

# THE NATIONAL PAYMENT POLICY FOR ENVIRONMENTAL SERVICES: A STEP BACKWARDS?

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## ABSTRACT

The article seeks to discuss legal consequences of the enactment of Law no. 14.119/2021, “Law on Payment for Environmental Services”, whose art. 9, sole paragraph, provides for awarding Payment for Environmental Services (PES) to owners/possessors of Permanent Preservation Areas (PPA), Legal Reserves (LRA) and Administrative Limitations Areas. PPA and LRA, provided for in the Forest Code (Law no. 12.651/2012), are types of administrative limitations, operationalizing fundamental precepts of art. 225 of the Federal Constitution, referring to the ecologically

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balanced environment. Administrative limitations are general obligations, ensuring public interest, imposed by the State, regardless of indemnities/compensations. The work includes analysis of art. 9, sole paragraph, Law no. 14.119/21, against the Forest Code and the Federal Constitution, regarding environmental protection. The analysis showed that Law no. 14,119/21, providing for the PES to PPA, LRA and environmental Administrative Limitation Areas, disregarded, due to its legal nature, preserving and recovering the environment in these areas is an obligation to the owner's right, regardless of compensation. The solution found starts from the systematic interpretation of Law no. 14.119/21, of Law no. 12.651/12 and the Federal Constitution of 1988, prevailing the obligation of owners/possessors to preserve/recover the environment in PPAs, LRAs and Administrative Limitations Areas, regardless of PES.

**Keywords:** permanent preservation area; legal reserve area; administrative limitations; payment for environmental services; environmental setback

## ***A POLÍTICA NACIONAL DE PAGAMENTO POR SERVIÇO AMBIENTAL: UM RETROCESSO?***

### ***RESUMO***

*O artigo objetiva discutir consequências jurídicas da promulgação da Lei n. 14.119/2021, “Lei do Pagamento por Serviços Ambientais”, cujo art. 9º, parágrafo único, prevê contemplação, com Pagamento de Serviços Ambientais (PSA), aos proprietários/possuidores de Áreas de Preservação Permanente (APP), de Reserva Legal (ARL) e Áreas de Limitações Administrativas. As APP e ARL, previstas no Código Florestal (Lei n. 12.651/2012), são espécies de limitações administrativas, instrumentalizando preceitos fundamentais do art. 225 da Constituição Federal, referente ao ambiente ecologicamente equilibrado. Limitações administrativas são obrigações de caráter geral, assegurando interesse público, impostas pelo Estado, independentemente de indenizações/compensações. O trabalho contempla análise do art. 9º, parágrafo único, Lei n. 14.119/21, frente ao Código Florestal e à Constituição Federal, tocante à tutela ambiental. A análise evidenciou que a Lei n. 14.119/21, prevendo o PSA às APP, ARL e Áreas de Limitações Administrativas ambientais, desconsiderou, pela natureza jurídica, preservar e recuperar o meio ambiental nessas áreas é*

*obrigação ao direito do proprietário, independente de indenização. A solução encontrada parte da interpretação sistemática da Lei n. 14.119/21, da Lei n. 12.651/12 e da Constituição Federal de 1988, prevalecendo obrigação dos proprietários/possuidores em preservar/recuperar o meio ambiente em APP, ARL e Áreas de Limitações Administrativas, independentemente de PSA.*

**Palavras-chave:** *área de preservação permanente; área de reserva legal; limitações administrativas; pagamento por serviços ambientais; retrocesso ambiental.*

## INTRODUCTION

The ecologically balanced environment is regarded, under the terms of the *caput* of art. 225 of the Federal Constitution of 1988, as a fundamental right, emerged in the third generation and connected to man as an authentic right of humanity. It is imperative to recognize that, as such, it bears in the Brazilian legal system a true position of entrenched clause, portrayed in the exercise of the dignity of the human person. Finally, this fundamental right, of evident ecological quality, is substantiated through the preservation of the specificities and natural ecosystem functions, allowing the existence, evolution and development of all living beings.

Among the various ways of operationalizing this fundamental right in ordinary legislation, the Forest Code (Law no. 12.651/2012) regulated PPA and LRA figures as ecological spaces essentially representative of legally protected ecological human rights.

Following this direction, Law no. 14,119/2021 modeled, in the ordinary field of the Brazilian legal system, the National Policy for Payment for Environmental Services (NPPES), aiming to operationalize an economic instrument, aimed at the preservation of ecological ecosystems essential to a healthy quality of life, called Payment for Environmental Services (PES).

The protection rules for PPAs and LRAs have long been established in the Brazilian legal system, having a generalist and imperative character, reaching any and all rural properties, regardless of the intent or destination that their owner or possessor intends to confer on them. They were integrated into the country's legal system long before Law no. 14.119/2021.

The rule of art. 9, sole paragraph, of Law no. 14.119/2021, established the possibility of the PES being carried out in relation to PPA, LRA and

other Areas affected by Administrative Limitations, disregarding the obligation to preserve the environment in these areas, regardless of indemnities, considerations or any other form of economic retribution. Thus, starting from its increasing profile, this regulation is motivated by an apparent relativizing character, which may have infused the norms of the Forest Code, related to PPA and LRA. Faced with this perception, the recent standard should be the subject of careful scientific reflection.

Brazil is experiencing, for the first time in its history, the condition of an unconstitutional state of affairs in environmental matters, meaning that, in recent years, there has been an exponential growth in environmental degradation, evidencing the incapacity of the Government to face it.

In this sense, attention must be paid to legislative innovations, preventing a legal norm, enacted with an apparent guaranteeing bias of the fundamental right to an ecologically balanced environment, from having opposite effects, further aggravating the aforementioned legal-political-environmental crisis.

Composing this scenario, the NPES was instituted to assume an important role in the economic strategies of sustainable development, being seen as a true tool destined to contribute to the solution of the installed environmental crisis, directly affecting living beings.

In this step, this article will deal with the legal integration between the norms related to environmental legal protection in PPA, LRA or other areas under administrative limitation, provided for in the Federal Constitution of 1988 and in the Forest Code, with the normative wording of art. 9, sole paragraph, of Law no. 14.119/2021, responsible for guiding the eligibility of such areas as recipients of the PES. It is intended, as an objective of the work, to understand the main legal implications that may arise from the provision of art. 9, sole paragraph, of Law no. 14,119/2021, providing for the PES to these areas.

The promotion of this discussion will provide the reflection of the public and private actors involved in the implementation of the Federal Program for Payment for Environmental Services (FPPES), a means established for operationalization of the NPES. This reflection is necessary, considering that such public and private actors will be involved in guaranteeing the fundamental right to an ecologically balanced environment.

As for the methodology, the theoretical-bibliographic and documentary research available was adopted, with the use of books, texts and scientific articles, internet sites, in addition to laws that are directly related to

the protection of the environment and tax incentives for society, based on, throughout the study, the constitutionalized view of environmental rights.

Regarding the methodological procedure, we opted for the deductive method, given that we started from a more general conception to reach more specific interpretive models. Thus, it was possible to carry out interpretive, comparative, thematic and historical analyses, in a discussion guided by the point of view of scientific research.

As it is a complex topic, the conclusions drawn during the development of the research in no way intend to exhaust the matter about the NP-PES and its relationship with sustainability and a balanced environment, of relevant importance to Brazilian society and that deserve deep discussions and subject to continuous improvement.

## **1 NATIONAL PES POLICY: ECOSYSTEM REGENERATION AND PRESERVATION**

Public policies, according to Dias and Matos (2012), correspond to government actions for the development of social activities, aiming, through order, to guarantee external security and internal solidarity to a given territory, resulting in actions that ensure social well-being.

The Brazilian legal system has long coexisted with municipal and state legislation for public policies aimed at paying property owners for ecosystem services, as a way of replacing traditional commercial productions, such as plantations and animal husbandry (MORAES, 2012).

At the national level, Law no. 14,119 was enacted only recently, in January 13, 2021, and was responsible for instituting the NPPES, which amended Laws no. 8,212/1991, 8,629/1993 and 6,015/1973, to adapt them to this new policy.

Based on this premise, it is possible to say that the NPPES emerged with the purpose of helping an important environmental issue, faced by man today: the perennial degradation of the ecologically balanced environment, essential to a healthy quality of life.

The Protector-Receiver Principle served as a philosophical foundation for the design of the NPPES, postulating that the public or private agent that protects the natural good, benefiting the entire community, should receive financial compensation as a form of incentive for the environmental protection service provided (RIBEIRO, 2005).

The practical applications and variations of this Principle were already

perfectly shaped by the Brazilian legal system, considering that the Forest Code, in a first allusion to this modulation, established general rules for the protection of native vegetation, including Areas of Permanent Preservation, Legal Reserve and Restricted Use; and, in particular, the payment or incentive to environmental services for voluntary activities for the conservation and improvement of ecosystems (BRASIL, 2012).

At this step, the NPPES should not be seen as a commodification of the environment, but as a state action concerned with maintaining the quality of an ecologically balanced environment. It should be understood as an economic instrument that it is, promoting the conservation or restoration of ecosystem services, whether in the private or public sphere, since it is guided by the Protector-Receiver Principle (BORGES, 2016).

When an ecosystem is exposed to damage conditions, the ecological balance remains compromised both because of the respective negative impacts of such damage and because of the ineffectiveness of state action aimed at protection. However, the drawing up and implementation of public actions aimed at improving these services, such as the NPPES, reduces social inequality, represented in the uneven division of environmental benefits, restoring environmental balance. Such actions enable the environmental quality of ecosystems, essential for biocenosis (MELLO, 2019; ORGANIZAÇÃO DAS NAÇÕES UNIDAS, 2021).

Considering its close and important relationship with the legal rules related to the protection of PPAs and LRAs, the conceptual aspects that make up the NPPES are now presented, according to the model implemented by Law no. 14.119/2021.

## 1.1 What is Payment for Environmental Services?

Despite being relatively innovative, the idea of making conditional payments for the provision of ecosystem services has been implemented by several countries around the world. It was under an environmental protectionist context that the juridical-institutional conception of the PES emerged, revealing itself to be a true promotional instrument for the preservation, regeneration and management of natural elements (WALDMAN; ELIAS, 2013). Rural landowners who contribute to the continuity of ecosystem services are called environmental service providers (FABRI *et al.*, 2018).

The PES corresponds to a recent legal institute, the result of the new

trend applicable to conservation activities, considering the market failures related to the lack of economic valuation of the positive externalities associated with the services provided by ecosystems. In other words, a PES scheme recognizes the evident tensions between conservation activities and the use of the territories in which the ecosystem goods that are provided by such services are located and provides the necessary incentives for the owners and/or possessors of these territories to be compensated for the conservation efforts they carry out within their areas (GUTIÉRREZ, 2014).

In Brazil, the PES has shown the legal nature of a private economic agreement, signed between the borrower and the provider, with the intervention of the Government to operationalize plans and programs (ALTMANN, 2010). From the perspective of Zeno Veloso (1995), it is a true legal transaction signed by the expression of will, becoming a contractual obligation between the parties. Thus, it was included in the NPPES, being intended to promote the preservation and protection of natural ecosystems, in the face of market rules markedly disinterested in the protection activities necessary for the sustainability of these natural elements (SEEHUSEN; PREM, 2011).

Thus, the PES can be defined as a tool of the so-called “economic instruments”, whose objective is to grant economic incentives for management practices that result in the provision and/or maintenance of ecosystem services for the population in general.

Its practical application is revealed through financial assistance provided in the preservation of the components that form natural ecosystems, an obligation of the Government and a fundamental human right (FREITAS; ORTIGARA, 2017).

From a representative perspective, Waldman and Elias (2013) view PES as a voluntary transaction – a formal agreement or service provision contract between providers and beneficiaries – through which a specific ecological service or the use of nature and technology that can guarantee it is acquired by one (or more) acquirer(s) from one (or more) provider(s) if, and only if, the provider guarantees its provision (conditional relationship).

Despite the numerous doctrinal definitions of the PES, there is one, widely used, which defines it as a “voluntary transaction”, through which a well-defined environmental service or a land use that can ensure this service is acquired by at least one buyer and provided by at least one provider, under the condition of guarantee of service provision (WUNDER *et al.*, 2009).

In this line, Law no. 14.119/2021, in its art. 2, IV, enshrined, in the Brazilian legal system, the concept of PES:

IV – payment for environmental services: a voluntary transaction, through which a payer of environmental services transfers to a provider of these services financial resources or other form of remuneration, under the agreed conditions, respecting the relevant legal and regulatory provisions (BRASIL, 2021).

For Lehfeld, Carvalho and Balbim (2013), the social foundation of this legal-environmental institute lies in the sharing of costs of conservation of ecosystem elements with those members benefiting from environmental services, but not directly supporting the intrinsic expenses.

The PES, therefore, is a strategy of environmental conservation policies, based on the Protector-Receiver Principle, and which seeks to compensate providers of environmental services in accordance with, again, the positive externalities generated by the maintenance of these services.

For Alarcon and Fantini (2012), although the term used is “payment”, there are dozens of projects that use the term “compensation”, since, in many cases, the relationship established with the environmental services provider is not merely financial. These cases include technology transfer, supply of inputs, training and other strategies considered as bargaining chips (BRASIL, 2013, 2015).

In short, the PES aims to promote the recovery of negative impacts on ecosystems resulting from economic activities, based on the Protector-Receiver Principle, focusing on those who do not pollute the environment, by defending the idea that the individual who protects an area, failing to degrade it, should receive incentives, financial or otherwise, as a way of being compensated for the provision of an environmental protection service (ARAÚJO, 2012).

Dealing with man’s behavioral changes in relation to ecosystems, Fabri *et al.* (2018) profess that the objective of the PES legal institute is to promote behavioral changes in society regarding the exploration and application of natural resources, favoring the real implementation of public policies aimed at environmental preservation.

As a result, the forerunners of environmental economics saw in the PES a true legal instrument capable of stamping, on natural ecosystems, an authentic label of necessary economic, social and human integrity, moving away from that anthropocentric ideal that nowadays falls on natural entities, revealing mere exploratory relationships (FABRI *et al.*, 2018).

In short, as Altmann (2015) explains, being classified as an economic instrument for implementing environmental management, the PES emerges as a tool for the reimbursement of those who act to, at least, mitigate the reflexes of predatory human action and the absence of environmental sustainability, characteristics of the capitalist mode of production.

## 1.2 Methods of Payment for Environmental Services

Dealing with modalities in the legal field corresponds to the confrontation of aspects or ways in which a given legal institute presents itself to human relations.

In principle, the introduction of the PES in Brazil, through public policies, required the legislator to define its own methods and consequent conditions, in order to differentiate the NPPES from other public policies for environmental protection (HALL, 2006).

Art. 3 of Law no. 14,119/2021, listed the following PES modalities: direct payment, monetary or non-monetary; providing social improvements to rural or urban communities; compensation linked to an emission reduction certificate from deforestation or degradation; green bonds; lending; and Environmental Reserve Quota (CRA), established by the Forest Code. The standard also provided for other modalities established based on normative acts of the NPPES's managing body (BRASIL, 2021).

It should not be forgotten that all these methods are voluntary; that is, the first feature is that these are non-coercive species, which are contractual and result from spontaneous adherence, as opposed to what occurs with imperative instruments, imposed through other forms of environmental policies.

This voluntary nature helps to relieve the Public Administration, which, instead of looking for the managed party, is now sought by him, which usually generates more effective results in terms of ecosystem protection (FARIAS; RÉGIS, 2021).

These modalities are available to the two main characters of the PES: the payer of the services (Article 2, V) and the provider of these services (Article 2, VI). The payer is the one who takes on the financing of environmental services, while the provider is the one who provides such services, capable of maintaining, recovering or improving the environmental conditions of Brazilian ecosystems, upon receipt of one of the PES methods.

### 1.3 Sources of funding for Payment for Environmental Services

If there is payment for environmental services, it is essential that there are funding sources provided for in the Federal Program for Payment for Environmental Services (FPPEs), necessary to implement the NPPES, thus enabling the aforementioned PES methods.

The terminology “source”, used in this context, refers to the origin of funds raised for the purpose of financing or defraying the FPPEs. Art. 6, § 7, of Law no. 14,119/2021, provides for two sources of financing: (i) raising of reserves from individuals and legal entities governed by private law; and (ii) perception of resources from multilateral and bilateral international cooperation agencies (BRASIL, 2021).

The first of the FPPEs’s funding sources corresponds to fundraising from private individuals and legal entities. This is a practice already carried out in different financing models, as can be seen in the administrative contracts of public-private partnership, through which the objective is to raise funds from the private spheres, in the form of investments, supplying the insufficiency of resources raised by taxation and the absence of public funds for state participation (SAES, 2021).

The second source of funding for the FPPEs corresponds to fundraising from multilateral and bilateral international cooperation agencies; that is, international organizations, created on the initiative of the main nations of the world, with the objective of acting globally in the development of the main human areas, such as health, education, security and the environment, among others.

In the guidelines for the development of international technical cooperation for Brazil, three sub-sources of funding by the respective international, multilateral and bilateral agencies are indicated: (i) sources composed of resources originating from the agencies’ own internal budget; (ii) sources composed of amounts donated by interested countries and managed by the agencies; and (iii) sources of funds raised, through these agencies, from other international organizations by interested national entities (BRASIL, 2004).

In this scenario of funding sources, the specialized doctrine has pointed out that the aforementioned infra-constitutional norm has the essence of a true blank norm, since it only predicted the funding sources, without, however, operationalizing them, relegating this mission to the administrative route and thus generating uncertainties regarding the implementation

(CARRERA, 2021).

Another aspect that has aroused criticism from social actors directly impacted by the FPPES comprises the lack of definition regarding the way in which these financial resources will be transferred to ecosystem service providers, an issue that can negatively impact the operationalization of the norm (GALERA, 2021).

Furthermore, Law no. 14.119/2021 revealed to Brazilian society, in its art. 6, § 7, the limitation of funding sources to interested parties from the national and/or international private initiative, excluding public resources from this list, going against the legislative evolution of other normative acts of a national, state and municipal nature.

It is true that many funding sources, based on public initiative resources, which were already pulverized by the Brazilian legal system, were simply ignored by the legislator in attention to the aforementioned norm (WINDHAM-BELLORD; MAFIA, 2012).

In the doctrinal scope of the discussion, Fabri *et al.* (2018) propose that the Government could incorporate the role of financing these payments, citing, as a hypothesis, the institution of tariffs on public prices, with the reversion of such values to environmental services providers, accompanied by strict budget planning.

In this wake of public funding, one cannot forget that art. 41, II, of the Forest Code, providing instruments for the support and incentive program for the preservation and recovery of the environment, already presents forms of compensation in environmental matters as ways of financing, *in verbis*:

[...] II – compensation for the environmental conservation measures necessary for fulfilling the aims of this Act, using the following instruments, among others: a) obtaining agricultural credit, in all its modalities, with lower interest rates, as well as limits and deadlines larger than those practiced in the market; b) contracting of agricultural insurance in better conditions than those practiced in the market; c) deduction of Permanent Preservation, Legal Reserve and restricted use areas of the base of calculation of the Rural Territorial Property Tax – ITR, generating tax credits; d) allocation of part of the resources raised with the collection by the use of water, in the form of Law No. 9,433, of January 8, 1997, for maintenance, recovery or recomposition of the Permanent Preservation, Legal Reserve and restricted use areas in the revenue generation basin; e) lines of funding to meet voluntary preservation initiatives of native vegetation, protection of endangered native flora species, forest maneuvering and sustainable agroforestry carried out on the property or rural possession, or recovery of degraded areas; f) tax exemption for major inputs and

equipment, such as: wire, treated wood poles, water pumps, soil drilling tract, among others used for the recovery and maintenance processes of Permanent Preservation, Legal Reserve and restricted use areas; [...] (BRASIL, 2012).

To the extent that the Government offers certain advantages in order to neutralize the expenses incurred, environmental compensation is characterized as an action aimed at balancing expenses, operated through a public payer of environmental services in favor of a provider of these services. For Lehfel, Carvalho and Balbim (2013), such compensations are operationalized through various financial and tax incentives, emphasizing that the list is merely exemplary.

Another good example of the participation of the Government in the costing of the PES corresponds to providing for the Contribution for Intervention in the Economic Domain (CIDE) which, in a broad sense, is supported by art. 149 of the Federal Constitution, composing the national tax system. It is a contribution that has a double character, monitoring and promoting certain activities in the country's economic and financial order and, at the same time, allowing the Federal Government to direct certain intended behaviors of individuals in the economic field (NAVARRO, 2019; COSTA, 2018).

Mentioning FPPES funding, Fabri *et al.* (2018) highlight the possibility of the CIDE – incident on the import and sale of oil and its derivatives, natural gas and its derivatives, and ethyl fuel alcohol – to be used to finance payments for environmental services, based on the provision of art. 177, § 4, *b*, of the Federal Constitution.

In fact, Law no. 10.636/2002, stating about the destination of the amounts collected by this means, provides, in its art. 4th, the financing of environmental services related to defense projects for coastal, marine and inland water conservation units; regeneration of ecosystems in areas degraded by activities related to the oil industry and its derivatives and gas and its derivatives; and recovery of forests and genetic resources in areas of influence of activities related to the oil industry and its derivatives and gas and its derivatives (BRASIL, 2002).

At the state level, there are several examples of legislative initiatives related to the topic. Between 2007 and 2015, ten Brazilian states had regulated their own programs, with emphasis on the states of São Paulo, Minas Gerais, Espírito Santo and Paraná, which concentrated eighty percent of these programs (COELHO *et al.*, 2021).

Particularly and by way of example, the State of São Paulo instituted, in 2009, by State Law no. 13,798/2009 (SÃO PAULO, 2009), the State Policy

on Climate Change (PEMC), with the objective of implementing economic instruments capable of promoting the preservation and recovery of forest assets in the State (GHELLERE, 2018).

Said Law, which has express provision regarding the creation, by means of a decree, of the Forest Remnants Program, may apply payment for environmental services to promote the preservation and recovery of degraded areas, *in verbis*:

Art. 23. The Executive Branch will institute, by means of a decree, the Forest Remnants Program, under the coordination of the Environment Department, with the objective of promoting the delimitation, demarcation and recovery of riparian forests and other types of forest fragments, being able to provide for, in order to achieve its purposes, payment for environmental services to conservationist rural landowners, as well as economic incentives for voluntary policies to reduce deforestation and protect the environment (SÃO PAULO, 2009).

In line with Art. 23, above, the Forest Remnants Program remained instituted, as planned, through Decree no. 55.947/2010 (SÃO PAULO, 2010), which established the sources of financing of payments, establishing, in its art. 47, the Green Economy Credit Program, aimed at offering, through Nossa Caixa Desenvolvimento – Agência de Fomento do Estado de São Paulo SA –, more advantageous lines of credit to those private entities interested in developing actions aimed at reducing greenhouse gases.

At the municipal level, one can cite, as an example of payment for environmental services, financed through public resources, the experience of the city of Extrema, State of Minas Gerais, which, through Municipal Law no. 2,100/2005, created the Water Conservative Program, aimed at containing behaviors that cause environmental degradation, practiced by rural landowners in the region to carry out milk production and the exploitation of forest resources.

As highlighted by Windham-Bellord and Mafia (2012), the program aimed to increase vegetation cover and implement ecological microcorridors; reduce pollution from erosion and lack of basic sanitation; and ensure the socio-environmental sustainability of the management and practices implemented, through financial incentives for rural producers.

As for the resources used in the financing, there was the institution of a municipal fund to pay for the environmental services provided, established by Municipal Law no. 2,482/2009, which, in its art. 4, provides for the forecast of public resources as sources of funding, namely:

Art. 4. The following constitute FMPSA revenues: I. Budget allocation, allocated annually, to the budget of the municipality of Extrema; II. Transfer from the budget of the Federal Government and the State of Minas Gerais; III. Product resulting from the collection of fees and/or the imposition of livestock practices, in accordance with environmental legislation; IV. Resources from charges for the use of water and water resources fund; V. Actions, contributions, subsidies, transfers and donations of national and international origin, public or private; VI. Resources from agreements, contracts, consortia and cooperation terms with public and private entities; VII. Income and interest from the financial investment of its assets; VIII. Reimbursement due under the Conduct Adjustment Terms – TAC, signed with DSUMA; IX. Revenues from the sale, negotiation or donation of carbon credits; X. Other resources intended for it (EXTREMA, 2009).

It is observed that municipal financing has an accounting and financial nature; therefore, linked to the Municipal Secretariat for Economic Development, Agriculture, Environment, Culture and Tourism, which provides the human and material resources necessary to achieve the objectives of Payment for Environmental Services.

As pointed out in this study, other municipal, state and even federal laws, including the Forest Code, have already addressed Payment for Environmental Services. Therefore, it is not an innovation of Law no. 14.119/2021. What is new in this Law are the normative perceptions about PPAs, LRAs and Areas of Administrative Limitations. So, in order for the present work to lead to the pertinent final considerations, it is advisable to take a more detailed look at these normative perceptions.

## **2 PPA, LRA AND ADMINISTRATIVE LIMITATIONS IN NPES**

The integration of the legal institutions of Permanent Preservation Areas and Legal Reserve Areas and Administrative Limitation Areas with the NPES aims to protect natural ecosystems, essential for a healthy quality of life (CARVALHO, 2020; OLIVEIRA, 2009). However, it is necessary to reflect on the nature of this relationship, which can be one with positive legal and social aspects or with legal and social aspects of concern from the point of view of legal protection of the environment.

### **2.1 Are permanent preservation areas and legal reserve areas species of administrative limitations?**

The starting point for answering this question lies in the reflective exercise on the design and legal nature of PPAs, LRAs and Areas affected by Administrative Limitations.

PPAs and LRAs are environmental goods represented in ideal parts of forests. For Celso Antônio Pacheco Fiorillo (2010), forests, when located on private properties, result in obligations to their owners, since the environmental asset belongs to everyone, who commonly uses and enjoys this asset.

Regarding the understanding of these areas, Gonçalves *et al.* (2021) emphasize that PPAs occupy a prominent place in natural ecosystems, functioning as true areas for the protection of water, forest, biodiversity and soil resources. The authors complement by asserting that such areas are responsible for harboring the development of the ecosystem essential to environmental balance.

As for the LRA, Braúna (2015) specifies that it is a space specially protected by law. In this sense, Milaré (2000) states that this area consists of the allocation of a continuous portion of each rural property for the preservation of vegetation and soil.

In the legal aspect, the first Brazilian legal norm to conceptualize a Permanent Preservation Area was the revoked Forest Code of 1965 (Law no. 4,771/65), through its art. 1, § 2, II (BRAZIL, 1965). The Institute of Legal Reserve Area appeared implicitly in the revoked Forest Code of 1934, with its first express mention in Law no. 7,803/89 (BRAÚNA, 2015).

Currently, the legal concept of PPA is provided for in art. 3, II, of Law no. 12.651/2012 (Forest Code), stating that they are protected areas, regardless of the existence of native vegetation, “with the environmental function of preserving water resources, the landscape, geological stability and biodiversity, facilitating the gene flow of fauna and flora, protect the soil and ensure the well-being of human populations” (BRASIL, 2012).

In turn, the LRA institute finds a normative conception in art. 3, III, of the Forest Code, consisting of any area highlighted within rural areas to perform the role of guaranteeing the “economic and sustainable use of the rural property’s natural resources, assisting the conservation and rehabilitation of ecological processes and promoting the conservation of biodiversity, as well as the shelter and protection of wild fauna and native flora” (BRASIL, 2012).

For Antunes (2021), PPAs and LRAs are species of the “forest property” sort, justifying their legal nature of forest property with a special aspect of general property law, just as civil property is seen in the Civil

Code through neighborhood rights. The property right has its general aspect fixed by the Federal Constitution of 1988, and the civil aspect or the environmental aspect are special aspects of this overview.

For Sarlet (2021), the nature of PPAs and LRAs corresponds to legal institutes incorporated into the property right, imposing on owners, possessors or occupants the obligation to restore the vegetation of these areas, even if they are not responsible for the degradation, to the extent in which this obligation has a “*propter rem*” nature, being linked to the thing.

Regarding the difference between these areas, Milaré (2000) establishes a practical distinction, emphasizing that in the LRA, the complete exploitation of the natural resources existing there, such as forests, is allowed, provided that there is regular authorization from environmental agencies, while in the PPA there is no such possibility.

It is important to note that, both in PPAs and LRAs, there is an “ecological function” linked to these areas, that is, once classified as PPA or LRA, protection and environmental function are automatically and essentially incorporated into them. Thus, because these areas have an embodied “ecological function”, the main objective is the preservation of nature, with no exceptions in the face of other interests, whether economic or social.

Another outstanding aspect about these areas corresponds to the constitutional foundation of protection. The establishment of such environmental areas, in the field of legal sciences, finds its initial foundation in art. 225 of the Federal Constitution of 1988. This rule imposes on the Government and society in general the commitment to defend and preserve an ecologically balanced environment for present and future generations (SILVA, 2019; MORAES, 2021).

From this meaning established in the fundamental law, Sarlet and Fensterseifer (2019) emphasize that the new constitutional order incorporated the environment into the conception of life, as a necessary element for a dignified and healthy quality of life.

In short, based on the constitutional foundation given by art. 225 of the Federal Constitution of 1988, it is concluded that the infra-constitutional provision, stamped in the Forest Code, regarding the mandatory environmental function of PPAs and LRAs, is mandatory for every citizen.

It is about the duty of conservation, as a way of guaranteeing life, therefore, no possibility of disregarding these precepts can be tolerated, except in legal hypotheses of disregarding the environmental function.

In turn, the Administrative Limitations receive doctrinal classification

next to the chapter referring to the restrictions imposed by the Public Administration on private property (DI PIETRO, 2008; MOREIRA NETO, 2005).

In this way, administrative limitations can be conceptualized as generic measures, imposed by law, in the strict sense and based on the State's typical police power, causing positive or negative obligations to the owners, with the purpose of conditioning the exercise of property right to social welfare (DI PIETRO, 2008).

On obligations, Di Pietro (2008) highlights that the content of administrative limitations, as a rule, comprises "obligations not to do" – *non facere* – imposed by general and abstract norms. The author emphasizes, however, that some of these "not to do" obligations end up also imposing a positive obligation (to do) on the agent, giving rise to the existence of administrative limitations of a positive nature. Exemplifying this exception, the author highlights the obligation imposed on the owner to demolish a building that threatens to collapse or the owner's obligation to adopt measures against fire.

Another accepted concept is the one in which the administrative limitation is seen as a modality of ordinary, abstract and generic intervention of the Public Administration on private property, restricting the freedom of action and the resulting rights, in a permanent and non-delegable way, without the need to have compensation (MOREIRA NETO, 2005).

Regarding its legal nature, the Administrative Limitation corresponds to a general obligation of a public nature (non-contractual) imposed by the State, limiting, among other rights, the right to property.

According to Di Pietro (2008), administrative limitations have the following characteristics: (i) they are imposed based on a public interest; (ii) are imposed by the Public Administration in the exercise of police power; (iii) stem from general and abstract rules applied to indeterminate private properties.

Another important characteristic of the Administrative Limitation, according to Celso Antônio Bandeira de Mello (2010), corresponds to the fact that the use of the property takes place within the limits established by law, without sacrificing the right to property.

Still regarding the characteristics, in Bielsa's perspective (*apud* DI PIETRO, 2008), the administrative limitations are specific, abstract and generic conditions in relation to the property right, thus, there is no possibility of indemnification. In the same sense, Moreira Neto (2005) teaches that

administrative limitations are universal, meaning that their applicability is uniform on properties, thus guaranteeing them free of charge.

The purpose of the administrative limitation is the satisfaction of the collective interest abstractly considered (DI PIETRO, 2008). In Marcello Caetano's perspective (*apud* DI PIETRO, 2008, p. 122), the purpose of the administrative limitation is related to the execution of "abstract public interests, of the ideal public utility not embodied in the function of a thing", that is, referring to an individualized thing, because only that thing can perform that function, meeting the need. In short, public utility ends up being embodied in the very function of the thing.

In Moreira Neto's perspective (2005, p. 376), the purpose of administrative intervention is to "dimension and condition the hypothetical amplitude that can be given to the exercise of individual freedoms, rights and guarantees, notably, in this case, the exercise of property right [...]".

In view of the above, PPAs and LRAs can be considered an administrative limitation insofar as they impose general conditions on the property right, forcing the owner to preserve nature intact (*non facere*) or to recover devastated nature (*facere*), aiming to ensure a collective interest represented in the preservation of the environment for present and future generations, without any right to be indemnified or financially rewarded.

## **2.2 Is the PES an environmental setback for PPA and LRA and Areas affected by Administrative Limitations?**

The answer to this question can only be reached through the dialectical exercise between the following legal norms: art. 225 of the Federal Constitution of 1988, the Forest Code (Law No. 12.651/2012) and the National Policy on Payment for Environmental Services (Law No. 14.119/2021).

The Federal Constitution, in its art. 225, revealed to Brazilian society the fundamental right to an ecologically balanced environment. Because it is fundamental, such a right is classified as a true normative element of what is understood by human dignity (SOUSA, 2021), impossible to disregard.

The Forest Code operationalized this environmental constitutional protection through the PPA and LRA, instituting the environmental function in order to prevent, or at least contain, the actions that cause environmental degradation. This is what can be deduced from the conjugation of its arts. 2 and 3, II and III, when they point out that forests and native

vegetation are assets belonging to all the country's inhabitants and that, for this reason, the right to property must be exercised strictly in accordance with legal dictates, taking into account their ecological function. The operationalization of environmental constitutional protection will also occur through other administrative limitations that, like the PPA and LRA, are instituted by law with the purpose of protecting the ecologically balanced environment, e.g. a law that prohibits the expansion of existing buildings in areas considered to be of environmental interest and not covered by PPA and LRA.

Regarding this topic, Trennepohl (2019) highlights that it is possible to exercise the right to property over environmentally protected areas, provided that their owners respect the legally established limitations, under penalty of being classified as illegitimate the conduct that confronts such limitations. Also in this regard, Franco (2017) emphasizes that any conduct that results in environmental damage entails civil, criminal and administrative liabilities for the author, under the legal terms in force.

With the apparent purpose of following the operationalization of the constitutional protection of the environment, Law no. 14,119/2021 presented to society the possibility of payment for environmental services for permanent preservation areas, legal reserve areas and areas affected by administrative limitations aimed at environmental protection, establishing in its art. 9, sole paragraph, that the purpose of such payments is, preferably, to protect such areas, when located in hydrographic basins, considered critical to the public water supply, or in areas considered priority for the conservation of biological diversity, which are under a regime of desertification or fragmentation.

However, when the aforementioned rule allocated the PES to PPAs, LRAs and Areas affected by Administrative Limitations, there was a false perception that, from that moment on, the owners, possessors or holders, would be entitled to "compensation or some other benefit", if they complied with the obligation to preserve and/or restore the natural ecosystem existing in these areas. At this step, it also insinuated the false perception about the release of the owners, possessors or holders, to preserve or restore the existing natural ecosystems in these areas if they were not contemplated with the PES.

At no time will it be possible to link the fulfillment of what is inherent to the property right – in this case, the environmental protection of PPA, LRA or Administrative Limitations of an environmental nature – to a

benefit, such as the PES, given the risk of imagining that failure to receive this benefit releases the fulfillment of those general and abstract duties legally imposed (ANTUNES, 2021). In comparison, it is as if the owner respected the neighborhood rights only if he was awarded some prize or compensation.

The lesson of Gonçalves *et al.* (2021) teaches that Brazilian environmental legislation has always shown concern for environmental protection; however, mere legislative action is no guarantee of success, if it is not combined with regular ecological management by the Government. As if the absence or the flawed performance of this ecological management were not enough, it has been seen that the legislation currently produced is also adopting positions that favor the anthropocentric paradigm of the relationship between human beings and nature, allowing a possible setback for environmental protection.

## FINAL CONSIDERATIONS

The National Policy for Payment for Environmental Services, which corresponds to an organized set of government actions, is implemented through the Federal Program for Payment for Environmental Services. Payment for environmental services was established as a mechanism for protecting the fundamental right to an ecologically balanced environment, extracted from the Protector-Receiver Principle and stamped with art. 225 of FC/88.

Thus, the PES has been seen as a legal instrument of an economic nature, a legal transaction of a transactional nature, between a “payer” of ecosystem services and a “provider” of these services, aimed at preserving areas where natural ecosystems take place, such as PPA, LRA and Areas affected by Administrative Limitations of an environmental nature, through the transfer of financial resources or any other form of remuneration.

The payment methods for environmental services, according to Law no. 14.119/2021, are: direct payment, monetary or non-monetary; the provision of social improvements to urban or rural communities; offsets linked to of emissions reduction certificates from deforestation or degradation; green bonds; lending and Environmental Reserve Quotas (CRA); with the expectation that other methods may be created by the NPPES’s managing bodies.

The sources of funding for the FPPES, established by Law no.

14,119/2021, comprise the capture of reserves from private individuals or legal entities and also resources from multilateral or bilateral international cooperation agencies. This model of sources is the target of criticism due to the non-inclusion of the Government as one of these sources; the absence of a forecast on how the amounts from monetary sources will be distributed also gives rise to discussions.

PPAs and LRAs are types of administrative limitations imposed with the aim of preserving and recovering environmental ecosystems essential to a healthy quality of life. Administrative limitations are usually responsible for imposing general obligations, limiting citizens' rights, including the right to property, regardless of compensation or any other form of consideration, due to the prestigious public interest.

The fact that Law no. 14.119/2021 provides for the possibility of making payment for environmental services to PPAs, LRAs and Areas affected by administrative limitation of an environmental nature may at first appear to be possible to value the ecologically balanced environment, insofar as it will be remunerating that owner, possessor or holder dedicated to the environmental cause.

However, the rule of art. 9, sole paragraph of Law no. 14.119/2021, can never be interpreted in such a way as to link the fulfillment of an obligation inherent to the property right to the receipt of indemnities or compensations, such as, for example, payment for environmental services, under penalty of implementing a pernicious legal hermeneutic, releasing the compliance with the duties of environmental preservation and recovery of these areas, linked to the property, in the face of not receiving these benefits.

In other words, the best systematic interpretation of the rule of art. 9, sole paragraph, of Law no. 14.119/2021, in line with the provisions of arts. 2 and 3, II and III, of the Forest Code (Law n. 12.651/2012) and art. 225, of the Federal Constitution of 1988, is the one that ensures payment for environmental services to permanent preservation areas, legal reserve areas and areas affected by administrative limitations of an environmental nature, without the eventual absence of this payment representing exemption from the duty to preserve and recover the environment in these areas.

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Article received on: 06/10/2022.

Article accepted on: 10/28/2022.

**How to cite this article (ABNT):**

SANTOS, S. S.; GUELFY, A. R.; BERTÃO, S. M. The national payment policy for environmental services: a step backwards? *Veredas do Direito*, Belo Horizonte, v. 19, no. 45, p. 189-217, sep./dec. 2022. Available from: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/2379>. Access on: Month. day, year.