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Working Paper

Regulatory reform for non-fuel minerals: Improving the post-leasing clearance mechanism

Srestha Banerjee*

April 2020

*Srestha Banerjee is a consultant with Brookings India, and works with the centre's Natural Resources, Energy and Sustainability vertical, with a focus on non-fuel mines and minerals.

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Abstract

The post-leasing clearance mechanism for mining projects, particularly with respect to environment, forest and community related matters, has remained a key matter of policy discourse for over one and a half decade in India. For mining businesses, it is often perceived as one of the key challenges for commencing mining operations in a timely manner and doing business profitably, considering the number of permits, the complexities of the processes and the time taken to obtain them. At the same time, since mining is an extractive industry with considerable environmental and social externalities, there is a strong emphasis on enforcing a robust and comprehensive regulatory mechanism to minimise such impacts.

Given the significance of the mining sector for the economy, as well as the importance of safeguard environmental protection and the interests of local communities, it is important to balance these competing demands. This paper outlines a post-leasing clearance mechanism to improve the clearance process, as well as monitoring and enforcement mechanisms, drawing on some international best practices and considering the scope and merit of India's regulatory and policy framework. It emphasises on an integrated assessment process for granting various clearances, strengthening community engagement and public consultation to reduce disputes, improving capacities of enforcement authorities to improve compliance monitoring, undertaking a regional planning approach to conserve sensitive ecological habitats and delineating mining jurisdictions, and the need of a concerted administrative approach involving key ministries related to the post-leasing clearance mechanisms.

I. Background

In March 2020, the Government of India passed the Mineral Laws Amendment Bill 2020, which amends the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act), alongside the Coal Mines (Special Provisions) Act, 2015 (CMSP Act). For the non-coal mining sector, a key reason for this move is to ensure 'ease of doing business' and sustained mineral production[1].

One of the most significant amendments that was introduced with respect to the non-coal mining sector is allowing "deemed" transfer of clearances for leases that were expiring in March 2020. Upon expiration, these leases were to be auctioned and the new lease holders were required to obtain all statutory clearances afresh before commencing mining operations[2]. This can involve as many as 20 approvals and permits related to different central government ministries and the concerned state government. Considering this, the March 2020 amendment has allowed all clearances related to these leases to be transferred to the new bidder for a two-year period. As specified, the successful bidder "*shall deemed to have acquired all valid rights, approvals, clearances, licences and the alike vested with the previous lessee for a period of*

[1] Ministry of Law and Justice, 2020, The Mineral Laws (Amendment) Ordinance 2020, as available from https://www.mines.gov.in/writereaddata/UploadFile/minerallawamendment202013072020.pdf, last accessed on March 14, 2020

[2] Ministry of Coal, Government of India, Release dated January 11, 2020, as available from https://pib.gov.in/newsite/PrintRelease.aspx?relid=197375 , last accessed on February 18, 2020

two years"[3]. However, the new lease holder is required to apply for and obtain all permits afresh within the two-year period[4].

The post-leasing clearance mechanism, particularly pertaining to environment and forest related regulations, has been a central issue in the governance discourse concerning the mining sector. The issue has been significant because these clearances and permits have a direct bearing on the local environment, ecology and communities residing in and around mining areas.

There are multiple regulations pertaining to these clearances and permit requirements. The implementation and enforcement of these in turn involves multiple authorities at the centre and state levels. The overall intention is to minimise the impacts of mining and safeguard the interests of environment and local community.

However, the way the clearance and permitting process happens and the way post-clearance compliance is ensured frustrates the objectives of the laws. With fragmented approaches to impact assessment, duplication of processes, and weak mechanisms of monitoring and compliance, the clearance mechanism has become an obligation of paperwork while the intentions of the applicable laws remain far from being achieved.

The need of the hour, therefore, is a streamlined clearance and permitting mechanism, along with strong institutions that will protect the interest of the environment and affected communities, but also account for business viability. This paper evaluates the existing mechanisms and practices for obtaining environment and social licenses for non-fuel mineral mining projects and well as the shortfalls in the current mechanisms. Finally, considering the scope of the regulatory and policy framework pertaining to India's mining sector and some of the international best practices, this paper offers some key recommendations for a well thought out post-leasing clearance mechanism, that is robust yet efficient.

II. Post-leasing clearances and permits: Environment and social license for mining projects

Broadly, there are four aspects of mining governance, making it difficult to regulate the sector. These include, granting of mineral concessions and permits, development and conservation of mineral resources, granting environmental-related clearances and permits, and settling displacement and rehabilitation issues of local communities.

Among all of these, granting of environmental-related clearances and permits and settling displacement and rehabilitation issues of local communities, in the post-leasing phase, possibly is most complex. This specifically involves procurement of environment and forest-related permits and social license for mining projects to commence. These permits and consents involve a number of regulatory provisions and associated processes, which in turn requires engagement with authorities at the centre, state and district levels.

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[3] Ministry of Coal, Government of India, Release dated January 11, 2020, as available from https://pib.gov.in/newsite/PrintRelease.aspx?relid=197375 , last accessed on February 18, 2020

[4] Ministry of Environment, Forest and Climate Change (MoEF&CC), March 28, 2020, *Amendments to the Environmental Impact Assessment Notification, 2006*, as available from https://www.mines.gov.in/writereaddata/UploadFile/eia288032021.pdf, last accessed on March 31, 2020

The following section outlines the key environment and forest clearances and permits pertaining to the mining sector. Since social licences for mining projects are also part of these clearance mechanisms, the section also outlines those.

A. Environment and forest habitat related clearances

India has a decentralised and fragmented project clearance and permitting mechanism pertaining to environment and forest habitats under the provisions of various laws, involving various authorities/agencies. The main clearances/permits as issued by various authorities include the following.

(i) Environmental clearance (EC): Any mining project, irrespective of the kind of mineral mined, the lease area or the production capacity, requires an EC before commencing operation. An EC is required under the Environment (Protection Act) 1986 and Environmental Impact Assessment (EIA) Notification 2006 as issued under it (including amendments)[5].

An EC to a non-fuel mining project can be granted at the centre, state or district level, depending on the size and capacity of the project[6]. At the centre, the Ministry of Environment, Forest and Climate Change (MoEF&CC) is the nodal authority for granting an EC. An EC is granted by the ministry after being reviewed and recommended by its Expert Appraisal Committee (EAC). At the state and district levels, similar mechanisms are in place: at the state-level, the concerned authorities are the state environment impact assessment authority (SEIAA) and the state expert appraisal committee (SEAC) while at the district-level, the concerned authorities are the district environment impact assessment authority (DEIAA) and the district expert appraisal committee (DEAC).

For obtaining an EC, the project proponent typically has to submit three important assessment reports and management plans — an Environmental Impact Assessment (EIA) report; an environmental management plan (EMP) as per requirements of the EIA Notification; and a mining plan as per provisions of the Mineral Conservation and Development Rules (MCDR), 2017, approved by the Indian Bureau of Mines (IBM). Among these the EIA report and the EMP form the basis of estimating environmental and socio-economic impacts of developmental projects and their mitigation measures[7].

ii. Forest clearance (FC): Whenever any mining project involves forestland diversion, a forest clearance (FC) must be obtained, as per provisions of the Forest Conservation (FC) Act 1980. Unlike EC, FC for all mining projects is granted only at the central level. The MoEF&CC is

[5] On March 12, 2020, the MoEF&CC released the draft of the EIA Notification 2020. The draft has been proposed in "supersession" of the EIA Notification 2006. Primarily a compilation of notifications and guidelines that the MoEF&CC had proposed from time to time with respect to the EIA Notification, the government has suggested that the 2020 Notification intends to make the clearance process more transparent and expedient.

[6] The EIA Notification (2006), that specifies the requirement for obtaining EC for various developmental projects (including mining) categorises projects into A and B types, depending on the spatial extent and potential impacts of proposed activities. All category A projects are appraised by the expert appraisal committee (EAC) of the MoEF&CC at the centre and cleared by the Union environment ministry. Category B projects are cleared by state level authorities- state EAC (SEAC) and state environmental impact assessment authority (SEIAA). Besides, district-level authorities have been created through an amendment to the EIA Notification in January 2016, for dealing with ECs of small-scale mining projects involving minor minerals.

[7] Datar, Mandar N., Sujeet Dongre and Madhav Gadgil, 2019, Current Science, Vol 117(5), page 776-782

the nodal authority for grating an FC, after the proposal is reviewed and recommended by the Forest Advisory Committee (FAC) of the union environment ministry.

As per Section 2 of the FCA, forest clearance for development projects involves a two-stage approval process. In stage I, upon review of the proposal, the MoEF&CC gives an 'in-principle' or stage I clearance by stipulating conditions, such as compensatory afforestation and expenses for mitigation of probable environmental damage. Following this, the state government submits a report, stating compliance of the stipulated conditions by the project proponent. The MoEF&CC gives its final or stage II approval based on the aforesaid report. Once the final clearance is obtained from the MoEF&CC, the state government issues a permit for the use of the forest land for non-forest purpose along with the conditions and safeguards imposed by the central government while according stage-I and stage-II clearances[8].

For FC, there is no requirement of an impact assessment report unlike the EC process. Separate sets of forms (five in total) are required to be filled on part of project proponents and forest authorities, to evaluate the impact of the project on forestland and the local flora and fauna.

The settlement of forest rights (wherever applicable) under provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, also referred to as the Forest Rights Act (FRA), is also a pre-requisite for forestland diversions. Under the provisions of FRA, the union environment ministry, in August 2009, issued detailed guidelines on submission of evidences of having initiated and completed the process of settlement of rights under the FRA. The guideline mentioned that wherever the process of settlement of rights under the FRA is still to begin, the state/UT governments are required to enclose evidences supporting that settlement of rights under the FRA will be initiated and completed before the final approval for proposals.

The District Collector is the key authority at the local level to complete the process of recognition and vetting forest rights settlement. The observations are thereafter forwarded to the Conservator of Forests of the concerned forest division[9].

iii. Wildlife clearance (WLC): The MoEF&CC prohibits any mining activity within eco-sensitive zones (ESZs) as delineated and notified around national parks and wildlife sanctuaries by the union environment ministry[10]. Such activities are also prohibited within one kilometer radius from the boundaries of national parks and wildlife sanctuaries if the ESZ area is smaller than that.[11]

In other cases, mining proposals 'may be required' to obtain an approval from the Standing Committee of the National Board for Wildlife (NBWL) as per provisions of the Wildlife Protection Act, 1972. As specified by the MoEF&CC, if the proposed project is located outside the boundary of notified ESZ, but falls within 10 kilometer radius of a national park or wildlife sanctuary, the potential impact of the project on the wildlife habitat will be examined by the

[8] Ministry of Environment, Forest and Climate Change, Government of India, 2019, Handbook of guidelines for effective and transparent implementation of the provisions of Forest (Conservation) Act, 1980

[9] Ministry of Environment, Forest and Climate Change, Government of India, 2019, Handbook of guidelines for effective and transparent implementation of the provisions of Forest (Conservation) Act, 1980

[10] Ministry of Environment, Forest and Climate Change, Government of India, Office Memorandum dated 8.8.2019

[11] The direction follows the order of the Supreme Court of India dated 4.08.2006 in the matter of T.N. Godavarman Thirumulpad Vs. UOI in W.P.(C) No. 202 of 1995 and the order dated 21.4.2014 in the matter of Goa Foundation Vs. UOI in W.P.(C) No. 435 of 2012

EAC, and thereafter, appropriate conservation measures will be suggested. This may include directions on prior approval by the NBWL, or necessary conservation measures may go as conditions of the EC letter.

However, in all cases where an ESZ has not been finally notified, any project falling within 10 kilometer radius of national park or wildlife sanctuary must obtain a prior approval from the NBWL before EC is granted.

There is no separate impact assessment report required for wildlife clearance. It is primarily evaluated on the basis of the EIA report as submitted by the project proponent.

iv. No Objection Certificates for project commencement and operation - Consents by State Pollution Control Boards: Besides the three key clearances — EC, FC and WLC — mining projects have been required to obtain two consents from State Pollution Control Board (SPCB) before mining operations can commence. These include the Consent to Establish (CTE) and the Consent to Operate (CTO).

Both CTE and CTO are required as per provisions of the Water (Prevention and Control of Pollution) Act, 1974, [12] and the Air (Prevention and Control of Pollution) Act,1981,[13] to assess and minimise the potential air, water and soil pollution from any proposed industrial activity.

For all mining projects, these two consents were mandated considering the significant pollution load and impact of mining and related activities. Mining projects have been categorised as 'red category' industries by the MoEF&CC considering their high pollution potential[14]. Industrial sectors that have a pollution index score of 60 and above fall under the red category. The index is computed as a function of the ambient emissions (air pollutants), effluent discharge (water pollutants), hazardous wastes generated and consumption of resources.

However, in a recent move, the Central Pollution of Board (CPCB) had issued directions to all SPCBs, removing the requirement of CTEs. It was directed that developmental projects that require an EC will not be required to get a CTE separately[15]. This had been advised particularly considering the fact that the documents reviewed for CTE are very similar to EC (in fact a subset of EC), and conditions laid down for both are very similar. Therefore, requiring a CTE after an EC has already been obtained does not add any value[16].

The mining companies are currently therefore required to obtain only the CTO, before starting production activities. The key documents required for obtaining a CTO include the EC letter,

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[12] As per Section 25(1) of the Water (Prevention and Control of Pollution) Act, 1974, no person shall, without the previous consent of the State Board, establish or take any steps to establish any industry, operation or process, or any treatment and disposal system (or any extension or addition thereto), which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land.

[13] As per Section 21(1) of the Air (Prevention and Control of Pollution) Act, 1981, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area.

[14] Ministry of Environment, Forest and Climate Change, Government of India, Release dated 5.3.2016, as available from https://pib.gov.in/newsite/printrelease.aspx?relid=137373 , last accessed on March 2, 2020

[15] Central Pollution Control Board, November 1 2018, Directions under Section 18(1)(b) of the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981 regarding streamlining of consent mechanism, Government of India.

[16] The key documents required for obtaining a CTE include, the EC letter, the EIA report, the EMP, the mining plan, public hearing observations, land records and registration documents of the proposed project site and details of pollution abatement actions to be taken by the project proponent.

water pollution, air pollution, waste management and other pollution abatement measures undertaken by the company, baseline pollution inspection reports as prepared by the regional offices of the SPCB etc.

The CTO is a renewable permit, which is typically granted for a period of one to three years to mining projects (red category projects). After the stipulated duration, the regional office of the SPCB evaluates the compliance of environmental pollution conditions on the basis of which the consent is renewed.

v. No Objection Certificate for ground water extraction: For projects that will involve groundwater extraction or intersecting the water table, a no objection certificate (NOC) is also required from the Central Ground Water Authority.

B. Social licence

The opinion of local communities regarding decisions on development projects (to allow or disallow) is crucial. When local communities approve and accept developmental activity in their area or vicinity, it is broadly termed as social license.[17]

In India, mechanisms to secure a social license for developmental projects, including mining, have been built into the clearance and permitting mechanisms. These include the public hearing /consultation requirement as part of the EC process, and the forest rights settlement mechanism as part of the FC process.[18]

The requirements of community consultation and their approval also follows the globally agreed principle of "Free, Prior and Informed Consent" (FPIC). The FPIC principle aims to make natural resource management an inclusive process by requiring consent from local communities (and indigenous groups) before any activity that affects their land and resource rights is undertaken.[19] The requirement of public consultation also follows the Rio Declaration (UNCED 1992), which obligates its member states to seek public opinion and responses for environmental decisionmaking.[20]

i. Environmental public hearing: The EIA Notification 2006 specifies the requirement of 'public hearing' as a crucial step of project appraisal process for decisionmaking on EC. Public hearing has been defined 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. The process practically provides the only opportunity through which people can interact directly with government officials and the project proponents regarding a proposed project and related concerns.

[17] Kieren Moffat, Justine Lacey, Airong Zhang and Sina Leipold, 2016, *The social license to operate: A critical review*, Forestry, Vol 89, page 477–488

[18] Besides these two, a social impact assessment (SIA) is also carried out during the time of land acquisition for mining projects.

[19] Sango Mahanty and Constance L. McDermott, 2013, *How does 'Free, Prior and Informed Consent' (FPIC) impact social equity? Lessons from mining and forestry and their implications for REDD+,* Land Use Policy, Vol 35, page 406-416

[20] M P Ram Mohan, Himanshu Pabreja, 2016, *Public Hearings in Environmental Clearance Process: Review of Judicial Intervention*, Economic & Political Weekly, Vol L1(50), page 68-75

ii. Obtaining Gram Sabha consent for forestland diversion and rights settlement: The Forest Conservation Amendment Rules 2016, developed under the FC Act, clearly specify the requirement of obtaining Gram Sabha consent for forestland diversion and ameliorative measures. It has further been underscored that the Gram Sabhas must have clear understanding of the purposes and details of forestland diversions.[21]

In addition, the Forest Rights Act, 2006, also requires "free informed consent of the Gram Sabhas" to be obtained for proposed resettlement and the compensation packages offered.[22]

C. Sequence for obtaining clearances

The MoEF&CC currently has a 'single window' online clearance mechanism for granting the environment and forest related clearances administered by the ministry.

The single window interface known as PARIVESH (Pro-Active and Responsive facilitation by Interactive, Virtuous and Environmental Single-window Hub) was launched in August 2018 by the Government of India.[23] As indicated by MoEF&CC, the mechanism has been introduced for "improving the overall performance and efficiency of the whole appraisal process".

The system provides for online submission, monitoring and management of proposals submitted by project proponents to the MoEF&CC, as well as to the state and district-level authorities for consideration of such clearances.

Under PARIVESH, a mining industry / project proponent can submit proposals for obtaining EC, FC and WLC simultaneously. A unique code is granted for the project for ease of tracking. The sequence of obtaining these clearances however remain contingent on each other. For a mining project that involves forest land diversion, the Stage I FC has to be obtained prior to an EC. Once both Stage I FC and EC have been obtained, the Stage II (or final FC) can be granted to the project proponent. If a WLC is required, this must also be obtained before the final FC. The total time taken between the EC and the FC (both stages), is approximately 760 days[24] ***(refer to Table 1: Average duration of EC and FC).*** This timeline is, however, contingent upon a number of factors such as completeness of information submitted by project proponent, the context of the project and opinion of various authorities, and also on volume of proposals being reviewed at a given time.

Once the EC, FC and WLC (as the case may be) is obtained, the CTO is given by the SPCB. Once all the clearances and permits are obtained, the mining activity can commence.

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[21] Rule 6(3)(e) of the Forest Conservation Amendment Rules 2016 stipulates that the District Collector shall complete the process of recognition and vesting of forest rights in accordance with the provisions of the Forest Rights Act, 2006, for the entire forest land indicated in the proposal; shall obtain consent of each Gram Sabha having jurisdiction over the whole or a part of the forest land indicated in the proposal for the diversion of such forest land and compensatory and ameliorative measures, if any, having understood the purposes and details of diversion, wherever required; and finally shall forward the findings in this regard to the Conservator of Forests.

[22] Ministry of Tribal Affairs, Government of India, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Chapter III, Para 4(2)(e).

[23] Ministry of Environment, Forest and Climate Change, Government of India, Release dated 10.8.2018, as available from https://pib.gov.in/Pressreleaseshare.aspx?PRID=1542607 , last accessed on March 11, 2020

[24] The approximate calculation of the total days for obtaining environmental and forest clearances is based on review of Rules, Notifications and guidelines as proposed by the MoEF&CC.

Table 1: Average duration of EC and FC

Environmental Clearance (EC)	
Steps	**Days (max duration) as per prescribed procedures**
Application to MoEF&CC and time for scoping and Terms of Reference (ToR)	60*
Public consultation (including announcement, hearing and receiving written responses)	45
Appraisal by EAC upon receipt of required documents	60
EAC Recommendation to MoEF&CC (upon receipt of the final EIA report	60
Decision by MoEFCC	45
Total time	**270**
Forest Clearance (FC) - Stage I	
Steps	**Days (max duration) as per prescribed procedures**
Application to Forest Department, and review and scrutiny of proposal at state-level by various forest officials (divisional forest officer, chief conservator of forest, nodal officer, state government)	180 (approximate)
Scrutiny at regional level, by FAC and decision on Stage I clearance	90
Total time	**270**
Forest Clearance (FC) - Stage II	
Compensatory afforestation fund and compliance certificate submission	60
Compliance certificate scrutiny (State/Central level)	60
Final approval by MoEF&CC	60
Communication to state Government and final diversion order	20-40
Total time	**220**

*This has now reduced by sector-specific standardised ToR, but EAC still grants some specific ToRs.

III. Challenges with the existing mechanism

While there are a number of laws pertaining to the post-leasing clearance mechanism to ensure that mining operations commence and continue in an environmental and socially responsible manner, the regulatory provisions and their implementation are fraught with a number of issues. Some of the key issues include the following:

i. Lack of comprehensive assessment: A key problem in the clearance mechanism is that there is no one comprehensive impact assessment report for a particular mining project, based on which it can be evaluated. The assessment process is fragmented, with various authorities looking into separate sets of documents while considering the impact of the project on the same piece of land and affecting the same set of people.

For example, the EAC (and state-level clearance authorities) of the MoEF&CC looks into the EIA report, the EMP and the mining plan prepared by consultants while evaluating the impact of a project for approval. The FAC on the other hand relies on site inspection reports prepared by forest officials and on five forms subject to review by different forest officials at the state level. For wildlife clearance, the NBWL primarily considers the EIA report ***(refer to Figure 1: Fragmented assessment of project impacts)***. Moreover, none of these documents include a detailed social impact assessment component.

This poses several challenges. Firstly, it creates multiple sets of paperwork for the assessment process. Secondly, it may make assessment incomplete, projects contentious and delay clearance decisions. For example, while the environmental authorities might find a project proposal to be in a position for a go-ahead based on the EIA report, the forest authorities might not consider so, based on the documents they evaluate.

Figure 1: Fragmented assessment of project impacts

Environmental Clearance	Forest Clearance	Wildlife Clearance
• Environmental Impact Assessment (EIA) report • Environmental management plan (EMP) • Mining plan (pre-approved by IBM) • Public hearing records	• Site inspection reports of Divisional & State-level forest officials • Mining plan (pre-approved by IBM) • Forest rights settlement (or initiation) proof	• Section on bio-diversity impact assessment as part of EIA report. • Further study on wildlife habitat *if recommended* by National Board of Wildlife (NBWL)

ii. Lengthy set of compliance conditions, weak monitoring capacity: Each of the clearances and permits as granted by various authorities comes with a long list of conditions that are required to be complied with by project proponents and monitored periodically by concerned authorities.

For example, the major clearances for a given iron ore mining project come with the following compliance conditions: the EC typically has 45 to 50 conditions, the FC another 45-50 conditions, the CTO has 10-15 conditions[25].

[25] The observations are based on evaluation of EC and FC letters as available from the database of MoEF&CC for non-coal mining leases.
https://portal.jharkhandminerals.gov.in/portal/misreports/misLesseeProfile.aspx?PDg6phId5pEcvgipdkBGyg==

This becomes particularly challenging when it comes to monitoring. The capacity of our monitoring authorities, such as the regional offices of the MoEF&CC or the SPCBs, has been a long-standing challenge.

The poor capacity of authorities makes compliance monitoring weak. For example, the 10 regional offices of MoEF&CC monitor thousands of EC and FC compliances. However, a review of the staff capacity of these regional offices suggest that on an average there are only six to seven officers who handle the various responsibilities of the regional offices.[26]

In the absence of proper monitoring, the entire compliance system over years has become reliant on periodic submission (required to be submitted every six months) of EC compliance reports by the project proponents. However, as per the central portal of MoEF&CC, the availability of bi-yearly compliance reports by companies is grossly sub-optimal. For example, for all iron-ore mining projects cleared since 2014, only about 30% compliance reports are available[27].

iii. Poor public engagement in decisionmaking makes projects contentious: A key drawback of the clearance mechanism is the conduct of public hearing, engagement of Gram Sabhas and the settlement of people's rights. This makes projects contentious both before commencing and after coming into operation.

For example, nearly 50% of cases filed in the National Green Tribunal (NGT) relate to green clearances awarded by MoEF&CC to development projects. The main submissions have been related to assessment of environmental impacts and conducting public hearings properly[28]. The case of poor public engagement has also been argued by researchers working on environmental jurisprudence in India[29].

The same is the situation with the recognition and settlement of forest rights and engagement of Gram Sabhas in forest land diversion decisions. Ground level reviews across 11 states (which also includes key mining states) have shown that Gran Sabha consultations for forest land diversion or rights settlements are often conducted in locations where the community cannot participate. This undermines the need to have a required number of Gram Sabha members present for giving consent to a project or observing rights settlements[30]. While in the flagship Niyamgiri judgement, the Supreme Court of India in 2013 categorically stressed upon the importance of Gram Sabha consultation before development projects can be allowed[31], scholarly studies have noted that there has been categorical violation of Gram Sabha

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[26] Srestha Banerjee, 2018, *Four years of the NDA Government: The status of green clearances*. New Delhi: Centre for Science and Environment.

[27] ibid

[28] Yukti Chowdhary, June 2015, *Tribunal on Trial*, Down to Earth, as available from https://www.downtoearth.org.in/coverage/tribunal-on-trial-47400, last accessed on March 23, 2020

[29] Armin Rosencranz and Geetanjoy Sahu, 2014, *Assessing the National Green Tribunal after four years*, Journal of Indian Law and Society

[30] Bipasha Majumder, March 2018, *How Governments across India are violating forest rights*, IndiaSpend analysis, as available from https://www.indiaspend.com/how-govts-across-india-are-violating-forest-rights-31750/, last accessed on March 23, 2020

[31] The Supreme Court of India, Judgement of 18.4.2013, *Writ Petition (Civil) No. 180 of 2011 in the matter of Orissa Mining Corporation vs. Ministry of Environment & Forest and others,* New Delhi

consultation and rights settlement for almost all projects whose forest clearances have been challenged[32].

The other problem lies in carrying out all these consultation processes separately. On the pretext of conducting too many consultations, the processes become cursory both on part of authorities as well as project proponents. On ground observations suggest that the participation of local communities also becomes lesser given the poor level of information sharing on part of authorities[33].

Finally, a project specific consultation process precludes sustained and proactive community engagement to make local communities partners in state development mechanisms. It limits the scope of such engagement to a one-day exercise which does not appropriately capture the concerns and aspirations of concerned stakeholders. As a result, mining businesses in many cases have encountered immense community resistance, particularly once mine development commences, resulting in delays and even lockdowns[34].

IV. Recommendations

The clearance and permit mechanism for mining projects in the post-leasing phase clearly needs a relook. Multiple channels in the clearance/permitting process, along with a fragmented approach, are major problems that lead to poor decisionmaking and also gives rise to unscrupulous activities. There is certainly a need for streamlining to improve assessment and compliance monitoring. This will also help in reducing unnecessary delays in the clearance process and reduce controversies in the post clearance phases.

Some key considerations in improving the post-leasing clearance mechanisms are:

i. **Integrated project assessment:** A project should be evaluated on the basis of one comprehensive and integrated impact assessment report. The report should look into the impact of a proposed mining project on environment, forest and biodiversity, and on the local community.

In fact, assessing the impacts of a proposed developmental project, including mining, through an integrated environmental and social impact assessment (ESIA) process is gaining momentum. ESIAs have been considered to be most effective, especially when the local communities affected are dependent on the same natural resources as the investor. It has also been argued that ESIA is a well-accepted process as it tries to ensure that mining projects are not conducted at the expense of sustainable development[35].

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[32] C.R Bijoy, 2017, *Forest rights struggle: The making of the law and the decade after*, LEAD Law Environment and Development Journal, Vol 13/2, Law, Environment and Development Centre, SOAS University of London, United Kingdom

[33] ibid

[34] Rajesh Chadha, Biplob Chatterjee, Santosh Pathak, 2020, *Sustainable Mining Jurisdictions: An approach towards accelerated mining businesses, forthcoming Working Paper*, Brookings Institution India Centre, New Delhi

[35] Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, 2019, *Guidance for Governments: Improving Frameworks for Environmental and Social Impact Assessment and Management*, as available from https://www.iisd.org/sites/default/files/publications/igf-guidance-for-governments-esia-en.pdf, last accessed on February 26, 2020.

An integrated ESIA report for mining shall have separate sections on impact on environment with mitigation measures; impact on forestland and biodiversity with mitigation measures; impact on wildlife; impact on local community including displacement, livelihood loss, and resettlement and rehabilitation measures.

ii. **Strengthening public consultation mechanisms:** Public and Gram Sabha consultation mechanisms must be made stronger to avoid possible conflicts and community alienation. The public consultation process for EC and the Gram Sabha consultation process for FC should be undertaken in an integrated manner.

The consultation should include all concerned stakeholders who will be potentially affected by the mining project or have any plausible stake in the environmental and ecological impacts of the project. This should include the local communities, including forest dwellers and forest dependent communities.

The consultation should be conducted on the basis of the draft integrated assessment report. This will help to capture concerns of local communities collectively. It will also help communities to participate in the consultation process meaningfully and give them the scope to understand the overall impact of the proposed project.

The Gram Sabha approval for forestland diversion must be submitted along with the public consultation documents for project appraisal.

iii. **Clearances given on basis of one integrated report:** The integrated impact assessment report, along with documentation of the community response, should form the basis of granting the EC, FC and the WLC, as the case may be. This will reduce time and complexity in the clearance process. For example, it will preclude the need of forest officials to prepare separate sets of site inspection reports for grating forest clearance. It will also help in avoiding duplication in specifying compliance conditions.

iv. **Improving compliance monitoring**: This is critical to improve the mining sector's performance. The latest draft EIA Notification 2020 recognises the problem and has recommended penalties in case of failure to submit yearly compliance reports by project proponents. As specified, in case the project proponent fails to submit compliance report of the previous year by June 30 of the current financial year, a late fee will be levied. This will be to the tune of Rs. 2,500 per day for category 'A' projects, Rs. 1000 per day for category 'B1' projects, and Rs. 500 per day for category 'B2' projects. Further, if non-submission of the compliance reports continues for 3 consecutive years, the EC shall be revoked.

While such a provision is important to create deterrence for non-compliance, the government needs to also ensure capacity for compliance monitoring. The lack of capacity in the regional offices of the MoEF&CC and SPCB has remained a significant challenge over the years. There is a clear need to address this through an institutional assessment process, revision of appointment criteria, increasing resources and renumerations[36]. To complement the capacity of authorities and to improve accountability, use of technology can be helpful.

[36] Centre for Science and Environment, 2014, *Strengthen institutions, reform laws and streamline processes*, New Delhi: India

v. **Planning at the early stages:** To improve decisionmaking, adopting proper planning from the start is crucial. To this effect, the government should consider doing two things:

a. Adopt a zoning mechanism to delineate areas where mining can be undertaken. This can conserve sensitive ecological habitats and also help in reducing conflicts. Delineating biodiversity hotspots and proper management of these areas is also considered as a global good practice for mining. The *Good Practice Guidance for Mining and Biodiversity* as proposed by the International Council on Mining and Metals (ICMM) underscores that good biodiversity management can bring benefits to mining companies as well. It can help in shorter and less contentious permitting cycles, as well as help in improved community relations[37].
b. Develop a regional impact assessment report of the mining jurisdiction, to streamline key decisions applicable to all proposed mining activities in the region. This will also help to improve the quality of project-specific EIAs, reduce the timeframe in generating certain information (such as temporal pollution data, biodiversity data etc.) on a case-to-case basis, and overall, improve the project assessment process. This will also preclude the overuse of critical natural resources such as water, prevent land degradation and also help in conducting mining activity within the regional carrying capacity[38].

vi. **Mechanism for proactive and sustained community engagement:** This process of engagement should start with the local community in areas where some amount of mining has happened, and before awarding of new leases. This will help to understand the socio-cultural dynamics of the local population and their developmental aspirations.

On part of mining companies, a plan for community engagement and mechanisms for information disclosure during the entire lifecycle of the mine should be developed. Such a plan should supplement the required documents for obtaining a mining license as well as post-leasing clearances. The requirement of such proactive community engagement has also been recognised by the Ministry of Mines as outlined in the Sustainable Development Framework for India's mining sector[39].

vii. **Inter-ministerial body to ensure sustainable mineral extraction:** Finally, as the National Mineral Policy (NMP) 2019 proposes, the centre should consider the constitution of an 'inter-ministerial body' to ensure sustainable mineral extraction within a mining jurisdiction, through a comprehensive review process. The factors determining sustainable mineral extraction will include estimating mineral resource potential of the region, assessing the carrying capacity of the region, considering the cumulative/ regional environmental impact of mining within the jurisdiction, and ensuring that mineral resource extraction happens with considerations of ensuring community rights and benefits and intergenerational equity.

To this effect, the government may, in fact, consider extending the responsibilities of the Post-Auction Mining Clearance and Approval Facilitator (PAMCAF), the inter-ministerial group created in 2016, to facilitate the post-leasing clearance process.

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[37] International Council on Mining and Metals, *Good Practice Guidance for Mining and Biodiversity*, as available from https://www.cbd.int/development/doc/Minining-and-Biodiversity.pdf, accessed on Match 2020
[38] Ministry of Mines, 2011, *Sustainable Development Framework for India mining sector*, Government of India
[39] Ministry of Mines, 2011, *Sustainable Development Framework for India mining sector*, Government of India

The composition of the body might also be revised accordingly. The body should have representation of Ministry of Mines & MoEF&CC in comparable position and capacity to balance decisionmaking, given the importance of both these ministries in guiding policies and practices for sustainable mining[40].

[40] Ministry of Mines, Office Memorandum dated March 23, 2016, *Constitution of inter-ministerial group, i.e., Post-Auction Mining Clearances and Approvals Facilitator (PAMCAF)*, as available from https://mines.gov.in/writereaddata/UploadFile/PAMCAF.pdf, last accessed on March 30, 2020

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