



AMCHAM INDONESIA

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Clarification Brief/Working Paper

Environmental Laws and Regulations

Issue Summary

Producing and distributing goods and services in an environmentally responsible manner is the primary objective of U.S. companies operating in Indonesia. American companies have a track record in effectively operating in complex and diverse regulatory environments and take pride in such leadership roles. Over the last 18 months, the Indonesian parliament has enacted several laws that impact how companies' environmental performance shall be characterized, monitored and managed by regulatory bodies at the national, provincial and municipal levels. These laws, although good in their intent, raise a number of questions regarding their interpretation and implementation.

The passing of Law 32/2009 (Environmental Protection and Management) and Law 18/2008 (Municipal Waste Management Act) brings about a number of implementing regulations, which are expected to provide guidance and clarity. This Clarification Brief/Working Paper (CB/WP) seeks clarification on the timing and format of consultation related to implementing regulations for Laws 32/2009 and 18/2008. More importantly, this CB/WP suggests clarification points to be inserted into such consultations, so key stakeholders engage in fruitful discussions that contribute to a greater understanding of and compliance with the law.

Since AmCham represents a broad scope of industry sectors, the organization looks forward to the opportunity for engagement to ensure stakeholder concerns are considered.

Objective

In an effort to find a balance between environmental and social responsibility, economic development and operational efficiency, and under the provisions set forth by Law 32/2009 and Law 18/2008, AmCham seeks to work with the Indonesian government and other key stakeholders to develop a set of implementing regulations that support the intent of these laws within proposed guiding principles and objectives. Ultimately, AmCham seeks to contribute to regulations that promote clarity, transparency, consistency, efficiency and competitiveness.

Position

AmCham expresses the following concerns and hopes to work closely with relevant government authorities to address these concerns during development of the respective implementing regulations:

Environmental Protection and Management No. 32/2009

Transition and Coordination

- Firms operating without AMDAL will require an environmental audit within two years of the regulation's passage, October 2009. Firms operating without a UKL-UPL shall formulate an environmental management document within two years of the passage of the Law. (Environment Law No. 32/2009 Article 121) Guidance is needed to clarify applicability, type of audit, the process for conducting audits and to what standard those audits will be carried. (Environment Law No. 32/2009 Paragraph 12)
- Companies are now required to work within the framework of the Environmental Management Protection Plan (Rencana Perlindungan dan Pengelolaan Lingkungan Hidup) (Environment Law No. 32/2009 Article 12) and Strategic Environmental Impact Assessment (Kajian Lingkungan Hidup Strategis) (Environment Law No. 32/2009 Articles 15-17). These mechanisms, critical to regulatory and planning context of the Law, have yet to be defined. Given the operational experience of its members, AmCham would be interested in providing inputs (sharing insights and best practices) to the KLHS and RPPLH, particularly related to the analyses of environmental carrying capacity, methodologies for impact assessment, climate change impact and use of natural resources. (Environment Law No. 32/2009 Article 18)
- Recognizing that Regulation of the State Minister of Environment 11/2006 requires firms conducting activities with significant impacts to conduct an AMDAL, and recognizing that Environment Law 32/2009 Article 23 indicates criteria for significance, it remains unclear if additional business activities will require audits. Clarification of which parties are qualified to perform the audits is also requested.
- Ministry of Environment (MOE), other Ministries and local government must coordinate closely to oversee overlapping regulations, for example in connection with monitoring of the Environmental Law compliance in the oil and gas mining activities which lies with the Ministry of Energy and Mineral Resources, rather than the MOE (Article 41 of Law No. 22 of 2001 Regarding Oil and Gas). Oversight of this complex regulatory environment is especially important given the strong enforcement mechanism in Law 32/2009.
- Clarification on ways Government plans to manage and enforce all related permits by both business and the government is needed to help facilitate and ensure compliance. The enforcement mechanism of the law relies on regional civil servants to interpret the law without the technical skills to fully understand environmental quality and the legal aspects of the regulations. The law does not indicate how compliance patterns will be monitored and how the health impact of chronic or acute non-compliance will be used to trigger action.
- Clarification is requested regarding the provisions whereby all existing environmental management licenses shall be integrated into an environmental permit, specifically whether all existing licenses will be replaced by the environmental permit. (Environment Law No. 32/2009 Article 123)
- Clarification on the coordination between MOE and the Minister of Communication with respect to the transportation of hazardous and toxic waste is required. (Environment Law No. 32/2009 Article 59)

Environmental Permits

- Requiring issuance of environmental permits prior to obtaining a business license will cause costly delays in establishing a business in Indonesia. Environmental permits become a “Super License” as no business permit can be issued without it. AmCham requests clarification on how compliance management will be implemented. The process of obtaining and revoking environmental permits is of concern given the consequence is denial or revocation of the business permit. It could mean that operation and production activities of a company can be shut down once it loses its environmental permit. Further, given the strengthened role of the AMDAL in the business licensing, AmCham would be interested in further understanding how permit conditions (RKL/RPL) will be monitored and managed. (Environment Law No. 32/2009 Articles 37 and 40)
- Environmental permits should be issued automatically following AMDAL approval. AmCham recommends a single Government agency issue both the AMDAL approval and environmental permit concurrently. It is likely that the processes for issuing both will be similar and hence, redundant. Waiting for AMDAL approval to begin the process of issuing an environmental permit will make the process unnecessarily long and costly. (Environment Law No. 32/2009 Article 36)
- It is unclear how firms currently operating will be impacted by the new requirement for obtaining environmental permits prior to obtaining a business license. Clarification is required as to whether a grandfather clause will be included in the implementing regulations or existing companies will be subject to the new requirement. If existing companies will not be grandfathered-in, AmCham requests guidance on the renewal and timing of existing business licenses. (Environment Law No. 32/2009 Article 40)
- Clarification is required on the issuance of environmental permits for projects requiring multiple-levels of AMDAL (UKL-UPL) approval, specifically after which approval stage environmental permits can be issued.
- Clarification of the environmental risk analysis component, which appears to overlap with the AMDAL, is requested. (Environment Law No. 32/2009 Article 47)

Industry Responsibility in Managing Environmental Quality

- Clarification on the environmental reserve requirement is necessary, specifically, identification of scope of remediation, characterization of costs assumed by firms, time period for payment, and the process for effectively establishing reserves. Additionally, the rights of industry in establishing and using funds earmarked for environmental damage or restoration purposes must be explained, specifically determining the amount of funds to be earmarked, addressing financial losses due to opportunity cost and diminishing value of earmarked funds, and avoiding third party abuse when restoring environmental function. (Environment Law No. 32/2009 Article 55)
- Transparency and security of funds while under government management must be elucidated. Clarification is requested to address concerns over the present value of money, specifically accrual of interest, and mechanisms for Government management of resources, including those funds that ultimately are unused. (Environment Law No. 32/2009 Article 55)

- Clarification is requested on whether funds spent to meet “Environmental and Social Responsibility” requirements are tax deductible. (Law of the Republic of Indonesia Number 40/2007 concerning Limited Liability Companies Article 74)
- Clarification is requested on the guarantee fund for environmental restoration which appears to overlap with the provisions regarding the reclamation and post-mining guarantees under the mining laws. (Environment Law No. 32/2009 Article 55)
- Clarification is requested on the guarantee fund for environmental restoration since there is potential for “double charge” with the platform decommissioning fund or Asset Retirement Obligation which is stipulated under the Production Sharing Contract for upstream oil and gas businesses. It could also potentially increase the cost recovery. (Environment Law No. 32/2009 Article 55)
- Clarification is needed on the range of risks and associated thresholds in terms of assessment, management, monitoring, and communication. (Environment Law No. 32/2009 Article 47)
- Clarification is needed on industry’s responsibility to safeguard environmental quality and to provide environmental data in an accurate and timely fashion. (Environment Law No. 32/2009 Article 68)
- A clause to address “abnormal” and “emergency” conditions that may cause the environmental quality standards or effluent/emission standards to be exceeded is required. In the absence of such guidance from the implementing regulations, the “abnormal” or “emergency” condition could be perceived as environmental pollution based on the definition of Environmental Pollution in Environment Law No 32/2009 Article 1.
- The determination of environmental standards is crucial. The existing MOE’s environmental standards do not distinguish new facilities from those in operation prior to the new standards. Existing facilities were designed and constructed based on previous standards and are not capable of meeting the new standards immediately. As with environmental permits, clarification is required as to whether a grandfather clause will be included in the implementing regulations on new environmental standards. If existing companies will not be grandfathered-in, AmCham requests a grace period (transition period) of a few years be granted to allow firms to upgrade facilities to comply with the new standards. Without this allowance, considerable parts of the extractive industries (mining, oil & gas, manufacturing, etc.) will have to be shut down. Such an event would significantly impact the country’s economy and the income of many people. (Environment Law No. 32/2009 Article 20)
- It is suggested the implementing regulations clarify that discharge and effluent standards be based on the environmental carrying capacity of the receiving media (Ministry of Environment Regulation No 4/2007 concerning Effluent Standards for Oil and Gas and Geothermal), instead of applying the same environmental standards regardless of the environmental carrying capacity. Additionally, discharge permit conditions (Ministry of Environment Decree No 12/2006) should be based on scientific study (modeling/assessment). (Environment Law No. 32/2009 Article 20)
- It is advised to set up an implementing regulation (guidelines) for dumping permits. The issues in the oil and gas industry include, but are not limited to, the dumping of drilling mud and cuttings, produced sand and hydrostatic water. Specifically for drilling mud and cuttings, it is recommended that the Ministry of Energy and Mineral Resources Decree No 45/2006 be used as

reference in the absence of guidelines for dumping permits from the Ministry of Environment. (Environment Law No. 32/2009 Articles 60-61)

- With regards to environmental quality standards, AmCham recommends establishing a mechanism whereby entities can apply for variance to the standard if justifiable and supported by a thorough scientific study. (Environment Law No. 32/2009 Article 20)

Enforcement and Litigation

- Clarification is requested regarding legal protections for individuals and organizations that report and press charges against a firm accused of violating environmental regulations. There is concern that the law eliminates personal accountability and allows parties to intentionally threaten a company without justification due to the prohibition of a mechanism for retribution, namely the ability of firms to respond through criminal or civil suit in a court of law. (Environment Law No 32/2009 Article 67)
- Recognizing increased cooperation between civil servant investigators and police, there remain concerns with the extended authority of civil servants to conduct investigations and arrest and detain offenders. The government is requested to clarify its role in enforcing the law when investigating allegations from organizations and the public. (Environment Law No. 32/2009 Article 94)
- Clarification is needed on the public right to sue - in particular, in the context and definition of empowerment, enforcement and material loss or other types of claims including the community's objection to the AMDAL document [Article 26(4)] and the judicial process and jurisdiction. (Environment Law No. 32/2009 Article 92)

Municipal Waste Management Act No. 18/2008

- Regarding new labeling requirements, guidance is needed on labeling standards (e.g the scope of information to include) and applicability of labeling requirements, specifically the type of good to be labeled and source (e.g. domestic versus import). (Municipal Waste Management Act No. 18/2008 Article 14)
- Clarification is required on producer obligations to manage non-biodegradable packaging and products. Items to address include the range of packaging and products affected by the requirement, limits to the length of firm responsibility for packaging and products, and elaboration on management processes. (Municipal Waste Management Act No. 18/2008 Article 15)
- Requirements for recycling or processing waste and by-products are vague. Waste management companies and agricultural producers need direction on how to process wastes from their operations as well as clarification on what types of waste are regulated. There is some concern that the definition of waste is too narrow. (Municipal Waste Management Act No. 18/2008)
- Financial incentives should be considered in order to encourage municipal waste companies to adapt new and clean technology rather than require composting through new regulations. Regulatory requirements to compost waste remove the possibility of financial incentives such as carbon credits. (Municipal Waste Management Act No. 18/2008)