



Assessing the Environmental Impact Assessment System: A Legal Review of the Philippine EIA System

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I. INTRODUCTION and CONTEXT TO THE PHILIPPINE EIA SYSTEM

An Environmental Compliance Certificate (ECC) of a banana plantation in Davao City has this item as a conditionality: "That the following stipulations on buffer zone shall be complied with: (a) that no planting shall be undertaken within 20 meters from the embankments, side slope at major rivers and (b) that a buffer zone of at least 30 meters from springs shall be provided." Other provisions with this buffer zone also indicate that "lot boundaries shall be planted with perennial trees/legumes to provide buffer/safety against pesticide drifts coming from within and/or from the outside shall be maintained".

A review of some ECCs in Davao City indicate that this buffer zone provision is apparently a standard conditionality in all Environmental Compliance Certificate (ECC) of banana plantations. But in a case filed by banana plantations against the City Government of Davao on an Ordinance Banning Aerial Spraying, the Pilipino Banana Growers and Exporters Association (PBGEA) claims that the Ordinance with a provision on 30-meter buffer zone is unreasonable and constitutes confiscation or deprivation of property without due process of law.

While that case is still pending in the courts, this ECC with a provision on 30-meter buffer zones are actually being implemented without protest from the project proponents and part of a continuing implementation of the ECC as required under our laws. There have been reports though from members of communities living near or beside these banana plantations that these conditionalities are not complied with, and thus, should be subject to penalties under the law. Unfortunately, no official record of violations has been recorded of this type of conditionality.

Curiously though, the ECC has this another standard provision found at the end of the list of conditionalities, and it states that: **"This ECC shall not be misconstrued as a permit; rather a set of conditionalities which should be followed by the project proponent in all stages of project implementation in order to mitigate potential adverse impacts on the environment."** From this general declarations, can we surmise that these conditionalities are merely stated for mitigation purposes and not merely requirements, violations of which can be subject to fines and penalties? What is the value of a document like an Environmental Impact Statement (EIS) if it is merely a planning tool, as the Department of Environment and Natural Resources (DENR) insists?

This is the context upon which this paper reviews the legal basis for the Environmental Impact Assessments (EIA) and Environmental Impact Statement (EIS) System in the Philippines. This is actually a continuing study on how the process can be improved and to which direction do we pursue reforms in the whole system. This paper hopes that

discussion on issues and concerns would eventually lead to reforms in the EIS System towards stricter environmental protection.

II. THE PHILIPPINE EIS SYSTEM

This section discusses how the Philippine EIS System evolved through time under different administrations.

11.a Presidential Decree 1151, The Philippine Environment Policy

Environmental impacts statements came into Philippine laws with the signing on June 6, 1977 of the Presidential Decree 1151, also known as the Philippine Environment Policy. This Marcosian decree declared as a continuing State policy (1) to create, develop, maintain and approve under which man and nature can thrive in productive and enjoyable harmony with each other, (2) to fulfill the social, economic and other requirements of present and future generations of Filipinos, and (3) to insure the attainment of an environmental quality that is conducive to a life of dignity and well-being.¹ Essentially, these declared policies became the precursors of such novel judicial concepts of intergenerational responsibility and sustainable development principles in environmental law.

Section 4 of the law provides that all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities shall prepare, file and include in every action, project or undertaking which significantly affects the quality of the environment, environmental impact statements (EIS).

As enumerated in the law, an EIS should contain a detailed statement on (1) the environmental impact of the proposed action project or undertaking, (2) any adverse environmental effect which cannot be avoided should the proposal be implemented, (3) alternative to the proposed action, (4) a determination that the short-term uses of the resources of the environment are consistent with the maintenance and enhancement of the long-term productivity of the same and (5) whenever the proposal involves the use of depletable or non-renewable resources, a finding must be made that such use and commitment are warranted.

The said provision further states that before an environmental impact statement is issued by a lead agency, all agencies having jurisdiction over, or special expertise on, the subject matter involved shall comment on the draft EIS made by the lead agency within thirty (30) days from receipt of an EIS. These mandatory requirements must continue to be enforced, in the absence of a law amending or repealing PD 1151.

PD 1151 is a significant legal document not only because it lays the foundation of the precautionary principle of environmental law by requiring the submission of an environmental impact statements in any action that might significantly affect the quality of the environment. It also establishes the State recognition of the right of the people to a healthful environment, whereby it shall be the duty and responsibility of each individual to contribute to the preservation and enhancement of the Philippine environment². As we all know, these principles are already incorporated in the 1987 Philippine Constitution on the twin provisions of recognizing the right of the people to health and balanced ecology.

Clearly, even during pre-1987 Constitution, ***the mandate is for State responsibility in pursuing these sustainable development policies in***

¹ Section 1, PD 1151.

² *Id.*, Section 3.

cooperation with concerned private organizations and entities, to use all practicable means in promoting the general welfare that the nation may recognize, discharge and fulfill the responsibilities of each generation as trustee and guardian of the environment for succeeding generations, and even assure the people of a safe, decent, healthful, productive and aesthetic environment. The law further encourages the widest exploitation of the environment without degrading it, or endangering human life, health and safety or creating condition adverse to agriculture, commerce and industry. Likewise, it is of utmost importance to preserve important and cultural aspect of the Philippine heritage, attain rational and orderly balance between population and resource use, and improve the utilization of renewable and non-renewable resources.

These policies and principles cannot be ignored when implementing the law on environmental impact statement. The policies and principles enshrined in PD 1151 should guide administrative agencies in the formulation of their guidelines, rules and regulations in the implementation of environmental impact assessments and statements. This paper would show that the recent agency guidelines on EIS and EIA have been inconsistent with this law and other laws regulating the EIS system.

11.b Presidential Decree 1586, The Philippine EIS System

While PD 1151 initially laid down the principles of the country's environmental policies and introduced the requirement of environmental impact statements, Presidential Decree 1586 strengthened such EIS by establishing the Philippine Environmental Impact Statement (EIS) System³. PD 1586 succinctly pointed out that the foundation of such system was PD 1151 requiring an EIS of all agencies and instrumentalities of the national government, including government-owned and controlled corporations, as well as private corporations, firms and entities, for every proposed project or undertaking, which significantly affect the quality of the environment. PD 1586 recognized PD 1151 as the basis for the EIS system.

The law succinctly states that the President of the Philippines may, on his own initiative or upon the recommendation of the then National Environmental Protection Council (NEPC)⁴ by proclamation, declare certain project, undertakings, and areas in the country as environmentally critical. No person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate (ECC)⁵ issued by the President or his duly authorized representative. Thus, clearly the law has made a requirement that for environmentally critical projects (ECPs) and projects in environmental critical areas (ECA), an ECC has to be secured before undertaking or operating any project.

In essence, before an ECC is issued, the proponent would have to submit an EIS whenever the proposed project is environmentally critical, or located in an environmentally critical area. All other projects, undertakings and areas not declared as environmentally

³ Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and For Other Purposes, 11 June 1978.

⁴ Executive Order 192 dated 10 June 1987 abolished NEPC and integrated its powers into the Environmental Management Bureau (EMB) of the Department of Environment and Natural Resources (DENR).

⁵ Section 4, PD 1586.

critical shall be considered as non-critical and shall not be required to submit an environmental impact statement.⁶ The law however states that environmental agencies may require non-critical projects and undertakings to provide additional environmental safeguards, as it may deem necessary. Note that the discretion of the government agency concerned is only provided in cases of non-critical projects and undertakings on whether to provide additional environmental safeguards or not. That is the only discretion given by law, for non-critical projects, and not for environmentally critical projects and areas declared which are already subject to the EIS System.

Penalties for not securing an Environmental Compliance Certificate (ECC) first before undertaking or operating any such declared ECPs or projects in ECAs shall be punished by the suspension or cancellation of such ECC and/or a fine in an amount not exceeding Fifty Thousand Pesos (P50,000.00) for every violation, subject to the discretion of the government agency. The same penalties shall also be declared for violating the terms and conditions in the issuance of the ECC, or the standards, rules and regulations issued pursuant to PD 1586, or the EIS System.

II.c Presidential Proclamation 2146, Environmentally Critical Projects & Areas

With the establishment of the EIS System, and the mandate of the President under PD 1586 to declare certain projects and areas as environmentally critical, Presidential Proclamation 2146⁷ was issued on 14 December 1981. Under the said proclamation, the following areas and types of projects are pronounced as environmentally critical and within the scope of the EIS System:

A. Environmentally Critical Projects

1) Heavy Industries

- a. Non-ferrous metal industries
- b. Iron and steel mills
- c. Petroleum and petro-chemical industries including oil and gas
- d. Smelting plants

2) Resource Extractive Industries

- a. Major mining and quarrying projects
- b. Forestry projects
 1. Logging
 2. Major wood processing projects
 3. Introduction of fauna (exotic animals) in public/private forests
 4. Forest occupancy
 5. Extraction of mangrove products
 6. Grazing
- c. Fishery Projects
 1. Dikes for /and fishpond development projects

3) Infrastructure Projects

- a. Major dams
- b. Major power plants (fossil-fueled, nuclear fueled, hydroelectric or geothermal)
- c. Major reclamation projects
- d. Major roads and bridges.

⁶ *Id.*, Section 5.

⁷ Proclaiming Certain Areas and Types of Projects as Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established Under Presidential Decree No. 1586.

B. Environmentally Critical Areas

1. All areas declared by law as national parks, watershed reserves, wildlife preserves and sanctuaries;
2. Areas set aside as aesthetic potential tourist spots;
3. Areas which constitute the habitat for any endangered or threatened species of indigenous Philippine wildlife (flora and fauna);
4. Areas of unique historic, archaeological, or scientific interest;
5. Areas which are traditionally occupied by cultural communities or tribes;
6. Areas frequently visited and/or hard-hit by natural calamities, geologic hazards, floods, typhoons, volcanic activity, etc.
7. Areas with critical slopes;
8. Areas classified as prime agricultural lands;
9. Recharged areas of aquifers;
10. Water bodies characterized by one or any combination of the following conditions:
 - a. tapped for domestic purposes;
 - b. within the controlled and/or protected areas declared by appropriate authorities;
 - c. which support wildlife and fishery activities.
11. Mangrove areas characterized by one or any combination of the following conditions:
 - a. with primary pristine and dense young growth;
 - b. adjoining mouth of major river systems;
 - c. near or adjacent to traditional productive fry or fishing grounds;
 - d. which act as natural buffers against shore erosion, strong winds and storm floods;
 - e. on which people are dependent for their livelihood.
12. Coral reef characterized by one or any combination of the following conditions:
 - a. with 50% and above live coralline cover;
 - b. Spawning and nursery grounds for fish;
 - c. Which act as natural breakwater of coastlines.

In addition to the above-declared environmentally critical projects and areas, Presidential Proclamation 803, signed on 6 June 1996, was issued declaring all golf-course projects, regardless of location, from its construction, development and/or operation are considered as environmentally critical. PP 2146 and 803 are the only presidential proclamations of environmentally critical projects and areas, as mandated by PD 1586 in declaring such areas and projects.

II.d The 1987 Constitution and relevant laws related to the EIS System

It is interesting to note that while Presidential Decree 1151 and 1586 as well as Presidential Proclamation 2146 are legal instruments under the 1972 Constitution, said constitution does not contain any provision regarding State protection of environmental rights. This distinguishes the 1987 Constitution from other Philippine Constitution as it incorporated environmental law principles into our highest law. Section 16, Article II of the 1987 Constitution states that "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." Its twin provision on the right to health under Section 15, Article II provides that "The State shall protect and promote the right to health of the people and instill health consciousness among them." Both provisions institutionalize environmental rights in our laws.

In *Oposa v. Factoran*, G.R. No. 101083. July 30, 1993, the Supreme Court enunciated the following landmark principles with respect to the Constitutional environmental declaration of State policies and principles:

“While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation —aptly and fittingly stressed by the petitioners —the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come —generations which stand to inherit nothing but parched earth incapable of sustaining life. The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.”

These constitutional provisions further strengthen the rationale for improving the EIS System and be consistent with the State obligation to protect and advance the right of the people to a balanced environment. With the jurisprudential imposition that this right carries with it the correlative duty to refrain from impairing the environment. Within this framework, EIS rules and regulations should conform to principles of sustainable development, intergenerational responsibility and precautionary principle. Any review or critical analysis of the regulations formulated to implement the EIS system should refer to these principles and be consistent with the objective it sought to achieve.

III. IMPLEMENTING RULES AND REGULATIONS RELATED TO EIS

The following discussions talk about the evolution of the implementing rules and regulations of PD 1586. The most relevant are the DAO 37-96 and DAO 30-2003.

III.a DAO 37-96

A precursor to DAO 37-96, DAO 92-21⁸ was issued as a new and comprehensive administrative regulation which devolved the issuance of the Environmental Compliance Certificate (ECCs) for Environmentally Critical Areas to the DENR Regional Offices, thus making the implementation more realistic.⁹ Among the policy objective of the AO was to involve as much as possible a wide spectrum of concerned sectors and the adjacent communities who will be affected by the project development in the exchange of views, information and concerns in order to effect project that are beneficial to the majority and acceptable to the community.

Despite these declared policies on social acceptability, there were still reforms needed in terms of implementation. At the instance of the Philippine Council for Sustainable Development, a policy paper was drafted and regional consultations were held for civil society recommendations for

⁸ Amending the Revised Rules and Regulations Implementing P.D. 1586 (Environmental Impact Statement System).

⁹ Luna, Ipat, *Avenues of Peoples Participation in the Philippine EIA System* (2007).

reforms in the EIA System, which were submitted to the DENR for its consideration in the drafting of new policies and this constituted the first organized effort for civil society to have an impact on the EIS System.¹⁰ The recommendations have since been lobbied before the DENR.

In January 12, 1996, Executive Order 291 was issued with the subject of improving the Environmental Impact Statement System. The declared policy was that optimum economic development shall be achieved without delay and shall be pursued consistent with the principles of sustainable development. The State then shall ensure that the present generation meets its needs without compromising the ability of future generations to meet their own needs. Civil society groups observed that agreements on major points were not reached, and the EO was a mere reiteration of existing policy and contained little by way of innovative ways to implement the system and to give it full stream.¹¹

It is in this context the civil society organizations accepted the issuance of DENR Administrative Order 37-96¹² as it addressed a number of demands of the civil society organizations for mandatory consultations, social acceptability and other environmental safeguards in the EIS System. According to noted environmental lawyer Ipat Luna, among the innovative provisions of DAO 37-96 were those on scoping with full public participation, environmental risk assessment and presumption of public risk, accountability statements from proponents and preparers, and environmental monitoring funds. Among those which were adopted from the recommendations that came out of the PCSD consultations were notification procedures, public accessibility of Environmental Impact Statements (EIS), an appeal mechanism open to interested parties, requirements for a "no action" alternative, the mandatory inclusion of an environmental guarantee fund and participative monitoring systems and the prohibition against DENR personnel participating in the review process. The new Rules even specified clear guidelines for exemption and officially established the review committee.

III.b DAO 30-2003

On November 2, 2002, former President Gloria Macapagal-Arroyo signed Administrative Order No. 42 rationalizing the implementation of the Philippine Environmental Impact Statement (EIS) System. Pursuant to AO 42, DENR issued DAO 30-2003, that supersedes DAO 37-96. The new policy was to streamline the EIA/EIS process and this is evident in the prescribed timeframe of 15-120 days for processing of ECC application, otherwise, there is an automatic approval. Similarly, the DENR-EMB is limited to two (2) written requests for additional information.

III.b.1 Shortcomings of DAO 30-2003

There are certain incongruities with how the Philippine EIS System now works under DENR AO No. 30, Series of 2003, the present implementing rules and regulations of PD 1586. Incongruity was used to describe DAO 30-2003 because based on a careful reading of this administrative order, it lacks the necessary mandatory requirements as earlier discussed. This shall be presented by comparing the present regulation with that of its precursor, DAO 37-96. DAO 37-96 explicitly adopts the principles of PD 1151, 1586 and even the enumerations of environmentally critical projects and areas and even states that no person

¹⁰ *Id.*

¹¹ *Id.*

¹² Revising DENR Administrative Order No. 21, Series of 1992, to further strengthen the implementation of the Environmental Impact Statement System.

shall undertake or operate any such declared ECP or project within an ECA without first securing an ECC, consistent with the said laws. Public participation and social acceptability are also the major principles established by the said administrative order.

There shall likewise be a critique of DAO 2003-30, some of which are taken from a *Position Paper on DAO 30-2003* by several Davao City-based organizations which wrote a letter to then DENR Secretary Michael Defensor pointing to the issues against AO:

III.b.1.a Classifying what was already classified

DAO 30-2003 makes a distinct classification of the classification as provided by law. This is *ultra vires* as the law limits the scope of such classification.

Under the new DAO, **only projects that pose potential significant impact to the environment shall be required to secure ECCs.** Clearly, this goes against the principle that ***an environmentally critical project (ECP) or a project in an environmentally critical area (ECA) is required to secure an ECC.*** By stating that only those projects that pose potential significant impact to the environment, it directly misconstrues the letter of the law. As a matter of fact, DAO 30-2003 creates another layer of classification over what the laws provided. Instead of the clear definitions and enumerations of what are the ECPs and ECAs are, it lists another specific criteria for determining which the EIS System covers. The present AO is also unclear on the access to justice procedures and notice requirements. The procedural manual formulated in implementing the AO further dilutes the established safeguards.

Looking further into the classifications created under DAO 30-2003, the AO looks into the characteristics of the project or undertaking such as the size of the project, location of the project and nature of the potential impact. The administrative order even sets four (4) categories which are also incompatible with what the law provided. Category A are those Environmentally Critical Projects (ECPs) with significant potential to cause negative environmental impacts. Category B are projects that are not categorized as ECPs, but which may cause negative environmental impacts because they are located in Environmentally Critical Areas (ECA's). Category C are projects intended to directly enhance environmental quality or address existing environmental problems not falling under Category A or B. Category D are projects unlikely to cause adverse environmental impacts.

With these categories, the AO merely requires projects under Categories A and B as those projects that require to secure ECC while those in Category C to submit merely a Project Description while Category D projects may secure a CNC. Below is a chart of descriptions for each categories and is summarized as to requirements of submission of ECC and public hearing and consultations:

Category A	Category B	Category C	Category D
Environmentally Critical Projects (ECPs) with significant potential to cause environmental impacts	Projects that are not categorized as ECPs, but which may cause negative environmental impacts because they are located in Environmentally Critical Areas (ECAs)	Projects intended to directly enhance environmental quality or address existing environmental problems not falling under Category A or B	Projects unlikely to cause adverse environmental impacts

Required to secure ECC <ul style="list-style-type: none"> - for co-located projects- option to secure Programmatic ECC - for ecozones, Programmatic EIS or locator specific 	Required to submit Project Description	May secure CNC (Certificate of Non-Coverage)
The conduct of Public Hearing as part of the EIS review is mandatory for new projects under this category unless otherwise determined by EMB	For all other undertakings, a public hearing is not mandatory unless specifically required by the EMB	
Proponents should initiate public consultations early on to ensure that environmentally relevant concerns of stakeholders are taken into consideration in the EIA Study and the formulation of the management plan. All public consultations and public hearings conducted during the EIA process are to be documented. The public hearing/consultation Process Report shall be validated by the EMB/EMB RD and shall constitute part of the records of the EIA process.		

The very essence of PD 1151 as well as PD 1586 on requiring the submission of an EIS for ECPs and projects under ECAs, and the subsequent PP 2146 enumerating what are environmentally critical projects and areas **already established what are ECPs and ECAs**. In further formulating categories on which reclassifies what projects or areas are covered by the EIS System is **tantamount to ultra vires and grave abuse of discretion amounting to lack or excess of jurisdiction. The recent administrative orders thus are in conflict with the law**. These questions need to be addressed by the administrative agency itself, or through judicial processes.

III.b.1.b Limiting people’s participation

The new AO withers down DAO 37-1996 provisions of public participation and social acceptability. The conduct of mandatory public hearing is now limited to environmentally critical projects (ECP).¹³ This mandatory character is further dropped when it provides, “unless otherwise determined by EMB”. Public hearing now becomes EMB’s discretion and stakeholders should be thankful for any token consultation project proponents conduct. In contrast, DAO 37-1996 significantly declares that the acceptability of the environmental impact of a project or undertaking can only be fully determined through meaningful public participation and a transparent EIS process.¹⁴ Scoping sessions initiated at the earliest possible stage of the project development were meant to define the range of actions, alternatives and impacts to be examined¹⁵ and involve the stakeholders to make their concerns known to ensure that the environmental impact assessment (EIA) adequately addresses the relevant issues. Public consultations are required whenever proponents underwent the EIS processes and public hearings are required whenever stakeholders are affected in great numbers, mounting opposition against it or requests for such hearing. All documents in relation thereto are available to stakeholders.

¹³ *id.*, Section 5.3.

¹⁴ Section 1.0, Article IV, DAO 37-1996.

¹⁵ *Id.*, Section 1.0, Article III.

III.b.1.c Limiting definition of stakeholders

The new Order even changed the definition of stakeholders. Stakeholders are now defined as entities who may be directly and significantly affected by the project or undertaking¹⁶. Undoubtedly, it is a step backward to the more inclusive definition in DAO 37-96, that stakeholders are persons who may be significantly affected by the project or undertaking, such as, but not limited to, members of the local community, industry, local government units (LGU), non-governmental organizations (NGOs), and peoples organizations.¹⁷ Restricting the definition would practically make other members of the civil society who are affected, but not in a direct manner, an outsider and should not be part of the process.

III.b.1.d Questionable monitoring

Moreover under the new DAO, not all projects with ECCs are required to form multipartite monitoring teams (MMT). An MMT is the multisectoral body set up to monitor the proponent's compliance to the conditions of the ECC. MMTs are now only required for environmentally critical projects and MMT reports are only required to be submitted twice a year and not quarterly.

III.b.1.e Shifting the burden

What is more alarming is that the DAO places unto the Environmental Management Bureau (EMB) a processing timeframe within which decisions on ECCs shall be made. If no decision is made within a given time (30-180 days depending on the project), the application is deemed automatically approved and an ECC should be issued. Given that the EMB is understaffed, it is doubtful whether EMB could realistically meet the designated deadlines. It is unfortunate that the burden is now placed on EMB to expedite the process, instead of exhausting all means to ensure that the project will not cause any significant negative environmental impact.

This is contrary to the precautionary principle wherein decision makers should take immediate preventive action, using the best available knowledge, in situations where there is reason to think that something is causing a potentially severe or irreparable environmental harm - even in the absence of conclusive scientific evidence establishing a causal link.

III.b.1.f Corruption loopholes

The new Order likewise does not improve on the accreditation process of EIA preparers. This has been a source of corruption since anybody could just sign the Accountability Statement of the EIS of a particular project that is submitted to the EMB. But the EIS was in reality prepared by EMB personnel or worse copied from other EIS prepared by qualified preparers.

III.b.1.g Biased for project proponents

Clearly then, the new administrative order is biased for project proponents at the expense of people's participation and the environment. This bias is made all the more evident when the DAO mandates the EMB to coordinate primarily with the Department of

16 Section 3 (gg), Article I, DAO 30-2003.

17 Section 3 (dd), Article I, DAO 37-1996.

Trade and Industry (DTI) when it updates or make revisions to the technical guidelines of the EIS System implementation. This particular attention to DTI as a main government agency that EMB should consult with raises some doubt as to which interests the environment regulatory body should protect. Is it the investment, or the environment? The policy being laid out now is for the first, and the latter is treated, as a mere obstacle to investment's full potential. Clearly, this AO was issued to make the EIS process friendly to investments, as stated in former President Macapagal-Arroyos State of the Nation Addresses.¹⁸

III.B.1.h Economic and environmental development: not either or

Economic and environmental development should always go together. Being pro-environment does not mean one is anti-development. All around the globe it has been proven time and again that it is only when one considers the environmental, social and economic benefits of a project and takes all these into account in the project implementation could you produce projects superior both in quality and value.¹⁹

All in all, DAO 2003-30 and its detailed implementation guidelines are viewed by many as a step backwards in terms of environmental regulation.

IV. SUPREME COURT DECISIONS ON THE EIS SYSTEM: Caselets

There are already some court decisions concerning the implementation or non-implementation of PD 1586 or the Philippine EIS System.

VI.a *Republic v. City of Davao*, G.R. no. 148622, 12 September 2002

Facts: City of Davao filed an application for a Certificate of Non-Coverage (CNC) for its proposed project, the Davao City Artica Sports Dome with the Environmental Management Bureau, which denied the application after finding that the proposed project is within an environmentally critical area. Thus, City of Davao must undergo the environmental impact assessment (EIA) process to secure an Environmental Compliance Certificate (ECC), before it can proceed with the project construction.

Believing it was entitled to a CNC, it filed a mandamus case with the RTC alleging that its proposed project was neither an environmental critical project nor within an environmentally critical area, thus outside the scope of the EIS system. The trial court ruled in favor of the City saying that there is nothing in PD 1586 which requires local government units to comply with the EIS law. The trial court also declared that based on the certifications of the DENR and Philvolcs, the site is not within an environmentally critical area, not an environmentally critical project.

The Supreme Court held that Section 16 of the Local Government Code mandates the duty of the local government units to promote the people's right to a balanced ecology, and pursuant to this, an LGU cannot claim exemption from the coverage of PD 1586. As a body politic endowed with governmental functions, an LGU has the duty to ensure the quality of the environment, which is the same objective of PD 1586. But these arguments

¹⁸ *Supra* note 9.

¹⁹ Modak P, Biswas A. 1999. Conducting Environmental Impact Assessment for Developing Countries, United Nations University Press.

presuppose that a project, for which an ECC is necessary, is ECP or within an ECA. City of Davao have sufficiently shown that the project will not have a significant negative environmental impact because it is not an ECP or located in an ECA.

IV.b Bangus Fry Fisherfolk vs. Lanzas, G.R. No. 131442, 10 July 2003

Facts: DENR Regional Executive Director (RED) issued an environmental compliance certificate (ECC) to National Power Corporation to construct a temporary mooring facility in Mindoro, in a mangrove area and breeding ground for bangus fry and *Sangguniang Bayan* declared tourism zone. Bangus fry fisherfolks sought reconsideration of the ECC issuance, but was denied by the DENR RED. They filed a complaint with the RTC Manila for the cancellation of the ECC and issuance of an injunction to stop the construction of the mooring facility. RTC dismissed the complaint on the grounds of failure to exhaust all administrative remedies, injunction can only be enforced within its territorial jurisdiction and being an infrastructure government of the government, injunction cannot be issued.

Ruling: The Supreme Court decided that while venue is proper since the principal respondent being DENR RED residing in Manila and within the territorial jurisdiction of RTC Manila, its power to issue injunctive writs is limited to acts within their judicial region. Also, trial courts are prohibited from issuing injunctive writ against government infrastructure projects.

NAPOCOR secured the ECC because the mooring facility in the area, while not an environmentally critical project, is located in an environmentally critical area. DAO 37-96 explains the rules on administrative appeals from the decisions of DENR Regional Executive Director. Instead of following the procedure for appeals, petitioners bypassed the DENR Secretary and immediately filed their complaint with the court, depriving the DENR Secretary the opportunity to review the decision of his subordinate.

With respect to the allegation of the patent illegality of the ECC for its violation of environmental laws, mandatory consultations with the local government unit and requirements of zoning permit and social acceptability, the Supreme Court did not believe so. A mooring facility is not a commercial structure prohibited by the declaration of the area as an ecologically threatened zone. A mooring facility is not even an environmental critical project hence does not belong to any of the six types of project that needs prior approval of the *Sanggunian*, unlike an operation of a power barge. Finally, mere absence of documents that were supposed to be part of the submissions required from a project proponent does not render the ECC issuance patently illegal. Such case must be that the public officer issued the ECC without any semblance of compliance, or even an attempt to comply, with the pertinent laws. While ECCs may be subject to cancellation for non-compliance with its terms and condition, it does not justify ignoring the procedure for appeals.

IV.c Principe vs. Fact-Finding and Intelligence Bureau, Office of the Ombudsman, GR no. 145973, 23 January 2002

Facts: This is about the dismissal of DENR Regional Executive Director (RED) from government service for gross neglect of duty in connection with the collapse of the housing project at the Cherry Hills Subdivision, Antipolo City. Antecedent facts reveal that the ECC application was approved by the DENR RED upon recommendation of a subordinate. The issue raised is whether the Ombudsman dismiss petition from the service on an administrative charge for gross neglect of duty, initiated, investigated and decided by the Ombudsman himself without substantial evidence to support his finding of gross neglect of duty because the duty to monitor and inspect the project was not vested in the petitioner.

The Supreme Court ruled in favor of the petitioner and orders his reinstatement with back pay and without loss of seniority. It held that the Ombudsman without taking into consideration the lawfully mandated duties and functions attached to petitioner's position as RED, immediately concluded that as the signing and approving authority of the ECC, it was incumbent upon petitioner to conduct actual monitoring and enforce strict compliance with the terms and conditions of the ECC.

A review of the applicable DENR administrative orders provide that the function of monitoring environmental programs, projects and activities in the region is lodged with the Regional Technical Director, not with the Regional Executive Director. Under SAO 38-1990, there is no mention of the responsibility of a regional executive director to monitor projects. Furthermore, monitoring as the activity designed to gauge the level of the conditions stipulated in the ECC is a function of the Provincial Environment and Natural Resources (PENR) and Community Environment and Natural Resource offices as mandated in DAO 97-36.

Administrative liability could not be based on the principle of command responsibility. The negligence of petitioner's subordinates is not tantamount to his own negligence. It is not within the mandated responsibilities of petitioner to conduct actual monitoring of projects. A head of a department or a superior officer shall not be civilly liable for the wrongful acts, omission of duty, negligence, or misfeasance of his subordinates, unless he has actually authorized by written order the specific misconduct complained of. The responsibility of monitoring housing and land development projects is not lodged with the DENR, but with HLURB.

IV.d Balicas vs. Fact-Finding and Intelligence Bureau, Office of the Ombudsman, GR No. 14372, 23 March 2004.

Facts: This is about the dismissal of a DENR senior environmental management specialist assigned in the province of Rizal. The charge against her was the supposed failure on her part to monitor and inspect the development of Cherry Hills Subdivision. She was dismissed from government service for gross neglect of duty in connection with the tragedy at the Cherry Hills Subdivision in Antipolo City. Antecedent facts of the case indicated that an inspection report prepared by Balicas was submitted regarding the field evaluation for the issuance of ECC, which was approved by the DENR Regional Executive Director.

Reports further disclose that Balicas monitored the implementation of the project development of the subdivision to check compliance with the terms and conditions in the ECC. In her reports, she noted that the project was still in construction stage, hence compliance with the stipulated conditions could not be fully assessed.

The Supreme Court ordered reinstatement of Balicas to her position with back pay and without loss of seniority rights. The responsibility for monitoring housing and land development projects is not lodged with the DENR, but with the HLURB as the sole regulatory body for housing and land development. The Court finds no legal basis to hold Balicas liable for gross neglect of the duty pertaining to another agency, the HLURB. The Court looked into the lawfully prescribed duties of Balicas in order to ascertain if there has been gross neglect of duty, but unfortunately, DENR regulations are silent on the specific duties of a senior environmental specialist while PENRO is tasked to monitor the project proponent's compliance with the conditions stipulated in the ECC, but these mainly deal with broad environmental concerns. HLURB's monitoring duty, however is more specific. PD 1586 even prescribes duties in connection with environmentally critical projects requiring an ECC with the HLURB such as preparing proper land and water use pattern for ECPs/ECAs, establish ambient environmental quality standards and develop a program of

environmental enhancement or protective measures against calamitous factors such as earthquake, floods, water erosion and others.

V. ISSUES AND CONCERNS FROM STAKEHOLDERS REGARDING EIS AND ITS IMPLEMENTATION

In a Focused Group Discussion among Davao City civil society organizations conducted on 23 September 2010, the environmental impact assessment (EIA) is viewed as important in assessing the potential impacts of a project on the environment. There is a consensus of the need for project proponents to prepare an environmental impact statement (EIS) as a requirement to secure an environmental compliance certificate (ECC). Issues raised are those on social acceptability, public participation, exemption and coverage of the EIS system and how stakeholders are defined and consulted on the project.

V.a Social Acceptability

An important aspect of the whole process is the social acceptability of the proposed project, and this includes public consultation and public participation from the scoping sessions to monitoring. Starting from the scoping sessions, it is important to conduct consultations with the residents of the area where the project is to be development because it is during this stage where the project proponent presents the project details and communities can express their sentiments over the proposals. One participant expressed the view that communities can actually reject a project during the scoping session.

V.b Transparency

It is observed though that in a scoping session with a mining company, Sagittarius Mines, participants were able to ask questions but the company can choose not to answer specific issues being pointed out. In another experience in Barangay Balengaeng, Tugbok District, the participants to the scoping sessions were preselected and only those who favored the plantations were informed of the conduct of the consultation. For project proponents, scoping is not considered as a venue to get social acceptability but merely for project presentation considering that the issues raised were not responded to.

V.c Public participation

It is observed that some banana plantations did not undergo the EIS process, especially the public consultations and social acceptability. One cited a case involving the Sumifro company where even before asking the barangay for a resolution to allow them entry in the area, they already have plantations. Barangay endorsements were asked only after two (2) into operations. One recalled that when an ECC was issued to DOLE and Sumifro, the barangay officials were not part of the multisectoral monitoring teams (MMTs) organized to monitor whether the terms and conditions of the ECC were complied with.

V.d Compliance of the ECC Conditions

With respect to monitoring of ECC compliance of the conditionalities, when observed regarding the presence of drainage system, DAVCO plantations were asked of their drainage plan, yet the company has not yet submitted the plan as of the time of the FGD, but the plantations continued with their development despite such documents lacking as part of the conditionalities. In other areas, monitoring teams does not even base their reports on the ECC or the EIS submitted, but merely rely on the report of the project proponent.

Monitoring reports are not even provided to the public, and MMT teams are not given a copy.

V.e Exemption and coverage of EIS System

Several NGO workers observed that some barangay officials are not aware of environmental regulations, much more the environmental impact statement (EIS) system. Companies take advantage of this situation by violating the law. Some plantations even excuse themselves from liability under the EIS law by resorting to contract growing, hence circumventing the restrictions provided for by law. Considering that plantations are covered by the EIS system depending on their plantations, the size and ownership requirements have been a tricky provision in the regulations. Compelling the companies to comply with the law has been difficult considering that most companies existed even without securing an ECC.

V.f EIS as a planning tool, hence exempt from LGU mandatory prior consultation

A participant also expressed frustration over how the DENR treats the EIS as merely a planning tool, a way to mitigate the potential hazards of environmental destruction that might result from a project. With that frame of mind, enforcement becomes a problem as the DENR will argue that such document is merely a planning tool, and other government agencies can deal with the violation other than the DENR. It is suggested that EIS should be honored as a social contract between the community and the company, and any violations thereof have corresponding contractual obligations and liabilities, binding on the project proponent.

V.g Role of LGU in monitoring and enforcement

Zoning and land use regulations are not being enforced, and local government units have not been active in monitoring companies on their compliance with the ECC conditionalities. In terms of implementation, EIS becomes merely an attachment to the project instead of a main document. As a conceptual framework, EIS is relevant but when applied to existing projects, it becomes problematic. Being science-based does not mean it should not be popular. When presented before the barangay, communities cannot understandable because of the technical terms peppered in the document. People would focus more on the economic implications with respect to work provided, instead of the environmental impacts. The document itself must be understandable to the local government unit and community.

V.h Proposals for Amendments

It was proposed that the EIS law, even rules and regulations be amended to be relevant with the changes in laws such as disaster risk reduction, climate change and environmental ordinances. EIAs should not be separated from what is happening in the community as it was supposed to be a mitigating tool on the potential hazards of a proposed project. Changes in the law should reflect nuances of environmental principles, precautionary principle and sustainable development, and not merely consider investment protection in the EIS process. In fact, precautionary principle should be the cornerstone of the EIA, meaning the approach to environment should be preventive rather than prescriptive.

All these results point to the fact that the EIS system, while considered important as part of environmental protection, has not been placed by environmental agencies in

their priority with respect to implementation. Education and information campaigns have yet to gain ground in the community levels, particularly with local government units. Scoping sessions and consultation mechanisms in the communities would have to be prior, free, informed before any consent in allowing projects be made. The EIS document itself should be understandable as the technicality in terms of presentation and language might have violated the information aspect of the process. An independent monitoring and publication of reports will compensate for any shortcuts made in the approval of the ECC.

VI. POLY RECOMMENDATION

Attached to this paper is a draft Administrative Order amending the present DAO 30-2003, and reverting to the previous DAO 36-1997 with revisions in further strengthening the environmental impact statements and assessments system. While several suggestions were raised regarding the establishment of an alternative Strategic Environmental Impact Assessment (SEIA) or Social Impact Assessment to include not only environmental impacts but human rights impacts as well in the documents prepared prior to the operations of an activity or undertaking, those proposals may also come subject to exhaustive discussion among civil society groups in the overhaul of the impact assessments systems.

Congress, however, seeks to amend the EIS System, by incorporating what has already been in previous administrative orders into the new law. Pending bills amending PD 1586 has been filed in previous Congress, with one version even taking on the incongruity of DAO 30-2003. But with new legislation, it is best to be reminded that a similar law in the US exists, that of the National Environmental Protection Act. Under the said law, in determining the scope of environmental impact statements, agencies shall also consider, among others, 3 types of alternatives which include, (1) no action alternative; (2) other reasonable course of action, and (3) mitigation measures, not in the proposed action. While these alternatives are also covered under PD 1151, the new law may well expand the coverage to consider not putting up any project or undertaking in the said area.