This extensive procedural and serious nature of the hearing became another bone of contention in 2012. In *Ossie Fernandes v Ministry of Environment & Forests* (2011), while dealing with the validity of the EC granted to a thermal power plant in Tamil Nadu, the NGT observed that in spite of the commotion or disturbances during the public hearing leading to the use of force by the police, people expressed their views without any fear. All other procedures were properly followed, be it the recording of views/objections or consideration of such views by the EAC. Accordingly, the NGT viewed this as an insubstantial and ignorable lapse. However, to avoid recurrence of similar situations, it issued supplemental guidelines to improve the procedure:

- The draft EIA must be presented by the project proponent in the presence of all the people assembled for the public hearing, item-wise.
- The leaders of the local institutions like gram panchayats and samitis, the members of legislative assembly (MLAs) and members of Parliament (MPs) may be requested to be present at the public hearing and they may also speak as to the viability or otherwise of the project and submit their written representations.
- No person shall be allowed to enter the pandal/hall where the public hearing is being conducted holding party flags and they shall not be allowed to raise party slogans. The public hearing should be strictly confined to the issues that arise from the draft EIA report and ancillary thereto, and nothing more.
- The persons who want to speak in the public hearing may be asked to give their names in a prescribed form indicating details such as name, father/husband's name, name of the village, taluk/tehsil, the extent of land, if any, affected and the subject on which he or she wants to speak, etc.
- Those who do not want to speak may be asked to stand/sit behind the persons intending to speak, in a separate enclosure. However, those who gave their names are to be called to the dais one after the other and may be allowed to speak on the subject indicated, allotting about five minutes' time to speak.

- If the project involves presentation/clarification requiring intrinsic science and technical knowledge, the environmentalist/scientist may be invited to speak on the occasion in the presence of the public and submit views, in writing, on the subject.
- At the end, all the views, whether for or against the project, may be addressed subject-wise/issue-wise and be responded to by the project proponent or his/her representative.
- The authority conducting the public hearing may be asked to take an active part in following each and every minute procedure required for conducting the public hearing. It shall prepare minutes of the proceedings in accordance with the EIA notification, 2006 and show it to the public.
- Further, the public hearing proceedings shall be drawn in a tabular form addressing each and every issue raised in the public hearing and the reply offered by the project proponent.
- EAC minutes should incorporate detailed reasons, in writing, for acceptance, or otherwise, against each issue arising out of the public hearing and brought before it.

It is noteworthy that even after the Gujarat High Court issued guidelines in 2000 and the subsequent issue of the notification in 2006 with a clear procedure, the Delhi High Court felt the need to strengthen the existing guidelines. It suggested that proponents and authorities have not yet adopted the procedure the way they should have. Despite previous guidelines with respect to the construction of pandals and list of speakers, the Bombay High Court too, very recently, reiterated the importance of "peaceful" proceedings and ordered for a "post decisional public hearing" over the failure of the authorities in following these guidelines of the Delhi and Gujarat high courts (*Padmakar Vinayak Deshmukh v Union of India* 2010; Pallavi 2011). Besides these guidelines, a further long list of directions issued by the NGT for proponents and authorities indicates that in spite of constant reminders by courts and the quasi-judicial authority, procedures are not yet being followed in a "fair" and "adequate" manner, which requires the immediate attention of both the legislature and proponents.

In *Adivasi Majdoor Kisan Ekta Sangthan v MOEF* (2011), while dealing with the validity of the EC granted to a thermal power plant in Chhattisgarh, the NGT observed that even after those who opposed the project had left the place due to initial disturbances, the panel continued the proceedings without any prior intimation to other people and declared it valid by considering only the views of those who supported the project. Moreover, the proponents never replied to any concerns of the people who had earlier opposed the project. Neither did they provide any summary of the hearing in the local language after the proceedings, nor were these concerns raised by the EAC during the appraisal, and by the MOEF, before the final decision. This was held to be a sheer violation of the law and the EC was set aside.

Mulling over the question of the postponement of public hearing by authorities, the NGT observed that if the concerned authorities are satisfied that a hearing needs to be delayed due to circumstances (SO 1533, 2006, Appendix IV, para 3.3), they can do so, but with due notification to the public through newspapers in both English and the vernacular language with a difference of at least 30 days between previous and new hearing dates (SO 1533, 2006, Appendix IV, para 3.4). A failure to ensure this

would count as inadequate publicity of the public hearing, which is a violation of the mandatory procedure and would vitiate the whole process (*Sreeranganathan KP v Union of India* 2013).

Though the public hearing is a mandatory step to be followed before the grant of ECs, but where regulatory authorities are satisfied that local situations are not conducive for a peaceful public hearing, the notification empowers them to skip this step by just accepting “written responses” from the public (so 1533, 2006, para 7[i][iii][3][v]). But, once skipped, the MOEF/SEIAA has no jurisdiction to order its revival after the EAC/SEAC has already expressed its remarks for acceptance or rejection of the EC to the project. This was observed by the NGT when it had to decide the legality of a letter issued by the MOEF to a district collector of the concerned district to conduct the public hearing and then re-submit the application, after the EAC had already recommended the project for EC (*Shiva Cement Ltd v Union of India* 2013).

The notification vests powers with the EAC/SEAC to exempt expansion or modernisation of those projects which were granted ECs under “this notification” (so 1533, 2006) from public consultation (so 1533, 2006, para 7[ii]). But, the NGT clarified that this power of the EAC does not extend to projects which were either granted EC under previous EIA notifications or were in existence before the 2006 notification (*Jan Chetna v Ministry of Environment & Forests* 2011).

### Place of Hearing

The place of the hearing is very important to ensure maximum participation of the local population or other affected members. Where, due to inescapable reasons, the hearing could not be arranged at the project site or in its close proximity, the 2006 notification suggests it should be ensured that adequate facilities are provided by the project proponent for the comfort of the public to reach the site of hearing and that the hearing does not become a mere formality due to the presence of only a few of those affected. If this is not done, the courts have the power to declare the EC illegal on the grounds of inadequate public hearing.

On the specific issue of conducting public hearings of two or more projects at same time and venue, the Delhi High Court in the *Utkarsh Mandal v Union of India* (2009) instructed the state/union territory pollution control authorities to ensure that such practices should be avoided (here, the hearing was for six projects at the same time and venue). However, where different venues could not be arranged due to paucity of space, it should be ensured that sufficient time gap exists between the two proceedings. This order was incorporated in the procedure by the MOEF office memorandum (19 April 2010).

On the issue of the place of the hearing being at the project site or in its close proximity, the NGT observed that the mere fact that a public hearing for a thermal power plant in Chhattisgarh was arranged at a place which was neither the project site nor in its close proximity (so 1533, 2006, para 7[i][iii][3][ii][b]) would not be sufficient to hold the entire proceedings invalid, but if it caused prejudice to the public or was inconvenient for them to reach that place and attend the proceedings, it could be a ground for its invalidation (*Jeet Singh Kanwar v Union of India* 2011). Though it is always desirable that it is conducted at a

proximate site to the local people, for instance, within 1 km, this in itself is not a substantial procedural lapse (*Krishi Vigyan Arogya Sanstha v the Ministry of Environment & Forests* 2011).

While dealing with the issue of a “neutral” place of hearing, the principal bench of the NGT heard a matter whether a hearing held at a property (other than project site) owned by the proponents can be held invalid on the grounds of a non-neutral place of hearing being inappropriate for the “free and fair participation” of the public. Here, it was observed that the 2006 notification prescribes the project site or its close proximity as an ideal place for a hearing (so 1533, 2006, para 7[i][iii][3][ii]). If the argument that a property owned by proponents is a non-neutral place is accepted, then it would be true also for the project site, which is owned by the proponent. Thus, the 2006 notification has no such intention to exclude sites owned by proponents from being a place of hearing (*Mahesh Chandul Solanki v Union of India* 2011). Here, it reiterated this point that merely being a place owned by proponents does not vitiate the hearing unless it is proved that, due to the choice of such a site, people could not participate freely in the hearing.

In the case of projects having an impact on more than one state, the notification mandates that public hearings should be held in every state where the project site exists (so 1533, 2006, Appendix IV, para 2.1). If a project is situated in one state, there is no obligation on the proponents to hold proceedings in other state(s) or notify the public of such state(s) about such a hearing, irrespective of its impact on the livelihood or environment of the people of the state(s). But, there is no bar on persons of such state(s) from attending these hearings (*Utkarsh Mandal v Union of India* 2009).

### Adequate and Authentic Information

The “transparent” nature of public hearings requires not only timely information dissemination, but also accuracy and authenticity (*State of Uttar Pradesh v Raj Narayan* 1975; *Jan Chetna v Ministry of Environment & Forests* 2011). The NGT has repeatedly reminded the MOEF and EAC of its duty to ensure the authenticity and unambiguity of information provided in EIA reports and associated studies (*T Mohana Rao v Ministry of Environment & Forests* 2011). This issue was again pondered over by the NGT when it dealt with the issue of discrepancies between the draft and final EIA report in *Ossie Fernandes v Ministry of Environment & Forests* (2011). It issued directions that such discrepancies do not occur or, even if they did, do not result in substantial changes in order to safeguard local people’s right to transparency and effective hearing.

Subsequent to the observation of the Delhi High Court in the *Utkarsh Mandal* case (2009), the NGT in *MP Patil v Union of India* (2014) also observed that while submitting a draft EIA report and for public consultation, the proponents should ensure that the information in the reports is authentic. The proponents are required to disclose all material issues like R&R policy, land to be acquired, quality of raw material, details of compensation, project affected persons, etc, to the public in their reports. This disclosure of adequate and authentic information is very significant on account of its likely impact on public opinion

related to project. However, even in cases of non-disclosure, if these issues have been adequately pondered upon by the EAC/MoEF before the grant of ECs, satisfied that it would not substantially change public opinion it can be considered an immaterial defect and can be avoided to save the project (*Ramesh Aggrawal v Union of India* 2013). But, this opinion was later modified when it observed that all studies related to a project, such as, changes in scope alignment, specifics of the project, etc, must be completed before the public hearing to offer the public an opportunity to express their opinions on the basis of these reports/changes. The Court, thereby, ordered the proponents to reconduct the public hearing on the basis of these reports (*Save Mon Region Federation v Union of India* 2012).

Another important issue in the form of disclosure of information about the exact "location/site" of a project came before NGT in *Ramesh Agrawal v Union of India* (2013). Here, it observed that any piece of information with likely impact on the public's opinion about a project or on environment/ecology of the "site" is vital information to be disclosed to the public. However, if such non-disclosure is neither deliberate nor mala fide, and has been addressed by the proponents in the final EIA report, it could be ignored as a marginal deviation without any significant impact on the environment/ecology or rights of the affected people.

The Southern Bench of the NGT in *T Murugandam v Ministry of Environment & Forests* (2012) gave directions to ensure "transparency" in the EIA process: that the MoEF should make available on its website all the relevant information other than the EIA report and report of the public hearing considered during the appraisal of the project, including the executive summary of specific studies; the SPCB should make available on its website pertinent information regarding the public hearing proceedings, consent to establish and consent to operate, compliance status, etc; the project proponent must upload the compliance status of the EC conditions, including the executive summary of the specific studies done in respect of the project and update the same periodically; and the EC certificate must be published in newspapers as soon as these are accepted by the MoEF/SEIAA for transparency.

These were to ensure that since the final EIA report is not accessible to the public before a final decision by the MoEF or SEACC, these documents should be made accessible to them through various mediums, as soon as the final decision is taken. This would help people know if their concerns have been incorporated in the final EIA report, which is mandatory before the final report is sent for appraisal (Menon and Kohli 2015).

However, in spite of earlier directions, the NGT in *Ossie Fernandes v Ministry of Environment & Forests* (2011) again noted discrepancies in the draft and final EIA reports and accepted that such discrepancies may cause prejudice to the public (being unaware about the contents of the final EIA report which is not in public domain) and affect the environment/ecology. The NGT sought to rectify these by providing instructions, such as: the EIA consultant shall be forewarned about careful preparation of the draft EIA in consonance with the Terms of Reference (TOR) issued by the EAC and also in preparing the final EIA report; the MoEF should evolve a strict mechanism to check the draft EIA report that is to be prepared strictly in consonance

with the TOR awarded for the EIA studies before it is uploaded on the website for conducting the public hearing; the final EIA report shall be evaluated as per the TOR and draft EIA; suggestions made during the public hearing before it is placed before the EAC for appraisal, with due procedure followed. This would leave no scope for mischief by the proponent while preparing the draft EIA report for the public hearing. All these measures would ensure authentic information about the project so as not to cause any threat to the environment/ecology.

In several cases, the NGT emphasised the need to follow the guidelines honestly. It has often instructed authorities to devise a mechanism to check whether the draft EIA report has been made in consistency with the TOR issued, and observed that concealing or providing misleading information in the draft EIA report may cause a threat to the environment/ecology, and would be grave misconduct. The non-availability of the final EIA report could be used by proponents to provide misleading information to the public, so it becomes necessary that there are no substantial discrepancies in the draft and final EIA reports. The NGT counts these discrepancies as material irregularities and a ground for invalidation of the public hearing which, unfortunately, is not happening (*Ramesh Agrawal v State level Environment Impact Assessment Authority* 2011). If these considerations are not regarded by courts as grounds for its invalidation, authorities may not even deliberate to correct these.

### Adequate Consideration

Procedurally, on completion of a public hearing, people must be informed about the final decision by a regulatory authority. To prevent it from being reduced to a mere ritual, it is mandatory that valid reasons be provided by authorities for acceptance/rejection of public concerns. Besides, being an administrative body deciding on civil rights, the EAC also has an obligation to furnish the reasons for its actions (*Rudresh Naik v Goa State Coastal Zone Management Authority* 2013).

The Delhi High Court, in *Utkarsh Mandal v Union of India* (2009) dealt with the failure of the appraisal committee to deal with the concerns raised at the public hearing. It opined that, being an administrative body performing delegated functions, it was necessary for the EAC to consider questions and issues raised at the public hearing. The EAC can certainly reject them but only with adequate reasons which are requisite for a valid order (*M J Sivani v State of Karnataka* 1995). Though its order is not binding on the MoEF, being a recommended expert body, its opinion acts as a valuable input for the MoEF to decide and thus, these reasons can determine the fate of the project as well as people's lives. Dealing with the issue of recording proceedings and consideration of public responses by proponents and appraisal committees, the NGT observed that it is imperative that the concerns from public consultations (both oral and written) and proponents' response to these concerns are noted and recorded and sent to the appraisal committee for consideration (*M P Patil v Union of India* 2012). This is then considered by the EAC and MoEF with adequate reasons, that is, application of mind, for their acceptance or rejection (*Mylarappa v Dr R Venkatasubbiah* 2018; *Gram Panchayat Navlakh Umbre v Union of India* 2012 &

*S Nandakumar v Secretary to Government, Tamil Nadu 2009*). These reasons serve the very purpose of conducting public consultations, that is, to know the ground reality of the project's impact on the environment/ecology and local population (*MP Patil v Union of India 2012*). The non-consideration of such issues for a final decision by the MoEF would render the hearing meaningless (*Gau Raxa Hitraxak Manch v Union of India 2012*).

Despite consistent guidelines and instructions issued by the Supreme Court, high courts and NGT, authorities continue to make unreasoned decisions. The NGT also cautioned that the EAC, as a high-level body, has been constituted to evaluate the merits and demerits of a project and to accordingly make recommendations for or against giving clearance to a project. While making recommendations, it has to consider the draft and final EIA reports along with all other relevant studies conducted by the proponents, and furnish adequate reasons for its decision. Public hearings mandate the EAC and MoEF to consider recorded public concerns and furnish reasons for their acceptance or rejection. The failure to do this would be liable to be set aside on account of substantial procedural lapses and non-diligent behaviour of the EAC/MoEF (*Padmakumar v Government of India 2013; Aranmula Heritage Village Action Council v State of Kerala 2013; Himgiri Zee University v Union of India 2015*).

Public hearings are significant for the benefit of the affected local persons. It reflects basic principles of public notice, timely access to authentic information, opportunity to participate and speak, recording of concerns raised and consideration of these concerns before the final decision. In spite of its benefits, many lacunae have been noted in the process of public hearings. First, the public hearing panel does not include any representative from the local community, but only officials. Second, there is no mechanism to ensure effective response by proponents to queries raised at the hearing, without which it would remain a futile exercise, and no quorum has been prescribed for initiating a hearing. Third, despite repeated guidelines of the NGT in regard to EIA reports, no mechanism has been provided to ensure that draft EIA reports are made on the basis of the TORs prepared by a regulatory authority. Moreover, the final EIA report is not provided in public domain to check whether issues raised at a hearing have been accounted for. Fourth, if issues raised at a hearing are not addressed, or not considered for the final decision, it would affect not only public participation in the current project, but also their confidence in the EC process for future projects. The

acceptance or rejection of their concerns must be substantiated by reasons. Besides, the public should be involved in the decision-making process at a much earlier stage, namely, at the stage of site selection (Ghosh 2013).

## Conclusions

The public hearing process is an important part of the EC process. But, it is clear that there exist procedural lacunae in the process. For "procedural impropriety" the courts have usually considered whether the lapse was a substantial, or minor deficiency. If such a lapse violated the mandate of notification or principles of natural justice, thereby, obstructing effective public hearing, courts pronounced them invalid. Courts have always considered the "place of hearing" as a requisite for the "free and fair" participation of the public in a hearing. Where it was found that the proponents failed to provide information about such a place or where it was arranged at a location inconvenient for the public to reach or "freely" participate in the hearing ("non-neutral place"), or at a time when the public could not attend hearings, the public hearing was held invalid by the courts. Consequently, high courts and the NGT have clarified that the place of hearing should ideally be near the project site and only one hearing should be arranged at a time at one place. For "adequate and authentic information," courts have considered whether reports and studies furnished by the proponents to the public and authorities were adequate and contained information sufficient for the public to form their opinions. Where these reports provided false and misleading information, or where all relevant reports were not supplied to the public on time, such a public hearing was held "mockery" and thus, invalid. Lastly, the courts observed that where the outcomes of public hearings were not incorporated in the final EIA report by the proponents and thus, not considered by the EAC, there would be no purpose left for conducting public hearings. The EAC and MoEF were also instructed to furnish reasons for acceptance or rejection of any concerns raised at public hearings so that members are aware of basis of its decisions. The high courts and NGT have constantly issued directions for the proponents and government authorities to ensure that both parties address and resolve each other's concerns through deliberations. The public hearing process must be considered as the first step for future conflict management on account of its relevance for impacting equally a project and the lives and livelihoods of the people involved.

## NOTES

1 SO 1533, 2006, Para 7(i)(III)(3)(i), all projects except

(a) Modernisation of irrigation projects (item 1[c] [ii] of the Schedule);

(b) All projects or activities located within industrial estates or parks (item 7[c] of the Schedule) approved by the concerned authorities, and which are not disallowed in such approvals;

(c) Expansion of Roads and Highways (item 7 [f] of the Schedule) which do not involve any further acquisition of land;

(cc) maintenance dredging provided the dredged material shall be disposed within port limits;

(d) All building or construction projects or area development projects (which do not contain any category A projects and activities) and townships (item 8[a] and 8[b] in the schedule to the notification);

(e) All category "B2" projects and activities;

(f) All projects or activities concerning national defence and security or involving other strategic considerations as determined by the central government.

2 *Grindlays Bank Ltd v Central Government Industrial Tribunal* (1981):

"We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no

express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties."

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