



December 23, 2009

Via Hand Delivery

Honorable Minister Jairam Ramesh
Honorable Secretary Sharma
Ministry of Environment and Forests (MOEF)
New Delhi, India

RE: MOEF Discussion on Proposed
National Environmental Protection Authority

Dear Honorable Minister Ramesh and Honorable Secretary Sharma:

On behalf of the Natural Resources Defense Council (“NRDC”), we respectfully submit this letter in response to the Ministry of Environment and Forests’ (“MoEF”) discussion paper, “Towards Effective Environmental Governance: Proposal for a National Environmental Protection Authority.” This letter also responds to the Ministry’s request for comment by NRDC on the National Environmental Protection Authority (“NEPA”) discussion paper. We greatly appreciate this opportunity to provide our perspective on the Ministry’s proposal to increase environmental protection in India and strengthen the government’s ability to protect the health of millions.

NRDC staff members working on key areas of environmental protection, including staff with extensive experience working within the US Environmental Protection Agency, have reviewed the Ministry’s proposal.

We support the goal of the Ministry’s proposal to improve and increase environmental protection. As discussed in the Ministry’s proposal, effective structures for compliance and enforcement are critical to environmental protection. Because the discussion of the potential new environmental structures is still at a conceptual stage and further details on the various options are necessary before the full implications of each option can be fully understood, we have limited our comments to a discussion of foundational principles for effective environmental governance and of the process for creating NEPA. We understand that the Ministry’s NEPA proposal is the first step in an administrative process that will

include public participation, and we hope that these principles will help inform MoEF's development of the specifics.

Given our roots in the US, much of the discussion below is informed by the US experience. We offer these recommendations to the Ministry with the recognition that India has a separate legal structure, that US-based approaches must be modified for the Indian context, and that, in some instances, US-based approaches may not work in the Indian context at all.

In this letter, we present our comments in two sections. The first section discusses foundational principles for meaningful compliance and enforcement structures based on our experiences in this area. The second section proposes suggestions and recommendations for the process creating the NEPA, including further analysis of the current Indian environmental governance system and basis for reform. We hope to meet with your staff during the week of December 21 to discuss the NEPA proposal.

Section One: Foundational Principles

Strong foundational principles are integral to a new agency structure. These foundational principles shape and inform the specific decisions posed by the Ministry's proposal. These principles for an effective enforcement and compliance structure are based on our decades of experience in the enforcement of environmental laws at the federal and state level in the US and in China.

Provide administrative, civil, and criminal authority to enforce environmental laws. In the US, at both the federal and state levels, environmental compliance and enforcement agencies may proceed with enforcement actions in several venues. The agencies can impose administrative penalties, with appeals to administrative adjudicatory bodies, followed by an appeal to the courts. The agencies can also choose to seek both or either civil or criminal penalties in the courts.

The availability of administrative, civil, and criminal enforcement authority utilizes resources more effectively, increases the deterrent value of enforcement, and is more cost-effective. For instance, the co-existence of administrative and judicial avenues of enforcement reduce pressures on courts, freeing them up to address truly egregious violations. Administrative enforcement authority also allows agencies to proceed quickly without delays from awaiting judicial decisions. Swift and consistent enforcement increases the deterrent value of enforcement actions. The administrative process is also more cost-effective since it often requires less time and resources. The availability of both civil and criminal penalties similarly reduces the burden on the courts by spreading the burden over both parts of the judicial system and streamlines enforcement by adjusting the burden of proof according to the severity of the remedy sought.

Irrespective of the creation of a National Green Tribunal, NEPA should have the authority to assess administrative penalties for matters within its purview. MoEF might even consider entrusting initial jurisdiction over challenges to administrative penalties to an administrative adjudicatory body. In any case, final judicial review by an independent court, such as the Delhi High Court, is essential to providing access to justice.

Provide adequate resources, including staff and training, to all levels of enforcement. To ensure consistent enforcement, all parts of the enforcement system must have adequate training in the policies, guidelines, and protocols central to the work. The agency must also have sufficient staff and budgets to monitor violations of the laws and enforce the laws to the extent needed to be an effective deterrent. These tasks require adequate technical resources to meet enforcement needs, such as computerized, uniform, and searchable databases to facilitate faster, more efficient, and more consistent trainings and enforcement actions.

It is also important to ensure competitive compensation for agency staff. Competitive salaries and benefits on par with market rates allow for greater levels of employee loyalty and performance. Moreover, this is an important mechanism for promoting independent decision-making and enforcement by agency staff. Competitive compensation, especially when combined with strong conflict of interest rules and procedures, can help reduce the influence of external pressures or incentives that may interfere with unbiased decision-making, and thus will strengthen the agency's overall legitimacy.

Ensure meaningful public participation. Meaningful opportunity for the public to participate in the governance process is central to the operation of laws in a democratic society. Public participation is particularly important in the enforcement of environmental laws. The public has a vested interest in the effective implementation of environmental laws because it is directly affected by pollution that environmental laws seek to prevent.

The public can play a critical role in bolstering and improving the work of enforcement agencies, in legitimizing their work, and in helping identify and enforce against violations of the laws. India's robust local communities are eager to participate and play this role. Providing access to these voices and resources will make the government's work more efficient.

Public participation takes a number of forms in the US. Both state and federal laws provide for public hearings and comment periods and require the agency to respond to the public's comments. Citizens are also given the right to challenge agency decisions in court. Several laws provide for direct citizen enforcement of environmental laws against polluters, to supplement, not replace, the work of the enforcement agencies. These laws also allow enforcement against the agency to ensure adequate implementation of the laws, keeping the agency accountable.

Mechanisms such as these ensure the agency's responsiveness to public concerns and counter the pressures that otherwise might be brought to bear on the agency from the regulated community and from others with a stake in the industries within the agency's jurisdiction. Other laws require agencies to collect and report on basic pollution data. This informs public participation and makes other records available to the public upon request.

It is also important that senior Ministry staff engage with the public directly during public hearings and workshops. At least one senior Ministry staffer should attend public hearings. By engaging directly with the public and local community, the Ministry would increase confidence that the Ministry is considering the public's input in the final agency decision. All of these mechanisms play a role in ensuring meaningful public participation and in helping ensure the effective functioning of agencies enforcing environmental laws.

Institute effective oversight and auditing functions. Internal and external oversight of agency actions is critical to the effectiveness of any agency. This oversight can identify wasteful practices, ineffective policies, and identify opportunities for improvement. The oversight can identify the successes of departments to be shared and implemented agency-wide. It is a simple and effective way of improving the agency's performance.

In the US, such oversight is performed by internal and external watchdogs. The US EPA has an independent Office of the Inspector General, with separate funding, which regularly audits the performance of the agency. Similarly, the US General Accounting Office (GAO)—the investigative arm of Congress charged with examining matters relating to the receipt and payment of public funds—routinely assesses the performance of agencies and of the implementation of particular laws.

In its regulatory capacity, US EPA also provides oversight over regional or state approval of federal projects. US EPA has the authority to independently review federal projects approved by states or other agencies. Based on its review, US EPA ranks these projects as part of the governmental funding allocation for the project. While US EPA does not outright veto the projects, its ranking plays an important role in determining whether the project will receive funding. Finally, the roles of agencies must be defined such that a national agency can step into the shoes of a regional agency should the regional agency fail to meet its obligations as required by India's environmental laws.

Of course, an active, broad, and engaged civil society is another independent check on the performance of the agency. Fostering meaningful public participation can play a central role in ensuring the effective functioning of the agency, as discussed above.

India's existing Comptroller and Auditor General (CAG) already carries out functions similar to that of the US GAO. Supplementing the CAG's work with the equivalent of the US EPA's Inspector General, focused on the environmental enforcement and compliance agency's operations, would provide a greater level of accountability and oversight.

Recruit and retain a highly qualified staff with relevant technical expertise.

We strongly endorse the draft proposal's key principle regarding professional management and best-in-class expertise from all relevant fields. As the discussion paper recognizes, effective standard-setting and enforcement agencies are characterized by a technically qualified staff with expertise in law, science, and economic and policy analysis.

The US EPA and state enforcement bodies such as California's Environmental Protection Agency reflect this emphasis, staffed with experts in these areas. Staff must be able to assess and incorporate cutting-edge science, detailed legal and regulatory language and arguments, and complex statistical, economic, financial or market-related mechanisms. This is crucial to establishing the agency's credibility and authority and engaging with a regulated community that may seek to use the law, science, statistics, or economics to challenge agency decisions. A highly qualified and experienced core staff with specialization and strong credentials will ensure better standard-setting, enforcement and compliance. In addition to staff experienced in governance structures and public sector institutions (such as existing Indian Administrative Service officers and other Civil Servants), the authority should also seek out expert candidates chosen through merit-based recruitment systems. Technically qualified staff should then be managed professionally to maximize productivity.

Simplify and clarify the charters and responsibilities of the various agencies involved in environmental governance and establish a floor of minimum requirements.

A clear and rational delineation of responsibility and authority between the Central and State bodies engaged in enforcement and compliance work is crucial to the newly proposed NEPA's effectiveness. One possible factor in poor enforcement and compliance is currently complex relationships between enforcement bodies. Creating a new NEPA, without addressing the complexity of these relationships and the confusion they can create, will handicap efforts to create an effective environmental enforcement and compliance structure in India.

A clearly structured division of responsibility and authority facilitates greater accountability. It ensures, to both the public and the regulated community, that important issues are not held up in interstitial grey areas and reduces other inefficiencies such as duplication of work.

The environmental governance structures in the US do not always live up to this principle, but may still provide a useful comparison for implementing this principle.

In the US, federal laws and their implementing regulations establish the minimum standards for environmental compliance. States may go beyond the federal standards to impose stronger requirements, but may not weaken the standards. Such as system establishes a uniform set of requirements that are protective of health and the environment while avoiding a race to the bottom, and at the same time allows for the tailoring of governance to local conditions.

The restructuring of the enforcement system must ensure that the central authorities have the power to review and provide oversight over the performance of state agencies in meeting the requirements of the Centre's laws and to deploy both "sticks" and "carrots" to ensure the constructive participation of state agencies. In the US, access to federal benefits is often tied to compliance with requirements of federal law. For instance, a state that fails to meet its obligations under the federal Clean Air Act can lose federal highway funds, a large source of revenue for state highway projects. Failing to have the right incentives in place for states to comply can lead to a misalignment of priorities so that states operating under other incentives do not prioritize environmental enforcement or compliance. In China, for example, the central government has taken a strong stance on addressing pollution. However, in the provincial governments, where the incentive structures lead to the prioritization of economic issues, environmental issues have not always had traction, sometimes leading to the neglect of the center's environmental priorities.

Clearly delineate roles of the proposed central authorities. The relationship between the MoEF and NEPA should be statutorily defined to avoid confusion. There should be a clear and rational delineation of jurisdiction, responsibility, and authority between the two central agencies. This is especially critical for effective oversight of state or local entities who need to know who they should be responding to and for what, for the regulated entities to have a clear process to follow, and for the public to know who to hold accountable.

Establish outreach and compliance assistance programs, and incentive programs to supplement effective penalties. While penalties, fines, and other enforcement actions are essential to effective deterrence of violations of the environmental laws, they must eventually be combined with outreach programs to educate the regulated community about the law and the options for meeting the requirements of the law. These programs should also provide assistance in complying with the law, especially for small and medium enterprises that may not have as many resources as larger companies. Such assistance is not only likely to encourage greater compliance, it leaves violators with no excuse for their failure to comply. In addition, incentive programs to help resource-poor enterprises can provide another avenue for achieving compliance goals.

Institute a self-monitoring, reporting, and compliance system for all regulated entities. All clearance/permits must require self-monitoring and self-reporting sufficient to determine compliance with the clearance/permit

requirements. This self-monitoring and self-monitoring requirement is central to enforcement, because it requires clearance/permit applicants to identify and disclose their own violations. The U.S. Congress required this system because self-monitoring facilitates effective enforcement: “One purpose of these new requirements is to avoid the necessity of lengthy fact finding [and] investigations . . . at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.” S. Rep. No. 414, reprinted in 1972 U.S.C.C.A.N. 3668, 3730. The U.S. Congress intended that prosecution for permit violations be swift and simple.

Because of this congressional directive, US EPA requires regulated industries to monitor their operations for environmental parameters, to keep records of their operations for relevant environmental parameters, and to report on their operations to the US EPA.

Having the regulated industry pay for the monitoring and the record-keeping is consistent with the “polluter-pays principle” endorsed in the MoEF’s discussion paper. In addition, these self-reports, bolstered by laws against falsification and serious penalties for falsification of material, often provide the basis for enforcement actions not only by the US EPA but also by citizens and state agencies. However, such self-reporting can only be effective once an effective verification system is in place that effectively discourages cheating. Thus, this may be a step that can only be instituted once a relatively mature enforcement infrastructure is in place.

Section 2: NEPA Discussion Process

As the Ministry has emphasized in the NEPA proposal and its overall approach, transparency and process are key to effective governance. We commend the Ministry’s NEPA proposal as a means to improve transparency as well as environmental compliance and enforcement. After discussing the NEPA proposal with various Indian and US governmental agencies, practitioners, and academics, we understand that some groups are requesting increased coordination and input on the proposal.

First, although the Ministry has cast a wide net for solicitation of comments, it is difficult to determine the diversity and scope of the commentary. One suggested solution is to create a dedicated sub-website on the Ministry’s main webpage that is an information resource for the NEPA proposal. This website could include background information on the proposal and comments could be posted on this website.

Second, as mentioned above, some practitioners have questioned the Ministry's basis for establishing NEPA given that environmental laws and governmental structures already exist in India. Some suggest that resources should be spent in empowering existing agencies, rather than further complicating the agency structure. While the Ministry's NEPA discussion paper discusses the need for the new agency, this discussion could be expanded and could serve as the basis for a public workshop process to discuss the NEPA proposal. In conjunction with the workshop, we respectfully recommend that the Ministry further analyze and provide additional information on the current institutions and governance regime in India. Such an analysis would allow examination of the current system and the need for reform. This additional analysis would allow for a more informed, rational, and broadly-supported decision by the Ministry on whether to create a new NEPA and the structure of the NEPA. Given the breadth of environmental laws and institutions in India, a system-wide evaluation is needed prior to a massive overall. Fortunately, some of this analysis has begun in the studies referenced in the Ministry's discussion paper. These studies could be used as the starting point for conducting the requisite underlying analysis to determine the best approach for strengthening environmental compliance and enforcement.

Finally, we have encountered many questions about the exact timeline and process for the proposal. Based on our experience, we respectfully request that the Ministry allow for a broadly inclusionary process for discussing the creation of the NEPA. Given the importance of this new agency, robust public participation is warranted to ensure that an effective structure is established. We recommend the following elements:

- Staff Report – sets forth an analysis of the legal background and basis for the NEPA proposal, discusses the current functions of the various boards, and explains the need for a new agency.
- Public workshops and hearings – a minimum of two workshops to receive comments on the creation of the NEPA; an informal workshop combined with a formal workshop may meet the needs of public participation. A final hearing for adoption by the Ministry would also provide more transparency.
- Response to Comments and Revised Proposal – collect and summarize comments and provide responses to comments submitted by various entities that explain the basis for accepting changes and rejecting changes; provide a revised NEPA proposal based on these comments.

At this point, the Ministry has received its first set of comments. Based on these comments, the agency could prepare a short response and hold a public workshop to receive further input on the process and to collect key stakeholders' feedback. After this workshop, Ministry staff could prepare a staff report, response to comments, and a revised proposal. The stakeholders could then comment on this

revised proposal which could be part of a workshop to finalize the Ministry's NEPA proposal.

We greatly appreciate this opportunity to provide input on the Ministry's proposal to create a NEPA. Since we believe that additional information is needed to identify and create an appropriate compliance and enforcement structure, at this time we are unable to recommend an option from among those listed in the Ministry's NEPA discussion paper. We look forward to providing further comment and analysis on the Ministry's NEPA proposal.

Please don't hesitate to contact Anjali I. Jaiswal (ajaiswal@nrdc.org) if you have any questions or would like to discuss this letter further.

Sincerely,



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