

The Challenge of Environmental Regulation in India

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India's environmental regulations have become stronger in the 25 years since Bhopal, but enforcing them remains a challenge.



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In the Niyamgiri Hills in the state of Orissa, on the east coast of India, activists have been waging a years-long legal battle to stall the development of a bauxite mine and aluminum refinery on protected forestland. The project has been opposed by members of local tribal communities, Indian environmental organizations, and an international human rights group. According to opponents, who have filed complaints with India's Ministry of Environment and Forests (MOEF), Sterlite Industries (India), Ltd., a subsidiary of U.K. mining firm Vedanta Resources, made misleading statements in its environmental impact assessment, including separating the mining and refining projects, which were meant to operate in tandem. The opponents also argue that the mining operation will affect land that forms an important wildlife corridor and is home to indigenous tribes that are protected by Indian law.

Attempts to reach Sterlite by phone and email were unsuccessful, but the company has previously stated that the projects are separate and that indigenous tribes were consulted.

To the activists, the fact that this argument is still going on is a victory of sorts. Although the refinery has been built, the mining has not yet begun because of these legal challenges. In a country still known for having failed to remediate the site of one of the worst environmental disasters in modern history, environmental regulation has come a long way.

Twenty-five years ago, on December 3, 1984, at a Union Carbide plant in Bhopal, India, a tank of methyl isocyanate leaked 40 tons of toxic gas into the nearby community. Estimates of the death toll vary, but at least 3000 people were killed instantly and thousands more died later from health problems caused by the leak.

At the time, India did have legislation to regulate air and water pollution, but it did not have comprehensive environmental protections in place. Reports from numerous outside groups, including Amnesty International, have noted that the Bhopal plant did not employ safety precautions on a par with those at similar Union Carbide plants in the U.S. These reports have also faulted decisions that led up to the gas leak, including how the methyl isocyanate was stored, as well as the company's failure to provide the community and surrounding hospitals with toxicity information immediately after the leak. In 1989, the Indian Supreme Court approved a compensation fund of approximately \$470,000 that has so far granted compensation to about 500,000 people, but critics argue that many who were left disabled by the leak have been turned away. To this day, the site has not been fully remediated. A statement on the website of Dow Chemical, which acquired Union Carbide, says that "although Dow never owned nor operated the plant, we—along with the rest of industry—have learned from this tragic event, and we have tried to do all we can to assure that similar incidents never happen again."

Even though the former Union Carbide site has yet to be fully remediated, environmental awareness and activism have grown in India, as in other countries, during the intervening years. A paper in the *India Infrastructure Report 2002* noted that India had about 20 times more environmentally oriented nongovernmental organizations at that point than in 1985. And the disaster precipitated important environmental legislation. In 1986, the country's Environment Protection Act, which empowers the central government to control pollution and protect the environment, was passed; the country's Air Act was amended in 1987 and its Water Act in 1988. In 1994, another law required those who want building permits to obtain environmental impact assessments. In 1997, public hearings became part of the environmental assessment process. In the early 1990s, the Supreme Court interpreted Article 21 of India's constitution, which guarantees the right to life, as including the right to pollution-free air and water.

At the same time, however, the country's economy is surging. Between 2003 and 2008, India's GDP grew at an average rate

of 8.8% per year, according to the *State of Environment Report India 2009* from the MOEF. In India, as in so many other places worldwide, development and environmental protection are often at odds.

“Our Environment Protection Act is one of the best in the world,” says Moulika Arabhi, the program coordinator of the Centre for Environmental Law at WWF-India’s office in New Delhi. However, she notes that the law, as well as the country’s water and air acts, are decades old and that “the environment has undergone drastic degradation, and the causes for such degradation have changed.... What is required is to identify loopholes, create clauses to make it watertight, and repeal those rules which are not effective.”

To better understand how effectively India’s laws help balance environmental conservation with development, Kanchi Kohli and Manju Menon, researchers with the Delhi-based environmental organization Kalpavriksh, analyzed data on environmental impact assessments clearances. The researchers were concerned that they had observed instances of companies not fully complying with requirements after receiving clearances. Using India’s Right to Information Act, they counted the total number of clearances granted between 1986 and August 2008 and collected detailed data on clearances granted in 2003.

In 2003, 223 building clearances were granted. When clearances are granted, developers are required to submit follow-up monitoring reports every six months. In addition, officials from the six regional offices of the MOEF may conduct site visits to monitor projects. In a report released earlier this year, Kohli and Menon found that with two to four scientists in each of those six offices and 4016 total clearances granted between 1986 and 2006, the ministry simply doesn’t have enough staff to enforce its rules.

“Out of 223 projects [cleared in 2003], only 150 projects have reported [on] compliance at least once in the years between 2003 and 2007. In the Southern region alone, 30 out of 75 cleared projects have never submitted a compliance report,” they note. And they found some interesting reporting habits, such as one company that submitted five identical compliance reports. Similarly, ministry offices reported being able to visit only a fraction of the development projects in their region each year.

The challenges are only likely to increase in coming years. In 2006, the environmental impact assessment process was streamlined, and by August 2008, 2016 new projects had been cleared for construction—slightly more than half the total that were cleared in the previous 20 years.

“The basic bias of the government of India is to push through all development projects,” says Armin Rosencranz, a former Stanford University professor and coauthor, along with Shyam Divan, of *Environmental Law and Policy in India*. (The book’s second edition was published in 2001.)

India’s courts provide one avenue through which citizens can challenge development projects. In recent decades, environmental lawsuits have increased at all levels, all the way up to the country’s Supreme Court, notes Rosencranz. This led to the creation in 1997 of a body designed specifically to hear challenges to the environmental clearances granted by the MOEF. Because such appeals relate to projects ranging from power plants to airports to mining, the National Environment Appellate Authority (NEAA) was structured to include members with technical expertise who could help the tribunal with complicated scientific questions.

In a commentary Rosencranz wrote last summer while serving as a visiting fellow at the Ashoka Trust for Research in Ecology and the Environment (known as ATREE) in Bangalore, he argued that most of the technical appointments had gone to people who did not possess the needed skill sets. Rather, he wrote, “it seems obvious that the posts of technical member(s) of the NEAA have become retirement jobs for superannuated officers from the MOEF and the state government. This is not only unseemly and corrupt; it also deprives the NEAA of expert members who could render careful and knowledgeable decisions on crucial ecological issues.” The result, he argued, is that the NEAA dismisses the majority of petitions that come before it.

In 2007, local activist Prafulla Smanthra challenged the environmental clearance for the Vedanta aluminum smelting plant in Orissa, and the petition was dismissed.

Such dismissals are common; the next step is for cases to be filed in the traditional courts. Although India’s courts take on environmental cases, such challenges are not always easy. In the U.S., attorneys often take such cases on contingency—that is, they are paid out of any money they obtain for their clients. That system does not exist in India, so petitioners must either pay out of pocket or rely on a small group of nonprofit attorneys who have come to specialize in environmental issues.

“Litigation in India is incredibly slow and costly, unless there’s a constitutional claim,” says Rosencranz. “Cases can take 10 to 20 years.”

A proposal that was tabled in Parliament in August and is expected to be considered this fall would create a fast-track court called the National Green Tribunal that would replace the NEAA and hear all environmental cases. Whether it will be an improvement over the existing system is unclear.

“The concern here is the existing National Environment Appellate Authority has been criticized for its record of dismissing all but one petition in the last 12 years. So, one has to wait and watch,” says WWF-India’s Arabhi.

Back in Orissa, the battles continue. The refinery is operational, although the company is importing raw materials from outside the state. And even that operation is facing challenges: on July 13, Orissa’s state pollution control board issued notices to the aluminum refinery charging that particulate matter in the refinery’s emissions exceeded the upper limit of 100 milligrams per cubic meter and that the company was discharging untreated wastewater with high levels of fluoride; this was reported in India’s leading environmental magazine, *Down To Earth*. A company representative told the magazine that Vedanta would comply with the pollution board’s direction.

The mining project has taken longer to get off the ground. The company has stated that it plans to begin mining in 2010. A preliminary environmental clearance, which environmentalists are challenging, was issued in spring 2009. In September, the U.K. government issued a critique of Vedanta, arguing that the company had ignored the rights of tribal communities in the Niyamgiri Hills, and both local and international protests continue.

“The success is that since 2004, the company has still not been able to begin mining, which itself is an important indicator,” says Kohli.

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