

Ideal Model of Environmental Approval as an Instrument for Pollution and Environmental Damage Control in Sustainable Development

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Abstract

This study is centered on the change in the arrangement of environmental permits as regulated in Law of the Republic of Indonesia Number 32/2009 concerning Environmental Protection and Management (UUPPLH) to environmental approval as regulated in Law of the Republic of Indonesia Number 11/2020 concerning Job Creation (Omnibus Law). This study aims to examine and analyze the implications of changes in environmental approval arrangements as regulated in the Omnibus Law concerning environmental licensing in the Environmental Protection and Management Law. A normative legal research method was employed in this study. The approaches used in this study included the statute approach and the conceptual approach. The results of this study confirmed the need to balance economic interests with environmental sustainability so that sustainable development can be well actualized.

1. Introduction

Sustainable development is a global commitment that has been agreed upon by countries all over the world to jointly reach its goals, one of which is by achieving prosperity in the future while protecting the earth. Welfare within the framework of sustainable development is implemented following human rights and equality. In this regard, the Indonesian state constitution has stipulated the right concerning

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a decent and healthy environment as one of the basic rights of Indonesian citizens as regulated in Article 28H of the 1945 Constitution of the Republic of Indonesia. For this reason, all forms of environmental management must be performed by the applicable constitution and laws to maintain the state's environmental sustainability.

The implementation of development is closely related to the environment since development and the environment are mutually affected. Development that provides high-value benefits is a development that pays attention to sustainability for the sake of good environmental sustainability, while a good environment can also provide good results for development. The concept of sustainable development refers to a paradigm in the field of development that is directly linked to the balance of nature or the environment. In its implementation, especially in Indonesia as a legal state, all activities must be carried out by obeying the applicable law. This is in line with the goal of a legal state, which is to provide legal protection for the people. Regarding the State Administrative Law, Philip M. Hadjon stated that legal protection for the people, especially against governmental actions, is based on two principles, comprising the principle of human rights and the principle of a legal state. In every legal state, the principle of legality is applied, meaning that all government actions must be performed according to the applicable laws and regulations, which must exist and apply first (prior to administrative actions).

Based on the foregoing matter that is in line with the understanding of a legal state, Jimly Asshiddiqie mentioned one of the main principles of a legal state, namely the limitation of powers carried out through the principle of division of powers both vertically and horizontally. The limitation of power is conducted so that the power possessed by the bodies of government is not misused to allow arbitrary actions. One of the power limitations in Administrative Law is the limitation through licensing. In terms of environment, permits are necessary to

ensure that all actions of interested parties comply with applicable laws and regulations (Law of the Republic of Indonesia Number 32/2009 concerning Environmental Protection and Management or hereinafter referred to as the UUPPLH and other related statutory regulations) so that environmental sustainability can be well preserved.

Having stipulated with the promulgation of Law of the Republic of Indonesia Number 11/2020 concerning Job Creation (hereinafter referred to as Omnibus Law) in which there are amendments to the UUPPLH, this has implications for its implementation, especially those concerning permits that are amended to environmental approvals.³ The process of environmental permits regulated in UUPPLH and its amendment to environmental approvals are considered to only support the investment climate without putting much concern on environmental sustainability aspects. Therefore, it is necessary to pay attention to various aspects to preserve the environment.

Based on the author's observation, no study related to the "Model of Environmental Approval Arrangements as an Instrument for Environmental Damage and Pollution Control in Sustainable Development" was found. However, a study conducted by Mulyadi, Fahrul Siregar, and Inayatullah Abd Hasyim entitled "Pollution and Environmental Damage Control through Licensing Management at the Regional Level" was found.⁴ This study is centered on the analysis and examination of pollution and environmental damage control through licensing management in Bogor Regency. The results of this study show that Pollution and Environmental Damage Control through Licensing at the Regional

³ Helmi, Fitria, Retno Kusniati, "Penggunaan Omnibus Law Dalam Reformasi Regulasi Bidang Lingkungan Hidup di Indonesia", *Masalah-Masalah Hukum*, Jilid 50 No. 1 (Januari, 2021), hlm. 24-35.

⁴ Mulyadi, Fahrul Siregar, dan Inayatullah Abd Hasyim, " Pengendalian Pencemaran dan Kerusakan Lingkungan Melalui Pengelolaan Perizinan di Tingkat Daerah", *Jurnal, Jurnal Hukum De'rechtsstaat. Volume 4 No. 2, September 2018*.

Level is something that absolutely must be implemented since Environmental Permits are instruments or forms of government authority and monopoly in maintaining the environmental conditions of their regions so that they remain safe, comfortable without any pollution and environmental damage, and it will not only become a source of income which will ultimately have a negative impact on the region.

Another study conducted by M. Reza Baihaki entitled “Environmental Approval as an Objectum Litis of Liability Rights in the State Administrative Court (Critical Study of the Shift in Nomenclature of Environmental Permits to Environmental Approval in Law Number 11/2020 Concerning Job Creation)”.⁵ The results of this study indicate that environmental approval is a state administrative decision that can be performed sequentially by the right of accountability in the State Administrative Court.

Based on the description above, this study is significant to conduct by aiming at analyzing the implications of environmental approval arrangements as stipulated in Omnibus Law for environmental licensing in the UUPPLH as an instrument for pollution and environmental damage control in sustainable development and finding out the ideal model for approval environment within the framework of sustainable development.

2. Research Method

This study belongs to normative legal research that was conducted by finding legal rules, legal principles, and legal doctrines to answer the related problems. The

⁵ M Reza Baihaki, “Persetujuan Lingkungan Sebagai Objectum Litis Hak Tanggung Gugat di Peradilan Tata Usaha Negara (Telaah Kritis Pergeseran Nomenklatur Izin Lingkungan Menjadi Persetujuan Lingkungan Dalam Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja)”, jurnal, *Majalah Hukum Nasional* Volume 51 Nomor 1 Tahun 2021, <https://mhn.bphn.go.id>

approach used in this study is a statute approach, namely by using laws and regulations that regulate or relate to pollution and environmental damage control as a basis for analysis. A conceptual approach was also employed by studying various literature regarding pollution and environmental damage control.

The data analysis used in this research is a qualitative normative analysis by analyzing the data to obtain a thorough description of the environmental approval regulatory model as an instrument for pollution and environmental damage control in sustainable development.

3. Result and Discussion

a. Environmental Approval as an Instrument for Environmental Sustainability

Law of the Republic of Indonesia Number 32/2009 concerning the Protection and Management of the Environment (UUPPLH) has emphasized that every Indonesian citizen has the same human rights in the environmental field, especially the right to a good and healthy environment as mandated in Article 28H of the 1945 Constitution of the Republic of Indonesia. This means that all matters relating to environmental management must always be performed according to applicable laws and regulations so that it can guarantee human rights. Therefore, the UUPPLH regulates the scope of protection and environmental management which includes planning, utilization, control, maintenance, supervision, and law enforcement. Pollution and environmental damage control is performed in the framework of preserving the environment which includes prevention, mitigation, and recovery. The implementation to prevent environmental pollution and damage has several instruments regulated in Article 14 UUPPLH, including KLHS, spatial planning, environmental quality standards, standard criteria for environmental damage, amdal, UKL-UPL, permits, environmental economic instruments, etc.

Licensing regulated in UUPPLH has 2 (two) meanings: environmental permits and business licenses. The former refers to a permit granted to anyone who runs a business and/or activity that requires an Amdal or UKL/UPL in the framework of environmental protection and management as a prerequisite for obtaining a business and/or activity permit.⁶ What is meant by a business and/or activity license is a permit issued by a technical agency to run a business. The business owner must have an environmental permit before receiving a business license. Also, each business owner must have an Amdal or UKL-UPL to obtain an environmental permit. For this reason, granting environmental permits is a determinant for a business entity to be eligible in running the business. Therefore, the determination must be made carefully following the principles of environmental sustainability. Environmental permits must be issued by following juridical measures that have an impact on environmental management.

Law of the Republic of Indonesia Number 11/2020 concerning Job Creation (Omnibus Law) regulates environmental approvals as a step to simplify the basic requirements for business licensing. Meanwhile, according to Omnibus Law, what is meant by environmental approval is a decision on environmental feasibility or a statement of ability to manage the environment that has received approval from the central government or regional government. In environmental approvals, the EIA document is used as the basis for an environmental due diligence test and then the environmental feasibility decision is used as a requirement for issuing business permits.

The Amdal document as regulated in the Omnibus Law is different from the Amdal document as regulated in the UUPPLH. The former provides more specific

⁶ Dwi Febriyanti, Sartika Nur Aini, Alya Vena Resta, Raka Bagaskara P.K.P., "Fungsi AMDAL Dalam Pengendalian Kerusakan dan Pencemaran Lingkungan Setelah Diundangkannya UU Cipta Kerja", Jurnal Kajian dan Penelitian Hukum: Widya Pranata Hukum, Vol. 3 No. 2 (September, 2021), hlm. 115-133).

suggestions and inputs as well as community responses to business plans than that of the latter since they are limited to communities directly affected or relevant to business plans. Furthermore, if there are inappropriate things, the UUPPLH provides an opportunity for the public to submit objections to the Amdal document, as stipulated in Article 26 paragraph (4) UUPPLH, whereas the Omnibus Law does not have any regulation regarding this matter. In general, there are no significant amendments in the arrangements regarding the EIA in the Omnibus Law. However, business licensing arrangements in the Omnibus Law use the concept of risk-based licensing.⁷ This means that business permits are issued according to the risk level of business activities and the risk level determines the type of business license. In this case, environmental documents with high risk are required to have an Amdal, then medium risk documents only need UKL-UPL, while documents with low risk only need a Business Identification Number (NIB).

The risk-based permits regulated in the Omnibus Law are used as a basis for determining the legality granted to business actors to start their businesses or activities, which is based on the risk level of business activities. Implementation of risk analysis in terms of issuing business licenses based on Government Regulation Number 5/2021 concerning Implementation of Risk-based Business Licensing is performed according to the determination of the level of risk conducted by the central government by identifying several aspects, such as business activities, hazard level assessment, potential assessment for hazard occurrence, level of risk and business scale rate, and determining the type of business license. Also, the Government stipulates an assessment of the level of hazard carried out on several

⁷ Evan Devara, Maret Priyanta, Yulinda Adharani, *"Inovasi Pendekatan Berbasis Risiko Dalam Persetujuan Lingkungan Berdasarkan Undang-Undang Cipta Kerja"*, Litra: Jurnal Hukum Lingkungan, tata Ruang, dan Agraria, Vol. 1, No. 1 (Oktober 2021), hlm. 101-116).

aspects, namely health, safety, environment, and/or resource utilization, and management in the same regulation.

The risk-based approach as described above means that the government will grant permits based on the level of risk and threat of an activity or business. This is different from the concept of environmental permits regulated in UUPPLH. The approach concept adopted by the UUPPLH is the concept of a regulatory or licensing approach as a form of obligation that must be fulfilled by business actors to be able to run their business or what is referred to as the licensing approach. The regulatory approach which was later changed to a risk-based approach was assessed by legislators to reduce the cost of implementing the regulation, thereby simplifying the business licensing mechanism. It is ultimately expected that it will be able to provide economic, social, and environmental benefits. This is good news at some point, but it still leaves many doubts for various parties. The Indonesian Center for Environmental Law (ICEL) states that risk-based licensing will be difficult to implement in Indonesia and is considered not to be able to run optimally since the risk determination tends to be implemented subjectively and requires qualified data to determine the risk while each sector still lacks the database.

Even though many things need to be further examined in implementing the Omnibus Law, Indonesia as a legal state and a religious welfare state⁸

represented by the government does not only serve as a night watchman but has broader duties to hold public interests such as health, education, housing, etc. As for the Omnibus Law, 3 (three) elements have an essential role in the administration of a good welfare state, such as government, business actors, and society. The government is obliged to take some actions to organize state welfare;

⁸ Arief Hidayat, *"Negara Hukum Berwatak Pancasila"*, Materi Kuliah Tamu pada Universitas Negeri Malang, 2017.

thus, business actors still receive supervision from the government in performing their activities.

b. Ideal Model of Environmental Approval in the Framework of Sustainable Development

The previous description confirms that there are differences between the UUPPLH and the Omnibus Law in terms of its terminology and procedures in the efforts to protect the environment as stipulated in both laws. However, there is substantially no significant difference between the two.⁹ If this is traced further in state administrative law as stipulated in the UUPPLH, the environmental permits are *vergunning* or permits which means that the permit from the government is required for actions that generally require special supervision, but are not considered undesirable things.¹⁰ As for the elements in licensing, among others, is the existence of a concrete event and a procedure or requirement.¹¹ A concrete event is seen as an event that occurs at a certain time, a certain person, a certain place, and a certain legal fact. The application for a permit must meet the requirements and follow the procedures set by the government. The two elements of licensing also exist in the form of environmental approvals as referred to in the Omnibus Law. What is meant by environmental approval in the Omnibus Law is a decision on environmental feasibility or a statement of ability to manage the environment that has received approval from the central government or regional government. If these two matters are further examined, the environmental permits and environmental

⁹ Hario Danang Pambudi dan Ega Ramadayanti, "Menilai Kembali Politik Hukum Perlindungan Lingkungan dalam Undang-Undang Cipta Kerja untuk Mendukung Keberlanjutan ekologis", *Jurnal Hukum Lingkungan Indonesia*, Vol. 7., No. 2 (2021), hlm. 297-322.

¹⁰ Ridwan H.R., "Hukum Administrasi Negara", Jakarta, PT. Raja Grafindo Persada, hlm. 198.

¹¹ *Ibid*, hlm. 206.

approvals have elements in common, namely the existence of concrete events and the existence of conditions and procedures that must be fulfilled by certain parties.

However, it should be recalled that with the increasingly developing patterns of interaction in this globalization era, the laws and regulations must be created in such a way as to be able to accommodate the interests of all parties, in this case, a sustainable society can be realized at the global, national and regional levels, which builds a life based on awareness of the importance of the environment.¹² The interests between the UUPPLH and the Omnibus Law have a quite different orientation. To improve the investment climate which is the goal of the Omnibus Law, it is expected that the related parties do not forget about ecosystem sustainability so that sustainable development can be realized for the next generation. The formation of a legal product should be able to accommodate the values that exist in society. Philosophically, Pancasila has provided essential values for the implementation of people's welfare as outlined in the Preamble to the 1945 Constitution of the Republic of Indonesia. This is further elaborated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which forms the basis for mastery and management of living natural resources by the state to be used for the greatest prosperity of the people.

Mastery by a state means that the state has the authority to regulate all living natural resources for the welfare of the people, and it is known that living natural resources are life support. Therefore, it is mandatory to preserve them. For this reason, one should always be able to realize ecological principles in making a policy related to the environment by protecting human rights in obtaining a good and healthy environment, complying with laws that have the objective of environmental sustainability, ensuring that the interests of every citizen to obtain a sustainable life

¹² Sonny Keraf, 2014, *Filsafat Lingkungan Hidup, Alam sebagai Sebuah Sistem Kehidupan*, Yogyakarta, PT. Kanisius, hlm. 125

through the conservation and utilization of living natural resources are considered and treated equally with the interests of sustainability, ensuring that the conservation and utilization of living natural resources are performed transparently, and every citizen can participate and be actively involved in every decision-making and its implementation.

4. Conclusion

Environmental approval as stipulated in the Omnibus Law, does not terminologically and procedurally have significant differences from environmental permits. However, the objectives of the Omnibus Law and UUPPLH have great significant differences. One of the objectives of promulgating Omnibus Law is to improve the investment climate by cutting licensing procedures that were initially regulated in the UUPPLH, while one of the objectives of the UUPPLH is to preserve ecosystems for sustainable development. This leads to an imbalance between the pace of the economy and sustainability. If it keeps taking place, it will bring a serious impact on environmental sustainability. Therefore, the government always puts much concern on the values upheld in society as well as environmental sustainability in making a policy by applying ecological principles to improve the state's economy. This is taken for the sake of actualizing sustainable development so that both the present and the future humans have a guarantee to fulfill their rights.

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