

# Circumventing Environmental Regulations

## Ganga National Waterway

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The National Waterways Act, 2016 declared 111 rivers as National Inland Waterways. Even as these waterways open up for commercial shipping and navigation, and for interventions like dredging, river training, construction of terminals, and land acquisition, the legally binding regime of environmental clearance is evaded.

On 12 November 2018, Prime Minister Narendra Modi dedicated a multimodal terminal at Varanasi on the river Ganga to the nation. This terminal is a part of the ambitious Jal Marg Vikas Project (JMVP), also known as the Ganga Waterway or the National Waterway (NW) 1. The JMVP is the flagship project of the government's massive National Inland Waterways (NIWs) programme. This programme is unfortunately being rolled out by bypassing the legally binding environmental clearance process, and twisting of laws to suit this end.

### NIW Programme

The launch of an ambitious programme to convert 111 rivers or river stretches as waterways (GoI 2016a) with the enactment of the National Waterways Act, 2016, enabled their regulation by the central government. This number includes five existing national waterways, notified prior to the act. The NIW programme intends to create large-scale commercial shipping and navigation systems in these waterways, to transport bulk commodities like coal, fly ash, petroleum products and container cargo, as well as passengers, including tourist cruises (IWAIND). The government has prioritised work on 37 waterways, to be developed in the next few years. These include the Ganga (NW 1), Brahmaputra (NW 2), Barak (NW 16), and Goa (NW 27, 68, and 111) waterways, where work is proceeding at a fast pace. The Inland Waterways Authority of India (IWAIND) under the Ministry of Shipping (MoS) is the nodal agency for planning and execution of this programme.

The most important requirement for a waterway is the existence of a channel of sufficient depth, which has adequate water throughout the year. Many of the

waterways are planned for movement of barges of 1,000 to 3,000 tonnes (IWAIND 2016a: 5, 2016b: 16) requiring minimum water depths of about 2 to 3 metres (m). Rarely do rivers in India have such depths. Therefore, these depths will have to be created by "capital dredging," used to dig and initially create a channel in the riverbed, and later "maintenance dredging" will be needed on a regular basis to clear silt brought in by the river. In addition, other major interventions will also be required like barrages, river straightening works, and bank protection works, along with construction of related infrastructure like ports, jetties, warehouses, parking and refuelling facilities.

These interventions have very serious adverse social and environmental impacts, including physical damage to the riverine habitats, and adverse changes in the morphology and hydrology of the river (IWAIND 2016c: xxx-xxxv), threatening the health of fish populations, and livelihoods of fisherpeople and others dependent on the river (ICAR-CIFRI 2017: iii-iv). Given all of this, a strong regime for assessment, prevention and mitigation of environmental impacts is expected. Unfortunately, not only are environmental regulations inadequate but even these weak regulations are dodged in the case of coming up of the NIWs.

### Environmental Regulatory Regime

The assessment of environmental and social impacts, and the environmental clearance for any development project is governed by the Environmental Impact Assessment (EIA) Notification, 2006, issued by the then Ministry of Environment and Forests (GoI 2006). This notification requires all projects/interventions listed in its schedule to obtain an environmental clearance prior to any work. The schedule does not list "waterways" per se. However, the Entry 7(e), amended in 2009, includes "ports, harbours, breakwaters, dredging" (GoI 2009). So waterways, or at least their components, would have to seek environmental clearance because they involve dredging and ports. The entry also mentions that "maintenance dredging is exempt provided it

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formed part of the original proposal for which Environment Management Plan (EMP) was prepared and environmental clearance obtained” (GoI 2009).

Clearance for some waterways may also be needed under the CRZ (Coastal Regulation Zone) Notification, 2011 or the Wildlife (Protection) Act, 1972. However, here we examine only the environmental clearance as this is applicable to all waterways. In line with Entry 7(e), the Ministry of Environment, Forest and Climate Change (MOEFCC) had initiated environmental clearance processes for several waterways, for example, for the Goa waterways (NW 27, 68 and 111) by issuing terms of reference (TORs) on 29 November 2016 (MOEFCC 2016a). However, in the case of the Ganga waterway, the MoS attempted to bypass the legally binding requirement for environmental clearance. Such attempts are traced here on the basis of documents obtained under the Right to Information Act over a period of mid-2017 to mid-2018.

### Legally Untenable Exemption

The Ganga waterway or NW 1 stretches for 1,620 kilometres (km) from Allahabad to Haldia, with three multimodal terminals at Varanasi, Sahibganj and Haldia, and other related infrastructure. While the issue of environmental clearance in this case was under discussion for several years, the matter was speeded up in 2017 as the project was under consideration for approval by the Public Investment Board (PIB). The MOEFCC (2017a) took an unambiguous stand, stating, “the item 7 (e) of EIA notification 2006 is relevant ... the instant proposal involves dredging and thus requires prior Environmental Clearance in terms of EIA notification, 2006 as amended.”

The MoS countered this stand in the meeting with the PIB held on 6 March 2017 and wrote to the MOEFCC on 15 March 2017, arguing why an environmental clearance was not needed for dredging in NW 1. It stated that a “navigation channel is already in existence on NW-1. It is therefore, not a case of creation and developing a new navigation channel but ... a case of capacity augmentation and maintenance of existing navigation channel” (MoS 2017a). However, this demand of

the MoS for exemption from environmental clearance by calling the dredging in NW 1 as “maintenance,” and not “capital” dredging, is legally untenable as the Entry 7(e) explicitly requires an environmental clearance for maintenance dredging as well. Further, there are enough indications that capital dredging is going on in the Ganga, but because the detailed project report is kept “confidential,” the MoS is able to escape scrutiny of this unsubstantiated claim. Moreover, the EIA notification states that prior environmental clearance is needed for “expansion and modernisation of existing projects or activities listed in the Schedule ... [that] cross the threshold limits given in the Schedule” (GoI 2006). Thus, dredging would need environmental clearance even if it is merely being expanded or augmented.

The MoS forwarded two more arguments. One, that an amendment dated 15 January 2016 to the EIA notification (GoI 2016b) provides exemption for certain cases from environmental clearance, as its point 5 of Appendix IX lists, “dredging and de-silting of dams, reservoirs, weirs, barrages and canals for the purpose of maintenance upkeep and disaster management.” However, this amendment relates not to waterways but to mining, especially river sand mining (MOEFCC 2017a). Further, it is evident that this exemption does not refer to navigation in rivers.

Second, the MoS quoted the Sustainable Sand Mining Management Guidelines, 2016 (MoS 2017a) saying that following “categorical provisions” exist, that is, “the de-silting of reservoir, dredging for upkeep and maintenance of structures, channels and averting natural disasters will not be treated as mining for the purpose of environmental clearance ... for navigation purposes, the river reaches in the water ways path may be dredged to have minimum depth of water.” The MoS conveniently forgot to mention that this provision is given under the heading “de-silting of reservoirs/barrages/annecuts/lakes/canals” as “exemptions of certain cases from being considered as mining for the purpose of requirement of environment clearance” (MOEFCC 2016b: 72). The case may not be treated as mining, but dredging for navigation is independently subjected to environmental clearance by the

EIA notification. Also, guidelines cannot overrule provisions of law.

In its letter to the MOEFCC, MoS ends with the astonishing argument that the dredging “has no discernible adverse environmental impacts,” and asks MOEFCC to reconsider its stand (MoS 2017a). The MOEFCC asked its expert committee to look into the issue. The committee, headed by S R Wate, met on 18 May 2017 and considered the applicability of EIA notification in the case of NWs. Hearing a detailed presentation by the IWAI representatives, it unambiguously concluded:

The proposal for implementation of Jal Marg Vikas Project ... by IWAI is covered under the EIA notification, 2006 and be appraised as “Category A” project ... Also, the maintenance dredging involved in this project cannot be exempted from environmental clearance as the project has not obtained any prior environmental clearance as provided in column 5 of item 7(e) of EIA Notification. (MOEFCC 2017b)

Further, it also gave a broader recommendation for all the waterway projects:

In order to create more clarity...the Expert Committee recommended for amending the EIA notification, 2006 to include Inland Waterways, Jetties and Multi modal Terminals under the list of items requiring prior environmental clearance. (MOEFCC 2017b)

This recommendation was conveyed to the MoS, adding that the environmental clearance process for other waterways had been initiated (MOEFCC 2017c). It is after this that the pressure seems to have been increased on the MOEFCC. On 24 October 2017, a meeting was held with the MoS, in which it stuck to its stand that the Ganga waterway needs to seek environmental clearance. Yet, astonishingly, the minutes record that the “house took note of the various positions advanced by the MoS and MOEFCC. It observed that a plain reading of the provisions of the EIA Notification ... left little doubt that “dredging” of silt in river beds to keep the same navigable did not require Environmental Clearance” (MoS 2017b).

There is no explanation provided as to how the meeting came to this conclusion. On 21 December 2017, the MOEFCC wrote to the MoS accepting the “non-requirement of environmental clearance for maintenance dredging in rivers for the purpose of navigation” as decided in this meeting (MOEFCC 2017d). These developments

leave us with only one conclusion that the MOEFCC was pressurised into exempting the Ganga waterway from the environmental clearance process.

### Other Dubious Exemptions

A similar questionable exemption has also been obtained for the multimodal terminal built in Varanasi. The MOEFCC insisted that the terminal in Varanasi needs environmental clearance, as it is a port and hence falls under Entry 7(e), while the MOS disagreed (MOLJ 2016). It was decided to seek legal opinion of the Ministry of Law and Justice (MOLJ). The MOLJ inquired from the MOEFCC if the terminal falls under the category of ports or harbours, and under which law. The MOEFCC responded categorically that “terminal is a part of port and is covered under item 7(e) of EIA Notification” (MOLJ 2016). However, the MOLJ held that this did not answer the second part of their query and asked the MOS for its opinion. The MOS responded, “the location of the proposed terminal at Varanasi is not in the port approaches of any declared as such under the Indian Ports Act, 1908 and the Major Ports Act, 1963” (MOLJ 2016).

Based on this, the MOLJ opined that the MOS is the administrative ministry for ports and “it is quite clear” that the terminal does not fall under the definition of a port, and hence, the environmental clearance requirement will not apply (MOLJ 2016). This ruling is problematic for several reasons. A perusal of the Indian Ports Act, 1908 and the Major Ports Trusts Act, 1963 clearly shows that the logic given by the MOS does not hold. Moreover, since the MOS, through the IWAI, is the project promoter for the Varanasi terminal, there is a clear conflict of interest and MOLJ erred in not applying its own mind and accepting the MOS opinion at its face value. Further, it shows the half-hearted attitude of the MOEFCC and offloading of responsibility by the MOLJ. It is a well-established principle that while interpreting legal provisions, in the absence of any ambiguity, courts adopt the literal meaning of the word or phrase, referring to the dictionary or the commonly understood meaning. Thus, a terminal is naturally a port and the MOLJ needed to consider this even if the

MOEFCC did not indicate any relevant provision of law.

### The NGT Case

While all these discussions were going on between the MOS and the MOEFCC, the National Green Tribunal (NGT) was hearing a case dealing with precisely this issue. A petition (*Bharat Jhunjhunwala and Others v Inland Waterways Authority of India and Others* 2018) pleaded that waterways in general and the Ganga waterway in particular should be subjected to mandatory prior environmental clearance. The ambiguity of the MOEFCC is evident from its affidavit dated 27 October 2016 in this case:

It is submitted that as per the provisions of EIA Notification, 2006 ... Ports, Harbours, break waters, dredging falls under item 7 (e) ... and are required to obtain prior environmental clearance.

Jetty, multimodal terminal and Inland waterway ... are not covered under the EIA Notification, 2006.

Further, neither the MOEFCC nor the IWAI thought it appropriate to inform the NGT about their ongoing discussions. Though some of the correspondence was placed on record by others, the NGT did not rule on the matter of environmental clearance for the dredging component. Instead, after three years of hearing the matter, the NGT in its final order merely directed the MOEFCC to submit its final opinion “as to whether any Environmental Clearance is required or not and whether Environmental Impact Assessment is to be done in projects relating to Inland Waterways” (*Bharat Jhunjhunwala and Others v Inland Waterways Authority of India and Others* 2018). MOEFCC’s response is not yet known.

### EIA Environmental Clearance

The IWAI argues that even though waterways are not subjected to the environmental clearance process, it is carrying out EIAs for all the projects (PIB 2016; Pandey 2019). However, an EIA done outside the legal framework of the EIA Notification, 2006 inspires little confidence in effectively protecting the environment from the impacts of waterways. Under the EIA notification, the entire environmental clearance process is carried out under the supervision of the MOEFCC’s

Expert Appraisal Committee (EAC), which has environmental experts and independent members, apart from officials. The EAC provides the TORs under which the EIA is prepared. A public hearing has to be conducted based on the EIA. The EAC then scrutinises the EIA, public hearing report and other information, and decides on the grant of environmental clearance.

For an EIA outside this process, it is the IWAI, the project promoter, who gets to decide the TORs and also to scrutinise the EIA report. This is a clear case of conflict of interest. Further, an environmental clearance is given with several legally binding conditions. These conditions are not only monitored by the MOEFCC, but in the case of non-compliance, even an ordinary citizen can seek implementation through judicial recourse. The EIA done outside this process has no such legal binding, and implementation of any environmental safeguards is entirely at the discretion of the project promoter. Thus, the level of accountability is very low in the case of any EIA and environmental measures undertaken outside the environmental clearance regime.

### Abdication of Responsibility

This sequence of events highlights the gross abdication of responsibility by the MOEFCC, its failure to protect the environment and implement its own laws. After the initial insistence that the Ganga waterway needs an environmental clearance, the subsequent reversal of its stand in face of what are clearly specious and legally untenable arguments, and that during the period, the MOEFCC continued with the environmental clearance process for some other waterways (for instance, TORs for NW 53 in Vasai Creek–Ulhas River were granted on 14 June 2018 (MOEFCC 2018), demonstrates the abject failure of environmental regulation in the country. It shows how laws can be twisted to suit political and economic interests, as does the flagship project of Ganga waterway, passing through the Prime Minister’s constituency of Varanasi.

It also creates precedence, and the very real risk that this special treatment can also be extended to other waterways. This is already happening, with projects

like Barak waterway and Sundarban waterways proceeding without an environmental clearance, and the MoEFCC not insisting on one, indicating that the MoEFCC is veering towards exempting all waterways from environmental clearance requirements, bending down in favour of a “ease of doing business” approach, where environmental requirements are seen as obstacles to development.

### In Conclusion

Given the significant social and environmental impacts of creating, maintaining and operating the waterways, it is necessary that the fullest possible assessment and scrutiny of their impacts be made. Moreover, both, the assessment of impacts, and the process of addressing them must be made accountable and legally binding. The best way to do this is to bring waterways in their entirety as well as their different elements unambiguously within the ambit of the EIA and mandate prior environmental clearance for them, even though the current environmental clearance process has several limitations and problems. This is also the clear recommendation of the S R Wate headed committee.

Further, it is not just a matter of mitigating the environmental impacts of waterways. The environmental impacts of waterways need to be considered as key criteria in assessing their viability and desirability. This is because in spite of the blanket claim of the government that such inland waterways are “cheap and environment friendly,” these advantages are not present by default but are conditional in the case of each waterway. Waterways are not always viable even from the financial and economic angle, and the social and environmental costs can further skew the balance. Hence, the demand that waterways be brought within the ambit of the environmental clearance process should not be construed as a blanket acceptance of waterways as the most optimal and desirable transport solution so long that they are subjected to an environmental clearance process. Such viability needs to be established for each waterway on a case to case basis, and it is imperative that the social and environmental impacts,

assessed through a legally binding, well-defined and accountable protocol be important considerations in this process of determining whether any specific waterway is a viable, desirable and optimal solution, or not.

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