

Clearing the Air

Environmental Law 32/2009

By Julie Cerqueira

Indonesia's rapid economic growth, coupled with its lack of transparency and consistency in environmental governance, has led to unsustainable resource exploitation and widespread environmental pollution. Previous environmental regulations have proved insufficient to manage and protect natural resources. As a result, the Ministry of Environment passed the Environmental Management and Protection Law No. 32/2009 in October last year. This law supersedes environmental management acts No. 4/1982 and No. 23/1997. While maintaining the spirit of its legal predecessors, the new regulation provides innovative (and complex) tools to manage environmental impact, emphasizes the importance of environmental compliance management, addresses (and creates) issues of authority in the newly decentralized government, links environmental permitting to business licensing, and instates steep criminal and civil penalties that will surely act as strong deterrents to violators (and investors).

Revisions to the Licensing Process: From Planning to Permit Planning is a critical component of the new regulation. Government involvement in the early stages of project approval is meant to prevent anticipated environmental degradation. Companies must now work within the framework of the Environmental Management Protection Plan (RPPLH) and Strategic Environmental Impact Assessment (KLHS). These mechanisms, critical to the regulatory and planning context of the Law, have yet to be defined. Industry experts should work closely with the government to share insights and best practices to the KLHS and RPPLH, especially in

relation to the analyses of environmental carrying capacity, methodologies for biodiversity characterization and impact prediction, climate change adaptation, and natural resource use. One of the most significant changes brought about by Law 32/2009 is in regards to the environmental permitting process. According to Article 40, environmental permits are now required prior to obtaining a business license. Although still unclear, it is possible that this new environmental permit may consolidate all other classes of environmental permits currently in use and consequently streamline the permit process.

In order to receive an environmental permit, firms must already have Environmental Impact Assessment (AMDAL) approval or Environmental Management and Monitoring Plans (UKL/UPL), which is the basis for determining the environmental feasibility of the project. It is likely that the process for issuing both will be similar and hence, redundant. Waiting for AMDAL or UKL/UPL approval to initiate the environmental license process will probably become unnecessarily lengthy and costly. It is recommended that environmental permits should instead be issued automatically following AMDAL or UKL/UPL approval, and that a single Government agency issue both.

Firms must obtain an environmental license, in addition to the AMDAL or UKL/UPL for non-



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significant impacts, by October 3, 2010. Firms currently operating without an AMDAL are required to conduct an environmental audit by October 3, 2011. Those operating without a UKL/UPL are required to formulate an environmental management and monitoring document within the same timeframe. For those companies requiring multiple levels of AMDAL or UKL/UPL approval, the process becomes further complicated and it remains unclear at which stage these firms would be issued environmental permits. Failure to comply with new requirements can result in forfeiture of a firm's operating or business license by various levels of government.

Given this complex regulatory mechanism, coordination between the Ministry of the Environment and other Ministries to oversee overlapping regulations is crucial. This will be especially important for firms in the mining, oil & gas, manufacturing, plantation and forestry sectors, where strong environmental regulations already exist.

Another noteworthy development, Article 47 requires companies generating significant impacts on the environment or human health and safety to conduct risk analyses, including assessment, management

and communication. The law, however, provides no guidance as to the range of risks and associated thresholds. It appears that the required analysis may very well overlap with the AMDAL.

Prevention and Rehabilitation: Economic Instruments and Environmental Reserves

While stiff penalties and empowered civil servants may deter polluters, Law No. 32/2009 provides important incentives to improve corporate environmental performance. Itemized in Article 43, these include a focus on procuring environmentally friendly products and promoting environmental labeling; developing an emissions and waste disposal trading system; incorporating

environmental principles in the policies of the financial sector and capital market; and imposing environmental taxes, retribution and subsidies. The government will also incorporate changes to the natural resource base into GDP estimates to more accurately calculate national income.

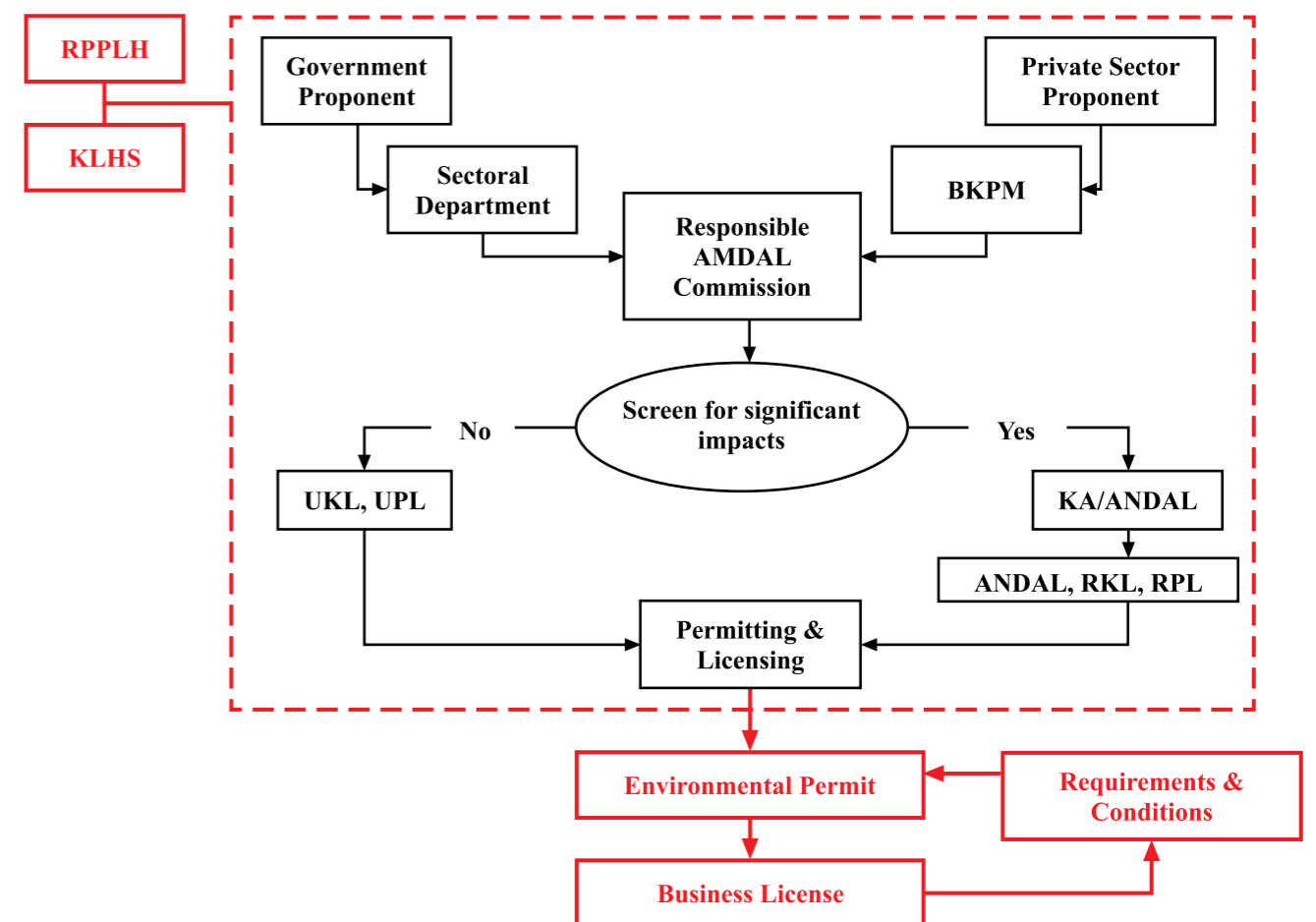
In an effort to guarantee that polluters are held financially responsible for environmental remediation, Article 55 requires all environmental permit holders to establish an environmental fund which is to be held in a designated government bank. The Minister, Governor and/or Mayor have the authority to assign a third party to use the funds to conduct environmental rehabilitation.

Although the environmental

reserve requirement is a valuable step in assuring funds are available to remediate degraded areas, the corresponding implementing regulations must clearly outline the rights of industry in establishing and using earmarked funds. Any ambiguity will subject the law to wide interpretation and certain abuse by rent-seekers and corrupt officials.

Implementing regulations must clarify the scope of remediation, characterization of costs assumed by firms, time period for payment, and the process for using such reserves. Regulations should also explain the process for determining the amount of funds to be earmarked, addressing financial losses due to opportunity cost and

Diagram of Revised Permitting Process



New steps required by Law No. 32/2009 are in red. Courtesy of PT ERM Indonesia.

diminishing value of earmarked funds, and avoiding third party abuse when restoring environmental function. Finally, there should be an indication for how funds will be managed if ultimately unused.

Enforcement and Litigation

Law No. 32/2009 includes a strong law enforcement mechanism that gives investigative authority to civil service officials. Article 95 authorizes civil servants to investigate cases of environmental non-compliance, examine proprietary information, seize materials to be used as evidence, halt infringements, and arrest and detain offenders. Civil servants mandated to enforce all related permits and ensure compliance are not required to possess the technical skills to fully understand environmental quality and the legal aspects of the regulations. Despite increased cooperation between civil servant investigators and police, there remain concerns with this extended authority of civil servants. In particular, it is likely that a gap may exist between interpreting the law and having the appropriate training and certification to effectively carry out the prescribed investigations.

The Law decentralizes not only the authority to investigate, but also the right to access information and bring suit against non-compliant firms. The public right to a clean environment as well as access to information, participation and justice, is a welcome step. The public has the right to lodge a complaint against projects perceived to significantly impact the environment and can file a class action law suit against would-be violators. The public is also protected from retaliation. This safety clause, while important in assuring the public can prosecute polluters without fear of legal retaliation, also opens the door to false accusations to delay unpopular projects. Articles 87 and 88 also explicitly state that firms are “strictly” liable for violations: the plaintiff is not required to prove fault

as a basis for damages claims. This strict liability applies if a party whose action, business and/or activity (i) includes the use of hazardous and toxic material (Bahan Berbahaya dan Beracun, or “B3”), (ii) reduces and/or manages B3 waste and/or (iii) poses a serious threat to the environment. Sub-paragraph (iii) makes it clear that strict liability is imposed even if B3 is not involved, if that party’s “action, business and/or activity” poses a serious threat to the environment.

Aside from the obvious financial repercussions resulting from potential project delays and litigations, the financial and criminal penalties for violators are quite severe. Negligent actions that cause exceedances of environmental quality standards carry a minimum of one year imprisonment and fines of 1-3 billion rupiah. Actions causing serious injury or death face a minimum of 12 years imprisonment and fines of 4-12 billion rupiah. The most severe penalties are reserved for firms or individuals introducing B3 wastes into the Republic. Maximum sentences are as high as 15 years and penalties range from 5 to 15 billion rupiah.

The Way Forward

Assistant Environment Minister, Dana A. Kartakusuma, predicts “that the regulations under this law will be done in one or two years, and the

implementation of this law will be executed stage-by-stage during the next five years.”¹ There is some concern that industries need more time to bring their operations into compliance with the new standards and would rather reduce supply than risk the criminal and civil penalties facing violators. Director General for Oil and Gas, Evita H. Legowo, has gone so far as to state that implementing Law No. 32/2009 at this stage may lead to oil and gas production reductions of up to 40%.² Implementing regulations detailing environmental standards are scheduled for release in the summer of 2010 and the dozen or so associated implementing regulations will soon follow suit. The window for industry input into the implementing regulations for this important law is narrowing. If Indonesia is to have a comprehensive environmental law that both protects its valuable resources and encourages investment (and thereby economic growth), it is essential that industry and civil society provide regulators with input, insights and guidance. ■

¹ Reuters. “Time needed for Indonesia environment law: official”. 16 October 2009

² Jakarta Post. “Ministers ask contractors to comply with environmental law”. 25 February 2010

Glossary	
AMDAL	Environmental Impact Assessment
ANDAL	Environmental Impact Statement
BKPM	Foreign Investment Coordination Board (Ministry level)
KA	Terms of Reference
KLHS	Strategic Environmental Impact Assessment
RKL	Environmental Management Plan (significant impacts)
RPL	Environmental Monitoring Plan (significant impacts)
RPPLH	Environmental Management Protection Plan
UKL	Environmental Management Plan (non-significant impacts)
UPL	Environmental Monitoring Plan (non-significant impacts)

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Home Security during Vacation

By Marilyn Ardipradja

During the summer holidays when many expatriates vacate their homes for long periods, special attention should be given to the security of your home. It is at this time of year and at *Lebaran* (the holiday period at the end of the fasting month of Ramadan), that you may become more vulnerable to incidents of theft. However, there are a number of measures that you can take to significantly reduce your risk exposure:

- Continually remind domestic staff not to admit unauthorized visitors.
- Also remind your staff to be cautious about giving sensitive

information, especially in relation to your whereabouts, to those telephoning your home. It is one of the best methods for organized thieves to identify windows of opportunity to steal. Staff need only reply to a curious caller “I am sorry, he/she is not here at the moment, please leave me your name and number so that he/she can return your call.”

- Remind your staff to carry out their usual household routines as much as possible. This would indicate to the casual observer that you are still at home. For example leaving the lights on at night, mowing the lawns, cleaning the windows, etc.

- Ask colleagues from the office or friends to telephone or visit your house unannounced. This serves to both test the effectiveness of the instructions you left with your staff, along with lowering the temptation for your staff to steal or have their own vacation during your absence. You might consider occasionally calling home for any phone messages to reinforce the message.

Having done all this, you should enjoy your home leave with peace of mind. ■

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