EXPANDING THE BOUNDARIES OF LEGAL PROTECTION FOR THE ENVIRONMENT: THE PEISS AS A TOOL FOR ENVIRONMENTAL LITIGATION*

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ABSTRACT

The Philippine Environmental Impact Statement System (PEISS), established in 1978, mandates all entities wishing to undertake a project with significant environmental impact to secure an Environmental Compliance Certificate, and in appropriate cases, conduct an Environmental Impact Assessment. Beyond its administrative function, the PEISS has more to offer in terms of environmental protection. Because of its wide scope and stringent requirements, litigation based on the PEISS is a valuable component for the achievement of its goals. This is strengthened by the fact that the new Rules of Procedure for Environmental Cases contain innovations that have great synergy with the PEISS, i.e. the liberalized rules on standing, the precautionary principle, and the Writ of *Kalikasan*. With the advent of the new rules, there has been an observed increase in Supreme Court cases involving the PEISS. A review of these cases reveals other trends: that cases grounded in the PEISS frequently allege violations of the public consultation requirements, provisions on the use of the proper EIA format, or the lack of an ECC. Also, litigants are frequently confronted with procedural issues such as the non-exhaustion of administrative remedies, the lack of cause of action due to prematurity, and the Supreme Court's deference to the decisions of the administrative agencies tasked to enforce the PEISS. Despite the fact that jurisprudence on the matter is still developing, a review of these trends is necessary for the success of environmental litigants challenging violations of the PEISS.

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* *Cite as* Numeriano Anton C. Rodriguez III, *Expanding the Boundaries of Legal Protection for the Environment: The PEISS as a Tool for Environmental Litigation*, 93 PHIL. L.J. 1309, [page cited] (2020).

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I. INTRODUCTION

The Philippine Environmental Impact Statement System (PEISS) was established with the goal of sustainable development.[1] Though varied to be flexible within the differing conditions of each jurisdiction,[2] the EIS system is consistently regarded as a tool to harmonize environmental protection and socio-economic growth. This harmony is achieved by requiring project proponents to consider environmental impacts prior to implementation, which, if properly executed, enables them to formulate and integrate less harmful alternatives. It is for this reason that the EIS has been described as a tool for institutionalizing foresight.[3]

However, despite its 42-year existence, it cannot be said that the PEISS's potential as a tool for environmental protection and conservation has been fully realized. For one, it is mostly dismissed as administrative red tape on the project proponent's end. Moreover, structural and logistical difficulties with the administering agency saddle the effective implementation of the law.[4] This leads proponents to view the law as a mere formality, while stakeholders fail to see its value in protecting environmental rights.

Despite these problems, there have been instances where environmental litigants anchored their cases on the PEISS and received favorable judgement from courts. This alone shows that the law has more to offer beyond its perceived role as a mere administrative tool of the DENR.

The objective of this Note is to find ways to expand the boundaries of legal protection by exploring the pathways through which the PEISS can be used to enforce environmental rights. This paper also aims to encourage a shift from the traditional mindset of viewing the PEISS as an administrative tool by exploring its role within the country's framework of environmental laws as well as in decisions of the Supreme Court.

In Part II, the PEISS framework, as well as its role in the current landscape of Philippine environmental law, is discussed. Part III analyzes the PEISS in view of the Rules of Procedure for Environmental Cases, while Part IV discusses Supreme Court cases involving the PEISS. In doing so, causes

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[1] Pres. Dec. No 1586 (1978), § 1.

[2] Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B. C. ENVTL. AFF. L. REV. 591 (1992).

[3] *Id*

[4] JOSEFO B. TUYOR, ET AL., DISCUSSION PAPERS – PHILIPPINES - THE PHILIPPINE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: FRAMEWORK, IMPLEMENTATION, PERFORMANCE AND CHALLENGES (2007).

of action under the PEISS, as well as common procedural hurdles that litigants have faced, are highlighted. Lastly, in Part V, recommendations for the amendment of the law are proposed, with the goal of, among others, strengthening it for further use in litigation.

II. THE PEISS AND THE PHILIPPINE ENVIRONMENTAL FRAMEWORK

A. The Creation and Administration of the PEISS

In 1977, President Ferdinand E. Marcos issued Presidential Decree (PD) No. 1151 or the Philippine Environmental Policy ("PEP").[5] The PEP was a step forward for environmental protection in four ways: *first*, it recognized the right of people to a healthful environment,[6] a right that would later on be enshrined in the 1987 Constitution; *second*, it reiterated the government's responsibility over the utilization and preservation of natural resources;[7] *third*, in aiming to "create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other" and to "fulfill the social, economic and other requirements of present and future generations of Filipinos,"[8] it foreshadowed the concept of sustainable development; and *fourth*, it established the Environmental Impact Statements (EIS) system as the means by which the policy's goals were to be achieved.[9]

Despite the EIS's introduction in the PEP, it was PD No. 1586,[10] issued a year later, which operationalized the PEISS by providing specific guidelines for its implementation. Section 1 of PD No. 1586 declared it the policy of the State to "attain and maintain a rational and orderly balance between socio-economic growth and environmental protection."

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[5] Pres. Dec. No. 1151 (1977). Philippine Environmental Policy.

[6] § 3.

[7] § 2.

[8] § 1.

[9] § 4.

[10] Pres. Dec. No. 1586 (1978). Establishing an Environmental Impact Statement System, Including other Environmental Management Related Measures and for other purposes.

According to Section 3 of the PEISS, all EIS shall be submitted to the National Environmental Protection Council (NEPC) for review and evaluation.[11] By virtue of Executive Order No. 192,[12] the NEPC was reorganized into the DENR and recognized as:

> [T]he primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, specifically forest and grazing lands, mineral resources, including those in reservation and watershed areas, and lands of the public domain, as well as the licensing and regulation of all natural resources as may be provided for by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.[13]

The same Executive Order created the Environmental Management Bureau (EMB) which was given the powers and functions of the NEPC.[14] As such, the DENR-EMB is currently the main administrative agency tasked to implement the PEISS. DENR Administrative Order (DAO) 2003-30 contains the current Implementing Rules and Regulations (IRR) of the PEISS. Pursuant to Section 8.1.1 of the IRR,[15] the DENR also created the Revised Procedural Manual of DAO 2003-30 (Revised Procedural Manual) as reference for processing applications.

B. The PEISS Framework

The PEISS requires all entities engaged in Environmentally Critical Projects (ECP) and those undertaking projects in Environmentally Critical Areas (ECA) areas to secure an Environmental Compliance Certificate (ECC) before conducting any project that may adversely affect the quality of the

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[11] § 3. Determination of Lead Agency. — The Minister of Human Settlements or his designated representative is hereby authorized to name the lead agencies referred to in Section 4 of Presidential Decree No. 1151 which shall have jurisdiction to undertake the preparation of the necessary environmental impact statements on declared environmentally critical projects and areas. All Environmental Impact Statements shall be submitted to the National Environmental Protection Council for review and evaluation.

[12] Exec. Order No. 192 (1987). The Reorganization Act of the Department of Environment and Natural Resources

[13] § 4.

[14] § 16.

[15] DENR Adm. Order No. 2003-30, § 8.1.1. The procedures to enable the processing of ECC/CNC applications within the timeframes specified in A.O. 42 shall be prescribed in a Procedural Manual to be issued by the EMB Central Office within ninety (90) days from the date of this Order.

environment.[16] Under Section 4 of the PEISS, the President is empowered to define ECAs and ECPs by way of proclamation. As of this writing, Proclamation No. 2146,[17] issued in 1981, and Proclamation No. 803,[18] issued in 1996, are the only issuances defining ECPs and ECAs.

An ECC is applied for by submitting an EIS, which is defined as a comprehensive study of the proposed project's significant environmental impacts.[19] The PEISS was designed to be accomplished in the early planning stages of a project so that mitigating measures could be considered and implemented.[20] The completion of the PEISS is also considered a go-signal for proponents to secure other necessary permits from other government agencies and the local government unit, when applicable.

Projects that are not considered critical or not located in critical areas need not go through the Environmental Impact Assessment (EIA) process, but the entities organizing them must apply for a Certificate of Non-Coverage (CNC). However, the DENR, should it deem it necessary, may still require proponents of non-critical projects to secure additional environmental safeguards.[21]

The PEISS has six phases: screening, scoping, EIA preparation, EIA review, decision making, and post-monitoring. During the screening stage, the proponent determines which class the project belongs to. The classification will also determine whether the proponent will need to apply for an ECC or a CNC. In this regard, the IRR provides for the following classifications:[22]

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[16] Pres. Dec. No. 1151 (1977), § 4.

[17] Proc. No. 2146 (1981). 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.

[18] Proc. No. 803 (1996). Declaring the Constriction, Development, and Operation of a Golf Course as an Environmentally Critical Project pursuant to PD 1586.

[19] DENR Dep't Order No. 03-30 (2003), § 3(k).

[20] § 5.3.

[21] Pres. Dec. No. 1151 (1977), § 5.

[22] DENR Dep't Order No. 03-30 (2003), § 4.3 (c).

Category	Definition	Principal Requirement
A	ECPs with significant potential to cause negative environmental impacts	ECC
B	Projects that are not categorized as ECPs, but which may cause negative environmental impacts because they are located in ECAs.	ECC
C	Projects intended to directly enhance environmental quality or address existing environmental problems not falling under Category A or B.	Project Description
D	Projects unlikely to cause adverse environmental impacts.	CNC

TABLE 1. Project Classifications to guide issuance of ECC or CNC.

After the classification of the project is determined, the scoping stage begins. Scoping refers to the process of identifying a project's most significant issues or impacts.[23] This is accomplished through public consultations with residents and stakeholders, as well as through sessions with a third-party technical reviewer. The EIA, which is prepared afterwards, focuses on the impacts identified through the scoping stage.

The EIA is defined as "a process that involves evaluating and predicting the likely impacts of a project on the environment during construction, commissioning, operation and abandonment" and also includes the "designing [of] appropriate preventive, mitigating and enhancement measures addressing these consequences to protect the environment and the community's welfare."[24] Different EIAs may be used depending on the specifics of the project, but primarily, the goal is to employ the proper EIA document type to predict the project's significant impacts.

After a review of the EIA, the agency issues an ECC or CNC, or a denial letter. Before an ECC is issued, the proponent must provide a sworn statement that it assumes responsibility for the full implementation of its

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[23] DENR EMB-EIAMD, REVISED PROCEDURAL MANUAL FOR DENR ADMINISTRATIVE ORDER NO. 30 SERIES OF 2003 (DAO 03-30) [hereinafter, "Revised Procedural Manual"] 15 (2007)

[24] DENR Dep't Order No. 03-30 (2003), § 3(h).

commitments.[25] The DENR, in some cases, also annexes in the ECC some conditions that the proponent must accomplish throughout the implementation of the project.

In the monitoring stage, compliance with ECC conditions and other related commitments are assessed to ensure that the significant environmental impacts are actually addressed and mitigated. Depending on the type of project, monitoring may be conducted by a Multi-partite Monitoring Team (MTT) composed of representatives of the proponent, the LGU, local non-government organizations (NGOs), the community, other government agencies, and other stakeholders identified throughout the application process. The creation of an MTT is intended to create a venue for stakeholders to take part in the monitoring process, thereby encouraging stakeholder vigilance.[26]

C. Role of the PEISS in the Philippine Environmental Framework

The Philippines is renowned for its natural wealth. However, without adequate measures for its preservation, conservation, and development, this natural wealth will prove to be a fragile resource. It is therefore unsurprising that the Philippines boasts of an expansive framework of environmental laws. On top of this framework is the right to a balanced and healthful ecology enshrined in the 1987 Constitution. Article XVI, Section 2 states that "[t]he 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."

In the case of *Ysmael v. DENR Secretary*,[27] the Supreme Court, in interpreting the constitutional mandate, stated:

> While there is a desire to harness natural resources to amass profit and to meet the country's immediate financial requirements, the more essential need to ensure future generations of Filipinos of their survival in a viable environment demands effective and circumspect action from the government to check further denudation of whatever remains of the forest lands.[28]

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[25] Revised Procedural Manual, *supra* note 23, at 9.
[26] *Id.*, § 29.
[27] G.R. No. 79538, 190 SCRA 673 (1990).
[28] *Id.*

Also existing within the PEISS framework are sector-specific environmental laws. These laws deal with particular sectors of the environment, such as air quality, water quality, waste management, and the like. The PEISS, in contrast, is not sector-specific. It concerns itself not with the particular industry or field of the project, but with such project's respective significant impacts. This quality of the PEISS gives it a special function in the framework of environmental laws.

First, the PEISS exists as a layer of protection where there is no existing legislation on a particular matter.[29] The legislature has seen it fit to enact laws to protect the nation's most valued or most fragile resources. However, the sheer number of modern innovations and discoveries makes it difficult for legislators to draft laws that keep up with breakthroughs in the scientific field. Thus, a certain level of protection for some fields of the environment may be necessary before legislation is enacted. The PEISS bridges this gap.

Second, the PEISS plays a complementary role to other sector-specific legislation.[30] This attribute was acknowledged by the Supreme Court when it ruled that compliance with the PEISS does not exempt a party from compliance with other environmental laws[31] and local ordinances.[32] Likewise, this function is recognized in the Revised Procedural Manual:

> The PEISS is supplementary and complementary to other existing environmental laws. As early as the project's Feasibility Study stage, the EIA process identifies the likely issues or impacts that may be covered later by regional environmental permits and other regulatory bodies' permitting requirements.[33]

One need only look at the different sectors of the Philippine environment to see how the PEISS complements existing legislation on the matter.

1. Indigenous People's Rights

Republic Act No. 8371, or "the Indigenous People's Rights Act," (IPRA) was enacted to protect the rights of indigenous people (IPs) to, among

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[29] Revised Procedural Manual, *supra* note 23, at 3.

[30] *Id.*

[31] Republic v. N. De La Merced & Sons Inc., G.R. No. 201501, Jan. 22, 2018.

[32] Province of Cagayan v. Lara, G.R. No. 188500, July 24, 2013.

[33] Revised Procedural Manual, *supra* note 23, at 3.

others, their ancestral domain and the resources found therein.[34] In this regard, the IPRA prohibits the government from granting licenses to enter into production-sharing agreements without the free and prior informed and written consent of the IPs.[35]

These provisions of the IPRA are strengthened by the PEISS. Proclamation No. 2146 declares areas traditionally occupied by cultural communities or tribes as ECPs.[36] This being the case, companies wishing to enter into production sharing agreements in an ancestral domain must secure not only free and prior informed consent from the IPs, but also an ECC. The IPRA, in Section 70, acknowledges the need for compliance with the PEISS on top of its own requirements.

> Section 70. Environmental Impact Assessment (EIA). - Except during the exploration period of a mineral agreement or financial or technical assistance agreement or an exploration permit, and *environmental clearance certificate shall be required based on an environmental impact assessment and procedures under the Philippine Environmental Impact Assessment System* including Sections 26 and 27 of the Local Government Code of 1991 which require national agencies to maintain ecological balance, and prior consultation with the local government units, nongovernmental and people's organizations and other concerned sectors of the community: Provided, That a completed ecological profile of the proposed mining area shall also constitute part of the environmental impact assessment. People's organizations and nongovernmental organizations shall be allowed and encouraged to participate in ensuring that contractors/permittees shall observe all the requirements of environmental protection.[37]

2. Air and Water Quality

Air and water quality are addressed by the Clean Air Act[38] and Clean Water Act,[39] respectively. The PEISS complements these pieces of legislation by likewise regulating industries that may contribute to the pollution of air and water. Proclamation No. 2146 names as ECPs various industries that are known to have a significant impact on air quality.[40] These include iron and

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[34] Rep. Act No. 8371 (1997), § 2.
[35] § 59.
[36] Proclamation No. 2146, B(5).
[37] Emphasis supplied.
[38] Rep. Act No. 8749 (1999), § 1. Philippine Clean Air Act of 1999.
[39] Rep. Act No. 9275 (2004), § 1. Philippine Clean Water Act of 2004.
[40] Proclamation No. 2146, A(I), (II).

steel mills, petroleum and retro-chemical industries, smelting plants, mining and quarrying projects, and major power plants, among others. The same Proclamation also declares aquifers and various water bodies as ECPs, the classification of which helps attain the goals of the Clean Water Act.

The Clean Air Act acknowledges the duty of a proponent to comply with the PEISS and, in fact, adds certain pre-requisites in order to successfully obtain an ECC from the DENR. Section 18 requires the project proponent, as part of its documentary requirements in applying for an ECC, to set up a financial guarantee mechanism to fund any emergency response, clean-up, or rehabilitation of areas that may be damaged during the project's implementation.

The Clean Water Act also requires an environmental guarantee fund to be incorporated into the ECC. The purpose of this fund is to finance: (1) the maintenance of the health of the ecosystems; (2) the conservation of watersheds and aquifers affected by the development; and (3) the needs of emergency response, clean-up, or rehabilitation of areas that may be damaged during the program's or project's actual implementation.[41]

3. Biodiversity Conservation

Republic Act No. 7586, or "the National Integrated Protected Areas System Act of 1992," (NIPAS) declared it the policy of the State to "secure for the Filipino people of present and future generations the perpetual existence of all native plants and animals through the establishment of a comprehensive system of integrated protected areas within the classification of national park as provided for in the Constitution."[42]

Through this law, biologically important public lands that are habitats of rare and endangered species of plants and animals, biogeographic zones, and related ecosystems—whether terrestrial, wetland, or marine—were declared as protected areas.[43] For each protected area, NIPAS mandates that a management plan be created with the goal of the adoption and implementation of innovative management techniques, which include, the concept of zoning, buffer zone management for multiple use and protection,

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[41] Rep. Act No. 9275 (2004), § 15.
[42] Rep. Act No. 7586 (1992), § 2.
[43] § 3.

habitat conservation and rehabilitation, diversity management, community organizing, socioeconomic and scientific researches, site-specific policy development, pest management, and fire control.[44]

In conjunction with this mandated management plan, NIPAS employs the use of an EIA. Thus, it is also complemented by the PEISS. Section 12 of NIPAS states:

> Section 12. *Environmental Impact Assessment.* – Proposals for activities which are outside the scope of the management plan for protected areas shall be subject to an environmental impact assessment as required by law before they are adopted, and the results thereof shall be taken into consideration in the decision-making process.
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> No actual implementation of such activities shall be allowed without the required Environmental Compliance Certificate (ECC) under the Philippine Environmental Impact Assessment (EIA) system. In instances where such activities are allowed to be undertaken, the proponent shall plan and carry them out in such manner as will minimize any adverse effects and take preventive and remedial action when appropriate. The proponent shall be liable for any damage due to lack of caution or indiscretion.

4. Climate Change

Since the First World Climate Conference in 1979, climate change has been one of the most pervasive threats faced by the international community. As such, 195 nations, including the Philippines, entered into the Paris Climate Agreement during the 21st Conference of Parties. Under this document, signatories committed to pursue efforts to limit global temperature increase in an effort to mitigate damage caused by climate change.[45]

The concern for the impacts of climate change is justified. According to the Intergovernmental Panel for Climate Change (IPCC), human activity is likely to result in a 1.5C global warming above pre-industrial levels by 2030 to 2052.[46] Rises in global temperatures at this level are predicted to result in a

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[44] § 9.

[45] Paris Climate Agreement, art. 2(1)(a).

[46] Myles Allen, et al., *Summary for Policymakers*, *in* GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY (Valerie Masson-Delmote et al., eds., 2018)

reduction of economic growth and an increase in poverty, hunger, and disease in significant segments of the global population.[47]

The fact that climate change is in the forefront of international concern does not mean, however, that all states face its impacts equally. Adaptation to climate change is one of the most difficult challenges that these countries face.[48] Developing countries have added vulnerability to climate change due to a lack of resources to prepare for its impacts.[49] As a developing country, the Philippines is among these states most vulnerable to climate change.

The Philippines' status as a developing country is not the only factor that magnifies the effects of climate change. Due to its location, climate, and topography, the Philippines is exposed to a wider range of climate-related hazards.[50] These hazards include intense tropical cyclones, drastic changes in rainfall patterns, sea level rise, and increasing temperatures. Their impacts translate to serious stresses in food production, health, and economic security.[51]

On the other hand, it seems that there is an inverse proportionality between contribution to global greenhouse gas (GHG) emissions and climate change vulnerability. It is well documented that developed countries emit the most anthropogenic GHG into the atmosphere. Meanwhile, developing countries, which comprise 80% of the world's population, only account for 20% of cumulative GHG emissions.[52] In 2012, the Philippines was found to have contributed 0.33% of the world's total GHG emissions.[53]

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[47] Global Humanitarian Forum, *Human Impact Report – The Anatomy of a Silent Crisis*, at 1, (2009) *available at* https://www.preventionweb.net/files/9668_humanimpactreport1.pdf.

[48] Jony Mainlay, *Mainstreaming gender and climate change in Nepal* (2012) *available at* https://pubs.iied.org/pdfs/10033IIED.pdf.

[49] B. Sudhakara Reddy, *Climate change - a developing country perspective*, 97 CURRENT SCI. 50 (2009).

[50] World Bank, *Getting A Grip on Climate Change in the Philippines: Executive Report* (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/EAP/Philippines/Final%20ExReport.pdf.

[51] Climate Change Commission, National Framework Strategy on Climate Change 2010-2022, *available at* https://climate.gov.ph/files/NFSCC.pdf (last visited June 23, 2020).

[52] *Id.*

[53] USAID, Greenhouse Emissions in the Philippines (2016), *available at* https://www.climatelinks.org/sites/default/files/asset/document/2016_USAID_Philippines%20GHG%20Emissions%20Fact%20Sheet.pdf

However, the fact that the country is not a major contributor to global GHG emissions must not be understood to mean that it should not pursue a policy of mitigation.[54] Given the vulnerability of the Philippines, it must implement policies and measures to protect itself from the impacts of climate change. Likewise, as a signatory to the Paris Climate agreement, the Philippines committed itself to lower emissions by 70%.

As a response to climate change, Republic Act No. 9729, or "the Climate Change Act of 2009," was passed. This law created the Climate Change Commission (CCC), the main goal of which is to create, monitor, and evaluate the country's climate change programs.[55] Furthermore, the country adopted the goal of the:

> [Stabilizing] of greenhouse gas concentrations in the atmosphere [to] a level that would prevent dangerous anthropogenic interference with the climate system which should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[56]

In 2016, the World Resources Institute reported that the energy sector was the biggest contributor to the Philippines' GHG emissions at 121 megatons of TNT (Mt) out of a total of 149.41 Mt. To address this, the National Framework Strategy on Climate Change 2010-2022 adopted the objective of developing and enhancing clean energy sources, uses, and other efficiency measures towards a low carbon economy in the energy sector. This objective is operationalized by the adoption of sources of renewable energy, sustainable transport action, and sustainable infrastructure.[57]

While the CCC spearheads the implementation of these projects, the PEISS could help in curbing the national GHG emissions in the interim. An author noted that the EIA could be a low-cost and pre-existing tool by which a jurisdiction could begin to address climate change.[58] As one of the few environmental management tools fashioned to consider isolated actions that have a cumulative effect, the EIA effectively regulates the roots of climate

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[54] Antonio La Viña, *After More Than 100 Years of Environmental Law, What's Next for the Philippines?*, 88 PHIL. L.J. 195, 212 (2014).

[55] Rep. Act No. 9729 (2009), § 4. Climate Change Act of 2009.

[56] § 2.

[57] Climate Change Commission, *supra* note 51.

[58] Nicholas Robinson, *International Trends in Environmental Impact Assessment*, 19 B. C. ENVTL. AFF. L. REV. 591 (1992).

change (e.g. CFC emission, stratospheric deterioration, etc.).[59] Thus, it becomes a viable answer for—or, at the very least, an inhibitor of—climate change as a pressing national concern.

The PEISS also aids in curbing national emissions by regulating the industries that emit GHGs. Proclamation No. 2146 lists major power plants—namely, fuel cell, gas-fired thermal power plants, geothermal facilities, hydropower facilities, and other thermal power plants—as ECPs,[60] and thus requires proponents to secure an ECC before operation. Other industries outside the energy sector that are also known to emit GHGs may likewise be regulated by the PEISS either as existing ECPs in Proclamation No. 2146, or as ECPs declared by the President in a future proclamation.

III. THE ROLE OF THE JUDICIARY AND THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES

The role of the judiciary in environmental protection cannot be understated. Courts, by virtue of their ability to strike down acts that contravene the Constitution, have a unique function in protecting environmental rights. In cases of emergency, when damage to the environment is imminent, courts can provide last minute relief. Another advantage of court litigation is that judges decide based on judicial standards and are not prone to political pressure in the same way legislators and other public officers are.[61]

In the case of *Ysmael*,[62] the Supreme Court stated:

> [T]his Court will not be a party to a flagrant mockery of the avowed public policy of conservation enshrined in the 1987 Constitution [and] should the appropriate case be brought showing a clear grave abuse of discretion on the part of officials in the DENR and related bureaus with respect to the implementation of this public policy, the Court will not hesitate to step in and wield its authority, when invoked, in the exercise of judicial powers under the Constitution.[63]

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[59] *Id.*

[60] Proclamation No. 2146, A(I)

[61] Fran Hoffinger, *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation*, 11 FORDHAM URB. L. J. 527 (1982).

[62] Ysmael v. DENR Sec'y, G.R. No. 79538, 190 SCRA 673 (1990).

[63] *Id.* at 676.

Professor Gatmaytan, in highlighting the function of the judiciary, likewise notes how "the constitutional mandate to protect environmental rights is meaningless without a judiciary that is sensitive to its role in protecting the environment."[64]

Judicial review is not the only power of the Supreme Court that aids in environmental conservation. By virtue of its rule-making power, the Supreme Court promulgated Administrative Matter No. 09-6-8-SC, or "the Rules of Procedure for Environmental Cases" ("RPEC"). The RPEC was created as a "response to the long felt need for more specific rules that can sufficiently address the procedural concerns that are peculiar to environmental cases."[65] Section 2 of the RPEC lists down the environmental laws whose enforcement or violation are governed by the rules. Notably, the PEP and PEISS are included in the list.

Created to address the peculiar difficulties of environmental cases, the RPEC introduced many innovations, such as modifications in the period within which to try and decide cases, the application and issuance of an Environmental Protection Order, and the like. The following section discusses aspects of the RPEC relevant to the PEISS.

A. Citizen's Suit

There are two modes of filing under the RPEC. The first mode, under Section 4 of Rule II,[66] is filing by the real party-in-interest. This provision is akin to the concept of a real party-in-interest under the Rules of Civil Procedure. Under the latter, actions must be filed by a real party-in-interest, i.e. that party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit.[67]

The second mode of filing, which is also why the RPEC should be deemed as having liberalized the rules on standing, is through a citizen's suit. According to the provision, any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce

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[64] Dante Gatmaytan, *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration*, 17 IND. INT'L & COMP. L. REV. 1, 27 (2007).

[65] ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES 98, *available at* http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf.

[66] ENVT'L PROC. RULE, Rule 2, § 4. Who may file. – Any real party in interest, including the government and juridical entities authorized by law, may file a civil action involving the enforcement or violation of any environmental law.

[67] *Id.* at 110.

rights or obligations under environmental laws.[68] This provision, brought about by the principle of human stewardship over nature,[69] enables parties who do not have a personal and direct interest to still bring suits in representation of others. Atty. Oposa explains the relevance of the citizens suit:

> A citizen suit provision for the enforcement of environmental law bears a symbolic significance in a functioning democracy, if only because it affords ordinary citizens, or a group of citizens, to ventilate with the force of law a value that it seeks government to elevate in its priority of values.[70]

The rules on liberalized standing are remarkably synergistic with the PEISS. Public consultation and social acceptability are key features of the PEISS, since a high level of public participation is instrumental to a successful EIA. The provisions of the PEISS allow stakeholders—including residents, NGOs, and LGUs—to have a participative role both during and after the application process. Stakeholders are present in the application process as early as the scoping stage and as late as the monitoring stage through the MTT. Through the liberalized standing allowed under the RPEC, participants of the ECC application process would have an easier time bringing to court violations of the PEISS.

B. Strategic Lawsuit Against Public Participation (SLAPP)

One threat to initiatives seeking court enforcement of environmental laws is that it opens the litigant up to the possibility of being targeted for retaliatory suits. These suits are called Strategic Lawsuits Against Public Participation (SLAPP) and have the effect of stifling criticism on matters of

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[68] ENVT'L PROC. RULE, Rule 2, § 5. Citizen suit. – Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws. Upon the filing of a citizen suit, the court shall issue an order which shall contain a brief description of the cause of action and the reliefs prayed for, requiring all interested parties to manifest their interest to intervene in the case within fifteen (15) days from notice thereof. The plaintiff may publish the order once in a newspaper of a general circulation in the Philippines or furnish all affected barangays copies of said order. Citizen suits filed under R.A. No. 8749 and R.A. No. 9003 shall be governed by their respective provisions.

[69] ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES 111, *available at* http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf.

[70] Antonio Jr. Oposa, *Setting the Course for Environmental Citizen Suits in the Philippines*, LAWASIA J. 52 (1998).

public concern. As such, these suits are common in cases involving animal rights, human rights, governance, consumer protection, and the like.[71] Indeed, the inclusion in the RPEC of provisions for protection against a SLAPP is recognition that it may be used against an environmental litigant. In the RPEC, a SLAPP is defined as follows:

> Section 1. *Strategic lawsuit against public participation (SLAPP).*—A legal action filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights shall be treated as a SLAPP and shall be governed by these Rules.

A SLAPP may come in many forms and is therefore not easily detected. Atty. Oposa recognized this when he said:

> [SLAPPs] do not come neatly packaged as retaliatory suits, but are disguised in a variety of causes of action such as libel, slander, tortious interference with business or contract, or abuse of process. Meritless as they may be, and because of the constitutional right of access to courts, the courts have little choice but to give the cases due course.[72]

The RPEC addresses this by allowing the defendant to interpose SLAPP as a defense.[73] This will cause the court to set the case for hearing to receive evidence only for purposes of determining whether or not the case is, in fact, a SLAPP.[74] For the swift resolution of what is potentially a vexatious suit, courts are directed by the RPEC to prioritize the conduct and resolution of this SLAPP hearing.[75] Hence, an allegation of the lawsuit being a SLAPP removes the immediate need to challenge the suit based on the merits of the case. Effectively, the RPEC allows the defendant to unveil the suit's true identity as a SLAPP without having to undergo a full-blown trial.

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[71] Judith Preston, *Participation from the Deep Freeze: "Chilling" by SLAPP Suits, available at* http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/18en_preston.pdf

[72] Antonio Jr. Oposa, *Setting the Course for Environmental Citizen Suits in the Philippines*, LAWASIA J. 52 (1998).

[73] ENVT'L PROC. RULE, Rule 6, § 2.

[74] Rule 6, § 3.

[75] ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES 132, *available at* http://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf.

The RPEC also protects vital resources a litigant stands to lose in protracted court proceedings for frivolous suits: time and money. *First*, as to time, the allegation of a lawsuit being a SLAPP will trigger the application of the RPEC, which mandates the resolution of the hearing within 30 days.[76] If the case is declared to be a SLAPP, it will be dismissed with prejudice. If it is declared to be a legitimate suit, it will proceed according to the Rules of Court. By interposing the SLAPP defense, the defendant is aided by provisions setting a strict timeline. *Second*, as to money, the RPEC allows the SLAPP defendant to pray for damages, attorney's fees, and the cost of the suit.[77]

In cases alleging violation of the PEISS, the likely scenario is that the litigant—often an NGO or concerned individuals—files a suit against corporations or government units. After all, it is these powerful entities that have the manpower and resources to enter into projects with significant environmental impact. This imbalance in power could deter would-be litigants from pursuing their cases. Fortunately, the SLAPP provisions were enacted to serve as an added layer of protection so that litigants can seek enforcement without fear of being dragged into protracted legal battles on other baseless matters.

C. Precautionary Principle

Another key feature of the RPEC is the institutionalization of the precautionary principle. The precautionary principle states that "when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat."[78] As for when it is applied, Section 1 of Rule 20 provides:

> Section 1. Applicability.—When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.
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> The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

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[76] ENVT'L PROC. RULE, Rule 6, § 4.
[77] Rule 6, § 2.
[78] Rule 1, § 4(f).

In cases where it is applied, the precautionary principle shifts the burden of evidence to those who wish to conduct the activity that would allegedly bring about the environmental harm. In essence, it operates as a bias against human activity.[79]

The PEISS serves as a tool that investigates all effects of a certain project to the environment. Thus, in the event of court litigation, the documents submitted for the ECC application as well as the findings of the DENR-EMB can theoretically serve as initial evidence of the project's impacts. If, despite these, there is still an evidentiary impasse, then the precautionary principle can apply. The precautionary principle could be favorable to litigants alleging two specific violations of the PEISS: (1) operation without an ECC; and (2) use of the wrong EIA document type. These violations essentially allege that a proponent has not undertaken the proper EIA and, therefore, the impacts of its project have not been properly predicted. In forwarding this argument, a litigant is paving the way for the application of the precautionary principle, i.e. that since there has been no study conducted, then the activity may lead to "serious and irreversible damage that is plausible but uncertain." A bias against human activity brought upon by the application of the precautionary principle will always favor the environmental litigant.

D. The Writ of *Kalikasan*

Perhaps the most notable addition in the Rules is the Writ of *Kalikasan*. Rule 7, Section 1 states:

> Section 1. Nature of the writ.—The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.

The Writ of *Kalikasan* is a special remedy that is available when actual or threatened environmental damage is of such magnitude that it prejudices the life, health, or property of inhabitants in two or more cities or provinces.

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[79] Fermin Nestor Gadrinab, *Due Process and the Writ of Kalikasan*, 55 ATENEO L.J. 983 (2011).

In explaining this qualification, the Supreme Court stated that the rules do not define the exact nature or degree of environmental damage, but that "it must be sufficiently grave, in terms of the territorial scope of such damage, so as to call for the grant of this extraordinary remedy."[80] Therefore, according to the Supreme Court, the courts must decide the sufficiency of the damage on a case-to-case basis.[81]

The Writ of *Kalikasan* affords the environmental litigant a speedy remedy if the requirement on magnitude of damage is met. A petition for the writ will cause the court to issue an order to the respondent to file a return containing its defenses. Afterwards, trial ensues. The significance of the writ also lies in the reliefs it may provide. Section 15 of Rule 7 contains a non-exhaustive list of reliefs should the privilege of the writ be granted. It provides:

> Section 15. Judgment. – Within sixty (60) days from the time the petition is submitted for decision, the court shall render judgment granting or denying the privilege of the writ of *kalikasan.*
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> The reliefs that may be granted under the writ are the following:
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> (a) Directing respondent to permanently cease and desist from committing acts or neglecting the performance of a duty in violation of environmental laws resulting in environmental destruction or damage;
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> (b) Directing the respondent public official, government agency, private person or entity to protect, preserve, rehabilitate or restore the environment;
>
> (c) Directing the respondent public official, government agency, private person or entity to monitor strict compliance with the decision and orders of the court;
>
> (d) Directing the respondent public official, government agency, or private person or entity to make periodic reports on the execution of the final judgment; and
>
> (e) Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation or restoration of the environment, except the award of damages to individual petitioners.

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[80] Osmeña v. Garganera, G.R. No. 231164, 859 SCRA 513 (2018).

[81] Braga v. Abaya, G.R. No. 223076, 802 SCRA 540 (2016).

In the case of *Casiño v. Paje*,[82] the Supreme Court affirmed that a party may challenge the validity of an ECC through a Writ of *Kalikasan*. However, the party doing so must prove three things: *first*, the defects or irregularities of the ECC; *second*, the actual or threatened violation of the constitutional right to a balanced and healthful ecology of the magnitude contemplated under the Rules; and *third*, a causal link between the two. Therefore, a petition simply alleging defects in the issuance of an ECC is insufficient for the grant of the writ. Without the causal link, the case should be dismissed and refiled in the proper forum.[83]

How then must a party question the validity of an ECC issuance if the territorial magnitude contemplated under the RPEC is not met or if the causal link is not established? This would be an instance of reviewing the acts of an administrative agency, for which a Rule 43 petition is appropriate. As is usual with Rule 43 petitions, the party must keep in mind the rule on exhaustion of administrative remedies.[84] This will be discussed in a later section of the paper.

The RPEC, especially considering its synergies with the PEISS, makes it easier for advocates to pursue enforcement of their environmental rights through courts. Through the rules on liberalized standing, parties who do not stand to be directly affected may still bring suit in representation of others. With the provisions concerning SLAPP, litigants are given added protection from retaliatory suits. The precautionary principle, if applicable, shifts the burden away from the environmental litigant and unto the project proponent. Finally, through the Writ of *Kalikasan*, litigants may avail of a speedy remedy that, if warranted, will cause the court to order the proponent to cease and desist the implementation of the project and, along with the appropriate government agencies, preserve and rehabilitate the area.

A review of the jurisprudence will show that the RPEC breathed new life into cases involving PEISS. Prior to the new rules, there were only three cases[85] involving questions on the PEISS decided by the Supreme Court. As

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[82] Casiño v. Paje, G.R. No. 207257, 749 SCRA 39 (2015).

[83] *Id.*

[84] *Id.*

[85] These cases were Otadan v. Rio Tuba, G.R. No. 161436, June 23, 2004; Province of Rizal v. Exec. Sec'y, G.R. No. 129546, Dec. 13, 2005; *and* Bangus Fry Fisherfolk v. Hon. Lazañas, G.R. No. 131442, July 10, 2003.

observed by Professsor Gatmaytan, the Supreme Court decided these cases in a way that "portrayed both an insensitivity toward the environment and an inability to appreciate basic environmental legislation."[86]

Presently, there is an observed rise in the number of Supreme Court decisions discussing the PEISS. As of this writing, there have been eleven cases decided by the Supreme Court squarely involving the PEISS.[87] Although some of these cases boasted victories for environmental litigants, there were also others that were resolved at the procedural level and therefore lacked a discussion on the merits of the case. Nevertheless, the increase in the number of cases filed and victories achieved is a welcomed development.

IV. CASE ANALYSIS

Notwithstanding the increase in cases involving the PEISS, there are many novel questions that have yet to be decided by the Supreme Court. Fortunately, the decided cases are varied enough to be instructive as to multiple aspects of the PEISS. The decisions to be discussed also exhibit a refreshing trend in the development of jurisprudence on environmental law.

A. Common Causes of Action Involving the PEISS

1. Undertaking a Project Without an ECC

In *Resident Marine Mammals v. Secretary Reyes*,[88] Japan Petroleum Exploration Co., Ltd. (JAPEX) was charged with having undertaken a project without the requisite ECC. The Government of the Philippines, acting through the Department of Energy (DOE), entered into a Service Contract

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[86] Dante Gatmaytan, *Artificial Judicial Environmental Activism: Oposa v. Factoran as Aberration*, 17 IND. INT'L & COMP. L. REV. 1, 2 (2007).

[87] These cases were Resident Marine Mammals v. Sec'y Reyes, G.R. No. 180771, 756 SCRA 513 (2015); Cordillera Glob. Network v. Paje, G.R. No. 215988, April 10, 2019; Boracay Found. Inc. v. Province of Aklan, G.R. No. 196870, 674 SCRA 555 (2012); Casiño v. Paje, G.R. No. 207257, 749 SCRA 39 (2015); Braga v. Abaya, G.R. No. 223076, 802 SCRA 540 (2016); Republic v. O.G. Holdings Corp., G.R. No. 189290, 847 SCRA 31 (2017); Special People Inc. Found. v. Canda, G.R. No. 160932, 688 SCRA 403 (2013); Republic v. N. De La Merced & Sons Inc., G.R. No. 201501, Jan. 22, 2018; Province of Cagayan v. Lara, G.R. No. 188500, July 24, 2013; Osmeña v. Garganera, G.R. No. 231164, March 20, 2018; Intl. Serv. for the Acquisition of Agri-biotech Applications, Inc. v Greenpeace Southeast Asia, G.R. No. 209271, Dec. 8, 2015.

[88] Resident Marine Mammals v. Sec'y Reyes, G.R. No. 180771, 756 SCRA 513 (2015).

(SC-46) with JAPEX. SC-46 involved the exploration, development, and production of petroleum resources in a block covering approximately 2,850 square kilometers offshore the Tañon Strait. Notably, Tañon Strait was declared a protected seascape in 1988.[89] Pursuant to SC-46, JAPEX conducted seismic surveys in the areas involved. After reviewing its findings, JAPEX committed to drill an exploratory well and subsequently applied for an ECC for its operations. This application was granted by the DENR-EMB. Having been issued the ECC, JAPEX began to drill the exploratory well in the western Cebu Province.[90]

Petitioners filed a petition seeking to enjoin the implementation of SC-46 and the nullification of JAPEX's ECC. According to the petitioners, SC-46 violated the 1987 Constitution and other environmental laws.[91]

The Supreme Court ultimately ruled that the project was unlawfully carried out without the requisite ECC. It said that "the public respondents themselves admitted that JAPEX only started to secure an ECC prior to the second sub-phase of SC-46, which required the drilling of an oil exploration well."[92] This necessarily meant that "when the seismic surveys were done in the Tañon Strait, no such environmental impact evaluation was done."[93] In this case, the environmental impact alluded to by the Supreme Court was the drastic reduction of fish catch and reported incidents of fish kill.[94]

Notably, the Supreme Court held that the subsequent compliance with the PEISS after the seismic surveys did not cure the defect. The clear wording of the law requires the ECC to be secured before the project is undertaken.[95] The seismic surveys, although preparatory to the drilling of the exploratory wells, already had its own significant environmental impact. As such, the ECC issuance must have preceded the seismic surveys.

In *Cordillera Global Network v. Paje*,[96] the DENR-EMB previously issued an ECC to SM Investments Corporation for its SM Pines Resort Project, which involved the construction of a shopping mall, a hotel, service apartments, a multi-purpose entertainment center, and other related structures. Years later, SM Investments Corporation sought to expand one of

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* at 572.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Cordillera Glob. Network v. Paje, G.R. No. 215988, April 10, 2019.

its shopping malls in Luneta Hill. For this purpose, it filed an application to amend its ECC. Eventually, the Secretary of the DENR approved the amendment. SM Investment Corporation then applied for a permit to cut and earth-ball some Benguet pine trees, Alnus trees, and saplings that were covered by the intended mall expansion. This permit was also granted by the DENR.[97]

At this point, Cordillera Global Network filed a complaint praying for a temporary environmental protection order to enjoin SM Investments Corporation from cutting and earth-balling the 182 Benguet pine and Alnus trees on Luneta Hill. Another complaint was filed later on by 76 concerned residents of Baguio City. Both parties asserted two arguments: *first*, tree-cutting and earth-balling would cause significant damage to the environment and health of Baguio City residents; and *second*, the presence of irregularities with the ECC.[98]

Petitioners argued before the Supreme Court that the mall expansion and the earth-balling and tree-cutting that came with it were actually new projects that required a separate ECC. Therefore, it was improper for SM Investment Corporation to simply seek for an amendment of a prior ECC. SM Investment Corporation disputed this and argued that the removal of the trees was reported in its Environmental Management Plan that was submitted during its application for a permit before the DENR. Consequently, only a permit was required.[99]

The Supreme Court agreed with the petitioners and ruled that a new ECC was required for the earth-balling and tree-cutting project. This was apparent from the fact that the original ECC, issued nine years before, only contemplated the removal of 112 trees from the original project. To make matters worse, the amendment of the ECC for the expansion project made no mention of the removal of 172 Pine and Alnus trees. The Supreme Court also took note of Executive Order No. 23, which declared a moratorium on the cutting of timber in natural and residual forests.[100]

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*

2. Use of the Wrong EIA Document Type

The EIA is defined as a process that involves evaluating and predicting the likely impacts of a project (including cumulative impacts) on the environment during construction, commissioning, operation, and abandonment. It is the main study required of a proponent in order to achieve the goals of the PEISS.[101]

Given the many types of projects a proponent may wish to undertake, an effective EIA must be in the format that best corresponds to the type of project whose impacts it will study. This is why the Revised Procedural Manual provides for seven types of EIAs: Environmental Impact Statements (EIS), Programmatic Environmental Impact Statements (PEIS), Initial Environmental Examination Reports (IEER), IEE Checklists (IEEC), Project Description Reports (PDR), Environmental Performance Reports and Management Plans (EPRMP), Programmatic Environmental Performance Reports and Management Plans (PEPRMP).[102]

In determining which type of EIA document the proponent must submit, the DENR-EMB looks at certain factors. *First*, there is a determination of whether the project is single or co-located. A co-located project is defined in the Revised Procedural Manual as a group of single projects, under one or more proponents or locators, which are located in a contiguous area and managed by one administrator, who is also the ECC applicant.[103] *Second*, there is an evaluation of whether the project is an ECP, located in an ECA, or if the project's impacts are uncertain. *Third*, the projects are further classified into: (1) new projects; (2) existing projects with ECC with a proposal for modification or resumption of operation; and (3) operating projects without an ECC. The Revised Procedural Manual provides a table for these factors and the corresponding appropriate EIA document type.[104]

The case of *Boracay Foundation Inc. v. Province of Aklan*[105] involved stakeholders alleging that the proponent used the wrong EIA document. In that case, the Province of Aklan intended to expand its port facilities in Caticlan, the main gateway to Boracay. In conjunction with this, the *Sangguniang Panlalawigan* of Aklan issued a resolution authorizing Governor

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[101] DENR Dep't Order No. 03-30 (2003), § 3(h).

[102] Revised Procedural Manual, *supra* note 23, at 7.

[103] *Id.* at 6.

[104] Revised Procedural Manual, *supra* note 23, at 10-11.

[105] Boracay Found. Inc. v. Province of Aklan, G.R. No. 196870, 674 SCRA 555 (2012).

Marquez to file an application to reclaim the 2.64 hectares of foreshore area in Caticlan, Malay, Aklan with the Philippine Reclamation Authority (PRA).[106]

The Province of Aklan began submitting requirements for its ECC application relative to the reclamation of the 2.64 hectares. Despite the submission of these requirements, the Province subsequently decided to expand its reclamation to 40 hectares, citing commissioned studies showing that coastal erosion would be a major concern for the project. The expanded reclamation area would cover the areas adjacent to the jetty ports at Barangay Caticlan and Barangay Manoc-manoc. At this point, the DENR issued an ECC for the original reclamation plan of 2.64 hectares covering the Caticlan jetty port area.[107]

Given that the project was expanded to 40 hectares, the petitioners questioned the fact that an ECC was only secured for the original 2.64-hectare reclamation and not for the 40-hectare expansion. According to the petitioners, the fact that the project was to be conducted in two sites meant that the project should be classified as "co-located" and not "single." Co-located projects, according to the petitioners, required a PEIS or PEPRMP.[108]

The Supreme Court ruled that the DENR's evaluation of the project was problematic, as was validly asserted by the petitioner.[109] As to the function of the EIA, the Court also stated that it should be able to predict the impact of the project to the environment in order to prevent harm that would otherwise be caused. With this as its main goal, the original studies submitted by the Province, which covered only the 2.64 hectares, failed to assess the environmental impact of the project in question, which was actually five times larger than what was intended. Also fatal to the Province's cause was the fact that the studies submitted were recycled studies of the original 1999 construction of the Caticlan jetty port. In the end, the Supreme Court remanded these matters to the DENR-EMB for it to make a proper determination of the classification of the project. Through this, the DENR-EMB may require the Province of Aklan to address the environmental issues found and thereafter require the submission of the correct EIA document.[110]

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106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*

Three years later, the Supreme Court laid down additional doctrines on the use of the appropriate EIA document type in *Casiño*.[111] Here, the Subic Bay Metropolitan Authority (SBMA) and Taiwan Cogeneration Corporation (TCC) entered into a memorandum of understanding for the construction of a coal-fired power plant in Subic Bay for the supply of power to the Subic Bay Industrial Park. Subsequently, TCC transferred its rights and interests to Redondo Peninsula Energy, Inc. (RP Energy). After the preparation of an EIA, an ECC was issued for the project.[112]

RP Energy later sought an amendment to the ECC for the inclusion of a barge wharf, seawater intake breakwater, subsea discharge pipeline, raw water collection system, drainage channel improvement, and a 230kV double-circuit transmission line. For this purpose, RP Energy submitted an EPRMP after the DENR's determination that this was a major amendment.[113]RP Energy then sought another amendment to its ECC so it could construct a 1x300-ML coal-fired power plant instead of the 2x150-MW coal-fired power plant it originally intended to install. For this amendment, it submitted a PDR to the DENR which was later granted.[114]

The petitioners asserted that the EPRMP and PDR submitted by RP Energy to the DENR, relative to the application for the first and second amendments, respectively, were not the proper EIA document types. For the first amendment, they relied on pertinent provisions of the IRR and the Revised Procedural Manual which provides that an EPRMP is used for projects operating or existing with a previous ECC but planning for expansion, or those operating without an ECC. Since the facilities covered by the first amendment had not even been constructed, an EPRMP was not the proper EIA document. As to the second amendment, the petitioners cited the definition of a PDR under the same issuances and concluded that this EIA document type is only used for new projects. The appropriate document type would thus be either an EPRMP or a PEPRMP, since this amendment involved an operating project with an ECC that proposed a modification of its original plans.[115]

Meanwhile, the DENR argued that a new EIS was no longer necessary since the first EIS was still within the period of validity when RP Energy applied for the first amendment. This allegedly necessitated only an

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[111] Casiño v. Paje, G.R. No. 207257, 749 SCRA 39 (2015).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

EPRMP. As to the second amendment, the DENR argued that a PDR was appropriate since the change of configuration of the power plant project—that is, from 2x150MW to 1x300MW—was not substantial.[116]

Ultimately, however, the Supreme Court disagreed with the petitioners. The Supreme Court laid down principle that the EIA process is "a system, not a set of rigid rules and definitions."[117] Based on this premise, the rules governing the PEISS must not be interpreted with a legalistic approach and the DENR must be allowed flexibility in determining the appropriate EIA document to be used. Following this, the Supreme Court ruled that the list of projects in the Revised Procedural Manual for which an EPRMP is appropriate is not exclusive. Furthermore, absent a showing of grave abuse of discretion on the part of the DENR, its findings and determinations as to the EIA must be accorded great respect. According to the Supreme Court, the principle controlling ECC amendments is Section 8.3 of the IRR/Revised Procedural Manual which states that "[r]equirements for processing ECC amendments shall depend on the nature of the request but shall be focused on the information necessary to assess the environmental impact of such changes."[118] Thus, leeway should be given for the DENR to determine the proper EIA document type for as long as the environmental impact of a project is properly analyzed by the chosen EIA format.[119]

Having established the purpose of an EIA and the principles that should guide ECC amendments, the Supreme Court answered the question of whether an EPRMP provided the necessary information to assess the environmental impacts of the project's first amendment. The Supreme Court ruled that it did, stating that "[a]bsent any claim or proof to the contrary, we have no bases to conclude that [the data summarized in the Project Fact Sheet was] insufficient to assess the environmental impact of the proposed modifications."[120] Citing the presumption of regularity in the performance of official duties, the Supreme Court held that the DENR-EMB must be deemed to have adequately assessed the environmental impact of the proposed changes before it granted the request under the first amendment to the subject ECC. The issue as to the propriety of a PDR for the second amendment was decided in the same way.[121]

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116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*

3. Non-compliance with Public Participation Provisions

Because the PEISS concerns itself with projects of significant impact, it values the input and concerns of the people and communities that stand to be affected. To implement this, the IRR of the PEISS contains guidelines on the conduct, timeline, and documentation of public consultations. The end goal of the consultation is to gauge the project's social acceptability, which, to recall, is considered in the grant or denial of the ECC. In this regard, the IRR states:

> Section 1. Basic Policy and Operating Principles.—The review of the EIS by EMB shall be guided by three general criteria: (1) that environmental considerations are integrated into the overall project planning, (2) that the assessment is technically sound and proposed environmental mitigation measures are effective, and (3) *that social acceptability is based on informed public participation*; and *the social acceptability of a project is a result of meaningful public participation, which shall be assessed as part of the environmental compliance certificate (ECC) application*, based on concerns related to the project's environmental impacts.
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> * * *
>
> Section 5.3. Public Hearing/Consultation Requirements.—Proponents should initiate public consultations early in order to ensure that environmentally relevant concerns of stakeholders are taken into consideration in the EIA study and the formulation of the management plan.[122]

Considering the highly participative nature of the PEISS, the absence or irregularity of public participation is one of the easiest violations interested parties could detect. However, while the PEISS provides for its own framework for public participation, it is not the only law requiring public consultation for matters that might have significant environmental impact. The relevant provisions of the Local Government Code (LGC) provide as follows:

> Section 2. Declaration of Policy.—
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> * * *

[122] Emphasis supplied.

(c) It is likewise the policy of the State to require all national agencies and offices to conduct periodic consultations with appropriate local government units, nongovernmental and people's organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions

Section 26. *Duty of National Government Agencies in the Maintenance of Ecological Balance.*—It shall be the duty of every national agency or government-owned or controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof.

Section 27. *Prior Consultations Required.*—No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained: Provided, That occupants in areas where such projects are to be implemented shall not be evicted unless appropriate relocation sites have been provided, in accordance with the provisions of the Constitution.

Interpreting these provisions, the Supreme Court has said that:

…the projects and programs mentioned in Section 27 should be interpreted to mean projects and programs whose effects are among those enumerated in Section 26 and 27, to wit, those that: (1) may cause pollution; (2) may bring about climatic change; (3) may cause the depletion of non-renewable resources; (4) may result in loss of crop land, range-land, or forest cover; (5) may eradicate certain animal or plant species from the face of the planet; and (6) other projects or programs that may call for the eviction of a particular group of people residing in the locality where these will be implemented.[123]

[123] Lina v. Paño, G.R. No. 129093, 364 SCRA 76, 87 (2001).

In one case,[124] the Supreme Court declared that under the Local Government Code, prior consultation and approval of the project by the *sangguniang* are two requisites that must be met before a national project that affects the environmental and ecological balance of local communities can be implemented. Absent either of these mandatory requirements, the project's implementation is illegal.

Recognizing the similar scope of the LGC and PEISS provisions on public consultation, the Supreme Court has also noted that "the required consultation under the LGC may overlap with the consultation prescribed under the EIS System," and that "[b]oth are intended to measure a project's social acceptability and secure the community's approval before the project's implementation."[125] Given the overlap, many cases reaching the Supreme Court allege defects in both the PEISS and the LGC provisions on public consultations as either alternative or cumulative causes of action.

Boracay Foundation, Inc.[126] also involved stakeholders alleging defects in LGC provisions on public consultation. There, after the *Sangguniang Panlalawigan* of Aklan issued a resolution authorizing Governor Marquez to file an application to reclaim the 2.64 hectares of foreshore area, the *Sangguniang Bayan* of the Municipality of Malay issued a resolution expressing its opposition to the foreshore lease. The municipality opposed because the proposed foreshore lease covered almost all the coastlines of the barangay.[127]

After the issuance of the ECC, the Province entered into what were called "information-education campaigns." These were dialogues with the residents and public officials of Malay, Caticlan, and Boracay, as well as other stakeholders, and NGOs. Thereafter, the Municipality of Malay and Boracay Foundation, Inc. issued separate resolutions denying favorable endorsement and manifesting strong opposition to the reclamation project. Despite the resolutions, the Province of Aklan continued implementing the project.[128]

Before the Supreme Court, Boracay Foundation, Inc. argued that the Province of Aklan violated the provisions of the PEISS and the LGC on public consultations as the belated public consultation meeting only involved

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[124] Province of Rizal v. Exec. Sec'y, G.R. No. 129546, 477 SCRA 436 (2005).

[125] Braga v. Abaya, G.R. No. 223076, 802 SCRA 540, 556 (2016).

[126] Boracay Found. Inc. v. Province of Aklan, G.R. No. 196870, 674 SCRA 555 (2012).

[127] *Id.*

[128] *Id.*

the presentation of the Reclamation Project and a detailing of the actions that had already been undertaken.[129]

The Supreme Court agreed and ruled that the public consultation campaigns fell short of those required under the PEISS and the LGC. These laws contemplate *prior* consultations precisely so that the concerns of stakeholders are implemented into the EIA study. Clearly, the goals of the public consultations were not achieved since an ECC application was already filed before the consultations were conducted.[130]

Notably, the Supreme Court ruled that the subsequent favorable endorsement of the Municipality of Malay did not cure the violations. Not only was the endorsement achieved by "the urging and insistence" of the Province of Aklan, but the LGC specifically contemplates approval before a project is implemented.[131]

4. Non-compliance with ECC Commitments

As previously discussed, the DENR, in issuing the ECC, is authorized to annex conditions that the proponent must comply with. The issuance of the ECC is also accompanied by a sworn statement of compliance by the proponent. The Supreme Court has highlighted the importance of complying with ECC commitments, noting how "the EIA process would be a meaningless exercise if the project proponent shall not be strictly bound to faithfully comply with the conditions necessary to adequately protect the right of the people to a healthful and balanced ecology."[132]

The case of *Republic of the Philippines v. O.G. Holdings Corporation*[133] illustrates the situation of a project proponent failing to carry out the conditions laid out in its ECC. In this case, O.G. Holdings applied for and was issued an ECC for its Beach Resort project in Panglao Island. The ECC imposed certain requirements for compliance at all stages of the project implementation. These included obtaining a foreshore lease from DENR, setting up an Environmental Guarantee Fund for any environmental impacts arising from the project implementation, and conducting a marine study to determine the impact of the project on the marine ecosystem.[134]

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Casiño v. Paje, G.R. No. 207257, 749 SCRA 39 (2015).
[133] Republic v. O.G. Holdings Corp., G.R. No. 189290, 847 SCRA 31 (2017).
[134] *Id.*

After compliance monitoring by the EMB, the proponent was found to have violated these conditions. Notice of Violations were sent to the proponent to notify them of the conditions that were not yet complied with. Eventually, O.G. Holdings submitted a marine study and set up an Environmental Guarantee Fund. However, the condition of getting a foreshore lease remained unfulfilled. As a result, the Regional Director of EMB-Region 7 issued a resolution suspending O.G. Holding's ECC.[135]

Before the court, O.G. Holdings argued that compliance with the requirement of getting a foreshore lease was legally impossible in view of the ECC's suspension. They claim that while they, in good faith attempted to comply with the condition by applying for a special registration of the reclaimed land, the EMB made the application's approval impossible by suspending their operations.[136]

Confronted with the question of whether the DENR-EMB committed grave abuse of discretion in suspending O.G. Holding's ECC, the Supreme Court ruled that the penal provision of the PEISS empowers the DENR-EMB to punish violations of the law. The Supreme Court highlighted that the decision to suspend the ECC came from a recommendation by the EIA division after the proponent committed repeated violations of Condition 2.2 in the ECC. Also noteworthy was the fact that EMB-Region 7 had issued several notices of violations to O.G. Holdings before it came to the decision to suspend the subject ECC for the proponent's noncompliance with its conditions. [137]

B. Procedural Hurdles Confronted by Litigants Alleging Violations of the PEISS

1. Exhaustion of Administrative Remedies

A review of Supreme Court cases will show that a failure to exhaust administrative remedies is one of the most frequent defenses used against cases filed for violations of the PEISS. The rationale for the requirement was given by the Supreme Court in the case of *Paat v. Court of Appeals.*[138] Here, the Court said that:

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Paat v. CA, G.R. No. 111107, 266 SCRA 167 (1997).

> This Court in a long line of cases has consistently held that before a party is allowed to seek the intervention of the court, it is a pre-condition that he should have availed of all the means of administrative processes afforded him. Hence, if a remedy within the administrative machinery can still be resorted to by giving the administrative officer concerned every opportunity to decide on a matter that comes within his jurisdiction then such remedy should be exhausted first before court's judicial power can be sought. The premature invocation of court's intervention is fatal to one's cause of action.[139]

The PEISS itself provides a mechanism for appeal for an administrative ruling. Section 6 of the IRR states:

> Section 6. Appeal.—Any party aggrieved by the final decision on the ECC/CNC applications may, within 15 days from receipt of such decision, file an appeal on the following grounds:
>
> a. Grave abuse of discretion on the part of the deciding authority, or
>
> b. Serious errors in the review findings.
>
> The DENR may adopt alternative conflict/dispute resolution procedures as a means to settle grievances between proponents and aggrieved parties to avert unnecessary legal action. Frivolous appeals shall not be countenanced.
>
> The proponent or any stakeholder may file an appeal to the following:

Deciding Authority	Where to file the appeal
EMB Regional Office Director	Office of the EMB Director
EMB Central Office Director	Office of the DENR Secretary
DENR Secretary	Office of the President

Thus, since the IRR provides for an administrative appeal, litigants are duty bound to comply with its provisions before seeking recourse with the courts.

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[139] *Id.* at 175.

In *Special People Inc. Foundation v. Canda*,[140] the petitioner sought to implement a water-resource development and utilization project with the goal of purifying water from a nearby river for distribution to residents of nearby municipalities. On the theory that the project would not cause significant environmental impact, petitioner applied for a CNC. Upon evaluation, however, the local chief of the EMB found that the project was located in an ECA. These findings were then appealed to the EMB Regional Director, who later agreed that the project was located in an ECA and denied the application for a CNC. Thereafter, the petitioner filed a petition for mandamus before the RTC. The RTC dismissed the petition.[141]

Upon reaching the Supreme Court, the Court ruled that:

> Notwithstanding the lack of a specific implementing guideline to what office the ruling of the EMB Regional Director was to be appealed, the petitioner could have been easily guided in that regard by the Administrative Code of 1987, which provides that the Director of a line bureau, such as the EMB shall have supervision and control over all division and other units, including regional offices, under the bureau.[142]

Considering the supervision and control of the Director over Regional Directors, the appeal should have been lodged in the former's office.[143]

The ruling in *Special People Inc. Foundation* illustrates that, in the case of a proponent, the appeal mechanism in Section 6 of the IRR should always be complied with. The proponent is a "party aggrieved by the final decision on the ECC/CNC applications," making them fall squarely within the coverage of Section 6. Failure to do so renders the case dismissible on the ground of failure to exhaust administrative remedies.

Bangus Fry Fisherfolk v. Hon. Lazanas[144] illustrates failure to exhaust administrative remedies on the part of a stakeholder questioning the issuance of an ECC. Petitioners in this case, who were local fisherfolk of Minolo, San Isidro, Puerto Galera, questioned by way of a complaint to the RTC the issuance of an ECC authorizing the National Power Corporation (NAPOCOR) to construct a temporary mooring facility in Minolo Cove. The

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[140] Special People Inc. Found. v. Canda, G.R. No. 160932, 688 SCRA 403 (2013).
[141] *Id.*
[142] *Id.* at 415.
[143] *Id.*
[144] Bangus Fry Fisherfolk v. Hon. Lazañas, G.R. No. 131442, 405 SCRA 530 (2003).

provincial officials of Oriental Mindoro moved to dismiss the complaint, asserting the failure of the petitioners to exhaust administrative remedies since no appeal was perfected before the Secretary of the DENR. The RTC, agreeing with the provincial officials, dismissed the complaint.[145]

In affirming the RTC's decision, the Supreme Court ruled that petitioners "bypassed the DENR Secretary and immediately filed their complaint with the Manila RTC, depriving the DENR Secretary the opportunity to review the decision of his subordinate, RED Principe."[146] After disposing of the petitioners' other arguments, the Supreme Court ultimately dismissed the petition.

The non-exhaustion of administrative remedies was also at issue in the case of *Boracay Foundation, Inc.* Like *Bangus Fry Fisherfolk*, the complaint was brought to the court by stakeholders. Boracay Foundation Inc. filed a petition for the issuance of an Environmental Protection Order and a Writ of Continuing Mandamus directly before the Supreme Court, alleging irregularities in the ECC long issued by the DENR-EMB.[147] Unlike in the *Bangus Fry Fisherfolk* case, however, the Supreme Court ruled in a different manner.

In ruling that there was no need to perfect an appeal before the administrative agency, the Supreme Court ruled:

> [T]he appeal provided for under Section 6 of DENR DAO 2003-30 is only applicable, based on the first sentence thereof, if the person or entity charged with the duty to exhaust the administrative remedy of appeal to the appropriate government agency has been a party or has been made a party in the proceedings wherein the decision to be appealed was rendered.[148]

Boracay Foundation, Inc. was never made party to the proceedings before the DENR-EMB since they filed the case long after the ECC had been issued. "Not being a party to the said proceeding," the Supreme Court reasoned, "it does not appear that petitioner was officially furnished a copy of the decision, from which the 15-day period to appeal should be reckoned, and which would warrant the application of Section 6, Article II of DENR DAO 2003-30."[149] It is also relevant that the petitioners in the case of Boracay

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[145] *Id.* at 541.
[146] *Id.* at 596.
[147] *Id.*
[148] *Id.* at 605.
[149] *Id.* at 605.

prayed for an Environmental Protection Order and Writ of Continuing Mandamus. These remedies, according to the RPEC, may be filed before the Regional Trial Court, Court of Appeals, or the Supreme Court.[150]

The cases of *Bangus Fry Fisherfolk* and *Boracay Foundation, Inc.* show the differing situations of stakeholders who question an ECC. In *Bangus Fry Fisherfolk*, petitioners initially sought reconsideration of the ECC issuance before the Regional Executive Director. This made them a party to the ECC application, putting them within the ambit of administrative appeal mechanism of the IRR. In *Boracay Foundation, Inc.*, the parties questioned the ECC after its issuance and was never made party to the application.

2. Prematurity

Section 4 of the PEISS states that an ECC is required before the proponent "undertakes" or "operates" a project with significant environmental impact.[151] However, the law fails to define when exactly a project is considered as being undertaken or operated. This definition is necessary so that litigants know exactly when a cause of action based on a violation of the PEISS accrues. If a case is filed before this point, there is a danger of the case being dismissed for prematurity.

The IRR defines the reckoning point for project implementation as "the date of ground breaking, based on the proponent's work plan as submitted to the EMB."[152] However, this definition should be read in relation to the rule that an ECC has a lifetime of 5-years, and the expiration of that period means that the proponent must secure a new ECC. Admittedly, it is not helpful in defining project implementation for the purpose of a stakeholder suing for non-compliance with the law.

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[150] *Id.*

[151] § 4. *Presidential Proclamation of Environmentally Critical Areas and Projects.*—The President of the Philippines may, on his own initiative or upon recommendation of the National Environmental Protection Council, by proclamation declare certain projects, undertakings or 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 issued by the President or his duly authorized representative. For the proper management of said critical project or area, the President may by his proclamation reorganize such government offices, agencies, institutions, corporations or instrumentalities including the re-alignment of government personnel, and their specific functions and responsibilities.

[152] DENR Dep't Order No. 03-30 (2003), § 5.4.3.

Braga v. Abaya[153] is the only case that tackles the question of when exactly a project is considered implemented. In that case, residents of Davao City and Samal, Davao del Norte filed a petition for a Writ of Continuing Mandamus and a Writ of *Kalikasan* to enjoin the DOTC's privatization of the Sasa Wharf. At the time of the filing of the petition, the DOTC commissioned feasibility studies and published invitations for interested entities to pre-qualify and bid for the project. Citing their right to a balanced and healthful ecology, the petitioners argued that the privatization and expansion of the Sasa Wharf would cause significant impact to the environment, thus, an ECC was required. They prayed that the implementation of the project be restrained until the DOTC secures an ECC.[154]

The Supreme Court, concluding that the need for compliance with the PEISS had not yet arisen, dismissed the case for prematurity. Considering the nature of the project, the Supreme Court looked to the provisions of the Build-Operate-Transfer (BOT) Law to determine the exact point when project implementation begins. Outlining the stages of a project within the scope of the BOT Law, the Supreme Court noted that the project must first go through bidding, after which a contract is executed between the agency and the winning bidder. Then, the agency issues a "Notice to Commence Implementation," which requires the proponent to prepare engineering designs and plans. After documents are reviewed and approved by the agency, they are incorporated into the contract and signed by the parties. Only after this, and upon the commencement of the Construction Stage, does implementation begin. Given this structure, the project proponent, who has the responsibility to comply with the PEISS, has not yet been identified at the current stage of the project.[155]

The caveat of the *Braga* decision is that the project called for the application of the BOT Law. Other than this specific framework, the Supreme Court has not laid down any guiding principles for projects of a different nature. For these projects, two guidelines are suggested: *first*, the plain and ordinary interpretations of the words "undertake," "operate," and "implement" must be employed, since the law does not define them; and *second*, because the goal of the law is to predict a project's environmental impacts to ensure that they are addressed by appropriate protection and enhancement measures, parties should construe the words to include all initial and preparatory acts that may cause significant environmental impact. A different interpretation would frustrate the objectives of the law.

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[153] Braga v. Abaya, G.R. No. 223076, 802 SCRA 540 (2016).

[154] *Id.*

[155] *Id.*

3. Deference to Decisions of Administrative Agencies

There are cases wherein the Supreme Court, in recognizing the expertise of a government agency with technical and specialized knowledge, would defer to decisions of that agency in matters falling within the scope of their authority. Decisions of these agencies are accorded respect and finality if supported by substantial evidence.[156]

The case of *Otadan v. Rio Tuba*[157] is a prime example of a dismissal based on this ground. In this case, Rio Tuba Nickel Mining Corporation was issued an ECC for its Hydrometallurgical Processing Plant in Barangay Rio Tuba, Municipality of Bataraza, Palawan. The Court of Appeals found no grave abuse of discretion on the part of the Secretary of the DENR in issuing the aforementioned ECC. The Supreme Court, through a minute resolution, denied the petition, citing the specialized expertise of the DENR in issuing ECCs.

Aside from the *Otadan* case, there are no other PEISS cases that involve dismissals primarily on this ground. Therefore, there are no guidelines that could instruct would-be litigants on how the Supreme Court might choose to apply this principle if a party were to question the validity of the issuance of an ECC.

However, future litigants may draw parallels with cases involving the specialized expertise of other administrative agencies. In the case of *Sps. Abejo v. de la Cruz*,[158] the Supreme Court stated that "the need for specialized administrative boards or commissions with the special knowledge, experience and capability to hear and determine promptly disputes on technical matters or essentially factual matters, subject to judicial review in case of grave abuse of discretion, has become well-nigh indispensable."[159] Thus, a litigant who wishes to question the act of issuing an ECC must make a clear case of grave abuse of discretion on the part of the DENR-EMB.

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[156] Republic v. Express Telecomm. Co., G.R. No. 147096, 373 SCRA 316 (2002).
[157] Otadan v. Rio Tuba, G.R. No. 161436, June 23, 2004.
[158] Sps. Abejo v. de la Cruz, G.R. No. L-63558, May 19, 1987.
[159] *Id.*

V. RECOMMENDATIONS

The analysis of the environmental framework and existing jurisprudence shows that initiating cases for violations of the PEISS is a viable strategy for the enforcement of environmental rights. As this Note suggests, court litigation based on the PEISS is a means by which its goals for sustainable development are realized. Still, the effectivity of the PEISS depends on the strength of the law itself. Amending PD No. 1586 would be an opportunity to strengthen both the administrative and litigation aspects of the law. The following section suggests some amendments for future consideration by policymakers.

A. Legislating Stronger Public Consultation Requirements

Despite the recognition of the importance of public participation and social acceptability, it should be noted that the current IRR contains less stringent requirements on public participation compared to its predecessor. Under the current IRR, the conduct of public hearings is only required under Category A projects, but may still be dispensed with by the EMB, while in other projects, public hearings are not mandatory unless ordered by the EMB.[160] Notably, under the previous IRR,[161] public consultations were necessary regardless of the type of project.[162]

The change in the public consultation requirements is significant. A study of the EIS System conducted by the World Bank noted that many problems associated with the EIA process stem from a lack of communication, understanding, and appreciation of the social, cultural, and political factors that affect EIA implementation.[163]

Reversion to the mandatory nature of the public consultations under the old implementing rules would be more consistent with the key principles of the PEISS. Considering that there are noted issues with public acceptance of certain projects, mandatory consultations could address issues with all

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[160] DENR Dep't Order No. 03-30 (2003), § 5.3.

[161] DENR Dep't Order No. 96-37 (1996).

[162] § 2.

[163] *Access to Environmental Justice: A Capacity Assessment on the Pillars of the Justice System*, OMBUDSMAN WEBSITE, *available at* http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/EJ-Capacity-Assessmnt.pdf (last visited Dec. 27, 2019).

parties involved. Furthermore, inclusion of minimum standards on public participation in the law itself will ensure that future implementing rules do not water down this requirement.

B. Shifting to Strategic Environmental Assessment

PD No. 1586 was worded in broad strokes—presumably for the purpose of strategically including all classes of projects within its coverage. However, there is a trend in other jurisdictions to widen the scope of the EIS to include policies, programs, and plans. This is called a Strategic Environmental Assessment. A recent House Bill[164] aims to adopt this trend. In the bill, the new system is defined as a management or planning tool for a systematic evaluation of the environmental consequences of a proposed policy, plan, or program to ensure that they are fully considered and appropriately addressed at the earliest stage of decision-making. The institutionalization of a different assessment system for policies, plans, and programs could fill up gaps in the law by requiring impact assessments for certain activities that are not covered by the PEISS.

Two recent events illustrate the need for this new kind of system. In 2019, local officials of Quezon City released an estimate of 1,000 bullfrogs into a local *esteros* in an effort to combat the dengue epidemic. In the same year, officials of Dagupan City released around 6,000 mosquito fish for the same purpose. The well-meaning acts might have caused more harm than good as it was found that both species were classified as invasive; their release into the environment meant great harm to the ecological balance. Worse yet, scientists claim that the release of the two harmful species had little impact on the dengue epidemic.[165]

The acts of the LGUs may not be covered by the current PEISS since it is unclear whether or not they could be classified as "projects." However, it cannot be denied that the effects they had on the human environment were significant, and their impacts should have been more thoroughly studied. The creation and implementation of a system of Strategic Environmental Assessments would address this gap and prevent this from happening in the future.

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[164] H. No. 1434, 18th Cong., 1st Sess. (1999).

[165] *See* Nicolas Czar Antonio, *Recipe for disaster? U.P. scientists slam release of invasive 'anti-dengue' species*, RAPPLER, Sept. 13, 2019, *at* https://www.rappler.com/move-ph/240009-up-scientists-slam-release-invasive-anti-dengue-species.

C. Codifying Best Practices

The letter of PD No. 1586 has remained unchanged since it took effect more than four decades ago. However, the manner by which it is implemented is vastly different. All changes in the law's implementation have come about by virtue of executive issuances or administrative orders. As of this writing, the DENR has issued ten administrative orders that all aim to streamline, strengthen, or operationalize the implementation of the PEISS, with each issuance bringing about its own innovations. At least three of those issuances were revised IRRs which updated the established requirements and protocols.

The flexibility and relative ease by which subordinate legislation may overhaul the implementation of the EIS system is a product of the broadness and generality of the terms used in the law. While it may be presumed that the authors of the law intended this in order for the appropriate agencies to gain leeway in carrying out a very technical piece of legislation, the nature of the law also creates challenges, especially for project proponents and stakeholders. Ironically, most issuances aim to simplify and streamline the EIS process, yet the voluminous number of these administrative orders may just have the opposite effect.

The often-changing rules and procedures also make a study and analysis of the system difficult. As one environmental NGO experienced, a comprehensive study made on the EIS system, which resulted in a book that was around three inches thick, was almost immediately rendered useless and outdated after new issuances by the DENR completely overhauled the system.[166]

Public participation is a key feature of the EIS System and is a requirement for the issuance of an ECC in some projects. However, this aspect of the PEISS is challenged by the technicality of the process and its requirements. One author noted that the language and format of the EIA is very difficult for the public to understand, hindering public participation in the process.[167] Consequently, the numerous issuances pertaining to the EIS System compounds problems in public participation, which as mentioned earlier, is also watered down in the latest version of the IRR.

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[166] Rhia Muhi, Comments during the NGO Focus Group Discussion at the Environmental Science Institute, Quezon City (Oct. 22, 2010).

[167] Ma. Paz D. Luna, Speech delivered at the Linear Resource Use: Pollution Laws, Pilot Multi-Sectoral Capacity Building on Environmental Laws and the Rules of Procedure for Environmental Cases, Puerto Princesa City, Palawan (June 23 – 25, 2010).

Another challenge to government agencies is the relative ease in which the public may question subordinate legislation in courts of law. Jurisprudence instructs that subordinate legislation must be by virtue of a valid delegation of legislative powers; the authority of the administrative agency must be well defined, and the scope of the issuance does not go beyond or contradict the law from which it is based. Since details are embodied not in the law, but in constantly changing subordinate legislation, there is a greater window within which proponents could disregard or question provisions of the PEISS.

The codification into law of the best practices from all executive and department issuances would lead to a stronger PEISS that is free from ambiguity and more easily deciphered by the parties involved. This would necessarily translate into parties knowing and understanding their rights and obligations under the law better, thereby allowing them to more zealously demand for proper enforcement of the law.

D. Strengthening Penal Provisions

Section 9 of PD No. 1586 states:

> Section 9. *Penalty for Violation.*—Any person, corporation or partnership found violating Section 4 of this Decree, or the terms and conditions in the issuance of the Environmental Compliance Certificate, or of the standards, rules and regulations issued by the National Environmental Protection Council pursuant to this Decree shall be punished by the suspension or cancellation of his/its certificate or and/or a fine in an amount not to exceed Fifty Thousand Pesos (P50,000.00) for every violation thereof, at the discretion of the National Environmental Protection Council.

The meager fine imposed by the law is one of the ways it shows its age. More recent environmental laws boast of penal provisions that are up to ten times what is provided for in the current version of the law. Notably, by virtue of Republic Act No. 10951,[168] the legislature has seen it fit to raise fines for certain felonies in the Revised Penal Code. According to Dean La Viña, however, the penalties provided for in the law are too small to be considered

[168] Rep. Act No. 10951 (2017). An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known as "The Revised Penal Code", as Amended.

deterrents against negligence, misrepresentation, and other offenses, especially for the large companies who can well afford to pay up and keep operating "business as usual."[169]

E. Revisiting Designations of ECPs and ECAs

The PEISS is only as strong as the proclamations defining ECPs and ECAs. As of this writing, Proclamation No. 2146 and Proclamation No. 803 remain to be the only issuances that define these. One can hardly imagine how these decade-old executive issuances could envision the new industries that would come years ahead.

It would be wise to revisit the aforementioned Proclamations to see if the identified industries and areas are still relevant to the PEISS. There is also a need to review the ECPs and ECAs to evaluate if they still reflect the current goals of the nation. For example, given the commitment of the Philippines to cut down GHG emissions, the sectors known to contribute the most GHG could be named as ECPs.

VI. CONCLUSION

The PEISS is a powerful tool for sustainable development. However, if one only sees its administrative function, a significant portion of its potential is unrealized. Litigation based on the PEISS is a viable strategy for enforcement of environmental rights. The qualities of the PEISS—namely, its synergy with other environmental laws, its wide scope, and its highly participative nature—makes it invaluable to environmental litigants.

The Supreme Court's words in the case of *Province of Rizal v. Executive Secretary* [170] are instructive. Laws pertaining to the protection of the environment were not drafted in a vacuum. Congress passed these laws fully aware of the perilous state of both the country's economic and natural wealth. It was precisely to minimize the adverse impact of humanity's actions on all aspects of the natural world, at the same time maintaining and ensuring an environment under which man and nature can thrive in productive and enjoyable harmony with each other, that these legal safeguards were put in place.

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[169] La Viña, *supra* note 54, at 232.

[170] Province of Rizal v. Exec Sec'y, G.R. No. 129546, 477 SCRA 436 (2005).

The fragility of the natural environment necessitates the maximization of the protections offered by the country's expansive framework of environmental laws. This can be done only if one investigates all pathways by which environmental rights can be enforced, thereby expanding the boundaries of legal protection for the environment. In this way, the constitutional right to a balanced and healthful ecology may be fully realized.

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