

Dhamra Port: how environmental regulatory failure fuels corporate irreverence

Sudarshan Rodriguez & Aarthi Sridhar

*Ashoka Trust for Research in Ecology and the Environment
659, 5th A Main Road, Bangalore. India.
Email: sudarshanr@yahoo.com; aarthisridhar@yahoo.co.uk*

The site of the proposed Dhamra port project is located on the eastern Indian coast of Orissa, north of the River Dhamra and is about 13 km away from the Nasi group of islands, the Gahirmatha Marine Sanctuary and the Bhitarkanika National Park. How diligent are the 'due diligence' practices outlined for the port developers? The environmental regulatory framework sets the country's priorities towards the environment and only provides a signal for companies to follow. The controversies over the Dhamra port area result from lacunae in the environmental laws, litigation processes and in the nature of engagement over environmental decision-making in the country.

Flexible priorities

The Wild Life Protection Act, 1972, is revered by many as one of the most stringent of conservation laws. Under the WLPA, areas can be set aside to declare Wildlife Sanctuaries and National Parks. Prior to the declaration of the Gahirmatha Wildlife Sanctuary, the earlier draft map of the GMS comprised of a region measuring 65 km in length, and 10 km in width (seaward distance). This included the Wheeler islands (site of the present DRDO missile testing range) as well as the site of the proposed Dhamra port. However the Government in its letter No. 11693 dated 20th June 1997 requested that these areas be excluded. This was promptly attended to and executed by the Forest Department. Ironically, there is no evidence to show that any consultation took place with local fisherfolk on conservation measures or fishing restrictions in the GMS area prior to its declaration. This was one of the first compromises of the environment, well within the letter of the law but against its spirit of conservation.

Assessments of environmental impacts

The original project proponent was International Seaports Private Limited (ISPL) which signed a concession agreement with the Government of

Orissa on 2 April 1998 to expand and develop the 'minor' port of Dhamra. As required by law, ISPL hired a private consulting firm, Kirloskar Consultants Ltd to conduct an Environmental Impact Assessment in October 1997 (Dhamra Port Company Limited, 2006).

It is important to note here that Dhamra is a 'minor' port governed under the Indian Ports Act, 1908. The term 'minor' only denotes those ports that are under the administration of the State Government, while 'major' ports are administered by the Central Government. This distinction has an important significance for the application of environmental regulations on ports. Minor ports are exempt from the environmental clearance process under the Environmental Impact Assessment (EIA) Notification of 1994¹. In reality however, most minor ports are much larger in scale and costs (Sekhsaria, 2002; Sridhar & Parthasarathy, 2003). Though exempt from the above process, 'minor' port projects are still required to conduct an EIA and seek environmental clearance under another law – the Coastal Regulation Zone (CRZ) Notification, 1991 as it falls within the coastal regulation zone. However, unlike the EIA Notification, the CRZ Notification does not require public hearings as part of the clearance process (Sridhar, 2001; Sridhar & Parthasarathy, 2003). These lacunae in the environmental legislation did not allow local coastal communities living in the vicinity or fisherfolk using these waters an opportunity to express their viewpoints and participate in the environmental decision-making process. In India, several faults with the EIA reports prepared by consultants have come to light only through public hearings and the availability of reports through the public hearing related procedures where these reports

¹ The Indian Ministry of Environment and Forests recently replaced the EIA Notification, 1994 with the EIA Notification 2006, but the provisions of the earlier law would apply to the Dhamra port project since it was cleared prior to the 2006 notification.

are kept in local district offices, as per the EIA Notification, 1994. The Kirloskar EIA did not go through any scrutiny by the larger public at that time.

The second gap in the environment clearance came from an amendment on 9 July 1997 to the CRZ Notification which transferred environmental clearance of port projects from the Ministry of Environment and Forests (MoEF) to the Ministry of Surface Transport (MoST). In fact, both of the above gaps made the environmental clearance 'easier' for state governments and the project proponents (Sekhsaria, 2005). This amendment was challenged on many grounds by the Wildlife Protection Society of India, in the Delhi High Court² and the case is pending till date. The MoST granted environmental clearance to the project in January 2000. Essentially, the Ministry which has a primary mandate towards the growth of shipping and ports in the country had granted clearance to a project which would benefit it. This reflects a grave conflict of interest. Though the 1997 amendment was reversed by another amendment to the CRZ in August 2000, the earlier clearances held good. DPCL, the current proponents of the port, repeatedly state that they have all statutory clearances; however the above issues enable us to evaluate the true value of these assessments and clearances.

The clearance by the MoST was challenged vide a petition filed by the Orissa Beach Protection Council filed with the National Environment Appellate Authority (NEAA), a body set up by the government under the National Environment Appellate Authority Act, 1997 to review appeals and grievances with respect to environmental clearances under the Environment Protection Act, 1986³. The petition challenged the Dhamra port environmental clearance on only two grounds – firstly, that the project site was a marine turtle nesting area and secondly that it was also ecological sensitive and falls under the CRZ-I(i) category in the Orissa Coastal Zone Management Plan (CZMP)⁴ making it a “no

development zone.” The NEAA was considered to be a defunct body for several years and environmentalists worth their salt hesitated approaching this authority until recently (T. Mohan, pers comm.). The NEAA upheld the port's clearance as the petitioner had not provided adequate papers including nesting data or data on turtle behaviour and ecology, causing the NEAA to conclude that the site was not a nesting ground. The NEAA overlooked the fact that the area was not included as a CRZ-I(i) category in the Orissa CZMP. Virtually no coastal state in India has an accurate, revised and finalised CZMP as per the guidelines provided by the MoEF in the CRZ Notification or in the conditional clearance letter issued by the MoEF⁵. According to the CRZ Notification, areas such as mudflats and fish breeding grounds are supposed to be included in CRZ I(i) category but this was not done in the CMZP and never corrected despite the MoEF's conditions. The NEAA also did not consider other issues, such as turtle congregations offshore, impacts of oils spills, ship traffic, dredging, port lighting on turtles, impacts on the ecology of the Bhitarkanika system and the port site itself, as these issues were not raised by the petition.

The environmental clearance for the port has also been challenged in the Orissa High Court by a petition by Wildlife Society of Orissa and others in 2000 which is still pending. There are many other instances of conservation oversight. According to a manual on Eco (Turtle) Friendly Coastal Development, no ports, harbours and jetties should be planned within a range of 25 km from any important nesting and congregating site (Choudhury *et al.* 2003). No doubt, the contents of this manual were long forgotten even if recognised.

Change of proponents and project details

In October 2004, Larson and Turbo (L&T) one of the share holders in ISPL took over as sole stakeholder and then assigned and subrogated all its rights and obligations to Dhamra Port Company Limited (DPCL), a 50:50 venture with Tata Steel which achieved full closure in May

² Delhi High Court petition CWP 4198/97.

³ The CRZ Notification, 1991 and the EIA Notification, 1994 are both issued under the Environment (Protection) Act, 1986

⁴ Every coastal state is mandated to prepare a Coastal Zone Management Plan showing various coastal

zones (CRZ –I(i), CRZ –I(ii), II, III and IV), as per the Coastal Regulation Zone Notification, 1991.

⁵ Letters dated 27th September 1996, from the MoEF to the Chief Secretaries of all coastal states.

2005. (Manoj, 2005; Dhamra Port Company Limited, 2006).

The 1998 and 2005 port site: from apples to oranges

When the project proponent changed, the site and scale of the project also changed significantly from the one proposed in the EIA of 1997. The site shifted from the Kanika sand bank island to the mainland coast (Table 1). As part of oft repeated environmental 'due diligence' requirements, during the assigning and subrogating of rights and obligations from ISPL to DPCL, the latter would have deemed it necessary to have re-applied for environmental clearance with a fresh EIA of its own accord.

The EIA Notification, 1994 requires that there should not be any change in the dimensions of the project once it has been accorded clearance. But with the regulatory and monitoring body, the MoEF, itself failing to do so, it is of little surprise that the company chose to pay short shrift to these significant details.

Many experts unanimously agree that the Kirloskar EIA study was inadequate and incomplete and had poor baseline ecological data, very little references to turtles, a poor Hazard Analysis and Risk Assessment. It has not taken into account impacts oils spills, lighting of the port, continuous dredging and ship movement (Johnston & Santillo, 2007; Sridhar *et al.*, 2005). To date there have been no impact studies on ancillary and downstream projects as a result of port which are a ship building yard, a steel plant, and a port-based fertilizer plant.

Many experts and NGOs are of the view that the Kirloskar EIA of 1997 is no longer valid, now that the dimensions of the project are totally changed under the new proponent. Rightfully, they have called for a fresh Environmental Impact Assessment and clearance. The Tatas and DPCL have refused to conduct a fresh EIA, or consider alternate sites. The same has been highlighted and stressed by campaigns, several letters to DPCL/ Tatas by various experts, press statement and campaigns by NGOs.

Table 1. Comparison of 1997 and 2005 Port details

Port Details	ISPL EIA (1997)	Dhamra Port Company Limited (2005)
Location	On Kanika Sand Banks Island ⁶	On mainland
Land Area	<ul style="list-style-type: none"> o 1200 acres on main land for port area o 5000 acres for industrial park o 3000 acres for rail road alignment 	<ul style="list-style-type: none"> o 4013 acres for Port o 3000 acres for rail road <i>Ancillary Industries</i> o Ship building yard o Steel plant o Port-based fertilizer plant
Channel Length	7 Km	18 km
Depth	14 m	18 m
Dredging	50 million tonnes	60 million tonnes for phase I (2 berths)
Maintenance Dredging	2.2 Million tonnes/year	No details available
Max Vessel Size	120,000 DWT	180,000 DWT
Cargo Handling /yr	25 Million tons/year	83 million tons/year
No. of Berths	2	13 (Two in Phase I)

Source: (International Seaports Pte. Ltd 1997, International Seaports Pte. Ltd 1998, DPCL 2006)

⁶ The EIA considers two options- one on the Kanika Sands itself, and the other on the mainland, before discarding the mainland option in favour of Kanika Sands going on to only evaluate impacts of the port location on Kanika Sands

In public statements to counter this issue and criticism, the Tatas and DPCL rely on and repeatedly emphasise NEAA's final judgement upholding the environmental clearance.⁷ This is doubly misleading. Firstly, the NEAA judgement itself was born out of a poorly argued petition. But more importantly, the petition was focused on the original location and scale as mentioned in the 1997 EIA report. The campaigns against Dhamra port are vocal and hard to ignore. Yet both the regional and central offices of the MoEF and their colleagues with the Departments of Environment or Forests in Orissa choose to demonstrate complacency over a major breach in the regulatory process for this project. DPCL chants on about possessing all requisite clearances, but no government authority has pointed out what is obvious to all else. The present port project is totally different from the earlier one proposed by ISPL and actually has no EIA and no environmental clearance.

More greenwash

The Tatas and DPCL have also approached many NGOs, individual experts, and institutions for research studies on possible impacts of the port and mitigation options, but have refused to agree to halt project related activities till the findings of these studies emerge. Abandoning the current site was also not an option they were willing to consider (Anon., 2004; Sahgal, 2005). Many NGOs, institutions and individual experts refused to engage any further because of this stand taken by the company. The insistence on continuing work on the port while impact studies were even on is against the spirit of the precautionary principle – an established principle of international environmental law⁸. The principle basically put the onus of burden of proof of no/minimum impact on the proponent and till such time that is achieved, considers no development as the best option.⁹ It is this

⁷ See Press Note by Tata Steel on "Dhamra Port and Olive Ridley Turtles". Available at <http://www.tatasteel.com/Dhamra-Port-project-and-Olive-Ridley-Turtles.doc>

⁸ See note, 'The Precautionary Principle in the Real World', by Peter Montague. Available at http://www.rachel.org/lib/pp_def.htm

⁹ It should be emphasized that while burden of proof to establish no/minimum acceptable impact on turtles is one element as per the principle it should be part of a fresh comprehensive Environmental Impact

principle which is also supposed to have guided the EIA Notification.

In most instances, many State CZMPs classify port areas and their limits as CRZ-II by default even though they may be ecologically sensitive sites warranting a CRZ-I classification (Bhaskar 2007). Furthermore, in most states zoning of areas into CRZ categories in the CZMP process lacked a well planned and participatory exercise and hence did not produce a robust scientific document to guide development along the coast (Menon & Sridhar, 2007). Thus many areas along the coast that should have ideally been CRZ-I(i) and hence protected, are sites for development projects. The Dhamra port is an illustrative example in this regard as the current project site is known to harbour ecologically significant biodiversity and was recently found to be an important habitat for the endangered horseshoe crab making it a fit case for a CRZ-I(i) classification (Dutta, 2007; Anon., 2008). This would have made it impossible for the port to be located in the site. Finally the Supreme Court appointed Central Empowered Committee (CEC)¹⁰ in its directions on a petition filed before it, through its July 2004 report to the Supreme Court states: "*The present site (Dhamra port) will seriously impact Gahirmatha's nesting turtles and could lead to the beach being abandoned by the marine creatures. It is therefore necessary that an alternative site is located for this port*".¹¹ The recommendation is yet to be acted upon by the State Government or by the Supreme Court.

Assessment study and environmental clearance process.

¹⁰ The CEC was appointed by the Supreme Court vide Notification File No.1-1/CEC/SC/2002. The rules and procedures of the CEC are outlined in Notification No 2 No. 1-1/CEC/2002 Date: 20.6.2002. The CEC was constituted primarily to deal with the large number of cases pending with the Supreme Court of India on matters related to forest laws, the WLPA and other environmental laws in India (Sridhar, 2005).

¹¹ In September 2002, the Supreme Court constituted a Central Empowered Committee (CEC) with the broad tasks to monitor and ensure the compliance with the orders of the Supreme Court concerning the subject matter of forests and wildlife and other issues. (For the Notification of the CEC: sanctuaryasia.com/resources/envirolaw/cecommittee.doc). Also see <http://www.forestcaseindia.org/f8>

Conclusion

Matters are still pending in the Orissa High Court challenging the development of the port. The question of the legal validity of the environmental clearance remains a very valid one. The Tatas and DPCL meanwhile carry on with their priorities. The construction of Dhamra Port cannot wait for the dust to settle on environmental matters. The Dhamra case is not an isolated event of mere corporate irreverence towards the environment. It is closely intertwined with the regulatory environment which at present is designed to fail, with its gaps in legal text, poor implementation and monitoring framework besides other systemic

issues such as corruption. Little succour is found in an already strained judicial system which is reluctant to intervene when a contentious project has already started, particularly when it is considered a 'development' project. The Dhamra case poses many fundamental challenges. Is it possible to expect an integrated and meaningful operation of the regulatory framework? What is required to integrate legislation, clearance procedures, implementation and compliance mechanisms and development planning? The regulator needs to demonstrate that environment protection is a social norm. Only then will corporate behaviour adapt itself to respecting and following environmental norms.

Literature cited

Anonymous. 2004. Minutes of meetings of Mr. Prasad, Tata Group of Companies with Coastal Marine Programme members, ATREE. 25th November 2004, Bangalore.

Anonymous. 2008. Horseshoe crabs vanishing from coast: Survey. *The New Indian Express*, 11th August. (Available from <http://www.newindpress.com/>)

Bhaskar, G.U. 2007. Infrastructure Development and Environment-Existing Law and Policy. (Available: <http://www.nlsenlaw.org/land/articles/infrastructure-development-and-environment-existing-law-and-policy>)

Choudhury, B.C., B. Pandav, B. Tripathy & H.A. Andrews. 2003. *Sea turtle conservation: Eco (turtle) friendly coastal development*. GOI UNDP Project Manual. Centre for Herpetology/Madras Crocodile Bank Trust, Tamil Nadu, India.

Dhamra Port Company Limited. 2006. (Available from <http://www.dhamraport.com/>)

Dutta, S.K. 2007. *Biodiversity Assessment of Dhamra Port Site and Surrounding Areas, Orissa*. Greenpeace India, Bangalore. 38pp. (Available: <http://www.greenpeace.org/raw/content/india/press/reports/greenpeace-biodiversity.pdf>)

Johnston, P. & D. Santillo. 2007. *The Dhamra-Chandbali Port: Critique of the Environmental Impact Assessment*. Greenpeace India, Bangalore. 15pp. (Available: <http://www.greenpeace.org/raw/content/india/press/reports/critique-of-the-environmental.pdf>)

International Seaports Pvt. Ltd. 1997. *Environment*

Impact Assessment for Dhamra Port Expansion Project, prepared by Kirloskar Consultants Ltd., International Seaports Pvt. Ltd.

International Seaports Pvt. Ltd. 1998. *Dhamra-Chandbali Port : Detailed Project Report*. International Seaports Pvt. Ltd.

Manoj, P. 2005. Financial closure of Dhamra port project by May, *The Hindu Business Line*, 23 February.

Menon, M. & A. Sridhar. 2007. An appraisal of coastal regulation law in tsunami-affected mainland India. In: *Report on ecological and social impact assessments post-tsunami in mainland India; Submitted to UNDP*. Post-Tsunami Environment Initiative. 105-149 p.

Sahgal, B. 2005. Record notes of discussion held on 14/12/04 to discuss various issues related to Dhamra port and Study related to spatial distribution of sea turtles. Message to: Kartik Shanker. 1 January 2005. Personal communication.

Sekharia, P. Minor ports, major trouble. 2002. *The Hindu Business Line*, 27 July.

Sekharia, P. 2005. The Dhamra Port in Orissa. *Indian Ocean Turtle Newsletter*. 1:14-16.

Sridhar, A. 2001. Portending Threats, *Deccan Herald*, 27 July.

Sridhar, A., & M. Parthasarathy. 2003. *An account of the environmental and legal implications of minor port development in India*. Submitted to ODAF and Oxfam (India) Trust. 103pp.