Independent Water Regulatory Authorities in India:

Analysis and Interventions

Compendium of Analytical Work by PRAYAS

2006-2009

प्रयास
आरोग्य, ऊर्जा, शिक्षण आणि पालकत्व या विषयातील विशेष प्रयत्न
Resources and Livelihoods Group,PRAYAS, Pune

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September 2009

Compendium of analytical work (2006-2009) by PRAYAS on "Independent Water Regulatory Authorities in India".

Published by:

Resources and Livelihoods Group, PRAYAS,
B-21, B. K. Avenue, S. No. 87/10-A, Azad Nagar,
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Printing: Yashoda Mudranalay, Pune

Layout and Design: Nirmiti Graphics, Pune

Cover Design : Divakar V. Desai

Contents

Abbreviations

ATR	:	Action-Taken Report
BC	:	Benefit – Cost
BOT	:	Build-Operate-Transfer
CAGR	:	Compound Annual Growth Rate
CBRs	:	Conduct of Business Regulations
CERC	:	Central Electricity Regulatory Commission
CGWA	:	Central Ground Water Authority
CGWB	:	Central Groundwater Board
CP	:	Central Province
CSOs	:	Civil Society Organizations
E-Act	:	Electricity Act
EOI	:	Expression of Interest
GoM	:	Government of Maharashtra
GR	:	Government Resolution
GSDA	:	Groundwater Survey and Development Agency
GWA	:	Groundwater Authority
ICA	:	Irrigable Command Area
IFIs	:	International Financial Institutions
IPC	:	Indian Penal Code
IRA/IRAs	:	Independent Regulatory Authority/Authorities
ISR	:	Irrigation Status Report
ISWP	:	Integrated State Water Plan
JPIRC	:	Joint Planning, Implementation and Review Committee
M & R	:	Maintenance and Repairs
MERC	:	Maharashtra Electricity Regulatory Commission
MKVDC	:	Maharashtra Krishna Valley Development Corporation
MMISF	:	Maharashtra Management of Irrigation Systems by Farmers Act
MoP	:	Ministry of Power
MWRRA	:	Maharashtra Water Resources Regulatory Authority
NCAER	:	National Council for Applied Economic Research
ND	:	Nira Deoghar
NGOs	:	Non Governmental Organizations
NWP	:	National Water Policy
O&M	:	Operation and Maintenance
R & R	:	Rehabilitation and Resettlement
RBA	:	River Basin Agency
ReLi	:	Resources and Livelihoods Group
SEBI	:	Securities and Exchange Board of India
Sect	:	Section of Law
SERC	:	State Electricity Regulatory Commission
SPCB	:	State Pollution Control Boards
SWP	:	State Water Policy
TAP	:	Transparency, Accountability and Participation
TOR	:	Terms of Reference
UP	:	Uttar Pradesh
UPWMRC	:	Uttar Pradesh Water Management and Regulatory Commission
VGF	:	Viability Gap Funding
WALMI	:	Water and Land Management Institute
WB	:	World Bank
WES	:	Water Entitlement System
WRD	:	Water Resources Department
WUA/WUAs	:	Water Users' Association/Associations
WWRC	:	Watershed-level Water Resources Committee/Committees

Preface

The water sector in India is going through a phase of comprehensive and fundamental reform at policy, legal, program (or project) level. The recent addition to various reform measures is establishment of Independent Regulatory Authorities (IRAs) in the water sector brought in through enactment of laws at the state-level. Such laws have already been passed in states like Maharashtra, Uttar Pradesh, Andhra Pradesh, and Arunachal Pradesh. Other states like Madhya Pradesh are planning for formation of similar regulatory authorities in the water sector.

This particular reform measure is not only an attempt to introduce a new institutional structure for regulation of the water sector, but it also attempts at institutionalizing newer principle of water governance such as 'full-cost recovery' or 'economic-use of water'. Though the reform measure related to water IRAs is in its nascent stage, looking at its far-reaching and wide impacts, there is an urgent need to generate wider debate on utility and desirability of these reforms right at its inception. Based on this felt need, the Resources and Livelihoods Group (ReLi), of PRAYAS initiated analysis and advocacy-based work in the area of water regulation. Some of the major work of analysis carried out by PRAYAS, as part of the various activities, is presented in the present compendium. It is hoped that this compendium will contribute towards generating awareness and facilitating a wider debate on various public-interest issues related to IRAs in the water sector.

The work by ReLi group began in the wake of enactment of the Maharashtra Water Resources Regulatory Authority (MWRRA) Act in 2005, the first such law to be passed by any state in India. To begin with preliminary analysis of this particular law was undertaken. This was followed by the process of consultations and some regulatory-level interventions. A dialogue was initiated among various civil society actors through individual meetings, interviews, and consultation workshops. A national-level consultation was organized to initiate dialogue with non-governmental and governmental actors from different parts of India.

Regional-level consultation workshops were conducted in various parts of the state of Maharashtra to generate awareness and seek inputs on analysis of the IRA law passed in the state. A small booklet on the water sector reforms and the new laws was published in the local Marathi language for wider dissemination. The current compendium begins with the summary of this book. The first part providing brief background to water reforms and the new regulatory law enacted in Maharashtra.

The second part of the compendium comprises of different articles and notes presenting analysis of IRA laws. An analysis note was prepared for dissemination during workshop organized in Uttar Pradesh in the light of enactment of the IRA law in the state in 2008. This note is included in this part one of the compendium. Apart from this broader analysis, a more focused analysis of 'procedural accountability' of MWRRA law is also included in this second part of compendium. This analysis was used to make a submission before MWRRA to advocate for the pro-people process of implementation of the law. The third and the last term of substantive analysis included in the second part of the compendium is the submission made during the consultation workshop organized by government officials on the proposed ground water regulation bill in Maharashtra.

The third and fourth part of this compendium comprises of work related to analysis of IRAs based on the concrete regulatory interventions done by PRAYAS. The third part includes the official documents (submissions and order) related to a petition filed by PRAYAS before MWRRA against the process of privatization of an irrigation project in Maharashtra. The fourth and the final part of the compendium includes official documents (submission) related to the intervention done by PRAYAS in response to the process initiated by MWRRA for determining regulations for bulk water tariff. On both the issues, viz., privatization of irrigation project and bulk water tariff, various activities were undertaken for awareness generation and coalition building. Coalition building effort was especially focused on various civil society actors in the

light of the official consultation process initiated by MWRRA on regulations for bulk water tariff. As part of this process, three state-level planning meetings and joint press conferences were organized. Joint submissions were also made as part of this collective process. Media played an instrumental role in enhancing the outreach and impact of the two regulatory interventions. Some of the selected news paper clippings are also included in the compendium for ready reference.

Overall, the compendium includes a broad range of analytical work carried out by PRAYAS in the past three years on reform and regulation in the Indian water sector. It is hoped that this compendium will be a useful reference to individuals and organizations for undertaking further detailed analysis and for facilitating debate around the issue of independent regulation and related reforms in the water sector in India.

■■■

Section 1

Background: Water Sector Reforms and Regulatory Laws

Introduction

This section provides a general introduction to the water sector reforms. It also includes an introduction specific to the recent laws passed in the state of Maharashtra, including the law for establishment of an independent regulatory authority in water sector.

The key principles of water sector reforms are briefly introduced, and followed by a short review of reform initiatives undertaken in India. The rest of the section is devoted to the introduction and primary analysis of the reform initiatives in Maharashtra, including the legal reforms like enactment of Maharashtra Water Resources Regulatory Authority Act and the Maharashtra Management of Irrigation Systems by Farmers Act, both passed in 2005.

1. Background to Water Sector Reforms and Regulatory Laws

1.1 Introduction

There have been remarkable changes in the water sector in many countries around the world since the last two decades. These changes, initiated in the legal, policy, and administrative spheres, indicate a break from earlier thinking in the water sector, and mark a new era that will have a long-term impact on the economy, society and even the culture in many countries. It is a paradigm shift which involves moving gradually away from the old 'state-centered' model of decision-making toward the 'market-centered' paradigm. This paradigm shift envisages radical restructuring of the water sector with emphasis on institutional reforms, a demand responsive approach and community participation in the management of water resources. The establishment of Independent Regulatory Authorities (IRA) and decentralized system of water allocation with government playing the role of the facilitator are some of the key measures promoted by the reforms.

The reflection of these changes in the water sector in India is evident since the late 80s. Radical changes in the policies and programmes at national as well as state levels reflect adoption of many new concepts and principles that are a part of the reform agenda. The role of the multinational agencies like the World Bank and the ADB in driving these changes is also evident. Today, regulatory reforms are introduced in Maharashtra, Uttar Pradesh, Arunachal Pradesh, and Andhra Pradesh by establishing independent regulatory authorities (IRAs) in the water sector. In other states like Madhya Pradesh draft legislations to bring regulatory reforms are underway. Many states have already passed another set of legislations with the objective to increase farmers' participation in irrigation management. Further, many states have also enacted laws to control and regulate groundwater in the state. There are proposals in the big cities across the country to privatize the water service delivery. Considering the far reaching impacts of these reforms in the water sector, there is a need to take stock of the implications of these reforms for society in general and for the poorer sections in particular. Since Maharashtra took the lead in establishing the IRA in water sector, it was felt that the Maharashtra experience could prove crucial for other states where this process is still underway.

This note is divided into four parts. Part one includes an international discourse on water, as this discourse has been influential in legitimizing the process of reforms in the water sector. The second part presents a brief overview of reforms in the water sector in India. The third part elaborates reform measures in the water sector in Maharashtra and presents analysis of reforms with the help of some key issues involved in this process. Part four presents the possible areas for action.

1.2 International Discourse on Water

The reforms in the water sector are a part of larger process of infrastructure sector reforms initiated by the international financial institutions (IFIs) in the 1980s. Therefore, it is necessary to understand the analysis made by the IFIs for infrastructure sector reforms. According to this analysis, in spite of the huge investment made by the public sector, infrastructure sector in developing countries failed to deliver services to people. There are several problems pertaining to quality, quantity, affordability, reliability and sustainability of infrastructure services. The root of the problem is traced to the institutional structure in the developing countries, especially the overarching role of the state institution. Since the state institution performs all the functions—viz. policy-making, implementation, and regulation-it is said that it leads to concentration of power and consequently, non-transparent governance. As a result, it becomes easier for the vested interests to influence the state to fulfill their narrow interests. This process culminates in ad hoc, politically motivated decisions compromising the long-term interests of the sector and gives rise to inefficiency and plunder.

The remedy suggested by the IFIs is to reduce the role of the state and introduce market oriented system which provides incentives for private sector participation at various levels and in varying degrees. The restructuring of the role of the state and the market has remained an important agenda of 'reforms' in the infrastructure sector. The 'reforms' propose that the state should play the role of a 'facilitator' in the infrastructure sector instead of being the owner and controller of these sectors.

The radical restructuring of the water sector suggested by the IFIs involves the following important principles:

a) Water as a commodity
b) Full recovery of the cost
c) Restructuring of the role of the State
d) Increasing participation of the private sector
e) Decentralization of governance

a) Water as a Commodity

Until recently, water was regarded as a 'public good' and welfare activity across the world. Hence, it was considered as the right of every citizen, and also the duty of the state to provide water to every citizen for life and livelihood. However, the market-oriented reforms are predicated on the axiom that 'water is an economic good or a commodity', which is to be sold and purchased. Being an economic good, it is proposed that market mechanism is the best for functioning of the water sector. It is argued that defining property rights in the water sector and allowing trading of water is necessary. It would lead to emergence of water markets, which in turn would set the prices based on supply and demand law, and would also lead to conservation of water resources and resolution of water conflicts. It is suggested that in the future, water should be used primarily for 'productive' purposes in order to increase efficiency of the water sector.

It is argued that even today, water rights exist in all societies, at an informal level. We need to make these rights formal so that we can put quantitative and qualitative constraints on use of water based on its availability. It is suggested that without putting such constraints on water use for different sectors and geographical areas, and without making water governance transparent and accountable, it would not be possible to regulate water resources effectively.

To achieve the above-mentioned changes, it is regarded necessary to limit the role of the state in the water sector. Accordingly, it is suggested that the state should not take the responsibility of providing water to all people at subsidized rates as it distorts market operations. It is also suggested that instead of conventional, 'supply-driven approach', which focus on building infrastructure and developing new water resources in order to provide water to all, there is a need to adopt 'demand-driven approach', which focuses on providing water only if people demand it and if people are ready to bear partial responsibility of running the system.

b) Full Recovery of the Cost of Water

According to the IFIs, free or subsidized water leads to wastage and inefficient use of water. Because of such welfare policies, people believe that it is their right to receive free water. It is also argued that in many countries, true beneficiaries of water subsidy are big farmers and other well off sections whereas poor people often buy water at higher rates. Analyzing the situation in this manner, it is suggested that the full cost of water should be recovered from consumers, including cost of operation and maintenance of water delivery as well as the capital cost of water resource projects. It is argued that tariff structure based on the principle of full cost recovery would automatically lead to conservation of water. Further, it is suggested that local community should raise partial contribution for new projects or schemes in the water sector. Such measure is expected to create a sense of ownership among the local people, which in turn will help the sustainability of the projects.

c) Restructuring of the Role of the State

As mentioned earlier, the crucial role of the state in water (and infrastructure) sector is regarded as the root of many problems by the IFIs. Therefore, substantial change in the role of the state is suggested as the remedy. Accordingly, the following changes are suggested in the role of the state:

i. To divest the state of its 'regulatory' function and create an 'Independent Regulatory Authority' (IRA) for regulation and for important decision-making in the sector (Please refer to Box No. 1),

ii. To end the monopoly of the state in the ownership as well as the provision of services by opening up the sector for private sector investment and to introduce competition in the service provision, and,

iii. To reduce the role of the state in the management and administrative functions and increase the participation of users in the management of the sector.

In this manner, it is expected that the state will not be the central agency in the water sector. The state is supposed to decide broad policy framework for the sector without engaging in regulation or other important decision-making processes. The market mechanism is expected to play a vital role in achieving both economy and efficiency in the sector.

Box No. 1: Independent Regulatory Authority in the Infrastructure Sector

The role of an 'independent' regulatory authority is crucial in the model pertaining to the regulatory 'reforms'. The institution of IRA originated in the United States in the nineteenth century to regulate the natural monopolies in the infrastructure sector[2]. Since the mid 1980s, it has become the central feature of 'reforms' in the Latin Americas, Asia, and the Central and Eastern Europe. In the last fifteen years, around 200 regulatory bodies were established in different countries under the influence of multilateral donor agencies.

It is believed that the establishment of the IRA—consisting of technical and economic experts outside the government—will ensure rational decision-making. Being technical experts, the regulators will have the knowledge about the regulated industry that will allow them to assess the capacity and the demands of the firms involved. The structured avenues created for participation of the stakeholders in the process of decision making will allow the regulators to comprehend requirements of consumers and to make decisions based on techno-economic criteria. Since regulators are independent of the government and its agencies, they will be able to consider long-term interests of the sector and to restrain the free play of the vested interests. Thus, independent regulation is expected to 'depoliticize' the process of decision-making and increase the role of techno-economic rationality in the decisions. It will provide assurance to private investors that ad hoc decisions will not hamper their interests and that it is safe to invest in the sector. The unbundling of services will increase the scope for privatization, which is thought necessary to increase the efficiency of the services. The regulatory agency will make important decisions with regard to service providers—public or private—and regulate them in order to protect interests of consumers. It is believed that accountability of regulatory agency can be ensured by robust procedures to bring transparency and public participation in the functioning of the regulatory agency. The participation of various stakeholders in the process of decision-making will provide the regulatory agency with an opportunity to know diverse viewpoints. In addition, the mandatory provisions to ensure transparency and accountability will ensure that decisions are made in a fair and just manner. It is believed that an open and accountable decision-making process can entrust a powerful weapon in the hands of the people to defend misuse of the power by the authorities or exploitation by the utilities (the private sector entities). The possibility of a regulatory capture can be nullified with the help of such enabling of the people.

d) Increasing the Participation of the Private Sector

According to the IFIs, many developing countries do not have adequate funds to invest in rapid development of infrastructure, which is very crucial for the economic growth. Therefore, they need to attract private investment. It is proposed that the participation of the private sector should be increased at different levels and in different degrees. The IFIs emphasize many advantages of private sector participation. It is argued that participation of the private sector will lead to an increased efficiency of the services. The entry of private capital in the infrastructure will end the monopoly of the public sector and provide for competition in service provision. The consumers will benefit from the competition as service providers will improve the quality of the services without charging extra money. The private sector is also expected to increase the reach of public services.

It is maintained that private sector participation in the water sector highlights the need for independent regulatory agency (IRA). The IRA is regarded essential to ensure equitable distribution of the service by regulating the private sector. This is in anticipation of potential development monopoly interests in the sector. According to the IFIs, appropriate regulatory mechanism and encouragement to private sector will also result in efficiency and economy in the water sector.

e) Decentralization of Governance

The analysis carried out by the IFIs suggests that the improvement in governance of the water sector will solve many problems. It is argued that exercise of centralized planning and implementation in the water sector has serious limitations as it fails to comprehend the priorities and needs of the local people. To overcome this lacuna, decentralization of governance in the water sector is proposed. The agenda of decentralization includes: participation of people in water governance; adoption of different measures to

[2] A natural monopoly takes place when it is economical for only one firm to produce goods or services for reasons of economies of scale.

make the governance transparent; and making the government accountable for its decisions. Eventually, transfer of the management responsibilities of water sector to the local level bodies is regarded essential.

After having briefly discussed the important principles of water sector reforms, the next part discusses the changes in the water sector in India over a period of time.

1.3 Water Sector Reforms in India

In India, water is both in the union list and a state subject. The 73rd and 74th Constitutional Amendments have lists of subjects to be devolved to urban and rural local bodies, which include: drinking water; water management; watershed development; and sanitation. Currently, water supply schemes are designed and implemented by the Public Health Engineering Department and the Water Boards under the state government. The central government participates in the planning of water resources through five-year plans. Similarly, large and medium irrigation, hydropower, flood control and multipurpose projects require central clearance for inclusion in the national plan. The central government is supposed to play an important role in the decisions pertaining to the inter-state rivers and such river valleys.

In the post-independence period, there was a thrust on establishing the infrastructure in the water sector by building big dams to fulfill drinking, irrigation and other needs of the people. After 1985, we experienced a process of change at the government level. Since the seventh five year plan, building new and big water resources projects was deemphasized. Instead, it was decided to focus only on projects which are incomplete and/or in the drought-prone areas. Even in drought-prone areas, the focus was supposed to be on medium and small projects.

In September 1985, the irrigation department was renamed as Ministry of Water Resources; it was expected that it should focus more on policy issues regarding water resources. In 1987, first National Water Policy (NWP) was prepared. This policy regarded water as a 'basic human need and a precious national asset'. This policy states that water is a part of larger ecological system and also that it is necessary to adopt following principles in the water sector: (a) river-basin or sub river-basin as unit of planning; (b) integrated and interdisciplinary approach to project planning; (c) consideration of the human, environmental, and ecological cost in project planning; (d) regulation of groundwater extraction; (e) conjunctive use of surface and groundwater; (f) first priority to drinking water; (g) water tariff covering the operation and maintenance cost and partial capital cost; and (h) farmers' participation in irrigation management. These principles, articulated in the NWP, exhibit a break from the earlier bureaucratic thinking at the policy level.

The Five Year plans after 1990 were influenced by the NWP. In the Eight and Ninth Five Year Plans, reform and restructuring of water sector was suggested. The main principles of this restructuring included: (a) decentralization of water service delivery to the local bodies and private sector, in order to ensure efficient water management; (b) a demand driven approach; (c) the participation of private sector in water schemes; and (d) freedom to the local bodies to decide the appropriate mechanism for water tariff. The Central government began the rural water sector reform project on a pilot basis in 1999. Later, this project was adopted at national level in the form of 'Swajaldhara'.

In 2002, the central government prepared the second National Water Policy. It reiterates the main principles of 1987 NWP. Further, it acknowledges that the planning and implementation of water resource projects involve socio-economic aspects, such as: environmental sustainability, appropriate settlement and rehabilitation of project-affected people and livestock, public health concerns of water impoundment etc. The policy also emphasized the need to develop water related data and information system which would help in future planning.

Many states in India also formulated a 'State Water Policy' each, elaborating their vision of development of their respective water sector in the future. We also witnessed enactment of 'Participatory Irrigation Management' bills by different states, which aim to increase participation of farmers in irrigation management, especially after 1990. Another important feature of this period is availing of loans for water sector by many states from the IFIs, and accepting conditions that aim to implement the 'reform' agenda. As a result, 'Water Sector Improvement' or 'Water Sector Restructuring' projects flourished in India, which required the state governments to establish IRAs in the water sector. Maharashtra is the first state to establish the IRA in the water sector, followed by Arunachal Pradesh. It is noteworthy that the Working Group on Water Resources for the XIth Five Year Plan has suggested the formation of water regulatory

authorities in all states. According to the report of this Working Group, the states which agreed to rationalize water rates in phases over a period of 5 years to recover full O&M costs are 'Reforming States'. These states include Gujarat, Maharashtra, Andhra Pradesh, Madhya Pradesh, Orissa, Rajasthan and Jharkhand.

The drinking water sector is also witnessing a rapid process of change. The introduction of drinking water schemes such as 'Swajaldhara' and 'Jalswarajya' — involving the principle of partial contribution of the capital cost by the users—exhibits a break from the earlier thinking that the state is responsible for the provision of basic services. There are proposals of privatization of drinking water services in many cities across the country. For an instance, the 'Urban Water Sector Improvement Project', funded by the World Bank, is currently being implemented in Karnataka. Further, the state governments are in the process of enacting new legislation to regulate groundwater, based on the 'model bill' produced by the central government.

In brief, the water sector in India is marked by the process of wide-ranging changes at different levels, many of them irreversible in nature. In the next section, we will examine how the process of reforms unfolded in Maharashtra and important issues involved in this process.

1.4 Water Sector Reforms in Maharashtra

The Government of Maharashtra (GoM) articulated the State Water Policy (SWP) in 2003 and enacted two laws, viz. 'Maharashtra Water Resources Regulatory Authority Act, 2005' and Maharashtra Management of Irrigation System by Farmers Act, 2005'. The Maharashtra Groundwater (Development and Management) Act, 2007 is in the proposal form. These policy and legal changes are discussed briefly here to throw light on the nature of the reforms in Maharashtra.

Maharashtra State Water Policy (SWP)

The SWP acknowledges the problem of inequitable distribution of water in the state and emphasizes the need to have an equitable and sustainable use of water. Considering several challenges in the water sector, the policy suggests a five-pronged strategy: (a) the state will adopt new policy framework for an equitable and productive water resource management; (b) the state will restructure the fundamental roles and relationships of the state and the water users; (c) the state will create a new institutional arrangement at the state and river-basin levels to regulate water resource management and to decentralize responsibility to the local level bodies; (d) the state will promote development, adaptation, and dissemination of new technology to improve efficiency and productivity; and (e) the state will adopt appropriate legislation and enabling rules to give effect to the above-mentioned strategies. Thus, the SWP clearly articulates the plan of radical restructuring of the water sector in Maharashtra.

The SWP sets priority for water use as: a) domestic use; b) industrial, commercial, and agro-based commercial use; and c) Agriculture and hydropower. Thus, the policy gives priority to 'productive' and more remunerative activities in accordance with the principle of water as an economic goods item. Further, the SWP also emphasizes 'public-private partnership' in the water sector and proposes participation of the private sector in it in various forms, at different levels, and in different degrees.

The New Laws: Maharashtra Water Resources Regulatory Authority (MWRRA) Act and Maharashtra Management of Irrigation Systems by Farmers (MMISF) Act

The new law establishes the MWRRA to regulate the water sector in the state. The MWRRA is invested with crucial functions and powers in the water sector. The MWRRA will determine distribution of entitlements for different users and also fix the criteria for trading of water entitlements. According to the act, water entitlements are 'deemed to be usufructuary rights which may be transferred, bartered, used or sold on an annual or a seasonal basis within a market system'. The MWRRA will establish a water tariff system and fix the criteria for water charges. The MWRRA will review and clear new water resource projects in future.

The MWRRA will consist of a Chairperson, who is or was of the rank of the Chief Secretary, and two other members, who are experts in water resources engineering and water resources economy, respectively. The selection committee will consist of high level officials. The act also provides for establishment of a State Water Board, which will consist of senior officials and State Water Council, which will consist of ministers of different departments.

The MMISF Act and proposed Groundwater Act provide for new bodies at the local level for the local level management. These local bodies include the Water Users' Associations (WUAs) provided in the MMISF Act

and the Watershed-level Water Resources Committees (WWRC) proposed in the draft Groundwater Act. The MMISF Act makes it mandatory to establish WUA to receive irrigation water. The act articulates structure, powers, and functions of the WUAs.

It needs to be mentioned here that there already are a host of committees involved at the village level, where the drinking water schemes have been or are being implemented. The rationale behind floating these local bodies is that these institutions would create a sense of ownership in the local beneficiaries, and will be more accountable to the local beneficiaries. It would hence make the management of local systems more efficient and effective. This then would reduce the financial burden on the state involved in maintaining the expensive bureaucracies and in continuously investing in these systems, which are not maintained properly by the bureaucracy.

The following section discusses some regressive and progressive provisions in the new acts.

The Regressive and Progressive Provisions in the New Acts

There are many regressive provisions in the MWRRA and MMISF Acts, which seriously undermine the public interest issues such as equity, social justice, and sustainability. Following are a few examples of such provisions:

(a) The concept of 'water entitlement' is used in new acts as a market right instead of a basic human right. It implies that, in future, people with purchasing power will have right to water. The concept that water is a fundamental right of every individual because it is indispensable for human existence does not find place in the act.

(b) Although 'ensuring equitable allocation of water' finds place in the objective of the MWRRA act, only the landholders are entitled to receive irrigation water. The landless people do not enjoy any right to water. This provision is surprising on the background of thirty years-long history of experimentation and movement for 'equitable distribution of water' in Maharashtra. There were attempts by experts, activists and NGOs to prevent linking of water entitlement with land ownership when new laws were in the draft form. However, the government went ahead with this regressive provision which is feared to strengthen the existing monopolies in the water sector.

(c) Since entitlement for irrigation water is linked with land ownership, the irritation system will be managed by landed people in the future. As the land is generally owned by men, women will not find a place in these new structures of power. Considering unequal distribution of land in Maharashtra, rich farmers are likely to dominate the WUAs. It needs to be noted that the function of water allocation is not merely technical in nature; but many broader issues, such as environmental sustainability, social justice, gender equity are involved in it. So entrusting such crucial function solely with the land owning farmers' organizations may lead to problems.

(d) There is a provision that water charges will be based on the principle of full recovery of the cost of irrigation management, administration, operation, and maintenance of water resources projects. Although the state government can give subsidy to the weaker sections, this provision will result in higher tariff for water, which will have adverse impacts on many sections of the society. Further, for irrigation water, a person having more than two children would have to pay one and half times of the normal rates of water charges in future. It is feared that such and other increase in water charges will prove devastating for small and medium farmers.

(e) The decentralization of irrigation management proposed in the Act raises several questions. First, most of the provisions in the act aim to increase participation of farmers in the lower level management or administrative functions, while keeping the decision-making powers centralized at the top level. Thus, it is in fact abandonment of many essential functions by the state, under the guise of decentralization. Second, the issues like the capability of people (technical, managerial, and political) and the willingness of people to undertake these functions are completely neglected. The delegation of crucial functions to people, without adequate preparation, may prove harmful.

On the other hand, as enunciated below, there are some progressive provisions in the MWRRA act. Following are some of the observations in this regard:

(a) The regulatory authority shall ensure that a 'tail to head' irrigation is implemented by the concerned agency. The experience of canal irrigation in Maharashtra so far exhibits that canal water is usurped by people whose lands are closer to the canal (known as head of canal), depriving others (the tail-enders). This provision is important to allocate water equitably in the command area of the project. Further, water entitlement

shall be measured volumetrically. This provision is useful to control wasteful use of water. There is also a provision that 'during the water scarcity period, each landholder shall be given quota adequate to irrigate at least one acre of land'. Thus, it is an attempt to manage scarcity periods in a more equitable manner.

(b) The authority shall give preference to projects that will address the physical and financial disparity in the state. Further, the authority shall strive to make the water available to drought prone areas of the state.

(c) The authority shall support and aid the enhancement and preservation of water quality in the state. It will follow the principle, 'the person who pollutes shall pay'. Thus, the MWRRA has the rights to take action against the polluters of the water resource.

(d) Water shall not be made available from the canal for perennial crops unless the cultivator adopts water saving technology (drip or sprinkled irrigation), from such date as notified by the authority. The water saved in this manner will be used primarily to satisfy increased demand for drinking water and further, it will be distributed equitably in the command and adjoining area.

(e) The authority shall ensure that the Irrigation Status Report is published by the government every year. Such report shall contain all statistical data related to irrigation. Thus, the people of the state will get official information about the status of irrigation in the state and can decide on strategies to hold the government accountable.

(f) The Integrated State Water Plan (ISWP) shall be prepared by the State Water Board, a body of high-level officials, and shall be sanctioned by the State Water Council, a body of elected representatives. The ISWP may be reviewed after every five years.

Following are some observations on the progressive provisions in MMISF law:

(a) All the holders and occupiers in the notified area of water user's association shall become members of the WUA and shall constitute the general body of the WUA. There is no discrimination among members and non-members of the WUA.

(b) A motion for recall of Directors of Managing Committee of a WUA at any level may be made by giving a notice by fifty percent of the members.

(c) Adequate representation shall be given on the Managing Committee of WUAs at every level, to the members of the WUAs from Head, Middle, and Tail reaches and to women members.

(d) Water will be supplied to the WUAs on volumetric basis, adopting the principle of 'tail to head'. The WUAs shall have the freedom of growing different crops within the applicable water entitlement.

However, it needs to be mentioned that without mobilizing the concerned sections of the society and building public opinion in favour of these progressive provisions, they are not likely to translate into reality. The experience of the Maharashtra Irrigation Act, 1976, which consists of some good provisions to improve the performance of the irrigation sector, suggests that good provisions remain on paper if not backed by strong public mobilization. It is remarkable that the GoM did not bother to prepare the rules for this act even after thirty years of passing the act and thus, made this act non-operational in practice.

Analysis of Water Sector Reforms in Maharashtra

a. Change in the Role of the State

The 'market-oriented' reforms aim at reducing the role of the state and rely on market mechanism for functioning of the water sector. However, this 'economic' view of the water sector is highly inadequate in a country like India, where majority population still lacks access to water. Considering the unique role that water plays in sustaining life on this planet, the undue emphasis on market-centered view of this sector, emphasizing full freedom to private interests of people who have purchasing power, would be dangerous.

The emergence of the IRA as a new power center in the water sector also raises many questions. First, handing over major decisions to the body of experts and bureaucrats can lead to the sidelining of wider socio-political concerns. Second, there is a danger that it may lead to a process of decision-making over which common people would have little or no influence. The functioning of the IRA, which is a quasi-judicial body, offers more space for experts to intervene. It is feared that most sections of the population will not be able to participate in the regulatory process. Third, in a developing country like India, the welfare role of the state is required to ensure the objectives of social justice and equity. Although performance of the state in the last fifty years is not very assuring in this regard, relying on market mechanism in a sector like water will further aggravate the problem (refer to Box No. 2).

b. Delegation of Local Management

The MMISF Act (that has been enacted) and the proposed law on ground water management propose to hand over the local management of irrigation and ground water systems to two different sets of local bodies. Additionally, the drinking water programs have been setting up a third set of local bodies for such management. The creation of the local bodies as well as their design and functioning has raised a host of issues. For example, the experience of the drinking water committees indicate that in practice, it is very difficult to motivate the local people, and enable & empower them to take control of the local management. Further, the design which relies on local people to hold these local bodies accountable remains vulnerable, as these local bodies are susceptible to capture by the local elite.

c. The Process of bringing reforms in Maharashtra

According to the Government of Maharashtra, it did conduct a process of consultations with the stakeholders across the state before finalizing the SWP and the two legislations. It was reported that consultation workshops were held at six regional headquarters and also at the state-level before the bill was moved to the cabinet. The state legislature referred the bill to the select committee of both the Legislature houses (Legislative Council and Legislative Assembly). It was also claimed that the select committee called views of the public, before finalizing the drafts of the two laws.

Box No. 2 Critique of the Independent Regulatory Authority [3]

The IRA model has been criticized on many grounds. It is argued that the IRAs are being set up in developing countries without evolving the normative framework within which they will operate. In the absence of any normative framework, people have to depend on fairness of individual regulators to consider social aspects while taking decisions. It is claimed that since the neo-liberal ideology is pushing the IRA model, it is necessary to think whether establishment of the IRAs is a new instrument of capital accumulation and restructuring of capitalism.

The process of de-politicization of decision-making implied in the IRA model is regarded dangerous, as the 'techno-economic' rationality alone can prove highly inadequate to resolve socio-political issues involved in the decision-making. Further, the quasi-judicial nature of the IRA is held responsible for alienating people from participating in it and thus, creating hurdles in assertion of their claims. It is argued that functioning of the IRA leads to a process of decision-making governed totally by the experts, thus reducing the scope for political action or negotiations, which are crucial for the democratic system. It is also claimed that, in practice, the provisions related to transparency and direct public accountability of the IRA can be easily by-passed. The combination of the enormous authority in the hands of a few people without the corresponding accountability becomes very dangerous. The 'sabotage prone' nature of this model is highlighted to claim that it cannot ensure achievement of any social goals or improvement in the efficiency of the sector.

Apart from the technical and managerial capabilities, there also are questions of the institutional capabilities of these local bodies, which will be critical in balancing the need for evolving a consensus on a host of issues. These would be with the imperatives of social justice, especially in the context of the high levels of economic and social disparities within the rural communities. The resolve of the state government, as evident in the project documents and the laws, to hand over the local management to these bodies despite these problems may lead to the dangerous situation wherein the vulnerable groups will be left to the mercy of the local elites and power centres. In some cases, the inadequate capacities of local bodies and/ or internal conflict may lead to the collapse of the local systems and eventually lead to an effective abandonment of the local communities by the state.

However, our interaction with several CSOs that participated in the 'consultation' process over the legislations revealed that there has been a widespread feeling of dissatisfaction about this process. The CSOs felt that the government conducted a farce of public participation only in order to window-dress its own intentions and just to fulfill the conditionalities imposed by the World Bank. In this regard, the following important observations were shared with us:

- The government did not incorporate many suggestions and recommendations by the CSOs in the final version of the laws, some of which were extremely important for ensuring equity in the water sector.

[3] The points of critique are summarized from various sources including interactions with senior activists and researchers.

- The government did not communicate anything (even the minutes of the proceedings) to the participants, after the consultation events.

- There was no explanation on the part of the government about the reasons behind the acceptance or rejection of the recommendations. Many CSOs perceived this as a complete lack of accountability on the part of the government.

There is no information available in the public domain on the proceedings of the consultations on the draft laws. It was told by many CSOs who attended the consultations that the host institutions where these consultations were conducted tried to evade sharing any information or the report of the consultations even with the participants, let alone the public. This is very surprising since the process is meant to increase public participation and as it is understood, there is nothing to hide about the outcome of this process.

This lack of true and wider participation is also reflected in lack of awareness about the new laws and new institutions even among more informed and active sections of the society. When we talked to the senior political leaders, social activists, and journalists across the state in 2007 on implications of the new laws in the water sector, we experienced that, barring a very few exceptions, there was a complete lack of awareness about their existence. It can be inferred that the common people are equally unaware about the process of reform in the water sector. It is also remarkable that, except for a few comments in the form of one or two articles in the English newspapers, policy and legal changes in the water sector did not find place in any vernacular media.

These instances throw light on the highly inadequate process of consultation, lack of informed debate, and failure on the part of the government to reach out to different sections of the society before introducing the far-reaching reforms. Even the manner in which the enactment of the law, that brought the MWRRA into being, was carried out is highly controversial. The bill was brought in the last hour of the last day of the legislative assembly session, along with sixteen other bills. Naturally, there was no discussion on the bill and it was passed by a 'voice vote'.

The lessons from the above-mentioned process are:

i) Since there are no standard norms of what constitutes a 'participatory' process, the government may conduct 'consultations' with experts and NGOs—however limited their social base and number may be—and may claim preparation of policy / legislation through 'participatory' process.

ii) Since a robust 'participatory' process is not well established in India, the government may treat it in the most unaccountable manner. It results in a blatant neglect on the part of the government to the most important aspects of the 'participatory' process, such as, ensuring wide participation, proper processing of suggestions and objections submitted by the participants, and producing justification for its actions. Further, the government is likely to showcase these processes to obtain legitimacy to implement reform agenda.

iii) There is a lack of awareness about 'participatory' process among common people and even among the more active CSOs. These processes are not seen as an opportunity to influence policy-making of the government. Although many organizations have close contact with people and a very good understanding of the ground-level issues, they tend to overlook the importance of converting their analysis into concrete suggestions.

iv) However, it needs to be noted that, the farce of public participation made by the government is largely responsible for the apathy among the CSOs. It resulted in very low expectations on the part of the CSOs from the so-called 'participatory' process and in the consequent lack of pressure to hold the government accountable for its actions.

v) It is necessary for the common people, the social and political activists, and the CSOs in the different states in India to be cautious and watchful of the so-called 'participatory' processes. It is essential to ensure a wider and an informed public debate and discussion before any reform measure is implemented. There is a need to pressurize the state governments to undertake an 'awareness-campaign' to inform the people about the possible changes in the water sector before conducting the process of consultations.

d. Structure and Nature of MWRRA

The composition of the MWRRA exhibits complete bureaucratic control over the newly emerging structure of the authority. The selection committee is composed of high-level bureaucrats, and the chairperson of the MWRRA is of the rank of chief secretary or equivalent. The other two members are experts in water resources engineering and water resources economy respectively.

There is also a provision of five special invitees from five river basins in Maharashtra who will be experts in different fields. However, their role is advisory in nature and they do not enjoy power to vote in the proceedings of the MWRRA.

We compared the MWRRA Act with the Electricity Act 2003, as electricity sector in India implemented regulatory reforms a few years back. The provisions of the E-Act 2003 exhibit an attempt to involve the judicial arm in the upcoming regulatory structure. According to the E-Act 2003, the chairperson of the State Electricity Regulatory Commission (SERC) is a Judge (current or past) of the High Court. The chairperson of the selection committee of SERC is also a Judge (current or past) of the High Court.

We also found that compared to the E-Act, the MWRRA Act is far more regressive in offering space for the civil society actors to participate in the functioning of the water sector. This is a serious lacuna considering the crucial functions entrusted to the MWRRA. Since the MWRRA is a selected body, it is extremely important to ensure its accountability by making it transparent and participatory to the extent possible. The lack of provisions related to transparency, accountability and participation (TAP) in the MWRRA Act is likely to have a long-term and serious impact on the water sector in Maharashtra.

The lessons from the above-mentioned points are:

(i) The MWRRA act is a good example of how avowed claims behind 'reforms' get sidelined in the process of actual implementation. The stated objective behind setting up of an IRA is to create an 'independent', expert regulatory body—outside the government—to ensure rationality and consistency in the decision-making process. However, creation of the MWRRA throws light on the lacuna in the design of the IRA itself.

First, creating an IRA dominated by bureaucrats goes against the claims made on behalf of the 'reforms', as bureaucrats develop close ties with politicians in their career and many times develop their own vested interests. Consequently, a bureaucratic body is unlikely to function 'independent' of the state, or for that matter, independent of the dominant sections. Second, the MWRRA is entrusted with a number of tasks that an elected body has a mandate to perform, without adequate provisions to ensure its accountability towards citizens or their representatives. This is very dangerous as it means transfer of decision-making function from the state to an unaccountable body of officials and experts. Third, the tasks entrusted to the MWRRA are so enormous, complex, and contentious in nature that it seems beyond the capabilities and capacities of the three technical and economic experts, who have no commitment towards the different sections of the society. Fourth, a bureaucratic body like the MWRRA is supposed to perform quasi-judicial functions without prior experience or expressed ability to do so. This has serious implications for the future of the water sector governance in Maharashtra.

(ii) The creation of IRA in most developing countries took place under the pressure of IFIs. In quite a few instances, the developing countries adopted this model to avail loans from the IFIs and to assure the private investors about rational and impartial process of decision-making. As a result, many important attributes of the IRA model, such as: independence from the executive branch, robust procedures, and strong accountability mechanisms, were neglected. Similarly, there was no consideration of the unique socio-cultural context of the country and the nature of the civil society, while adopting this model. As a result, adaptation of this model to suit the peculiar situation in the country remained weak.

(iii) The unquestioning adoption of the IRA model in the water sector may lead to problems. Water is a decentralized resource and is a highly politicized and contentious subject. The regulation of the water sector is extremely important, however, adoption of a particular model for regulation in a non-transparent manner creates doubts in the minds of CSOs about the intentions of the government. It is also necessary to learn from the regulatory reforms in the electricity sector. It is noteworthy that the original idea of insulation of the regulators from politics could not make much headway in the electricity sector. The experience of the regulatory reforms in the water sector in different countries can also provide valuable inputs for the process of improving regulation in water sector in India. Thus, the review of already 'reformed' sectors could prove crucial in deciding whether to adopt the IRA model for the water sector. It is also imperative to ponder over an alternative model of regulation for the water sector.

There is no doubt that current situation in the water sector calls for urgent efforts to improve regulation and ensure minimum benefits to all, including poorer sections of the society. However, the model of independent regulatory authority,

Box No. 3: Experience of the Electricity Sector Reforms

The regulatory reforms in the electricity sector have not yielded the results expected by the different quarters. The ideal of an institutional mechanism that is politically neutral and capable of making decisions on technical and objective bases alone seems not to be working. Consequently, reforms in the electricity sector proved a halted and a slow process. The apprehensions of opponents of reform agenda that it will lead to privatization of electricity sector on a wide scale across the country also proved erroneous. The experience of the electricity sector shows that, although reforms are designed and implemented with certain logic, they do not always follow a definite path. The process of regulatory reforms depends on politics in the country. The political economy plays an important role in deciding the course that a reform agenda will take in any sector. In a sense, the path of the reforms is open for the influence of the actors who take conscious and decisive actions.

There is also a need to consider the peculiar nature of the water resources while thinking of a new institutional mechanism. Because of the local and dispersed nature of water resources, it becomes extremely difficult to impose the control through a centralized system. The vested interests developed at the local level and the economic and political power they command, make this task even more difficult. The economic and political vulnerability of the poorer sections and caste dynamics, especially in villages, are some of the constraining factors.

promoted by the donor agencies in the water sector, raises important issues.

First, we have a decade long experience of regulatory reforms in the electricity sector in India. It is important to learn from the lessons from electricity sector before bringing in such reforms in the water sector (refer to Box No. 3).

Second, the peculiar nature of water resources also raises some questions about the feasibility of such reforms.

The Current Situation in the Water Sector in Maharashtra

The water sector in Maharashtra is currently experiencing changes at different levels and of different degrees. The status of the water sector can be summarized as follows:

(i) Although the MWRRA came into existence in August 2005, there has not been a single regulation that the authority has passed. The Conduct of Business Regulations (CBRs) are not yet prepared by authority nor has the government prepared rules for entitlements. The CBRs specify the way the authority will function in the future. Since the CBRs are not prepared, the manner in which the MWRRA will address the controversial issues in water sector is unclear. That restricts the CSOs from utilizing the space offered by the MWRRA as a conflict resolution mechanism. The only public process that MWRRA has recently initiated is in relation to determining regulations for bulk water tariff. Other initiatives such as review and approval of water resource project has been undertaken by MWRRA but the same is still a closed-door process.

(ii) The 'Integrated State Water Plan' (ISWP), supposed to be prepared by the State Water Board within six months after application of the act and supposed to be passed by the State Water Council in the next six months, is not ready yet. The process of preparing the river basin plan is initiated in only one river basin out of five. Such procrastination is detrimental for the water sector, especially when the MWRRA is expected to clear new water resource projects in accordance with the ISWP.

(iii) Several new processes are unfolding in the water sector in Maharashtra. There are proposals for part or full privatization of water service delivery in some cities in Maharashtra. There is an official campaign to close down public stand-posts in order to save water in some cities. The drinking water schemes in the rural areas are reportedly facing many problems, such as: corruption, capture of schemes by local vested interests and weak implementation. There are proposals to involve private developers in the construction of water resource project on 'Build-Operate-Transfer' (BOT) basis.

However, the MWRRA is not in a position to respond to these developments. In case of the proposed privatization of irrigation projects in Maharashtra the authority in response to a petition filed by PRAYAS, have ensured certain level of regulations on the privatization process. Some of the key developments in the water sector (like privatization proposals) require much higher scrutiny and analysis, as they will set a precedent for the future.

1.5 Possible Areas for Action

Considering the lessons from Maharashtra and the fact that many state governments are in the process of implementing similar reforms, we feel that it is necessary to evolve possible areas for action. Following are some of the areas for consideration:

(a) Since IRAs are not yet established in the other states, there is an opportunity to prepare ground for influencing the official process of bringing regulation in the water sector. It is necessary to develop a knowledge base on the design and implementation of an IRA in the water sector as well as in other sectors. It will strengthen the CSOs' efforts to respond to and intervene in the process when the proposal to set up an IRA will be mobilised. In states where laws for establishment of regulatory authorities are already in place, there is a need to undertake regulatory interventions for promotion and protection of public interest.

(b) It is necessary to evolve the desirable model of regulation for the water sector, including the scope and the nature of 'regulation' and its preliminary objectives. It can be evolved through a collaborative effort of different actors in the water sector. There is also a need to mobilize public opinion around such an alternative and make people aware about the government's plan of bringing 'reforms' in the water sector. Some of crucial questions that need to be addressed in this regards are: Considering the unique nature of water resource, what kind of regulatory system should be adopted for its effective implementation? Is the proposed regulatory system (suggested in the recent legislations) appropriate for the water sector in India? Can there be a uniform system of regulation for all states in India? Considering the geographical diversity and different problems in different states in India, is the model of independent regulatory mechanism appropriate for all states?

(c) It is essential to keep a watch on the process of 'reform' in the water sector in the state. It is necessary to demand for wider dialogue and discussion before the implementation of any reform measure. There is a need to pressurize the governments to undertake public campaign for creating awareness about the 'reform' process, prior to its implementation.

(d) It is necessary to analyze the reform principles (as reflected in different projects, policies and laws) and their possible impacts on different sections of the society. The wide dissemination of such analysis will help create awareness among the people.

(e) There is a need to intervene in the process of 'consultations'—whenever it will be undertaken—by the government on draft policy and legislations. It is necessary to pressurize the government to undertake a wider and a meaningful process of participation, involving the different sections of the society. It is also necessary to hold the government accountable for the output of such 'participatory' process, by compelling it to produce justification for the inclusion or exclusion of every suggestion made in the consultation after each round of such 'participatory' process.

(f) There is a need to use existing spaces in the 'reform' process and try to create new spaces to further pro-people agenda. There is a need to increase transparency, accountability, and participation related spaces in the new structures of power at the initial stage itself. There is also a need to increase capacity of the CSOs to intervene in the governance of the water sector.

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Section 2

Analysis of Regulatory Laws: Independent Regulatory Authorities in Water Sector

Contents

Introduction

This section includes a compilation of various documents related to analysis of regulatory laws. The section begins with a note on water IRA laws in UP and Maharashtra. The UP law is largely based on the Maharashtra law with some crucial differences. Understanding of these laws is crucial for envisaging the nature and possible impacts of these IRAs in water sector in India. This particular note was prepared in light of the dissemination workshop held in UP in the aftermath of the passing of the law.

The second part of this section includes analysis of the procedural aspects of the MWRRA law, especially in light of its implications on the mechanisms required for evolving public control on governance of IRAs. This analysis was further used for developing a submission made before MWRRA for recommending pro-people processes. The submission is reproduced in this part of the section.

The last part of the section focuses on analysis of the proposed ground water regulation bill in Maharashtra. This is also a part of the submission made in a consultation meeting organized by government officials on the proposed bill. The submission presents the preliminary analysis of the note circulated by the officials on the proposed bill. The actual copy of the draft bill was not circulated during the consultation. The particular draft bill is of importance due to the far-reaching impacts that ground water regulation will have on the rural sector and also due to the proposal to vest the responsibility of groundwater regulation with MWRRA, the already established IRA in Maharashtra.

2.1 Water IRA Law in UP and Maharashtra: Need for Civil Society Attention

2.1.1 Introduction

Under the rubric of reforms, fundamental, comprehensive, and often, irreversible changes are taking place in almost all economic and social sectors. These changes are predicated on the market-based principles, which are accepted as part of the agenda for economic liberalization and globalization. The changes are also affecting governance of water, the most fundamental need of all life. The most disturbing fact is that most of these changes are taking place without adequate and informed public debate. As a result, even irreversible changes, like changes in the legal framework governing water sector, are taking place without the knowledge of either the public or the elected representatives (many laws are passed without adequate debate in the state legislations).

The 'Uttar Pradesh Water Management and Regulatory Commission (UPWMRC) Act, 2008' passed recently in the legislative assembly of Uttar Pradesh (UP) is the latest addition to the legal reforms pursued in various states in India in water sector. It was the state of Maharashtra that first enacted a similar law for establishment of 'Maharashtra Water Resources Regulatory Authority' (MWRRA) in 2005. Arunachal Pradesh followed suit in 2006 and Uttar Pradesh took the decisive step in 2008. Other states are planning for the establishment of similar regulatory authorities in the water sector.

Establishment of a regulatory authority in water sector will have wide ranging impacts on the public interest1 in the water sector. This article attempts to give a brief introduction to the new regulatory laws and highlights the major areas of public concern. Since the UP act draws largely from the Maharashtra law, though with certain crucial differences, a comparison between MWRRA Act and UPWMRC Act is also provided.

2.1.2 Genesis of Water IRA Laws

The genesis of MWRRA or UPWMRC laws can be traced to the processes related to market-oriented reforms in the water sector that are underway in different parts of the country. These reforms are guided by the principles of water governance, popularly known as 'Dublin Principles', which were articulated and accepted by participants of the 'International Conference on Water and Environment' held in Dublin, Ireland in 1992. One of the 'Dublin Principles', states that 'Water has an economic value in all its competing uses and should be recognized as an economic goal'. The particular principle proposes water to be considered as an 'economic good'. This perspective to water makes the management and governance of water, amenable to market principles similar to those applied to any other economic good or commodity. The prescriptions such as 'privatization' and 'full cost recovery'2 emanate from these market-oriented perspective of water governance.

In the post-globalization era, the national as well as state governments in India are taking forward various market-oriented reform initiatives in water sector. The reforms, which began as part of development projects, are now gradually encapsulating the policy and legal framework for water governance. From the recent changes in the regulatory frameworks in water governance, it is clear that the latest frontier of the reforms is the legal system for water sector in India. Majority of these reforms are driven by the technical and financial support from international aid agencies like the World Bank (WB). New laws like UPWMRC Act and MWRRA Act are poised to change the entire regulatory structure of water governance. Looking at the irreversible and fundamental changes that these legal reforms can bring, it is high time that the citizens and water users groups, which are at the receiving end of these reforms, wake-up to address the issues of public interest.

2.1.3 Fundamental Change in Regulatory Framework

It is important to understand that the establishment of water regulatory authorities or commissions in states likes Maharashtra, UP or Arunachal Pradesh is aimed at establishment of what is called as 'Independent Regulatory Authority' or IRA. Such IRAs are already established in India, mainly in infrastructure sectors like telecom (Telecom Regulatory Authority of India), electricity (State Electricity Regulatory Commission),

and also in service sectors like insurance. The Securities and Exchange Board of India (SEBI) also functions as an IRA in the sector of securities market.

Within the given policy and regulatory framework, these IRAs are supposed to balance two things, viz., (a) interests of the service users, and (b) interests of the market including the private sector players in the market. In doing so, the IRA is expected to ensure that a conducive environment is created for free and fair competition in the sector. To achieve this objective, naturally the IRA should be empowered enough to take decisions and give orders regarding key economic matters like the terms of competition, price of services, distribution of various service or other benefits among various stakeholders. Hence, the IRA is often entrusted with powers equivalent to courts and as such these institutions are quasi-judicial in nature. Due to their quasi-judicial nature and due to the responsibility of regulation vested in them, these institutions are supposed to be 'independent' in their decision making process. Thus, the assumption is that by isolating itself from undue political influence, such independent institutions having sectoral expertise combined with judicial powers, can bring economic efficiency in the sector as a whole.

Before IRA comes into existence, the key sector-level decisions are taken by government departments and ministries, thus making the decisions amenable to various political influences including genuine politics, vested interest politics and politics related to whims and fancies of particular ruling party or minister. Thus, in effect, the establishment of an IRA leads to transfer of a big chunk of regulatory function from the government departments and ministries to the newly established IRA. This brings in a fundamental change in role of government towards regulating the sector. These changes may have multiple adverse effects such as:

- Complete de-politicization of the crucial public interest issues involved in regulatory functions of the IRA. This may limit the scope for influence on key sectoral decisions through legitimate and just political activism.

- Unaccountable behavior of IRAs, since IRA is not directly accountable as the government is through electoral process.

- Market capture of IRA, since the market and market players with their strength of financial and knowledge resources can have higher influence on the techno-centric and judicial proceedings of the IRA. This may lead to reduction in space for raising genuine concerns relating to public interest including the interests of the poor and other disadvantaged sections.

But at the same time, IRAs can also be instrumental in bringing public interest at the center stage of the governance of the sector. For example, the IRAs have the capacity to bring transparency to the otherwise opaque decision making processes in the sector. Similarly, IRAs can play key role in ensuring intensive and meaningful participation of all stakeholders including the marginalized sections of the society. But these gains certainly get shadowed if the law for establishment for IRA does not favor development of effective public control on the regulation of the sector. Also, if the basic framework for governance, especially in life-sustaining sector like water, is totally 'market centric', then it is hard to expect that the IRA will always keep public interest over and above the private interests of the players in the market.

Apart from this fundamental change in the regulatory framework that an IRA brings in a sector, there are other changes that are specific to water sector that the new regulatory laws will bring. These changes are discussed in the following sections of the article.

2.1.4 Water Entitlement Regime

Creation, management and regulation of 'water entitlement system' (WES) is at the heart of the regulatory framework of the IRA in water sectors. As part of the WES, various water users and groups of users shall be allotted certain shares of water as their 'water entitlement'. The UPWMRC and the MWRRA are empowered through the respective legislations to determine and regulate water entitlements to different user groups. UPWMRC Act defines entitlement as, 'any authorization by the Commission to use the water for the specified purpose...' (refer Sect. 2 (h) of UPWMRC Act). MWRRA Act further states that, 'entitlements,...are deemed to be usufructuary rights...' (refer Sect. 11 (i) of MWRRA Act). Water entitlements are certainly not the ownership rights but they are 'rights to use' (in short 'use-rights'), which are also called as 'usufructuary rights'3. Thus, 'entitlements' are legally recognized, registered, (near) perpetual and regulated rights over use of water.

There could be two ways to view this new regime. One way could be that creation of water entitlements regime will ensure rights of water users, especially the rights of poor and disadvantaged sections of society over the use of water resources and shall act as a barrier to monopoly

control of the dominant groups in the society over the bulk of the water resources. The second way could be that creation of property use-rights over a share of water would pave way for development of market mechanisms in water sector, similar to the existence of land market. The actual impact of establishing water entitlement regime depends on the finer details of the related regulatory provisions and also the kind of political dynamics that comes into play while implementing the regime.

2.1.5 Equity in Water Distribution

The impacts of entitlement regime will depend on the level of cognizance and integration of social policy considerations in the regime such as equitable distribution of water. Both the UPWMRC and MWRRA Act specifically mention in the preamble of the laws that the regulator shall ensure judicious, equitable and sustainable management and allocation of water resources. Thus, the legislations accept 'equity' as the key principle that shall guide the allocation of water resources. This acceptance would be expected to lead to equitable distribution of entitlements, thus, making the poor and other disadvantaged sections entitled for due shares of the water use-rights allocated by the regulator.

Except for the preamble of the UPWMRC Act, the term 'equity' is not at all mentioned in the legal provisions in the rest of the document of the law. In fact, there has been no attempt to legally define the criteria for 'equitable allocation' of water resources. In absence of a practically implementable definition of 'equity' the regulator will not be able to implement the principle of 'equitable distribution' in practice. MWRRA Act states that, 'for equitable distribution of water in command areas of the project, every land holder in the command area shall be given quota', and that, 'the quota shall be fixed on basis of the land in command area' (refer Sect. 12 (6) (a) & (b) of MWRRA Act). Thus, water will be made available to only those people having land in command area and it will be in the proportion of land holding. Hence, in MWRRA Act 'equity' is defined in a manner that only includes all landowners in command area of an irrigation project.

Thus, in Maharashtra a vital opportunity is lost to bring into reality an inclusive interpretation of the principle of 'equity' as: 'water to everyone including the landless'. Such legal boundaries on definition of equity are not imposed by UPMWRC Act and there could be an opportunity in UP to evolve a much comprehensive and inclusive definition of 'equity' by influencing the rules and regulations that will be prepared for implementation of the law.

The combination of establishing the entitlement regime (legally recognized and perpetual use-rights over water) and the system of allocation of entitlement in proportion to the land owned, will allow the big landlords to gain immense control over water resources that would not only have government sanction but also have legal sanctity. The 'Water Entitlement System' with a narrowly defined principle of 'equity' may thus lead to emergence of 'Water Lords', similar to the existing 'Land Lords'. This will ultimately reinforce the financial and political clout that the dominant group holds today and would lead to further erosion of space for disempowered sections to assert their rights. The problem gets further accentuated when we explore the linkages between 'Water Entitlement System' and the creation of 'Water Markets'.

2.1.6 Water Markets

UPWMRC Act does not include specific provisions for creation of water markets. But there are clear linkages between creation of 'water entitlement systems' and 'water markets'. Hence, the possibility of creation of formal water markets, once the entitlement system is in place, cannot be dismissed.

Strategically, creation of legally recognized 'water entitlement' could be a pre-cursor to creation of 'water markets'. Once established, the water entitlements can then be traded within a market system under a sound legal framework.

It is worth understanding the linkages between 'water entitlements' and 'water markets' from experiences of countries, which have already implemented market-oriented reforms in water sector. Water access entitlements, allocations and trading have been key elements of water reforms in Australia. The Australian government defines 'water trading' as transactions involving water access entitlements (permanent trading) or water allocations assigned to water access entitlements (temporary trading)4. Similarly, in Chile, water use right is treated as a private property independent of land (title) that can be traded, used as collateral, and treated as assets for tax purposes5. While the Chilean government grants quantified water rights (entitlements) to all users, an active water market facilitates reallocation of such entitlements both within and across sectors.

Though UPWMRC Act does not provide a clear and direct provision for trading of water entitlements, considering the strong linkage between 'entitlements' and 'markets', there will be efforts in future to build a market system, once the entitlement system is in place. This concern about creation of formal water markets in India is not hypothetical and based just on some remote international experiences. The provisions in MWRRA Act suggest beyond doubt that 'entitlement regime' is established for the specific purpose of allowing future allocations of water through market mechanisms. Though the specific provisions of MWRRA law imposes certain restrictions on such market mechanisms the direction to move towards full-scale commercial water markets is very evident.

According to MWRRA Act, the regulator has been accorded the powers to fix criteria for trading of water entitlements on the regulator (refer Sect. 11(i) of the MWRRA Act). Further, the law states that, "entitlements,...are deemed to be usufructuary rights which can be transferred, bartered, bought or sold...within a market system" (refer Sect. 11(i) (i) of the MWRRA Act). Thus, the scenario of emergence of formal water markets is not just a matter of policy debate, but it has already penetrated into the regulatory framework and received legal sanctions in one of the state in India. There will be every possible attempt to replicate this model of creation of 'water entitlement system' and 'water market system' across various parts of the country.

The GoUP was wise enough to avoid provision for trading of entitlements, but the same may be given a backdoor entry through inclusion of the same in rules and regulations for implementation of the law. A study done on the distributive impacts of water markets in Chile concludes that farmers' share of water rights decreased significantly after formal water markets backed by the system of property use-rights (entitlements) were introduced. This led to deterioration of their standards of living6. Such impacts can be detrimental to the agro-economy and the overall rural economy in India.

2.1.7 Tariff Regime

Establishing a tariff system and regulation of the same is one of the key functions of the IRAs. UPWMRC Act as well as MWRRA Act entrusts the responsibility of determination and regulation of water tariff to the respective regulatory authorities. The tariff will be determined based on the principle of 'cost-recovery'. It is necessary to gain critical understanding of the principle of 'cost-recovery' and also analyze the implementation of this principle with respect to the 'levels of cost-recovery' envisaged in UPWMRC Act and MWRRA Act.

The principle of 'cost-recovery' from water tariff emanates from the principle of 'water as an economic good'. It is argued that water has economic value and hence provision of water services should be accompanied by recovery of cost incurred to provide the services from the users. It should be noted that, in many parts of India, water charges are based on the (explicit or implicit) criteria of 'affordability' for the water users. As a result, at many places, water is being provided free or at highly subsidised rates to certain areas or populations. And, expenditure for water services were supported using the revenue generated from general taxes. Thus, historically water services were pre-dominantly considered as 'social services' and water was considered as a 'social good'. The new tariff regime that will be implemented as part of water sector reforms attempts to reverse this principle and replace the same with the principle of water as 'economic good'. There is an emerging consensus that water services should either be run like a business, or become a business7. A business-like operation would require 'full cost-recovery' from water tariffs charged to individual consumers. In effect, this requires charging of water services based on the market principles. Today, most of the states in India have accepted the principle of 'cost recovery' in their 'State Water Policies'. But, there was no formal mechanism to establish the tariff regime based on this principle. This has been achieved by making relevant provisions in the new regulatory laws such as UPWMRC Act and MWRRA Act, which effectively provide legal sanction to the paradigm shift in the perspective towards economic water services and tariff. Both the laws empower the water regulatory authorities to establish tariff system based on the principle of 'cost-recovery', and to determine and regulate water tariffs. MWRRA Act restricts the level of recovery to operation and maintenance (O&M) cost whereas UPWMRC Act provides for recovery of part of capital costs (in form of depreciation) along with O & M costs. Provision of recovery of capital costs paves way for higher commercialization of the water services. Recovery of capital costs also creates conducive environment for privatization in water sector.

It is necessary to understand that, both the regulatory laws have still not made provision of recovery of return on investments or profits from water tariff. Once this

level of recovery is reached, it is argued that, the water sector will be able to attract more and more private investors since there will be a provision for certain percentage of tariff to be collected as profit for the investors. This issue of level of cost recovery defined in the laws (limited to the operation and maintenance cost in case of MWRRA Act) and privatization of water services is at the cornerstone of one of the petitions filed by PRAYAS before the MWRRA against the initiative to privatize an irrigation project in Maharashtra8. It is surprising that, UPWMRC Act also makes provision for recovery of cost of subsidy from the water tariffs. Such an attempt will lead to tremendous pressure on the service providers to reduce the subsidy component of the costs to enhance already limited revenue collected from water tariffs.

The discussion on tariff regime suggests that UPWMRC Act seems to be going ahead with the next generation of market-based regulatory reforms. Overall it can seen that the kind of tariff regime that gets established bears a lot of influence on crucial issues of public interest such as privatization of water services and subsidy to the disadvantaged sections of society.

2.1.8 Licensing Regime for Water Service Providers

A major framework-level departure of UPWMRC Act from MWRRA Act is the provision of licenses to water service providers and thereby regulating the functioning of the various water utilities. Unlike the UPWMRC Act, MWRRA Act is ill equipped to regulate water utilities. The UPWMRC is empowered to regulate the procedure and conditions for granting, revocation, and amendment of licenses, the terms, conditions, and procedure for determination of revenues and tariffs, determine standards of services and ensure reporting on standards from the licensees. So UPWMRC Act takes a typical 'utility regulation' approach that exists in other sectors like electricity and telecom. This approach includes not only 'economic regulation' but also 'service regulation'. Hence, UPWMRC Act ushers in next generation of regulatory framework with respect to regulations of water utilities.

The attempt done in UPWMRC Act to bring in comprehensive (i.e. both economic and service) regulation of water utilities can be seen as a welcome proposition, considering the lackluster performance of water utilities in India. But there is a need to further analyze the linkages between creation of licensing regime in water services and privatization of the services. It is considered that a major step in the privatization and liberalization process in many countries is the issuance of a license to incumbent operators. Thus, there is a need to dwell more into the issues of public concern surrounding the provisions related to creation of licensing regime.

2.1.9 Licensing Regime for Groundwater Extraction

Another fundamental departure of UPWMRC Act from MWRRA Act, is the provision for regulation of groundwater exploitation through 'licensing' mechanism. Though the specific provisions related to functions of UPWMRC are quite silent about the regulation of groundwater, there are clear indications about the same from the various definitions given in the law.

First and foremost, UPWMRC Act includes a definition of 'Ground Water Entitlement' [refer Sect. 2(j) of UPMWRC Act]. Hence, while determining the allocation and distribution of water entitlements [as per powers given to the commission vide Sect. 12(b)] the UP Regulatory Commission can also go ahead and determine individual or bulk-level groundwater entitlements.

A similar possibility exists in case of MWRRA Act also because it do includes a similar definition for groundwater entitlements. But the difference is that, MWRRA Act defines groundwater entitlements [referred as 'Sub-surface Entitlements' in Sect. 2(z)] only in relation to the groundwater extracted from a command area of a dam project. The particular definition given in UPWMRC Act does not actually include such a condition and hence is applicable for all type of groundwater, not just restricting to that in the command area of a dam project.

The most fundamental departure of UPWMRC Act in comparison to MWRRA Act can be seen in the definition of 'Licensee' given in UPWMRC Act. As mentioned earlier MWRRA Act does not include the approach of 'regulation through 'licensing' and hence there is no such definition in the said Act. The UPWMRC Act defines a 'Licensee' as the one (individual or organisation) who not only operates a water supply system (i.e. licensing regime for water service provider, as mentioned in earlier section) but also those who exploits and uses groundwater for any purpose.

Overall it can be seen that UPWMRC Act has paved way for licensing of groundwater user. Though there are no direct functional provisions related to this in the Act, it is clear that this is a beginning of devising mechanisms for regulation of groundwater through 'licensing'. The

concern is that whether this will bring in the 'unjust and exploitative license regime (raj)' in groundwater sector,

2.1.10 Planning Regime: Integrated State Water Planning

Decisions about the location, size and other aspects of new water resource projects have a very close bearing with the development and growth of particular regions. It is one of the most controversial and highly sensitive issues at the regional level. An attempt to bring these decisions under regulatory purview has been done in both MWRRA as well as UPWMRC Act, through the provision for development of a planning regime in the form of 'Integrated State Water Plan' (ISWP).

According to UPWMRC Act, the government shall develop the ISWP while the approval to the ISWP will be given by UPWMRC. In contrast to this, MWRRA Act accords the power of approval of ISWP to a committee comprising various ministers while the role of MWRRA is limited to monitoring of implementation of ISWP. Thus, UPWMRC Act envisages next generation of regulation by bringing the planning regime under direct control of the regulator. Delegating highest order powers relating to a crucial development tool like ISWP to an IRA may have detrimental impacts especially those related to the concern of de-politicization of water resource planning. There is an urgent need to articulate and address the concern over loss of public control on the planning of water resources.

2.1.11 Public Control on Governance of Regulator: Provisions for Transparency, Accountability and Public Participation (TAP)

Since, the IRA is supposed to be an autonomous body; there are questions of accountability of IRAs. The problem is that the IRAs such as UPWMRC and MWRRA are empowered to take key decisions on water tariff and water distribution but they are not directly accountable to the public. Hence, the only option that remains for exerting public control on the IRA is through ensuring that the process followed by the IRA is transparent, accountable and participatory (TAP). Thus, TAP is necessary requirement for ensuring some level of public control over the decision making process of the IRA.

The comparative analysis of the provisions of the law for establishment of IRA in water sector (MWRRA & UPWMRC Act) with the provisions of law for establishment of IRA in electricity sector (Electricity Act) suggests that the provisions regarding TAP in MWRRA and UPWMRC Act are weaker that their counterpart in electricity sector. For example, there is no provision in UPWMRC as well as MWRRA Act for 'prior publication' of regulations that will be prepared by respective regulators for implementation of the law. Provision of prior publication makes it mandatory on the regulator to publish the draft regulations before finalizing the same. Thus, availability of draft regulations opens the opportunity for public scrutiny and influence. It is surprising UPWMRC Act does not include the provision of 'prior publication' even in case of rules to be prepared by government for implementation of the law. Such a provision is included in MWRRA Act. Thus, UPWMRC Act neither provides space for public participation in process of formulation of regulations nor for rules. It is also surprising that whereas MWRRA Act provides space for stakeholder consultation in formulation of tariff regulations, but the same is not included in UPWMRC Act. Thus, UPWMRC Act totally ignores the principle of public participation in regulatory processes.

In case of transparency, the UPMWRC Act seems to be progressive then MWRRA Act because it makes it obligatory on the regulator to issue its decisions, directions or orders accompanied with reasons behind the same (Sect. 10(4) of UP Act). Thus, the UPMWRC will have to disclose the reasons behind each of its decision. But there is a much regressive provision related to transparency in UPWMRC Act, which states that information obtained by commission with respect to any person or business shall be treated as classified and shall not be disclosed by commission without consent of the person or business (Sect. 18 of UP Act), except for information related to tariff. Further, the law also includes a blanket provision making all information in possession of the regulator to be kept confidential and to be furnished to any person or agency only with the permission of the regulator. These provisions categorized under a separate heading of 'restriction on disclosure of information' are counterproductive to the measures to enhance the transparency of the regulator.

Such lacunas related to TAP resulting into lack of effective public control over the governance of IRAs can potentially lead to un-accountable behavior by IRA and regulatory capture by the vested-interest groups.

2.1.12 Miscellaneous: Penalties, Cess for Flood Management and Water Conservation

Apart from the above-mentioned issues, there is a need to look into the public concerns related to other

provisions of UPMWRC Act. For example, there is a need to look into the level of penalties envisaged in the law. The UPWMRC Act seems to provide for much stricter and heavy penalties as compared to MWRRA Act. Further, the law also empowers the regulator to impose cess to be charged from owner of lands benefited by flood protection and drainage works implemented under new projects. Such provision would certainly burden the public, especially, the poor farmers.

Considering the failure of State Pollution Control Boards to effectively control the pollution of water resources, the UPWMRC Act envisages concrete role for the IRA in water conservation. MWRRA Act restricts the role of IRA in water conservation by not giving powers to IRA to penalize the polluters. In contrast, UPWMRC Act empowers the IRA to penalize the polluter to the extent of withdrawal of entitlements.

2.1.13 Need for Evolving Response Strategy by Civil Society

As discussed, the enactment of UPWMRC Act will have a far-reaching impact on the governance of water sector in UP. There are serious issues of public concern that emanates from the change in the regulatory framework in water sector. These issues, if not addressed, can potentially lead to severe erosion of public interest associated with life-sustaining resource like water. Hence, there is an urgent need for social activists, like-minded NGOs, researchers, media persons and other such concerned groups and individuals to evolve appropriate strategies to respond to this new scenario in water sector. The response should be based on more in-depth analysis, articulation and building of critical understanding on the impacts of the new regulatory framework imposed on us.

PRAYAS has been actively engaged in analysis and awareness generation activities related to the establishment of IRAs in water sector in various states in India. Our experience in Maharashtra suggests that the IRA, once established through a law, follow the strategy of very slow and gradual progress towards initiating regulation in water sector. This 'slow-go strategy' makes it very difficult for the civil society to envisage the real impacts of the new laws and hence there is tendency to overlook the developments and wait till the actual impact is felt with relation to water tariff or water distribution. But such 'wait and watch' tendency can lead to loss of vital opportunity to influence the evolving regulatory framework in its formative stages.

Hence, it becomes necessary for the concerned civil society actors to give urgent attention to these developments and start evolving relevant response strategy in the best interest of the public. Activities aimed at wide-scale awareness generation and consensus building could be the starting point of this process.

Endnotes

1. Public interest could be defined as the sum total of the interest of the poor and disadvantaged sections as well as the interest of the society as a whole.

2. Full cost recovery means recovery of all costs associated with water services from the water tariff charged to the water users. This typically includes capital as well as operational and maintenance costs including return on investment.

3. The dictionary meaning of the term 'usufructuary' is the right of using and enjoying all the advantages and profits of the property of another without altering or damaging the substance (Webster's New World Dictionary).

4. Source: Government of Australia, (2005). Water Access Entitlement, Allocations and Trading. Australian Bureau of Statistics, Australia

5. Source: Saleth Maria R, Dinar Ariel, (1999). Water Challenge and Institutional Response: A Cross-Country Perspective. World Bank

6. Source: Romano D, Leporati M, (undated). The Distributive Impact Of The Water Market In Chile: A Case Study In Limarí Province, 1981 – 1997.

7. Source: Kessler Timothy, (2005). Social Policy Dimensions Of Water And Energy Utilities: Knowledge Gaps And Research Opportunities. World Bank.

8. Petition filed in Jan 2008 before MWRRA. The petition was against by-passing of MWRRA Act and related tariff provision while initiating process of privatization of one of the irrigation projects in Maharashtra. In its order issued in Nov 2008, MWRRA directed the proponents of privatization to withdraw the proposal until privatization policy is revised to limit the recovery level to O&M cost and in order to ensure role of the regulator. The order is available on www.mwrra.org. Other details of the petition can be sent on request to PRAYAS (reli@prayaspune.org)

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2.2 Analysis of Procedural Accountability in MWRRA Law: Recommendations to MWRRA

2.2.1 Introduction

An Independent Regulatory Authority (IRA) is supposed to be an autonomous quasi-judicial body empowered to make crucial sector-level decisions in an apolitical manner. Since IRA is vested with very high level power without any direct representation in it by a publicly elected member, it raises the crucial concern about the accountability of the IRA. This gives rise to a genuine concern related to de-politicization of the sector due to the establishment of an IRA. In this regard, it is argued that the IRA shall be accountable to the public at large through the procedures adopted by the IRA in decision making. The procedures shall be highly transparent, accountable, and participative (TAP) in nature, thus allowing the public to influence the decision of the IRA through analytical means. In this way, it is possible to establish 'procedural accountability' of the IRA.

Once the IRA is established, the 'procedural accountability' provides a major tool to ensure public control on the IRA. The other measure to ensure public control on an IRA is by invoking legislative accountability of IRA through political means and making the publicly elected representatives intervene in the functioning of the IRA to protect public interest. But as per the IRA framework, such a political intervention is possible only in cases of extreme threats to public interest. In the normal course of functioning and decision-making by IRA, it is the procedural accountability that plays an important role. In light of this, an analysis of the provisions related to the 'procedural accountability' of Maharashtra Water Resources Regulatory Authority (MWRRA) law was undertaken. This analysis was based on comparison of the MWRRA law with its counterpart in electricity sector, i.e. the Electricity Act (E-Act). This comparison focused on provisions of laws as well as actual practice followed by the Maharashtra Electricity Regulatory Commission.

Based on this analysis, a submission was prepared with the objective of ensuring 'procedural accountability' of MWRRA. The submissions presented to MWRRA included concrete recommendations to MWRRA for its future functioning and process of preparing regulations. This intervention was made in a phase when MWRRA was still in its evolution stage. Hence, the submission attempted to sensitize the regulator on the need for enhancing TAP in its overall functioning and decision making process. The submission made in this regard is reproduced verbatim in the following paragraphs.

2.2.2 Letter to MWRRA: Summary of Analysis and Recommendations

Date: 14 May 2007

To,
The Secretary,
Maharashtra Water Resources Regulatory Authority,
Mumbai.

Subject: Suggestions for the process of preparing the Regulations

Respected Sir,

We thank you for inviting our suggestions on the regulations which are currently being prepared by the MWRRA. We see this as an opportunity for civil society actors to participate in the process of making the regulations.

We feel that the formulation of the regulations of the MWRRA is one of the most important processes, as it will define the future course of the functioning of the MWRRA. Further, in view of possible reforms in water sector in other states of India, these regulations are critical as they would set an example which other states would follow. Thus, these regulations will play a crucial role in shaping not only the future of the water sector in Maharashtra, but will also provide a benchmark for other states in India. Formulation of the regulations is a challenging task, as it requires an interdisciplinary approach and careful consideration of many procedural, technological, and legal issues. It also requires very good understanding of ground realities and flexibility to address upcoming issues.

Prayas has been working in the area of policy research and analysis, with the aim of protecting the public interest. It has actively participated in the regulatory system in the electricity sector at the central as well as

in Maharashtra and some other states since 1998. This experience enabled us to understand the potential of the regulatory system and processes in India, if used in the broader public interest.

After comparing the MWRRA act with the Electricity Act 2003, we came to the conclusion that the MWRRA law does not offer much space for civil society actors to participate in the functioning of the water sector. This has been discussed in detail in the accompanying notes. This serious lacuna can be overcome, at least to some extent, through the appropriate regulations, which could define processes for participation of public and civil society organizations in the decision-making of this sector. This puts the onus on the MWRRA of formulating the regulations even more carefully and with the purpose of creating appropriate spaces for public participation, and thus, overcoming weaknesses in the Act.

Our analysis of the infrastructure sector reforms at the global level as well as in India suggests that it is a paradigm shift that will have long-term impact on economy, society and even culture in many countries. This paradigm shift involves moving gradually away from the "state-centered" paradigm of decision-making in the infrastructure sector toward the "market-centered" paradigm. The state-centered paradigm, dominant in India until 1990, assumes important role of the state institution in planning, implementation, and regulation of the infrastructure sector. The development of infrastructure sector was viewed as crucial for achieving the broader objectives of economic growth and poverty reduction and, therefore, as a matter of concern for the society as a whole. The market-centered paradigm, on the contrary, believes in reduction of the role of the state and relies, with varying degrees, on the market mechanism for functioning of the infrastructure sector. It views the infrastructure sector as an arena of a purely "economic" activity, wherein various actors participate through various means (viz., capital, labour, technology, skills, and purchasing power) to achieve their own limited 'private' interests.

We feel that this "economic" view of the water sector would prove severely inadequate in a country like India, where the contribution of the water sector will continue to be critical in achieving broader national objectives. Considering continued critical importance of the public interest issues such as equity, social justice, and sustainability, and considering the unique role that water plays in sustaining life on this planet, the undue emphasis on the "market-centered" or "economic" view of this sector emphasizing on full freedom to 'private' interests of those who have purchasing power could be dangerous, if not disastrous.

We feel that, even after restructuring, the water sector in India cannot absolve itself of its "political" responsibility, i.e., responsibility towards the wider objectives and long-term interests of the society as a whole. Although, it could be necessary to adopt some elements of the "market-centered" paradigm in the process of restructuring, the interests of common and poor people need to remain at the center of any affair in the sector. The restructuring process offers an opportunity for different sections to represent themselves through the regulatory process. This requires that the regulatory system and processes will remain transparent, accountable, and participatory (TAP) not only to "economic" actors but also to people at large. It is noteworthy that lack of effective TAP in the functioning of the all-powerful state was the main lacuna in the earlier paradigm, which led to deterioration of the sector.

However, it is evident that most sections of populations will not be able to participate in the upcoming regulatory process on their own. The role of civil society institutions is vital in this regard, as they can make an attempt to represent different sections of society. But, there is lack of awareness, skills, and capabilities on the part of most civil society organizations that are expected to participate effectively in the regulatory system. This has further reduced chances of their participating in the regulatory process and benefiting from new opportunities. Although many organizations have close contact with people and very good understanding of ground-level issues, they tend to neglect newly emerging forums like the regulatory authority and overlook importance of converting their analysis into concrete suggestions.

On this background, it is essential for the newly emerging regulatory system to take up the task of ensuring promotion of broader societal objectives. It is imperative in this situation to take some extra steps to overcome the above-cited barriers posed by ground realities. We feel that the newly forming regulatory system should undertake the following three major steps in this situation:

- Operationalising transparency through mandatory and comprehensive provisions for transparency;

- Enhancing effectiveness of provisions related to accountability and participation; and

- Capacity building of civil society institutions;

We suggest that the MWRRA should take the initial steps in this direction. Unfortunately, the process of reforms in infrastructure sector in India is devoid of informed public debate. Even the process of enactment of the law that brought the MWRRA into being was highly controversial. On this background, it becomes difficult for the appointed body like the MWRRA to gain confidence and respect of people to perform the important functions entrusted to it. It is of utmost importance for the MWRRA to ensure wider public participation to overcome this lacuna. As indicated in the accompanying note, the experience of the electricity sector suggests that participation of civil society organizations helped increase awareness, acceptance, and respect about regulatory commissions in public mind.

The task of bringing people into the regulatory system is going to be a long, difficult, and continuous process for the MWRRA. One way to begin is to put the draft regulations in public domain and invite comments on the same. Once draft regulations are made public, it will be easier for people or civil society organizations to contribute to this process. Therefore, we request you to publish draft regulations and try to reach to different sections of the society through electronic and print media as well as meetings and consultations.

We are enclosing two notes with this letter. The first note (refer para 2.2.3) highlights the participatory processes undertaken in the electricity sector in India while bringing reforms. The second note (refer para 2.2.4) briefly takes a review of major lacunas in the MWRRA act and how some of them can be overcome through the regulations.

We are in the process of further analyzing MWRRA Act and identifying possible areas for regulations. We will like to know areas on which the MWRRA is preparing the regulations. It will give us opportunity to share our thoughts on those areas.

We thank you for your cooperation and openness towards us.

With regards,
Resources and Livelihoods Group
Prayas, Pune.

2.2.3 Participatory and Transparency Processes Undertaken in Electricity Sector

A brief account of electricity sector reform in India and Maharashtra is presented in the following paragraphs. The objective is to highlight attempts made at both the central and the state levels to ensure participation of civil society actors at different stages of the process of restructuring of the sector.

Electricity Regulatory Commissions Act 1998

The central Ministry of Power (MoP) initiated a process of enacting the Electricity Regulatory Commissions Act in 1998. The efforts done by the MoP and the CERC to ensure participation of people in this process included:

- The MoP conducted informal public consultations all over the country, although it was not a very structured process to seek inputs from public. Many organizations, especially from business community, from all over the country gave their inputs on the draft act.

- The Central Electricity Regulatory Commission (CERC) published draft 'Conduct of Business Regulations' for comments and suggestions by people. Several consumer organizations and other associations gave their comments on draft CBRs. After processing these comments, the CERC finalized the CBRs and other regulations.

The Electricity Act 2003

The process of formulating the Electricity Act began in 2001. It is marked with a long and wide-ranging process of seeking public participation.

- There was a very extensive process to seek public participation. The MoP assigned the work of preparing draft E-Act to the National Council for Applied Economic Research (NCAER). The NCAER prepared the first draft and put it in the public domain for comments and suggestions.

- The NCAER conducted several meetings to discuss the draft. It tried to reach to different sections of society (industries associations, consumers oranizations) and participated in several seminars. Based on the inputs from different groups, it prepared the revised drafts of the act.

- The MoP adopted the revised draft and modified it according to its needs. This modified draft was tabled in the Parliament where it was referred to the

Parliamentary Standing Committee for suggestions. The Parliamentary Standing Committee again invited comments from general public and conducted hearings at different locations on the draft act before giving its report.

The Regulations Prepared by the Central Electricity Regulatory Commission

The CERC ensured public participation while preparing the regulations on some key areas.

- The CERC published a detailed discussion paper in June 2003 on 'Terms and Conditions of Tariff Regulations' and asked for comments by public. The CERC also held public hearings in November 2003.

- The CERC released a detailed (197 pages) order explaining why it incorporated certain comments and left out others. The final regulations were adopted two months after the CERC released this order.

- The CERC published a discussion paper on 'Development of Common Platform for Electricity Trading' in June 2006 for comments and suggestions. The CERC also held public hearing on this issue. After considering the comments by people, the CERC finalized the regulations.

The Regulations of Maharashtra Electricity Regulatory Commission (MERC) 2003

The Electricity Act 2003 prescribes that the Regulations should be prepared by all the states within a year of passing the act. According to the act, the regulations were subject to prior publication. The MERC undertook a participatory process to formulate the regulations.

- All licensees (for example, Tata Power, Reliance Energy, MSEB) as well as four consumer representatives including Prayas participated in the work of preparing the draft Regulations of MERC. The group of licensees and consumers organizations was named as the 'Project Consultative Committee'. The process of preparing the Regulations was defined after in-depth discussions among licensees, the Commission, and the consumer organizations.

- After the process of preparing the draft regulations was complete, these regulations were put in the public domain to seek comments and suggestions. After considering comments made by people, the regulations were finalized.

Thus, the process of preparing the regulations became more meaningful because of the participation of consumer organizations in preparing its very first draft.

It is important to note that all recent national policies in the electricity sector, such as National Electricity Policy, Tariff Policy, and Rural Electrification Policy, have been put in the public domain in draft form for comments and suggestions by public.

It is evident from the above-mentioned processes that it has become a well-established practice in the electricity sector to ensure participation of people in the decision-making process. Participation of the civil society groups in formulating the CBRs and other Regulations was sought by the MERC and by the CERC (while preparing the CBRs in 1998) even when it was not mandatory on both these institutions. This shows very high level of commitment on their part to the participatory process. The credibility and acceptance gained by the CERC and the MERC from citizens, media, and civil society in the subsequent period is certainly rooted in this commitment towards openness, participation, and accountability demonstrated by them during the initial period. In Maharashtra, at the time of current power crisis, the target of people's fury has always been MSEB, while the MERC was seen as the agency which can give justice. In fact, MERC could conduct peaceful and fruitful public hearings at six different places across the state (that too on tariff increase) even in the situation of widespread and strong unrest among people and received good response from people at large. This shows the respect and confidence in the functioning of the MERC among large sections of society. This is essentially because people believe that the MERC is an independent and capable institution where their problems could get resolved. The MERC could achieve this over a period of time by adopting appropriate measures to ensure transparency, accountability and participation in its functioning.

We feel that it is important for the MWRRA to learn from the lessons of the electricity sector. Being in the formative stage, it has an opportunity to include such provisions in the regulations that will help create its image as an open, independent and body capable to handle difficult and delicate tasks. This will also help the MWRRA to handle the political pressure in future. In our opinion, adhering to TAP related provisions and opening up to public process are critical factors for any regulatory mechanism to gain confidence of its stakeholders, especially general public. In absence of

such proactive steps by the MWRRA, there is a danger that the MWRRA will be victim of widespread suspicion about reform efforts in general, which was further fuelled by the way in which the MWRRA act was enacted. Considering the fact that water is a highly politicized and controversial issue, the MWRRA will badly need the widespread acceptability and credibility to withstand efforts of vested interests to sabotage its authority and make it scapegoat for unavoidable negative impacts of highly contentious decisions that the MWRRA will have to make in future. Further, the MWRRA has a very crucial role as the key decision-making body in the water sector in protecting wider public interest and this can be done effectively only by considering general public and civil society organizations as allies to fight the vested interests dominating the sector.

On this background, it is important that the MWRRA ensure that it is seen as proactively working for transparency, accountability and participation (TAP). We have two specific suggestions in this regard for immediate action.

a) MWRRA should publish draft CBRs on the MWRRA website and make proactive efforts to obtain comments from general public and CSOs. These proactive efforts could include: media releases, sending invitations to groups, conducting hearings at different places in the state.

b) After receiving comments and making decisions about their acceptance or rejection, the MWRRA should publish a report listing all the comments received and giving specific reasons for their acceptance or rejection. This could be seen as a major step by the MWRRA to ensure its own accountability. It needs to be noted that this is a regular practice in the electricity sector and not a difficult task as demonstrated by the electricity commissions in the electricity sector.

We want to emphasize the need to take measures mentioned in second suggestion simply because of the negative feeling created by the so-called process of participation conducted by the state government on the MWRRA and MMISF laws. Our interaction with several CSOs that participated in this process revealed that there is a widespread feeling of unsatisfaction about the government led process of consultations. They felt that the government conducted a farce of public participation only to window-dress its own intentions and just to fulfill conditionalities imposed by the World Bank. They shared the following observations about the participatory process:

a) The government did not incorporate many suggestions and recommendations by CSOs in the final version of the acts. Some of these recommendations are extremely important for ensuring equity in the water sector. Non-incorporation of these recommendations by the government created doubts in the minds of CSOs about the intention of government to conduct participatory process.

b) The government did not communicate anything to the participants once the consultative process was over. There was no explanation on the part of the government as to why certain recommendations were accepted and others were rejected. Many CSOs perceived this as a lack of accountability on the part of the government. It reduced much of the weight in government's claim of engaging people in the decision-making process.

We faced problems when we tried to gain documentation of the consultations on the draft acts. We were told by many CSOs that the government institutions where these consultations were conducted try to evade sharing any information or the report of the consultations even with the participants let alone the public. This is very surprising since the process is meant to increase public participation and as we understand, there is nothing to hide about the outcome of this process.

From the above observations, we feel that the MWRRA should take adequate care while conducting the public process. It is essential to reach out to different sections of society by adopting various means and not restricting the process of participation only to selected CSOs. At the end, we urge the MWRRA to learn from the positive and negative lessons from electricity and water sectors and accept both the suggestions made in this note.

Good Practices in the Electricity Sector to Ensure Public Participation

a) Policies at the Central Government

Table No. 1: Public Participation on Various Electricity related Policies

Policy Instrument	Draft Policy put in the Public Domain	Last Date for Submitting Comments	Adoption of Final policy
National Electricity Policy	February 2004 The draft Policy was subsequently revised after receiving comments from various stakeholders	No specific date was mentioned	February 2005
Tariff Policy	August 2003 The draft Policy was subsequently revised after receiving comments from various stakeholders	No specific date was mentioned	January 2006
Rural Electrification Policy	November 2003. The draft Policy was subsequently revised after receiving comments from various stakeholders	No specific date was mentioned	August 2006

b) The Regulations Prepared by CERC and MERC

Table No. 2: Public Participation on Various Electricity related Regulations

Type of Regulations	Draft Regulations put in the Public Domain	Last date for Submitting Comments by People	Adoption of the Regulations	Date of Issuing Reasoned Order
CERC Terms and Conditions of Tariff Regulations 2004	CERC Discussion paper was published in June 2003.	CERC held public hearing in November 2003. Last date for submitting comments was 31 January 2004.	March 2004	Detailed 197 pages order released in January 2004
CERC Development of Common platform for Electricity Trading 2007	CERC Discussion paper was published on 20 July 2006	Public hearing held on 19 December 2006 Last date for submitting comments was 30 Sept 2006	18 January 2007	18 January 2007
MERC CBR 2004	24 May 2006	7 June 2004	June 2004	No reasoned response. Only the final regulations were notified.

2.2.4 Recommendations based on Comparison of Laws

The MWRRA Act is crucial in many respects. It has initiated the process of radical restructuring of the role of the state in the water sector in Maharashtra. Since Maharashtra is the first state in India to establish the Regulatory Authority in the water sector, other states where water sector reforms are underway are likely to follow the MWRRA act as a model.

In view of this, we felt it essential to analyze the new act and comprehend its implications. To begin with, we compared the Electricity Act 2003 with the MWRRA Act 2005. This comparison is from the 'People-centered Governance' perspective and it tries to highlight the spaces that the two acts offer for participation of people in the decision-making process as well as the provisions to ensure transparency and accountability of the regulatory mechanism. Our analysis shows that the MWRRA Act is far weak and regressive as compared to

the E-Act with regard to provisions related to transparency, accountability and participation (TAP). This comparison is presented in the form of a table in Part I of this annexure, viz., 'Comparative Analysis of Transparency, Accountability and Participation (TAP) Related Provisions in the Electricity Act 2003 and MWRAA Act 2005'. Lack of adequate TAP related provisions in the act not only goes against the spirit of the process of regulatory reforms but also weakens the position of the regulatory authority. We feel that this weakness will have long-term and serious impact on the water sector in Maharashtra.

Further, we analyzed the Conduct of Business Regulations prepared by the MERC in 2004 and tried to compile key provisions ensuring TAP. We thought that this exercise will help us to learn from the electricity sector reforms in Maharashtra. These key provisions are presented again in the table form in Part II of this annexure, viz., 'Key Provisions of TAP in MERC Conduct of Business Regulations, 2004'.

Based on our analysis of the electricity sector reforms, we prepared a detailed note entitled 'Concrete Suggestions for the Regulations to the MWRRA'. The note, included in part III of this annexure, is focused on four aspects. First, the note articulates the guiding principles for democratic governance in the water sector. We feel that these guiding principles will be useful for the MWRRA while framing the regulations and general guidelines. In the second section, we made an effort to articulate specific provisions that need to be incorporated in the act for bringing the guiding principles into practice. Third, we articulated specific provisions that we feel are crucial for ensuring TAP and should be incorporated in the CBRs and other regulations by the MWRRA. Fourth, we tried to articulate recommendations for the regulations on water tariff. This work of articulating recommendations on specific issues is still under way.

We hope that the MWRRA will take note of suggestions prepared by us. We would like to know the areas on which the MWRRA is preparing the regulations. We would like to share our views on those areas. We will appreciate your considered response on our suggestions.

Part I: Comparative Analysis of Transparency, Accountability and Participation (TAP) Related Provisions in the Electricity Act 2003 and the MWRAA Act 2005

Table No. 3: Provisions for Public Participation

No	Provisions in the Electricity Act (E-Act)			Related Provisions in the MWRRA Act			Comparison of the E-Act and the MWRRA Act
	Section	Subject	Provision	Section	Subject	Provision	Comparison of E-Act and the MWRRA Act
1	3 (4)	National Electricity Plan	Provided that the Authority in preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed	15. (3)	Draft Integrated State Water Plan	The (State Water) Board shall prepare a draft Integrated State Water Plan on the basis of basin and sub-basin wise water plans prepared and submitted by the River Basin Agencies.	Unlike the provision in the E-Act, there is no provision in the MWRRA Act either for publishing the draft plan or for inviting suggestions and objections from public.
2	64 (3)	Tariff Order	The Appropriate Commission shall, within one hundred and twenty days from receipt of an application (from generating company / licensee for determining tariff) under sub-section (1) and after considering all suggestions and objections received from the public,- (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order.....(contd.)	11. (d)	Tariff system	To establish a water tariff system, and to fix the criteria for water charges at sub-basin, river basin and State level after ascertaining the views of the beneficiary public, based on the principle that the water charges shall reflect the full recovery of the cost of the irrigation management, administration, operation and maintenance of water resources project	•The E-Act provides for consideration of suggestions and objections from public. Consideration involves taking into account the suggestions during decision-making. •The MWRRA act provides for ascertaining views of beneficiary public. Ascertaining may be narrowly interpreted as just finding out the views and not necessarily taking them into account during decision-making. •The E-Act specifically provides for consideration of suggestions and objections while the MWRRA Act provides for ascertaining of views. Suggestions and objections are based on a logical rational but views can be just personal opinion. Thus, the E-Act is more serious, systematic, and specific on the type of comments from public. •The MWRRA Act gives space for participation for only beneficiary public, but the E-Act provides space for participation for any general public. Thus, the E-Act invites broader participation. •The E-Act invites participation in actual tariff setting while the MWRRA Act talks about ascertaining public's views only during establishment of tariff system and criteria and not during every instance/process of tariff setting.
3	181 (3)	Powers of State Commissions to Make Regulations	All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.	Nil	Nil	No such provision in the MWRAA Act	Unlike the provision in the E-Act, the MWRRA Act does not provide for prior publication of regulations. The condition of prior publication keeps open the opportunity for public awareness and participation in formulation of regulations before they are finalized. The MWRRA Act does not provide any such opportunity.
4	94 (3)	Powers of Appropriate Commissions	The Appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.	Nil	Nil	No such provision in the MWRAA Act	Unlike the provision in the E-Act, the MWRRA Act does not provide the power to appoint consumer representative in proceedings. Such a provision gives legal mandate for 'public-interest', independent agencies to participate in proceedings for protecting public interest.

Table No. 4: Provisions for Transparency

No	Provisions in the Electricity Act (E-Act)			Related Provisions in the MWRRA Act			Comparison of the E-Act & the MWRRA Act
	Section	Subject	Provision	Section	Subject	Provision	
1	86. (3)	Functions of State Regulatory Commission	The State Commission shall ensure transparency while exercising its powers and discharging its functions. (The same provision is also applicable to the Central Regulatory Commission via sub-section 3 of section 79.)	Nil	Nil	No such provision in the MWRRA Act	The provision in the E-Act is really a hallmark of the Act. It provides such blanket acceptance and unrestrained scope for transparency that it should be emulated in all sectors. Unfortunately, the MWRRA Act does not provide any concrete measure for transparency. This curtails the possibility of development of mechanisms or regulations of ensuring transparency while exercising powers and discharging functions by the MWRRA.
2	73. (j)	Functions of Central Electricity Authority	The authority shall make public from time to time information secured under this Act, and provide for the publication of reports and investigations	Nil	Nil	No such provision in the MWRRA Act	The E-Act specifically makes the provision for sharing all information secured under this Act with the public. The MWRRA Act does not provide any such measure of transparency.
3	3. (2)	National Electricity Policy and tariff policy	The Central Government shall publish National Electricity Policy and tariff policy from time to time	Nil	Nil	No such provision in the MWRRA Act	The E-Act makes provision for publishing the national as well as the tariff policy. This enhances the transparency about the policy issues in particularly the tariff policy. The MWRRA Act does not provide any measure for transparency in the tariff or other critical policy matters.

Table No. 5: Provisions for Accountability

No	Provisions in the Electricity Act (E-Act)			Related Provisions in the MWRRA Act			Comparison of the E-Act and the MWRRA Act
	Section	Subject	Provision	Section	Subject	Provision	
1	95	Proceedings before the Commission	All proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code	Nil	Nil	No such provision in the MWRAA Act	Section 193 of the Indian Penal Code (IPC) provides for punishment for intentionally giving false evidence in proceedings. Hence, it enhances the accountability of the parties involved in the proceedings. The E-Act specifically provides for application of section 193 of IPC, while the MWRRA does not provide such provision.
2	6	Supply electricity to all	Obligation to supply electricity to rural areas: The Appropriate Government shall endeavour to supply electricity to all areas including villages and hamlets.	Nil	Nil	No such provision in the MWRRA Act	The particular provision in the E-Act makes the government accountable for providing electricity services to all areas including the remote & rural areas. The MWRRA Act does not make the authority or the government accountable for providing water services to all areas including the remote areas.
3	3(4)	National Electricity Plan	The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years	16(4) and 16(5)	Integrated State Water Plan	16. (4) - The (State Water) Council shall approve, with such modifications as deemed necessary, the draft of the Integrated State Water Plan .....The water plan so approved by the Committee shall become "Integrated State Water Plan". (5) The Integrated State Water Plan may be reviewed after every five years from the date of its approval by the Council.	• The E-Act provides for notification of the plan. Notification leads to enhancement in accountability of the concerned authorities to implement the plan. The MWRRA Act does not provide such measure of accountability in the Integrated State Water Plan. • The E-Act makes it mandatory to notify the plan once in five years, whereas the MWRRA Act keeps it discretionary on the concerned authority to review the plan after five years. Thus the accountability mechanism for review the plan in the MWRRA stands weak.

Table No. 6: Provisions for Protecting Public Interests

No	Provisions in the Electricity Act (E-Act)			Related Provisions in the MWRRA Act
	Section	Regarding	Provision	
1	61 (d)	Guidelines for tariff determination	Safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner	Nil
2	88 (iv)	Objects of State Advisory Committee	The objects of the State Advisory Committee shall be to advise the State Commission on:- (iv) protection of consumer interest	Nil

Table No. 7: Comparison of Other Provisions

No	Provisions in the Electricity Act (E-Act)	Related Provisions in the MWRRA Act
1	The chairperson of SERC will be a person who is, or has been, a Judge of the High Court.	The chairperson of the MWRRA shall be a person who is, or was, of the rank of Chief Secretary or equivalent
2	The chairperson of the selection committee of SERC will be a person who has been a Judge of the High Court.	The president of the selection committee of MWRRA shall be the Chief Secretary of the State.
3	Chairperson/Member holds office for 5 yrs & no eligibility for re-appointment in same capacity. No one will hold office after he attains 65 years age.	Chairperson/Member holds office for 3 years & eligible for re-appointment for not more than 2 consecutive terms. No one will hold office after he attains 75 years age.

Comparison between the provisions in the Electricity Act and the MWRRA Act made in table no. 5 suggests complete bureaucratic control over the newly emerging structures of authority. Over-bureaucratization even after the restructuring of water sector goes against the spirit of reform process. The provision for reappointment opens up the possibility of undue influence exerted by the vested interests in the government over the judgement of the members. The age bar for the members of the authority is too high which may affect the efficiency of the authority.

Part II: Key Provisions of TAP in MERC Conduct of Business Regulations CBR, 2004

Table 8: Key Provisions for Public Participation in MERC CBR

No	Section	Regarding	Provision
1	18	Participation of Consumer Associations and Other persons	The Commission may permit any person, including any association or other bodies corporate or any group of consumers, to participate in any proceedings before the Commission. In this behalf, the Commission may if it considers necessary – (a) notify a procedure for recognition of associations, groups, forums or bodies corporate as registered consumer association for the purposes of representation before the Commission
2	19	Proceedings of the Commission	In discharge of its functions under the Act, the Commission may, from time to time, hold hearings, proceedings, meetings, discussions, deliberations, inquiries, investigations and consultations, as it considers appropriate.
3	32	Initiation of Proceedings	The Commission may initiate any proceedings suo motu, or on a Petition filed by any affected or interested person.
4	33	Initiation of Proceedings	The Commission may, if it considers appropriate, issue orders for publication of the Petition inviting comments on the issues involved in the proceedings in such form as the Commission may direct.
5	87	Proceedings to be open to public	The proceedings before the Commission shall be open to the public.

Table 9: Key Provisions for Transparency and its Operationalization in MECR CBR

No	Section	Regarding	Provision
1	78	Indexed Database	The Commission shall, as soon as may be practicable, maintain an indexed database of its records including, inter alia, Petitions filed, details of hearings conducted, orders/ documents issued from time to time.
2	79 (a)	Inspection of Records	Subject to sub-regulation (c) herein, records of the Commission shall be open to inspection by all, subject to the payment of the fee and complying with the terms as the Commission may direct.
3	79 (b)	Supply of certified copies	The Commission shall, on such terms and conditions as the Commission considers appropriate, provide for supply of certified copies of documents and papers available with the Commission to any person subject to the payment of fee and complying with the terms as the Commission may direct. The Commission shall designate an Officer for ensuring timely response to requests received for supply of certified copies of documents. Such Officer shall maintain a register of such requests made in Form V herein and shall endeavour to dispatch the certified copies of documents requested for within a period of fourteen (14) working days from the date of receipt of request.
4	80	Access to information involving public interest	The Commission shall endeavour to make information involving public interest accessible and available to the public, including, inter alia, through its website and endeavour to facilitate meaningful public participation in matters involving public interest.
5	90	Publication of Petition	(a) Where any application, Petition, or other matter is required to be published under the Act or these Regulations as per the directions of the Commission, it shall, unless the Commission otherwise orders or directs or the Act or Regulations otherwise provides, be advertised normally at least three (3) weeks before the date fixed for hearing in not less than two (2) daily newspapers in the English Language and two (2) daily newspapers in the Marathi language having circulation in the area, in such form as directed by the Commission. (b) Except as otherwise provided, such advertisements shall give a heading describing the subject matter in brief.

Table 10: Key Provisions for Accountability in MERC CBR

No	Section	Regarding	Provision
1	73 & 74	Orders of the Commission	73. The Commission comprising of the Members hearing a proceeding shall pass orders in such proceedings, and such orders shall be signed by the members of the Commission hearing such proceeding. 74. Every order made by the Commission shall be a reasoned order.

Part III : Concrete Suggestions to the MWRRA for Developing Regulations

The MWRRA is entrusted with the crucial responsibility of regulating the water resources within the state of Maharashtra and ensure judicious, equitable and sustainable management of water resources. Accordingly, the MWRRA has the responsibility of protecting and utilizing the water resources in the interest of the society as a whole and the interests of the disadvantaged sections in particular.

To fulfill this objective, the MWRRA should accept and apply certain core principles that will guide its own functioning as well as the functioning of other stakeholder in the water sector. In our opinion, the MWRRA should accept some guiding principles while framing the regulations and general guidelines.

1. Guiding Principles

We tried to articulate guiding principles for ensuring effective and efficient governance in the water sector. These guiding principles would help efforts to provide a

greater role of public in the water sector in order to democratize the governance of the sector for the benefit of the society.

1) Protecting public interest, which comprises of both the interests of the disadvantaged sections and the long-term broader interests of the society as a whole.

2) Ensuring transparency in different processes and operations including the decision-making processes. There should be easy access to information for public. It also requires that information should be in such form that people can easily understand it.

3) Developing different types of strong accountability systems, with measures at systems as well as decision level, which would lead to identification and fixing of the responsibility for a particular decision.

4) Creating concrete and practical spaces for meaningful participation of public and civil society organizations (CSOs) at all stages of governance including planning and decision-making.

For operationalizing these guiding principles, concrete provisions need to be incorporated in the Act as well as in the different types of rules and the regulations. We tried to articulate specific recommendations for implementing the above-mentioned principles.

2. Recommendations for Amendments in the MWRRA Act

As we understand, the MWRRA plans to propose some amendments in the MWRRA Act. We feel that this opportunity could be used to facilitate the incorporation of some important provisions required for democratic governance of the water sector. The following are the specific recommendations which could be introduced through amendments in the MWRRA Act. The list should not be seen as the final and many provisions should be added as the analysis and deliberations among the CSOs and experts progress.

Table No. 11: Recommendations for Changes in Existing Provisions of MWRRA Law

No	Relevant Section of MWRRA Act	Topic	Specific Provision that Need to be Included in the Amendments of the MWRRA Act
1	15(3)	Integrated State Water Plan	"Each concerned Authority shall publish the draft of the sub-basin, basin and state water plan and invite suggestions and objections from the public within such time and process as may be specified by the regulations. The sub-basin, basin and state water plan will be finalized only after consideration of the suggestions and objections from the public."
2	11(d)	Tariff System	"The Authority shall publish the draft of the tariff system and invite suggestions and objections from the public within such time and process as may be specified by the regulations. The Authority shall issue an order for the tariff system after consideration of the suggestions and objections from the public."
3	31	Powers of Regulatory Authority to Make Regulations	"All regulations made by the Regulatory Authority under this Act shall be subject to the condition of previous publication."
4	13	Powers of Authority	"The Authority may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it."
5	11	Functions of Authority	"The Authority shall ensure transparency while exercising its powers and discharging its functions."
6	11	Functions of Authority	"The Authority shall make public, from time to time, information secured under this Act, and provide for the publication of reports and investigations."
7	13	Proceedings before Authority	"All proceedings before the Authority shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code."
8	15(3)	Integrated State Water Plan	"The sub-basin, basin and state water plan finalized after considering the public suggestions and objections should be notified by the concerned Authority once in five years."

Following provisions need to be included in the Act. At present, there is no specific provision in the act that incorporates following points.

Table No. 12: Recommendations for Inclusion of New Provisions in MWRRA Law

No.	Topic	Specific Provision that Need to be Included in the Amendments of the MWRRA Act
1	Tariff Structure	"The concerned agency/Authority shall publish the draft of the proposed tariff structure which is in confirmation with the tariff system set by the Authority and the regulations thereof, and invite suggestions and objections from the public within such time and process as may be specified by the regulations. The agency shall issue an order for the tariff structure after consideration of the suggestions and objections from the public." "The Authority shall provide minimum water service to all at minimum charges. A graded structure of water charges should be evolved in which higher charges will be levied for water use above minimum basic use of water."
2	Water supply to all villages	"The authority shall ensure supply of water to all areas in Maharashtra including remote villages and hamlets."

3.Recommendations for the Conduct of Business Regulations (CBRs) of the MWRRA

The guiding principles for democratic governance in the water sector should also reflect in the CBRs of the MWRRA. Since work of preparing the CBR is under way, it will be useful to consider how provisions can be articulated for this purpose. Table below gives the specific recommendations based on these guidelines for the provisions in the CBRs.

Table No. 13 : Recommendations for the CBRs

No	Topic	Specific Provisions that need to be included in the CBRs of the MWRRA
1	Participation of people in proceedings	"The Authority may permit any person, including any association or other bodies corporate or any group of consumers, to participate in any proceedings before the Authority. In this behalf, the Authority may, if it considers necessary, notify a procedure for recognition of associations, groups, forums or bodies corporate as registered people's association for the purposes of representation before the Authority."
2	Proceedings of the Authority	"In discharge of its functions under the Act, the Authority may, from time to time, hold hearings, proceedings, meetings, discussions, deliberations, inquiries, investigations and consultations, as it considers appropriate."
3	Initiation of Proceedings	"The Authority may initiate any proceedings suo motu, or on a Petition filed by any affected or interested person."
4	Initiation of Proceedings	"The Authority may, if it considers appropriate, issue orders for publication of the petition inviting comments from public on the issues involved in the proceedings in such form as the Authority may direct."
5	Proceedings to be open to public	"The proceedings before the Authority shall be open to public."
6	Indexed Database	"The Authority shall, maintain an indexed database of its records including, inter alia, petitions filed, details of hearings conducted, orders/documents issued from time to time."
7	Inspection of Records	"Records of the Authority shall be open to inspection by all, subject to the payment of the fee and complying with the terms as the Authority may direct."
8	Supply of certified copies	"The Authority shall, on such terms and conditions as the Authority considers appropriate, provide for supply of certified copies of documents and papers available with the Authority to any person subject to the payment of fee and complying with the terms as the Authority may direct. The Authority shall designate an Officer for ensuring timely response to requests received for supply of certified copies of documents. Such Officer shall maintain a register of such requests made in Form V herein and shall endeavour to dispatch the certified copies of documents requested for within a period of fourteen (14) working days from the date of receipt of request."

contd...

contd...

No.	Topic	Specific Provisions that need to be included in the CBRs of the MWRRA
9	Access to information involving public interest	"The Authority shall endeavour to make information involving public interest accessible and available to the public, including, inter alia, through its website and endeavour to facilitate meaningful public participation in matters involving public interest."
10	Publication of Petition	"Where any application, petition, or other matter is required to be published under the Act or these Regulations as per the directions of the Authority, it shall, unless the Authority otherwise orders or directs, or the Act or Regulations otherwise provides, be advertised normally at least four (4) weeks before the date fixed for hearing in not less than two (2) daily newspapers in the English Language and two (2) daily newspapers in the Marathi language having circulation in the area, in such form as directed by the Authority. Except as otherwise provided, such advertisements shall give a heading describing the subject matter in brief."
11	Orders of the Authority	"Every order made by the Authority shall be a reasoned order."
12	The Regulations by the Authority	"Every regulation made by the Authority shall take into consideration the suggestions and objections from public. For this purpose, the draft regulations shall be published and made available for the public."
13	The Regulations by the Authority	The Authority shall make the regulations on all the issues that affect public interest. The regulations should be made on the following issues : a) Establishing water tariff system, b) Setting water tariff, c) Allocation of water entitlements, d) Transfer of water entitlements, e) Waste-water treatment and re-use, f) Diversion of water use from one category of use to other and within the category of use g) Grievance redressal system
14	Tariff Setting	"Safeguarding public interest and in particularly the interest of the poor should be one of the main principle guiding the tariff. In this respect some minimum basic water services should be provided for the poor and vulnerable sections of the society at minimum charges."

4. Recommendations for Provisions of the Regulations Related to Water Tariff

The MWRRA is entrusted with the responsibility of establishing the water tariff system and fix criteria for water charges. There is need to prepare the regulation at the user-level tariff setting. Hence, the MWRRA should ensure that they include provisions for tariff setting in the interest of common people. These provisions should be included in the regulations for water tariff system. Following are the specific recommendations for the regulations of water tariff.

Table No. 14: Recommendations on Water Tariff Regulations

No	Topic	Specific provisions that need to be included in the CBRs of the MWRRA
1	Tariff Determination and Public Participation	a) The agency proposing the tariff shall, publish a notice, in at least two (2) English and two (2) Marathi language daily newspapers widely circulated in the area to which the application pertains, outlining the proposed tariff, and such other matters as may be stipulated by the appropriate authority, and inviting objections from the public. b) Provided that the concerned agency shall make available a hard copy of the complete application, to any interested party, at such locations and at such rates as may be stipulated by the appropriate authority c) Provided further that the concerned agency shall also put up on his internet website, in downloadable spreadsheet format showing detailed computations, the application made to the appropriate Authority along with all regulatory filings, information, particulars and documents submitted to the appropriate Authority along with the application d) Provided further that web-link to the information mentioned above shall be easily accessible, archived for downloading and shall be prominently displayed on this internet website. e) Provided, however, that the concerned agency may not provide or put up any such information, particulars or documents which are confidential in nature, with the previous approval of the appropriate Authority. Explanation – for the purpose of this Regulation, the term "downloadable spreadsheet format" shall mean one (or multiple, linked) spreadsheet soft ware files containing all assumptions, formulae, calculations, soft ware macros and out puts forming the basis of the application.
2	Publication of Tariff Approved	The concerned agency shall publish the tariff or tariffs approved by the appropriate authority in at least two (2) English and two (2) Marathi language daily newspapers having circulation in the area of operation and shall put up the approved tariff/tariff schedule on its internet website and make available for sale, a booklet containing such tariff or tariffs, as the case may be, to any person upon payment of reasonable reproduction charges
3	Minimum Water Services	Safeguarding public interest and in particularly the interest of the poor should be one of the main principle guiding the tariff. In this respect, some minimum basic water services should be provided for the poor and vulnerable sections of the society at minimum charges.
4	Grievance Redressal Mechanism	The tariff-collecting agency shall set-up a grievance redressal mechanism as specified by the appropriate Authority.

■■■

2.3 Analysis of Proposed Ground Water Regulation Bill: Procedural and Other Recommendations

The Government of Maharashtra (GoM) passed the Maharashtra Groundwater Act in 1993 based on the model groundwater regulation bill proposed by the central government. But the said law was not effective in regulating the groundwater resource. Hence, the GoM decided to restructure the whole regulatory framework for groundwater based on the latest model bill proposed by the central government. A new draft bill was prepared for this purpose. The concerned government department conducted a consultation workshop on the proposed bill for selected organizations. A note was prepared for dissemination and submission during this workshop.

This note is based on "Maharashtra Groundwater (Development and Management) 2007 Draft Bill: A Detailed Note" sent by Groundwater Survey and Development Agency (GSDA) in Maharashtra. The note prepared by GSDA provides a very brief analysis of the Maharashtra Groundwater Act of 1993 and an equally brief description of major provisions in the proposed bill. These comments are based on this brief description of provisions. It may be possible that some of the recommendations are already included in the proposed bill, which is not shared with the public.

We urged the GSDA to release the full draft of the proposed bill to public so that a comprehensive debate takes place before the draft is finalized. There are many precedents, when the draft bills and policies have been discussed publicly before its consideration by the cabinet, notable among them is the long and comprehensive debate on drafts of the Electricity Act 2003.

This note is divided in three sections. In Section one, comments on some basic issues, such as the GSDA's analysis of failure to implement Maharashtra Groundwater Act, 1993, the issue of decentralization of groundwater governance, and issues related to equity and sustainability are presented. In Section two, the importance of participatory process is discussed. There are specific recommendations regarding these in both Section one and two after the discussion. In Section three, concrete recommendations related to the governance process are presented.

Section 1: Some Basic Issues and Recommendations

I. Analysis of Past Failure

Reference: Section 2 of the above-mentioned note by GSDA, titled: 'The Maharashtra Groundwater (Regulation For Drinking Water Purposes) Act, 1993: Implementation and Limitations'.

This section in the GSDA note discusses implementation of the 1993 Groundwater Act and problems faced in its implementation. It candidly states that there was no effective implementation of the act, the reasons being, (a) technical reasons, (b) mistakes on the part of the government (e.g., recourse to provisions of 1976 Maharashtra Contingency Service Rules rather than 1993 Act, and (c) lack of awareness and apathy among people.

Based on this analysis, the prescription that seems to be suggested is of establishing a new type of institution, i.e. 'Watershed level Water Resources Committee' (WWRC) and devolution of the critical functions to this institution. The underlying implicit assumption could be that devolution of functions and authorities to WWRC, would ensure people's participation and would resolve the key problems faced in implementation of the 1993 law, viz., lack of awareness and apathy on the part of people.

The analysis made in the GSDA note seems highly inadequate to comprehend the ground reality and reasons behind the failure of previous attempt to regulate groundwater. In order to expect success in the subsequent attempts, it is imperative to make an in-depth and comprehensive analysis of previous failure so that appropriate lessons can be drawn for the proposed act. In fact, such an analysis should be the precondition for articulation of any new bill. This analysis will provide the base essential for articulating provisions that will avoid repetition of past mistakes, by strengthening certain forces and weaken other. The analysis of the failure in implementation of 1993 Maharashtra Groundwater Act made by different researchers1 suggests the following points:

a) The general conclusion is that the 1993 Act lacks social support and legitimacy, mainly because the right to extract groundwater for irrigation even during the

stress period is accepted by people as natural and inevitable. Sometimes, they fail to establish a connection between the shortage of drinking water and withdrawal of water from nearby wells for irrigation purpose. But even when they could establish such a connection, they do not find this groundwater extraction for irrigation as unacceptable, mainly because private property regime is well entrenched in their value system.

b) People who extract excessive groundwater are generally (economically and politically) powerful as against the common people who suffer from their actions. This puts severe constraints on common people in even voicing their grievances, let alone taking any effective action against the violators. Further, the dominant sections at the local level have considerable influence on the local gram panchayat, which is expected to initiate action against them. The panchayat representatives are also unwilling to make a formal complaint and follow it up, considering strong vested interests involved.

c) Moreover, common people believe that the state will, anyway, take some action to relieve them from the stress situation and ensure supply of drinking water, however unsatisfactory and inadequate that may be. As a result, they avoid taking any unpleasant steps against the powerful local interests. Relying on the government to somehow provide drinking water appears to be a 'soft option' to them as against the 'hard option' of hurting their fellow villagers, that too powerful ones.

The ultimate victim here are women-folk as well as young girls and boys of the village, trudging miles together or fighting among themselves for water, and in the process, closing down their other options and opportunities. Thus, it essentially involves the larger issues of gender and social justice, and, hence, cannot be left to the gram panchayat. Since effective influence of village womenfolk in the affairs of the gram panchayat is very weak, their concerns and difficulties about the issue of drinking water are not likely to be addressed by the gram panchayat members.

d) Unfortunately in many instances, the elected representatives and officers see more alternative opportunities for financial gains in bringing some drinking water scheme in the village than conserving groundwater.

e) Further, the tanker lobby, emerged over the years, is also not interested in allowing the long-term solutions to the problem of water scarcity to take shape.

f) It needs to be noted that apathy among the people, cited by the GSDA note, is due to the lack of ownership or commitment on their part to the implementation of the 1993 act. This lack of ownership and commitment is essentially because the process of making the law or implementing it do not take people in confidence. Hence, such top-down solutions thrust on people from above, however good-intended they might be, are rejected, if not resisted, by people, even out of mere suspicion about the possible ulterior intentions underlying these resources.

Participation of people in making some micro-level decisions and, in merely managing micro-system is not adequate to inspire confidence in the minds of people. Without such confidence there does not arise the possibility of credibility, acceptance, ownership, and commitment to the law or its implementation.

Further, it needs also to be noted that having mere awareness among people is not adequate. Politically and economically strong local forces will not allow common people any action, how much these common people are aware. Managing conflicts and providing level-playing field to all its members by controlling stronger sections are important elements of the institutional capacities of anyl organization. If local organizations do not have these capacities, then the mere devolution of authority to them is not only an inadequate but often counter-productive measure.

This analysis shows that the government has not taken cognizance of many issues that would also severely affect implementation of the proposed act. The solutions based on inadequate analysis will not yield desired results. The above-mentioned analysis is only from two sources. Similar analysis needs to be compiled from different stakeholders.

Recommendations:

a) It is imperative to undertake an exercise of in-depth analysis of the failure in the implementation of 1993 Act. List of all lessons to be drawn for this analysis as well as that of measures to be adopted to implement these lessons need to be prepared.

b) There is a need to prepare a multi-pronged and novel strategy, which will include short-term and long-term plan and measures to deal with various probable problems that affect the implementation process. It is necessary to clearly articulate how provisions in the proposed bill would incorporate these lessons from past experience.

II. Decentralization of Governance of Groundwater

There is a provision in the proposed act to create a new institutional structure for implementation and devolve power to this structure. According to the GSDA note, Maharashtra Groundwater (Development and Management) draft bill 2007 proposes establishment of Watershed based Water Resources Committee in the notified areas to undertake measures for groundwater management and to protect drinking water sources.

First, the description of provisions of the draft bill in this regard as presented in the note by GSDA is very confusing. It is not clear from the description whether WWRC will be established only in the notified areas or even in the non-notified areas. Second, it is not clear whether it is a hierarchical structure wherein there will be multiple WWRCs at different levels or whether there will be one big WWRC at the watershed level. Third, the composition of WWRC is also not clear from the provisions. It is mentioned that it will comprise of members of all gram panchayats/local self government in the notified area. Further, it is stated that panchayat samiti and zila parishad members within the notified area will be ex officio members of WWRC.

Fourth, the WWRC is given wide authority to perform important tasks, such as,

(a) In notified areas, WWRC will encourage measures to ensure availability, development, and management of groundwater, with public participation, in order to undertake equitable distribution of water,

(b) it will monitor the measures undertaken for use of pesticides, chemical fertilizers as well as disposing off effluent water and garbage and request district authority for action,

(c) it will control use of available water and extraction of groundwater based on water accounting done by GSDA,

(d) it is necessary to take permission of WWRC for digging new well or setting new pump for extraction of groundwater,

(e) it will decide areas from where sand can be extracted,

(f) to adopt measures for groundwater management and to protect public drinking water resources.

Considering this wide range of responsibilities related to implementation of the proposed law, the composition of WWRC becomes critical. According to the draft bill, in addition to the automatic membership of gram panchayat and often panchayat rajya institutions, the gram panchayat will select one member from gram sabha and one NGO representative for WWRC. Effectively, the WWRC will be made of a large number of members of gram panchayat and other panchayat rajya institutions as its members. Thus, considering this composition of WWRC, it would be as effective as the gram panchayat was effective in implementation of the 1993 law. The analysis of past failure presented in Part 1 of this note clearly mentions serious failure of gram panchayat in implementing the 1993 act. The analysis presented in the second section of the above-mentioned GSDA note is equally clear on this issue. If there is no qualitative change in the ground reality, how the body that has the same members can again be entrusted with the similar task in the proposed act? What care has been taken to ensure that past instances will not be repeated?

Another issue is the capabilities of WWRC to perform various functions entrusted to it. The analysis in Part 1 suggests that gram panchayats and local people avoid taking any action against violators, as it may lead to conflict. This is because of the fact that the gram panchayats lack institutional capability to resolve conflict. Therefore, it is necessary to invest in development of capabilities of concerned agencies which will implement the provisions in the act.

However, the whole experience of implementing Jalswarajya scheme has shown how difficult it is to build even technical and managerial capabilities of local institutions. Building institutional capabilities, which essentially is a socio-cultural process, involves very long gestation period and require diligent and intensive efforts.

The limitations on the success of building institutional capabilities are further aggravated due to disparity in distribution of economic, social, and political power among different sections within a village. This skewed distribution of power needs to be corrected by increasing accountability of local and other institutions involved in governance and opening up ways for outside actions to extract this accountability. Such argument creates the potential threat of affirmative intervention in local affairs by external actors in favour of vulnerable sections or common people, if there is a need.

In short, making the local and other governing institutions accountable to even external/outside actors creates (potential!) force countervailing to the influence of local powerful sections, and thus,

increases the possibility of effective implementation of pro-people and pro-environment measures against the wishes of local strong vested interests.

Recommendations:

a) The plan of devolution of functions to WWRC proposed in the draft bill should be revisited on an urgent basis and in an in-depth manner.

b) The institutional structure necessary for implementation of the act should be evolved in a participatory and transparent manner. The experience of implementation of 1993 Act could provide important lessons for evolving the new structure.

c) It is necessary to make adequate provision for development of capabilities, including technical, managerial and institutional capabilities, of concerned agencies which will implement the provisions in the act.

d) There is a need to design and implement governance processes that have appropriate, adequate, effective, and mandatory provisions for accountability as well as for participation and transparency.

III. Issues related to Equity and Sustainability

The purpose of the proposed bill is to plan, regulate, and manage groundwater resources in the state. There is no mention of how groundwater will be distributed. It needs to be noted that the MWRRA act specifically mentions 'equitable distribution of water' as one of its objectives. Although the definition of the term 'equitable' in the MWRRA act is very limited and self-defeating in nature, at least the MWRRA has taken cognizance of the crucial issue of distribution of water.

In the proposed bill on groundwater, there is a mention that WWRC will encourage measures to ensure 'equitable distribution of water' in the notified areas. (GSDA Note, Section 5, Point No. 17) This is a welcome step. However, the term 'equitable' is not defined in the bill. Does 'equitable' mean the right over groundwater for all people living in that area? Or does 'equitable' mean the right only for landed people over groundwater? Further, it appears from the description of the GSDA note that this provision applies only to notified areas. Are non-notified areas outside this provision? If so, what should be the principle of distribution of groundwater in the non-notified areas and which agency will execute this function?

It is necessary to note that participation and involvement of all people in conserving groundwater can only be ensured if they are assured of their rightful share in the conserved water. A very skewed pattern of distribution of land in Maharashtra has left large population without land rights. Consequently, they lose their right over water, if the water right is linked to the land right, as has been done in the MWRRA Act. Since recharging of groundwater, in this situation, is not likely to benefit them in the long run, there is no significant incentive to common people to participate in implementation of the law. Further, past experience suggests that activities undertaken to recharge groundwater do not benefit much to landless and poorer sections in the village. On the contrary, it results in increasing inequality by favouring the landed people, with economic and political power, who can invest in wells and pumps. The interests of rural poor are, in turn, hampered due to closing of commons and ban on keeping goats and cutting trees.2 In this situation, it is wrong to expect any participation of common people in the implementation of the proposed act.

It is remarkable that the proposed bill does not subscribe to the principle of sustainability. There is no provision to prevent unsustainable use of groundwater once it is recharged. Thus, there is a danger that enhanced water resource through recharging will be used again in an unsustainable manner by a few powerful people. All public resources and efforts put in recharging the groundwater would be conquered for own benefit by a few. The conservation of groundwater, therefore, will not prove a long-term solution, unless it is accompanied by restrictions on its use even after recharging. The factors such as, crop-pattern and high-input modern agriculture are very important in this regard. The issue of groundwater depletion cannot be treated in an isolated manner. Further, the proposed bill provides no guarantee against restrictions on use of groundwater by industry for commercial purposes.

It seems that implementation of the new act will primarily concentrate on the ninety-six notified areas out of 1505 watershed areas in the state. The development and management of groundwater is of utmost importance even in non-notified areas, although they are not in a critical situation today. There is a need adopt preventive rather than curative approach to the question of groundwater. Accordingly, there is need to articulate detailed provisions to regulate groundwater even in non-notified areas.

Recommendations:

a) It should be clearly mentioned in the proposed bill that ground water is a common property resource.

b) The principle of 'equitable distribution of groundwater', i. e. right of all people in the village over groundwater, should be recognized by the government and the proposed bill should clearly mention that 'equitable distribution of groundwater' is one of the major objectives of the bill.

c) The process of operationalizing the principle of 'equitable distribution of groundwater' should be defined in the proposed bill.

Section 2: Importance of Participatory Process

It is necessary to comprehend the broader picture of water sector reforms in India, while pondering on the proposed groundwater bill. In the pre-reform era, the state was regarded as 'the' custodian of public interest. The state was responsible for and accountable to the citizens through democratic mechanisms, including elections. Therefore, in return, it was invested with wide authority, including that of planning, implementation, and regulation of the infrastructure sector. With the introduction of independent regulatory institutions after the reforms, the state was divested of its regulatory role and the center of decision-making in the infrastructure sector shifted from the state to the newly constituted regulatory authority.

This created a situation wherein, the state (which was accountable to public at least to some extent), on one hand, gave up the mandate and responsibility of protecting the public interest, while, on the other hand, the regulatory authority, which was given the powers that ones were enjoyed by the state, is not effectively or adequately accountable to the public, on whose behalf and whose interests, it is claiming to make decisions.

This imbalance between authority and accountability in the new structure will have the disastrous implications for the sector, economy, and even society. This is because, this imbalance would give rise to, on one hand, unaccountable behaviour by the authority, and, on the other hand, rejection by people of the power and mandate given to the authority and the decisions made by the authority.

Recommendation:

a) There is an urgent need to introduce adequate provisions to allow citizens to directly extract accountability from the authority as well as similar provisions of participation and transparency, which, in turn, are required to effectively operationalise the provisions for accountability.

Process of Participation

After introduction of regulatory institutions in the infrastructure sector, taking participation of people in governance processes became a norm. However, attempts made by the government to take public participation in the governance process in different sectors during last few years exhibit many limitations. Generally, sector experts along with some NGOs are invited to 'participate' in a 'consultative' process on the proposed policy or legislation. The grassroots activists and people hardly ever find place in such a 'participatory process'. Further, generally it is not binding on the government or regulatory authority to accept advise of these consultations neither the consultants/experts have adequate 'nuisance power' to ensure that their advise is taken seriously. On many times, such exercises are implemented in such casual, if not sham manner, that even minutes of those consultations are not recorded nor the minutes are shared with the invited experts. Thus, although such process gives an opportunity for outside experts to give their opinion in decision-making process, there is a danger that it will lead to 'expertocratic' influence on consultation rather than true and meaningful public participation in the decision-making. Participation of people could be meaningful only if the agencies seeking such participation are effectively accountable to participants for conducting an honest and open process of deliberations. It needs to be noted that experts or NGOs do not necessarily represent people and there is danger that they become early target for pressures or enticements of vested interests.

Recommendations:

a) Any participatory process should be open for any member of public. It should be accountable, in different ways. Full and timely information should be made available for such process to be meaningful. Thus, transparency, that too in operationalized manner, is a necessary precondition for true process of participation.

b) The following could be seen as necessary steps in a meaningful process of public participation.

- The agency seeking public participation should invariably put the proposal (of a new policy, legislation, rules, regulations, notification, etc.) in the public domain.
- This proposal should be given wide publicity by using electronic and print media, website, and other available options for communication.

■ The rationale and detailed reasoning behind the proposal should be articulated in the proposal.

■ Adequate time should be given for the public to provide comments, suggestions, and objections.

■ The process of conducting consultations (except in the case of minor, limited proposals) on the proposal should be open to public and any person should be allowed to participate in the consultations held for this purpose.

■ The concerned agency should diligently process all comments, suggestion and objections received from the public.

■ The final draft of the proposal should be published, with reasoning, recorded in writing. The necessary shall include rationale behind adoption and rejection of each of the suggestions received from public.

■ After publishing the final draft, there should be time for public to study the final draft. If people find the draft unsatisfactory, there should be provision to make an appeal or seek a review.

■ It is necessary, therefore, to provide for Appellate Authority where an appeal or demand for review can be made.

Section 3: Concrete Recommendations Related to the Governance Process

■ In this section we provide some of the most crucial recommendations relating to the process of governance in groundwater sub-sector. This section is based on the analysis of the (proposed and current) governance process as it reflects from mainly the following (existing and proposed) legislations:

■ The Model Bill to Regulate and Control The Development And Management of Ground Water, 2005 (hereafter referred as the Model Bill),

■ Maharashtra Groundwater (Development and Management) 2007 Draft Bill: A Detailed Note' prepared by the GSDA (hereafter referred as the GSDA note)

■ Maharashtra Groundwater (Regulation for Drinking Water Purpose) Act, 1993

■ Maharashtra Water Resources Regulatory Authority Act, 2005

3.1 Role of Regulatory Authority

Background Logic :

a. Section 5 of the Model Bill provides for the powers to notify certain areas for regulation and control of the development and management of ground water. The subsection (2) of Section 5 reads, '...the Authority...will advise the State Government to declare...area to be a notified area for the purpose of this Act...'

b. Hence, the model bill assumes only advisory role for the Authority in the process of notifying the area for groundwater regulation. In this case, the regulatory authority does not have adequate powers to notify the area for the purpose of the act. The final decision remains with the state government.

c. While the model bill depends on government to take the decision about the notification, it does not specify any designated officer or an authority, which is responsible for taking such a vital decision. This leads to weak accountability structure.

d. In the GSDA note it is proposed (section 5-1 & 5-2 of the GSDA note) that the area for groundwater regulation shall be notified through the Maharashtra Water Resources Regulatory Authority (MWRRA). To be more precise, it seems to be proposed that the area shall be notified through the MWRRA and not by the MWRRA. Thus, there is no clarity on whether the MWRRA is the final authority to notify the areas for regulation or it is the government.

e. If the final authority to decide about the areas to be notified for groundwater regulation rests with the government, then there is hardly any autonomy to the regulatory authority in such a highly important decision. This defeats the very purpose of having a regulatory authority.

Recommendations:

i. The power to notify the areas for control and/or regulation of the extraction or use or both of the ground water should be vested in the hands of the regulatory authority constituted for the purpose. The government should play the role of laying down the rules and policy directions for the regulatory authority for this purpose.

ii. If the powers to notify are given to the regulatory authority, then it should be backed by strong provisions for transparency, accountability, participation (TAP), which are currently lacking in the Model Bill.

3.2 True Participation in the Process of Notifying or De-notifying Areas for Regulation

Background Logic:

a. Sect. 5 (2) of the Model Bill reads, ' If the Authority, after consultations with various expert bodies, including Central Ground Water Authority (CGWA) is of the opinion that it is necessary or expedient in the public interest to control and/or regulate the extraction or the use or both of ground water in any form in any area, it will advise the State/Union Territory Government to declare any such area to be a notified area for the purposes of this Act.....'

b. Thus, through Sect. 5 (2) the model attempts to bring in 'participation' in the process of notification, but in a very limited sense, by providing for consultation of 'expert bodies' and CGWA.

c. Sect. 5 (4) of the Model Bill, related to the process of de-notification, is also based on the similarly limited interpretation of the term 'participation'.

d. Both these provisions, in fact, provide for 'consultation' and only with 'experts'. It does not provide for 'participation of general or affected section of public'. The bill also does not provide further details of the process by which the actual decision would be taken.

e. As per Sect. 5 (2) of the model bill, the authority will advise for notifying a certain area, if it is of the opinion of that it is necessary to notify in the public interest. We appreciate that the particular section gives emphasize on public interest. But unfortunately, as per provision in the model bill, the public is not consulted in this process of protecting public interest.

Recommendations:

i. The process of notification (both, for notifying and de-notifying the areas to be regulated for groundwater) should be open to any general public and any member of the public should be allowed to participate in the consultations held for this purpose. It should follow the procedure of public participation described in Part 2 of this note by Prayas.

ii. The Act should also include a section that provides for preparing the rules and regulations for defining the process of notifying or de-notifying the areas for control and regulation of groundwater.

3.3 True Participation in the Process of Granting or Refusing Permission for Extraction of Groundwater in Notified Areas

Background Logic:

a. Sect. 6 of the Model Bill provides power to the Authority for granting or refusing of permission to sink a well in a notified area.

b. Though, this is one of the most contentious issue (about who will get the permission and who will not), the model bill does not provide appropriate provisions related to transparency, accountability and participation (or TAP) in the process of granting or refusing permission for extraction of groundwater in notified area.

c. In the Model Bill, there is a general list of points that the Authority should consider while granting or refusing a permit (Section 6-5). But, there is no provision for making public the proceedings of the decision nor is there any provision for inviting objections from the public while granting the permit.

d. There is a provision in the Model Bill (Sect. 6-3) for giving a hearing to the applicant before refusing a permit to the applicant. Though, this is a good measure of transparency and participation, the same is inadequate considering the overall importance and criticality of the issue of granting permits to extract water in notified areas.

e. The issue of granting or refusing the extraction of groundwater in notified areas should not remain as an internal matter between the applicant and the permission-granting Authority. Rather, this issue should be seen as a broader 'public-interest' issue, involving stakes of the farmers and villagers from adjoining areas as well as the larger public.

f. The repercussions of depletion of groundwater in any specified area are not limited to the particular watershed of that area but it has clear linkages (e.g. water scarcity in one region leads to increased demands for water in other regions) to the overall water balance at the level of river basin and also at the state-level. Hence, the issue of allowing permission for groundwater extraction in notified areas is an issue of broader 'public interest'.

g. Apart from these direct implications (or repercussions), depletion of such key natural resource like water (many times non-renewable on cases of aquifer extraction) would naturally be a concern for all

the right-minded citizens and organizations in the country.

h. Hence, there is a need to bring all aspects of granting or refusing permission for groundwater extraction into the public domain.

i. The note by GSDA on the main principles for the proposed groundwater act (2007) suggests (in point no. 5-5) that, the Authority (i.e., MWRRA) will prohibit the sinking of wells and deep-tube-wells in notified areas. At the same time, the note also mentions that (in point no. 5-19), the approval of the watershed-level water resources committee (WRCC) is compulsory for sinking a new well or installing a new electricity pump for extracting groundwater. This leads to an interpretation that the Authority will prohibit groundwater extraction while the WRCC may approve the same. Hence, it is also not clear whether the approval of watershed committee is a sufficient condition or just one of the necessary conditions for the Authority to approve groundwater extraction. The roles of the Authority and the WRCC are not clear in this regard. In any of these cases, there is a need to bring this process in the public domain.

j. Point no. 5-12 of the GSDA note states that there will be prohibitions on sinking new wells in the area of influence of the existing public drinking water sources. Further, it states that there is a need for recommendation by the village panchayat or WRCC and final approval by the District Authority for sinking new well in such an area of influence. Here also, there is a need to bring this process in the public domain.

Recommendations:

i. The entire process of granting or refusing permission for ground water extraction in all type of cases (as mentioned in the background logic) should be made public.

ii. Clear (i.e. specific, measurable) criterion as well as the method of processing of applications (for granting permission for groundwater extractions), based on these criterions should be clearly laid down in the form of regulations to be prepared by the regulatory Authority.

iii. There should be provision for giving powers to the Authority to make regulations in this regard. The method of processing of the applications and the criterion for decision making should be finalized after taking suggestions and comments from the public.

iv. Such criterion and methodology should be published and disclosed to the public through making it available at the local level (in the village) as well as on the website.

v. The information about the processing of applications, right from submission stage to the stage of final decision making, should be maintained in a systematic database with all details (using a computerized system) and the same should be openly and easily accessible to the public.

vi. The process of granting or refusing the permit for groundwater extraction should follow the procedure for public process as mentioned in the Part 2 of this note by Prayas.

vii. Apart from such transparency and participation related provisions, there should also be mechanism for monitoring of compliance of the orders of the authority about the permission (granted or refused) for groundwater extraction. This monitoring mechanism should have roles for the appropriate authority as well as the common public.

viii. The act should provide for an appropriate mechanism that allows any member of the public to appeal against the non-compliance of the orders of the authority in this regard.

3.4 Provisions for Reasoned Order

Background Logic:

a. The concerned citizens, do not always understand the underlying rationale of different decisions taken by the various authorities or committees, in totality.

b. This leads to confusion about the decision making process, and, in some cases, also leads to suspicion and speculations.

c. Such confusion, speculation, or suspicion seriously erodes credibility, acceptance of the decision-making body as well as the decisions.

d. Further, this lack of adequate credibility and acceptance of the Authority leads to lack of acceptance and ownership of the decisions made by the Authority, seriously eroding the motivation or peer-pressure to abide by or respect the decisions.

Recommendation:

i. The proposed groundwater act shall provide a blanket provision saying that, 'All decisions of the

appropriate authority should be in the form of a reasoned order' i.e. the decisions/orders should be accompanied with detailed reasoning recorded in writing. Such a provision will enhance the accountability and transparency in the decision making of the various authorities.

3.5 Provision for Appeal Against any Orders

Background Logic:

a. Sect. 14 (1) and 14 (4) of the Maharashtra Groundwater Act (1993) prohibits an aggrieved person to resort to the courts against the orders of the appellate authority or event against any direction issued or any order made under that Act.

b. Sect. 14 (4) reads, '...every order made and every direction issued under this Act shall be final and shall not be called in question in any Court'.

c. Sect. 14 (1) reads, '...every order made by the Appellate Authority...shall be final and shall not be called in question in any court'

d. Such a blanket provision will limit the scope of providing justice to the any aggrieved person. Such neglect of the basic principles of natural justice leads to suspicion about the intent of having an independent authority. This in turn, leads to rejections and side-stepping of the authority and will-full non-compliance of its orders. Such behaviors give rise to all kinds of malpractices including corruption.

Recommendation:

i. The proposed Maharashtra Groundwater Bill (2007) should not include the provisions similar to Section 14 (1) and 14 (4) of the Maharashtra Groundwater Act (1993).

3.6 Building Multiple Levels of Accountability (Checks & Balances)

Background Logic:

a. Section 3 (2) of the Model Bill proposes a representative of Central Groundwater Board (CGWB) to be one of the member of the Groundwater Authority (GWA) responsible for regulating groundwater in the state.

b. Hence, the Model Bill provides for multiple levels of accountability mechanism (checks and balances) within the GWA by inclusion of a representative of CGWB as part of the GWA.

c. The GSDA note on the Maharashtra Groundwater Bill (2007) does not include the member of CGWA as part of the regulatory authority. This reflects on the tendency to avoid being accountable to an agency outside the state bureaucracy or the control of state government.

d. Participation of central government body will enhance the accountability of the state GWA and also keep a check on the state-level vested interests. It will also help the state agency to get a different and wider perspective on the issues involved.

Recommendation:

i. The MWRRA, which is the proposed groundwater regulator in the state, should include within its membership a representative of Central Groundwater Board (CGWB) for all matters or proceedings related to groundwater.

3.7 Powers to the Authority to Make Regulations

Background Logic:

a. Many decisions that are crucial for individuals, environment, and the society as a whole would be taken with regards to the regulation of groundwater through implementation of proposed act. Also, various proceedings would be undertaken in making and implementing such decisions.

b. The public at large will not gain confidence in the regulatory authority, unless well-defined procedures have been laid for various processes with appropriate and adequate opportunities for true and meaningful participation. There is a need to lay down such procedures and norms in the form of regulations in order to make the law effectively implementable and enforceable.

c. The Model Bill as well as The Maharashtra Groundwater Act (1993) does not provide powers for the Authority to make its own regulations on the crucial processes of regulating groundwater. In absence of such regulations, the executionary as well accountability mechanisms of the Authority would remain weak.

Recommendation:

i. The proposed Maharashtra Groundwater Bill (2007) should provide powers to the regulatory authority to make regulations. Among other things, the

Authority should make regulations on following aspects:

- Procedure for notifying or de-notifying areas for regulation and control on groundwater
- Procedure for granting or refusing permission for groundwater extraction in notified area or in areas of influence of public sources of drinking water
- Procedure of implementation of powers given to the watershed-level water resources committee (WWRC) (powers to decide water use & control on extraction based on groundwater assessment, specifying the areas for sand mining in river beds and enforcing the measures of groundwater recharge for existing irrigation well - as per point number 5.21, 5.22, 5.23 in the GSDA note)
- Procedures for bringing prohibitions on groundwater extraction in any area for protecting public sources of drinking water (as per point no. 5.13 of the GSDA note)
- Procedures for declaring an area as water scarce area (as per point 5.14 of the GSDA note)

3.8 Condition of Previous Publication for Making Rules and Regulations

Background Logic:

a. The Model Bill does not provide the condition of previous publications while making the rules by the government, whereas the Maharashtra Groundwater Act (1993) does provide the same.

b. The MWRRA Act, which is the law that governs the proposed groundwater regulatory in Maharashtra, provides the condition of previous publications for the rules but it does not provide the condition of previous publication for the regulations made by the Authority.

c. Absence of the condition of previous publications leads to absence of any opportunity for the public to participate in the process of making rules and regulations. This affects the quality of rules as well as it leads to lack of ownership and apathy by the people towards abiding by this rules and regulations.

Recommendation:

i. The condition of previous publication for all rules made by the government and all regulations made by the Authority should be included in the appropriate sections of the proposed Maharashtra Groundwater Bill (2007)

3.9 Issuing Orders for Prohibiting Over Exploitation of Groundwater in Non-Notified Areas

Background Logic:

a. As per the GSDA note on the proposed Maharashtra Groundwater Bill (2007), the Authority shall issue guidelines for undertaking measures for watershed based groundwater use, for avoiding over-exploitation of the groundwater and for avoiding deterioration of quality of water in notified as well as non-notified areas (refer point no. 5-8 in GSDA note).

b. This is an important provision towards sustainability of groundwater. But the provision will not be influential, if the same is attempted to be implemented by issuing guidelines. It needs to be noted that the guidelines are not enforceable by law.

c. For effective implementation of this particular provision, which has crucial implications for the very purpose of the law, the Authority should be empowered to issue detailed mandatory orders in this matter.

Recommendation:

i. The regulatory Authority should be empowered to issue orders and not just guidelines for undertaking measures for watershed based groundwater use, for avoiding over-exploitation of the groundwater and for avoiding deterioration of quality of water in notified as well as non-notified areas (refer point no. 5-8 in GSDA note).

3.10 Public Participation in Preparing the Maharashtra Groundwater Bill (2007)

Background Logic:

a. The invitation letter sent by the Director, GSDA for the consultation workshop on the proposed Maharashtra Groundwater Bill (2007) states that, the future adverse impacts can be avoided by preparing the Groundwater Act through public participation.

b. But there is no well-defined process (that has been made public) outlined for ensuring public participation in preparing the proposed Maharashtra Groundwater Bill (2007). There is tendency to have consultations of invited experts, NGOs and others but there is no attempt to involve general public in preparing the act.

c. Often even basic norms of such a consultative process are not followed (such as sharing the detailed

proceedings or the ways in which the inputs from the consultation have been considered in the final draft). These norms should be followed in the process of making the Maharashtra Groundwater Bill (2007). In adherence to these norms, the participants and the public gets an impression that these exercises of consultations are not serious but a farce, undertaken to satisfy some conditionality put by some external agency like the World Bank. Such an impression severely erodes credibility not only of the consultation process and of the agency conducting the process but also of the law that ultimately emerges from this process.

Recommendations:

i. The process of preparing the Maharashtra Groundwater Act (2007) should be open to public and it should follow the process detailed in the Part 2 of this note by Prayas.

ii. The current and similar consultative process undertaken in regards of the proposed Maharashtra Groundwater Bill (2007) should be made public and it should follow the following norms:

- Preparation of detailed proceedings of the consultations (including the inputs received) and distribution to all participants and publishing the same in website.

- Preparation of 'Action-Taken Report' (ATR) on various suggestions and comments given by the participants. This report would record reasons for accepting or rejecting each of the suggestions and comments and would be published as soon as the bill is tabled before the cabinet.

- Often such a process is seen as cumbersome, infeasible and unnecessary burden. It needs to be mentioned that MERC undertakes this process for its every order. Further, this process is unavoidable if we want to establish credibility of the process, the agency, and the law that would emerge from this.

3.11 Public Participation in Preparing the 'Integrated Watershed Area Development and Management Plan'

Background Logic:

a. Point 5-7 of the GSDA note on the Draft Maharashtra Groundwater Act (2007) proposes a provision for 'Integrated Watershed Area Development and Management Plan' (refer point 7. in GSDA note), which will be incorporated into the Integrated State Water Plan (which in turn will be prepared as part of the MWRRA Act, 2005).

b. The section 15 (3) of MWRRA Act provides for preparation of draft Integrated State Water Plan but it does not provide for public participation in preparing the plan. Though, the Maharashtra Water Policy (2003) provides for some level of participation, the same is not enforceable, since the policy does not have the force of law.

Recommendation:

i. The proposed Maharashtra Groundwater Bill (2007), should explicitly provide for public participation in preparing the 'Integrated Watershed Area Development and Management Plan' and shall follow the process outlined in Part 2 of this note by Prayas.

References:

1. The analysis draws from, (a) Sanjiv Phansalkar and Vivek Kher, A Decade of the Maharashtra Ground Water Legislation: Analysis of the Implementation Process; (b) Analysis made by Resources and Livelihoods Group of Prayas

2. K. J. Joy, Suhas Paranjape and others, Watershed Development Review: Issues and Prospects, Center for Interdisciplinary Study of Environment and Development, December 2004.

■■■

Section 3

Privatization of Irrigation Projects: Regulatory Intervention through MWRRA

Contents

Introduction

This section includes a compilation of documents of regulatory intervention related to the process of privatization of an irrigation project in Maharashtra. A short introductory note included in the first sub-section presents in brief the rationale, strategic and substantive contents, and the overall outcome and impacts of the intervention.

The sub-section 2 to 5 include the petition filed before the water regulatory authority in Maharashtra and various submissions made during the hearings. This reflects the analysis of various issues pertaining to public interest protection in light of the privatization of an irrigation project. The final order issued by the regulatory authority on the petition is reproduced in the sixth sub-section of this compilation. The last sub-section includes a short compilation of news clippings and articles published in the leading news papers and magazines.

3.1 Introduction to Regulatory Intervention on Privatization of Irrigation Project

Background

The Government of Maharashtra (GoM) initiated the process of privatization (on BOT basis) of Nira Deoghar Irrigation project in 2007[4]. The Resources and Livelihoods Group of PRAYAS filed a petition before the Maharashtra Water Resources Regulatory Authority (MWRRA) against this process of privatization. This became the first petition to the first water IRA in India related to the first concrete initiative towards privatization of irrigation project in Maharashtra. The petition concluded with a comprehensive order by the MWRRA, directing the concerned government authorities to withdraw the advertisement released for inviting expression of interest from interested private parties. The process and substance of the petition provide valuable insights into the public interest issues involved in privatization of water resource projects, especially during the planning and designing stage of privatization.

Rationale for Intervention

Privatization was accepted by GoM in the State Water Policy 2003 as a policy directive. According to government statistics, there are about 1200 incomplete irrigation projects, and these require about Rs. 36,000 crores of capital investment. Considering the huge capital expenditure required, the GoM decided to complete these irrigation projects through private investments. Accordingly, a Government Resolution (GR) was issued by the Government of Maharashtra (GoM) in 2003 for completion of incomplete irrigation projects, through the route of private investments. The GR laid down the "Policy for Privatization" of such irrigation projects on the basis of Build-Operate-Transfer (BOT).

There was no public discussion on this crucial GR, nor was there any legislative process for ratifying the privatization policy by all the elected representatives in the state. There was a need to bring this issue into the public domain for critical analysis and relevant interventions for protection and promotion of public interest. Since GoM did not take any significant action towards implementation of the particular GR, there was no possibility for initiating a public debate on the issue.

It was only in 2007, four years after the GR was issued, that a concrete initiative was undertaken by the GoM towards privatization of incomplete irrigation projects. The GoM selected Nira Deoghar irrigation project as a pilot project to be completed on BOT basis. Accordingly, an advertisement was issued for inviting expressions of interest (EOI) from private developers.

There were no attempts by GoM to conduct any public process, while initiating this privatization process. There was no space provided by GoM for participation of the proposed beneficiaries of the project in the crucial decisions related to privatization. There was no transparency in the process and no space for intervention for public interest protection.

The GoM had enacted a law for establishment of MWRRA in 2005. The objectives of the law state that MWRRA shall ensure 'equitable, judicious, and sustainable management of water resources in the state.' It was found that GoM had not taken cognizance of the role of MWRRA and the provisions of the MWRRA law in the process and content of the privatization initiative.

The proposal (design and planning) stage of the privatization process was entirely a closed-door process, without oversight by any external regulatory agency. It was found necessary to ensure formal regulatory control over the process not only at the level of the entry of private party, (i.e. entry-level regulation) but also at the level of the planning and preparation (e.g., fixing policy, selecting projects) being carried out by the government for privatization of the project (i.e. pre-entry level regulation). Hence, it was necessary to utilize the formal platform—in the form of the regulatory authority—created by the GoM, for opening-up avenues for critical review and public intervention right at the design and planning stage (or proposal stage) of the privatization process.

Strategies Used during Intervention

One of the key strategies for intervention in the privatization process was to engage the particular government utility (in this case, Maharashtra Krishna

[4] The project is located in Pune District of Maharashtra State (India).

Valley Development Corporation or MKVDC) in a litigation by filing petition before MWRRA. Considering the short time in hand, this strategy was found to be relevant as part of the immediate action to ensure review and reconsideration of the decision of privatization. The regulatory intervention strategy could then be followed by other strategies such as legislative advocacy, media campaign, or lobbying through delegation.

Intervention through MWRRA was also found to be useful with regard to the objective of ensuring some regulatory control over the privatization process. MWRRA has been accorded with powers equivalent to the civil court and hence, is empowered to conduct legal proceedings on matters brought to its attention. This legal provision in MWRRA law was used as the basis for intervention.

The strategy for intervention was to position the case as 'non-cognizance of MWRRA Law in the privatization process', especially with respect to MWRRA's powers related to 'water tariff' or 'water entitlements'. Gradually, as the proceedings over the petition progressed, the focus moved towards critical issues of the privatization model and possible consequent encroachments on public interest.

Efforts were taken to hold on to media pressure for release of information regarding the petition till things reached a conclusive stage. This was found necessary, especially because of the sensitive nature of the issue and the possibility of undue political interventions in the proceedings of the petition. This was also thought necessary in view of lack of experience on the part of the regulatory agency to conduct proceedings on such a controversial issue under the media glare.

The petitioners engaged with other civil society organizations working on water sector issues in a consultation mode. This openedup possibilities of collaborative work on the issue in future. It helped also to link the outcome of the petition with the strategies adopted by beneficiaries of the proposed project being privatized.

Processes and Activities Conducted

The intervention efforts included analysis of various government documents, especially the State Water Policy, MWRRA law, the GR for privatization, and the booklet issued to prospective developers by MKVDC (EOI booklet). Based on this analysis, a petition and subsequent submissions were developed and filed before MWRRA. MWRRA initiated hearings on the petition. The respondent (in this case MKVDC) was asked to file their response to the petition. This prompted the petitioners to build further arguments related for the case. Various additional submissions were made (written and oral) by petitioners before the MWRRA. After four hearings on the petition, MWRRA concluded the case by issuing a comprehensive 20-page order on the petition.

The petitioners disseminated the petition as well as the interim outcomes of the proceedings amongst various CSOs in the state. Valuable inputs were received from some of the activists and CSOs. The final outcome of the petition was disseminated to a larger audience through media campaign. Two press releases and one press conference were conducted for the purpose.

The issue was followed up with the groups of local farmers, who were beneficiaries of the proposed project. The local activists and CSOs were skeptical about the benefits of privatization and had already raised their voices against the privatization process. The outcome of the petition was disseminated to a large public meeting organized by the local activists and CSOs. The analysis of the intervention and its outcome were documented and disseminated in the form of a small booklet published in the vernacular language. The issue is being followed up with the group of CSOs in Maharashtra working on various water issues.

Substantive Content of Intervention and MWRRA's Order

Though the petition focused on 'non-cognizance of MWRRA law in the privatization process', the core substance of intervention was on the 'critical public interest issues involved in privatization of a water project'. The analysis of government documents by petitioners indicated several contradictions between the policy for privatization of irrigation projects (as mentioned in the GR) and the provisions of MWRRA law. These were pointed out in the petition to MWRRA. In its final order on the petition, MWRRA accepted most of the contradictions while rejected a few. A summary of the contradictions pointed out by the petitioners has been given in the following table (refer Table No. 15).

Table No. 15: Summary of Contradictions

No.	Process and Content of Privatization as per Government Policy [5]	MWRRA Law and Other Laws
1	No role to MWRRA in the high-powered committee formed to review and approve privatization process	As per preamble of the law, MWRRA is to regulate for equitable, judicious, and sustainable management of the water resources in the state. As per section 11(f) of law, MWRRA is empowered to review and approve projects
2	Provision for 10% increase in water tariff, if needed, by developer	Powers related to water tariff exclusively to MWRRA
3	Recovery of capital investment by the developer through levying of water charges and using sources	Water to be charged on O&M cost and not for capital recovery
4	Provision for changes in water distribution by the developer in times of scarcity	Powers related to distribution exclusively to MWRRA
5	Land acquisition will be done by the government (i.e. through public spending) Viability gap funding will be made available if there is revenue shortfall for private investor	Nira Deoghar Irrigation project lies in non-backlog area where there are limitations imposed by the Governor's directives on using government funds for irrigation development [6]. This issue comes under the jurisdiction of the MWRRA because the MWRRA Act provides special powers to MWRRA for backlog removal based on Governor's directives.
6	Scheme of building and operating the project by private developer	As per the Maharashtra Management of Irrigation System by Farmers (MMISF) Act, the water users associations (WUA) are empowered to participate in the work at the construction stage and also in operating the whole systems. There is a direct linkage between the MMISF Act and the MWRRA Act. The MWRRA is obliged to issue entitlements to the WUAs as per the criteria given in the Act. This scheme of operations is in contradiction with the BOT model.

Most of the contradictions presented in the table were accepted and duly recognized by MWRRA in its final order. These contradictions represent some of the most crucial issues related to public interest. The major point of disagreement between the petitioners and respondents was related to application of section 11(f) of MWRRA law for review of the privatization proposal. It was argued by petitioners that due to the entry of private developer, there would be major changes in the originally conceived irrigation project. Most importantly, there would be conflicts between the private interest of the private investor and public interests of the farmers and citizens at large. Hence, there is a need to review the privatization proposal in its entirety. Gradually, the logic that emerged from the content of the petition and submissions was that the privatization model cannot proceed unless public interest is jeopardized in one form or the other. Hence, the main argument in the petition was that a close review of the feasibility of the privatization proposal is required in the light of the possible conflict between public and private interests.

MWRRA issued a comprehensive 20-page reasoned order based on the substantive arguments made during

[5] The content is derived from the Government Resolution (GR) for privatization and arguments made by respondents during the hearings

[6] In Maharashtra certain parts of the state (Vidarbha, Marathwada) have been identified as economically backward regions due to the backlog of public spending by government in various development sectors including irrigation. This irrigation backlog needs to be removed by increasing the budgetary allocations for this backlog region at the cost of allocations to other non-backlog region.

the hearings. The order includes the analysis of the various arguments presented in the case and the rationale behind the directions given by MWRRA. The Following are the key substantive features of the order issued by MWRRA:

- MWRRA accepted the contradictions—mainly related to water tariff and distribution—pointed out by the petitioners between the MWRRA law and the privatization policy (as reflected in the GRs). MWRRA reiterated in the order its role in determining water tariff and water entitlements.

- MWRRA also accepted the contradictions with regards to government expenditure for privatization of the project and the Governor's directives that put a limit of such expenditures for projects in non-backlog region. MWRRA clearly stated that it should have a role in determining whether the project would come under the Governor's directives on backlog.

- MWRRA ruled out the demand for review and clearance of the privatization proposal under section 11(f) of the law. It was specified that the particular section is applicable only to new projects, whereas Nira Deoghar project is an already approved project and cannot be treated as a new project. But, at the same time, MWRRA accepted the position that if there is any change in the economic parameters of the already approved project, and if that change leads to changes in the public benefits as planned in the original project design, then such changes have to be treated as changing the character of an existing project, thus converting it into a new project.

- MWRRA further clarified that in such a situation, the project would be considered new regardless of the stage at which these changes occur (mid way or beginning) and regardless of the reasons for such changes (like conversion to BOT). In all such cases, the privatization proposal will need review and clearance of MWRRA (refer para 12-i of the order by MWRRA).

- In continuation with the substantive position taken by MWRRA with regards to the review of privatization project, it is further clarified by MWRRA, in its order, that it is important to examine the revenue streams of the private investors in the light of the conflict between the public interest and interests of the private investor. Since the law does not allow recovery of capital costs from water tariff, the private investor will have to explore options for other sources of revenue. In this regard, MWRRA has come out very clearly that the other sources of revenues should not have any adverse effects on the benefits to the farmers that were contemplated by Government when the project was cleared as a budget financed project (i.e. the Benefit-Cost analysis as per originally sanctioned project). Further, these revenue streams should not adversely affect the operational efficiency of the system by, for instance, cutting the budgets for operations and maintenance. Thus, MWRRA concluded that it should have a role in vetting the revenue model of the privatization proposal.

Outcomes and Impacts

The comprehensive order by MWRRA on the petition includes several directions to government with regard to privatization of irrigation projects. The order will have an impact not only the fate of privatization of the Nira Deoghar project, but it will influence all further initiatives for privatization of any irrigation project in the State. The Following are some of the outcomes and impacts of the order:

- In due recognition of various contradictions pointed out during the hearings, MWRRA directed the government agency (i.e., MKVDC) to withdraw the advertisement for privatization within 15 days and not to re-advertise, until such time as the GR which reflects the privatization policy, is revised in light of the other directions in the order. MWRRA further directed the government to revise the privatization policy in light of the provisions of the subsequently enacted statutes (mainly MWRRA and MMISF law) and various contradictions pointed out by the petitioners. Thus,effectively, a stay was put on the privatization process by MWRRA, since the process was found to be inconsistent with provisions of the MWRRA law. This reinforced the need for revisiting the very policy on the basis of which privatization was initiated. The order also effectively pushed the process of privatization back to the design stage. This has increased spaces and possibilities for public intervention through legitimate political process.

- Concrete directions are given by MWRRA in the order for strengthening the regulatory control over the process of privatization, right from the proposal or design stage. Apart from water tariff and entitlements, MWRRA shall regulate other aspects of privatization such as the revenue model, selection of project, selection of private developer, and issues related to irrigation backlog. Thus, this will significantly enhance

transparency in the privatization process right at the proposal stage and also enable creation of spaces for public debate, public scrutiny and intervention. Regulation of the revenue model by MWRRA right at the design stage of privatization will play a key role in exposing the financial and other implications of privatization on the broader public interest and especially on interest of farmers and other rural communities in the project area.

- MWRRA has taken a strong position for protection of benefits of the farmers provided in the originally sanctioned project report. Hence, the privatization proposal cannot progress unless these benefits are secured. This has become a major tool for furthering the cause of public interest protection not only in relation to privatization proposal but also in other areas of water governance such as water allocations.

- One of the major outcomes of this intervention has been the public awareness and debate that it generated due to the publicity given by media. The issue was widely read about and debated among various stakeholders. One of the leading Marathi newspapers also held a public debate on the issue. Many newspapers followed up the issue with MWRRA and other stakeholders for updates and standpoints. The local farmers and CSOs in the proposed project area also held a large public meeting to explore the future strategies and action agenda on various demands in light of the threat of privatization. The issue is still followed up by PRAYAS as well as other CSOs to assess the need and strategies for further interventions for protection of public interest.

- The intervention has also led to development of publicly available literature on the analysis of entry-level and pre-entry level privatization of irrigation projects. About 90 pages of literature have been produced, including various analysis documents prepared by PRAYAS in the form of the petition and submissions and government documents in the form of arguments and decisions. This literature will be useful not only for practitioners engaged in public interest protection work but will also be useful for researchers and academic institutions.

Overall, the intervention has provided valuable insights and knowledgebase related to independent regulation and reforms in the water sector.

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3.2 Petition filed before MWRRA

The petition against the process of privatization of Nira Deoghar irrigation project filed before the Maharashtra Water Resources Regulatory Authority (MWRRA) has been reproduced in this section verbatim.

3.2.1 Introduction Page of Petition

Before The Maharashtra Water Resources Regulatory Authority, Mumbai

Filling No.

Case No.

(To be filled by the Office)

IN THE MATTER OF

Maharashtra Krishna Valley Development Corporation's (MKVDC) non-recognition of the powers and functions of the Maharashtra Water Resources Regulatory Authority (MWRRA) with regards to the proposed initiative (invitation of expression of interest vide WRD/07-08/ T/ 0390 dated 12-9-2007) for selection of developers/consortiums for completion of Nira Deogarh Irrigation Project on Build, Operate and Transfer (BOT) basis.

AND

IN THE MATTER OF

Petitioner:
Dr. Subodh Wagle, Trustee and Group Coordinator,
And
Mr. Sachin Warghade, Senior Research Associate
Resources and Livelihoods Group,
Prayas, Initiatives in health, energy, learning and parenthood
'Mangeshpushp', Survey No.133, Swami Vivekanand Society, Behind BAIF, Warje, Pune - 411 052, INDIA. Tel.:+91(20) 2523 2836/25231059; Fax:+91(20) 25232836

Respondent:
The Executive Director,
Maharashtra Krishna Valley Development Corporation (MKVDC),
Sinchan Bhavan, Barne Road, Mangalwar Peth,
Pune - 411 011. Phone: 020-26114618, 261352633.2.2

3.2.2 Main Body of the Petition

Facts of the Case / Petition and Grounds in Support of the Same:

1. Petitioner, Prayas is a registered charitable trust working for protection of public interest.

2. Respondent, Maharashtra Krishna Valley Development Corporation (MKVDC), has issued an advertisement for inviting expression of interest (EOI - ref. WRD/07-08/T/0390 dated 12-9-2007) for selection of developers/ consortiums for completion of Nira Deogarh Irrigation Project on Build, Operate and Transfer (BOT) basis.

3. In the process of inviting EOI, the MKVDC has not taken adequate cognizance of the powers and functions of the honorable MWRRA as provided in the Maharashtra Water Resources Regulatory Authority Act, 2005, especially when the act has been passed and notified [refer the Government of Maharashtra notification dated 8th June 2005 - No. Committee-2005/(72/05)/1/WRI] in the state and hence has come in force in the entire state of Maharashtra.

4. The MKVDC has not divulged the fact in its advertisement that the MWRRA act is in force and that the MWRRA has wide and diverse powers to regulate the entire water resources within the state of Maharashtra [please to refer preamble of the MWRRA Act, 2005 and in particular the provision 11 (n) of the Act] and hence the activities related to Nira Deogarh project including the completion and management of project on BOT basis will be regulated by the MWRRA.

5. It is mentioned in Section 1 of this advertisement for the EOI issued by the MKVDC, that the Government of Maharashtra has approved privatisation policy for irrigation projects, vide the government resolution [G.R. No. BOT/ 702(425/ 2002)/ MP-1 dated 15-07-2003], to complete the development of irrigation projects in Maharashtra through private sector participation on BOT basis.

6. Hence, for the proposed completion of the Nira-Deogarh project on BOT basis, the MKVDC has taken the basis of this particular G.R. for its EOI. Section 2.1 of the

annexure of this particular G.R. states that, "For any reasons, if there is any changes in the expected (as planned during the contract) availability of water in the project than the developer shall have the powers to change the standards for irrigation and other water supply." This particular provision in the G.R. gives powers to the private developer to change the standard water distribution and supply norms. However, according to the MWRRA Act (the Act came into force after the particular G.R. and hence supersedes the G.R.), it is the MWRRA which has the diverse powers related to determination of water distribution and entitlements [as per Sections 11 (a), 11(c), 11 (g), 11 (h), 11 (i), 11 (j), 11 (k), of MWRRA Act]. But, in its advertisement for the particular EOI, the MKVDC has not taken congnizance (not divulged the fact) of these powers of MWRRA related to the water distribution and entitlement, while, at the same time, it provides reference to the G.R. that provides certain powers related to the water distribution and entitlement to private developer. Thus, the basis on which the MKVDC has issued the advertisement for the EOI is not in line with the related provisions in the MWRRA Act, which gives these powers to the MWRRA.

7. Section 2.2 of the annexure of the above-mentioned G.R. [G.R. No. BOT/702(425/2002) /MP-1 dated 15-07-2003] states that, "Water charges will be levied to the project beneficiaries and the water users association on the basis of the existing norms prevalent at that time. If there is a need to change this water rates, then there shall be the provision in the contract/tender with the developer for increasing the water charges to maximum 10 % of the fixed charges after discussion with the beneficiaries'. This particular section of the G.R. allows changes in the prevailing water charges by providing such related provision in the contract or tender with the developer. This again is not in line with the MWRRA Act because the powers of fixing the rates for water use (refer to the preamble of the MWRRA Act) and setting water tariff systems has been vested with the MWRRA as per this Act [refer to Section 11 (d) and 11(u) of MWRRA Act]. The MKVDC has taken the particular G.R. as the basis for the EOI, but has not taken any congizance (not divulged the fact) of the powers of the MWRRA related to water tariff.

8. Hence, the MKVDC's advertisement, which mentions the particular G.R. but does not make clear and explicit mention of the powers of the MWRRA, is misleading for the prospective developers as well as the general public. On the basis of these facts, there is an urgent need for MWRRA to intervene in the process of the completion of the Nira-Deogarh project on the B.O.T basis, initiated by the MKVDC

9. Section 11 (f) of the MWRRA Act, provides the power to MWRRA to review and clear every project proposal related to any sub-basin and river basin level project in the state to ensure that the proposal is in conformity with Integrated State Water Plan and also with regard to the economic, hydrologic, and environmental viability. Hence, according to the act, no proposal can be approved without the review and clearance of MWRRA Act. The advertisement for the EOI issued by MKVDC states that, 'A committee will be formed by the MKVDC, for selection of the developer...All rights, regarding selection of the developer/consortium, are reserved with the MKVDC.' Thus, the MKVDC assumes no role for MWRRA in the selection and approval process and also in the process of finalising the contract with the developer. This is contradictory to the provision mentioned above in the MWRRA Act.

10. Like any other project, the Nira Deograh project was predicated on certain technical, economic, and financial components. The technical components involved a certain pattern of distribution of water resources created by the project, while the economic components included a certain distribution of costs and benefits among the certain list of stakeholders. Similarly, the financial components included flow of finance from and to certain entities at certain time instances, with charging of interests at certain rates. With the proposed initiative of B.O.T, comprehensive and fundamental changes will be introduced in the technical, economic, and financial components of the project. As per Section 2 of the advertisement for EOI, it is proposed that the prospective developer can engage in fisheries development, tourism activities, agro-based industries, export promotion etc. Such business activities by the prospective developer completely changes the pattern and distribution of water resources generated among the stakeholders and introduces many new stakeholders from outside the command area. Further, the MKVDC allows the prospective investor to invest and collect revenue and earn profit from the range of activities. This would introduce comprehensive and fundamental changes in the economic and financial component of the project design. Further, the wide range of new activities is also bound to bring in considerable changes in quantity, timing, and quality of water flows in the command areas drastically altering the ecological conditions. Thus, the proposed BOT initiative will bring in drastic,

comprehensive, and fundamental changes in technical, economic, financial, and ecological components of the design of the project. Such changes compel a serious re-looking at the altered project design by the concerned authority, which, in this case is the MWRRA as per section 11(f) of the MWRRA Act.

11. Further, the originally approved Nira Deogarh project was based on a particular set of processes and procedures for its implementation, particular roles and responsibilities were defined or assumed for different stakeholders in the project, and a particular set of rules were prescribed or assumed to govern the design, implementation, monitoring, and management of the original project. But, now all these features are bound to change with the proposed introduction of a new stakeholder in the project in the form of the private investor/developer. In combination with the changes mentioned in the earlier paragraph these changes contribute to comprehensive and fundamental redesigning of the project. This requires that the project be re-defined as a new project for the application of the Section 11(f) of the MWRRA Act.

12. The proposed BOT basis will also introduce significant changes in the receipts and expenditure to state government and its agencies. Hence, there is a need to review the project based on the economic viability as per the Section 11(f) of the MWRRA Act.

13. The above mentioned points numbered 10, 11 and 12 suggest that the proposed BOT basis of the Nira-Deogarh project has implications not only on the of water distribution and tariff (refer point no. 6 and 7 of above facts of the case), but it also has larger implications on the financial aspects of the project as well as the larger socio-economic development of the region. Thus, the project cannot be seen as just a new managerial arrangement between the MKVDC and the private developer. The entire project should be re-looked in the context of the BOT basis, in which the developer will not just build the irrigation systems but will be operating the system for a long-term period significantly affecting the economic, financial, and ecological interests of a range of stakeholders, the state government, the public, and the environment for a long period of time. This calls for in-depth analysis of the diverse implications of such initiative. All this leaves no scope for treating this as revision of an old project but there is a logical need for the new initiative to be given the status equivalent to a new project. Hence, the MKVDC's unilateral decision to conduct the process of issuing advertisement for the EOI, to prepare tenders, to select and award a contract to private investors/developer on its own, without any role for the MWRAA, is a clear case of ignoring the powers and functions of the MWRRA and contravening to provisions of the MWRRA Act.

14. This petition is being filed before the MWRRA on the basis of following statutory provisions

a. The Maharashtra Water Resources Regulatory Authority Act, 2005

b. The Government of Maharashtra notification dated 8th June 2005 - No. Committee-2005/(72/05)/1/WRI

c. The Government Resolution dated 15-07-2003 G.R. No. BOT/ 702(425/ 2002)/ MP-1

15. The petition is within time limits and relates to the non-cognizance of the powers and functions of the MWRRA and hence MWRRA has jurisdiction to try, entertain and dispose of the petition.

16. The initiative to complete the irrigation project in Nira Deogarh on BOT basis may be replicated by other projects in the state. The Secretary, Water Resources Department, Government of Maharashtra in an interview to a newspaper (refer news titled 'Irrigation project find few takers among private firms' published on page 8 of The Times of India-Mumbai Edition dated 12 Dec 2007, given in the annexure of the petition) has already conveyed that, 'it has been decided to offer three irrigation projects—Nira-Deogarh, Demb-Balakwali and Ambeohal-Sarfnaka in Kolhapur district—to the private sector" (quoted from the fourth paragraph of the particular news). Hence, this particular initiative cannot be seen as an isolated case or a local issue confined to the command area of Nira Deogarh. Rather, this being one of the first attempts of such a kind, it does have state-wide implications. The model that gets evolved for the proposed completion of Nira Deogarh project on BOT basis may be replicated for completion of more such irrigation projects. This calls for serious and comprehensive review of the new proposed model based on the socio-economic-financial-ecological viability of the model. Considering the state-level implications of the currently proposed completion of Nira Deogarh project on BOT basis and the need for a serious public scrutiny of the new proposed model, Prayas, as an organization working for the overall interest of the citizen's in the state, requests the MWRRA to consider the relief clauses or prayers mentioned in this petition. As concerned citizens of the state and as representatives of an organization which

has a long-standing experience of credible and genuine intervention with the Maharashtra Electricity Regulatory Commission (in the capacity of the member of the Commissions Advisory Committee) for protection of the public interest, we saw this as our bounden duty to point to MWRRA these facts and assist and facilitate the new water regulatory authority to protect and promote public interest.

Relief Clause / Prayers:

17. Considering above facts and various provisions of the Act / notifications/ resolutions, we request the honorable MWRRA to kindly -

a. Without prejudice to the other arguments put forth in this petition, take suo-moto cognizance of the advertisement issued by the MKVDC, which involves non-cognizance and or encroachment on the powers and authorities of the MWRRA by the MKVDC.

b. Direct MKVDC to inform the interested developers/consortiums and the general public in written form and by putting a clause in the relevant tender or agreement and or contract document prepared or to be prepared for the purpose, that the MWRRA Act has been passed, notified and come into force in the entire state of Maharashtra including the Nira Deogarh Irrigation Project site and that the MWRRA has wide and diverse powers to regulate the entire water resources within the State of Maharashtra (please refer to the preamble of the MWRRA Act, 2005) and hence the functioning of any new and existing water projects including the completion of Nira Deogarh project on BOT basis will be regulated by the MWRRA as per the powers and functions given to the MWRRA through the MWRRA Act.

c. Direct MKVDC to inform the interested developers/consortiums and the general public in written form and by putting a clause in the relevant tender or agreement and or contract document prepared for the purpose that the terms of contracts with the developers/consortiums will be subject to the rules, regulations, awards, orders and decisions of the MWRRA and that the developer will have to abide by the same and that the contractual agreements/provisions between the MKVDC and or any other party with the selected developers/consortiums will not put any limitation or restrictions or conditions on the duties of the developers/ consortiums to abide by the rules, regulations, awards, orders, and decisions of the MWRRA.

d. Direct MKVDC to give wide publicity to the above mentioned facts (those mentioned in prayer 17-b and 17-c) by publishing a newspaper advertisement in this regard of appropriate size and at proper place which is central and is able to attract attention of the public and in all the leading newspapers in both English and Marathi including the news papers in which the first advertisement about the EOI was published.

e. Direct MKVDC to send a letter of communication mentioning the above facts (those mentioned in prayer 17-b and 17-c) to all the prospective investors/ developers/ consortiums and all other related parties (including the related government departments) who are concerned in present and future activities related to the completion of Nira Deogarh project on BOT basis and or related to all future such initiatives on BOT basis for any other irrigation project.

f. Direct MKVDC to take the major decisions about the project, which have implications for water distribution, entitlements, tariff and other aspects, in totally transparent and participatory manner, using the legally created platform of the MWRRA.

g. Direct the other river basin corporations and departments and municipal corporations engaged in water resource management, to take adequate cognizance of the powers and functions of the MWRRA, in any future activities related to water projects and water management and issue appropriate letter of communication related to this to all concerned parties.

h. Direct MKVDC to submit the proposal for completion of the Nira Deogarh and any other irrigation project on BOT basis to the MWRRA for review and or clearance, with all the technical, financial, economic, ecological parameters and details on the basis of which it will scrutinize the expression of interests by prospective developers.

i. Direct MKVDC to submit all current and future documents related to the proposed completion of Nira Deogarh and other irrigation projects on BOT to MWRRA for its review and or clearance.

j. Direct MKVDC to present to the MWRRA the lists, in the tabular form, of all technical, economic, financial, and ecological changes in the Nira Deogarh project (vis-à-vis the originally envisaged project) that may be caused due to the new initiative of completion of the said project on BOT basis and also explain why the proposed initiative should not undergo review based on socio-economic viability as per the section 11(f) of the

MWRRA Act and the facts of the case mentioned in this petition (especially fact number 9 to 13 of this petition).

k. Direct MKVDC to pay the petitioner Re. 1/- (Re. One) as partial reimbursement of cost of the petition.

l. Direct MKVDC to inform the MWRRA and the petitioner on the compliance of all the aspects of the order that may be issued regarding this petition with copies of the advertisement and other documents of proof of the compliance and other related documents in the period of hundred working days after the order is passed.

m. Allow petitioner to submit additional data / evidence and to amend / modify the petition, if the circumstances warrant.

n. Issue regulations for filing of such petitions or issue notification for use of the regulations related to filing of petitions developed by the MERC till the time when the MWRRA prepares and notifies there own regulations in this regard.

Place

Date

Dr. Subodh Wagle,
Trustee and Group Coordinator,
Resources and Livelihoods Group,
Prayas, Pune

AND

Mr. Sachin Warghade,
Senior Research Associate,
Resources and Livelihoods Group,
Prayas, Pune

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3.3 Analytical Submissions: Hearing One

The MWRRA reacted to the petition by directing the respondent to file their comments. The Maharashtra Krishna Valley Development Corporation, the government utility responsible for development and management of irrigation infrastructure in the state provided detailed response to the issues raised in the petition. Along with the response, MKVDC also shared the EOI booklet (expression of interest) that was circulated among the private developers who responded to the advertisement published by MKVDC. The first substantive hearing (the petitioners requested for more time to plead the case in the hearing conducted prior to this) was conducted on 3rd March 2008. Based on the analysis of the response filed by MKVDC and the EOI booklet, the petitioners developed detail arguments which were presented and submitted in written during this hearing. The four submissions made before MWRRA are reproduced verbatim in the following paragraphs.

A. Submission One: Legality and Maintainability of the Petition

1. As per the Preamble of the Act, MWRRA is to regulate water resources within the state. As per Sec. 3(2) of the Act, MWRRA is empowered to do all things necessary for the purposes of this Act.

Hence, MWRRA is empowered to intervene in issues that have bearing on its powers and functions and in issues related to regulation of water sector in the state.

2. The EOI and process of privatization initiated by the EOI as per the said GR have bearing on specific powers and functions (e.g. tariff, entitlement) of the MWRRA prescribed by the said Act.

Therefore, the EOI is in the ambit of the said Act.

3. The subject matter of the petition is about safeguarding the powers and functions of the MWRRA in the context of the privatization process initiated through the EOI.

Hence, the petition is legal and maintainable in the ambit of the said act.

4. The issues related to the cause of the action for the MWRRA is dealt with in other submissions made along with this during the present hearing.

B. Submission Two: Non-Cognizance of and Misleading Statements about MWRRA Act

1. The respondent admits that the EOI advertisement does not mention about MWRRA Act and also that the advertisement does not give any mention of the availability or existence of the EOI booklet which comprises the reference to said Act. Hence, effectively the respondent admits that officially the information about the EOI booklet i.e. the document which gave reference to the said Act, was not made known to the prospective developers and the concerned public through the advertisement.

This is a major lacuna in the process of EOI, especially in the process sharing of the contents of the EOI booklet. The respondent should have been more open and transparent in sharing the availability of such a document if it was serious on sharing the contents. This lacuna at the very beginning of the process encourages non-transparent behavior and allows for possible arbitrariness in the further process.

2. The respondents have submitted the receipts of purchase of booklet to prove the point that all prospective developers were made aware of the applicable laws given in the booklet. The respondent claims to have made available the EOI booklet (which contained the reference to MWRRA as per claim of the respondent) before or during the site visit as per the date given in the advertisement (para 8 page 5 of MKVDCs response), which was scheduled on 5/10/07.

But the dates on the booklet purchase receipts, which have been submitted by the MKVDC as proof of procurement of the booklet by the developers (hence proof of the cognizance of powers of MWRRA), suggests that the prospective developers procured the booklet only from date starting on 19/10/07 till (as late as) date 12/12/07.

Further, on two such proof documents (booklet purchase receipt no. 3443638 and 3443639) there is overwriting done on the dates of purchase.

Also, purchase receipts of Shinde Developers Pvt. Ltd. (who attended the first conference held on 15/10/7) and also for Indian Hume Pipe Company (to whom the copy of the minutes of first conference was sent since

they were an interested party) have not been submitted by the respondents.

Though, this matter is of less importance, it reflects on the lacunas in the process followed by the respondent in sharing of the contents of the EOI booklet in appropriate manner and time.

3. Even if we assume that all the developers received the booklet in time, still the study of the booklet reveals that the respondents took highly inadequate cognizance of the MWRRA Act.

Moreover, at some places, the respondents have provided factually incorrect information which denies the role of MWRRA Act and MWRAA pertaining to the BOT proposal. The following are the examples of the same:

3.1. There is very casual, cursory and hence, grossly inadequate reference to MWRRA Act (Act is introduced in just 2 effective lines) in Section 15 (a) of the booklet.

3.2. The short introduction of the MWRR Authority (given in Section 15-a of the booklet) is also incorrect, because it leads to the interpretation that the MWRRA has already begun regulation of tariff, diversion of water use, and compensation.

3.3. The introduction to MMISF Act is also very short and its description as a stand-alone act is misleading as the MMISF Act has linkage with the MWRRA Act and the MWRRA authority through Section 65 of MMISF Act

3.4. In Section 16 (a) of the booklet, there is list of four acts as the main laws governing irrigation in Maharashtra in one single sentence. The MWRRA Act and the MMISF Act merit only mention in this single sentence list.

3.5. Thus the introduction to both the crucial Acts, especially the MWRRA Act is done in very inadequate manner, mainly because the most crucial part of the powers of MWRRA (i.e. to determine equitable distribution of entitlements, determine equitable distribution during scarcity) have not been mentioned explicitly in the booklet.

3.6. As against this, there is more emphasis given in the booklet on the GR of Privatization Policy. In Section 16(a), which mentioned the list of four laws, the GR is given central importance by saying "implementation framework to be proposed by investor to complete the balanced works on BOT basis shall as per privatization policy of Government of Maharashtra".

3.7. In addition to this, a separate subsection [viz., Section 16 (b)] is provided in the booklet to give more details of the GR and Privatization Policy.

3.8. Section 16 (c) provides factually incorrect information that the developer can recover their investments through, among other things, "water charges for irrigation and domestic use." This is totally incorrect and misleading. As per Section 11 (d) of MWRRA Act, capital investments or the cost of capital is not included in the lists of costs that could be recovered through water charges.

3.9. The respondents loose another opportunity to describe the role of MWRRA in Section 16 (d) wherein they, again incorrectly, mention that water rates to be charges as per prevailing water rates "as prescribed by Government of Maharashtra". This repeated failure to make the role of the MWRRA explicitly clear is unexplainable.

3.10 On this background, the booklet provides in the Annexure around 9 full pages for reproducing the GR and policy in full in both Marathi as well as English

3.11 This is especially inappropriate, when the MWRRA Act prevails over the GR; and many provisions related to tariff and water distribution in the GR are contradictory to the Act (e.g. right to change the norms of water supply, right to increase the tariff - refer para 6 and 7 of our petition). Hence, these particular provisions in the GR stand null and void after the enactment and notification of the Act. All this has not been explicitly explained in the booklet. This explicit mention is important because, the Act is creation of legislation and hence it is the will of the people, while GR is just creation of the executive. There was a need to explain the key provisions of the Act and its specific relation with the GR.

4. This incorrect and inadequate cognizance of the MWRRA Act, leads to vague interpretation of the Act by the prospective developers especially with respect to its enforceability and the obligations that arise from the said Act. Such vague interpretation encourages the parties involved to either flaunt the norms or go ahead with wrong assumptions and at the end land-up into extended litigations. This situation will lead to waste of public resources and it may lead to a situation where the parties may approach the MWRRA or other judiciary body with fait accompli.

The queries and demands raised by Ashoka Buildcon, a prospective developer, in its letter are indicative of this vague interpretation of MWRRA Act, especially, when the said developer demands for permission to decide water rates from users, wants force majeure clause in scarcity and wants to dictate the kind of cultivation to farmers. The queries raised here also indicates that there are many such issues which fall under the jurisdiction of the MWRRA and that it will require

clarifications and decisions on part of MWRRA. Hence, the EOI and the related privatization process is certainly in the ambit of the MWRRA Act and there is sufficient cause for intervention by MWRRA at this stage of negotiations.

Further, it should be noted that the minutes of the first conference submitted by the respondent reveals that all the queries raised by Ashoka Buildcon were not clarified in this conference, nor the respondent has filed relevant documents in this matter.

5. In the comments filed, the respondent has admitted that the MWRRA has wide and diverse powers especially related to tariff and entitlement. However, at the same time, the respondent has not taken any position whether the particular provision from the GR that contradicts the powers and functions (mentioned in the Act) still stand true or need to be considered null and void after the existence of the MWRRA Act.

For example in para 7 of its comments, the respondent admits that MWRRA will fix basic rate but at the same reiterates that the GR allows 10% increase by the private developer. The respondent has not taken any position on this. Such a vague interpretation of the Act by the respondent and inability to take firm position with respect to the applicability or non-applicability of particular provisions creates an urgent need for the MWRRA to intervene in the process of the EOI and privatization process. The MWRRA need to intervene to check the viability of the proposal in light of the various laws and rules that fall under its jurisdiction.

6. In para 8 of our petition, we have argued that the process followed by the respondent is misleading not only to the prospective developers but also to the general public. The reference of the availability of the EOI booklet was not given in the advertisement, thus leaving the general public especially the farmers, water users associations, and other key stakeholders in dark about any further details of the EOI and the privatization policy.

The prospective developers were invited for further process and then supplied with the EOI booklet. But there was no means by which the various other stakeholders could access the details of the process before it begins. There was also no information available on the official government website apart from the advertisement[7]. The only publicly available information for these stakeholders was the advertisement which provided the reference of the GR, but no reference of the MWRRA Act. Hence, this wrongly lead them to the believe that the GR is the only instrument which governs the BOT proposal; and hence they effectively kept away from gaining any benefit from the existence of MWRRA Act and the Authority established under the Act.

7. Thus, the process of sharing of information about MWRRA has many and serious lacunas and also the content of the information is incorrect and inadequate. Hence, there is sufficient cause for action by the MWRRA. The decision on the same can be taken based on the merits of the arguments once the case is admitted.

8. A summary of the points related to the non-cognizance of MWRRA Act in the process of EOI has been outlined in the charts given on next page.

9. Annexure: Summary of Non-Cognizance of the MWRRA Act (refer Table No. 16-17)

Table No. 16: Summary of Points Indicating the Non-cognizance of Powers and Functions of the MWRRA As Against the GR for Privatization [based on information available for prospective private developers]

No.	Place / Location	Cognizance of MWRRA	Cognizance of GR for Privatization
1	EoI Newspaper Advertisement	None	First para, GR projected as the only governing instrument
2	EoI Booklet: Para 15 and 16	Cursory, 24 words/2 line introduction, incorrect and inadequate introduction	Presented as the main implementation framework, even when the key provisions of GR are contradictory to the MWRRA Act and Act prevails over the GR
3	Annexures	None	Full text of GR reproduced in Marathi along with its English translation, 10 pages

[7] In fact there is no official and active website of the MKVDC. We have checked all websites like www.mahagovid.org; http://irrigation.maharashtra.gov.in. There is a link to MKVDC on www.mahagovid.org; but this link takes the browser to Godavari Irrigation Corporation's website and not to MKVDC. Godavari and Vidharbha Irrigation corporation have their own websites, but one does not find a separate website for MKVDC, which probably is the largest of all corporations.

Table No. 17: Summary of points indicating the non-cognizance of powers and functions of the MWRRA as against the GR for privatization [based on information available for other stakeholders/ public]

No.	Place / Location	Cognizance of MWRRA	Cognizance of GR for Privatization
1	EoI Newspaper Advertisement	None	First para, GR projected as the only governing instrument
2	EoI Booklet: Para 15 and 16	No Access	No Access
3	Annexures	No Access	No Access

C. Submission Three: Admissions Made by Respondents and Need for Checking the Viability

1. The initiative of privatization in Nira-Deogarh involves investment by private sector in a pre-dominantly public and life-sustaining resource like water. Any private investment in such a public resource needs to be done in a manner that would be above suspicion and hence in most transparent and participatory manner possible. This is because ultimately there is danger of conflict between the public interest and interests of the private party. The public interest in such privatization efforts revolves around the measures taken for cost-effectiveness of the investment and choosing appropriate model for recovery of investment and for return on investment. We have in the past experiences where privatization initiatives undertaken without transparent and participatory measures have lead to serious flaws in the model, with severe adverse impacts on the interest of the public. We have approached the MWRRA through this petition with this concern in mind.

Currently, the MWRRA is the legally recognized and competent Authority which can ensure that the privatization efforts are undertaken with due consideration to the public interest. We believe the MWRRA Act is a legislation which has been enacted for ensuring equity and sustainability in the interest of the public. Hence, MWRRA is the appropriate platform for discussion, debate and decisions on this matter.

2. We are glad that the respondents have admitted, in their comments, some key aspects which actually allow us to take a very positive approach to this petition. These admissions by the respondents create the possibility for evolving a mechanism of transparent and participatory framework for decision-making regarding privatization initiatives, using the platform created through the MWRRA.

Following are the aspects admitted by the developer which provide us the opportunity to evolve a solution in this regard:

2.1. That developers have to submit their EOI considering the provisions of the Act (Para 5 of respondents' comments)

2.2. That MWRRA has wide and diverse powers to regulate the entire water resources within the state of Maharashtra (Para 6)

2.3. That MWRRA has every right and all powers relating to distribution and entitlement (Para 6)

2.4. That MWRRA has the powers to fix the basic water rates from time to time (Para 7)

2.5. That MWRRA Act came into existence in 2005 (as against the GR which came in 2003), therefore the private developer is required to follow the directions if any given by the MWRRA under the act (Para 7)

2.6. That economic and financial component of the BOT will be assessed by component authority to decide the viability of proposals by the developers (Para 11)

2.7. That, in case developer is selected, it is necessary to follow the provisions enumerated in the MWRRA Act and powers and functions of the MWRRA would be taken into consideration during finalization (Para 12)

2.8. That, as per sect. 11 of MWRRA Act, the MWRRA has powers and can give directions for implementation (Para 13)

3. In the above admissions, the respondent has admitted that the economic and financial component of the BOT will be assessed by the component authority and that the MWRRA has wide and diverse powers to regulate the entire water resources and hence, can give directions for implementation. These key admissions provide adequate space for enabling the MWRRA to be party to the assessment of economic and financial viability of the BOT in the Nira Deogarh project.

4. In other words, we feel that the statements or admissions made in the response indicate that the respondents would be agreeable to submit the EOI proposal as well as the draft contractual agreement with prospective developer to MWRRA, only for assessment and approval on following two criteria:

4.1. Conformity to the MWRRA Act and other laws and rules that come under the jurisdiction of the MWRRA

4.2. Economic and financial viability of the BOT

5. The need for assessment of the economic and financial viability as well as viability with respect to existing laws arises due to the following key reasons:

5.1. Viability with respect to Government funds already invested: The Government has already invested Rs. 454.34 Crores (upto August 2007 as per the EOI booklet Para 1.2 page 2). Hence, there is a need to check the viability with respect to returns to the government from the project (absolute value as well as percentage share of total revenue). Viability also needs to be checked for the kind of role that the MKVDC will play and the kind of benefits that will accrue to the MKVDC. This is important with respect to the future sustainability and growth of the publicly-owned river basin agency like MKVDC.

5.2. Viability with respect to the funds invested by the private investor: The private investor will be concerned with the returns on the investment made. In this aspect, viability from the point of view of investors would require adequate revenue share. This requires viability check with respect to the possible revenue generating sources, their sustainability and their impacts on the local, regional, and state-level economy. Any type of financial or economic failure of the private investor will not only remain restricted to the particular investing company, but the failure lead to severe adverse impacts on the project and hence, on local people and regional development. Hence, it is necessary to check the viability from the point of view of the private developer also.

5.3. Viability in context of changing laws and policies: The water sector is going through many reforms and scenario of the sector will drastically change in the coming future. The new legislations and policies outlined in the respect in the water sector will bring this change in the governance of the sector. Hence, the existing governance structure cannot be taken as the basis for implementing a privatization project on BOT basis especially when such a project involves long-term engagement of the private developer. This requires that the currently proposed privatization on BOT basis should be checked for its viability in the context of the new legislations and policies and also with the newly evolving governance structure.

If thorough viability check on this aspect is not done right at the beginning of the project, then this may potentially lead to future conflicts and litigations. Such conflicts and litigations will either delay the project or lead to abandonment of the project by the interested parties. This will ultimately put extreme burden on the government and lead to excessive wastage of pubic resources.

6. The above proposition will also be in conformity with the particular GR enumerating the policy for privatization. This GR suggests that there should be a feasibility check and approval before initiating the tendering process (refer Sect. 2-B and 2-D of the GR) and also at the time of the contractual agreement (Sect. 2-D of the GR).

7. Further, the Sec. 2.2.5 of the State Water Policy mentions that, 'The participation of the private sector,....will be encouraged where appropriate in order to...improve the quality and cost-effectiveness of water services and accountability to water users'. Thus, the State Water Policy specifically mentions cost-effectiveness and accountability to users as one of main criterion for privatization. As per Sec. 12(1) of MWRRA Act, the Authority is supposed to work according to the State Water Policy.

Hence, the particular provision of the State Water Policy gives the mandate to the MWRRA to play key role in ensuring (a) cost-effectiveness as well as (b) accountability to users in privatization efforts.

Cost-effectiveness is directly related to the economic and financial component of the project while accountability is directly related to ensuring transparency and participation in the process of privatization.

8. The admission of the respondent that the financial and economic component will be assessed by the competent authority (Para 11 of the comments by the respondent) also has direct bearing on the jurisdiction of the MWRRA. For example, the aspects related to water tariff as well as to entitlements and distribution of water to various water users (that involves economic benefits), will have direct bearing on the economic and financial component of the project. All these aspects of tariff, entitlement, and distribution fall under the jurisdiction of the MWRRA. Hence, the MWRRA is

mandated to be party to the assessment of the economic and financial component of the BOT, which as per the admission of the respondent, shall be undertaken by a competent authority. The MWRRA is an independent expert body with quasi-judicial powers and hence, is the appropriate authority to be party to this assessment proposed by the respondents.

9. Considering the proposition in para 4 and discussions in para 5 and 8 above of this note, we kindly request the MWRRA to accept the minimum level of prayers mentioned below:

9.1. We request the MWRRA to kindly give directions to the respondent MKVDC to submit to the MWWRA the EOI proposals, details of process of selection of developers, contractual agreement with prospective developer, and revised financial design (when ready) of the project for assessment and approval on the following two criteria:

9.1.1. Conformity with the MWRRA Act and other laws and rules that come under the jurisdiction of MWRRA or in which the MWRRA has a role to play

9.1.2. Economic and financial viability of the project

9.2. We request the MWRRA to kindly make Prayas and other interested organizations and individuals parties to this process of assessment and approval.

D. Submission Three: Contradictions in the Laws and Rules Applied to the BOT

1. There are some fundamental contradictions in the provisions of various laws and GRs applicable to the privatization initiative in Nira Deogarh. These contradictions have not been explicitly mentioned in the booklet nor considered in the process of EOI and privatization.

These contradictions fall under the jurisdiction of the MWRRA and hence, there is a need for MWRRA to intervene and address these contradictions.

2. Though the respondents admit that the water tariff will be decided by the MWRRA, they have not disclosed the principle on which water tariff system will be established and actual water charges will be calculated.

The study of the MWRRA Act, GR for privatization and the EOI booklet reveals that there are sharp contradictions in these documents related to the principle of water tariff.

As per sect. 11(d) of the MWRRA Act, the water tariff system and the water charges will be based on the principle that water charges shall reflect full recovery of the cost of the irrigation management, administration, operation and maintenance of water resource project. Hence, this particular provision mandates the MWRRA to use the principle of recovery of mainly the operations and maintenance cost for water tariff system.

As against this, the formula for the privatization on BOT basis as suggested in sect. 2(C), provides that the investment made by the private developer be recovered by way of water charges for water usages, as well as through other means of income. Thus, it is implied from the GR the water charges will be based on the principle of investment recovery (partial or full).

This is contradictory to the principle accepted in the MWRRA Act.

3. The MWRRA has also initiated the process of formulation of regulations for bulk water tariff, in which the emphasis has been on the principle of recovery of operation and maintenance cost. The need for intensive review and regulation of capital cost will emerge in case the principle of recovery of investment is accepted.

Though, the State Water Policy enumerates the principle of recovery of capital costs, the same is not directly included as the principle in the Act, which is a statue with force of law. Further, the Act provides that the MWRRA shall work according to the framework of the State Water Policy. But this particular provision is part of just general policies, whereas the provision for following the principle of recovery of mainly operation and maintenance cost is part of the mandatory duties of the MWRRA.

Hence, this principle of recovery of mainly operation and maintenance cost is dominant over and above the principle of recovery of capital as enumerated in the State Water Policy.

Hence, there is a strong contradiction of the principle of water tariff as mentioned in the Act and the same mentioned in the GR for privatization. This strongly suggests the need for the MWRRA to admit the case and allow for the decision to be made on the basis of the merits of further arguments.

4. Sect. 65 of the MMISF Act provides the legal linkage between MWRRA Act and the MMISF Act, making the provisions in the MWRRA Act applicable to the MMISF. Hence, the MWRRA also has the jurisdiction over various provisions in the MMISF Act.

As per the MMISF Act, the operation of the irrigation system from the minor level canal to the project level shall be transferred to the appropriate level of water users association (WUAs).

As per Sect. 73 (1), the MMISF Act is applicable to ongoing projects also.

As per Sect. 73 (2), the work of distribution system shall be carried out only after constituting Minor Level WUAs with participation of the WUAs and areas of operation shall be handed over to such Associations. Minor level WUAs will be participating in the construction stage.

Further, the MWRRA is mandated to give water entitlements to the WUAs. Each higher level WUA will pass on the entitlements to the lower level WUA. Also, as per the MWRRA Act, it is the River Basin Agency which will be the conveyance entity who will pass the entitlement to appropriate level of WUA.

The MMISF Act also provides certain rights to the WUA with regards to tariff and dispute resolution.

This scheme of distribution of water and management of the irrigation through WUAs is contradictory to the formula of allowing the private developer to manage and operate the system for a long-term lease period.

All these aspects have not been addressed in the EOI booklet nor discussed in the minutes of the first conference.

Hence, there is a need for the MWRRA to intervene and allow review of the EOI for Nira Deaogarh.

The decision on these contradictions can be taken only on the merits of the arguments that can follow after admitting the petition.

5. The MWRRA has been given special powers for removal of backlog as per Governer's directives.

As the Authority is aware that the Krishna Basin is no more a backlog affected region. Hence, there is no priority for the government to incur expenditure on irrigation projects in the region.

However, the EOI (refer para 4 of the advertisement and refer para 6 of the booklet) mentions that land acquisition has been partially completed and the remaining land acquisition will be made by the Government.

Also the EOI booklet (refer para 7) mentions that there is certain cost (the cost has not been given at the particular place) for resettlement for rehabilitation of affected people. This implies that the Government will be incurring expenditure for land acquisition and resettlement in project that is situated in non-priority area as far as removal of irrigation backlog is concerned.

Such expenditure need to be reviewed and approved by the MWRRA based on the special powers given to the MWRRA.

The respondents have not taken any cognizance of these contradictions and hence there is a need for MWRRA to intervene and initiate proceedings to address the same by admitting the petition.

6. The respondents have not taken cognizance of all the above mentioned contradictions in the EOI and the process of privatization. The respondent should have addressed these contradictions and issues arising from the same, before even publishing the EOI. These contradictions fall under the core of the jurisdiction of the MWRRA and hence the MWRRA should intervene.

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3.4 Analytical Submissions: Hearing Two

The first substantive hearing was the major breakthrough in the process subsequent to the petition. After this hearing, MWRRA came out with the detailed proceedings of the hearings, including directions to the respondents (i.e. MKVDC) to file response on specific areas of concern outlined by MWRRA that were based on the submissions made by the petitioners (i.e. PRAYAS). Thus, it became clear that MWRRA would take cognizance of the case and shall take the case to its logical conclusion. This was a major breakthrough because this was the first petition to the regulatory authority and it was not sure whether the regulator would consider the petition, especially, on issue such as privatization of water resource project, which apparently seemed to be out of purview of the MWRRA law. Hence, it was established that MWRRA would conduct legal proceedings on any matter that has relevance to its powers and functions.

In its proceedings, MWRRA directed the respondents to file comments after government approval. So through this direction, government was also directly made party to the petition. In adherence to the directions by MWRRA, the respondents filed their comments with government approval. The second hearing on the matter was held on 29th May 2009. The petitioners analyzed the comments filed by respondents and developed counter arguments, which were presented during the hearings and submitted to MWRRA in written. The seven short submissions made during the hearings are reproduced verbatim in the following paragraphs.

A. Submission One: Overview of Arguments and Issues under Focus

1. Petition: Prayas (hereafter referred as the petitioners) filed a petition (dated 15th January 2008) citing inadequate cognizance of the MWRRA Act in the advertisement issued for Expression of Interest (dated 12th September 2007) by MKVDC (hereafter referred as the respondent). The petitioners also'pointed out various contradictions in the GR (dated 15/7/2003) articulating the privatization policy and the MWRRA Act. Among other prayers, the main prayer of petitioners is that the MWRRA under the Section 11(f) of the Act, should carry out review and clearance of the proposal for completion of Nira Deoghar on BOT basis (hereafter referred to as the ND-BOT).

2. Objective: The objective of the petition is to ensure that responsibilities, authority, powers, and jurisdiction of MWRRA are protected in the ND-BOT and that MWRRA plays a key role in ensuring public interest in the privatization initiative.

3. The Response by MWRRA: MWRRA initiated the proceeding for admissibility of the petition. This is the first petition to the MWRRA since its establishment (registered as Case 1 of 2008). The MWRRA directed the respondent to file their response to the petition.

4. MKVDC Response (dated 21-2-08) : In brief, the respondent submitted that there is no cause of action by MWRRA on the ground that the respondent had taken adequate cognizance of the MWRRA Act in the EOI booklet issued to the prospective developers in time. Further, the respondent disagreed for the review and approval of the BOT proposal by MWRRA by arguing that the project was an old project (administratively approved in 1984) and that the Section 11(f) of the Act is applicable only for new projects.

5. Hearing before MWRRA (3rd March 2008): Based on the detailed analysis of the EOI booklet produced by the respondent, the petitioners presented various instances and examples of inadequate cognizance of and incorrect references to MWRRA and MWRRA Act, even in the EOI booklet and also the process of EOI. In addition, the petitioners presented fundamental contradictions between on one hand, the ND-BOT process and the GR (related to the privatization policy) and on the other hand, the MWRRA Act.

Citing these unresolved contradictions and partial admission of the non-cognizance by the respondent, the petitioners proposed the respondent to accept review by MWRRA. The respondent argued that the EOI is outside the scope of the Act and that MWRRA could be involved at the tender stage.

6. MWRRA Proceedings and Directions: After the hearing, the MWRRA issued directions requiring the respondent to file their detailed comments with government approval on the issues raised by the

petitioners, along with the issues raised by MWRRA [related to viability gap funding, application of section 11(f) and other issues] in the proceedings.

7. MKVDC Response 2 (with government approval): In this written response dated 25th April 2008, the respondent argued that the EOI is the stage to assess the viability and practicability and hence there is no need for MWRRA's intervention since no action has been taken.

The respondent further argued that all contradictions and ambiguities will be resolved in the bid document and that a committee has been established through a GR (dated 21/3/06) for finalizing the same. Based on this the respondent submitted that there is no need for any intervention by MWRRA.

The respondent disagreed with the petitioner's proposal for review by MWRRA on the basis of the argument for non-applicability of Section 11(f) of the MWRRA Act to the "old" projects.

8. Identifying the Core Issues for Conclusion: From the above mentioned summary of arguments and counter-arguments at different stages, the petitioners have surmised that there are six core issues where decisions by the MWRRA would lead to the conclusion of this petition. The following are the core issues for decision by MWRRA identified:

8.1. Why directions by MWRRA are needed at this juncture?
8.2. Demonstrating the Resolution of Conflicts before the MWRRA
8.3. Application of 11(f) for Review and Clearance
8.4. Review in the Context of Backlog Issue
8.5. Cognizance of MWRRA
8.6. Third Party Intervention

9. Submissions by Petitioners for Hearing on 29th May 2008: The submissions being made by the petitioners for the hearing are focused on these six core issues. The written submissions are attached with this note. Please find a written submission on each of the above mentioned core issues.

We request the MWRRA to admit this overview and the attached submissions as part of the official submissions by the petitioners and consider the entire content of these submissions for deliberations and decision on the petition by the MWRRA.

Similarly, we request MWRRA to also admit the six written notes submitted on 3rd May 2008 as part of the official submission by petitioners and consider the entire content of these submissions for deliberations and decision on the petition by the MWRRA.

B. Submission Two: Why directions by MWRRA are needed at this juncture?

1. Critical Influence of EOI Stage on Final Selection of Private Developer :

1.1 Respondent's (MKVDC's) Argument: Respondent argues that the EOI is an effort to assess the viability and practicability of BOT and that the main aim of EOI is to identify prospective developers and that nothing is finalized or action is not taken and hence no need for intervention by MWRRA. (Reference: refer Row no. 2 Page 1 & 2 of the respondent's latest response dated 25th April 2008, hereafter referred as the Response 2)

1.2. Petitioner's Counter Argument 1: The title and the content of the advertisement of the EOI as well as the EOI booklet (which is the official document open for the public) clearly states that the process of EOI is for 'selection of developers'. Thus, in its own words, the respondent has admitted that EOI is part of the selection process.

1.3. Petitioner's Counter Argument 2: Even if we accept the argument that the EOI is aimed at 'identifying' the prospective developers, the process will influence the final selection of the developers since the final selection will be from the pool of the 'identified' developers. As the Hon. Member of MWRRA observed during the hearing, by choosing not to mention the oversight of MWRRA on the process, the respondent has alienated a set of prospective developers. Thus, the EOI process will certainly affect the final selection of the developer.

1.4. Petitioner's Counter Argument 3: The respondent has presented an integrated process of processing the BOT proposal (please refer to Row 8-i Page 6 of the Response 2 of MKVDC), which includes various stages that will lead to finalization of the contract and selection of developer. In this integrated process, it is clear that the inputs from the first stage i.e. EOI stage will lead to development of the bid document in the second stage.
The respondent admits (refer Row 2 Page 1 & 2 of the Response 2), that, in the EOI process, interested developers will put forth their views and suggest terms and conditions to be incorporated in the bid document. Thus, the EOI process has a direct connection to the bid document and will have a direct impact on the

content of the bid document.Hence, the EOI process needs to be taken more seriously.

1.5. Thus, serious and concrete steps have been taken towards selection of the developer through the initiation of EOI process. The stage of EOI is as critical as the stage of the bid document and the respondents' argument that no action is taken (refer Row 2 Page 2 of the Response 2) cannot be accepted.

2. Failure to Apply Mind on Matters Pertaining to MWRRA's Jurisdiction :

2.1. After the contradiction pointed out by the petitioners, the respondent admits (refer Row 9-vii Page 7 of the Response 2) that the GR regarding privatization policy will have to be amended in view of the various provisions in the MWRRA Act. The respondent also admits (refer Row 5 Page 5 of the Response 2) that funds for land acquisition and rehabilitation will be obtained from the private developer and not from the government (as is indicated in the GR of privatization policy). This second admission came in response to the backlog issue raised by the petitioners.

2.2. Thus, in a way, the respondent's admit that these important matters or issues were not correctly or adequately addressed by the respondent in the official documents related to the EOI process (including the EOI booklet).

2.3. It needs to be noted that, on one hand, these matters or issues will have significant bearing on the content of the bid document and the final agreement with the developer. On the other hand, it is useful to reiterate that these issues have direct bearing on the jurisdiction, responsibilities, & authority of the MWRRA.

2.4. These critical matters or issues should have been correctly and adequately addressed and resolved by the respondent before going to the private developers with the EOI invitation. As it is clear, addressing and resolution of these issues do not need interaction with the private developer, as these are the legal issues that are beyond the purview of the private developer.

2.5. These matters could have been addressed and resolved before the EOI process if the respondent had taken due cognizance of the MWRRA Act and had conducted due assessment of implication of the provisions of the law for the BOT process.

2.6. This demonstrates that the respondent has consistently failed to apply mind on serious matters related to jurisdiction, responsibilities, and authority of MWRRA.

3. Considering the inferences in 1.5 and 2.6 together, it could be argued that the MWRRA cannot rely on MKVDC for ensuring the protection of its jurisdiction, responsibilities, and authority, and MWRRA is required to intervene at this juncture (at the EOI stage itself) and give appropriate directions to the respondents.

C. Submission Three: Demonstrating the Resolution of Contradictions before the MWRRA

1. Key contradictions between the GR forming legal basis for ND-BOT and MWRRA Act. The petitioners have already presented in detail the contradictions in the GR for privatization (which is taken as the basis of the ND-BOT by the respondent) and the MWRRA Act. Since, the contradictions are related to the issues that fall under the jurisdiction of the MWRRA, the petitioners had suggested the respondent to submit the EOI and other future documents related to BOT to MWRRA for review and approval. The following is the list of the contradictions raised by the petitioners:

1.1. Changes by developers in water tariff Vs MWRRA's jurisdiction over tariff (refer para 7 of the petition) AND Changes in water distribution by developer Vs MWRRA's jurisdiction over entitlement (refer para 6 of the petition): The above-mentioned GR for privatization provides for changes in water distribution by the developer in times of scarcity. The GR also provides for 10% increase in water tariff if needed by developer.
Both these provisions are contradictory to the provisions in the MWRRA Act, which accords the powers related to water tariff and distribution exclusively to MWRRA.

1.2. Tariff based on O&M Vs Recovery of Investment through Water Charges: The GR for privatization provides the formula of recovery of capital investment by the developer through levying of water charges and using other revenue sources. This is contradictory to the MWRRA Act, where there is a concrete provision for water to be charged on O&M cost and not for capital recovery.

1.3. Expenditure on land acquisition and rehabilitation by Government Vs Restrictions on government expenditure due to backlog issue: The EOI advertisement as well as the booklet states that the land acquisition will be done by the government. But since the project lies in non-backlog area there are

limitations imposed by the Governor's directives on this matter in using government funds for irrigation development in non-backlog area. This contradiction comes under the jurisdiction of the MWRRA because the MWRRA Act provides special powers to MWRRA for backlog removal based on Governor's directives.

1.4. Scheme of undertaking works, operations and water distribution as per MMISF Act (which has linkages to MWRRA) Vs Scheme of building and operating the project by private developer: As per MMISF Act, the water users associations (WUA) are empowered to participate in the work at the construction stage and also in operating the whole systems. There is a direct linkage between the MMISF Act and the MWRRA Act. The MWRRA is obliged to issue entitlements to the WUAs as per the criteria given in the Act. This scheme of operations in contradictory to the ND-BOT.

2. Acknowledgement of Contradictions and Admission by the Respondent to Resolve Them:

2.1. The respondent admitted that all contradictions will be dealt with before finalization of the bid document (refer Row 9-iv Page 6 & 7 of the Response 2). The respondent claims that due cognizance of all issues raised (in the petition) will be taken before finalizing the bid document (refer Row 5 Page 4 of the Response 2). The respondent further assures that no conflicting provisions of the GR on privatization policy vis-a-vis MWRRA Act and other relevant Act/regulations will be left while finalizing the final bid document and that the final bid document will be free from any ambiguities (refer Row 5 Page 4 of the Response 2). Such an assurance for resolution of conflicts has been given by the respondent.

2.2. Apart from the above-mentioned generic admission, the respondent's submission on specific contradictions are as follows:

2.2.1. Allowing changes in water tariff Vs MWRRA's jurisdiction over tariff (refer para 7 of petition) AND Allowing changes in water distribution by developer Vs MWRRA's jurisdiction over entitlement (refer para 6 of the petition): Responding to these contradictions pointed out in the petition, the respondent has admitted that the GR for privatization will have to be amended in respect of fixation of water rates and entitlements during drought period (refer 9-vii of the Response 2).

2.2.2. Tariff based on O&M Vs Recovery of Investment through Water Charges: Responding to this contradiction pointed out by the petitioners (refer row 5 of the Response 2), the respondent has accepted that due cognizance of the issue will be taken before finalizing the bid document.

2.2.3. Expenditure on land acquisition and rehabilitation by Government Vs Restrictions on government expenditure due to backlog issue: Responding to this contradiction, the respondent admits that the funds for land acquisition and rehabilitation will be obtained from the private developer and not from the government.

2.2.4. Scheme of undertaking works, operations and water distribution as per MMISF Act (which has linkages to MWRRA) Vs Scheme of building and operating the project by private developer: Responding to this contradiction, the respondent has admitted that the detailing of the linkage between MMISF and MWRRA is yet to be worked.

But petitioners have already pointed out that there is direct linkage between the MMISF Act and MWRRA Act. The link is very well established through the section 65 of the MMISF Act and also through section 39(6) of the MMISF Rules, 2006.

2.3. It needs to be noted that the respondent will have to amend the GR for privatization on all the provisions wherein the petitioners have identified the contradictions, not only in those related to tariff and entitlement during scarcity (as admitted by the respondent).

2.4. Overall, the respondent has acknowledged most of the contradictions identified by the petitioners and agrees to resolve the contradictions before the bid document is presented.

3. Respondents' Refusal for Assessment by MWRRA

3.1. Though, the respondent agrees to resolve the contradictions, the respondent does not agree for intervention by MWRRA in this matter. The respondent disagrees with the proposal put forth by the petitioners for assessment of ND-BOT by MWRRA for ensuring that the EOI, bid document and agreement are in conformity with MWRRA Act.

3.2. In support of this, the respondent assures that all the contradictions will be resolved by them in the bid document.

3.3. In this context, the respondent claims that a high level committee has been established as the final

authority for approval of the project (refer Row 8 Page 5 of the Response 2) and hence there is no question for direct involvement of MWRRA.

4. Petitioners' Counter-arguments for directing the respondent to demonstrate the resolution of contradictions before the MWRRA

4.1. The respondent has promised to resolve the contradictions in the bid document but refuses to the assessment of the resolution by the MWRRA. However, there seems to be no ground to rely on this promise.

4.1.1. It should be noted that MWRRA has direct jurisdiction over the above mentioned issues and it is the responsibility of the MWRRA to ensure that the contradictions related to these issues are resolved in proper manner.

4.1.2. Since, the contradictions have been raised by using the platform of MWRRA and that MKVDC has admitted to resolve these contradictions on this platform, then it is necessary and logical that the MWRRA ensures that MKVDC actually adheres to their admissions by directing the MKVDC for demonstrating the same on the platform of MWRRA.

4.1.3. All of these contradictions could have been resolved by the respondent before coming out with the advertisement for EOI. There was no need to have any discussion with private developers before the resolution of any of these contradictions. In fact, all these contradictions are required to be resolved in order to ensure the very legality of the BOT process for the ND project.

4.1.4. It is sad that even the recent GR (dated 21/3/06) about the establishment of committee for looking into the matters related to BOT (which was issued after the date of passing of the MWRRA Act) does not take any cognizance of powers, functions, or jurisdictions of the MWRRA.

4.2. It is clear from the above facts that a serious thought on the legal aspects and due consideration to MWRRA Act were not'given by the respondent before initiating the EOI process.

In other words, the respondent has consistently failed to demonstrate application of mind when it comes to the jurisdiction, responsibilities, & authority of MWRRA.

Hence, the MWRRA cannot rely on the respondent to ensure that due action would be taken and all contradictions would be resolved.

4.3. As mentioned in above-mentioned point 3.3, the respondent claims that a high level committee has been established as the final authority for approval of the project (refer row 8 of the Response 2) and hence there is no question for direct involvement of MWRRA.

4.4. The following facts would be helpful in deciding the authority, role, and functions of the said committee:

4.4.1. The committee has been established by a GR while the MWRRA has been established through legislation. Legislation is the will of the people and has a force of law. Hence, the MWRRA has a higher status and bigger responsibility to ensure that the contradictions are resolved.

4.4.2. The committee comprises of the officials who, in turn, are part of the 'executive'. Such an agency, which is part of the executive, cannot discharge the function of an independent regulatory authority.

4.4.3. Such a committee can function as a executive for taking decisions internal to the government but certainly cannot satisfy the obligations put up on the MWRRA through the MWRRA, Act.

4.4.4. In fact, there is no mention of the MWRRA or its obligations in the list of the functions to be carried out by the committee or for that matter in the entire GR.

4.5. Hence, the high-level committee cannot be the substitute to MWRRA or obviate the need for intervention by the MWRRA for the reasons mentioned above.

4.6. Thus, there is no demonstrated track-record of the respondent, which would inspire the confidence that there is no need for independent assessment by MWRRA to ensure that the said contradictions will be resolved. At the same time, the high-level committee referred to by the respondent cannot substitute assessment by MWRRA.

4.7. Hence we request the MWRRA to direct the respondent to demonstrate before the MWRRA that all contradictions have been resolved as and when they are resolved but certainly before the bid document and or the agreement with the developer is finalized.

Since this is a matter of public interest and since the MWRRA is expected to function in a transparent and participatory manner, the petitioners as well as other stakeholders should also be involved in this process of assessment.

D. Submission Four: Application of Section 11(f) for Review and Clearance

1. Petitioners' Prayer for Review of project by MWRRA based on section 11(f):

1.1. The petitioners have already pleaded that the proposed completion of Nira Deoghar project on BOT basis will bring various changes in the project economics, operations and governance. Hence, there is a need to review the project by MWRRA. The petitioners also prayed that section 11(f) of the MWRRA Act be applied to the Nira Deoghar project.

2. Respondent's Defense:

2.1. The respondent submitted that the Nira Deoghar is old project whereas 11(f) is applicable only to new. Hence MWRRA cannot review the project.

3. Petitioners' Counter Argument:

3.1. The petitioners after due study and analysis of the issue submits that the section 11(f), especially the main enactment (i.e. first para) of the particular provision is applicable to Nira Deoghar project and the MWRRA has the powers to review the project on the basis of economic, hydrologic and environmental viability. The arguments provided in the justification can be categorized into arguments related to the purpose of the act and arguments related to the interpretation of the letter of the provision.

3.2. Purpose of the Act:

3.2.1 The purpose of the MWRRA (as mentioned in the preamble of the Act) is tO regulate, facilitate and ensure judicious, equitable and sustainable management, allocation and utilisation of water resources.

3.2.2. To fulfill this purpose the MWRRA has the responsibility to ensure the economic and environmental sustainability of the project as well as ensure that the water distribution with in the project is just and equitable.

3.2.3. The proposed completion of Nira Deoghar project on BOT basis brings a new stakeholder in the project in the form of the private developer. The inclusion of a new stakeholder will lead to changes in the project. Due to the participation of the private developer the economic aspects as well as water distribution in the project area will be affected (please refer to Para 10 to 13 of the petition for detailed discussion on these changes)

3.2.4. This change will have a strong bearing on the judicious, equitable and sustainable management, allocation and utilization of the water, i.e. it will have a strong bearing on the fulfillment of the purpose of the Act.

3.2.5. Hence, the MWRRA has the responsibility and powers to review and clear the project on the basis of economic, hydrologic and environmental viability.

3.2.6. Unless the viability of the project is reviewed, approved and regulated by MWRRA, the purpose of judicious, equitable and sustainable management and allocation of the water resource project cannot be achieved. The purpose of the Act will be defeated if the MWRRA does not use its powers to review and approve the ND-BOT project based on economic, environmental, hydrologic and other criteria.

3.2.7. Further, as per section 3(2) of the Act, the MWRRA has powers to do all things necessary for the purposes of the Act. Hence, MWRRA can use these powers to direct the respondent to submit the various documents of the project for review and approval of the same by the MWRRA.

3.2.8. The purpose of the Act and Section 11(f) in particular also needs to be looked in the light of the ground reality of the irrigation projects in the state.

The current status of the irrigation projects in the state suggest that majority of the projects have already been administratively sanctioned before the Act was passed. It needs to be noted that, in view of the current financial conditions of the state government, most of these projects face the prospect of significant changes and restructuring of technical, hydrological, economic, and financial components of the original designs. Naturally, this will have equally significant implications for the economic, hydrological, and environmental viability of these projects as well as the sustainable management of water resources in the state.

In this situation, if Section 11(f), which is the one of the most important sections for pursuing the purpose of the Act, is applied only to the new projects, then the majority of the projects that are administratively cleared but have serious implications for the purpose of the Act will remain outside the purview of the Act. This will defeat the whole purpose of the creation of the Act and the creation of Section 11(f).

In the light of this argument, there is also a need to apply Section 11(f) to all projects, old, new, or on-going in which major changes are proposed to be

implemented. Without such an interpretation, the MWRRA cannot fulfill its obligations towards the purpose of the Act.

3.3. Interpretation of the letter of the provision:

3.3.1. The first paragraph (also called as the main enactment) of the section 11 (f) of the Act, does not mention that the particular paragraph is applicable only to 'new' projects. In absence of such explicit mention of the term 'new', the particular paragraph of the provision is also applicable to pending and on-going projects.

3.3.2. In this case, the meaning of the term "proposed projects" can be taken as projects that are yet not complete. It may as well apply to 'project proposed for privatisation' or 'project proposed for completion on BOT Basis' or 'project proposed to be managed under the framework of the MWRRA Act'. In such cases, the authority has all powers to review and clear the project proposed for completion on BOT basis.

The GR for privatization also uses the word 'proposal' while referring to projects to be completed on BOT basis. Hence, the meaning of the term "proposed projects" can also be applied to projects proposed to be completed on BOT basis.

3.3.3. The second and third paragraphs of the above-mentioned provision are riders to the main enactment (main enactment part of the provision is in the first paragraph) with qualifiers, hence are called here as proviso.

3.3.4. A proviso is not construed as nullifying the enactment or as taking away completely the right conferred by the enactment [8]. Hence, proviso in the second and third paragraphs, do not take away the right of the Authority to review and clear any proposed projects, either 'new', 'on-going' or 'in-complete'.

3.3.5. Further, the proviso articulated in the second paragraph is applicable to clearing of new projects. Since here the proviso makes specific and special mention of the term 'new', it is in fact qualifying the main provision in the first paragraph.

3.3.6. Such a need for including the qualifying proviso for 'new' project clearly means that the main enactment part of the provision in the first paragraph does not necessarily apply to only 'new project,' but the same can be applied to 'not new' or to be specific to 'on-going' and or 'in-complete projects.' Unless this is accepted, the need for having this as a separate proviso cannot be explained.

3.3.7. In other words, if both the paragraphs (the first and second) were applicable for the new projects only, then the responsibility regarding the Governor's directives could be very well added to the list of the three responsibilities mentioned in the first paragraph of the provision.

3.3.8. The third paragraph articulating the second proviso is about "the powers to accord administrative approval or revised administrative approval under this clause". This could be seen as the further explanation of the term "to review and clear" in the beginning of the first paragraph of the provision.

3.3.9. All these points clearly indicate that the main provision in the first paragraph of the Section 11 (f) is not restricted only to the new projects, but is applicable to all the proposed, i.e., non-complete projects. Hence the same is applicable to Nira Deoghar project which is a project proposed to be completed on BOT basis.

4. Thus, a detailed study and analysis of the purpose of the Act and the interpretation based on the letter of the Act, leads us to the conclusion that MWRRA has the powers to review and clear the Nira Deoghar project based on the economic, hydrologic and environmental viability.

5. The points raised here are substantiated with legal opinions on this matter received from reputed lawyers [9]. The legal opinion is attached with this submission for consideration.

6. Based on these grounds of logical and substantiated arguments we request the MWRRA to exercise its powers and direct the respondent to submit all documents related to the EOI, the bid documenT and the agreement for review and clearance by MWRRA on the basis of economic, hydrologic and environmental viability.

7. On two occasions (response 1 dated 21/2/08 and response 2 dated 25/4/08) the respondent were given opportunity to file comments and on both these occasions the respondent has already submitted their views on the issue of applicability of the section 11(f) to Nira Deoghar project. Hence, after giving adequate time and opportunity to file comments on the particular issue, we now request the MWRRA to take the decision and give

[8] See text and notes 67, 68 p. 199. In S. Sundaram Pillai v. Pattabhiram, supra (p.610 SCC) – As referred in Singh G P, Principles of Statutory Interpretation, page 187.

[9] Lawyers: 1) Adv. Prashant Bhushan (Supreme Court), 2) Adv. Gayatri Singh & Adv. Mihir Desai (High Court)

appropriate directions for undertaking the review of the Nira Deoghar project based on section 11(f).

E. Submission Five: Review in the Context of Backlog Issue

1. Jurisdiction of MWRRA on Regional Backlog Issue

1.1. As per Sections 21 (1) and 21 (2) of the MWRRA Act, the MWRRA has special powers for removal of backlog as per Governor's Directives. Section 12 (9) of MWRRA Act requires the MWRRA to frame policies so that priority can be given to projects essential for removal of backlog.

2. Applicability of the Provisions for the ND-BOT Project. The issue of backlog removal arises in the case of proposed completion of Nira Deoghar on BOT basis for the following three main reasons:

2.1. Proposed Expenditure by Government on Land Acquisition and Rehabilitation

2.1.1. Petitioners' Arguments:

2.1.1.1. The project is located in a non-backlog area and hence expenditure by government on irrigation facility in Nira Deoghar project is not a priority.

2.1.1.2. Though, the private developer will be investing the required funds for the completion of the project, the EOI (refer para 4 of the advertisement and refer para 6 of the booklet) mentions that land acquisition has been partially completed and the remaining land acquisition will be made by the Government.

2.1.1.3. Also the EOI booklet (refer para 7) mentions that there is certain cost (the cost has not been given at the particular place) for resettlement for rehabilitation of affected people.

2.1.1.4. This implies that the Government will be incurring expenditure for land acquisition and resettlement in project that is situated in non-priority area as far as removal of irrigation backlog is concerned.

2.1.2. Respondent's Admission:

2.1.2.1. The respondents have admitted that (refer Row 5 Page 4 of Response 2) though the GR for privatization requires the government to provide funds for the land acquisition, but the same will not be followed in the case of Nira Deoghar (ND) project where the private developer will be asked to provide funds for land acquisition as well as for rehabilitation.

2.1.3. Petitioners' Counter Argument:

2.1.3.1. The disclosure of this fact about financing of land acquisition and rehabilitation by the private developer was not done in any of the EOI documents (the official documents from the respondents).

2.1.3.2. This is an 'after-thought' of the respondents and hence it is clear that the respondent had not assessed the implications of the backlog issue for ND-BOT project, prior to issuing the EOI or before the petitioners pointed out these contradictions.

2.1.3.3. As of now, the respondent does not have any official document that clarifies the way in which the backlog issue will be dealt with, while identifying the sources of finances for land acquisition and rehabilitation.

2.1.3.4. It should be noted that the provision in the GR for privatization related to the land acquisition is contrary to the admission by the respondent that land acquisition will be done by the private developer. This would need amendment in the specific provision in the GR. However, the respondent has not taken any cognizance of this specific need in any of their submissions.

2.1.3.5. Thus, even after having long time-period for filing the response, the respondent has failed to apply the mind on the legal requirements related to the issue of backlog. As a result, the issue remains unresolved.

2.1.3.6. Hence, the MWRRA cannot rely on the admissions made by the respondents and need to take a review of the matter. The MWRRA is empowered to use the special powers given in this regard to direct the respondent to submit its proposal for government expenditure in Nira Deoghar project and check its validity with regards to Governor's Directives.

2.2. Viability Gap Funding (VGF) by Government:

2.2.1. MWRRA's Directions

2.2.1.1. The issue of revenue for the private developer was raised in the hearing when the petitioners pointed out the illegality of provision allowing recovery of capital investment through water charges.

Based on this discussion, the MWRRA directed the respondent to file comments on whether VGF will be availed for covering the short-fall in revenue. Further, the MWRRA also asked the respondent to comment on

the possibility of VGF vis-a-vis limitations for government expenditure arising from the backlog issue.

2.2.2. MKVDC Response

2.2.2.1. In responding to the query raised by the MWRRA, the respondents admitted that there may be a need for availing of VGF from the government to cover the shortfall in revenue (refer Row 9-vi Page 7 of Response 2).

2.2.2.2. Further, the respondent assured that the government funds used for the project will be obtained after applying the backlog formula (refer Row 9-vi Page 7 & Row 5 Page 4 of Response 2).

2.2.3. Petitioners' Arguments

2.2.3.1. The respondent states that no funding is expected from government except for viability gap funding which may be required to cover any shortfall in revenues required for recovery of capital investment for the private developer (refer Row 9-vi Page 7 of Response 2).

2.2.3.2. Regarding the issue of applicability of backlog-related provisions, the viability gap funding from government is also a source of fund that will have to be reviewed in light of the Governor's Directives for removal of backlog.

2.2.3.3. But the respondent has not provided any details of how the VGF will be obtained after applying the backlog formula.

2.2.3.4. In the current situation, there is no concrete data or information about VGF and its implications on the backlog issue.

2.2.3.5. Hence there is a peed for a competent authority to review the issue as and when more concrete information is available. Since, MWRRA has special powers for removal of backlog; it has all the rights to review the source of funds for VGF in light of the Governor's directives.

2.2.3.6. Even if the VGF is availed in the form of loan from institutional investors, the same leads to liability to the government and the public at large.

2.2.3.7. Hence, whatever is the source or form of the VGF, the same need to be reviewed by the MWRRA in the light of the Governor's directives for removal of backlog.

2.2.3.8. Coming to the issue of application of mind, the possibility of the need for VGF to cover shortfall in revenue was also not disclosed by the respondent in any of the EOI document. In fact, the EOI document conveys incomplete and misguiding information that the developer can recover his capital investment from the water charges.

2.2.3.9. Thus, the admission by the respondent about the need for VGF is also an after-thought on the part of the respondents after the petitioner pointed out the illegality in allowing recovery of capital cost from water charges (since the water charges are based on the O & M cost as per MWRRA Act).

2.2.3.10. Thus, this is another instance of failure of the respondent to apply mind on the critical issues pertaining to the jurisdiction of MWRRA. This gives more strength to the argument that MWRRA cannot merely rely on the promise of the respondent that the backlog formula will be applied. Instead the MWRRA should proactively attempt to ensure that the Governor's Directives are followed in providing or attracting financial resources for the ND-BOT project.

2.3. Raising Resources from Private Developers:

2.3.1. The third reason for raising the backlog issue in the case of Nira Deoghar project is the need to review— in the light of the backlog-related provisions—the very option of availing funds from private investor for completing the project.

2.3.2. The investment done by the developer is a financial resource raised from the private sources or the market sources and, hence, Section 7.11 and Section 9 (1) of the Governor's Directives issued for 2002-03 are applicable to the project.

2.3.3. As per these particular sections of the Governor's directives, the sources raised in the market should be pooled together and distributed equitably among all the regions.

2.3.4. The particular directive state that the budgetable and non-budgetable (source of funds external to government budget) taken together should be distributed among the three regions in the Irrigation sector on the basis of the formula for backlog removal.

2.3.5. Hence, the formula for backlog removal will be applicable for the funds invested by the private developers also. These private funds come under the purview of the Governor's directives for backlog removal.

2.3.6. Hence, MWRRA also needs to review the private investment in the light of these directives by the Governor.

2.3.7. It should be noted in this context that the extent of investment done by the private developer(s) will also determine the extent of viability gap funding from the government. Hence, both the funds need to be reviewed by the MWRRA, considering the Governors' directives.

2.3.8. While implementing the BOT, there may be other expenses or liabilities towards the government which also need to be reviewed.

3. As per Section 8.10 of the latest directives by Governors' for 2008-09, the MWRRA has been entrusted with the responsibility of monitoring the implementation of the Governors' Directives. The particular section directs the MWRRA to take a periodic review of the implementation of the Directives and submit a quarterly report to the governor.

4. In the light of the issues raised above and to conform with the powers and responsibilities given to MWRRA through the MWRRA Act and the Governors' Directives, we request the MWRRA to direct the respondent to submit all documents related to funding sources and liabilities to government for the review by the MWRRA to check adherence to the Governors' Directives.

5. We also request MWRRA to specify the process—with stages and time line — through which MWRRA would ensure that funds allocated or obtained—from all the sources and in different forms—for the ND-BOT project do adhere to the norms laid down by Governor's Directors regrading the regional backlog issue.

F. Submission Six: Cognizance of MWRRA

1. Petitioners' Grievance: Non-cognizance by the Respondent

1.1. The petitioner argued that the respondent did not recognized the powers of MWRRA in the advertisement for the EOI.

2. Respondent's Argument

2.1. The respondent submitted that though the advertisement did not mention about the MWRRA, the same has been included as part of the EOI booklet issued in time to all the prospective developers. Based on this argument, the respondent argued that adequate cognizance of the MWRRA Act has been taken.

3. Petitioner's Counter-Arguments

3.1. Based on detailed analysis of the EOI document and of the process details provided by the respondent, the petitioners pointed out significant number of instances and examples of inadequate cognizance— of serious nature—of the MWRRA Act in the content as well as in the process of the EOI (please refer Prayas written submissions given on 3rd March 2008)

4. Lack of Seriousness on the Part of the Respondent

4.1. The respondent has not given detailed and adequate response to the significant number of instances and examples of inadequate cognizance of serious nature presented by the petitioners,' even after adequate time period - as per the demand of the respondent—provided to the respondent for filing the response.

4.2. Instead, the respondent has tried to project that the issue is of less importance since it does not affect the preparation of bid document (refer Row 3 Page 2 of the Response 2).

4.3. Thus, the respondent has not made use of the invaluable opportunity provided by the Hon. MWRRA to prove that adequate cognizance of MWRRA was taken and, instead, tried to project that inadequate cognizance of the MWRRA's authority is a trivial matter.

4.4. This demonstrates lack of seriousness and lack of diligence on the part of the respondent in responding to arguments pertaining to a matter of such a crucial nature.

4.5. This also allows the petitioners to infer that the respondent do not have any argument to counter the petitioners' arguments in this regard.

5. Need for MWRRA's Intervention:

In the light of the above-mentioned inference as well as in the light of the lack of seriousness shown by the respondent in this regard, we request the MWRRA to accept the following prayers, some of which are already included in the petition:

5.1. Direct MKVDC to inform the interested developers/consortiums and the general public. In written form and by putting a clause in all the relevant documents (including the tender or agreement and or contract document) prepared or to be prepared for the purpose, that the MWRRA Act has been passed, notified,

and come into force in the entire state of Maharashtra including the Nira Deogarh Irrigation Project site and that the MWRRA has wide and diverse powers to regulate the entire water resources within the State of Maharashtra (please refer to the preamble of the MWRRA Act, 2005) and hence the functioning of any new and existing water projects including the completion of Nira Deogarh project on EOT basis will be regulated by the MWRRA as per the powers and functions given to the MWRRA through the MWRRA Act.

5.2. In the same manner mentioned above, direct the respondent to share? and disclose all the relevant details of the jurisdiction of the MWRRA along with the current contradiction in the MWRRA Act and the policy of privatization.

5.3. Direct MKVDC to inform the interested developers/consortiums and the general public in written form and by putting a clause in the relevant tender or agreement and or contract document prepared for the purpose that the terms of contracts with the developers/consortiums will be subject to the rules, regulations, awards, orders and decisions of the MWRRA and that the developer will have to abide by the same and that the contractual agreements/provisions between the MKVDC and or any other party with the selected developers/consortiums will not put any limitation or restrictions or conditions on the duties of the developers/ consortiums to abide by the rules, regulations, awards, orders, and decisions of the MWRRA.

5.4 Direct MKVDC to give wide publicity to the above mentioned facts (those mentioned in prayer 17-b and 17-c of original petition) by publishing a newspaper advertisement in this regard of appropriate size and at proper place which is central and is able to attract attention of the public and in all the leading newspapers in both English and Marathi including the news papers in which the first advertisement about the EOI was published.

5.5. Direct MKVDC to send a letter of communication mentioning the above facts to all the prospective investors/ developers/ consortiums and all other related parties (including the related government departments) who are concerned in present and future activities related to the completion of Nira Deogarh project on BOT basis and or related to all future such initiatives on BOT basis for any other irrigation project.

5.6. Direct the other river basin corporations and departments and municipal corporations engaged in water resource management, to take adequate cognizance of the powers and functions of the MWRRA, in any future activities related to water projects and water management and issue appropriate letter of communication related to this to all concerned parties.

G. Submission Seven: Third Party Intervention

1. Petitioners' Submission to Include Prayas and Other Interested Parties in the Review:

1.1. The petitioner while submitting the proposal for review by MWRRA on various aspects of BOT had also argued that Prayas and other interested parties should be allowed to participate in this process.

2. Respondent's Disagreement Over Participation:

2.1. Responding to the proposal presented by petitioner about the need to involve Prayas and other interested organizations and individuals in the process of review of the ND-BOT project by the MWRRA, the respondent submits that the MWRRA should not set precedence of involving third parties in the BOT process.

3. Petitioner's Counter Argument:

3.1. It needs to be noted that the petitioner seeks participation as a stakeholder and not as a third party. The issue being discussed in the petition is a matter of public interest and various stakeholders including the farmers, NGOs, women's representatives, other local groups, and activists should be involved when key decisions are being taken related to water resources management.

3.2. The State Water Policy (refer sections 1.3,2.1.1, 2.2.2 of the policy) requires that stakeholder participation is taken in various decision making and the other governance functions related to water resources.

3.3. The MWRRA has a mandate, to work according to the State Water Policy and hence MWRRA is a platform where participation of stakeholders needs to be encouraged.

3.4. The preamble of the Act puts the responsibility of judicious, equitable and sustainable management of resources on the MWRRA. Hence, it is the responsibility of the MWRRA that the process conducted within the ambit of water resource management is transparent and participatory. This will ensure equity through enhanced participation of all stakeholders.

3.5. Hence, we request the MWRRA to give relevant directions in the matter. We also request the MWRRA to include Prayas and other interested parties in the review and other future proceedings related to the ND-BOT project.

■■■

3.5 Analytical Submissions: Hearing Three

The third hearing was the concluding hearing of the proceedings of the petition. The respondents were asked to file comments on the submissions made by the petitioners in the previous hearing. Based on the analysis of the comments by respondents, the petitioners made oral and written submissions before MWRRA during the third submission held on 14th August 2008. The respondents were asked to file comments, if any, on the submissions made by petitioners, after which, the MWRRA issued the final order on the petition. The final order is reproduced in the next chapter while the four submissions made during the third hearing are reproduced verbatim in the following paragraphs of this chapter.

A. Submission One: Comments by Prayas (Petitioner) on MKVDC's (Respondent) Response (dated 29th July 2008)

I. Comments on Respondent's Reply on Submission 2 of the Petitioner (Core Issue 1: Need for Directions at EoI Stage)

a. Frequent Changes in the Position by Respondent (on Stated Objective of EoI)

1. In its efforts to respond to points raised by petitioner (on the importance of EoI stage), the respondent has continuously changed its position regarding the objective of EOI. This could be demonstrated through the following statements of the respondent at different stages:

1.1. "EOI for selection of developers" (Ref: advertisement for EOI as submitted in the EOI booklet)

1.2. "The main aim of inviting the EOI is to identify the prospective developers for completing the balance works of this project on BOT basis" (Ref: Row 15 of para 2 of respondent's comments filed on 25th April 2008)

1.3. "The main aim of inviting the EOI is to consider views and suggestions of the prospective bidders to incorporate the same suitably in the terms and conditions of the bid document." (Ref: Comments filed on 29th July 2008)

2. This demonstrates continuous lack of application of mind by the respondent on such a critical issue as well as lack of systematic efforts to validate legality of the actions and statements.

3. Such a state of affairs further buttresses the petitioner's demands that the MWRRA cannot rely on Respondent and need to step in itself and ensure that its functions, responsibilities, jurisdiction, authority are not encroached upon.

b. Acceptance by Respondent that the Bidding Process will be Open for all Prospective Developers

1. The Respondent accepts that, after finalization of the bid document, the bidding process will be open for all interested parties. This acceptance is the latest addition to the submissions by the respondent.

2. This is an important admission and hence it should be part of the list of admissions made by respondent to be included in the final order by the MWRRA.

c. Directions in the Privatization Policy GR for Assessing the Feasibility before Processing of BOT Proposal

1. As submitted before, the Privatization Policy GR (dated 15.07.2003) requires that feasibility of the privatization projects should be decided before the tenders are called (read para 2 D with para 2B).

2. The Respondents admit that the process of inviting EoI is the first stage in the processing of BOT Proposal which culminates in acceptance of bids (Ref: comments by Respondent in Row 9 of the reply dated 3rd March 2008). Thus, the bidding (or tendering) process has begun as per the submission of the Respondent.

3. The respondent has already acknowledged that there many provisions and statements in the EoI document and in the Privatization Policy GR that are in contravention of the MWRR Act and MMISF Act, which it has promised to resolve.

4. Thus, it is clear that the tendering process is in contravention even of the Privatization Policy GR, which the Respondent uses as the legal basis of the ND-BOT Project.

5. This is a serious failure of the respondent as well as of the high-powered committee, which is established for the purpose of looking into the matters of BOT projects.

6. This situation further strengthens the petitioner's demands that the MWRRA cannot rely on Respondent and need to step in itself and ensure that its functions, responsibilities, jurisdiction, authority are not encroached upon.

II. Comments on Respondent's Reply on Submission 3 of the Petitioner (Core Issue 2: Demonstrating Resolution of Contradiction before the MWRRA)

a. No new points or arguments presented by the respondent in this reply

1. There is no new point or argument presented by the Respondent in this reply to justify its position on this issue.

2. Hence, we request the Hon. MWRRA to consider the points and arguments presented in this regard by the petitioner in its previous submissions and hearing, especially, regarding the position of the petitioner that a government committee cannot obviate the need for or substitute the role of an independent regulatory authority such as MWRRA.

3. In this matter, we request the MWRRA to consider the failure of the high power committee, which is demonstrated in the previous point (Refer: point C. 5 in the previous section).

III. Comments on Respondent's Reply on Submission 4 of the Petitioner (Core Issue 3: Application of 11(f) for Review and Clearance of BOT Project)

a. No new points or arguments presented by the respondent in this reply

1. There is no new point or argument presented by the Respondent in this reply to justify its position on this issue.

2. Hence, we request the Hon. MWRRA to consider the points and arguments presented in this regard by the petitioner in its previous submissions and hearing, especially, related to the interpretation of the purpose as well as the letter of the Act (along with two legal opinions submitted in this regard).

b. Query Raised by Hon. Member of MWRRA

1. The Hon. Member, MWRRA raised a very valid query in the last hearing about the need for the economic review of the BOT, especially the investment done by the private developer. Since this query is not related to the response filed by the respondent, we shall be making this submission separately addressed to the MWRRA.

IV. Comments on Respondent's Reply on Submission 5 of the Petitioner (Core Issue 5: Review in Context of Backlog Issue)

a. Land Acquisition and Rehabilitation

1. There is no new point or argument presented by the Respondent in this reply to justify its position pertaining to this issue, except for the submission that a query regarding this was raised in the conference for developer and same was replied as per the decision.

2. The respondent has not provided any counter-argument regarding the issue of contradiction between the para 4 of Section 3.0 of the Privatization Policy GR (dated 15.07.2003) and the decision by MKVDC to procure funds for land acquisition and rehabilitation from private developer instead of government. Hence, we are left to assume that the respondent admits that this contradiction exists.

3. The respondent also has not countered the claim of petitioner that there is no official government document (a policy, a GR, or other) that provides legal / policy basis for the decision of the Respondent to use funds from private developer for land acquisition and rehabilitation in this project. Hence, we are left to assume that the respondent admits that there is no such official document or basis.

4. In absence of such an official document and in the context of the casual manner in which such a decision—that contradicts the policy on which the BOT process is said to be based—was announced, there is clear need for the MWRRA to step in and assess the authenticity, tenability, and implementation of this decision. This is because this decision has direct relation with the backlog issue, which is the legal responsibility of MWRRA.

5. This also demonstrates that there is complete lack of systematic thinking or procedures for making decisions on crucial matters. The Respondent, as per its own admission in the current reply, made ad-hoc announcement in the conference in this regard, even though the announcement contradicted the provision of the policy on which the BOT Process is said to be based. There is no mention of any effort to take this matter to the said high-power government committee.

6. In the background of such policy chaos and ad-hocism, it becomes necessary that the MWRRA steps in, in order to ensure that its authority is not encroached upon or discharging of its legal responsibilities is not affected by the actions of the respondent. This is especially true in the case of the backlog issue and sources of funds for land acquisition and rehabilitation.

b. Viability Gap Funding (VGF)

1. The petitioners have repeatedly pointed out that the Respondent will have to demonstrate that the funds provided from government sources, including through the VGF route, should be provided only after demonstrating compliance with the Governor's Directives regarding the regional backlog.

2. In response, the Respondent kept on promising that funds will be provided from government sources only after application of the backlog formula.

3. In this context, there is need that the MWRRA—which is entrusted with "special powers . . . for removal of (regional) backlog as per Governor's Directives"—explicitly asks MKVDC to demonstrate compliance with Governor's Directives, if and when MKVDC decides to make use of government resources for this project through any direct or indirect instrument, including VGF.

4. The direction by MWRRA in this regard should clearly require the MKVDC to demonstrate this compliance before actual allocation or disbursal of funds.

5. Further, compliance should be demonstrated with not only the formula for distribution of funds among the different regions, but with all the relevant provisions of all Governor's Directives issued until then.

6. There are other sections in the Governor's Directives, other than the allocation formula, that have direct relevance to this case. For example, the Governor's Directives (2008-09) directs that use of the government funds in Krishna basin should be primarily made for creation of storages (Refer: paras 7.5 and 7.12 (1)). However, 95% work of dam (i.e., storage related work) in the ND project has already been completed. Hence, use of government resources for non-storage related work in ND-BOT would attract these sections.

c. Funds from Private Developer

1. One of the major concern underlying the directives from Governor is "the lop-sided distribution of funds raised from market" which has "worsened the regional imbalance" (as mentioned in para 7.11 of the Directives for Annual Plan FY 2002-03).

2. In other words, the types of funds that would attract provisions of the Governor's Directives are not restricted only to government's own resources or its market borrowings. But, the types of funds that attract Governor's Directives would include even the resources raised by making use of any of the 'finance-related capabilities' of the state government to raise financial resources.

3. These 'finance-related capabilities' of the state government that are relevant for raising finances not only include capabilities to incur expenditure but also capabilities to endure the losses due to revenue forgone, especially the revenue which could be used to ensure return on investment already made by the government in the project.

4. For example, funds of private developers could be attracted by employing different financial arrangements or innovations, such as offering of direct or indirect tax benefits, subsidies, guarantees of any sort (including revenue or profit guarantee) as well as risk sharing arrangements or revenue sharing arrangements of different sorts. All these involve and affect 'finance-related capabilities' of the government that are discussed above.

5. In this light, the MWRRA—instead of relying on the assurance of MKVDC— should investigate whether the raising of resources from private developer would be in line with the proper interpretation of the Governor's Directives, and ensure that the means employed to attract private funds do not constitute clever ploys to avoid scrutiny by MWRRA about the compliance with Governor's Directives.

6. Hence, there is need for diligent scrutiny by MWRRA of all details of the different terms and conditions on the basis of which private developers' funds would be attracted by MKVDC. This scrutiny needs to be first done before the deal with the developer is finalized. Such scrutiny would also be necessary whenever in future the government make use of its 'finance-related capabilities' to attract or retain funds from private developers.

V. Comments on Respondent's Reply on Submission 5 of the Petitioner (Core Issue 5: Cognizance of MWRRA)

1. There are no new points or arguments presented by the Respondent in this reply to justify its position pertaining to this issue, except the claim by respondent

that the EOI booklet states MWRRA as main act for implementation of the BOT proposal.

2. This claim has been answered by the petitioner in its earlier submission (refer: para 3.4, 3.5, 3.6, and 3.7 Petitioner's Submission Note 2 dated 3rd March 2008).

VI. Comments on Respondent's Reply on Submission 5 of the Petitioner (Core Issue 6: Third Party Intervention)

1. The respondent seems to be assuming in its reply that Petitioner (Prayas) seeks participation of different stakeholders or MWRRA in the bidding process. This is a wrong assumption of the respondent. Prayas seeks participation of different stakeholder in the process of review and other proceedings initiated by MWRRA in relation to the Neera-Deoghar-BoT (ND-BOT) Project.

2. If MWRRA decides to review ND-BOT in a participatory manner it will not impinge on the administrative control of the government and neither will it create a dual administrative control as envisaged by the respondent.

3. It should be noted that MWRRA is an independent regulatory body in water sector created by a considered action of the legislature of enacting a law and hence the process of review or any other action undertaken by MWRRA should not be considered as effort to create dual administrative control.

4. Though assessment and implementation of ND-BOT is within the purview of administrative control of the Government (as submitted by the respondents), it should be noted here that review and regulation of water resources project including ND-BOT is within the purview of the regulatory oversight by MWRRA with the legal sanction provided through the law enacted by the legislature.

5. Such a function of MWRRA cannot be substituted by a Government Committee. Hence, there is no legally valid basis for rejecting the proposal for review by MWRRA in a participatory manner by involving various stakeholders including the petitioners.

B. Submission Two: Brief Summary of Arguments and Prayers

I. Resolution of Contradictions

Petitioner's Arguments	♦ Contradictions between: (a) the privatization policy GR (dated 15.07.2003) and MWRRA Act/ MMISF Act (b) the EOI booklet and MWRRA Act/ MMISF Act ♦ The Committee appointed by the government to look into matters of BOT cannot obviate or substitute the need for demonstration of contradictions before the MWRRA Note: For the details of the argument, please refer the submission made by petitioners in this regard, inter alia, original petition (para 6), submission 3 dated 29th May 08 (para 1) and submissions made during the hearing dated 14th August 2008.
Respondents' Response	♦ Most contradictions accepted ♦ Admitted that all contradictions will be resolved in the bid document ♦ Matters related to resolution of contradictions will be handled by the committee appointed by the government, and hence there is no need for separate demonstration before MWRRA Refer: Respondent's response dated 25th April 2008 (para 9-iv, 9-vii, 5, 3) and response dated 29th July 2008 (reply on core issue 2) as well as petitioners' submission 3 dated 29th May 08 (para 2, 3)
Petitioner's Prayers	1. Bring on record the admissions done by the respondent on the issue of these contradictions by including the same in the final order by Hon. MWRRA. 2. Direct the respondent to demonstrate the resolution of contradictions before the Hon. MWRRA and satisfy MWRRA as well as the petitioners on the issue. 3. In the light of the initiation of EOI process based on the Privatization Policy which is in contradiction of the MWRRA and MMISF Acts, the petitioners also request the MWRRA to issue directions to the respondent to make no further progress in the BOT process, unless all contradictions are resolved and the same is demonstrated before the MWRRA. 4. Since, MWRRA has a clear mandate on issues related to water tariff and entitlements/ water distribution, we request the MWRRA to direct the respondent to submit to the MWRRA for detail review and approval of all those matters related to the bid document and contractual agreement (including any future revisions in agreement) that are directly or indirectly related to tariff and water distribution.

II. Application of Section 11(f) of the MWRRA Act to ND-BOT Project

Petitioner's Arguments	♦ Privatization of irrigation project in ND will bring many changes affecting the economic, financial and other aspects of public interest. Hence, MWRRA need to review the project by applying the powers vested upon them by section 11(f) of MWRRA Act. ♦ The purpose of the Act as well as the interpretation of the wording of the particular section of the Act strongly demonstrate that the MWRRA has powers to review new as well as ongoing project (such as the ND project). In fact, MWRRA is also expected to "perform (this) function" (refer: Section 11). ♦ The public interest issues related to economic, financial and environmental aspects of the privatization project demands an independent regulatory body like MWRRA to review the project. Note: For the details of the argument, please refer the submission made by petitioners in this regard, inter alia, petitioners' original petition (para 9 to 13), submission note 3 dated 3rd March 08 (para 1 to 8), submission 4 dated 29th May 08 (para 3) and two legal opinions submitted and submissions made during the hearing dated 14th August 2008.
Respondents' Response	♦ Particular section is applicable only for new projects. ND project is administratively approved project and hence it is an old project. Section 11 (f) cannot be applied to this project. ♦ There are no economic, hydrological and environmental changes expected in the ND-BOT project. Hence, no need for review. Refer: Respondent's response dated 25th April 2008 (para 9-ii) and response dated 29th July 2008 (reply on core issue 3)
Petitioner's Prayer	1. Apply section 11(f) of MWRRA Act for review of privatization of ND project and direct the respondent to submit all matters related to the privatization process of ND project to MWRRA for review and approval at the stages of bid document, actual agreement, and during any future renegotiation of agreements with the private developer.

III. Review under Backlog Issue

Petitioners Arguments	♦ The issue of backlog removal arises in the case of ND-BOT in light of the various costs and liabilities accruing to the government (such as cost of land acquisition and rehabilitation, VGF, liability due to raising resources from private developer) and use of government's 'finance-related capabilities' for the privatization project situated in a non-backlog area. Note: For the details of the argument, please refer the submission made by petitioners in this regard, inter alia, petitioners' submission note 4 dated 3rd March 08 (para 5) and submission 5 dated 29th May 08 (para 2) and submissions made during the hearing dated 14th August 2008.
Respondents Response	♦ Though as per BOT policy, the land acquisition should be done through Government funds, the same will be done through the funds procured from private developer in the case of ND project. Hence, there will be no cost to government and no implications on the backlog issue. ♦ VGF if required will be sourced from the funds made available to MKVDC from government after applying backlog formula. ♦ Funds invested by private developer are not resources raised from market and hence particular Governor's Directive is not applicable. Refer: Respondent's response dated 25th April 2008 (para 5, 9-vi) and response dated 29th July 2008 (reply on core issue 4)

(contd..)

(...contd.)

Petitioner's Prayer	1. Direct the respondent to submit all documents having details related to the source of funds for the ND project including the various direct and indirect liabilities to the government for review by the MWRRA. 2. Direct MKVDC to demonstrate compliance with Governor's Directives, if and when MKVDC decides to make use of government resources for this project through any direct or indirect instrument, including VGF. 3. Direct MKVDC to demonstrate compliance with not only the formula for distribution of funds among the different regions, but with all the relevant provisions of all Governor's Directives issued until then 4. Direct MKVDC to submit all details of the different terms and conditions—before the deal with the developer is finalized—on the basis of which private developers' funds would be attracted,. 5. Direct MKVDC to demonstrate this compliance at various stages, including finalization of the bid document, finalization of agreement, and any renegotiation of agreement.

IV. Inadequate Cognizance of MWRRA by Respondent in EOI process

Petitioner's Arguments	♦ The respondent did not recognize powers, functions, or responsibilities of MWRRA in the advertisement for EOI. ♦ There are significant number of instances and examples of inadequate cognizance of MWRRA Act in the content as well as the process of the EOI. ♦ Though the respondent admits that the EOI booklet takes cognizance of MWRRA Act (even if the same is not mentioned in the advertisement of EOI), the respondent fails to provide justifiable reasons for various instances and examples of the inadequate cognizance cited by the petitioners (even after giving adequate time period for response). Hence, the respondent is not serious on this matter. Note: For the details of the argument, please refer the submission made by petitioners in this regard, inter alia, petitioners' original petition (para 3 to 8), submission note 2 dated 3rd March 08 (para 1 to 9) and submission 6 dated 29th May 08 (para 4 and 5) and submissions made during the hearing dated 14th August 2008.
Respondents' Response	♦ Though the advertisement does not mention MWRRA Act, the EOI booklet takes cognizance of MWRRA Act. Refer: Respondent's response dated 25th April 2008 (para 3) and response dated 29th July 2008 (reply on core issue 5)
Petitioner's Prayer	1. Prayers given in submission 6 dated 29th May 08 in para 5.

V. Participation of Stakeholders in Future Proceedings

Petitioner's Arguments	♦ Prayas and other interested organizations and individuals need to be included as parties to the process of assessment/review by MWRRA in any future proceedings related to ND-BOT project. ♦ Participation of Prayas and other parties is sought in the capacity of a stakeholder and not as third party. ♦ Participation is expected in the process of review or any other proceedings of the MWRRA related to ND-BOT project and not directly in the bidding process by MKVDC. This will not create any dual administrative control as envisaged by the respondent. ♦ Though assessment and implementation of ND-BOT is within the purview of administrative control of the Government (as submitted by the respondents), it should be noted here that review and regulation of water resources project including ND-BOT is within the purview of the regulatory oversight by MWRRA. Note: For the details of the argument, please refer the submission made by petitioners in this regard, inter alia, petitioners' submission note 3 dated 3rd March 08 (para 9.2) and submission 7 dated 29th May 08 (para 3) and submissions made during the hearing dated 14th August 2008.
Respondents' Response	♦ There is no need for involvement of any third party. MWRRA is requested to avoid setting such precedents of involving third parties. ♦ Government has the administrative control for review and approval of the BOT. Involvement of agencies other than bidders not allowed in government bidding. The Committee is competent to look into all issues. ♦ Involvement of other parties may lead to dual administrative control on process of BOT. Refer: Respondent's response dated 25th April 2008 (para 8) and response dated 29th July 2008 (reply on core issue 6)
Petitioner's Prayer	1. Give clear directions to all parties concerned that participation of Prayas and other such stakeholders is required and will be undertaken in all proceedings of the MWRRA including all future proceedings related to ND-BOT project.

C. Submission Three: Response to Query Raised by Hon. Member, MWRRA on Need for Economic Review in ND-BOT Project

1. The Hon. Member, MWRRA raised a crucial question in the last hearing about the need for economic review by MWRRA and whether it will lead to taking up the responsibility of the executive function by MWRRA. Since this a very crucial question pertaining to this subject matter of application of section 11(f) of MWRR Act, we would like to submit our position on this matter.

2. The initial economic review of the irrigation project at the time of inception of the project typically comprises the cost-benefit analysis with respect to the social and economic benefits (like productivity gain, food production, local economy boost, contribution to GDP) and associated costs (financial costs, environmental, social, and other costs). This type of initial economic review is required and adequate at the inception stage of the project.

However, in the case of the ND-BOT project, there is a need for fresh economic review especially in light of the newly added actor, viz., private developer who will incur major costs and secure significant benefits. This factor is bound to significantly change the distribution of economic costs and benefits among the stakeholders involved in the original project design for which the economic review was carried out.

This significant change in distribution of economic costs and benefits calls for fresh economic review to assess the possible impacts of entry of private developer on interests of different stakeholders, on the project as a whole, on the economy of the region and the state.

It should be noted here that privatization is a highly contentious issue as it involves potential conflict between public interest and private interests of the private developer.

It is well known that this issue becomes more contentious in water sector mainly due to the peculiar characteristics of the sector (such as natural monopoly, public good, sunk investment with no path of return). In these circumstances, the need for economic review of the possible impacts of the privatization of irrigation project like ND project becomes necessary.

3. The need for economic review could also be argued on the basis of the significance and magnitude of the interests of different stakeholders involved in the BOT process. This could be demonstrated through the stakeholder analysis presented in the following chart (on next page):

Key Stake-holders		
Government (MKVDC/ Government Committee/ Government)	**Water Users and their Association from Minor to Project-level**	**Private Developer and Operator**
Major Stakes of the Key Stake-holders		
• A major investor in project (having spent resources on 95% of the dam work) • A long-term owner of the water project • Accountable to the people for delivery of water services as a necessary public good for life and livelihoods as well as for prudent investment and expenditure of financial resources	• Partial owners and operators of the project (as per MMISF Act) • Long-term users of the water system who will pay for the services • Dependents of the water system on a long-term basis (earning livelihoods based on the water services)	• A major investor and profit seeking body • An external stakeholder with stakes limited to the BOT period
Reasons for Economic (Cost-Benefit) Review		
• Ensuring adequate share of revenue for investments made, expenditures incurred, and liabilities created • Minimizing the amount of subsidy to private developer in different forms, including VGF • Ensuring quality of construction (adequate capital investment by developer) and proper maintenance of infrastructure (adequate O&M expenditure by developer) from beginning till the end of the contract with developer (i.e. throughout the life-cycle of the contract) • Risk coverage in cases like cost overruns, time overruns, project failure, contract abandonment, legal disputes, monopolistic behavior of private developers	• Minimizing the cost of services • Maximizing the quality of services delivered by private developers • Ensuring quality of infrastructure maintained and handed over for operation after or during the BOT • Ensuring quality and timely services even to groups willing but incapable to pay fully • Ensuring quality and timely services in comparison with the other bulk buyers or profit earners or high-end customers of the private developer • Risk coverage in cases of time delays in project and services, cost escalations affecting service costs, project failure/ abandonment/ disputes, upward revisions in service cost, downward revisions in service quality standards	• Ensuring adequate demand for services • Ensuring revenue generation from services (capacity and willingness to pay) • Managing business within the legal and policy frameworks and contradictions vis-à-vis business model • Maximizing the profit margins based on higher pricing and lower capital investments and O&M expenditures OR higher investments and O&M costs (for cost-plus regulation) • Ensuring imposition of quality norms that are achievable and financially feasible for construction, maintenance and service delivery • Risk coverage for cost-time overruns, disputes, demand failure, input failure, inability to pay, contract cancellation, imposition of additional norms

From the above stakeholder analysis presented in the chart, it is clear that there may be strong differences in interests of the parties involved. Such conflicting interests between the private and public bodies can be managed only through proper review and regulation by an independent regulatory authority.

4. Thus, the project with participation of private developer requires economic and financial arrangements that have robust balance of interests of all the key stakeholders. In absence of such a balance, major economic inefficiencies or irregularities can creep in the project. Hence, an independent review to ensure such a balance is necessary before the initiation of the project. Following are some examples of the probable economic inefficiencies or irregularities that may occur in absence of proper review and regulation:

- Cost underestimation by the private developer during the process of bidding to ensure selection in the bidding process, and then relying for profits on renegotiation of costs after the agreement is made
- Lowering of capital investments and O&M expenditures to enhance profit margins.
- Ignoring the low-end, small-scale or small-numbered service-users, and focusing on the high-end, bulk users to boost profits.
- Projecting higher costs to gain sanction for higher selling price of service.
- Imposing externalities by private developer: Social externalities like non-servicing of low-end service users and environmental externalities such as overexploitation of groundwater or other natural resources.
- Neglect on capital investments as well as O&M expenditure towards the end of the contract leading to deterioration of the assets at the time of their transfer.
- Reduction in incentive for efficiency and service quality due to reliance on government support and lack of competition (monopoly abuse).
- Threatening to withdraw along with capital to gain bargaining strength (monopoly abuse)

The impact of such economic inefficiencies or irregularities could be so large that it could ultimately lead to failure of the project. The water users which form the main group of stakeholders for whom the project is developed are worst affected by such economic inefficiencies. This leads to adverse impact on the local as well as the state economy.

5. We also would like to point at the roles played by various stakeholders in the proposed BOT process. It should be noted that the MKVDC, WRD, Govt. Committee are all stakeholders in the ND project whereas MWRRA is an external independent regulation agency. Hence, though the Government Committee or the Government itself can undertake review of the project it cannot substitute or obviate the need for review and regulation by an independent regulator formed through legislation.

6. Preparing the bid document is a executive function carried out by MKVDC (Government agency). It is expected that the government would prepare the bid document after due and balanced considerations of interest of the government, the private developer, farmers and other stakeholders.

However, the government is one major stakeholder in the project arrangements, and hence there is need for review of the proposal prepared by the government through an independent regulatory agency.

Thus, the function of the MWRAA is to review the proposal of the government (presented in the form of various documents) to ensure that the due and legitimate interests of all the stakeholders are protected and the distribution of costs and benefits among different stakeholders is not disproportionate or skewed. This is necessary to ensure effective, efficient, and sustainable functioning of the project.

Thus, the MKVDC will have full control over the executive function of proposal in the form of preparing different documents (such as Detailed Project Report, Bid Document, Contract / Agreement with Private Developers). As against this, the MWRRA will restrict itself to review of the proposal from the perspective of an independent regulator. Thus, there is no scope for encroachment on each other's functional territories.

7. It is found that the privatization process such as BOT undergoes through a process of negotiation and renegotiations in not just the stage of initial bidding but throughout the life-cycle of the project. Such negotiations alter the distribution of costs and benefits among stakeholders. Hence, the review and regulation mechanism to be set by MWRRA should be activated not just at the pre-bid or bidding stage but also at later stage whenever there are renegotiations of old terms or imposition of new terms for the private developer.

8. The above analysis on the need for economic review of the ND-BOT tries to clarify the questions raised by the Hon. MWRRA on this subject. We have already submitted the legal basis for the need for review of ND-BOT by MWRRA under Section 11(f) of the Act. The analysis presented above provides the substantive basis for the demand of economic review, which is the core of Section 11(f) of the Act.

In the context of both the legal as well as substantive arguments provided by petitioners we pray to the Hon. MWRRA to use the powers given by the Act for initiating review and regulation of the first privatization project in irrigation under BOT. Such a review and regulation will not only ensure sustainability of the project but it will also provide confidence and a model framework for any such future initiative.

D. Submission Four: Procedural Aspects

1. The petitioners have already submitted their adverse opinion on the long delay by the respondent in filing comments after the last hearing on 29th May 2008 (almost two months after the hearing).

The issue now becomes more critical in light of the cursory response submitted (3.5 pages with wide spacing) by the respondent with hardly any new arguments (please refer petitioner's comments dated 14th Aug 2008).

This raises doubts on the need for the respondent to delay the procedure for two months for the kind of response submitted. We request the MWRRA to take due cognizance of the matter and pass strictures against the behavior of the respondents. This is necessary in order to curtail repetition of such behaviour in future.

2. We request the MWRRA to take due cognizance of all written submissions made by the petitioners and use the same for consideration before passing the order on this matter.

3. We request the MWRRA to ensure that systematic documentation of the entire process of petition be done, so that the same is easily accessible for future reference.

We also request to include all our written submission as part of this documentation.

As part of measure for transparency, the documentation be brought in public domain by making it available for anyone who is interested both in form of hard copy (available from the office) and in form of electronic copy (available from the website).

This can be developed into a proper system of registry of all documents available with MWRRA that can be accessed by any interested party.

4. We request the MWRRA to ensure that the order passed by MWRRA is a reasoned order that would contain detailed discussion of all the points raised by petitioners and respondents as well as the detailed justifications of each decision taken or not taken by MWRRA on every point raised.

In this regard, we want to bring to the kind notice of the MWRRA that the concluding order on this petition is going set many precedents in this sector and hence need to set very high standards for the future orders of regulatory commissions in the other states.

We also wish to bring to the notice of MWRRA that, this being the first order of the first regulatory authority in the water sector in the country, it will be studied with great interest and will be subjected to analytical and media review.

Further, as the issue involved is highly controversial and contentious, there is great chance that the order will also be subjected to judicial review.

5. We feel that the process of first petition to the MWRRA has been a learning experience for all parties involved. The valuable lessons that emerge from the proceedings be used for developing formal regulations for conducting of business of the authority.

Among other things, the regulations should cover aspects such as the detailed formats for written petitions, formats for comments filed by various parties, time limits for each stage, details of the process of recording of proceedings, the process and guidelines for preparing orders, and, most importantly, the application of principles of participation, transparency and accountability in the process. It is hoped that Prayas and other stakeholder would be allowed to actively participate in the process of making these regulations.

■■■

3.6 Order by MWRRA

The final decision on the petition filed by PRAYAS was declared by MWRRA in the form of a order dated 10th November 2008. The 20-page order was in form of a 'reasoned' order, which comprised the discussions and rationale behind the decision by MWRRA. The discussions and rationale presented in the order represents the substantive position taken by MWRRA on various aspects related to the petition. The main operational part of the final directions given by MWRRA can be found in the last section of the order. The order has been reproduced verbatim in the following paragraphs.

3.6.1 Introduction Page of the Order

Before the Maharashtra Water Resources Regulatory Authority World Trade Centre-1, 9th Floor, Cuffe Parade, Mumbai-400 005. Tel. No. 022 22 152019, Fax 022 2215 3765. E-mail : mwrralibrary@yahoo.co.in

Case No. 1 of 2008

In the matter of

Petition filed by PRAYAS, Pune seeking directions upon Maharashtra

Krishna Valley Development Corporation regarding Expression of Interest for Completion of Nira-Deoghar Irrigation Project on Build, Operate, Transfer (BOT)basis.

Shri Ajit M. Nimbalkar, Chairman
Shri A. K. D. Jadhav, Member (Economy)
Shri A. Sekhar, Member (Engineering)

Dr. Subodh Wagle
Trustee and Group Coordinator

Sh. Sachin Warghade
Senior Research Associate
Prayas B-21, B K Avenue, Survey 87/10 -A, New D.P. Road, Azad Nagar, Kothrud, Pune -411 038.

....Petitioner

Versus
The Executive Director
Maharashtra Krishna Valley Development Corporation
Sinchan Bhavan, Barne Road, Mangalwar Peth, Pune 411 011

....Respondent

3.6.2 Main Body of the Order

ORDER Dated : 10th November 2008

1. Prayas, Pune, a registered charitable trust, filed a petition on 18-1-2008 objecting to the issuance of an advertisement by the Maharashtra Krishna Valley Development Corporation ("MKVDC") on 12-9-2007 calling for Expression of Interest ("EOI") for selection of Developers/Consortiums for completion of the Nira-Deoghar (ND) Irrigation project on Build-Operate-Transfer (BOT) basis. The objection essentially challenges MKVDC' s action of issuing the said advertisement without the due involvement of this Authority in terms of its powers and functions specified under the Maharashtra Water Resources Regulatory Authority Act, 2005 ("MWRRA Act"). Prayas has alleged that in the process of inviting EOI, MKVDC has not divulged the fact that the MWRRA Act is in force and that the Authority has wide and diverse powers to regulate all matters concerning water resources within the State of Maharashtra and hence all activities relating to Nira-Deoghar project including the completion and management of the project on BOT basis, are required to be regulated by the Authority.

2. It is averred in the petition that while issuing the above mentioned advertisement, MKVDC has relied upon a Government of Maharashtra G.R. No. BOT/702 (425/2002)/MP-1 dated 15-07-2003. It is stated that Section 2.1 of the annexure of this GR provides that "for any reasons, if there is any change in the expected (as planned during the contract) availability of water in the project then the developers shall have the powers to change the standards for irrigation and other water supply ". It is also pointed out in the petition that the aforesaid GR at Section 2.2 of its annexure provides that "water charges will be levied to the project beneficiaries and the water users associations on the basis of the existing norms prevalent at that time. If there is a need to change these water rates, then there shall be the provision in the contract / tender with the

developer for increasing the water charges to maximum 10% of the fixed charges after discussion with the beneficiaries. " In the submission of Prayas, the aforesaid stipulations in the GR cannot be given effect to without the approval of the Authority. Prayas has also contended that since the Nira-Deoghar project was predicated on certain technical, financial and economic components as well as project design, MKVDC cannot unilaterally permit any developer to effect any drastic or fundamental revision or change in the same. This will consequently affect the (i) economic, financial and ecological interests of a range of stakeholders, State Government and the public; and (ii) socio - economic development of the region. For these reasons, the Nira-Deoghar Project cannot be treated as an old project but should be given the status equivalent to that of a new project. And therefore, this Authority should clearly have a role in the process of issuing advertisement, tenders, selection and award of contract, etc.

3. In essence, it is the contention of Prayas that the aforesaid advertisement calling for EOI is not only misleading but also bad in law for the reasons aforesaid.

4. Subsequently, Prayas filed an amendment to the petition on 31.1.2008 supplementing its prayers made in the petition essentially to seek an opportunity of hearing in the matter and a direction upon MKVDC to file its reply in the matter.

5. The Authority heard the parties on 26-2-2008, 3-3-2008, 29-5-2008 and on 14-8-2008. Shri. Subodh Wagle, Shri. Sachin Warghade and Shri. Vivek Jadhavar, represented Prayas. Shri. D.D. Shinde, Shri. H. Y. Kolawale, Shri. R. R. Shah represented MKVDC. Shri. P.K. Pawar represented Nira Deogarh project. In the course of the hearings both the Petitioners as well as the Respondents made a number of submissions through their affidavits and their oral and written arguments.

6. The main points made by the Petitioner in the Petition and in the various written and oral submissions are :-

(i) Cognizance of the Authority has not been taken and its powers and functions have not been divulged in the EOI advertisement nor in the EOI booklet distributed to those who responded to the advertisement. References to MWRRA Act & Maharashtra Management of Irrigation Systems by Farmers Act 2005 (MMISF Act) in the EOI booklet are short and cursory and the linkage between the two Acts is not spelt out. There was no mention in the EOI advertisement about sale of EOI booklet.

(ii) Intervention of the Authority is needed at this stage because the EOI represents serious and concrete steps towards selection of a Developer and non disclosure of the Authority's pivotal role at this stage to the bidders will have many adverse consequences for the selection process as well as the BOT project

(iii) Government ResoIution (GR) dated 15-7-2003 is the fundamental basis on which the EOI has been issued. This administrative order was issued before the enactment of the MWRRA Act 2005. There are dichotomies in the GR and the Act and hence the GR will first need to be amended in the light of the Act. The major dichotomies are:-

(a) The GR permits the private developer to make changes in the quantum of water to be made available to various users from the Project. Under Section 11 (a), (c), (g), (h), (l) and (k) of the MWRRA Act the authority to determine water entitlements vests with the Authority and the developer cannot be allowed to exercise the powers of the Authority

(b) As per the the private developer can increase the water tariff by 10% beyond the existing rates whereas under section 11 (d) and 11 (u) of the MWRRA Act it is the Authority which has to determine revisions in water tariff.

(iv) There are other contradictions between the GR and MWRRA Act that need resolution, namely:-,

(a) The GR permits recovery of capital cost through water tariff whereas vide section 11 (d) of the Act restricts water tariff to O&M recovery only.

(b) The GR seeks investment in both backlog and non-backlog areas while the Authority is required to prioritize backlog removal,

(c) The GR ignores WUA participation in planning and construction which is stipulated by the MMISF Act which in turn is linked to the MWRRA Act in terms of section 65 of the MMISF Act ;

(d) Neither the GR nor the booklet states that the private promoter shall invest in land acquisition and R & R although in its written submission the Respondent has stated that the required funds for acquisition and R &R would be obtained investors.

These matters need to be resolved and until then all further action needs to be halted;

(v) MKVDC should obtain project clearance from the Authority under Section 11 of the Act in view of likely changes in the project parameters the originally envisaged project parameters after the project is converted to a BOT project from a purely government funded project. Legal opinions of Shri. Prashant Bhushan Advocate, Smt. Gayatri Singh, Advocate and Shri. Mihir Desai, Advocate have been submitted in support of this argument.

(vi) The issue of Viability Gap Funding has not been addressed. This has implications for clearance of backlog as per Governor's Directives which the Authority is bound to follow;

(vii) PRAYAS and other interested stakeholders should be allowed to participate in the privatization process.

7. MKVDC filed its reply on 25-4-2008 refuting the allegations made by Prayas regarding the contents and the manner in which the aforesaid EOI advertisement was issued. MKVDC has also denied the allegation that the EOI advertisement was not transparent. It has been stressed that the EOI advertisement has been open and transparent. Furthermore, MKVDC has submitted that the EOI advertisement should be considered as a short tender notice where only MKVDC is involved. It has been explained that the stipulations appearing in the EOI advertisement are supposed to be altered / modified in any case as per the requirements of various statutes and regulations which would be reflected in the final document based on which the offers are proposed to be accepted. MKVDC has also submitted that the role of the Authority will come at a later stage in order to check whether there is any kind of conflict between the aforesaid Government of Maharashtra G.R. dated 15-07-2003 and the MWRRA Act. It has been submitted that the final bid document will address these issues and will be free from all ambiguities. It has been further submitted by MKVDC that at this stage there is no cause of action and calling for intervention of this Authority is unwarranted.

Besides the above submissions, the other points made by MKVDC in its reply and in the various written and oral submissions are as follows:-

(i) Assessment of the viability of the BOT project is the prerogative of the Government of Maharashtra and is well within the administrative competency of the High Level Committee formulated under the Chairmanship of Chief Secretary vide GR No. BOT 702 (425102) MP-1 dated 21-3-2006. The Nira-Deoghar project is an old project administratively approved by the Government in May 1984. At present, the construction of the dam is more or less complete and construction of canal works is in progress. The project has already been started after getting administrative approval of the State Government and the storage work is nearly complete. Hence, the proposal contained in the advertisement calling for EOI to complete the balance works on BOT basis will not constitute it as a new project under Krishna River Basin. Thus, not being a new project, it is outside the scope of Section 11 (f) of the MWRRA Act which deals with new projects.

(ii) MKVDC has denied the contention of Prayas that MKVDC have admitted during the hearings that they would submit the advertisement / EOI to the Authority for assessment / verification of conformity with the MWRRA Act and/or for approval of economic and financial viability of the proposal. Therefore, MKVDC shall not submit these matters before the Authority because they are the prerogative of the Government of Maharashtra. However, MKVDC shall address all the concerns raised by Prayas regarding compliance with MWRRA Act and MMISF Act, while finalizing the bid documents.

(iii) The High Level Committee under the Chief Secretary constituted vide GR dated 21-3-2006, will look into contradictions, if any, between the GR and the MWRRA Act pointed out by the Petitioner and will finalise the terms & conditions of the BOT contract and decide upon the acceptance of tender offer. However, the aforesaid Government of Maharashtra G.R. dated 15-07-2003 will need to be amended because of the stipulations in the MWRRA Act regarding fixation of water rates and entitlements during drought period. This fact will be brought to the notice of the Government for necessary action. On these issues the Authority will certainly be approached.

(iv) In response to the EOI advertisement, four prospective developers approached the Executive Engineer and were issued a booklet giving details of the project (EOI booklet). These are Ashoka Builders, Pune, Gammon Infrastructure Limited, IVRCTL Infrastructure Projects Ltd. and IL&FS, Mumbai. This EOI booklet lists all applicable Laws and Manuals and the MWRRA Act, 2005 appears first in the list. Further a conference with Prospective Developers was held on 15th October 2007 under the chairmanship of the Executive Director, MKVDC when the developers raised various queries relating to water charges, cropping pattern, water availability etc. Prospective Developers were apprised of the point that water rates are to be

fixed by the MWRRA. The dialogue with the developers rests at this stage. The selected Developer would be required to follow the provisions of the MWRRA Act on fixation of water rates. Also, MKVDC has acknowledged that the Authority has the right and power relating to the distribution of water and determination of entitlement.

(v) Investments made by a private developer are in the category of non budgetary resources from the market and hence Governor's directives on backlog will not be applicable.

(vi) Expenditure on land acquisition and on the rehabilitation of project affected persons will be the responsibility of the private developer.

(vii) Assessment of project viability and getting the work completed through the BOT process is within the purview of the State government and thus there is no question of involvement of other agencies like PRAYAS.

(viii) The Petition as such is not admissible and should be dismissed on the above grounds.

8. Prayas submitted its rejoinder to the submissions made by MKVDC during the hearing on 29-05-2008. In brief, Prayas has submitted as under:-

(i) The issue under consideration concerns public interest and therefore Prayas seeks participation as a stakeholder and not as a third party.

(ii) The continuous change in the objectives for issuance of the EOI advertisement as stated by MKVDC throughout the proceedings demonstrates lack of application of mind on such a critical issue as well as lack of systematic efforts to validate the legality of the actions and statements.

(iii) MKVDC has already acknowledged that there are many provisions in the EOI advertisement and in the aforesaid GR that are in contravention of the MWRRA Act and MMISF Act, which it has promised to resolve.

(iv) The Governor's directives should be adhered to particularly with regard to financial resources and funding.

(v) Though assessment and implementation of Nira-Deoghar BOT is within the purview of the administrative control of the Government (as submitted by MKVDC), it should be noted that review and regulation of ND-BOT is within the purview of the regulatory oversight by the Authority with the legal sanction provided through the law enacted by the legislature. In the ND-BOT project there is a need for fresh economic review especially in the light of the newly added actor, viz., the private developer who will incur major costs and secure significant benefits. This significant change in distribution of economic costs and benefits calls for fresh economic review by the Authority to assess the possible impacts of entry of private developer on the project as a whole. Such a function of the Authority cannot be substituted by a Government Committee. Hence, there is no legally valid basis for rejecting the proposal for review by the Authority in a participatory manner by involving various stakeholders including Prayas.

9. Subsequently, MKVDC filed further written submissions which, in brief, state as follows:-

(i) While undertaking the bidding process wide publicity will be given in order to give opportunity to interested parties.

(ii) The Chief Secretary's Committee will look into and resolve contradictions, if any, between the GR dated 15.7.2003 and the MWRRA Act, 2005.

(iii) The funds required for land acquisition and rehabilitation are to be obtained from the private developer. If viability gap funding is required, the same will be met from the funds made available to MKVDC by the Government as per the Governor's formula which is based on backlog components. The Directives issued by the Governor of Maharashtra vide section 7.11 and section 9(1) for the Annual Plan 2002-03, will not be applicable in this case.

10. Having heard the parties and after considering the material placed on record, at the outset it is necessary to set out the back ground to Public Private Partnership in the Irrigation Sector. The large number of incomplete irrigation projects and the paucity of funds to complete them have been engaging the attention of the State Government. As on March 2007, 1246 irrigation projects with a balance cost of about Rs.36,630 crores and a balance potential of 3.5 million ha were incomplete. Participation of the private sector with the State government was mooted in 2003 in the State Water Policy for the financing and implementation of these water projects as an innovative measure to remedy the situation. A Government resolution was also issued vide GR dated 15-7-2003 laying down the guidelines for private sector participation on BOT basis for the completion of irrigation projects. The State Government initiated the BOT process by offering the Nira-Deoghar project on river Nira in Bhima sub basin of

Krishna valley to the private sector for its completion. The project in Bhor taluka of Pune district has a planned annual utilization of 12.981 TMC to irrigate 43050 ha ICA. While the storage works have been more or less completed, work on the canal system is lagging behind. The latest estimated cost of the project is Rs. 1491.22 crore of which the expenditure till July 2008 was Rs. 467.58 crores.

11. The Authority is of the view that on the basis of the various submissions that have been made by the parties, the following issues are required to be framed for rendering a comprehensive decision:-

(i) Whether Nira-Deoghar project which is already an administratively approved project requires clearance of the Authority under Section 11 (f) of the MWRRA Act before it is taken up for completion through the BOT process?

(ii) In view of the contentions raised by the Petitioner, is it necessary to interfere with the EOI advertisement either at this stage or at all?

(iii) Whether the GR dated 15-7-2003, which was issued before the MWRRA Act came into existence, needs revision to bring out the role of the Authority in the BOT process in the light of the duties and powers vested in it in the Act?

(iv) Whether investment in Land Acquisition and R&R is to be made by the private entrepreneur or by the Government? What is the implication of this for project viability?

(v) Whether Governor's directives in respect of removal of backlog are applicable to investment in non-backlog areas through the BOT model proposed for Nira-Deoghar?

(vi) What is the extent and manner in which stake holders and NGOs need be involved in the BOT process?

12. Examination of issues by the Authority:-

(i) As regards the first issue, when the MWRRA Act was formulated in 2005, notwithstanding the fact that a GR of 15-7-2003 on BOT was in place, Section 11 (f) of the Act was envisaged to deal with projects implemented with State Government funds. The term 'Economic' in Section 11 (f), in the context of usual government financed projects, primarily means the usual cost - benefit analyses carried out for such projects viz. annual cost to Government vis-a-vis annual benefits to farmer and the economy in terms of increase in productivity and agricultural production of agri-produce. In BOT proposals the BC ratio would be based not only on socio-economic parameters but also on the revenue model, viz, the revenue streams that the private promoter is projecting to recover his investment. The acceptability of these revenue streams would depend on whether they reduce in any way the benefits that would have accrued to the farmers had the project been a routine government funded project. The acceptability would also depend on whether these revenue streams, unrelated to water charges, are capable of meeting capital costs and yielding appropriate rates of return so as not to affect the operational efficiency of the system. This is important because the Act clearly enjoins upon the Authority the duty to ensure that water charges are so determined as to recover the cost of operations and maintenance only. Hence para 1.2 of the enclosure to GR dated 15-7-2003, which states that feasibility of the project be examined as per existing norms, will need to be revised.

In so far as the Nira -Deoghar project is concerned, the Respondent has argued that the state has already expended a substantial sum on the project and the work of the storage reservoir is close to completion. When the project was originally undertaken the project was administratively approved on the basis of viability established by the Benefit - Cost (BC) analysis and, therefore, approval of the project under section 11 (f) is not now required. The Petitioner has argued that the entry of the entrepreneur has changed the rules of the game and there is likelihood of a conflict between the public interest and interests of the private party. The private investor will be concerned with returns on investments made and hence it is necessary to check the possible revenue generating sources identified by the investor and how they impact the sustainability of the project as also how it affects local, regional and state level economies. Conflicts and disputes relating to the latter can not only delay project implementation but could aggravate litigation and even lead to abandonment of the project.

An examination of both arguments reveals that whiIe the former is too technical and misses the woods for the trees the latter is too general and unless specific adverse impacts are identified in regard to the conflict between public and private interests on sustainability, likely litigation etc the project cannot be kept on hold merely on apprehensions. Hence, it is necessary to examine this issue in the context of the principles mentioned above. Certain benefits were contemplated by the Government to the farmer when the project was cleared as a budget financed project and funds from the

budget were expended. The BOT process has to therefore ensure that newly envisaged revenue streams do not lead to reduction of these in any way. Deviations from the improved cropping patterns envisaged in the BC studies with a view to generate additional sources of income through such means as contract farming, etc have to be not only strictly voluntary in nature from the farmer's side but should demonstrate that the farmer has gained and not lost from these deviations in terms of relative opportunity gains from the former (BC studies) and the proposed gains from the newer activity proposed in order to generate additional sources of revenue. Further these revenue streams should not adversely affect the operational efficiency of the system by for instance cutting budgets for O & M. The Authority thus has a definite role in vetting of the revenue model. As long as the hydrology and inter state issues remain the same, fresh clearance far these would not be required under Section 11 (f) but the vetting of the revenue model will have to be done by the Authority in accordance with the jurisdiction granted by section 11 (f) of the Act over economic viability. In this regard the Authority is inclined to agree with the opinion of Shri. Prashant Bhushan that the Authority's approval is inter alia required if significant changes are contemplated in an existing project where such changes have a bearing on the technical and economic parameters of the project. The Authority is not convinced about the opinion presented by Shri. Mihir Desai and Smt. Gayatri Singh that "new" projects are to be examined only where they have implications for regional imbalance because the proviso to 11 (f) uses the word "new" only in this context. It is expected that projects once proposed and approved cannot and will not be proposed again. Hence proposed projects would perforce be newly proposed projects and the word "new" in the proviso refers to such projects only and not to incomplete projects simply because they are incomplete. However, where the economic parameters of an already approved project are likely to change, regardless of the stage at which these changes occur i.e whether mid way or at the beginning and also regardless of the reasons for such changes like conversion to BOT, unless the revenue model of the revised project is so designed as to retain the public benefit without the slightest erosion, such changes have to be treated as changing the character of an existing project thus converting it into to a new project. Hence the answer to the question of whether the Nira- Deoghar project, which is already an administratively approved project, needs clearance of the MWRRA under Section 11 (f)of the Act before it is taken up for completion through the BOT process is that such clearance would be required only if the economic parameters in terms of the cost to government and benefits to the users undergo a change as a result of the investor's proposal.

(ii) As regards the second issue, it is not disputed that there is no mention of the MWRRA in the advertisement calling for Expression of Interest. It is claimed by MKVDC that the Act has been referred to in the EOI booklet sold to those who responded to the advertisement. However, it is noted that there is no mention of the sale of the EOI booklet in the EOI advertisement either. The advertisement merely states that the EOI is to be submitted along with documents confirming compliance of technical and financial requirements and equity capital. Further it is noted that even in the EOI booklet there is only a mention of the MWRRA Act itself and the implications of certain provisions of the Act such as the Authority's powers relating to water entitlement and tariffs do not find any mention. The EOI process cannot be delinked from the overall BOT process because while on the one hand some who are not aware of the Authority's role in the determination of entitlements and water tariffs may be discouraged from responding to the advertisement, on the other hand there may be those who respond on the incorrect understanding that they will be free to determine these vital parameters. Hence, in fairness to all private developers and in the interest of transparency due reference should have been made to the MWRRA and MMISF Acts in advertisement. The advertisement should have also mentioned that interested parties are expected to purchase EOI Booklet which, inter alia, contain the framework set out by the said two statutes within which the investors would have to operate. It is noted from the advertisement that a specific statement has been made to the effect that the investment is expected to be recovered through various means including levy of water charges. Since in terms of Section 11 (d) of the MWRRA Act the determination of water charges is within the purview of the Authority and the said enactment prescribes certain parameters on which the Authority is to base these charges, the Authority is of the view that the advertisement can be considered to be misleading in that it does not clearly spell out the stipulations and limitations imposed by the MWRRA Act on the levy of water charges. For these reasons the advertisement is not tenable in its present form and needs to be withdrawn.

(iii) As regards the third issue, Petitioner's argument that the Government Resolution dated 15-7-2003 is the

fundamental basis for the privatization initiative has not been countered by the Respondent. The said GR lays down the guidelines for the BOT process and is an administrative order issued before the MWRRA Act came into force in 2005. A reading of the GR and its enclosure reveals that there are dichotomies between the GR and the provisions of the MWRR Act. These are:-

(a) Para 2.1 of the Enclosure to the GR states that in certain situations the rights of changing the norms of irrigation as well as water supply should be given to the entrepreneur. Para 2.4 further states that the norms of usage and distribution can be changed after discussions between Government and the Entrepreneur. These provisions vitiate section 11 of the MWRRA Act which specifically vests the right of determining water entitlement in the Authority.

(b) Para 1.1 of the Enclosure states that the entrepreneur's investment should be recovered from water charges for water usage in addition to certain other sources. Para 2.2 permits the entrepreneur to negotiate a 10% increase over levied water charges with the beneficiaries. These provisions miIitate against section 11 (d) of the MWRRA Act which enjoins upon the Authority the task of determining the criteria for water charges and spelIs out the basis on which this should be done.

(c) There are certain provisions in the MWRRA Act which the GR dated 15-7-2003 omits to mention because the GR preceded the Act. These provisions are contained in Section 11 (d), 11 (f), 21 (1) of the MWRRA Act and Section 2.1 of the State Water Policy, 2003 and relate to exclusion of capital cost recovery, investment in back log vis-a-vis non-backlog areas, participatory planning in association with Water User Associations and Relief and Rehabilitation of affected persons by the entrepreneur. As regards investment in Land Acquisition the GR states that this will be done by the Government whereas the Respondent has claimed that in respect of the Nira Deoghar project this expenditure will be incurred by the entrepreneur.

The Respondent has not touched upon the dichotomies between the GR and the MWRRA Act either in the written or oral submissions but has submitted that the GR having been issued before the MWRRA Act came into force, the latter will prevail. In the second submission dated 3rd March, 2008 the Respondent has submitted that no conflicting provisions of the GR on privatization policy vis-a-vis the MWRRA Act will be left in the final bid document. In other words, the final bid document would address these issues in conformity with the MWRRA Act. In the written submissions, stated to have been concurred in by the State Government, the Respondent has submitted that the Chief Secretary's Committee set up by GR dated 21.3.2006 will remove the contradictions and ambiguities regarding water rates and entitlements and due cognizance of the MWRRA Act and MMISF Act will be taken by the Committee while scrutinizing the proposals.

A perusal of the GR dated 2 1.3.2006 shows that one of the terms of reference of the Chief Secretary's Committee is to assess the necessity of modifications in the present policy of the Government regarding privatization of water resources projects and to give suitable suggestions to the Government in this regard. Since the submissions made by MKVDC with the concurrence of the State Government do not touch upon the dichotomies between the GR and the two aforesaid statutes, it is clear that these dichotomies are still to be taken cognizance of by the Committee. Clearly, therefore, the original GR dated 15- 7-2003 needs to be revised so as to remove all dichotomies between the GR and the MWRRA Act and more particularly the dichotomies relating to water entitlements, fixation of water charges, recovery of capital costs, investments in non-backlog areas, WUA participation and investment in land acquisition and relief & rehabilitation. It is, therefore, essential that the State government should revise the GR dated 15-7-2003 in the light of the MWRRA Act and MMISF Act clearly spelling out the various stages in the BOT process and the role of the Authority.

(iv) As regards the fourth issue that of cost of land acquisition and R & R, the Respondent has taken conflicting positions which have been highlighted by the Petitioner. The GR dated 15-7-2003 provides at paragraph 3.4 of its enclosure, that the land will be acquired at Government's expense and leased out to the investor for raising funds (presumably as collateral). This is reiterated by the EOI advertisement and the booklet which are project specific. Petitioner has argued that since Nira-Deoghar is in non-backlog area the expenditure on these activities will come under the purview of MWRRA Act which has a special responsibility in the matter of removing backlog. In its submission dated 25-4-2008, the Respondent has stated that while the land will be acquired by the Government the funds for acquisition and rehabilitation will come from the investor. The implications are two-fold. If the funds are expended by Government then they become a part of the BC equation on the cost side. The benefits to the consumers as spelt out in the BC analysis will need to cover this cost to establish viability. Secondly, if the

expenditure is met by the investor then the returns will have to come from revenue flows without affecting, supply and maintenance and without reducing the benefits which would normally accrue to the farmers from the project had the funds been expended by the Government. It is, therefore, necessary for the Respondent to decide the source of funding for LA and R & R and design the project in such a way as to ensure that the costs are rightly reflected and are paid for by the appropriate party.

(v) As regards the fifth issue that is the question of whether the Governor's directives in respect of removal of backlog are applicable to investment in non-backlog areas through the BOT model proposed for Nira-Deoghar and whether this has important ramifications for the programme of completion of incomplete projects by raising project based funds from the market, the Petitioner has raised the following significant issues :-

(a) The Governors' directives include funds raised from the market. Hence regardless of the source of the funds the investment priority for back log areas remains;

(b) If the cost of Land Acquisition and R & R is met by Government then the back log restriction will apply on BOT projects and such projects cannot be taken up in the non-backlog areas;

(c) The issue of viability gap funding is connected with the back log issue because this is a source of fund from Government and hence the directives relating to back log become applicable. Even if it is raised as a loan by Government the liability will fall on Government and hence VGF is covered by the Governor's directives;

The above issues are discussed below ad seriatim:-

(a) With regard to the Governor's directives applying to market borrowings the Petitioner has submitted in the written submissions made on 29th May, 2008 (Para 2.3 of Core Issue 4) that section 7.11 and 9 (1) of the Governor's Directives issued for 2002-03 are applicable to the project. It is stated that these sections require that sources raised from the market should be pooled together with Government funds and distributed equitably amongst all regions on the basis of the formula for removal of backlog. A careful reading of the sections shows that the term "non-budgetable allocations" used in the sections is explained subsequently in that it refers to the market borrowing programme of the State Government through what are commonly known as "irrigation bonds". These borrowings, often described as "off budget borrowings" were raised by the Government through the Irrigation Corporations. The term "pooled together" mainly relates to the fact that borrowings through independent corporations led to some corporations raising more funds than other corporations which further aggravated the imbalance. Hence the Governor' s directives have prescribed that these borrowings should be for the irrigation sector of the state as a whole. The basic difference between these generalized borrowings and the private funds to be expended under the BOT programme is that the former are raised on the basis of government guarantees and are serviced directly by the budget, They are a charge on the state treasury and hence these funds are actually government funds. On the other hand BOT borrowings are not to be raised by thegovernment directly from the market and more importantly are not to be repaid by the government from the treasury. Since the water charges are also restricted to servicing O & M only the returns to the investor are expected to come from sources external to the project such as contract farming, agro processing, ancillary activities like fisheries, tourism, etc. and the borrowing are expected to be repaid from these earnings. Hence the argument that BOT funds are covered by the Governor's directives and hence cannot be expended in non-backlog areas is technically not tenable. However, since this is a policy issue, covered by State of Maharashtra (Special Responsibility of Governor for Vidarbha, Marathwada and the Rest of Maharashtra) Order, 1994, a view will need to be taken by the State Government in this regard.

(b) The argument that VGF for Nira Deoghar would amount to Government expenditure in non-backlog areas has been elaborated upon by the Petitioner in their submission made on 29.5.2008 (para 2.2.3 -Core Issue 4). The Respondent has not ruled out viability gap funding by Government and has stated (reply to 9 (v) (compliance report) that this will depend on the proposals received from the investors. While it is true that VGF from Government would amount to a public finance component in the BOT project and hence bring the project within the backlog regime the Respondents' response does not amount to an admission that VGF funding will actually happen in the case of Nira - Deoghar as concluded by the Petitioner. Declaring VGF availability in advance can amount to influencing the tender process and can depress prices artificially. The Respondent's contention that this will depend upon the nature of proposal received is reasonable. It cannot be anticipated that investors will find the project non-viable without VGF from Government. The Respondent's

admission that if such an eventuality arises then Governor's Directives will apply should therefore sufice. However, since the backlog regime is implemented through the regulation of the Authority it follows that if any VGF is proposed then the proposal would be subject to the Authority's scrutiny and approval. An observation which may not be out of place here is that as mentioned earlier the BOT component does not make an incomplete project a "new project" per se but it does lead to an open ended dispensation to the investor for creating new avenues of recovering returns. If these returns do not adversely impinge upon existing costs and benefits in the case of incomplete projects then VGF will not be hit by backlog restrictions provided the finds are within the allocation for the concerned area and the revenue model is subject to the Authority's scrutiny and prior approval for the purpose, inter alia of confirmation that such adverse impingement has not occurred.

(c) With regard to the cost of Land Acquisition and R & R we agree that if the funds are expended by Government then the issue of prioritising back Iog area projects becomes relevant. The Governor's directives that projects should be cleared first in back log areas apply regardless of the component of the project on which public expenditure is incurred. However, the VGF argument applies here as well. If the funds are already included on the cost side in the pre-BOT BC Analysis and BOT does not in any way dilute the benefits side then this does not become a new project and if funds made available axe as per formula they can be expended on the incomplete projects. Whether this is actually the case will be a subject of the Authority's scrutiny and prior approval. Hence, it is not enough for the Respondent to say that funding will be made available after applying the back log formula. It has to be ensured that the earlier BC of the public funding side of the project is maintained by the new BC of the BOT project.

(vi) As regards the sixth and final issue of stakeholder participation and the locus standi of the Petitioner's involvement in the BOT process the Petitioner has argued that :-

(a) In the context of checking the viability of the project interested organizations and individuals should be made party to the process of assessment and approval (written submission on 3rd March, 2008). This is a matter of public interest and stake holders like farmers, NGOs, women's groups, other local groups and activists should be involved. The state water policy requires stake holder participation and the Authority has to act in accordance with the state water policy. The Authority has to ensure judicious equitable and sustainable management of water resources and enhancing stake holder participation will ensure equity.

(b) The Respondent has argued that the final authority for approval and handing over of BOT projects is that of the Chief Secretary's Committee set up under the GR dated 21-3-2006. Hence no third party like Prayas or the Authority can be involved in the process and such precedents will affect established procedures and lead to complications. Since the beginning the BOT process has been transparent and involvement of outside agencies is never allowed in any bidding process in Government. Assessment of viability is within the purview of Government and the question of dual control over the process does not arise.

The Authority is of the view that it is necessary to disaggregate the issue into two parts. Firstly, there is the broader issue of determining the design of the BOT process in respect of incomplete projects like Nira Deoghar; and secondly, the narrower issue of selecting a BOT investor for a particular project to work in line with the chosen design. The State Water Policy has laid emphasis on stake holder participation in the preparation of basin and sub basin plans and user participation in planning and development of water resources and operation of water infrastructure through their legally recognized organizations or service providers. The Authority is charged with ensuring stake holder participation (beneficiary public) when determining the water tariff criteria. The Respondent has already agreed that the GR dated 15- 7-2003 needs revision in the light of later developments like the MWRRA and MMISF Acts. The GR broadly lays down the policy design of the BOT model and in the process of revision of the GR it would be in the interest of the Government to invite constructive participation from stake holders while designing a more updated PPP policy. As for the process of selection of the BOT investor this is an executive action and it is up to the Government to decide what kind of expertise it should invite to support its PPP initiatives. As long as the executive action is in line with the broader policy design and as long as it takes care to meet statutory requirements laid down in the relevant statutes like the MWRRA Act third party intervention may not be called for.

In view of the above, the Authority directs as under:-

i) The Respondent MKVDC shall withdraw the advertisement within 15 days from the date hereof and shall not re- advertise until such time as the Government Resolution dated 15-7-2003 is revised.

ii) MKVDC shall approach the State Government seeking revision in the Government Resolution dated 15-7-2003 addressing the various contradictions that need to be resolved in the light of the provisions of the subsequently enacted statutes.

iii) The revised Government Resolution shall further lay down in clear terms the role of the Authority in the BOT process. This will include :

(a) Fixing criteria for selection of project and the developer;
(b) Vetting the revenue model;
(c) Fixing Entitlement of various users;
(d) Allowing permissible changes in water tariff rates;
(e) Vetting of revenue mode fully selected for approval;
(f) Determining whether the project is covered under the backlog regime prescribed by the Governor's Directives viz. State of Maharashtra (Special Responsibility of Governor for Vidarbha, Marathwada and the Rest of Maharashtra) Order, 1994;
(g) The role of the High Lever Committee vis-a-vis the Authority.

The Authority directs that the above orders shall be complied with within 3 months from the date hereof and MKVDC shall report to the Authority regarding the same.

With the above, the present Petition filed by Prayas stands disposed off.

Sd

Shri A. Sekhar
Member (Engineering)

Sd

Shri A.K.D. Jadhav
Member (Economy)

Sd

Shri Ajit M. Nimbalkar
Chairman

Sd

Shri. S. V. Sodal
Secretary

■■■

3.7 News Clippings

Media played an important role in dissemination of some of the key outcomes of the regulatory intervention related to privatization of Nira Deoghar irrigation project. A short compilation of the various news stories published by newspapers and magazines is included in this sub-section. The first advertisement published by MKVDC for inviting expression of interest and the next advertisement published for withdrawal of the same by MKVDC (in adherence to MWRRA order) is also given at the end of this compilation.

The Indian Express, 20th November 2008, Pune

State plan to privatise Nira project put on hold

EXPRESS NEWS SERVICE
NOVEMBER 19

THE Maharashtra Water Resources Regulatory Authority (MWRRA) has put a hold on the state government plan to privatise the Nira Deoghar Project on a BOT basis.

In a press release from Resources and Livelihoods Group, Prayas, the body that challenged the Maharashtra Krishna Valley Development Corporation (MKVDC) decision to privatize the Nira Deoghar, the MWRRA order is quoted, "The respondent MKVDC shall withdraw the advertisement (inviting EOI from prospective developers fof privatisation of Nira Deoghar) within 15 days from the date hereof and shall not re-advertise until such time as the government resolution dated 15-07-2003 is revised."

The order was issued on November 10 and was received by Prayas on November 15.

The privatisation was based on a state water policy declared in 2003 that accepted the policy of particiapatuon of private investors in development of water resource projects. Prayas has said that the MKVDC was trying to initiate privatization without taking due congnisance of the powers and functions of MWRRA.

"This could have led to un-regulated privatisation of the irrigation projects, without any scrutiny by independent experts or members of public," the press note said.

Prayas said that this was first petition before the water regulatory authority, which is the first of a kind in India. The petition was filed on January 15.

DNA, 20th November 2008, Pune

Nira-Deoghar dam privatisation plan runs into rough weather

Amend water resources privatisation norms, regulatory agency tells state

Rooni Abraham, Mumbai

Maharashtra Krishna Valley Development Corporation's (MKVDC) plan to privatise the Nira-Deoghar dam project in Pune district has run into rough weather with the regulatory agency directing the state to first amend its water resources privatisation norms.

This is the first-ever ruling by the Maharashtra Water Resources Regulatory Authority set up in Maharashtra.

Confirming this, a senior secretariat official told DNA: "On Saturday, the Authority asked the irrigation department to amend the original government resolution, issued on July 15, 2003, on the subject of privatisation of its water resources." It was based on this GR that the MKVDC has issued a public notice on September 18, 2007, inviting expressions of interest from private contractors for completing the construction of the dam as well as waterway networks.

The Pune-based NGO, Prayas, had petitioned the Authority against the proposed privatisation plans of the MKVDC of the project on several grounds. Sachin Warghade of Prayas told DNA: "We had pointed out issues of water tariffs and the existing development backlog of various regions of Maharashtra that have to be borne in mind for irrigation projects."

MKVDC had stated that 95% of the construction work on the Nira-Deoghar dam was already completed using state funding. Private contractor bids were sought to construct two supply canals totally measuring 161 km, the entire water distribution network and to complete the remaining 5% work. For this, MKVDC estimated a cost of Rs810 crore in September 2007 when it invited private bids.

The Times of India, 21st November 2008, Pune

Setback for Nira irrigation project

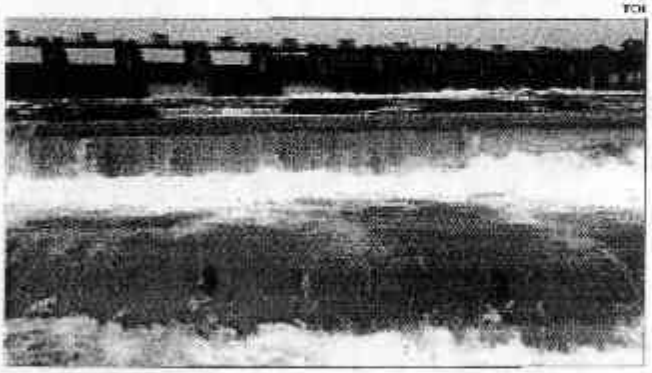
Regulatory Body Tells MKVDC To Put On Hold The State Govt's Privatisation Plan

TIMES NEWS NETWORK

Pune: The state government's plan to privatise the Nira Deoghar irrigation project in Pune district has received a setback as the Maharashtra Water Resources Regulatory Authority (MWRRA) has ordered the Maharashtra Krishna Valley Development Corporation (MKVDC) to put the move on hold till certain vital issues were addressed.

MWRRA was established in 2005 and given responsibility of regulating the water resources to ensure judicious, equitable, and sustainable management and allocation of water resources in the state.

ToI



CLASH OF INTERESTS

The main functions of the authority include determining shares of water allotted to different users and setting tariff systems and determining water tariffs. The Resources and Livelihoods (ReLi) Group of city-based Prayas filed a petition in January 2006 before the MWRRA challenging the proposed build-operate-transfer (BOT) based privatisation of the Nira Deoghar Irrigation project initiated by MKVDC.

A statement issued by Subodh Wagle and Sachin Warghade from Prayas said the MKVDC issued an advertisement in September 2007 for inviting expression of interest (EOI) by prospective developers for privatisation of the project. The advertisement referred to government resolution (GR) passed by the state government in 2003 for privatisation of irrigation projects on a BOT basis. The state water policy declared in 2003 had accepted the policy of participation of private investors in development of water resource projects.

A detailed analysis of the advertisement as well as the GR carried out by Prayas revealed that there were serious contradictions in provisions of the GR vis-à-vis provisions of MWRRA Act. "For example, the GR gave certain powers related to water tariff and decision about distribution of water to private developers. In contrast to this, the said powers are vested with MWRRA as per the law. Giving such unilateral powers to private developers was detrimental to public interest," Wagle and Warghade stated.

Further, the advertisement did not even make a single mention of MWRRA as a regulatory authority for water resources in the state. Thus, MKVDC was trying to initiate privatisation without taking due cognisance of the powers and functions of MWRRA. "This could have led to un-regulated privatisation of the irrigation projects, without any scrutiny by independent experts or members of public. This would certainly have an adverse effect on the public interest in such a crucial matter," Wagle and Warghade said.

Further, it was feared that the privatisation process in this case would set a bad precedence to follow in case of other pending projects in the state and beyond. Hence, it was necessary to challenge various aspects of the proposed privatisation process for this project and ensure that public interest is not compromised at any cost, they stated.

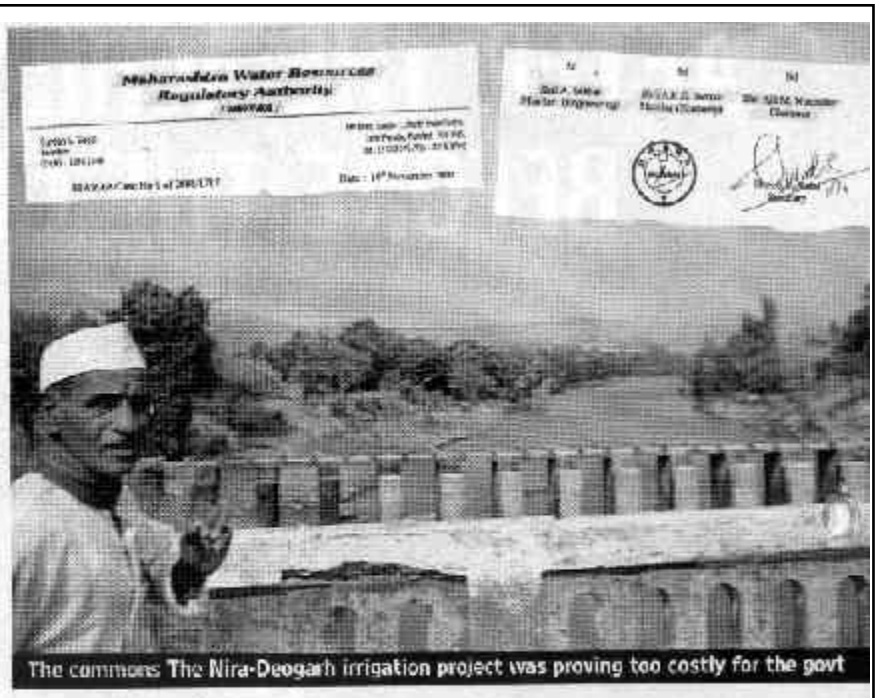
"Essentially through the petition, Prayas challenged the privatisation process proposed by MKVDC and sought corrective actions on the flawed advertisement put up by MKVDC. Further, it sought active participation of independent experts and stakeholders in the process of scrutiny of the privatisation proposal," the statement said.

In its petition Prayas sought to achieve the somewhat limited objective of establishing MWRRA's active role in regulating the proposed privatisation process and thereby making the proposal for privatisation open for public scrutiny. "It is expected that open public scrutiny of privatisation proposal will not only help establish public control on the privatisation process but it may also help in challenging the very proposal for privatisation," the statement said.

In its order issued on November 10, the MWRRA has asked the MKVDC to withdraw the advertisement about Nira Deoghar within 15 days from the date hereof and not re-advertise until such time as the GR dated November 15, 2003 is revised.

It also asked the MKVDC to approach the government seeking revision in the GR addressing various contradictions that needed to be resolved in the light of the provisions of the subsequently enacted statutes. The MWRRA further said that the revised GR shall further lay down in clear terms the role of the authority in the BOT process.

by **Saikat Datta** in Pune



The commons: The Nira-Deogarh irrigation project was proving too costly for the govt

EVERYONE'S NIRA

Outlook's river-on-sale runs a happy course

AS sales go, this one was surely bound to evoke a great deal of incredulity: the Maharashtra government was looking for buyers for the Nira river. And a mega irrigation project to boot. But that has been put on hold for now. In a landmark judgement, the Maharashtra Water Resources Regulatory Authority (MWRA) has asked the state government to defer the sale. Its 19-page judgement, delivered after hearing a petition from Pune-based NGO Prayas, raises several questions about the viability of such a sale and the implications of taking such a course.

At a time when privatisation of natural resources is the buzzword, the proposed sale of the Nira and the Deogarh irrigation project almost went unnoticed. *Outlook* broke the story in its December 17, 2007, issue (*Rs 1000 crore? A River Is Yours*), detailing how Maharashtra water resources minister Ramraje Naik-Nimbalkar was keen to sell 208 km of the project's right bank canal and 21 km of the left bank canal to developers. The state government had run out of money to complete the irrigation project, started in 1984, and incurred large cost overruns.

With a restriction on spending on irrigation projects in western Maharashtra (Nira flows through Pune and Satara districts), Naik-Nimbalkar took the unprecedented step of selling the river and handing over the riparian rights to a private developer. In 2000-01, it was estimated that it required Rs 970 crore to complete the irrigation project.

But how would the private company recover its investment when the project's chief aim was to irrigate farmlands? Would it mean that farmers would have to pay exorbitant water charges fixed by the company? Would the government pay for the acquisition of the land necessary to set up irrigation infrastructure by the private player? If so, would such privatisation benefit the public?

The advertisement inviting EOIs had stated that "the investment made by the developer/consortium is supposed to be recovered through various means, viz, levy of water charges for irrigation and domestic use, fisheries development, tourism activities etc".

After deliberating on questions raised by Prayas, the MWRA decided the state's advertisement inviting EOIs wasn't lucid enough. It noted the NGO's argument that the ad was deliberately silent on the contradictions between the sale of the river on a Build-Operate-Transfer (BOT) basis and the provisions of the MWRA Act. For instance, how could the private developer decide any hike in tariff of the supplied water when this was the exclusive domain of the MWRA? Keeping the interests of citizens in mind, the authority finally decided to pass an order which delivers a decisive blow to the sale of a precious natural resource.

Says Sachin Warghade, who petitioned MWRA on behalf of Prayas along with Dr Subodh Wagle: "This is a significant judgement. The state was trying to privatise the river by bypassing the regulatory authority. With this order, citizens will now have a voice in all policy decisions in the water sector."

Incidentally, Nira was not the first river to be put on sale. Chhattisgarh's privatisation of the Sheonath raised hackles in 2002. But the Nira-Deogarh proposal beats it in terms of sheer magnitude. At stake is nearly 229 km of the canal meant for irrigating nearly 43,000 hectares. The Chhattisgarh government, in contrast, had offered only 23 km along the Sheonath. ■

CALLED TO A HALT

- The Maharashtra government had run out of money for the Nira-Deogarh irrigation project
- So it offered 229 km along the canals of the project to developers. Cost: about Rs 1,000 crore. The agreement allowed them to recover costs
- Decision challenged by NGOs
- MWRA ruling puts sale on hold

Inordinate delay

An excuse to privatize irrigation project

NIDHI JAMWAL *Mumbai*

STARTED in 1984, the yet to be completed Nira Deoghar irrigation project in Maharashtra has run into rough weather. A recent judgement by the three-member water regulatory authority has put on hold the privatization of the project in Bhor taluka, Pune district.

Aimed at irrigating 45,000 hectares the project when conceived was to cost Rs 62 crore. By 2007, the state government had spent over Rs 450 crore on the project, which remained incomplete. Another Rs 870 crore was required to finish the project, claimed fresh official estimates. What remained was 5 per cent of dam construction and 164 km of canals. A water distribution network also had to be put in place. With state coffers drying up, Maharashtra needed an investment of Rs 36,630 crore to complete its over 1,200 incomplete projects. The government decided to seek private participation through an advertisement issued in September by the Maharashtra Krishna Valley Development Corporation (MKVDC), a state body.

The recent judgement forced the corporation to withdraw its advertisement on December 17. But the regulatory authority's order is in conflict with a government resolution, which allows private sector participation in such projects (see box: *Who calls the shots*).

In Nira Deoghar the role of the private player was to complete the construction of the dam, build canals and put in place a water distribution network. In return, the private player would be in control of the dam and its water.

After the advertisement was published, Prayas, a non-profit in Pune, sought the intervention of the Maharashtra Water Resources Regulatory Authority. In its petition in January 2008 Prayas challenged the advertisement and claimed it was issued without involving the authority, mandatory under the Maharashtra Water Resources Regulatory Authority Act, 2005. It also asked for the involvement of interested parties like water user associations, farmers and non-profits, which MKVDC dismissed.

"There is little transparency in such projects and the government lacks clarity. There is confusion whether to empower the regulatory body or limit its role," said Sachin Warghade, research associate at Prayas. But he is happy as the response to the petition was positive.

The regulatory authority conducted a hearing and ordered MKVDC to withdraw the advertisement and not to re-advertise until the 2003 resolution was revised. MKVDC officials argued that their actions conformed to the existing law. "The EOI (expression of interest) advertisement should be considered as a short tender notice where only MKVDC is involved... EOI advertisement is supposed to be altered/modified... the final bid document will be free from all ambiguities," read the written report submitted to the authority.

The report added that since the project received administrative approval in 1984, it should not be considered a new project and kept out of the authority's purview. The authority countered the corporation's view and said there was need for a fresh economic review especially in the light of a new factor— the private developer, who would bear costs and secure benefits. This may impact the project, including water tariffs, the authority said.

The authority was correct in pointing out water tariffs may increase, said Warghade. "The company would like to recover the money it invests in the project and earn profits out of it. Increased tariff will directly impact farmers. Such a revenue model needs to be scrutinized before approval," he added.

SHIRISH CHANDRA

Maharashtra needs Rs 870 crore more to complete the Nira Deoghar project

Why privatization

The state government came up with a State Water Policy in 2003 where it sought the participation of the private sector to finish incomplete projects. The resolution laid down guidelines for private sector participation on a build-operate-transfer basis.

According to state records, as of March 2007, there were 1,246 incomplete projects. ■

Who calls the shots?

Regulatory authority or the government resolution? The authority wants the resolution revised

Government resolution in 2003	Maharashtra water resources regulation Act, 2005
Private developers can make changes in the quantum of water to be made available to users	Authority can determine water entitlements
Private developers can increase water tariff	Only authority can determine revisions
Permits recovery of capital cost through water tariff	Operations, maintenance recovery only
Ignores participation of water users association in planning and construction stage	Stresses on such participation

Source: MWRRA Case No 1 of 2008/1777, November 10, 2008 order of MWRRA

The Indian Express, 12th September 2007, Pune

MAHARASHTRA KRISHNA VALLEY DEVELOPMENT CORPORATION (MKVDC) PUNE

(Government of Maharashtra undertaking)

INVITATION FOR EXPRESSION OF INTEREST (EOI)

For Selection Of Developers/Consortiums

For Completion of

Nira Deoghar Irrigation Project On Bot Basis.

1.0 The Opportunity : The Government of Maharashtra has approved privatization policy for the irrigation projects, vide G.R. No. BOT-702 (425/2002)/MP-1, dated 15-07-2003, to complete the development of irrigation projects in Maharashtra through private sector participation on Build, Operate and Transfer (BOT) basis.

Maharashtra Krishna Valley Development Corporation (MKVDC) Pune is a body corporate constituted under the Maharashtra Act XV of 1996. MKVDC has been set up by the Government of Maharashtra to make special provisions for promotion and operation of Irrigation projects, Command Area Development & Schemes for generation of hydroelectric energy to harness water of Krishna River, allocated to the state of maharashtra under the Krishna Water Dispute Tribunal award, and other allied and incidental activities, including flood control in the Krishna Valley. Nira Deoghar Project is one of the major irrigation schemes undertaken MKVDC in late 90's. The construction of Dam is nearing completion. The total command area of the project is about 43,000 Ha. of agricultural land. Part of the Project works are completed.

With a view to boost the agricultural development in the command area, MKVDC desires to complete the balance work on this project through Private Sector Participation on BOT basis. The project comprises of construction of a Dam, construction of Main Canal, Distribution System and 4 lift irrigation Schemes on Right Bank Canal. The project is located in Taluka Bhor, District Pune. The necessary environment clearance for the project has been obtained from the Ministry of Environment and Forest, Government of India, New Delhi.

2.0 Expression of Interest : Expression of Interest (EOI) is invited from interested developers/ Consortiums, who have to submit their offers to complete the balance work of the project by deploying their own financial resources. The investment made by the prospective Developer/ Consortium is supposed to be recovered from the project through various means, viz, levy of water charges for irrigation and domestic uses, fisheries development, Tourism activities etc. associated with the project. The prospective Developer/ Consortium can also raise resources through avenues like contract farming through land owners in the command area, as per the Government provisions. There are also prospects of promoting Agro-based Industries, Export promotion etc. The Developer/ Consortium shall hand over the project back to the water Resources Department, Government of Maharashtra, after the designated lease period required to recover investments made on the project by the Developers, together with reasonable rate of returns.

3.0 Project : The project comprises of Nira Deoghar Dam, constructed on Nira River, Ta. Bhor, Dist. Pune, along with 206 km long Right Bank Canal and 21 km Left Bank Canal, together with 4 lift Irrigation Schemes on Right Bank Canal, and all distribution network. The total command area involved in the Nira Deoghar Irrigation Scheme is about 43,000 Ha. The work of the Dam is almost 95% completed. The full storage capacity, i.e. 11.91 TMC (337.291 Mcum) has been created.

3.1 Scope of Each Project : The prospective Developer/ Consortium will complete the balance work on the Dam (about 5 %) construct the Main Right bank Canal from KM 66 to 206, Left bank Canal of 21 KM long, 4 lift Irrigation Schemes on Right Bank Canal and entire distribution network. The proposed work also includes concrete/ geo-synthetic lining of entire Main Canal. The Main Canal passes through Bhor Taluka of District Pune, Khandala and Phaltan talukas of District Satara, and Malshiras Taluka of District Solapur. The Entire work is expected to be completed within 3 years period. The land acquisition has been partially completed for Canal Works. ...no the remaining land acquisition will be made by the Government of Maharashtra, as per the provisions of Land Acquision Act.

5.0 Applicant : The applicant may be as single entity or a multiple entry of forming consortium to implement the project. Consortium, as a whole, must have necessary expertise and financial capability to execute large scale project of magnitude of the project under consideration. The members of the Consortium will be jointly and severely responsible for all matters related with the tender.

6.0 Eligibility : 1) The applicant must have proven experience of developing large projects of similar magnitude. 2) The applicant shall have track record of sound financial resources and profit making company. 3) The applicant should fulfil the following minimum criteria:

a) Net-worth Rs. 810 Crores b) Average Annual Turnover shall be Rs. 400 Crores for the last 3 years.

The applicant company shall furnish all the documentary evidence in support of their technical and financial capability including equity. In case of Consortium, all members should furnish the required information in support of their technical and financial capability, including equity.

7.0 Procedure for submission of EOI : The interested company/ consortium may submit their detailed EOI, along with documents confirming compliance of technical and financial requirements and equity, and submit the same by 15/11/2007 at the address indicated below. In case, the interested parties are not able to formally finalize the consortium, they may also submit their EOI, alongwith details of proposed consortium members.

Address :

The Executive Engineer,
Nira Deoghar Project Division,
Sangvi (Bhatghar), Ta. Bhor. Dist. Pune.
Telephone (02113) 222613.
E-mail : niradeoghar@vsnl.net

OR

The Superintending Engineer,
Pune Irrigation Project Circle,
New Administrative Building,
Pune 411 001. Telephone (020) 26122867
E-mail sepipcpune@dataone.in

8.0 Time Schedule :

Visit to Project site	5/10/2007
Developers/ Consortiums conference at Pune in MKVDC office	15/10/2007
Date of submission of EOI	15/11/2007

9.0 Selection of the Developer : A committee will be formed by the MKVDC, for selection of the Developer/ Consortium from the eligible applicants. All rights, regarding selection of the Developer/ Consortium, are reserved with the MKVDC.

Web site : www.maharashtra.gov.in
WRD/07-08/T/0390 Dt. 12-9-2007

Sd/-
Executive Engineer
Nira Deoghar Project Division
Sangvi (Bhatghar) Ta. Bhor

The Indian Express, 17th December 2008, Pune

PUNE | WEDNESDAY | DECEMBER 17 | 2008

PUBLIC NOTICE

MAHARASHTRA KRISHNA VALLEY DEVELOPMENT CORPORATION, PUNE

(A Govt of Maharashtra Undertaking)

A public notice of Expression of Interest for completion of Nira Deoghar Project, Tal. Bhor, Dist. Pune, under Maharashtra Krishna Valley Development Corporation, Pune on Build Operate & Transfer (BOT) basis was published in following newspapers.

1) Daily Sakal & Loksatta Dt. 18/9/2007.
2) Hindustan Times & Business Standard Dt. 19/9/2007.
3) Times of India Dt. 23/9/2007.
4) Indian Express (Mumbai) Dt. 24/9/2007.

The above notice is hereby withdrawn.

(Old Web-site No. www.maharashtra.gov.in - WRD/07-08/T/0390 dated 12-09-2007)

Executive Director
Maharashtra Krishna Valley
Development Corporation, Pune

Dgipr/2005-2009/2558

Section 4

Bulk Water Tariff: Regulatory Intervention through MWRRA

Contents

Introduction

This section includes a compilation of documents of regulatory intervention related to the process of determination of bulk water tariff regulations. The regulatory intervention was undertaken in response to the process initiated by MWRRA. A short introductory note included in the first sub-section presents in brief the rationale, substantive contents, and the overall results of the intervention. The subsequent sub-section includes various submissions made by PRAYAS with the objective of promotion and protection of public interest during the process of determining tariff regulations. The last sub-section includes the press notes released to media, and clippings of news and articles published in the leading newspapers.

4.1 Introduction to the Regulatory Intervention in Bulk Water Tariff

Background

The Maharashtra Water Resources Regulatory Authority (MWRRA), in accordance with the provisions of the MWRRA law, initiated the process of determining regulations for bulk water tariff in 2007. The task of developing an Approach Paper on 'Developing Regulations for Bulk Water Pricing in the State of Maharashtra' was assigned to a private consultancy firm. The approach paper was published on the MWRRA website for comments by the stakeholders. Written comments were invited on the Approach Paper, followed by consultation meetings in various parts of the state. The regulatory authority is in the process of finalizing the approach paper and criteria for determination of bulk water tariff [10].

This was the first ever consultation process initiated by MWRRA in the past four years of its existence (since August 2005). In fact, this process is the first concrete action taken by MWRRA towards implementation of the law. Hence, the process and substantive analysis thinking evolved during this process provide valuable insights into the public interest issues surrounding the process of water tariff regulation. Many individuals and civil society organizations (CSOs) in Maharashtra, including PRAYAS, undertook various efforts to ensure promotion and protection of public interest in the process and outcome of the regulatory process. The regulatory interventions by PRAYAS involved making various substantive submissions to MWRRA on different critical issues related to tariff. Further, these interventions were accompanied with other advocacy related activities like awareness generation and facilitating evolution of an informal coalition of CSOs in the state. The note provides brief introduction to the process and substantive content related to the particular intervention by PRAYAS.

Rationale for Intervention

Regulation of economic activities in the sector through regulation of tariffs is one of the key functions of any independent regulatory authority (IRA). Since MWRRA—the first water sector IRA in India—was undertaking the first-ever consultative process related to tariff regulation, it was necessary to intervene in order to ensure protection of public interest. The process initiated by MWRRA would lead to fixing of regulations for tariff and hence, it would have an impact on all future processes and outcome related to determination of public water tariff.

The process was also found to be important in respect of the possibility of institutionalization of certain principles for governance of the water sector. For example, the process of determining tariff regulations is important in the context of the debate surrounding the principles of 'full cost recovery vs affordability'. This particular debate on the principles governing tariff not only has direct impact on the levels of water tariffs to be charged to various water users, but the debate is also important in the context of the larger issues such as the 'equity and human rights' dimensions of water sector governance.

The fundamental lacunas (such as the neglect of the 'equity' principle) in the Approach Paper prepared by the consultant provided additional impetus to undertake intensive analysis and regulatory intervention on the issue.

Processes and Activities Conducted

The TOR for the consultant to prepare the Approach Paper was circulated by MWRRA for consultation. This became the starting point of the subsequent analytical work and regulatory interventions related to bulk water tariff. The analysis of the TOR resulted in two written submissions forwarded to MWRRA on the process and content of the TOR. Detailed analysis of the issue was undertaken only after the draft Approach Paper was uploaded on the MWRRA website for stakeholder consultations. The analysis of the Approach Paper in various stages resulted into five written submissions made to MWRRA.

Apart from the analysis work, it was found necessary to undertake intensive awareness generation activities to facilitate wider debate, discussions, and interventions

[10] At the time of publishing this document MWRRA had prepared a summary of various comments and suggestions made by various stakeholders.

by CSOs, especially the farmers' organizations. A state-level awareness and consultation meeting was organized on 19 January 2008. The meeting was attended by about fifty participants, representing various social organizations, NGOs, individual experts, and farmers' organizations. The meeting was successful in providing a platform for collective analysis and for planning relevant responses on the Approach Paper. A collective submission was prepared on the day of the meeting and submitted to MWRRA. The group of CSOs and activists decided to meet the MWRRA officials to share and push for the demands emerging from the analysis of the Approach Paper. Accordingly, a meeting was held in the MWRRA office attended by the chairperson and other two members of the MWRRA. Serious concerns with respect to the 'equity' related issues were raised by the group of activists and CSOs during this meeting. The need for more transparent and participatory process necessary for 'empowering' the water users was also emphasized during this meeting. An important outcome of the meeting was the acceptance by MWRRA to undertake nine consultation meetings with stakeholders instead of the originally planned four meetings across the state.

The group of activists and CSOs also held three press conferences to provide wider publicity to the 'equity' related concerns. Subsequently, members of the group undertook various efforts individually and jointly to organize and help various stakeholders to raise their concerns on the issue of water tariff. The PRAYAS team participated in ten different meetings organized by the stakeholders' groups in various parts of the state. A small booklet comprising the summary of the Approach Paper and analysis of the same was published and widely disseminated by PRAYAS. In accordance with the decision of the group of activists and CSOs, a pamphlet was also published to help individuals and groups to understand various 'equity' and 'empowerment' related issues and develop their written comments to be submitted to MWRRA during the consultation meetings organized by MWRRA. A team of PRAYAS members attended each of the nine consultation meetings conducted by MWRRA and took various efforts for awareness generation. Articles on critical issues pertaining to public interest were written by members of PRAYAS teamand got published in a leading Marathi newspaper. The team also helped a television news channel to develop relevant content and a 'feature' show on the issue.

After the first state-level meeting, the group of activists and CSOs came together for two more such meetings to discuss the follow-up actions with regard to tariff issue and also other water regulatory issues. The group continues with these efforts of analysis and awareness generation related to the subsequent process of water tariff regulation.

Substantive Content of Tariff Related Intervention

The approach paper prepared by the consultants and put forth for consultation by MWRRA provided the glimpse of the direction that the MWRRA would take on this issue. The analysis of the approach paper clearly showed that the socio-politically relevant principles such as 'equity', which have been accepted right in the preamble of the MWRRA law, have been totally ignored. The draft approach paper clearly provided the push towards reduction of cross-subsidy by increasing the tariff for agriculture and domestic use to a very high level as compared to the increase in tariff for industrial use. For example, the illustration given in the Approach Paper showed that by application of the approach and methodology suggested in the Paper, the industrial tariff would increase by only 5%, while the tariff for agriculture and domestic use would increase by 39% and 49% respectively. While ignoring the 'equity' principle, the draft approach paper also provided no concrete proposal for integrating the principle of 'affordability' as the primary approach to water tariff determination. For example, there was no consideration to the low economic capabilities of small and marginalized farmers nor was their any such affordability related considerations in tariff for domestic water use by the poor and vulnerable sections of the society.

Another fundamental flaw in the approach paper was its total neglect to the regulatory role of MWRRA with regards to improving the efficiency and efficacy of water resources as well as the financial resources that are utilized for development and distribution of water. There was no procedure envisaged for technical validation of various costs and other data that would be used in tariff determination nor was there any attempt to evolve the norms for service quality.

On the front of the process of preparing tariff regulations and fixing tariff, there was no serious attention to develop mechanisms for transparency, meaningful and intense participation, and ensuring accountability. In absence of the Conduct of Business Regulations (CBR) for its own operations, the MWRRA

had asked the consultant in the TOR to prepare at least CBRs for subsequent process on tariff determination. But, the approach paper did not include the CBRs for tariff process, nor did MWRRA emphasize on the need for the same. Based on the recommendations by PRAYAS and other organizations, MWRRA accepted in the TOR to publish the entire approach paper in Marathi language along with the English version. But the consultation process began with only the English version of the approach paper available to the stakeholders. After a lot of demands and pressure from PRAYAS and other CSOs, the MWRRA came out with a short summary of the approach paper in Marathi, which was found to be unreadable even by senior-level retired government officers from the water sector. As per the original plan of MWRRA, only four regional consultation meetings were organized to cover the entire state of Maharashtra. Thus, it was found that the regulatory process around the issue is not at all empowering the common citizens and, especially the rural and agro-based communities to actively raise their concerns and demands.

Based on this analysis of the process and content of the approach paper, PRAYAS and other CSOs raised various demands on the three aspects of tariff regulation, viz. equity, efficiency, and empowerment. The various submissions made by the group of activists and CSOs, individually as well as collectively, emphasized the need for integration of these crucial aspects in tariff regulations. Even various participants of the consultation meetings, especially farmers' groups, picked up this thread of analysis to raise their concerns before MWRRA.

Results and Outcomes

Though the process of determination of tariff regulations and fixing the tariff is not complete, there are certain positive outcomes of the intervention which built the foundation for further pro-people interventions on the issue.

It was found that written and verbal submissions were made by various stakeholders, including common farmers, during the consultation meetings conducted by MWRRA. The pamphlets disseminated to participants of the consultation meetings held by Prayas were widely used by participants and their colleagues in developing their own submissions. The pamphlet was also used as a 'stand-alone' submission by the participants. It needs to be noted that a significant number of submissions presenting analysis and arguments of high quality were submitted to MWRRA from across the State, as outcome of the efforts for awareness generation and public education done by PRAYAS and other organizations in the state. This resulted in what could be called as an analytical offensive to protect and promote public interest in the process of determination of bulk water tariff. The media played a critical role in facilitating the reach-out to a large audience and developing a critical discourse around the issue. The comprehensive knowledgebase generated during this process will be very vital in evolving future analytical content and positions.

The collective process with various CSOs and activists in the state conducted by PRAYAS also played a key role in enhancing the analytical offensive and intensifying interventions. The collective process immensely contributed reach-out to various parts of the state including certain rural pockets. This led to considerably higher and intense interventions by stakeholders in the MWRRA's consultation meetings. The meeting of the group of CSOs and activists with the MWRRA top-officials and the acceptance of MWRRA to increase the number of consultation meetings was instrumental in achieving this intense participation and interventions.

Another concrete area of influence was the preparation of TOR for consultancy for preparation of the Approach Paper. Various submissions made by PRAYAS and other CSOs in this regard led to acceptance of certain progressive conditions in the TOR. Publication of the approach paper in Marathi language, preparation of regulations for the process, stage-wise review and approval process are some of the conditions that were included in the final TOR owing to the intervention by PRAYAS and other organizations. These conditions, though not met fully by the consultant or MWRRA, provided an important leverage for critical assessment of the procedural accountability of MWRRA.

The process till now has led to attract attention and generate interest among various stakeholders about the issue of bulk water tariff regulation. The level of awareness and analytical capacities created during this period will play an important role in the future interventions for public interest protection in not only tariff process but also in other regulatory matters.

■■■

4.2 Analysis of Draft TOR for Consultancy to Prepare Approach Paper: Submission One

Introduction

In accordance with the Maharashtra Water Resources Regulatory Authority (MWRRA) law, the regulatory authority initiated the process of determining regulations for bulk water tariff in 2007. A decision was made by MWRRA to assign the task of preparing an approach paper on bulk water tariff regulations to a private consultancy.

The draft of terms of reference (TOR) for this particular consultancy was circulated by MWRRA for comments from stakeholders. Accordingly, a note was prepared and submitted to MWRRA as part of the official consultation process. As per the draft TOR provided by the MWRRA, the was also to prepare a draft tariff order [section 2(14) of the TOR]. Hence, the comments and suggestions provided in this note are applicable to the process of preparing draft regulations as well as a draft tariff order.

A request was made to MWRRA to prepare a report listing all the comments and suggestions it received in this regard—along with the reasons for accepting or rejecting each suggestion—to be published on its website.

1. Public Participation in the Process of Preparation of Tariff Regulations

The MWRRA should ensure that there should be continuous and meaningful public participation in the process of preparing the regulations and tariff order for bulk water tariff. The participation should not be limited to the stages of preparing the TOR or at the stage of finalizing the regulations. Instead the participation should be seen as a continued process in all the stages of the consultants work. The participation should also not be limited to seeking inputs from certain groups of experts. Rather, the participation should be broad-based involving all possible stakeholders and all the citizens who are willing to participate in the process. In this respect, we are proposing the following steps for public participation in the process of preparing the tariff regulations:

1.1 All information related to the TOR and the contract should be made public and comments and suggestions should be sought from all the stakeholders. This can be done by publishing the notice of inviting the comments on the web and other media like newspapers. Participation by all public should be sought in this manner in the following stages of the work:

a. Draft TOR
b. Draft Contract with the Consultant
c. Draft Reports of the 'Review and Assessment' of various aspects as mentioned in the sub-section 1 to 9 of section 2 of the draft TOR
d. Draft Approach Paper on Methodology for determining tariff as per section 2 (11) of the draft TOR
e. Draft Regulations
f. Draft Tariff Order

1.2 Public participation on some of the crucial aspects of the work by the consultant should be sought through face-to-face public hearings. To this end, public hearings should be organized in at least five different regional areas of the state. Such public hearings should be undertaken for the following stages:

a. Draft Approach Paper on Methodology for determining tariff as per section 2 (11) of the draft TOR
b. Draft Regulations
c. Draft Tariff Order

1.3 A 'Stakeholders' Committee' comprising civil society representatives should be formed. This committee can work as a reference group for the MWRRA as well as the selected consultant. The MWRRA and the consultant should share the progress of the work and seek feedback and suggestions from this stakeholder committee on a continuous basis. The Stakeholders' Committee may also play a key role in assisting the MWRRA and/or the consultant in achieving wide-scale public participation in the process of preparing the regulations. The Stakeholder Committee should be involved in the process right from:

a. finalizing of the TOR and preparing the contract document,
b. review of the plan of action by the consultant,
c. periodic (quarterly) review of the progress of work by consultant,

d. review of the draft outputs produced by the consultant and
e. facilitating wide-scale public participation in the process.

1.4 All related reading material (like draft TOR, draft contract, other draft reports) issued by the MWRRA or the consultant for comments and suggestions from the public or any other group should be simultaneously made available in the local Marathi language. This is necessary to ensure the participation of all stakeholders especially the farmers and other groups.

1.5 The consultancy assignment should include the work of simultaneously producing the draft reports in local Marathi language. The large-size reports (more than 50 pages) should also be made available in the form of the abridged version (10% of the total size of the report) in the Marathi language (the full-report should also be available in Marathi).

1.6 The period for response by the public should not be limited to 30 days. Considering the complex nature of the regulations for water tariff there is a need to provide adequate period for the civil society to comprehend the draft reports or regulations and organize their thoughts and articulate the same. Hence, the period for response by public in any type of consultation should not be less than 60 days.

1.7 A 'synthesis report' should be prepared after every process of seeking comments and suggestions from public or any other groups. The synthesis report should include summary of all comments and suggestions received. The synthesis report should also include the reasons for inclusion or exclusion of each comment /suggestions by the MWRRA and/or consultant.

1.8 The consultant should be assigned the work of review and assessment of the norms and procedures for public participation adopted / followed in the processes related to tariff and in making other crucial decisions in different sectors in India and in other countries across various sectors. This task should be included in the list of various issues assigned to the consultant for review and assessment as given in sub-section 1 to 9 of section 2 of the TOR.

1.9 The MWRRA Act includes a concrete provision for public participation in the process of establishing water tariff system [refer section 11(d)]. Hence, all above suggestions related to public participation in preparation of regulations on bulk water tariff should be included as part the TOR and the Contract Agreement with the consultant. This will ensure the compliance of the particular provision in the act.

2. Transparency in the Process of Preparation of Tariff Regulations

The State Water Policy emphasizes on evolving a transparent system of water tariffs (section 4.4, State Water Policy). The MWRRA is required to work according to the framework of the State Water Policy. Based on this policy guideline, it is necessary to establish transparency in water tariff right from the process of selection of consultant to the final Tariff order. The following are the suggestions on ensuring transparency in the process of preparing tariff regulations:

2.1 The process planned for different stages of preparing the tariff regulations should be made public prior to its implementation by publishing the same on the web. In particular, the process for following stages should be made public by the MWRRA and/or the consultant:

a) Work plan including the schedule of various activities to be conducted by the MWRRA

b) Selection of consultant for the assignment and the final agreement or contract with the consultant including the criteria and schedule of payments

c) Work plan including the schedule of various activities to be carried out by the consultant

d) 'Review and Assessment' of various aspects by the consultant as mentioned in the sub-section 1 to 9 of section 2 of the draft TOR

e) Preparation of Draft Approach Paper on Methodology for determining tariff as per section 2 (11) of the draft TOR

f) Preparation of Draft Regulations

g) Preparation of Draft tariff order

2.2 The documents related to the actual process executed in various stages of preparation of the regulations and tariff order should be made public by publishing the same on the web. In particular, the details of the following should be made public by the MWRRA and/or the consultant:

a) Report on the selection of the consultant (including the details of the assessment of the bidders)

b) Report of the periodic progress of the work by the consultant

c) Report of the periodic performance review of the work done by consultant and reviewed by the MWRRA

d) Execution status reports and review report of the process of public participation conducted by the consultant and/or the MWRRA

e) Report on the process of finalizing the drafts delivered by the consultant

2.3 The consultant should make public all the elements of the knowledge base used (like documents, literature, notes, interviews relied upon) while executing the assignment including the comments and feedback from any group or individuals. This resource base should be properly indexed and organized into a registry in such a way that the same can be easily accessible to all.

2.4 The consultant should be assigned the work of review and assessment of the norms and procedures related to establishing transparency in tariff systems followed in India and in other countries across various sectors. This task should be included in the list of various issues assigned to the consultant for review and assessment as given in sub-section 1 to 9 of section 2 of the TOR.

2.5 Every task assigned to the consultant should have clear-cut deliverable(/s) along with adequately articulated specifications of the deliverables. This will enhance the transparency in the expectations from the consultants. The deliverables for the task of review and assessment of various aspects of the water tariff [refer section 2 (1 to 9) of TOR] assigned to the consultant through the TOR does not mention the specific deliverables. Each of this review and assessment should conclude with well organized review and assessment report.

2.6 The consultant should be asked to explain (in adequate details) how the policy and other guidelines/principles (refer section 3.1 of this submission for list of some of the principles) have been addressed in each of the deliverables of the consultant. There should be a separate section for such an explanation. This will enhance the transparency of the deliverables of the consultant towards the important guideline and principles.

2.7 In pursuance of the policy guidelines on evolving transparent water tariff system (section 4.4, State Water Policy), all above suggestions related to transparency in preparation of regulations on bulk water tariff should be included as part the TOR and the Contract Agreement with the consultant.

3. Approach Paper on Methodology for Determining Tariff

It is envisaged in the draft TOR that the consultant will prepare an approach paper proposing a methodology for determining the tariff. This is one of the important stages of the process of preparing tariff regulations. The approach paper will be a crucial document that will form the basis for preparing the draft regulations. The following are suggestions for the TOR related to this approach paper:

3.1 The approach paper should be seen not just as the paper elaborating the method for tariff determination, but it should also be seen as a paper elaborating the tariff philosophy or principles. The tariff philosophy or principles are the accepted substantive guidelines that shall govern the tariff systems as a whole. Hence, there should be two clear-cut parts of the approach paper, the first part presenting the tariff philosophy or principles and the second part presenting the methodology for tariff determination. The methodology presented should also be justified on the basis of how the particular method reflects the substantive guideline articulated in the tariff philosophy and principles. Among other things, the TOR should specify the following guiding principles for elaboration by the consultant in the first part of the proposed approach paper:

a) The principle: 'Judicious, equitable and sustainable management, allocation and utilization of water resources (this guideline comes from the very preamble of the MWRRA Act). This particular guideline have direct and indirect impact on the water tariff and hence needs due consideration by the consultant in pursuance of the MWRRA Act.

b) The principle: 'to create enabling environment for better and more equitable and productive water resources management in an environmentally sustainable manner to promote growth with reduction in poverty and minimizing regional imbalance' (mentioned in the section 1.3 of State Water Policy as the first prong of the five prong strategy of the state water policy).

c) The principle: 'full recovery of cost of irrigation management, administration, operation and maintenance of water resource project [as mentioned in section 11(d) of MWRRA Act]

d) The principle: 'the person who pollutes shall pay' [as mentioned in the section 12(5) of MWRRA Act]

e) The principle: 'a person having more that two children shall be required to pay one and half times of the normal rates of water charges fixed'. Though this comes from the MWRRA Act itself, it is really a regressive—as it penalizes the victims of certain socio-cultural and economic processes—provision that has potential to create political turmoil. So special effort should be made to evince guidance from the stakeholders (especially public) on implementation of this provision.

f) The principle: 'recovery of all or a portion of capital costs of the infrastructure (as mentioned in the section 4.4 of State Water Policy) or the principle of recovery of capital cost with interest (as mentioned in the section 10.1 of State Water Policy) as part of the financial and physical sustainability.

g) The principle: 'prudent capital cost or capital investment'. This particular principle becomes especially important in the light of the principle of full cost recovery of capital costs as mentioned in the state water policy. Also, the capital costs have direct implications for management, administration of irrigation as well as operations and maintenance costs of water resource project (which has been accepted as the principle in the MWRRA Act). Hence, due consideration should be given by the consultant to the principle of 'prudent capital cost/investment' as part of pursuance of the state water policy and the MWRRA Act.

h) The policy guideline: 'In order to alleviate the impact of tariff charges on those (who are) unable to pay, the state may allow cross-subsidies and allocate government funds' (as mentioned in the section 4.4 of State Water Policy) and also the policy guideline that the 'subsidy on water rates to the disadvantaged and poorer sections of the society shall be well targeted and transparent (as mentioned in the section 10.1 of State Water Policy)

i) The principle: 'cost effectiveness of the state water services (as mentioned in the section 10 of State Water Policy) including the principle of 'optimizing the cost of service and maintaining transparent accounts of the amount and sources of revenues and costs and their allocation to various functions and services'. This particular principle will have the direct impact on the water tariff. Hence, in pursuance of the state policy, this principle needs to be given due consideration in the tariff regulations.

j) The principle: 'transparent system of water tariffs' (as mentioned in the section 4.4. of State Water Policy)

k) The principle: 'public participation in the water tariff system [as mentioned in section 2.2.1 of the State Water Policy and section 11(d) of the MWRRA Act]

l) The principle of 'linking water rates directly to the quality of service provided' (as mentioned in the section 10.1 of State Water Policy). In the light of this principle, the consultant should also be assigned to review and assess the norms and procedures linking the quality of water services (including the quality of water supplied through the service) with water tariff that are adopted in India as well as in other countries.

m) Tariff principles—that are adequate and appropriate—should also be elaborated for giving due consideration to situations of water scarcity or economic distress suffered by any community.

3.2 Apart from the tariff principles mentioned above (in section 3.1 of this submission), the consultant should also be assigned to review and assess 'progressive' tariff principles that are followed in India as well as other countries. Here, the term 'progressive' implies that the principles striving to protect and promote the public interest, which would primarily include the interests of the poor and disadvantaged sections of society as well as the broader and long term interests of society such as environmental protection and ensuring equity.

3.3 The approach paper comprising the above mentioned two distinct parts should be reviewed and approved by the MWRRA. The consultant should work on the second part of the paper comprising the tariff determination methodology only after the MWRRA approves the first part comprising the tariff philosophy or principles.

3.4 The consultant or the MWRRA should follow the process of public participation and transparency as mentioned in the section 1 and 2 of this submission during review and approval of the approach paper.

3.5 The approach paper prepared by the consultant proposing the methodology for determining tariff [refer section 2(11) of the draft TOR] should also include illustrative calculations for determining tariff based on different methods proposed. The approach paper would not be able to adequately explain the outcome of the various methods proposed in the absence of such illustrative calculations. These illustrative calculations should be done for a sample of at least two to three working projects in the state. This will clearly spell-out the financial implications of the

proposed methods for determining tariff and enhance transparency about the implications of using these methods. The illustrative calculations shall be done not just for bulk tariff but it should also be done for the tariff at the water user end, clearly spelling out the assumptions made in the process. The end-use tariff will actually enable people to understand the impact of the particular method or regulations on their individual finances. Such illustrations of the various options (in methods and draft regulations) depicting the implications of the options on bulk as well as end-users' tariff will facilitate quality inputs from stakeholders on the approach paper based on better comprehension of the methods proposed in the paper. Hence, the TOR for consultant [in section 2 (11) of the TOR] should include such illustrative calculations as one of the content of the approach paper on tariff determination methods. It should not be assumed that such illustrative calculations will be included in the draft tariff order to be prepared by the consultant. The draft tariff order is the last deliverable in the process and it leaves hardly any room for discussions and revisions in the methodologies presented in the approach paper. Hence, the step of providing illustrative calculation of determining tariff should be very much a part of the draft approach paper on tariff methodologies (the second part).

3.6 The approach paper should also discuss the pros and cons of the different options for determining tariff along with the implications of the options on furthering the objectives and principles as reflected in the state water policy and related legal instruments (including the guidelines mentioned in section 3.1 of this submission).

4. 'Stage Gate System' for Consultancy Assignment

The current TOR for the consultancy assignment seem to provide an integrated consultancy assignment requiring the consultant to conduct review and assessment of various aspects of tariff, prepare approach paper on methodology, prepare draft regulations and finally prepare the draft tariff order. In this process, if such an integrated assignment is awarded to one single consultant then there are many vulnerabilities that may be detrimental to the process of completion of work in given time and quality. At the same time, it is easy to hold one single consultant accountable for maintaining the quality of the output. The following are the suggestions to reduce the vulnerabilities and at the same time maintain the accountability of the consultant:

4.1 The assignment should be broken into stages and there should be a system of review and assessment of the performance of the consultant after each stage of the assignment. The consultants should satisfy the MWRAA and other stakeholders (and the Stakeholders' Committee mentioned in section 1.3 of this submission). The consultant should be allowed to proceed with the next stage of the assignment only after complete satisfaction of the work in earlier stage. In this 'Stage-Gate System' there should be adequate provisions for discontinuing services of the consultant in the case of dissatisfactory work at any stage of the assignment. This 'Stage-Gate System' can be applied to following four well demarcated stages:

Stage 1: Review and assessment of the various aspects of the water tariff

Stage 2: Approach Paper comprising the substantive guidelines and methodologies

Stage 3: Draft Regulation

Stage 4: Draft Tariff Order

4.2 Among the above mentioned stages, there should be clear differentiation between the stage of draft regulation and draft tariff order. Tariff order is an order that is a clear mandate of the MWRRA while the tariff regulations will be jointly approved by the MWRRA and the state government. Hence, the stage of tariff order should not be undertaken before final approval and official notification of the regulations.

4.3 Considering the vast challenges in the assignment, the MWRRA should ensure that the work should be completed in timely manner and without major controversies. To this end, the MWRRA may explore the option of appointing multiple consultants headed by a lead consultant. The consultants then can form a steering committee headed by the lead consultant. For this purpose, the assignment will have to be broken into specific modules that can be worked on independently with proper integration by the lead consultant. Further, for smooth operationalization, the responsibility and accountability—of both the substantive as well as coordination tasks—should be clearly defined in the beginning itself.

4.4 The selection of the consultant should be a two step process which involves selection of prospective

consultants based on first the technical bid and then the final selection of the consultant based on the financial bid. While both the bids should be submitted together in the beginning of the process, only those qualifying the technical bid shall be allowed for the financial part of the tender. The selection process should be fully transparent. The results of the technical (and financial) bid along with the technical (and financial) assessment of each bidder should be made public as soon as the bid has been assessed.

Conclusion

Such a detailed and elaborate process—involving proper care for making processes and procedures systematic, transparent, participatory, and accountable—could be found cumbersome and impractical by some. However, it needs to be noted that, first, Maharashtra Electricity Regulatory Commission (MERC) has demonstrated that such an elaborate and detailed process can be successfully implemented in India and in Maharashtra in timely manner. Second, whether it is practical or not, such a process is a precondition for establishing credibility of the MWRRA as it would clearly demonstrate the clean and honest intentions of the MWRRA and would help dispel all the apprehensions and suspicions in the minds of different stakeholders. This is, in turn, necessary for ensuring the ownership of the MWRRA and its functioning by different stakeholders (especially media and public). It needs to be noted that, without such a widely-shared feeling of ownership, the MWRRA would not be able to effectively discharge its mandate in such a contentious sector as water. In this vein, the following observation becomes important:

It is not adequate to seek participation, it is equally, if not more, important that all stakeholders (mainly those which are on the fringes of sector and society) clearly see and are convinced that participation is actively sought.

In this context, it should be noted that even after the MWRRA adopts such an elaborate process for tariff regulation, its effort will be looked at with high level of circumspection, if not suspicion. This is because such a process could be interpreted as a stratagem to ensure least resistance to MWRRA's 'design' of bringing in water trading and privatization. In fact, MWRRA's decision to bring in tariff regulation before brining in 'Conduct of Business Regulations' (or CBRs) has already strengthened this feeling. MWRRA should now understand and acknowledge critical importance of CBRs in giving clear indication to all stakeholders that the MWRRA is open and inviting to proactive public participation, while being fully transparent and accountable in conducting its own business. Hence, we earnestly request the MWRRA to initiate, with same enthusiasm and urgency, the process of drafting CBRs. Drafting of CBRs in the very initial stages of its functioning by MERC has been one of the ways in which MERC could secure the credibility and respect among its peers as well as ownership of its stakeholders. We hope that the MWRRA will give serious considerations to the recommendations given in this submission.

■■■

4.3 Analysis of Draft Approach Paper on Bulk Water Tariff Regulations: Submission Two

Introduction

The draft approach paper titled "Developing Regulations for Bulk Water Pricing in the State of Maharashtra" was prepared by the consultant and published by MWRRA on their website for consultation with stakeholders. Subsequently, PRAYAS undertook analysis of the 300-page long approach paper in various stages. In each stage of the analysis, a submission was prepared and forwarded to MWRRA as part of the consultation process. In this way, about four submissions were made before the MWRRA comprising the analysis of approach paper from public interest perspective and recommendations on the same. The first submission (dated 30th Nov. 2009) based on the preliminary analysis of the approach paper is reproduced verbatim in the following sections.

The submission has been divided into following parts:

1. Process of Preparing Approach Paper and Tariff Regulations
2. Insufficiency in the Content of Approach Paper vis-à-vis the Agreed TOR
3. Lacunas in Proposed Philosophy or Principles
4. Interpretation of the Tariff Related Provision in MWRRA Act

Detailed comments and recommendations substantiated with justifications are presented under each of the above mentioned parts. The comments and recommendations are given in the following paragraphs.

Part 1. Process of Preparing Approach Paper and Tariff Regulations

This section focuses on the actual and expected process of preparing approach paper and tariff regulations. In the following submissions only process related aspects are covered, while the content related aspects are covered in other sections of the submission.

Submission 1.1 Strict Adherences to 'Stage-Gate System

It was agreed in the TOR that the consultancy assignment will be divided into various stages and after every stage there will be review and approval of the outputs of that stage. This type of 'stage-gate system' is useful to avoid accumulation of errors in the final output and enhance the quality and appropriateness of the content of the outputs.

Accordingly, in paragraph 5 of the TOR, the stages of submission of various reports are mentioned. Specific time-period is also allotted for suggestions and approval of the output of particular stage. The TOR further mentions that the approval will be done by the Joint Planning, Implementation and Review Committee (JPIRC) comprising of all the members of MWRRA and Secretary, MWRRA.

As per the TOR, in the first stage the submission, the consultant is required to submit 'Draft Conduct of Business Regulation' and 'Part 1 of the Approach Paper' comprising tariff philosophy or principles (refer para 5(1) of TOR). Only after approval of the outputs in first stage can the consultant go ahead with the output in the second stage (refer para 3 (19) (c) of TOR). The output in the second stage is 'Part 2 of Approach Paper' comprising methodology for tariff determination as well as terms and conditions of tariff regulations giving detailed step-by-step procedure with illustrative examples.

The draft approach paper, in its present form published by MWRRA for public consultation, states that the paper is a consolidated approach paper comprising of Part 1 and Part 2 (refer para 1.3 of approach paper). The approach paper does not mention about the process of review and approval of the first part of the paper by JPIRC. This leads to a conclusion that the 'stage-gate system' adopted in the TOR has not been strictly adhered by the consultant.

The separation of tariff philosophy or principles (i.e. first part of paper) from the operational part of tariff regulations (such as methodology for tariff determination) is necessary because it automatically

leads to commitment on the philosophy/ principles before exploring the options for operational/ methodology part. In absence of this commitment there is a tendency to approach the operational/ methodology part by neglecting or compromising on essential principles of tariff. Hence, strict adherence to the 'stage-gate system' is necessary.

More importantly, such a 'short-cut' process would restrict the scope of the debate on the approach paper, severely affecting quality of the final version of the approach paper. To explain this, one needs to consider that the debate on methodology and Terms and Conditions can be meaningful if the principles or philosophy is frozen. The principles or philosophy cannot be frozen unless there is debate on the draft principles proposed by consultant. Efforts to simultaneously conduct debate on the one hand on principles or philosophy and, on the other hand, on methodology and Terms and Conditions would create confusion. This was the rationale for applying the 'Stage-gate System' in between the stage of developing principles/ philosophy and developing methodology and Terms and Conditions.

If at all this 'Stage-gate System' accepted in the TOR has been adhered to then it will be useful to know the process and to share the finally copy of 'principles or philosophy' approved by JPIRC.

Recommendations based on Submission 1.1:

1. Based on this submission on 'stage gate system', it is recommended that the JPIRC undertakes review and approval process for Part 1 of the approach paper.

2. Stakeholder consultation should be held in this process of review and approval.

3. And, only after approving Part 1, the process for review and approval of Part 2 should be begun.

4. Comprehensive stakeholder process should be undertaken through regional consultations in at least four different parts of the state.

Submission 1.2 First Develop CBRs for Stakeholder Consultation and then Initiate Consultation on Tariff Regulations

Along with the approach paper comprising tariff principles and regulations, as per the TOR, the consultant is also supposed to prepare the 'conduct of business regulations' (CBR) for water tariff. Among other things, the CBR are supposed to define and articulate steps and procedure for the process of stakeholders' consultation to be undertaken while preparing regulations and before issue of tariff orders (refer para 4(1) of TOR). In other words, the process of consultation with stakeholders that will be undertaken by MWRRA to finalize the draft approach paper (that includes tariff regulations) should be as per the process of stakeholder consultation defined and articulated in the CBRs.

Hence, it is expected that the CBRs should be prepared, discussed, and finalized before initiating stakeholders' consultation on tariff regulations based on the approach paper. The TOR in paragraph 5(1) clearly mentions that the consultant should submit draft CBR along with the first part of the approach paper. Hence, the TOR also requires that the CBRs, and especially, the process of consultation should be defined in the first step. Once this model of the process of consultation is finalized, it should be followed for conducting any process related to tariff regulations and tariff determination including the process of consultations on the approach paper.

But the current process initiated by MWRRA involves consultation process on tariff regulations without preparing appropriate CBRs to guide the process of stakeholder consultation.

The present draft of the approach paper—claimed to be the complete approach paper—does not make any mention of CBRs or process of stakeholder participation, except for para 7.21. In this Para (7.21), the consultant takes liberty of suggesting short-cut process for consultation on tariff regulation. Following the consultant's advice, MWRRA seems to be conducting consultation on approach paper on tariff regulation before finalizing the CBRs for such consultation. This will amount to putting the horse before the cart. This serious lacuna needs to be addressed by following the recommendations given below.

Recommendations based on Submission 1.2:

1. As per the TOR, draft CBRs should be submitted by the consultant, which should include in details the process of consultation to be adopted for preparation of tariff regulations and issuing tariff order.

2. There should not be any consultation process on tariff regulations before the draft CBRs are reviewed and approved by MWRRA.

3. As consultation process is the main window for participation of stakeholders, in the true spirit of

transparency, accountability, and public participation, MWRRA should conduct, the review and approval process pertaining to CBRs with appropriate and due consultation with stakeholders.

Submission 1.3 Inadequate Publicity to the Public Notice Issued by MWRRA for Consultation on Approach Paper

An advertisement was published in Times of India dated 23rd October 2008 giving the public notice, informing the public about the draft approach paper and also seeking comments and suggestions from interested parties on draft approach paper till 30th November 2008. But this notice was published in the 'classified' section of only the Mumbai edition of Times of India. The said notice does not appear in the Pune or Nagpur editions of Times of India [11]. Thus, the notice could not be accessed by readers of Times of India from Pune or Nagpur and other parts where Pune or Nagpur edition is circulated.

Apart from this, the size of the advertisement about the notice published in Mumbai edition of Times of India is so small that it is difficult for the reader to notice the advertisement. It should be noted that the advertisements published in 'classified' section of news papers are always in smaller font size then the other sections of the paper. Hence, advertisement of such a crucial matter like consultation on tariff regulations should be published in bigger size and bigger font so that its gets immediate attention of the readers. In effect, the advertisement should be reader-friendly.

Further, the website on which the approach paper is hosted does not mention about the consultation process or the date of submission of comments and suggestions. So if someone accesses the approach paper from website, without getting chance to notice the press advertisement, will get no clue what-so-ever about any such consultation process.

Hence, the publicity given to the process of consultation is inadequate and insufficient.

In absence of details like the various stages of public consultation (like consultation through website, regional workshops, and focused group meetings) or the exact process of consideration of recommendations received (e.g. reasoned report) it is difficult for various stakeholders to prepare themselves for the said consultation.

Recommendations based on Submission 1.3:

1. Public consultation should be initiated only after all details of the consultation process are articulated and disclosed in the form of CBRs. CBRs should be finalized after appropriate and due consultation with various stakeholders.

2. Consultation by inviting suggestions through a public notice in newspapers should be done in such a way that the notice gets published in proper size and proper place in all editions of all leading newspapers (including Pune and Nagpur edition of Times of India)[1].

3. Consultation by hosting documents on website should be accompanied with hosting of a document comprising all the details of the consultation process on the same website.

Submission 1.4 Marathi as Official Language for Consultation

As per the TOR, the consultant is expected to submit draft CBR and approach paper in English as well as Marathi language (refer para 7 of TOR). Hence, Marathi has been accepted an official language in the process of preparing the regulations. This is found necessary in the context of the language barriers faced by farmers and rural community, which represent a major group of stakeholders in water sector.

But the process of consultation has been initiated without publishing the approach paper in Marathi language. This will lead to disrespect to genuine needs of vast majority of stakeholders in water sector who are not well versed with English.

Recommendations based on Submission 1.4:

1. Public consultation should be initiated only after the documents related to consultation are simultaneously published in Marathi language.

2. It should be clearly mentioned in the public notice about the consultation that comments and suggestions from stakeholders can also be sent in Marathi language.

Submission 1.5 'Operational Summary' of the Approach Paper

The approach paper published for consultation runs into almost 300 pages. It is difficult for most of the civil society groups and individual stakeholders to analyze

[11] This conclusion is based on study of editions of Times of India available on website. Factual information in contrast to this conclusion could be shared by MWRRA.

such a voluminous document in a short period of time and give suggestions on the same to MWRRA. Hence, it is necessary that an abridged version of the operational sections of the report be made available for the public and stakeholders for comments. The abridged version of the paper will also be useful to enhance the outreach of the paper and ensure informed and, hence meaningful and intensive participation of all stakeholders. Such an abridged version of the paper comprising the operational summary of the paper (especially of chapters 7 to 10, which comprise of the key features of the proposal) should be made available in both English and Marathi languages.

Recommendations based on Submission 1.5:

1. An abridged version of the operational sections of the report should be made available for the public in both English as well as Marathi languages.

2. Such abridged version should be published in large scale in form of a booklet and the same should be widely disseminated to various stakeholders, especially, to the civil society groups having potential to reach-out to large number of stakeholders and to other who are not in capacity to access the document from internet.

Part 2. Insufficiency in the Content of Approach Paper vis-à-vis the Agreed TOR

In this section comments and suggestions are made based on the analysis of the content of the approach paper. But this section restricts to the comparison of the content expected as per the TOR and the actual content include in the approach paper. So the submissions below highlight whether all contents as expected in the TOR have been included in the approach paper or not. The comments on the quality of substance of actual content of approach paper are not included in the current section and the same are given in the next section of the submission.

Submission 2.1 Absence of Review of Tariff Structure of Various States in India in the Approach Paper

As per the TOR, it was required from the consultant to undertake review of the tariff structure in various states in India like Andhra Pradesh, UP, Punjab, Haryana, Tamil Nadu (refer para 3(2) of the TOR). The draft approach paper submitted by consultant does not include any information on this aspect. In this sense the draft paper is incomplete.

Recommendations based on Submission 2.1:

1. The consultant should complete the approach paper by incorporating the review of tariff structure in various states in India.

2. Public consultation should be undertaken only after the approach paper is complete in all respect.

Submission 2.2 Absence of Methodology for Tariff Determination in the Approach Paper

As per the TOR, the consultant is required to present the methodology for tariff determination in the second part of the approach paper (refer para 3(19)(b) of the TOR). But the approach paper does not provide concrete details of the generic methodology to be used for tariff determination. Instead the paper only provides illustrative example of arriving at tariff. The illustrative example cannot be considered as the methodology proposed for tariff determination because it pertains only to the current data and various other assumptions (e.g. the ad hoc assumptions about the weightages given for apportionment of O&M costs in Table 10-2 of the approach paper).

It should be noted that the TOR clearly indicates that the methodology for tariff determination is not the same as illustrative example for tariff determination (refer para 3(19)(b) & (c) of the TOR). A generic methodology cannot be derived from the illustrative example given in the approach paper. Hence, a generic method for determination of tariff for all future purposes in not included in the approach paper. In this respect the approach is incomplete.

The approach paper states that as per the GR dated March 25, 2007, the water rates as on April 1, 2007 will remain applicable till MWRRA determines tariff. As per the GR, now MWRRA is required to determine tariff from the year starting from 2009. Thus, the major focus of the approach paper seems to be limited to determining tariff for the control period from 2009 till 2011.

Based on this narrow focus, it can be clearly seen that the approach taken by the consultant is to arrive at the tariff for the next three year period, without giving due consideration to the generic methodology of tariff determination or terms and conditions (refer next submission 2.3 for comments on terms and conditions) for tariff regulations.

It should be noted that the regulations for bulk water pricing that will be formulated through the on-going process should cater to the needs of all future occasions

and not just next three year period. Regulations are meant to serve the purpose determining methodology to be used on long-term basis. Hence, focusing on narrow three-year period will not be sufficient while formulating the regulations. This will not serve the purpose of regulation as can be understood from the letter and spirit of the MWRRA Act.

Recommendations based on Submission 2.2:

1. The consultant should complete the approach paper by incorporating the generic methodology to be followed in all future occasions of tariff determination. Illustrative example should not be considered as satisfying the purpose of presenting the methodology for tariff determination.

2. Public consultation should be undertaken only after the approach paper is complete in all respect.

Submission 2.3 Absence of Terms and Conditions of Tariff Regulations in the Approach Paper

As per the TOR, the consultant was required to submit the draft terms and conditions of tariff regulations (refer para 3(19)(c) of the TOR). But the draft approach paper submitted by the consultant does not include any concrete proposal on the terms and conditions for tariff regulations. In fact the approach paper has no single section or paragraph that clearly states the terms and conditions.

In chapter 7 of the paper, an attempt is done to lay down the framework for tariff regulations. But the introduction to the chapter clearly states that various issues associated with tariff regulations are discussed in the chapter (refer second paragraph in the beginning of the chapter). Thus, this chapter also does not include concrete proposal for terms and conditions for tariff regulations. In this respect the approach is incomplete.

Recommendations based on Submission 2.3:

1. The consultant should complete the approach paper by clearly stating the proposed terms and conditions for tariff regulations.

2. Public consultation should be undertaken only after the approach paper is complete in all respect.

Submission 2.4 Absence of Review and Assessment of Various Aspects in the Approach Paper

As per the TOR, the consultant was required to undertake review and assessment of various aspects related to water tariff (refer para 3 of TOR). The study of the approach paper submitted by consultant suggests that the following areas of review and assessment have not been included in the approach paper:

a. Review and assessment of the O&M norms and allocations made for O&M for last 5 years (refer 3(5) of TOR):

In Chapter 9 of the approach paper, the consultant includes references to the O&M costs for last 5 years. But these are mere reproduction of data provided by MWRRA and it does not include any review or assessment of the costs (refer Table 9-1, 9-8, 9-12). This data is not reviewed or assessed but directly used by the consultant to calculate projections of O&M for next three years of control period. As per TOR, the consultant is actually required to not just review but also assess the norms as well as allocations for last 5 years. But no where in the report, the consultant presents their own review and assessment of the norms. The consultant has reproduced sections of the report prepared by WALMI on norms for M&R and made observations on the report. But the observations are based on the norms proposed by WALMI. Hence, it cannot be considered as an independent review and assessment of past norms, as required by the TOR. Hence, the approach paper is incomplete in this respect.

b. Review and assess inter-sectoral cross subsidy and government subsidy as reflected in water tariff assessment vis-à-vis actual O&M expenditure in last 5 years (refer 3(8) of TOR):

The consultant has totally ignored the requirement, as per TOR, to review and assess various subsidies. In fact there are only two sub-sections where subsidies are discussed. These are: paragraph 8.3.8 which only refers to particular GR that makes provision for management subsidy to WUAs, and paragraph 10.5 which only gives definition of cross-subsidy. In effect, the approach report does not include review and assessment of subsidies as required by TOR. Hence, the approach paper is incomplete in this respect.

c. Review and assess existing tariff structure vis-à-vis paying capacity and productive usage by each user category (refer 3(9) of TOR):

The consultant in its approach paper has totally ignores the issue of paying capacity. The approach paper does not include any review or assessment of existing tariff structure in relation to paying capacity or productive usage. The only references to paying capacity is found either in relation to the findings of various committees

established to review water sector (refer para 4.5.6 and 7.1.1 of paper) or in relation to proposed methodology for apportionment of revenue requirement (refer para 10.3.2 of paper). It should be noted that the findings of the various committees are based on the tariff structure existing in the past, whereas the consultant was required to assess this issue in context of current tariff structure. Hence, the cursory references to issue of paying capacity given in the approach paper in relation to findings of various committees cannot be considered as review and assessment of the particular issue. Similarly, the reference to paying capacity in relation to calculations for apportionment of revenue requirement also cannot be considered as review and assessment of the issue. This is because these calculations pertain to the proposed norms for revenue apportionment and does not include review and assessment based on existing tariff structure. In effect, the requirement of review and assessment of the issue of paying capacity and productive usage has not been full-filled by the consultant in the approach paper. Hence, the approach paper is incomplete in this respect.

d. Review and Assessment of Provisions of Water Tariff in CP & Bearer Act 1931:

As per TOR, the consultant was expected to review and assess provisions related to water tariff in various Acts including Central Province (CP) & Bearer Act 1931. Though, the consultant has taken cognizance of various acts in this relation, but fails to take cognizance of CP & Bearer Act. So for a stakeholder it is not clear whether CP & Bearer Act would have any effect on the tariff regulations and if so how.

Review and assessment of the above-mentioned issues is very crucial towards formulation of tariff regulations. Due to this very reason, it was included in the TOR. But the same has not been included by the consultant in the approach paper. Hence, there is a need to first ensure that the review and assessment of these crucial aspects is done and the same is included in the approach paper.

Recommendations based on Submission 2.4:

1. The consultant conduct thorough review and assessment of the issues mentioned above (required as per para 3(5), (8), (9) of TOR as reproduced in para 2.4 (a), (b) & (c) in present submission) and include the same in the approach paper.

2. Public consultation should be undertaken only after the approach paper is complete in all respect.

Part 3. Lacunas in Proposed Philosophy or Principles

This section includes comments on the qualitative aspects of the proposed philosophy or principles for tariff determination. The submission below present a brief assessment of the philosophy or principles as proposed in the approach paper.

Submission 3.1 Scanty and Inadequate Detailing of Tariff Philosophy or Principles

As per the TOR, the first part of the approach paper is supposed to be devoted completely to tariff principles or philosophy. Hence, it was expected that paper would include detail elaboration and articulation of proposed principles. But it can be seen from paper that out of 302 pages of approach paper only 3 pages are devoted to enumeration of principles or philosophy (refer Chapter 6 of paper). This clearly indicates at the scanty and inadequate detailing of tariff philosophy or principles given in the approach paper.

Hence, the consultant has missed the point that principles and philosophy are crucial since they are the guiding post or foundations on which the regulations need to be built.

It could be argued that Chapter 7 also includes certain principles. But it is clear from the statement in Chapter 7 made by the consultant in the paper that the particular Chapter discusses various issues associated with bulk water tariff (refer second paragraph in the beginning of the said Chapter). The discussion on these issues included in the Chapter also clearly suggests that the same cannot be considered as proposal for tariff philosophy or principles.

Recommendation based on Submission 3.1:

1. The approach paper should include detailed and comprehensive proposal for tariff philosophy or principles and avoid giving scanty and inadequate details. It should form the major part of the first part of the approach paper.

Submission 3.2 Neglect to Progressive Principles

The regulator is supposed to protect the interest of various stakeholders as well as the public at large. In particular, the regulator should give special attention to the problems and needs of the poor and other disadvantaged sections of the society. Thus, regulation should cater to social policy considerations in the water sector. The MWRRA Act as well as water policy outlines

some of these social policy considerations. The consultant has not only given scanty and inadequate details of tariff principles and philosophies, but the consultant has also neglected certain progressive principles in its proposal. Some of the progressive principles that are neglected in the approach paper are:

a. Equity: The MWRRA Act emphasizes the need for judicious and equitable management, allocation and utilization of water resources. Equitable management also includes management of costs and tariffs. The approach paper does not include 'equity' as the main guiding principle in the list of principles enumerated in Chapter 6 of the paper. There is a cursory mention of the principle of 'no tariff shock to any class of consumer' in the said chapter, which we could be indirectly linked to the principle of 'equity'. But apart from this cursory mention, there is no attempt to separately and comprehensively discuss the issue of 'equity' in tariff regulations and concrete proposal for the same.

In Chapter 7 of the paper, the consultant discusses principle of 'ability to pay' vis-à-vis 'cost-based pricing'. In this discussion the consultant concludes by proposing that 'cost-based pricing' should be followed since it is most rationale and economically sound principle (refer Para 7.1.1 and 7.1.2 of paper). Hence, the consultant proposes to close the option of applying the 'ability to pay' principle in tariff regulations. Further, the consultant proposes that 'ability to pay' may be used to apportion costs between categories of users (refer Para 7.1.2 of paper). In the illustrative example for determination of tariff for three year control period, the consultant tries to incorporate this aspect by making provision for consideration of 'economic utilization' of water, with the assumption that 'economic utilization' is linked to 'ability to pay' (refer Para 10.3.2 of paper). But in practice the consultant restricts the application of the principle of 'ability to pay' to only broader categories of drinking water, industry and agriculture. So the consultant assumes all consumers of drinking water or all consumers of irrigation water are equal and have same capacity to pay the tariff. The consultant totally neglects the principle of 'equity' which is more important within each category of use and not just at the level of broader category of use. For example, all farmers do not have equal capacity to pay or all drinking water consumers do not have equal capacity to pay. The consultant ignores these crucial aspects of equity.

The consultant also ignores the need for applying the principle of equity at times of distress on certain water users arising due to drought, any other scarcity like through pollution or economic distress. This consideration is especially required in life-sustaining resource like water.

b. Life-line Water Services: The State Water Policy (SWP) clearly states that in order to alleviate the impact of tariff charge on those who are unable to pay the complete charge, the State may allow cross-subsidies and allocate Government Funds (refer Para 4.4 of SWP). Thus, the SWP includes the social policy consideration of ensuring basic water services to the poor and disadvantaged sections (such as tribals, dalits, women, small farmers and others) even if they are not able to pay for the same (i.e. principle of 'ability of the water users to pay'). This makes it obligatory on the MWRRA to adhere to this policy consideration aimed at ensuring water to the poor and the disadvantaged section of the society.

Though, the approach paper discusses the issue of applying 'ability to pay' principle for water tariff, it concludes by leaving the issue out of the ambit of the current tariff regulation (with the assumption that the government may decide upon provision of subsidy to certain category of users). Lack of consideration of ensuring basic water services to the poor and disadvantages sections at affordable rate in the current tariff regulations will make the regulations incomplete and lead to non-adherence of the policy and legal provisions.

The MWRRA Act states that the MWRRA should, 'determine and ensure that cross-subsidies between categories of use...are...offset by stable funding.....' While interpreting the particular provision the approach paper states that, 'One of the important functions of MWRRA is to establish a water tariff system, to fix the criteria for water charges at sub-basin, river basin and State level and to determine the cross-subsidies between categories.' (refer Para 2.3.1 of approach paper). Thus, MWRRA is obliged to give due consideration to the matter of life-line water services to poor and other disadvantaged sections. In this respect, the approach paper does not elaborate on the possible regulations through which it can address this particular social policy consideration.

In the international experiences on water tariff systems presented in the approach paper, there could have been more emphasis on the South African model of tariff system which provides free basic water to the poor and disadvantaged sections. But the approach paper

fails to draw lessons from such innovative models that could benefit the vast populations of poor and marginalized sections in Maharashtra.

Though the final decision about the provision of subsidy is in the hands of the government, there is very much a need to integrate the regulations for determining the need and extent of such subsidies in the overall process of determining the water tariff. In absence of these regulations, the aspect of ensuring water services to the poor and disadvantaged sections will not gain importance and will remain ignored.

c. Environmental Considerations: One of the objectives of the MWRRA as mentioned in the preamble of the Act is to ensure sustainable management of the water resources in the state. Conservation of water resources and its quality is important for sustainable management of water resources. These prime considerations should be incorporated as part of the tariff regulations.

There is a clear direction from the MWRRA Act that the MWRRA is empowered to establish the tariff system for sustainable management of resources (read preamble in conjunction with sect. 11-d of Act). The tariff system is also supposed to ensure that total cost of maintenance of water resources is recovered. Thus, maintenance of water resources in good quality and quantity through tariff system has been clearly outlined as one of the obligatory functions of the MWRRA. But the approach paper ignores to this interpretation of the legal provision and instead refers only to section 12 (5) of the Act which provides MWRRA a supportive role in preservation of water quality. With this narrow interpretation the approach paper concludes that the Act does not empower MWRRA to create penal provisions and instead the regulatory framework of MWRRA should be in the form of incentives for water recycling and reuse technologies. Such a narrow interpretation does not serve the objective of the MWRRA mentioned in the preamble of the Act. It should be noted that MWRRA is empowered with the powers of civil court and hence can have powers of undertaking judicial proceeding related to pollution.

Further, it should also be noted that the State Pollution Control Boards (SPCB) have been less effective in ensuring control over water pollution. MWRRA have been awarded the powers as are vested under the Code of Civil Procedure, 1908. SPCBs do not have such powers and hence they are handicapped in disposing cases of regulating pollution. In this context, the policy and legal framework of MWRRA Act provides opportunity to evolve strong regulatory mechanisms for conservation of water. It should not be left to the voluntary option of obtaining incentives for water recycle and reuse. It should be very much part of the water tariff regulations.

It should also be noted that the particular section that provides supportive role to MWRRA [sect 12(5)] finally concludes that. '...in doing so the principle that the person who pollutes shall pay shall be follow.' Thus, it is obligatory on part of MWRRA to incorporate these principles in the current tariff regulations being prepared. (This aspect is also elaborated in submission 4.3)

Another crucial aspect related to environmental consideration, is the need for allocation of water for 'environmental' purposes. Maintaining some minimum base flow in the river is one such example of allocation of water for environmental purpose. 'Environment' is one among the various priority of water allocation identified in the State Water Policy (refer Para 4 of the policy). MWRRA Act also include 'environment' as one of the category of use of water (refer 2(f) of MWRRA Act). Thus, MWRRA is required to ensure water entitlement for environmental purposes. This means that environmental allocation should be considered as one of the category of use while apportioning the revenue requirement for water services. For example, costs at the head-works also need to be apportioned for the allocation of water for maintaining base flow in rivers. Such apportionment is necessary in recognition of the environmental allocation to be made. This apportioned revenue may be collected from other category of users or the government. In absence of such separate apportionment cost, there will be tendency to ignore the environmental allocations. This crucial aspect related to environmental consideration has been totally ignored by the consultant in the approach paper.

d. Tranperancy-Accountibility-Participation-Capacity (TAP-C) Building: The role of any regulator is to ensure protection and promotion of public interest. In doing so the regulator needs to ensure that provisions for transparency, accountability and participation (TAP) are built in the regulatory framework. Along with this, it is also necessary to make provisions in the regulatory framework for capacity building of stakeholders so that they are able to make use of the TAP provisions made in the regulatory framework. Hence, it was expected that the approach paper includes TAP-C as key principles to be followed in tariff determination and regulation. Unfortunately,

Chapter 6, which specifically proposes principles of tariff system, provides inadequate detailing of principle of transparency and totally neglects principles of participation, accountability and capacity building. This is a serious lacuna considering the role of regulator to protect public interest, especially, the interest of the disadvantages sections of society.

Recommendations based on Submission 3.2:

1. The approach paper should take cognizance of all progressive principles and philosophies in determination of tariff.

2. In particular, the paper should comprehensively detail out the principle of equity, life-line water services, environmental considerations and the principles of transperancy-accountibility participation-capacity (TAP-C)

Submission 3.3 No Reflection of Philosophy or Principles in Proposed Methodology for Tariff Determination

Though the approach paper outlines some of the social policy considerations, it does not provide concrete proposals for regulations relating to these special considerations. Thus it is not clear from the paper on how the principles will be operationalised. Following are initial observations on some of the crucial aspects of the social policy considerations that lack the required attention in the approach paper:

a. Equity: Though, the approach paper provides excerpts from various other study reports on the relation between equity and tariff, the same does not get reflected in the regulations proposed. E.g. the approach paper quotes that Maharashtra State Irrigation Commission Report, 1962, recommended that seasonal rates (i.e. uniform rates for all crops in a season) which were in vogue were to be replaced by crop rate system (i.e. water rates for individual type of crops). This was recommended to make water rates more equitable with reference to differential gross income derived from the crops (refer para 4.2 of paper). But the approach paper does not incorporate such and other aspects of equity in the final proposal for tariff regulations.

b. Other Principles: Similarly, the approach paper fails to establish clear linkages between the proposed regulations (methodology/ terms and conditions) and other such principles enunciated in the paper. In particular, the concluding proposal in the approach paper does not reflect in totality how the principle of reliability, quality service, no tariff shocks and transparency will be made operational.

Recommendation based on Submission 3.3:

1. The principles or philosophies accepted in the approach paper shall be clearly linked with the regulations proposed. There should be clarity on how these principles are made operational. In particularly all above-mentioned principles (including principles discussed in submission 3.3 and submission 3.2 as above) should be made clearly operational in the form of concrete regulations.

Part 4. Lacunas in Proposed Tariff Regulations

This section deals with the content level lacunas in the proposed regulations including the methodology used for determining tariff for control period. The section also includes the submission on the crucial issue of powers of MWRRA related to 'rebate' and 'penalizing polluters'. The submissions are as follows.

Submission 4.1 Ad-hoc Method of Determining Tariff for Three Year Control Period

As mentioned in the earlier submission, the approach paper does not include generic methodology for tariff determination. Rather it is narrowly focused on illustrating the method of determining tariff for three year control period starting from 2009. In this sense the approach paper is incomplete. However, here we would like to comment on the very method of arriving at tariff for the control period. Our analysis suggests that the method used in the illustrating example of arriving at tariff for control period is ad hoc and cannot stand the test of analytical soundness and accuracy.

Though, lack of data is a serious constraint posed before the task of determining tariff for the current period, there are crucial steps in the method applied by the consultant, which remains very ad hoc and unexplained. The ad hoc approach can be understood based on the analysis of the three main stages of tariff determination. These stages and the analysis of methodology in each stage are presented below:

a. Determination of Revenue Requirement for O&M: For determination of revenue requirement for next three year control period, the consultant proposes the adoption of method of applying CAGR to past five year data of actual O&M expenses (M&R plus establishment costs) (refer para 9.6 and 9.7).

Extrapolation of the figures of actual expense incurred in past is the fundamental basis of the proposal. The consultant has neither done any assessment of the actual O&M that may be required in the control period nor does the consultant propose a methodology for such an assessment.

Thus, the consultant assumes that whatever expenditure has been done in the past is appropriate and neglects the possibility of deterioration of quality of water resource assets due to inadequate allocation and expenditure of funds to O&M in the past. In contrary to this assumption, it is well-known that the O&M expenditure incurred in recent past is not sufficient to satisfy the actual need of O&M that is required for the sustainability of the assets. In fact, since the core mandate of MWRRA is to ensure sustainable management of water resources (refer preamble of MWRRA Act) it was expected that the consultant would put some light on the O&M expenses in recent past and its impact on the quality and sustainability of assets. But the consultant has ignored this aspect in the proposal for determination of revenue requirement.

The approach has some cursory references to the aspect of sufficiency of O&M costs. The approach paper (refer para 2.4 of paper) states that on aggregate basis (i.e. probably ignoring the issue of arrears) revenue collection from past five years is approximately matching with the O&M cost. Further, the approach paper (section 2.5.1) states that the tariff realized is insufficient to meet the O&M costs (though the data presented in this particular section is silent about the current status of recovery of O&M costs). In effect it is left to conclude from these cursory remarks that the revenue collected or the O&M costs incurred is insufficient to meet the actual requirement of O&M.

In this context, the proposed method of applying CAGR to past expenditure and arriving at the future requirements of expenditure is based on ad hoc assumptions about the O&M requirements.

If we accept this method for the control period or if we try to derive a generic methodology for tariff determination from this example then the MWRRA will have no role to play a simple extrapolation of past figures by applying certain growth rate is all that is needed to determine revenue requirement and the tariff. Hence, the proposed method does not full-fill the requirement of the MWRRA Act, which requires the MWRRA to regulate tariff based on the requirements of prudent costs. In the current proposal there is no space for MWRRA to exercise its powers of prudence check on various costs and ensuring sustainability of assets. Thus, the method proposed for arriving at revenue requirement for control period is ad hoc.

b. Apportionment of Revenue Requirement: According to the proposal in the approach paper, the revenue requirement calculated from the above-mentioned method is then distributed among industrial, drinking and agricultural category of water use. This apportionment of revenue requirement is done based on weightages defined by the perception of the value for qualitative factors like quality, reliability, economic use for each of the water use category (refer para 10.3.2 of the paper). The values for each of these factors are crucial because they determine the revenue requirement and hence tariff to be charged to various category of use. In the proposed method, the values of these factors for different category of use have been arrived at through mere perceptions and not through specific calculation or through any objective method. The consultant has made no attempts to explain the rationale behind the exact figures assumed for these values. Though, the consultant explains in the paper (refer para 10.4 of paper) the rationale behind the high, medium and low value to be allocated to each category of use, no attempt has been made to provide the rationale behind the exact figures of the value allocated to each category of use (refer figures given in table 10-2 of paper). It is actually these figures that determine the revenue and hence tariff to be charged to different category of users. But these crucial figures have not been arrived through an objective method, but they are assumed in ad hoc manner.

This ad hoc approach is evident from the fact that the consultant in the approach paper proposes on one hand that reliability factor for industry should be more than the same for agriculture and accordingly the consultant assigns value of 3 to industry and 2.5 to agriculture for reliability (refer Table 10-2 of paper). But on the other hand the consultant in the approach paper states that "reliability of water supply for agriculture is as important as for industry if not more, as the reliability of water supply has significant impact on the yield of the crop" (refer para 10.4, bullet no. 3 in paper). This highlights the contrary views presented by consultant and still taking ad hoc approach to assign higher value to industry. This clearly shows that the proposed method does not stand the test of consistency and reliability of outcomes.

Further, it should be noted that through proposed method it is expected that the share of revenue to be

collected from each category of use is arrived by multiplying these identified weightages of each category with the identified total revenue requirement. Thus, this method of arriving at revenue share of each category of use does not take into consideration the consumption of each category. This leads to the situation where lower the consumption of particular category higher is the revenue share per volume of water consumed by that category and vise-versa. Or in other words lower the consumption of certain category higher will be the tariff charged per volume of water consumed. For example, if for some reasons, the total consumption of agriculture water use reduces in three year period, than naturally the projections for future consumption will be lowered during next tariff revision, which will lead to increase in tariff per volume of water consumer by agriculture consumer. Thus leads to unnecessary burden on the low consuming category. This shows that the method proposed is not reliable and consistent.

c. Determining Tariff Per Volume of Water for Each Category:

The share of revenue for each category identified through above-mentioned method is then divided by the estimates of the future consumption (next 3 years) of each category of use to arrive at the tariff for water per volume for each category. In this method, the estimates for water consumption are again based on the application of CAGR to past data of actual consumption of water by each category of use.

Thus, the consultant in the approach paper assumes that the past data of measurement of water consumed by each category is correct and it also assumes that the rate of increase in the future consumption by each category will remain same as in the past.

This method of arriving at consumptions figure (and hence tariff) by extrapolation of past data after applying the same rate of growth as in past leaves no space for MWRRA to regulate. In particularly, it neglects the crucial role of MWRRA in regulation through technical validation of past data of consumption and through systematic and participatory assessment of future consumption needs.

The consultant neither takes into considerations these crucial aspects of water consumption for arriving at tariff for control period nor does the consultant proposed any methodology for the same. Thus, the basis of arriving at tariff figures is ad hoc and does not address the various factors that may affect consumption figures.

It also needs to be pointed that in all the above stages the data source is not clearly mentioned. In most of the crucial data relating directly to the finally proposed method of tariff determination (refer Tables 9-1, 9-7, 9-8, 9-9, 9-12), the source is mentioned as 'MWRRA Data'. There is a need to provide the source of primary data. In absence of confidence in the data being provided there is a need to undertake validation of the data and technical validation of the process of compiling the data.

Overall, it can be seen that the method proposed for arriving at tariff for control period is full of various ad hoc approaches. This method does not stand the test of analytical soundness, accuracy and consistency. The method also does not accommodate numerous variable and factors that would affect tariff system. Most importantly the method does not lead to any space for monitoring and regulation by MWRRA and thus does not follow the letter and spirit of MWRRA Act (this aspect is highlighted in detail in next submission 4.2).

Recommendations based on Submission 4.1:

1. Considering the comments and analysis presented in this submission, it is necessary to re-work the approach paper so that ad hoc assumptions and conclusions are avoided. The methodology evolved should stand the test of analytical soundness, accuracy, consistency and reliability.

2. It is also necessary to undertake technical validation of the data provided for evolving the methodology.

Submission 4.2 Non-cognizance of MWRRA's Regulatory Role in Tariff Determination: Regulation of Costs, Expenditures and Quality

One of the major functions of any independent regulatory authority (IRA) is to ensure efficacy in the costs and expenditures of utilities. This pertains to the core function of economic regulation. Following are some of the crucial lacunas in the approach paper regarding economic regulation:

a. No Space for Prudence Check: The basic proposal in the approach paper is to determine tariff based on the application of CAGR to O&M costs incurred in the past as well as to consumption in the past. There is hardly any discussion or concrete proposal for how MWRRA will regulate the adequacy of the costs estimated for determining tariff. There is a need for

evolving regulations that will provide space to the MWRRA to assess whether the costs estimated are prudent and will meet the requirements of maintaining the infrastructure in good condition and at the same time not over-burden the water users with unnecessary costs.

b. No Space for Regulating the Efficacy of Expenditure: The prudent costs allowed by MWRRA while determining tariff should also match with efficacy in actual expenditures by the utility. This is highly important considering the past experience of various types of inefficiency and irregularities that creeps in the actual expenditures and procurements by the utility. The approach paper neither proposes any regulation nor discusses these crucial aspects of bringing a check on the efficacy of the expenditures by the utility out of the revenue generated from the tariff charged or collected.

c. No Space for Regulating the Service Quality Vis-à-vis Tariff Charged/ Collected: Water tariff paid by the users is supposed to provide financial resources required to deliver the appropriate level of quality water services. Hence, from public interest point of view it is necessary to regulate quality of service vis-à-vis the tariff charged or collected. The approach paper has a very scanty discussion on the quality of service with almost no proposal for regulation of the service quality by MWRRA.

Recommendation based on Submission 4.2:

1. The methodology proposed needs to be re-worked so as to include the role of MWRRA as a regulatory agency, especially towards, prudence and other checks and monitoring of costs and expenses involved in tariff calculation as well as regulating the quality of services vis-à-vis the tariff charged.

Submission 4.3 Excessive Focus on Rebate for Water Conservation/ Recycling Technologies and Neglect to Penalizing Powers for Pollution

The approach clearly states that rebate and penalties would be essential aspects of enabling framework that will encourage consumers to adopt water conservation and water recycling techniques. But the concluding proposal in the approach is too biased towards provision of rebates to industries implementing water conservation and water recycling techniques. In comparison the proposal totally ignores the penalizing options available. Following are the comments:

a. Rebates in Tariff Detrimental to Financial Health of Utilities: Incentives for water conservation and treatment through rebate in tariff would be detrimental. This is because the tariffs are already at lower side with a cap on future tariff hike due to the legal provision of recovery of only O&M costs from tariff. So rebate in situation where there is already limited source of revenue for running water services would be detrimental to long-term financial sustainability of water service operations. It should be noted in this context that MWRRA is obliged to ensure sustainable management of water resource, which also includes financial sustainability of water utilities (refer preamble and section 11(r) of MWRRA Act).

b. Rebates in Tariff Not Effective: In India, we have wide-spread experience of failure of voluntary or incentive-based conservation measures. Incentives have been successful to some extent where subsidies with regard to capital cost of installations are provided (e.g. Solar Water Heaters) and where there are clear economic benefits. But incentives with respect to rebate in tariff would be ineffective. This is because the cost of water for industrial user will always remain low due to the legal provision of recovery of only O&M costs from tariff. Secondly, since the tariffs are already low it does not make economic sense to provide incentive through reduction in tariffs. Thus, incentives could be evolved through mechanism of subsidy for capital cost of the conservation technologies and not through tariff reduction.

c. No Economic Gains for Bulk Water Utility through Rebates in Tariff for Conservation / Treatment: One important aspect that needs to be considered is that tariff charged to the bulk water users in the current context does not include the cost of effluent treatment. Hence, it is economically unviable to provide incentive by reducing tariff for promotion of effluent treatment. There are no economic benefits gained by the water utility that supplies bulk water due to effluent treatment plants installed at the polluters end. Hence, promotion of effluent treatment, though necessary, cannot be related to bulk water tariffs.

d. Economically Inappropriate to Provide Capital Subsidy through Tariff Not Based on Capital Recovery: Rebates are required for capital costs of the conservation technologies that will be installed by industry. Such capital investment contributes towards the general capital assets related to water services. Hence, it could be argued that such investments by industries should be subsidized because the burden of

capital investment on the utilities gets reduced. But such investments cannot be subsidies by rebate in water tariff because water tariff are based on O&M costs only and does not have the component of recovery of capital investments from industrial or other users. Hence, it is inappropriate to provide incentives for capital investments in conservation technologies through rebates in tariff that is based merely on O&M costs.

e. No Legal Basis for Rebate in Tariff: The consultant in the approach argues that the legal basis for rebate is found in Section 7 of Water (Prevention and Control of Pollution) Cess Act, 1977 (refer para 5.10 of paper). But this basis used by the consultant is totally wrong and miss-guiding. It should be understood that the particular provision of the Water Cess Act is related to rebate on cess and not rebate on water tariff. This cess applied through Water Act is a very particular cess that is collected from industry as a contribution towards the operational cost of Pollution Control Boards (PCBs). So this cess has nothing to do with water tariff or with cost of provision of water service. The rebate in cess is appropriate in this particular is cess is based on the economic rationale that any investment by industry in affluent treatment will naturally lead to reduction in the administrative burden on PCBs and reduction in the cess required to be collected from industry for its own administrative costs. This rationale is not applicable in case of bulk water tariffs that will charged by water utilities because the tariff is suppose to recover only the O&M costs of provision of water services to industrial users. Hence, the legal basis for rebate on cess in Water Act is not applicable to rebate in tariff.

f. Legal Basis for Penalizing the Polluter Does Exists: There is not a single mention of word 'rebate' or 'incentive' in provisions of MWRRA Act related to responsibility of MWRRA in water conservation and sustainability. In contrast, there is a clear policy guideline given to MWRRA in the Act to adhere to the principle of 'the person who pollutes shall pay' (refer Sect. 12 (5) of Act). Even in presence of this policy guideline explicitly mentioned in the Act, the consultant in the approach paper maintains an excessive focus on the principle of 'incentive through rebate' instead of agreed principle of 'the person who pollutes shall pay'. This is an attempt to miss-guide the stakeholders and reduce the regulatory authority to a body of 'facilitator' then a 'regulator'.

It should be noted that, as per the preamble of the Act, MWRRA is empowered to regulate entire water resources in the state to ensure sustainability of water resources. Further, MWRRA has powers equivalent to civil court (refer Sect. 13 of Act) and also has powers to penalize in case of non-compliance of its own order as well as penalize those who contravene or attempt to contravene or abets to contravention of any of the provision of the Act or rule or regulations made by MWRRA. Thus, MWRRA has a clear guideline to adhere to the principle of 'the person who pollutes shall pay', has the powers to make regulations for matters related to the Act and also the powers to penalize for contravention of these regulations. Hence, in effect there is a strong legal basis for penal provisions in cases of pollution. The conclusion drawn by the consultant in the approach paper that MWRRA does not have powers to penalize the polluter is incorrect (refer para 7.11 of paper).

It should also be noted that the State Pollution Control Boards (SPCB) have been less effective in ensuring control over water pollution. MWRRA have been awarded the powers as are vested under the Code of Civil Procedure, 1908. SPCBs do not have such powers and hence they are handicapped in disposing cases of regulating pollution. Thus, a MWRRA is an apex regulatory authority for all matters related to water regulation. SPCBs have the powers of entry and inspection under Sect. 94 of the Code of Criminal Procedure, 1973. Hence, MWRRA in combination with SPCBs can effectively bring control on pollution of our water resources and full-fill the letter and the spirit of MWRRA Act. The policy and legal framework of MWRRA Act provides opportunity to evolve strong regulatory mechanisms for conservation of water.

Recommendations based on Submission 4.3:

1. MWRRA should conduct a detail review of its powers with respect to rebate and penalizing for pollution control.

2. Based on the arguments made in the above submission, MWRRA should simultaneously initiate process for evolving a framework for implementing the policy guideline of 'the person who pollutes shall pay'

3. Based on the arguments made in the above submission, MWRRA should not link the issue 'incentive for capital investments in conservation technologies' with the 'tariff based on O&M costs'. MWRRA should take a clear position on this aspect and issue a concrete direction in this regard.

Part 5. Interpretation of the Tariff Related Provision in MWRRA Act

There are certain crucial observations on the interpretation of the very provision of water tariff in MWRRA Acti.e. of Sect. 11(d) of MWRRA Act. Following is a submission based on detail study and analysis of this provision.

Submission 5.1 Establish Water Tariff System for All Water Users (Bulk as well as Retail)

The main provision pertaining to tariff in the MWRRA Act (refer Sect. 11(d) of the Act) reads, 'to establish a water tariff system, and to fix the criteria for water charges at sub-basin, river basin and State level after ascertaining the views of the beneficiary public, based on the principle that the water charges shall reflect the full recovery of the cost of the irrigation management, administration, operation and maintenance of water resources project'. The current interpretation of this particular provision being done by MWRRA in the process of making regulations is that the MWRRA is empowered to determine only the bulk water tariff and not the retail water tariff. Hence, such an interpretation limits the regulatory purview of MWRRA only on bulk water supply. But this very interpretation of the provision needs to be re-visited considering the detail word-to-word interpretation of the provision. Following are some observations on the same:

- The first part of the provision empowers the MWRRA to establish entire tariff system, not limited to bulk water supply. The later part which suggests the level of sub-basin, river basin and the state can be applied only to the second part of the provision which empowers the MWRRA to fix criteria for water charges (based on the placement of comma and its grammatical interpretation). In this situation, the MWRRA is empowered to establish water tariff system for all water uses, bulk as well as retail.

- Further, the approach paper attempts to interpret the meaning of the term 'sub-basin, river basin and State level' in para 7.3 of the paper. According to this interpretation, the term relates to determining separate tariff for each basin and sub-basin based on the costs associated with that basin and sub-basin. This means that particular provision in the Act empowers MWRRA to determine basin and sub-basin wise tariffs instead of uniform tariff for all basins. In effect this provision has no relation to the powers of MWRRA to determine bulk or retail tariff. For example, if MWRRA opts to exercise this power then they are empowered to determine basin or sub-basin-wise tariff for all consumers in that basin and sub-basin and not just restricted to bulk consumers.

- If the objective of the particular provision was to limit the powers of MWRRA only to bulk water tariff then there would have been an explicit mention of the same. In absence of such a mention, MWRRA has been made responsible to establish tariff system for all water users, bulk as well as retail.

- Based on the above arguments, it is clear that MWRRA cannot restrict the current process to bulk water pricing. Since, the MWRRA is empowered to establish tariff system for entire State and also mandated to regulate the water resources of entire State (refer preamble of the Act) it is necessary for MWRRA to at least develop a broader framework for tariff system within which other agencies responsible for distribution and management of water services to end-users can determine appropriate tariff in adherence to the principles and regulatory framework of MWRRA Act.

Recommendations based on Submission 5.1:

1. MWRRA should conduct a detail review of the letter and spirit of the tariff related responsibilities, functions and powers of MWRRA.

2. Based on the arguments made in the above submission, MWRRA should simultaneously initiate process for evolving 'Water Tariff System' for all water users, bulk as well retail.

■■■

4.4 Analysis of Draft Approach Paper on Bulk Water Tariff Regulations: Submission Three

1. Introduction

This is the third submission by Prayas before MWRRA on the process of determination of bulk water tariff regulations initiated by MWRRA. It is based on the next level of analysis of the approach paper and focuses on major mistakes, gaps, and lacunas in the approach paper.

The major mistakes, gaps, and lacunas discussed in this submission are classified under the following two main heads:

Major Mistakes and Lacunas Related to Substantive Contents of the Approach Paper Major Mistakes and Lacunas Related to Non-Compliance of the TOR

The paragraphs below discuss these lacunas and also present the recommendations for rectifying the same.

Part I

2. Critical Mistakes and Gaps in the Substantive Content of Approach Paper

The substantive content of the approach paper is fraught with various fundamental and significant mistakes, gaps, and lacunas which need to be rectified before making any progress in the process of public consultation. Some of the most important mistakes and lacunas are briefly described in the paragraphs below.

2.1 Factual Errors or Incorrect Interpretation

a. Discrepancy in O&M Data: Table 9-12 of the approach paper considers Rs. 490 Cr. as the O&M cost incurred for 2006-07. The projections for future cost as well as for the revenue requirement are made on the basis of these past costs,. These projections, in turn, decide the final bulk water tariff. However, in variance with the figure quoted in the approach paper, the Irrigation Status Report (ISR) published by Government of Maharashtra quotes the O&M cost for 2006-07 as Rs. 416 Cr. Hence, there is a discrepancy in the data of O&M costs. The error amounts to the difference of almost Rs. 74 Cr. (almost 18% of the cost quoted in ISR). This is a serious mistake in the proposal presented in the approach paper that would affect the final bulk water tariff.

b. Factual Error in Comparison of M&R Cost Projections: In Table 9-6 of the approach paper, the consultant has provided comparison of cost projections arrived through CAGR Approach, WALMI Approach and the Jakhade Committee Approach. This comparison is incorrect because the consultant has assumed annual escalation of 6% while calculating projections based on WALMI approach, whereas, WALMI has actually recommended annual escalation of 10%. Thus, the comparison and the conclusions drawn based on the comparison are incorrect.

c. Incorrect Interpretation of Provision of Subsidy: The State Water Policy (SWP) clearly states that 'In order to alleviate the impact of such charge on those who are unable to pay the complete charge, the State may allow cross-subsidies and allocate Government Funds.' (Please refer para 4.4 of SWP). Hence, the SWP very much accepts the principle of 'cross-subsidy' in determining water tariff. In contrast to this, the consultant in para 6.1.5 of the approach paper recommends that, “All tariff principles (tariff reflecting the cost of supply, reduction of cross-subsidy, etc.) should be applied....”.

Thus, the consultant makes a factually incorrect interpretation of the provision in SWP and provides a patently false and misleading picture that reduction in cross-subsidy is or should be one of the principles behind determination of tariff.

This misleading on the issue of cross-subsidy does not end here, In Figure 10-1 of the approach paper, the consultant presents the flow chart for tariff simulation process using 'ABPS Infra Model'. In this model, the consultant proposes determination of O&M Costs, Revenue Requirements, and Tariff separately for each of the three categories of use. In doing so, the model proposed by consultant completely eliminates the possibility of inter-sectoral cross-subsidy. Thus, both the particular tariff principle and the simulation model are seriously flawed as it is based on incorrect interpretation of the policy and laws.

This is a serious mistake on the part of the consultant. With this sleight of hand, the consultant has managed

to nip in the bud the rights of those who are unable to pay the complete charges to the cross-subsidy given to them by the State Water Policy. Such a mistake by the consultant could prove dear as it would give rise to suspicion on the very intent of the exercise. This because many members of different stake-holding groups see such processes as World Banks' design to cut down the cross-subsidy for the poor.

d. Incorrect Interpretation of Provision for Rebate to Benefit Water Recycling Equipment Industry and Failure to Apply the of Principle of 'Polluters Pay': A detailed discussion is provided in PRAYAS' second submission before MWRRA on the subject matter. This issue is listed here to maintain the continuity of logic of this submission (refer para 4.3 of the submission by PRAYAS before MWRRA via letter dated 30th November 2008).

2.2 Failure to Explain Key Contradictions or Address Key Issue

a. Why Tariff Increase When Tariff Levied is Equal to O&M Expenses? : The data in the approach paper as well as the Irrigation Status Reports suggests that in the past years the tariff levied has been equal and at times more than the O&M expenses. This suggests that the current applicable tariffs are sufficient to recover O&M expenses and hence can satisfy the requirement of the recovery criterion mentioned in MWRRA Act. This reflects that currently there is no financial burden on utilities providing bulk water, as far as O&M costs are considered. In contrast to this picture created by the official data, the approach proposed by the consultant leads to increasing the agriculture tariff by almost 39% and domestic tariff by 49%. This contradiction and the tremendous hike in tariff are not explained in the approach paper.

b. If 'No Tariff Shocks' then Why 39% and 49% Increase in Tariff? : In para 6.1.2 of the approach paper, the consultant proposes that the principle of 'No Tariff Shock to any Class of Consumer' should be applied. But the proposed tariff structure involves tremendous increase in agriculture (39%) and domestic tariff (49%), leading to significant tariff shock for the year 2009-10. The consultant has not explained this contradiction, nor has he been able to provide any solution to reduce the tariff shock.

c. Proposed Tariff for Bulk Water Supply But Costs Considered Based on Retail Supply? : The cost projections used to determine tariff are based entirely on past expenses on O&M costs. The consultant has not clarified whether these costs include cost of O&M for retail supply or for only bulk supply or for both. Since the figures of past O&M expenses match with the figures given in the Irrigation Status Report, the reader could assume that the costs are for supply of water both at bulk and retail levels. If this is true, then it seems that the consultant included the cost of retail supply in calculating tariff for bulk supply. The consultant failed to clarify this contradiction in the approach paper.

d. Water 'Quality' used as Factor for Apportionment but Is Bulk Supply Done Based on Quality Parameter? : The model for apportionment of revenue requirement between categories of users is the core of the tariff methodology proposed by consultant. But one of the major problems in the model is that the consultant proposes to use 'water quality' as one of the parameter affecting the apportionment of revenue requirement. It is well known that the quality parameters is not something that is cared for in majority of the bulk supply of water, neither is quality of water measured in most bulk supply situations. The consultant has not taken cognizance of this situation and effectively ends up making an unrealistic assumption.

e. Are Economic Benefits from Water Use for Agriculture Almost Half of the Benefits Accrued from Water Use for Industrial Purpose?: The model for apportionment of revenue requirement proposed by consultant also uses 'Economic Use' as one of the factor affecting apportionment. As per the approach paper 'economic utilization of water supplied is directly related to paying capacity' (refer para 10.3.2 of paper). Hence, the consultant seems to assume that the economic benefits accrued through use of water have direct correlation with the paying capacity of the user. In other words, the economic benefits accrued from a certain category of water use should be used as factor for apportionment of revenue requirement.

Further, the consultant rightly assumes that the “economic use” or “economic benefits” of water used for agriculture purpose are less than that for industrial purpose. But while determining specific weightages for this factor, the consultant assumes the weightage of 5 for industrial use and 2.5 for agriculture use. Thus, the weightage given to agriculture use is half of industrial use. So in effect, the consultant assumes that benefits accrued from agriculture use are half in magnitude of the benefits accrued from industrial use. This

subjective decision made by the consultant is highly contentious. It is well known that economic benefits from industrial water use, in most cases, are much higher than those from agriculture and certainly not half in the magnitude. The consultant has not provided any sound justification for his assumptions on this crucial aspect.

f. Is Reliability of Water Supply to Agriculture Anywhere Close to the Reliability to Industry? : The model for apportionment of revenue proposed by consultant also includes reliability as a factor affecting the apportionment. The consultant assumes reliability weightage of 3 for industrial use and 2.5 for agriculture use. In effect, the consultant assumes that the reliability of water supply to agriculture is almost 83 % of that to industrial users. In other words, the reliability of agricultural water supply is close to reliability of industrial water supply. It is well known that when it comes to reliability, it is the agriculture water supply that is always compromised and hence the actual reliability of supply to agriculture is not comparable to that of industrial supply. Again, the consultant has not provided any sound justification for making this assumption on such a contentious and crucial aspect.

g. Unable to Identify Current Crisis and Regulate for Resolution: The above-mentioned bullet point no. 3.2 (a) of the present submission suggests that the tariff levied in the recent years is equal to actual O&M expenses incurred. So, in effect, as per the MWRRA Act, all O&M costs could be recovered from the tariff levied as per the current structures. Hence, it seems that there is no crisis of 'lower tariffs' or 'lower levy of tariffs' as believed by many.

In that case, the approach paper, specifically the so-called proposal part, is not able to clearly identify or highlight the main problem or crisis that needs to be addressed through tariff regulations. On one hand the proposal does not question the data provided on the O&M expenses or on tariff levied. Thus, it accepts that there is no problem of matching the revenue requirement with tariff levied. On the other hand, the proposal does not indicate at any other problematic area.

It is alarming that the proposal is totally silent on areas with acute and critical problems such as water losses, inadequate O&M and deteriorating infrastructure, absence of effective measurement system, lack of service standards and their enforcement, inefficiencies in capital expenses leading to increase in O&M requirements, and other similar crucial issues. It should be noted that these problems have serious implications for the sustainable operations and management of water systems, which is the mandate for MWRRA as per the Preamble and Section 11(r) of the MWRRA act. This is a major gap and flaw in the proposal put forth by the consultant.

h. How MWRRA will Address Issue of Cross-Subsidy?: The section 2.3.1 of the approach paper mentions that "One of the important functions of MWRRA is to establish a water tariff system……and to determine the cross-subsidies between categories". But the approach does not include concrete proposal for the way or manner in which MWRRA should address the issue of cross-subsidy. Thus, a major issue such as cross-subsidy remains unaddressed in the approach paper.

i. What is the role of Regulation and MWRRA in Tariff Determination Process? : The responsibility of MWRRA as per MWRRA Act is not limited to determination of tariff. MWRRA is also mandated to establish and operationalize set of regulatory mechanisms as part of tariff determination and regulation process. The approach paper does not take any cognizance of this crucial role for regulation as a function of governance and MWRRA as an institution responsible for regulation.

The approach paper does not detail out the exact tariff determination and regulation process that will be followed by MWRRA. Hence, crucial regulatory mechanisms like cost regulation, service standard regulation, regulation of losses, inefficiencies and other matters are not dealt with in the approach paper.

It should be noted that the approach paper does not include 'draft regulations' as required by the TOR. Hence, in absence of regulations and exact tariff determination process, the approach paper cannot be used as a discussion paper for conducting stakeholder consultation.

In this respect, it should also be noted that Maharashtra Electricity Regulatory Commission (MERC) has an elaborate process of tariff determination and regulation. Based on the study of process in electricity sector, we present in brief the recommendations towards objectives and process of tariff determination and regulation in the last section of this submission (refer section IV of this submission).

2.3 Questionable Data and Questionable Basis for Tariff Proposal

a. Consumption Data Not Accurate: Among other things, the volumetric tariff calculations depend on the total consumption of the particular category of use. It is well known and also accepted in the approach paper that majority of the water consumption is not measured accurately. Hence, the consumption data presented in the approach paper and the volumetric tariff calculations done on the basis of this data can be challenged on the grounds of accuracy of this data.

For example, in absence of accurate data there is wide scope to argue that the agriculture consumption data may comprise of actual agriculture consumption as well as technical and commercial losses. If this is true, then the volumetric tariff for agriculture also includes the cost burden incurred due to losses. This would be largely unacceptable by the particular category of water users.

b. O&M Cost Projections Not on Basis of Actual Requirement: The current tariff largely depends on the O&M cost projections. The O&M costs projections proposed in the approach is entirely based on the past data of actual expenses on O&M. The current sorry state of existing water infrastructure clearly indicates that the actual expenditure on O&M in the past was grossly inadequate and the actual need for O&M was far above the actual expenses.

For example, the assessment done by WALMI for M&R expenses suggest that the average demand for M&R for selected project was Rs. 2275 lakhs, whereas, the actual expenditure was Rs. 1241 lakhs (refer Table 12 of Report by WALMI on M&R Norms). This situation allows speculation by many that the O & M expenses were intentionally kept much below the actual requirement, so that they match with the tariff recovery figures.

Looking at the data for establishment costs, it could be argued that the establishment costs are disproportionately high as compared to the costs incurred for maintenance and repairs (M&R). Hence, tariff based on such a high level of establishment costs will have to be challenged.

Overall, a different picture may emerge if the assessment of actual requirement for carrying out O&M is done. Accepting the data of expenses incurred in the past without any validation will lead to fundamental flaw in the tariff proposal and will be open for challenge by various stakeholders. If the O&M projections proposed do not meet the actual requirements of O&M, then there is danger that water infrastructure will deteriorate and will harm the sustainability of the system.

2.4 Non-Comparable Tariff Figures Hindering Participation

The proposed tariff is presented only on volumetric basis. There is no effort to illustrate the relationship of the proposed volumetric tariff with the tariff calculated on crop, area, or seasonal bases. Due to this lacuna it is difficult for farmers to compare the proposed tariff with the current tariff. In absence of such a user-friendly or comparable tariff figures, it is not possible for farmers to assess the real impact of the proposed tariff on their operations and raise their concerns and demands regarding water tariff. This is another fundamental lacuna in the approach paper, as it effectively keeps the farming community—that forms the largest water consumer category—out of the process of stakeholders' participation.

Part II

3. Major Mistakes and Lacunas Related to Non-Compliance of the TOR

The Terms of Reference (or TOR) given to the consultant for the purpose of developing regulations for bulk water pricing were finalized after due consultation on the draft prepared by MWRRA with selected stakeholders. Hence, the TOR reflected the needs and requirements of MWRRA as well as the concerns and expectations of various stakeholders. As a result, the TOR became the main tool that should be used for assessment of the Draft Approach Paper submitted by the consultant. In other words, the Draft Paper is expected to act as the benchmark to be achieved by the Approach Paper at the minimum.

In order to adhere to the provision in MWRRA Act for stakeholder consultation, it was necessary to comply with the process and content of the Approach Paper as defined in the TOR. Hence, a detailed assessment of compliance of the provisions in TOR—related both to the process and content—was carried out. The results of this assessment are discussed as below.

3.1 Non-Compliance of TOR Provisions Related to Content of Approach Paper

Sections 3 and 4 of the ToR provide details of the expected content of the different outputs to be submitted by the consultant. The assessment of the

status of the compliance with these sections is presented in the Table 1 and Table 2. The content-related requirements outlined in the ToR could be further classified in two groups: (a) provisions outlining different content-related outputs expected to be articulated in the approach paper, and (b) provisions meant for creating the knowledge base through analysis of relevant information from different sources for preparing the different content-related outputs expected from the Approach Paper. For the purpose of the analysis, the provisions in Sections 3 and 4 were divided in these two groups and their analysis is presented in Table 2 and Table 1 respectively.

The assessment presented in these tables reveals that the approach paper is in far-from-satisfactory state. Table 1 presents the observations and remarks pertaining to the provisions mostly requiring review, assessment, or examination of different information. Based on these observations and remarks, the Compliance Status for each of the provisions is determined and presented in the last column of the table. The categories used for ascribing the compliance status in Table 1 include: Completed, Partially Completed, Superficially Addressed, Completely Ignored.

Similarly, Table 2 presents the analysis of compliance of provisions articulating the content-related outputs. In this table, the category used to indicate the Compliance Status are: Not Delivered as Expected, Not Followed / Not Delivered At All, and Will Not be Possible to Deliver / Follow.

(Please refer to tables on following pages)

Table No. 18: Non-Compliance of the TOR: Provisions Related to Creation of Knowledge-Base on Content

TOR Para No.	Main Task as per the ToR	Observations and Remarks	Compliance Status
3 (1)	Review international best practices on water tariff and analyze their relevance and applicability in the context of the situation in Maharashtra	• The review is done by an international expert, however, he seems not to have any work-experience of water sector in Maharashtra. • Neither the international expert nor the ABPS Infra provided any analysis or findings pertaining to relevance and applicability of lessons from international practice to situation in Maharashtra. • Hence, there is no concrete recommendation for the purposes of this approach paper emerging from the international review.	Partially Completed still Very Limited Utility
3(2)	Review the tariff structures in Other States in India	• Completely ignored and not included in the paper.	Completely Ignored
3 (3)	Review and assess the provisions relating to water tariff in the MWRRA Act and State Water Policy	• Detailed assessment not included	Partially Completed
3 (4)	Review and assess the progressive increase in tariff structure in the State for irrigation and non irrigation uses	• Though there is mention about the progressive increase in tariff the same has not been assessed. • There was a need to assess the rationale, method of arriving at the increase and also the impact of tariff increase.	Superficially Addressed
3(5)	Review and assess the O&M norms for irrigation in the State and the allocations made for O&M, separately for works and establishment, for last five years.	• Apart from mentioning the actual expenses on O&M in the past, there is no attempt for assessment of O&M with respect to adequacy of expenses incurred, impact of the same on the quality of services and actual demand or requirement of O&M to maintain the system efficiency.	Partially Completed still Limited Utility
3 (6)	Review and assess the establishment norms in the State for irrigation management	• Apart from mentioning the actual expenses on establishment in the past, there is no attempt for assessment of these costs with respect to necessity of expenses incurred, reasons for low quality of services despite high establishment costs and determination of benchmark ratio between O & M and establishment costs • No cognizance of WALMI report on establishment cost	Partially Completed still Limited Utility
3 (7)	Review the water use and water tariff levy and collection in last five years in the State separately for agriculture, industry and drinking water	• Review of losses or the data on losses is completely absent • The review of water use is not much useful as the accuracy of the data is doubtful as the approach paper itself accepts	Partially Completed still Limited Utility

(Contd...)

(...Contd.)

TOR Para No.	Main Task as per the ToR	Observations and Remarks	Compliance Status
3 (8)	Review and assess inter-sectoral cross subsidy and government subsidy as reflected in water tariff assessment vis-à-vis actual O&M expenditure in the last 5 years.	• Review of inter-sectoral cross subsidy or government subsidy is completely absent • Also there is no assessment of the subsidies, especially, the rationale and impact of these subsidies	Completely Ignored
3 (9)	Review and assess existing tariff structure vis-à-vis paying capacity and productive usage by each user category	• Apart from general discussion on the principle of 'ability to pay' there is no review and assessment of existing tariff structure in light of the paying capacity and productive usage	Superficially Addressed
3 (10)	The consultant may plan to visit 6 irrigation projects (2 major, 2 medium & 2 minor), 6 water supply schemes (3 urban, 3 rural) and 6 typical industries consuming water for realistic assessment of ground conditions at his own costs.	• There is no data or conclusions presented from field visits to irrigation projects	Completely Ignored
3 (11)	Review and assess how the provision in Section 12 (11) of the Act linking family size to water tariff should be dealt in volumetric and area based tariff for agriculture and how Water User Association should be advised to fix water charges from Members keeping the provisions in view.		Completed
3 (12)	Study the water audit, benchmarking and irrigation status reports brought out annually by Water Resources Department (WRD) and assess the applicability of the data/conclusions made in these reports for tariff Regulations.	• There is no study of water audit, benchmarking, or irrigation status reports • There is no assessment of applicability of data from these reports for the tariff regulations	Completely Ignored
3 (13)	Study and assess as to how reliability and timeliness of supplies to the agriculture sector should have a bearing on the tariff structure.	• Apart from the integration of factors like reliability for apportionment of revenue requirement, there is no attempt to propose operational methodology for linking various levels/ parameters for reliability and timeliness with tariff levels.	Superficially Addressed

(Contd...)

(...Contd.)

TOR Para No.	Main Task as per the ToR	Observations and Remarks	Compliance Status
3 (14)	Suggest 4-5 modern technologies for recycling by industries, the adoption of which will qualify the industry for rebate in water tariff. Quantum of rebate to be suggested. Similar suggestion for WUA, drinking water agencies adopting water conservation measures.		Completed
3 (15)	Suggest extent of rebate in water tariff for industries adopting effluent treatment and discharging effluent into water courses as per standards prescribed by State Pollution Control Board.		Completed
3 (16)	Review and assess the provisions relating to water tariff in other Acts like CP & Berar Act 1931, Maharashtra Irrigation Act 1976, Municipal Act, various River Valley Corporations Acts.	• No review of CP & Berar Act 1931 • No assessment of the implications and inter-relations between various acts	Partially Completed
3 (17)	Examine whether a two part tariff system comprising a fixed charge for assets created irrespective of water use and a variable charge depending on actual use should be introduced.	• The entire examination of such an important issue is scanty and is covered in only 2 pages • The paper fails to discuss problems and impacts of this issue in adequate details	Partially Completed
3 (18)	Examine whether rebate in tariff should be given for advance/timely payment.		Completely Ignored
4 (2)	Review international and national practices of Conduct of Business Regulations in various sectors		Completely Ignored
4 (3)	Weigh and consider various options for stakeholder consultation like display in web site, paper advertisement, public hearing etc. and suggest a suitable procedure keeping in view how this issue is handled in other regulatory processes		Completely Ignored

Table No. 19: Non-Compliance of the TOR: Provisions Related to Outputs on Content of Regulations

TOR Para No.	Main Task as per the ToR	Observations and Remarks	Compliance Status
3 (19) (a)	First part of approach paper comprising the tariff philosophy or principles & various options available	• Chapter 6 titled "Principles for Tariff Setting" comprises scanty coverage of principles or philosophy (only 3 pages in the 300 page long document). In fact, principles or philosophy is supposed to be the main output in Part I of the approach paper. • Chapter 7 seems to discuss some principles, though the authors call them issues. However, in most cases, the analysis of these issues failed to produce adequately and logically argued conclusions or recommendations that could be termed as principles. • In short, the Approach Paper fails to provide a clear list of Tariff Principles with adequate justification based on sound analysis and logical argumentation.	Not Delivered as Expected
3 (19) (b)	Second part of the approach paper presenting the methodology for tariff determination based on the chosen option.	• Apart from the illustrative example (or Tariff Proposal), the paper does not include the generic methodology and procedure for tariff determination.	Not Delivered
3 (19) (c)	Terms & Conditions of Tariff Regulations giving detailed step-by-step procedure with illustrative examples.	• There is absolutely no mention of the draft terms and conditions of tariff regulations. This is the most glaring deficiency as articulating Tariff Regulations was the main objective of the entire exercise. • Apart from a small paragraph (refer para 7.22 of approach paper), there is no detailing of the tariff determination process in the approach paper. The small paragraph makes cursory reference to international practice and an Australian process. It is not mentioned exactly which international practice (with what steps) is recommended by the consultant. Further, there is no analysis or assessment of the said international practice for its relevance or suitability for the situation in Maharashtra. • The benchmark in this regard is already set by the Terms and Conditions (Regulation) for Tariff Determination as articulated by MERC. The performance of the consultant in this regard is abysmally dismal.	Not Delivered
3 (20)	Draft of model tariff proposal	• Without adequately detailing the principles, methodology and other terms and conditions, the consultant directly went ahead proposing the final tariff. • The expected output as per the ToR is the draft of the model proposal which can be used in subsequent proceedings.	Not Delivered
4 (1)	Conduct of Business Regulations specifying the process to be adopted by the Authority, including stakeholder consultation while preparing Regulations and before issue of tariff orders	• In adherence of the TOR, it was necessary and important to first prepare and approve the CBR. But the same has not been adhered to even after the draft consolidated approach paper has been published.	Not Delivered

Table No. 20: Non-Compliance of the TOR: Provisions Related to Process Defined in the ToR

Stage Identified in TOR	TOR Para No.	Expected Process	Observations and Remarks	Compliance Status
I	5 (1)	Submission, review and approval of Draft Conduct of Business Regulations and Part I of the Approach Paper for Terms & Conditions of Bulk Water Tariff	• Draft CBR not prepared and hence no question of review/ approval. Hence, stakeholders are in dark about the consultation process, and in particularly, if there will be an intensive consultation process on the output of Stage III of the process i.e. the stage at which the draft Terms and Conditions and CBR will be submitted and approved by MWRRA. • Part I of the approach paper not reviewed and approved separately. Logical sequence not followed.	Not Followed
II	5 (2)	Submission, review and approval Part 2 of Approach Paper	• Part II of the approach paper not reviewed and approved separately. Logical sequence not followed.	Not Followed
III	5 (3)	Interim Report covering both Terms & Conditions of Tariff Regulations & CBR based on comments on approach paper and draft CBR	• Instead of separately reviewing and approving Part 1 and Part 2 of approach paper a consolidated draft approach paper has been submitted and published for public consultation. • The consolidated approach paper does not comprise the 'Draft CBR' as well 'Draft Terms and Conditions or Regulation'. Hence the public consultation process is impaired in absence of these documents. There is no space in the current on-going process of public consultation to comment on the draft CBR.	Will Not Be Possible to Follow
IV	5 (4)	Draft Final Report with draft Tariff Order	• Since, the above stages are not followed in its proper sequence and manner the process in this stage will be seriously impaired.	Will Not Be Possible to Follow
V	5 (5)	Final Report		

A look at the last column of both these tables presents a very gloomy picture, as in case of most of the requirements in ToR, the adequacy and quality of compliance is less than satisfactory. In Table 1, only 3 provisions carry the tag of "Completed" out of total 20 provisions. The tag of "Partially Completed" is borne by 7 provisions, out of which 4 carry the additional tag of "with Limited Utility". In the remaining 10 provisions (50% of total number), 7 carry the tag of "Completely Ignored," while 3 carry the tag of "Superficially Addressed".

The picture is more bleak in Table 2. While 1 out of the total 5 provisions articulating content-related outputs carry the tag of "Not Delivered As Expected", the remaining all 4 carry the tag of "Not Delivered".

3.2 Process-Level Non-Compliance of the TOR

The TOR also defines the process to be followed for carrying out the assignment given to the consultant and for submission of final outputs. In absence of the Conduct of Business Regulations (CBRs), the TOR is the only official document that can be used a guiding document for assessing the appropriateness of the process followed for development of regulations for bulk water tariff. This makes the process-related provisions in the ToR critical.

Section 5 of the TOR defines the process, in terms of various steps, for carrying out the assignment of preparing the approach paper on the bulk water tariff regulations. The assessment of compliance of the process-related provisions from Section 5 in TOR is presented in Table 3.

Table No. 21: Summary of Assessment Compliance with TOR (based on detail assessment given in Table 1, 2, and 3)

Non-Compliance of the TOR: Factor Chosen to Assess	Status of Compliance on Chosen Factors					
	Completed	Partially Completed	Partially Completed still Limited Utility/ Not Delivered as Expected	Superficially Addressed	Completely Ignored/ Not Followed/ Not Delivered	Will Not be Followed
1. Creation of Knowledge-Base on Content	3	3	4	3	7	-
2. Provisions Related to Outputs on Content of Regulations	-	-	1	-	4	-
3. Provisions Related to Process Defined in the ToR	-	-	-	-	2	3
Total	**3**	**3**	**5**	**3**	**13**	**3**
Compliance Level in %	**10 %**	**10 %**	**17 %**	**10 %**	**53 %**	

This assessment of the process-related provisions level follows the same logic and method that is followed in preparing Table 18 and 19. The last column of Table 20 presented the Compliance Status for the process-relate provisions. The categories used here for denoting the Compliance Status are: "Not Followed", and "Not Possible to Follow."

The scene here is also not much encouraging. While 2 provisions carry the tag of "Not Followed", the remaining 3 carry the tag of "Not Possible to Follow."

Table 21 presents the summary of the Compliance Status as per the all the tree tables. The main finding that come out of Table 21 include:

- The consultant has achieved satisfactory level of performance only in case of the 10% (3 out of total 30) of the ToR provisions.
- In the case of about 27% (8 out of 30) provisions from ToR, the performance is partially satisfactory.
- In the case of about 53% provisions from ToR, performance is near the zero level.
- In the case of about 20% provisions, the work was found to be of little utility.

3.3 Impact and Implications of the Non-Compliance of TOR

a. Serious non-compliance in the case of content-related provision from the ToR indicate that the work done by the consultant is inadequate to use it as the substantive basis for deliberation on the issue of tariff determination. In other words, the approach paper does not provide adequate substantive foundations for using the same for developing regulations or tariff order.

b. Serious non-compliance in the case of process-related provisions raises more grave issues. If MWRRA decides to accept the current draft of the approach paper and to go ahead with the process, it would be seen as not adhering to the process it itself has laid out. Unless it provides cogent and satisfactory reasons for this condoning of non-compliance, MWRRA would be seen as willing to work on ad-hoc and arbitrary manner.

Condoning the failure to come up with the Tariff-related CBRs and conducting the process of deliberations without these CBRs would make MWRRA more vulnerable to the charge of ad-hoc and arbitrary behavior. The failure of MWRRA to have general CBRs in place further complicates the matter.

There is no need to reemphasize the importance of proper, previously defined, transparent, truly participatory, and completely accountable process. In absence of such a process, legitimacy of agencies like MWRRA to arrive at essentially political decisions like Tariff Rates is suspect. [These decisions are political because they determine the distribution of resources among different sections of society.] This is because these agencies are making political decisions, even though they are not politically accountable to people. The only way for agencies like MWRRA to gain the legitimacy to make political decision is by strictly adhering to the process laid out in the law, rules, regulations and even procedural norms such as ToRs. The temptation to put the process in fast-forward mode cold prove disastrous for these agencies. [In this regard, we attract attention of MWRRA to the relevant sections on Regulatory Process (pg 71 to 73) from Handbook for Evaluating Infrastructure Regulatory Systems published by the World Bank. We have already submitted a soft copy of this handbook to MWRRA[12].

In addition, MWRRA has to carry out the burden of mistakes made by Government of Maharashtra. The public consultations on draft of the MWRRA bill were seen by civil society as an unaccountable exercise for manipulation and window-dressing. Further, the manner in which the MWRRA law was passed also created suspicion about the intent of the government in constituting MWRRA. Whether it likes it or not, MWRAA's conduct will be seen in this context. This requires that MWRRA exercise utmost care and caution on the matters of process.

c. Further, such deficiencies in process and content has serious implications for acceptability and credibility (which are the cornerstone of smooth functioning of any independent regulatory agency) of MWRRA. Inadequate and superficial work on content and non-coherent and non-systematic process might lead to not only erosion in acceptance and credibility of MWRRA but it would also create unnecessary suspicion in the minds of stakeholder.

For example, the inadequate interpretation of the provision for application of 'polluters pay' principle and simultaneous overemphasis on providing incentive through rebate in tariff for industries can potentially lead to perception of bias on part of MWRRA towards industry [13]. This bias could be seen as the successful attempt of 'regulatory capture' by industries and other dominant market forces like consultants to further their private interests through MWRRA at the cost of larger public interest.

d. Non-compliance to the process and content as per TOR has adversely affected the process of stakeholder consultation in following ways:

- In absence of draft CBR (which should have comprised, as per TOR, the process of stakeholder consultation to be followed for preparation of regulations and before issue of tariff orders), the stakeholders have the least idea of the overall process that will be followed for finalization of regulations and tariff order. In absence of this crucial information, the stakeholders are not able to participate and provide inputs on their concerns and suggestions. Large number of stakeholder groups and individuals are still not aware of the process initiated by MWRRA.

- In absence of adequate content on all issues outlined in the TOR, the stakeholders are not able to study, analyze and prepare effective comments and suggestions on the tariff regulations. For example, in absence of the draft regulations in the approach paper, it is not at all possible to provide comments on the regulations for bulk water tariff.

- The combined effect of process and content-level lacunas is that the stakeholders are not confident that their participation will have any positive impact on developing solutions to their problems and concerns through the on-going process initiated by MWRRA.

For example, the current draft of the approach paper does not provide any tariff regulation at all. If the MWRRA goes ahead with the process of stakeholders' consultation, the deliberations will focus on the content and process related deficiencies in the current draft of the approach paper. Further, there is apprehension in the minds of stakeholders that, in the absence of the CBRs, there is every chance that MWRRA would not carry out a wider process of stakeholders again when the concrete tariff regulations will be articulated. Thus, despite high level of expenditure of public money and time of the members of stake-holding groups, the process will end up without any concrete recommendation from stakeholders and the tariff regulations will be finalized without any public participation.

[12] Handbook for Evaluating Infrastructure Regulatory Systems by Brown, Ashley C., et al. published by the World Bank

[13] For detail discussion on this issue please refer to para 4.3 of second submission by PRAYAS – dated 30th November 2009.

Part III

4. Recommendations Based on Above Assessment and Analysis

1. Reject the current form of draft approach paper submitted by ABPS Infrastructure.

2. Stop forthwith the on-going process of public consultation including the public hearings scheduled on the basis of the current draft of the approach paper.

3. Direct the consultant to revise the entire approach paper in compliance with the TOR and taking cognizance of various lacunas pointed-out by PRAYAS and other organizations and individuals during the first phase of consultation.

4. Circulate the revised draft approach paper to select research organizations, experts and social activists to ensure adequacy and quality of the approach paper.

5. Undertake elaborate, well planned and intensive rounds of public consultations including public hearings on the revised draft of the approach paper.

Part IV [14]

5. Recommendations for Terms and Conditions for Tariff Determination and Regulations

5.1 Introduction

Maharashtra Electricity Regulatory Commission (MERC) has an elaborate process of tariff determination and regulation. Based on the study of process in electricity sector, we present in brief the recommendations towards objectives and process of bulk water tariff determination and regulation in the paragraphs below.

We request MWRRA that these recommendations should be included in the section on 'Procedure for Tariff Determination' in the 'Terms and Conditions of Bulk Water Tariff Regulations' to be prepared by MWRRA.

The approach paper prepared by ABPS does not provide minute details of the proposal for tariff determination procedure. Hence, it was thought necessary to provide recommendations on this crucial aspect of tariff regulation. We kindly request MWRRA to give due considerations to these recommendations. We also request MWRRA to follow the recommended procedure given in this submission for the on-going process of tariff determination initiated by MWRRA.

5.2 Objectives of Water Tariff Determination Process

The procedure for determination of bulk water tariff should have following objectives:

a. Enhance regulatory review and scrutiny on various financial, economic and social aspects of bulk water tariff.

b. Create avenues to expose the crucial lacunas in the system including amount of losses, mismanagement, pilferage-theft and such other gross inefficiencies affecting the overall performance of the system.

c. Create avenues for development of solutions to plug the inefficiencies and effective enforcement of the solutions developed.

d. Develop opportunity for and capacities among various stakeholders to participate in the proceedings in most effective, comprehensive and meaningful manner and thereby bring together diverse perspectives and view-points on crucial aspects affecting the sector.

e. Give special attention to the concerns and problems of disadvantaged sections having meager voice in the various proceedings related to bulk water tariff.

5.3 Procedure for Determination of Bulk Water Tariff

Following should be the step-wise procedure for determination of bulk water tariff (detail recommendations for each step is discussed separately in other paragraphs):

i. Application for Tariff Revision: The bulk water supply utility like the River Basin Agency (RBA) or Water Resource Department (WRD) should file application for tariff revision to MWRRA. The application should be in the prescribed format and manner. In particular the application should have different components such as: Demand Estimation, Supply Plan, Cost Estimation and Revenue Requirement (based on past data as well as actual plans for projected year).

[14] In the original submission this was referred as Annexure I.

ii. Internal Scrutiny of Application: MWRRA should scrutinize the application. Among the various other methods for scrutiny, MWRRA should also adopt the method of 'Technical Validation'. Technical validation sessions should be treated as regular proceedings. Experts and public interest groups should be involved in these proceedings. Scrutiny of the application should be done based on the following components of the tariff determination process:

a. Demand Estimation: Scrutiny of estimation of demand for water for the control period.

b. Supply Plan: Plan for supply of water as per demand through various sources and means. Among other things the plan should compromise options like demand management, supply management, capacity addition-augmentation and other measures to ensure adequate supply in the most cost-effective manner.

c. Cost Estimation (Capital as well as O&M): Estimation of costs to be incurred in control period. This should comprise estimation of capital as well as O&M costs, since capital investments have direct bearing on the amount and timing of O&M expenses.

d. Revenue Estimation (Annual Revenue Requirement): Estimates of annual revenue requirements including capital as well as O&M.

e. Revenue Apportionment: Apportionment of revenue requirement among different categories of water users.

f. Tariff Calculation: Calculation of tariff for different categories of water users.

iii. External Scrutiny of Application: The application should be made available to public and the organizations working in the interest of public for scrutiny by interested parties.

iv. Revisions in Application: The applicant should revise the application based on the requirement of additional or improved data, if any, identified after the scrutiny.

v. Public Consultation on Revised Application: Public consultation should be undertaken by inviting comments on the revised application and also through organization of regional-level public hearings.

vi. Processing of Public Opinion & Deciding Reasonability of Issues: The public opinion and comments received should be compiled and considered to take crucial decisions on the exclusion and inclusion of various opinions.

vii. Reasoned Tariff Order: Give the final tariff order accompanied with detail reasoning behind the order, its various components and the exclusion / inclusion of public opinion received. The tariff order should also include the cost elements that are approved/ disapproved by the regulator and also the performance targets for the utility or RBA.

viii. Annual Performance Review: Since, the above-tariff setting process will be done once in three years it is necessary to take annual review of performance of utility or RBA based on the performance targets set in the tariff order. Such a review is necessary in a multi-year tariff system that will be followed in current context.

Detailed recommendations on each of the above-mentioned step should be developed and presented in the approach paper.

■■■

4.5 Analysis of Draft Approach Paper on Bulk Water Tariff Regulations: Submission Four and Five

Introduction

The first stakeholder consultation meeting was conducted by MWRRA in Mumbai. After analysis of the process of this consultation meeting, the fourth submission was prepared to recommend changes in the process of conducting the remaining meetings. The fifth and the concluding submission was prepared in light of the consultation meeting conducted by MWRRA in Pune (dated 12th February 2009). These two submissions have been reproduced verbatim in the following paragraphs.

4.5.1 Submission on Process of Conducting the Consultation Meetings

This is with regard to the consultation meetings organised by MWRRA on the draft approach paper on bulk water tariff regulations. Based on the lessons from the first consultation meeting, following are the recommendations for the procedure of conducting the remaining consultation meetings:

1. Inward Register: All written comments submitted by stakeholders should be registered in a systematic manner. There should be an 'inward register' available during the consultation meetings and all written comments received should be properly registered in the registry. Every stakeholder should be given an 'inward number' as documentary evidence of his submission being registered in the registry.

2. Photocopy Acknowledgment: Acknowledgment of submissions can also be done by signing on the photocopy of the submission. In case a stakeholder has a photocopy of his submission and he requests for an acknowledgment of his submission, then there should be arrangement for authenticating the photocopy. (The photocopy may be done by the stakeholder.)

3. Oral Evidence: There will be certain stakeholders who may be less literate or not able to articulate their opinions in writing. Also there could be occasions when very crucial discussion may be in progress, but the points raised during the discussion does not get reflected in the already prepared written submission. In both the cases it is necessary to accept the oral submission by recording the verbal comments made during the discussion in the meetings. There should be arrangement for taking detail notes of the verbal comments and reproducing the same in the proceedings of the meetings.

4. Record of Proceedings: Record of proceedings during the meetings should be prepared and circulated among the participants in the meetings.

5. Reasoned Report or Order: After completion of the consultation meetings it is necessary to develop a report or order (whatever is required as per the process) which will give in detail the comments made by various stakeholders and also the opinion of MWRRA on those comments with detail reasons.

6. Representative Submission: As per the advertisement issued by MWRRA for consultation meetings, it is expected that the representatives of bulk water users and NGOs participate in the meetings. Considering the fact that the water users in agriculture and domestic water use are not organised systematically, it is difficult for such users to decide the representative of their bulk water use. Also we all are aware that the number and quality of water users associations (WUAs) in agriculture sector are still not reached to the desired levels. Hence, in absence of such representatives, there should be adequate space and time for all water users to participate in the consultation process.

7. Procedures for Consultation Meetings: In absence of CBR, it is very necessary to prepare a standard procedure for the specific purpose of the current consultation meetings planned by MWRRA. These procedure will be useful for the local organizers to organize the meetings.

MWRRA being a quasi-judicial body all proceedings before MWRRA shall be deemed to be judicial proceedings. As per section 9(1) of MWRRA Act the Authority shall observe such rules of procedure in regard to transaction of business at its meetings as determined by regulations. In absence of such formal regulations (i.e. CBR), MWRRA should prepare at least a set of procedure for conducting the consultation meetings of the approach paper for tariff regulations.

4.5.2 Submission on Regulation of Losses and Regulation for Equitable and Just Water Resource Management

A. Regulation of Losses and Inefficiencies

Comments on Approach Paper

- The approach paper totally ignores the role of MWRRA in regulating water losses and various other operational and cost inefficiencies. The cost of these losses and inefficiencies are ultimately borne by the water users in the form of water tariff. Hence, it is important to address the issue of regulation of losses and inefficiencies while determining regulations for bulk water tariff.

- The collecting interpretation of the State Water Policy and MWRRA Act clearly suggests that there is a strong legal basis for undertaking regulatory measures by MWRRA for reducing water losses and various other inefficiencies.

Legal basis for Regulating Water Losses including Water Theft

- Sect. 11(d) of MWRRA Act empowers the Authority to establish tariff system. The particular section does not restrict the authority of MWRRA to just fixing the tariff. It empowers MWRRA to establish a whole system for water tariff. Hence, MWRRA has a mandate to establish a system for water tariff that includes not only fixing tariff but it also includes system for regulating losses and various other inefficiencies.

- The preamble of MWRRA Act gives a very clear direction for MWRRA with regards to ensuring sustainable management of water resources in the State. Sustainable management necessarily includes management of projects including its operations and maintenance (O&M) such that the losses are minimized and overall efficiency of financial and other resources is improved.

- Sect. 11(d) of MWRRA Act as well as the directions in the preamble clearly shows that MWRRA has the responsibility to develop regulations for water tariff which should include regulations for reducing losses as well as reducing various other inefficiencies.

- The State Water Policy (para 10) states that, 'state departments and.....shall optimize the cost of service including establishment, works, materials, energy and other costs and maintain transparent accounts of the amount and sources of revenues and costs and their allocation to various functions and service.' Further as per MWRRA Act, the Authority has to work as per the framework of the policy. Thus, the policy has given clear directions to MWRRA that 'cost-effectiveness' should be the prime objective in water resource management. Since, bulk water tariff are based on 'cost recovery', MWRRA should include regulations for achieving cost-effectiveness.

- Sect. 11(d) of MWRRA Act, further states that, MWRRA shall '.....establish a water tariff system.....based on the principle that the water charges shall reflect the full recovery of the cost of the irrigation management, administration, operation and maintenance of water resources project'. The particular provision directs MWRRA to follow the principle that water charges shall reflect the full recovery of various cost. It should be noted that the provision does not direct MWRRA to ensure that cost should be recovered even if there are huge amount of losses and inefficiencies. There are following important points to be noted in this regard:

- While determining tariff, MWRRA will have to project the future costs and revenue requirement. While projecting the future costs MWRRA can consider the amount of losses in water and inefficiencies in various operations. In this process, there should be an assessment of the amount of losses and inefficiencies that can be reduced in phased manner during the period for which tariff is being determined. Once this assessment is done then the actual cost can be defined as the gross costs minus the losses and inefficiencies that can be reduced by proper management and operations. This actual cost then can be considered as the cost that should be recovered from water charges. Thus, Actual Cost to be Recovered = Gross Cost Estimated – Losses/Inefficiencies (to be reduced). Cost-effectiveness as mandated in State Water Policy can be achieved only if consideration of losses and inefficiencies is done in the cost projections and tariff setting.

- It should be noted that if the law was suppose to make it mandatory on MWRRA to ensure recovery of costs, whatever is the efficiency or losses, then instead of using the word 'cost' the appropriate word should have been 'expenses'. Expenses are something that have been incurred and recover of such expenses would have meant recovery of whatever are the expenses incurred by the particular water supplier. But in this case, the Act mandates MWRRA to recover 'costs' and

not 'expenses'. Expenses are given while cost is supposed to be determined. Determining costs means determining the value of each of the input that goes into the service of providing water at the given levels of service quality, losses and efficiency. Hence, the letter and spirit of the Act clearly suggests that MWRRA should include the regulation of losses and inefficiencies as part of the tariff system and regulations being developed by MWRRA.

- The use of word 'cost' in the MWRRA Act means 'legitimate costs'. It presumes that the cost used for determining tariff will be the most optimum and prudent cost. Hence, it becomes the responsibility of MWRRA to ensure that losses and inefficiencies are kept at minimum and thus costs are optimized to the maximum possible. Any cost that is beyond this optimal should not be allowed under tariff regulations. Any operations that lead to losses or inefficiencies should be assessed and regulated by MWRRA.

- Sect. 11(q) of MWRRA Act, empowers the Authority to fix reasonable use criteria for each Category of Use. Wasteful use of water leads to losses. Hence, this particular provision should be applied by MWRRA is regulating losses due to wasteful usage.

- Sect. 11(n) of MWRRA Act, empowers authority to establish regulatory system of water resources in the state and to regulate the use of these waters. This is a very broad powers given to MWRRA and the same should be utilized to evolve regulations for reduction of losses and various other inefficiencies in management, operations and maintenance of water resource systems.

Recommendations

- MWRRA Act provides wider powers to MWRRA to develop regulations for various crucial sub-components of tariff system. Following are some of the sub-components of these regulations which can be included as part of the tariff system:

- Regulating Water Losses Due to Inefficient Systems: Losses of water due to managerial and operational reasons like leakage, theft, avoidable evaporation and other reasons can be easily reduced. Such losses in water should be reduced by proper regulations developed as part of tariff system.

- Regulating Cost Ineffectiveness: Various inefficiencies related to expenditure of available or allocated budget leads to loss of valuable financial resources. The tariff system should include regulation for reducing such inefficiencies in utilization of budget.

- Regulating Billing Inefficiencies: There have been numerous cases where large powers plants or other industrial units are not billed at all or not billed to the full extent of their consumption. There are numerous reasons for non-billing or less-billing. For example, one of the reason is that there are certain water sources or rivers where proper legal procedure of notifying the source or river has not been done. Such a notification is required as per MI Act for empowering the government to collect water tariff from the users of this water source or river. These and other reasons of non-billing or less-billing should be identified and regulatory measures should be developed for curtailing revenue losses due to such billing inefficiencies.

- Regulating for Revenue Losses: There could various ways in which revenue can be generated if various losses are tapped. Such a loss in revenue leads to the need for increasing water tariff. Hence, regulations for reducing such losses and thereby increasing the revenue should be developed as part of tariff system.

- Regulating Wasteful Use of Water: Losses due to wasteful usage practices should also be regulated as part of the tariff system.

- MWRRA should adopt various mechanisms for disincentivising such losses and inefficiencies. This can be done by allowing and disallowing certain costs projected in future. There should be specific targets given by MWRRA to bulk suppliers for reduction in these losses and inefficiencies. In case of non-adherence of the targets MWRRA can apply the penal powers as per Section 26 of the Act. MWRRA can also apply the powers of Civil Court granted as per Section 13 of the Act to conduct legal process against default on targets for loss reductions or any related matters.

B. Regulating Water Tariff for Ensuring Equitable and Just Water Resource Management

Comments on Approach Paper

- Approach paper does not even mention the principle of 'equity' and 'social justice' in the specific chapter that proposes the philosophy and principle of tariff setting (Chapter 6 of Approach Paper). Thus, there is also no concrete proposal to evolve tariff system to ensure 'equity' and 'social justice' among the water users.

Legal Basis for Regulating Tariff for Ensuring Equitable & Just Water Resource Management

Preamble clearly states that MWRRA should ensure, '.....judicious, equitable and sustainable management...of water resources..' Thus, the preamble mandates MWRRA to apply these principles in all aspects of water management including tariff system.

- Preamble is considered as the set of policy guidelines that should be adhered while implementing the various provision of the Act. Thus, the preamble of the Act is supreme and cannot be neglected for want of specific provision in the Act.

- Hence, it is absolutely necessary for MWRRA to apply the principal of social justice and equity is all aspects of water tariff system.

Recommendations

- MWRRA should include the principle of 'equity' & 'social justice' as the guiding principle for bulk water tariff setting.

- The draft regulations should clearly articulate the various dimensions and regulatory measures of determining and regulating tariff for achieving equity and social justice.

- Various civil society organizations have given a detail list and discussion about the various aspects of tariff setting that has direct bearing on the adherence to the said principles given in the preamble of the Act. Concrete recommendations have also been submitted on this aspect. MWRRA should further develop concrete regulatory proposals and include the same as part of regulations.

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4.6 News Clippings

Various news stories related to regulatory intervention in water tariff were published in leading newspapers. Some of these news are presented verbatim in this sub-section.

The Times of India, 4th February 2009, Pune

'Revise water tariff approach paper'

Pune: Raising strong objections on the fundamental flaws in the approach paper drafted by the Maharashtra Water Resources Regulatory Authority (MWRRA) for bulk water tariff determination in the state, various civic societies organisations (CSOs) demanded revision of the paper here on Tuesday.

The representatives of various CSOs were speaking at a state-level seminar, which was organised to discuss the flaws in the proposed approach paper. The CSOs stated that the protests will be held across the state if the MWRRA fails to revise the approach paper with the suggested changes.

Subodh Wagle, from Prayas, said, "The MWRRA has initiated a process of determining bulk water tariff by drafting an approach paper. However, this paper is marred with fundamental flaws and it has been prepared using an incorrect methodology. In a meeting with CSOs recently, the MWRRA took a decision to go ahead with the consultation meetings inspite of the lacunas in the paper. This is totally wrong."

Stating that the approach paper has disallowed the effective participation of farmers, Bharat Patankar of Shramik Mukti Dal said, "This paper has not yet reached the rural areas, which are the biggest stockholders in the bulk water sector. The MWRRA should make the draft's Marathi summary available in these areas. The paper was available only on a web site, which is still out of reach of the majority of farmers."

> The MWRRA has initiated a process of determining bulk water tariff by drafting an approach paper. However, this paper has been prepared using an incorrect methodology

Stating that all the suggestions made in the paper are fraudulent, Ajit Abhyankar of Kisan Sabha, said, "The paper is bias towards the industries. The proposal in the paper calls for 58% increase in water tariff for the agriculture sector in next three years, and it suggest 98% increase in the final year. Similarly, the increase in the water tariff for domestic use has been fixed to 49% for first year and 74% for the next three years. However, the increase in the water rate for industries has been proposed at only 5% for the first year and 22% for the next three years."

Sopecomm's Suhas Paranjpe said that the paper fails to address problems like water losses, theft and revenue losses. There is no discussion on achievement of policy objectives like the effective use of water resources, pollution control and people's participation. TNN

The Indian Express, 4th February 2009, Pune

Water tarrif hike draws flak

EXPRESS NEWS SERVICE
FEBRUARY 3

OPPOSING the approach paper of Maharashtra Water Regulatory Authority (MWRRA) on determining bulk water tariff, civil society organisations have demanded the revision of the paper while threatening to launch a statewide agitation.

"The approach paper, prepared on bulk water tariff regulations, has not adhered to the agreed terms of reference (ToR). Almost 43 per cent of various aspects of ToR have been completely ignored and only 10 per cent of the terms have been completed while the rest have been partially considered," said Bharat Patankar of Shramik Mukti Dal in a press conference.

The proposal in the approach paper leads to 39 per cent increase in the water tariff for agriculture in the first year and 58 per cent increase in the next three years. Similarly, it proposes 49 per cent increase in water tariff for domestic use in the first year and 74 per cent for the next three years, he said.

> The approach paper, prepared on bulk water tariff regulations, has not adhered to the agreed terms of reference
> Bharat Patankar

The MWRRA is conducting consultation process based on incomplete approach paper, Patankar alleged. "There is widespread fear among the stakeholders that after the current process of consultation initiated based on half-baked approach paper, the MWRRA will directly issue the order for determining final regulations as well as tariff".

It was mandatory to prepare the complete approach paper in Marathi, but this condition was not complied with and the consultation process was initiated on the basis of the approach paper prepared in English language, he said.

"The vast majority of farmers and the water users associations were kept in dark about the approach paper," he said. The consultation meetings by MWRRA will now be held under the incorrect and incomplete approach presented in the paper, said Subodh Wagale of Prayas.

Suhas Puranjpe of Sopecom said that a statewide agitation will be launched if the MWRRA fails to revise the approach paper before the consultation meeting scheduled in nine places in the state.

DNA, 13th February 2009, Pune

Water regulatory body comes under fire at public hearing

Activists, NGOs and politicians oppose the 'approach paper'

DNA Correspondent

The first public hearing of the newly created Maharashtra Water Resources Regulatory Authority (MWRRA) turned stormy on Thursday after civic activists, NGOs and politicians strongly criticised the authority's 'approach paper' which recommended a hike in tariff for drinking water and irrigation.

The activists and people's representatives have demanded that the MWRRA clarify its position in this regard. The 'Approach Paper on Developing Regulations for Bulk Water Pricing in the State of Maharashtra' has been published on the MWRRA's website.

MWRRA chairman Ajit Nimbalkar clarified that the approach paper was just a "beginning point for discussion" and that the authority would prepare its final paper considering the suggestions and objections by activists and NGOs.

The authority came into existence in August 2005 and became operational in mid-2006 after Maharashtra's water sector reforms and passage of the Maharashtra Water Resources Regulatory Authority (MWRRA) Act, 2005.

The MWRRA establishes a regulatory mechanism for overseeing the relationship between the service provider and water user entities.

The key responsibilities of the authority are determination, enforcement and monitoring of entitlements of water, determination of bulk water tariffs for agriculture, industry and drinking water; hearing and disposal of petitions relating to tariff and other powers, duties and functions of the authority.

MWRRA had organised a regional consultation meeting on the issue of 'Bulk Water Tariff for Agriculture, Industry and Domestic Use' at the Institution of Engineers.

Civic activists and NGOs strongly criticised the 'approach paper' primarily for recommending substantial increase in the water tariff for drinking and agriculture and a nominal increase in water tariff for industries. They attacked the authority for ignoring principle of equitability.

Activists Bharat Patankar, Sumedh Wagale, Datta Desai, Sachin Warghade submitted objections during the hearing. MLA Narasayya Adam, Ajit Abhyankar (both belonging to CPM) and corporators Ujjwal Keskar, Yogesh Gogawale (both BJP) also raised objections.

Representatives of Akhil Bharatiya Grahak Panchayat, municipal councils of Lonavla, Talegaon, Sarigola, Shirur Vita and Lonand participated in the hearing, which was attended by the MWRRA chief Nimbalkar, secretary SV Sorlal and members A.D. Jadhav and A Shekhar.

Later, Patankar and Wagale told reporters that the authority should prepare its own draft and put it before the public for consultation.

He warned that there would be an agitation if the authority does not present its own draft.

Nimbalkar said there is a misunderstanding among activists that the approach paper published on the website was a draft tariff order.

HIKE IN WATER TARIFF PROPOSED

The MWRRA 'approach paper' has proposed substantial increase in water tariff for drinking and agriculture and a nominal increase in tariff for industries.

Civic activists have warned that there would be an agitation if the authority does not present its own draft and put it before the public for consultation.

MWRRA chairman Ajit Nimbalkar said that the approach paper was just a "beginning point for discussion" and the authority will consider the objections of NGOs.

About Resources and Livelihoods Group, PRAYAS, Pune

PRAYAS is a registered charitable trust established in 1994. The Resources and Livelihoods (or ReLi) Group is one of the four independent groups of PRAYAS, working on issues related to natural resources and livelihoods. It emerged from Prayas' Energy Group (PEG) in November 2000, with the substantive objective of working on core social and political issues affecting natural resources and people's livelihoods. The organizational objective was to spawn the next generation of researchers-activists who would adapt the strategic model of PEG to address a broader range of social and political issues.

The Mission Statement of PRAYAS is: "We apply our professional knowledge and skills to understand the issues afflicting society. Further, we strive to translate this understanding in strategic but sensitive responses. We believe that, if equipped with adequate information, sound analysis, and necessary skills, even disadvantaged sections of society can tackle their problems and shape their own future. All our activities are geared to the objective of equipping the afflicted and facilitating people's own action."

Specifically, two objectives guide ReLi group's activities: (i) To bring livelihoods-related issues of disadvantaged sections to the centre of development discourse, policy, and practice; (ii) To increase influence of common citizens, especially disadvantaged sections on the mainstream governance agencies and processes.

In the past, the ReLi group worked at the level of perspective, practice, and policy with activities such as: analysis and articulation of 'Sustainable Livelihoods (SL) Perspective', development of tools for articulation of the 'Community Livehood Manifesto', experimentation and capacity building on 'Sustainable Cultivation for Poor', documentation of 'good practices' in the government schemes, advocacy initiatives on issues such as 'Below Poverty Line Survey', Tribal Policy of the Central Government, Employment Guarantee Scheme, and Disaster Management.

Currently, the group has focused its work on following four themes and areas of work:

- Structures and Roles of New IRAs in Basic and Social Services Sectors
  (Water Sector)
- Spaces Created by Pro-Public and Pro-Poor Reform Measures (Urban Sector)
- Strengths and Weaknesses of Public Organizations Serving Poor
  (Urban and Rural Drinking Water)
- Accessibility and Efficacy of Mega Anti-Poverty Schemes (NREGS)

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The first ever 'Independent Regulatory Authority' (IRA) in water sector in India came into being after the law was enacted for the purpose in 2005 by the state of Maharashtra. Concrete developments have taken place in Uttar Pradesh, Arunachal Pradesh, Andhra Pradesh and other states in India towards establishment of such state-level IRAs in water sector.

The establishment of IRA signals towards a major change in the sector. It comes with a complete package of new sector reform principles along with legally binding institutional and operational mechanisms for implementation of these principles. In many cases, it also introduces newer operational definitions of already accepted principles such as equity and sustainability. Looking at its far-reaching impacts, there is an urgent need to generate a wide debate on utility and desirability of these reforms, while those are in a nascent stage. Based on this felt need, the Resources and Livelihoods Group (ReLi), of PRAYAS initiated analysis and advocacy-based work in the area of water regulation. Some of the major work of analysis carried out by PRAYAS, as part of various activities, is presented in this compendium.

The compendium includes a broad range of the analytical work carried out by PRAYAS including analysis of the new regulatory laws, and regulatory interventions in the area of bulk water tariff as well as privatization of irrigation projects. It is hoped that this compendium will be a useful reference to individuals and organizations for undertaking further detailed analysis and for facilitating debate around the issues of independent regulation and related reforms in the water sector in India.