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PRICING NATURAL RESOURCES THROUGH THE ENRA SYSTEM: LEGAL CONSIDERATIONS[1]

Department of Environment and Natural Resources

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Environmental and Natural Resources Accounting Project

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PRICING NATURAL RESOURCES THROUGH THE ENRA SYSTEM: LEGAL CONSIDERATIONS[1]

ENRAP IV TECHNICAL PAPER

by:

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I. BACKGROUND

Environmental and Natural Resources Accounting (ENRA) is an approach operationalize the goal of sustainable development.

Accordingly, ENRA serves two purposes. One is scorekeeping, or keeping track of the diminution of the national product due to resources depletion and environmental deterioration. Hence, the accounting results are directly related to the macroeconomic indicators such as net national product, a measure of gross national product minus depreciation of man-made capital.

Natural resources accounting as a process could also serve various management objectives. In particular, it could provide resource managers with information needed for resource and land-use allocation decisions, sustainable extraction rates, and resource-related equity issues.

2. PURPOSE OF THE STUDY

The 1987 Constitution calls for more active State involvement in natural resources utilization. Where the mode of utilization before was through a lease, license or concession, the Constitution now allows direct undertaking by the State or through co-production, joint venture or production sharing agreements. Since natural resources are owned by the State, the shift is obviously an attempt to ensure that the government really gets the true value of the resources.

Natural resources management, while mainly vested with DENR is also vested with other agencies. For equity considerations, the benefits that are to be derived from the national wealth are mandated to be shared by various sectors of society.

These issues, however, are contained in so many legal instruments that there is a need to examine the jurisdictions of various agencies tasked with managing natural resources, the sharing mandates of the various laws with respect to the national wealth, the provisions on pricing the use of environment and natural resources, mechanisms of collection, and mechanisms for plowing back the funds derived into natural resources development.

3. LIMITATIONS OF THE STUDY

This study is a preliminary attempt to examine the various legal mandates of the agencies dealing with natural resources management, the present status of pricing efforts, sharing mechanisms and associated problems.

As the study is only for a limited duration, the intricacies of the various efforts of the government agencies in pricing, etc. were not touched.

It is hoped, however, that this will serve as a guide in institutionalizing and harmonizing pricing efforts of the ENRA Project.

4. CONSTITUTIONAL MANDATES TOWARDS SUSTAINABLE DEVELOPMENT OF NATURAL RESOURCES

The following are the important provisions of the 1987 Constitution dealing with sustainable management of the country's natural resources:

Article II. Sec. 16. "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

Article XII. Sec. 2. "All lands of the public domain, waters, minerals coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated."

"The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens."

Article XII. Sec. 5. "The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being."

Article X. Sec. 7: "Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits."

Discussion:

The following are the important principles under said constitutional provisions:

a) That the people are entitled to a balanced and healthful ecology.

b) <u>That all natural resources are owned by the State.</u> This is known as the Regalian doctrine and has been supported by legal and regulatory texts and Supreme Courts decisions.

c) <u>The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.</u> And that the State, may:

- directly undertake such activities, or it may enter into:
  - co-production,
  - joint venture or
  - production sharing agreements with Filipino citizens, or corporations or associations at least sixty percent of whose capital is owned by such citizens

d) <u>Need to protect the rights of indigenous cultural communities</u>.

e) Right of LGUs to equitable sharing in the proceeds from the utilization and development of national wealth.

5. AGENCIES TASKED WITH MANAGING THE ENVIRONMENT AND NATURAL RESOURCES

A. Department of Environment and Natural Resources

The DENR is the primary government agency responsible for environment and natural resources management. This is contained in Executive Order No. 192 dated June 10, 1987. The pertinent provisions are:

5.1 The Department shall be the 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 by law in order to ensure equitable sharing of the benefits derived therefrom for the welfare of the present and future generations of Filipinos.

5.1.2 Among the powers of DENR under EO 192 are:

- Exercise supervision and control over forest lands, alienable and disposable lands, mineral resources and in the process of exercising such control, the Department shall impose appropriate payments, fees, charges, rentals and any such form of levy and collect such revenues for the exploration, development, utilization or gathering of such resources.

- Promulgate rules, regulations and guidelines on the issuance of co-production, joint venture or production sharing agreements, licenses, permits, concessions, leases and such other privileges and arrangement concerning the development, exploration and utilization of the country's natural resources and shall continue to oversee, supervise and police our natural resources.

5.1.3 Executive Order No. 292, otherwise known as the Administrative Code of 1987, issued July 25, 1987 reproduced EO 192, although some addenda are worth mentioning, specifically those relating to the powers of DENR to establish policies and programs for the equitable distribution of water, and for the DENR to regulate the development, disposition, extraction and use of the country's forest, land, water and mineral resources.

5.1.4 The following are the agencies of DENR dealing with environment and natural resources management:

- Forest Management Bureau
- Lands Management Bureau
- Environmental Management Bureau
- Protected Areas and Wildlife Bureau
- Ecosystems Research and Development Bureau

- Protected Area Management Board
- Natural Resources Development Corporation
- National Mapping and Research Information Authority
- National Electrification Administration

5.2 Department of Energy

The Department of Energy through the National Power Corporation and Philippine National Oil Company has jurisdiction over some watershed areas, namely Tiwi Geothermal, Tongonan and Palimpinon.

Section 2 of of PD 1515 as amended by PD 1749 reads:

"Sec. 2. In relation to Sec. 1, the Ministry of Energy through the National Power Corporation shall be responsible for the management, protection, development and rehabilitation of the aforementioned watershed areas, x x x Provided, that said areas, pursuant to Letter of Instruction No. 917, shall not be the subject of exploitation of whatever nature."

5.3 UP Los Baños with Respect to Mt. Makiling Forest Reserve

This is contained in RA 6967 (1989) which states:

"Sec. 1. The entire forest reserve at Mt. Makiling in Laguna, ceded, transferred and conveyed to the University of the Philippines pursuant to RA 3523 shall be administered and conserved primarily as a training laboratory for the advancement of scientific and technical knowledge particularly in the preservation, conservation and development of our forest, flora and fauna and natural resources."

"Sec. 2. The exclusive jurisdiction, administration and complete control of said forest reserve are hereby vested in the University of the Philippines in Los Baños."

5.4 Local Government Units

This is contained in RA 7160 (1991), otherwise known as the Local Government Code of 1991, thus:

"Sec. 3 (i): Local government units shall share with the national government the responsibility in the management and maintenance of ecological balance within their territorial jurisdiction, subject to the provisions of this Code and national policies."

Among the functions devolved from national government to LGUs include social forestry projects, communal forests and small-scale mining.

5.5 National Commission on Indigenous Cultural Communities / Indigenous Peoples (NCIP)-

The following are the pertinent provisions of the IPRA Law:

"Sec. 38. National Commission on Indigenous Cultural Communities / Indigenous Peoples (NCIP). – To carry out the policies herein set forth, there shall be created the National Commission on ICCs/IPs (NCIP), which shall be the primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains as well as their rights thereto.

Sec. 43 (e) To issue certificate of ancestral land / domain title."

5.6 Other Agencies

Through Presidential Proclamations, there are also other government agencies tasked with managing special reservations.

Discussion:

1. Under EO 192, DENR has the power to promulgate rules and regulations of all natural resources governing the exploitation, development, conservation, extraction, disposition, use and such other commercial activities tending to cause the depletion and degradation of natural resources.

2. DENR also has the power to impose appropriate payments, fees, charges, and rentals and any such form of levy and collect such revenues for the use of natural resources; and to promulgate rules and regulations on the issuance of co-production, joint venture or production sharing agreements.

3. Under EO 292, DENR also has the power to issue regulations regarding development, disposition, extraction and use of the country's water resources.

4. In sum, DENR has all embracing powers with respect to natural resources within its jurisdiction.

5. On October 9, 1984, the Ministry of Justice rendered an opinion to the effect that pursuant to PD 1515 and PD 1749, the watersheds enumerated therein including the forest resources therein are under the exclusive jurisdiction of the Ministry of Energy.

6. Mt. Makiling Forest Reserve is being exclusively managed by UPLB.

7. The devolution of forest management functions to the LGUs shall be "pursuant to national policies and subject to supervision, control and review of the DENR."

8. The respective roles of DENR and NCIP with respect to ancestral domains and lands involving forestlands have yet to be threshed out.

6. PRINCIPLES, LAWS, RULES AND REGULATIONS ASSOCIATED WTH THE USE OF NATURAL RESOURCES: TAXATION, PRICING, USERS FEES, POLLUTERS FEES, ETC.

6.1 Sustainable Development as the cornerstone of natural resources management.

The 1987 Constitution, the Philippine Strategy for Sustainable Development, the Philippine Master Plan for Forest Development, other environmental laws, programs and policies have adopted sustainable development as the cornerstone of natural resources management. This policy is consistent with international environmental programs and agenda.

6.2 EO 192 (1987) (DENR Reorganization) calls for the application of a true value system in natural resources utilization.

Section 3 thereof states: "it is also the policy of the State to recognize and apply a true value system including social and environmental cost implications relative to their utilization, development and conservation of our natural resources."

6.3 RA 7161 (1991) set the rates of forest charges and amended for the purpose certain provisions of the National Internal Revenue Code.

Said law sets the rates of charges on timber cut in forest lands, firewood, branches and other recoverable wood wastes of timber and minor forest products.

The 3rd paragraph of Sec. 73 thereof states:

"These forest charges shall be applied to naturally growing timber and forest products gathered within public forest lands, alienable and disposable lands and private lands. Forest charges collected shall be in lieu of the administrative charge on environment and other fees and charges imposed thereon: Provided, that planted trees and other forest products harvested from industrial tree plantations and private lands covered by existing titles or by appropriate land application are exempted from the payment of forest charges."

6.4 1987 Constitution allows four modes in the exploration, development and utilization of natural resources.

As stated, these may be done: a) directly by the State; b) through co-production; c) joint venture; or d) production sharing agreements.

6.5 Local Government Units are entitled to Share in the Proceeds of the National Wealth.

The pertinent provisions of RA 7160 are as follows:

Sec. 289.- Share in the Proceeds from the Development and Utilization of the National Wealth. – Local government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including the sharing of the same with the inhabitants by way of direct benefits.

Sec. 290. – Amount of Share of Local Government Units. – Local government units shall in addition to the internal revenue allotment, have a share of forty percent (40%) of the gross collection derived by the national government from the preceding fiscal year from mining taxes, royalties, forestry and fishery charges, and such other tax, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture or production sharing agreement in the utilization and development of the national wealth within their territorial jurisdiction.

6.6 Indigenous cultural communities / indigenous peoples entitled to share when natural resources in their areas are utilized.

The pertinent provisions of RA 8371 (IPRA Law) are as follows:

Sec. 7 (b) Right to Develop Lands and Natural Resources. – Subject to Sec. 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; *to benefit and share the profits from the allocation and utilization of natural resources found therein;* the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains *and to receive just and fair compensation for any damages which they may sustain as a result of the project*; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights.

Discussion:

1. As stated, the modes of allowing exploitation of natural resources under the 1973 Constitution is either through a license, concession or lease. The low charges imposed on natural resources utilization have been blamed to a great extent for the environmental degradation that the country suffered in the 70's and 80's. For example, the forest charge imposed on dipterocarp timber was only about P30.00 per cubic meter. This has been subsequently increased by RA 7161.

2. Recent developments have called for a true value system in natural resources exploitation.

   The 1987 Constitution now calls for the active role of the government in natural resources utilization. It is however difficult at this time to determine the proper government share in co-production, joint venture or production sharing agreements. For one, the Constitution does not provide for the definition of these schemes.

   The definitions of these schemes in RA 7942 (Mining Law) are instructive:

"Mineral production sharing agreement – is an agreement where the government grants to the contractor the exclusive right to conduct mining operations within a contract area for financing, technology, management and personnel necessary for the implementation of this agreement".

"Co-Production Agreement – is an agreement between the government and the contractor wherein the government shall provide inputs to the mining operations other than the mineral resources."

"Joint Venture Agreement – is an agreement where a joint-venture company is organized by the government and the contractor with both parties having equity shares. Aside from earnings in equity, the government shall be entitled to a share in the gross output."

The Mining law gives us more guidance on government share vis-à-vis mineral resources as follows:

"Sec. 80 - Government Share in Mineral Production Sharing Agreement. – The total government share in a mineral production sharing agreement shall be the excise tax on mineral products as provided for in RA 7729, amending Sec. 151(a) of the National Internal Revenue Code, as amended."

"Sec. 81. – Government Share in Other Mineral Agreements. The share of the government in a co-production and joint venture agreements shall be negotiated by the government and the contractor taking into consideration: a) capital investment of the project; b) risks involved; c) contribution of the project to the economy; and other factors that will provide for a fair and equitable sharing between the government and the contractor."

It is however more difficult to determine government share with respect to the utilization of forest resources. For one, there is no legislation yet defining these concepts in forestry.

- For example, under DENR DAO 96-29, a Community Based Forest Management Agreement is a production sharing agreement which is designed to ensure that the participating community shall enjoy the benefits of sustainable utilization, management and conservation of forest lands and natural resources therein. The government shall share in these benefits in the form of increased natural resource protection and rehabilitation, forest charges, fees and / or taxes as determined and agreed upon.

- In Industrial Forest Management Agreements, the government share in the production agreement is pegged to be 5% of the sales of logs, less logging and transport costs.

- Whether the true value system has been captured in said regulations is a research effort worth conducting.

3. In 1997, EO 406 was issued institutionalizing the Philippine Economic-Environmental and Natural Resources Accounting (PEENRA) System

- As stated in EO 406, the PEENRA System shall be treated as a satellite account to the Philippine System of National Accounts to generate macro-indicators that shall reflect the relationships between the natural environment and the economy.

- The PEENRA System aims to establish mechanisms for the integration of environmental considerations in planning, policy, project development and implementation based on PEENRA results.

4. LGUs' share in the proceeds from the national wealth is now institutionalized.

   - Note that LGUs should now share with national government: a) 40% of gross collections derived from the utilization of natural resources including such other taxes, fees and charges including related surcharges, interests or fines; and b) in any co-production, joint venture or production sharing agreements.

   - A problematic area arises when LGUs start to claim that aside from their share in the national wealth, they accordingly may also impose fees and charges for the utilization of natural resources within their areas. Their source of authority apparently is also the LGC when it empowers the Sanggunians to approve ordinances for acts which endanger the environment and other activities which result in pollution of rivers, lakes or ecological imbalance.

5. ICCs / IPs are now to:

   a) benefit and share the profits from the allocation of natural resources when the same is allowed to be used.

   b) receive just share in development projects conducted in their areas.

6. There is however no formula on how this share will be computed.

7. In sum the benefits that are to be derived from the utilization of natural resources are to be shared by:

   a) The National Government
   b) LGUs
   c) ICCs / IPs

8. The question arises whether these sharings shall also apply to proceeds derived from the utilization of natural resources when jurisdictions of the areas are with other government agencies such as DOE and UPLB.

9. What about the polluters fee principle under the Clean Air Act of 1999?

   - It will appear that the fees will be mainly managed by the DENR thus:

"Sec. 14. Air Quality Management Fund. – An Air Quality Management Fund, to be administered by the Department as a special account in the national treasury is hereby established to finance containment, removal, and clean-up operations of the government in air pollution cases, guarantee restoration of ecosystems and rehabilitate areas affected by the acts of violators of this Act, to support research, enforcement and monitoring activities and capabilities of the relevant agencies as well as to provide technical assistance to the relevant agencies . Such fund may likewise be allocated per airshed for the undertaking herein stated.

The Fund shall be sourced from the fines imposed and damages awarded by the Pollution Adjudication Board (PAB), proceeds of licenses and permits issued by the DENR under this Act, emission fees from donations, endowments and grants in the forms of contributions. Contributions to the funds shall be exempted from donor taxes, charges or fees imposed by the government."

- While mainly managing the Fund, DENR has to coordinate with the other players of the Clean Air Act, namely, the LGUs, DOTC and the National Statistical Coordination Board.

- A mechanism on how to operationalize the AQMF is in order.

10. What about Fees and Charges under AFMA?

- RA 8435 (1998), otherwise known as Agriculture and Fisheries Modernization Act does not have provisions on pricing of natural resources. Section 12 thereof however deals with watershed protection and hence an opportunity to apply pricing principles later.

- Sec. 12 states: "Protection of Watershed Areas. – All watershed areas that are sources of water for existing and potential irrigable areas of major acquifers identified by DA and DENR shall be preserved as such at all times.

- The implementing rules provide as follows: "All logging, clearing or any activity within watershed areas shall be limited and regulated per existing laws and regulations. Reforestation, agro-forestry and conservation and optimal management projects are eligible for support and financing from resources made available under RA 8435. The DA shall collaborate with the DENR to implement such watershed protection and conservation projects.

- Under RA 8435, an amount of P 20 billion is made available initially.

- Whether reforestation projects in watershed areas are actually funded out of this law is a major question.

- If no reforestation projects are funded out of AFMA, and considering that DENR is required to conserve, protect and preserve the watershed areas, can DENR charge those using the water from these

watersheds? If the watershed is not within the jurisdiction of DENR, can that agency charge those using the water resources?

- It is submitted that based on the existing mandate of the DENR, this cannot be done as yet. The proper remedy is actually to put into operation the mandate of AFMA – i.e. for the DA to fund reforestation and watershed protection projects. This should also be the remedy of other government agencies which have jurisdiction of the watershed areas.

- The PEENRA can assist in the determination of the amount necessary for the reforestation and watershed protection efforts.

11. What about the National Water Resources Council?

- PD 424 (1974) created the NWRC. Among its powers and functions are:

> *Coordinate and integrate, on a sound and logical basis, water resources development activities of the country, within the context of national plans policies for social and economic development.*
>
> *Determine, adjudicate, and grant water rights x x x*
>
> *Promulgate rules and regulations for the exploitation and optimum utilization of water resources, <u>including the imposition on water appropriators of such fees or charges as maybe deemed necessary by the Council for water resource development.</u>*

- Note that the NWRC can impose fees and charges for the use of water. The question however is: Since water supply and quality are dependent to a large extent on the watersheds or forest areas presently under the jurisdiction of DENR or other agencies, can these agencies impose fees and charges to the water users, as being claimed by these different agencies?

- It appears that presently, it is NWRC which is the primary government agency with respect to water under PD 424. This however has to be reconciled with the provisions of EO 292 (1987) when said text/gave DENR authority over waters.

- If we consider NWRC as the "king" with respect to waters, it is submitted that other national government agencies cannot impose fees and charges for the water users, as the same will be tantamount to taxation and is not within the rights and powers of the agencies under the laws granting them jurisdiction over the natural resources.

- Similarly, it is respectfully submitted that while the LGUs through their Sanggunians are empowered under the Local Government Code to "approve ordinances x x x and in this connection shall protect the

environment and impose appropriate penalties for acts which endanger the environment such as dynamite fishing, illegal logging and smuggling of logs, smuggling of natural resources and of the endangered species of flora and fauna, slash and burn farming and such other activities which results in pollution, acceleration or euthrophication of rivers, lakes or of ecological imbalance,."-

cannot impose fees and charges to water users for the following reasons:

a) the LGUs are not, under said provision authorized to impose fines and charges for water use, as what is contemplated in said provision are ordinances which are related to environmental protection.

b) imposing fees and charges to water users may take the form of taxation or revenue generating activity, which the LGUs cannot properly impose.

c) Under tax laws, the taxing power of local governments are not inherent. LGUs can only exercise the power if delegated to them by the national legislature or conferred by the Constitution itself. While LGUs have the power to impose taxes, imposing the same on water users is not among those powers.

- the remedy however is either a legislative enactment to empower these national agencies and LGUs to impose fees and charges on water users or inter-government coordination with the NWRC.

- Note that under the AFMA, reforestation and rehabilitation activities maybe funded out of AFMA appropriations. If NWRC can incorporate the fees necessary to maintain the watershed vis-à-vis water takeout, then the national agencies and LGUs will have additional funding for forest or watershed rehabilitation.

- Finally, as stated, there is a need to reconcile the mandates of DENR with NWRC vis-à-vis waters.

12. What about the NIPAS Act?

Sec. 16 of RA 7586 (1992) provides as follows:

"Sec. 16. Integrated Protected Areas Fund. – There is hereby established a fund to be known as Integrated Protected Areas Fund for purposes of financing projects of the System. x x x

All incomes generated from the operation of the System or management of wild flora and fauna shall accrue to the Fund and may be utilized directly by the DENR for the above purpose. These incomes shall be derived from:

a) Taxes from the permitted sale and export of flora and fauna and other resources from protected areas.

b) Proceeds from lease of multiple-use.

c) Contribution from industries and facilities directly benefiting from the protected area; and

d) Such other fees and incomes derived from the operation of the protected area.

Disbursements from the Fund shall be made solely for the protection, maintenance, administrative, and management of the System, and duly endorsed by the PAMBs in the authorized by DENR."

Under said law; the Secretary is empowered to fix and prescribe reasonable fees to be collected from government agencies or persons deriving benefits from the protected areas.

Under DENR DAO 25 (1992), and IPAF Governing Board was established to manage the Fund.

The determination of these fees may also be facilitated through the PEENRA System.

7. RECENT DEVELOPMENTS IN THE PRICING AND USE OF NATURAL RESOURCES

7.1 Administrative Initiatives

7.1.1) Grazing Lands

On August 10, 1999, DENR AO No. 99-36 entitled "Revised Rules and Regulations Governing the Administration, Management, Development and Disposition of Forest Lands Used for Grazing Purposes."

- Said AO provides that a Forestland Grazing Management Agreement (FLGMA) is a production sharing agreement between a qualified person, association and / or corporation and the government to develop, manage and utilize grazing lands.

- Said AO provides for a 5-year transitory period whereby existing lessees should convert their lessees into a FLGMA. For the meantime, payment for the use of the grazing lands shall be computed based on user's fee computed on a per hectare per year basis.

- Sec. 26 of said AO provides the basis for the computation of government share in FLGMA, thus:

"Sec. 26. Basis of Government Share. – Under this order, a new classification for payment of fees for the use of grazing lands to the

government as resource owner shall be classified based on the economic rent formula computation as follows:

ER = *(TR-TC)-MPR*

Where:	*ER*	=	*Economic Rent / Government Share*
	TR	=	*Total Revenue*
	TC	=	*Total Cost*
	MPR	=	*Margin for Profit and Risks which is 30% of TC"*

- Government share mandated to be paid to NRDC, thus:

"Sec. 29.-Payment of Government Share and Corresponding Penalties. Payment of government share for the previous year should be remitted on the first month of the succeeding year. Sixty percent of the government share shall be remitted to NRDC who shall provide assistance in management and technical services to the agreement holders. x x x"

- The legal authority of NRDC to collect these fees and charges is discussed below.

7.1.2) Protected Areas

- The DENR, through the assistance of ENRAP, is coming up with a draft Administrative Order entitled " Guidelines and Principles in Determining Fees for Access to and Sustainable Use of Resources in Protected Areas."

- A cursory review of said draft AO will show that: a) the AO is an attempt to capture the true value system in the use of resources inside protected areas; b) the AO operationalizes the first mode of utilization of natural resources – i.e. by the State directly undertaking such activities through the imposition of Protected Area Entrance Fee, Facilities Users Fees, Resource User Fee, Concession Fee, Development Fee and Royalty; c) These fees are determined through the use of certain pricing principles; d) opens the door for co-production, production sharing and joint venture.

- The above proposal is a step in the right direction insofar as it provides the bases for the various fees involved.

7.1.3) Commercial Waste Water Discharge

- The DENR through ENRAP is also coming up with an AO entitled: "Revised Industrial and Commercial Wastewater Permitting Rules and Regulations of 1999".

- Under said draft as of November 4, 1999, persons who discharge wastewaters into the Philippine waters and / or land resources must secure a wastewater discharge permit from the DENR.

- The Wastewater Discharge Permit Fee is proposed to be based on the administrative costs involved, and the unit pollution load per type of establishment or facility.

- The administrative fee will accordingly cover the administrative cost of the program administration, i.e. processing and filing fees and regular monitoring costs which is based on the volumetric rate of discharge.

- The load based fee, on the other hand, is based on a pollutant load, i.e. the volume and concentration of a particular pollutant, ambient condition of a water body and weighing facts based on the pollutant allowable concentration per type of water classification.

- The obvious intention of the waste water permit fee is for the polluter to pay the government such amount as will be necessary to cover up for the harm on the environment of waste water discharge.

- The draft provides that industrial and commercial establishments that are able to demonstrate proof of an Environmental Management System (EMS) in place, shall be granted a discount of up to fifty (50%) of the assessed local-based fee.

- It is suggested that before said proposal is finally endorsed for issuance by the Secretary, the following points be considered:

(1) The fees sought to be imposed, ranging from PhP 6,500.00 to PhP12,500 depending on the rate of discharge and whether the discharge contains heavy metals or not, are quite high. The imposition of fees in excess of the amount of regulation may be seen as a revenue measure which may not be within the powers of DENR to issue.

(2) Again, the discount provision may make the Order a revenue measure. A privilege right to be priced uniformly, EMS or no EMS, as the privilege to dump waste water is the same, the nature and volume of business notwithstanding. The discount may partake the nature of a tax deduction or exemption.

7.1.4) Revised Rules and Regulations on the Conduct of Appraisal of Public Lands and other Patrimonial Properties of the Government.

- Similarly, the DENR, through ENRAP is coming up with an AO for the revision of land appraisal, the objective being to secure for the government reasonable returns from the sales, lease, occupation and utilization of its land resources.

- The principle for which said AO is being drafted is in order and is within the powers of DENR.

8. PROBLEMS BESETTING PROPER PRICING OF NATURAL RESOURCES

Based on the above reviews, it is clear that the intention of all the laws vis-à-vis natural resources utilization is sustainable development.

Sustainable development can be better achieved, however, if we really put a true value in the utilization of these natural resources. Likewise, it is important that the benefits derived from the utilization of these resources be shared by the intended beneficiaries, and that at least a portion of these benefits be plowed back to natural resources rehabilitation, etc.

Presently, the following problems beset proper pricing of natural resources utilization.

8.1 Question of Jurisdiction. There are many government agencies dealing with natural resources management and all of these agencies would like to impose the necessary pricing mechanism in the use of natural resources within their jurisdictions. The result is bickering and uncoordinated pricing among government agencies.

8.2 Determination of Proper Government Share – As previously discussed, the inability of the government to impose the necessary prices for natural resources utilization has contributed to a great extent to the destruction of our natural resources.

8.3 Slow implementation of the modes of natural resources utilization – as called for under the 1987 Constitution. It is lamentable that after almost 12 years since the 1987 Constitution was ratified, the modes of natural resources utilization have not been fully implemented, except probably in the mining sector. In some sectors, such as in forestry, the proper government share in joint venture, production sharing and co-production has not been properly determined.

Of particular interest is the first mode – i.e. by the government directly undertaking natural resources utilization. This has not been fully explored. The proposed AO however imposing certain fees in the use of protected areas may be considered as implementing such mode.

8.4 Lack of Data on Real Sharing of Benefits Derived from the National Wealth. - As mentioned, benefits derived from the national wealth are to be shared by: a) national government; b) local governments; and c) indigenous peoples.

That natural resources fees and charges go to the national government may be safe to assume. But as to whether the local governments indeed get their share, the law notwithstanding, remains to be verified. This problem becomes more difficult when we talk about indigenous peoples who under the law are also entitled to share in the benefits. As it is, there are no implementing guidelines to operationalize this.

As a corollary question, when the natural resources are with the jurisdiction of other government agencies, will the LGUs and the ICCs/IPs also share when there are collections?

8.5 Lack of legal and institutional mechanisms for the plowing back of benefits for natural resources development, or mechanism for monitoring the same. - The IPAS Law speaks of the IPAF funds where funds are required to be plowed back to the activities inside protected areas. This is also true under the Clean Air Act (Air Quality Management Fund).

There are however no legal mandates / mechanisms in other funds.

9. NEED TO HARMONIZE POLICIES ON PRICING OF NATURAL RESOURCES

Given the above problems, and the need to give life to the policy of sustainable development, it is ineluctable that proper pricing of natural resources utilization be made. It is important that the different conflicting policies, mandates and questions be harmonized so that pricing can be done holistically.

It is submitted that pricing of natural resources can proceed based on the following considerations:

9.1. Recognize jurisdictions of each agency involved in natural resources management.

Based on this study, it is clear that DENR, DOE and UPLB are kings in their own jurisdictions.

This simply means that these agencies can formulate their own pricing policies within their respective jurisdictions, subject to allowable activities that may be undertaken in their respective areas. The PEENRA system can be of assistance in these efforts.

9.2. Recognize and apply the four modes in the utilization of natural resources.

It is submitted that the constitutional provision regarding this should be internalized and put into motion. It is submitted that policy makers have not yet outgrown the old modes of natural resources utilization – i.e. either through concession, lease or license. These modes were after all contained both in the 1935 and 1973 constitutions. Then, it was simple for government to set the tax and charges and let the concessionaires operate.

Now, the Constitution mandates a more active role of the government in natural resources utilization.

9.3 Issue Administrative Regulations in the Application of the four Modes: Determining Pricing through the ENRA System

These modes are within DENR's mandates to issue via administrative regulations. This is explicitly provided for in EO 192.

9.4 Recognize and Implement Sharing

The national government share in these pricing efforts is clearly determined. It is however important that the LGUs and the ICCs/IPs share be properly remitted to them so that the purpose for which the law allows them to share will be realized.

9.5 Plow Back Collections to Natural Resources Development

As the call for environmentalism and sustainable development is loud and clear, it is important that the collections derived should be plowed back to these renewable resources.

10. NRDC AS POSSIBLE COLLECTION ARM OF DENR

- It is posited: To ensure that collections from national wealth are plowed back to natural resources development, can the NRDC be the collecting arm of DENR and thereafter for said office to use said collections for environmental programs?

- A review of EO 786 (1982), creating NRDC shows:
"Sec. 3. Functions / Objectives. – The NRDC shall undertake all manner of activity, business or development projects that shall achieve the following purposes, to include but not limited to the following:

1) Engage in the production of charcoal pig-iron and small and/or medium scale steel mills as well as the necessary support fuel wood plantations.
2) Engage in and / or encourage the private sector to engage in reforestation and industrial forestry operations through the stumpage sale system and other means.
3) Ensure a stable market for natural resources-based products by coordinating the production and / or local international marketing of critical natural resources based products.
4) Promote investment in natural resources-based industries by providing financial, technical and /or management support assistance.
5) Conduct research and development on natural resources based products.
6) Engage in the production and marketing of minor forest, aquatic and marine products."

- A closer look at the whereas clauses of EO 786 will show that NRDC was created with the end in view of more productive utilization of resources by the use of new or better systems of technologies, such as the stumpage valuation system.

- Based on EO 786 therefore, it is submitted that NRDC cannot be the collecting arm of DENR to manage incomes derived from natural resources utilization.

- EO 192 (DENR Reorganization) on NRDC is however interesting:

"B. Natural Resources Development Corporation.- the existing NRDC shall be reorganized under the direct supervision of the Secretary. It shall be responsible primarily for promoting natural resources development and conservation through:

x x x " 1) Financing natural resources development projects undertaken by the private sector such as establishing industrial tree plantations, agro-forestry, small scale mining and retooling of the natural resources based processing industries to improve their efficiency and competitiveness; <u>to discharge these functions effectively, it is hereby authorized to generate</u>

funds through debt instruments from various sources and innovative income generating strategies.

- Does said power authorize NRDC to be the collecting arm of DENR and classify such activity as innovative income generating activities?

- It is submitted that EO 102 does not empower NRDC to be the collecting arm of DENR:

  a) Note that the primary function of NRDC under said provision is financing private sector activities;

  b) The income derived from natural resources utilization cannot be considered as innovative income generating activities but actually traditional sources of income.

- It is submitted that had EO 786 and EO 192 intended NRDC to be the repository of collections from natural resources utilization, the texts could have easily so stated.

- Be that as it may, there might be wisdom in having a collecting arm for the various funds that will be derived from natural resources utilization and ensuring that these funds are plowed back to natural resources. NRDC can be the said arm through a legislative enactment.

REFERENCES

1973, 1987 Constitutions

PD 424 - Creating the National Water Resources Council

PD 705 as amended - Forestry Code of the Philippines

PD 1515 as amended - Vesting Jurisdictions of Certain Watershed Areas to the Ministry of Energy

RA 7160 - Local Government Code of 1991

EO 786 (1982) - Creating the Natural Resources Development Corporation

EO 192 - DENR Reorganization

RA 6967 - Vesting Jurisdiction of Mt. Makiling to UPLB

RA 7161 -Forest Charges Law

RA 7586 - National Integrated Protected Area System

RA 7942 - Mining Code

RA 8371- Indigenous People's Right Act

RA 8425 - Agriculture and Fisheries Modernization Act

DENR DAO 96-29 - Rules and Regulations Implementing CBFM

EO 406 (1997) - Institutionalizing the Philippine Economic and Environmental Accounting (PEENRA) System

Ministry of Justice Opinion, Oct. 9, 1984

DENR DAO 99-36 Revised Rules and regulations Governing Forest Lands Used for Grazing Purposes

Draft Guidelines and Principles in Determining Fees for Access to and Use of Resources in Protected Areas

Draft Revised Industrial and Commercial Wastewater Permitting Rules and Regulations of 1999

Draft Rules and Regulations on the Conduct of Appraisal of Public Lands