



## **Making Environmental Regulation Work for the People**

**Mission October 2017 Report- Indonesia**

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## 1. Introduction

The project “Making environmental regulation work for the people” is a cooperation project between the Indonesian Center for Environmental law (ICEL), researchers from the University of Indonesia Faculty of Law, and the Van Vollenhoven Institute (VVI) of Leiden University. The project is financed by the Netherlands Royal Embassy in Jakarta, through its Rule of Law Fund, managed by the International Development Law Organization (IDLO).

The project aims to develop ideas and concrete suggestions to improve the regulatory framework on industrial water pollution in Indonesia. The project runs from 20016 until the end of 2017 and consists of the following components:

- legal research to administrative law aspects of the regulatory framework on water pollution control and the coherence between different regulatory mechanisms,
- empirical research to enforcement practices by the local government;
- development of a handbook for environmental officers on monitoring and enforcement;
- development of a handbook for Civil Society Organizations (CSO's) on complaint handling of environmental violations; and
- providing technical assistance to the Ministry of Environment and Forestry (KLHK) with the revision of the Government Regulation on Water Pollution Control 2001 (PP 82/2001).

The project runs on insights of the doctoral research of VVI-researcher Laure d'Hondt on water pollution control, based on case studies into concrete pollution cases, observations of the practice at some environmental offices, and an analysis of the environmental legislation.

Several missions have taken place within the context of the project. In February 2016, Laure d'Hondt (VVI) gave a one week training to the researchers involved in the empirical and legal research that is part of this research. In September 2016, the researchers as well as officials from KLHK visited the Netherlands to get more understanding of the Dutch institutional and legal framework and practice on water pollution control. In January 2017, Laure d'Hondt conducted a one week to discuss with the Indonesian partners of the project the progress of the different components of the project, but focussing on the development of the handbook for environmental officers. In May 2017, a one week mission was carried out by Bart Teeuwen, who is contracted by VVI for the legislative dimension of the project, to discuss with ICEL and KLHK the Draft Government Regulation on Water Pollution Control (RPP on WPC). From 2 to 10 October, another mission took place in which Laure d'Hondt and Bart Teeuwen (the Dutch team) discussed with ICEL and KLHK the different research components of the project.

The outcome of the discussions between ICEL, KLHK and the Dutch team that took place during the October 2017 mission is reflected in this mission report. This report discusses various project components that were central in the mission's discussions, namely the handbooks for environmental officials and CSOs, a policy brief, and the input for the draft government regulation on water pollution control. In doing so, this mission report at the same time discusses some essential issues that came up in the discussions and provides recommendations regarding these issues.

## 2. Outline of the Mission Findings

### 2.1. Meetings with ICEL and KLHK

The Dutch team had various separate and common meetings with ICEL and KLHK. A list of the people who the Dutch team met throughout the mission, is set out at **Annex 1** and **Annex 2** contains the mission's programme .

It turned out at the start of the mission week that:

- the development of a handbook on monitoring and law enforcement is now in its final stage;
- the development of a handbook for CSOs that focusses on complaints handling is still in a starting phase; and
- a new draft version of the Government Regulation (RPP) on WPC was not yet available. KLHK will revise the May 2017 version of the RPP after the five public consultations on the RPP are all carried out, three of which had already taken place. The fourth consultation took place during the mission week and the last one is planned after the mission week. The Dutch team attended part of the fourth public consultation.

### 2.2. Handbook for environmental officials on Monitoring and Law Enforcement

The case study research under this cooperation project aimed to assess major problems in water pollution control in practice. The ineffective and inconsistent system of monitoring and law enforcement were found a crucial issue. The system creates a lot of misunderstanding in practice about the task division between the different government levels in the application of monitoring and law enforcement. Comparative study shows that the Dutch system and the Indonesian system strongly differ. In the Dutch system, the task division between central and local government is very clear and the responsible authorities focus on the administrative law approach in case of industrial water pollution. In the Indonesian system, the task division between central and local government is confusing due to inconsistencies between the general decentralization legislation and the specific environmental legislation. Furthermore, the competent authorities are very reluctant with applying the administrative law approach. They focus more on facilitating disputes between local communities and industrial polluters. As a consequence of this approach, community participation plays an important role in monitoring and law enforcement, not only in practice, but also in the legal framework. There are however strong indications that this does not effectively contribute to a cleaner environment.

In order to address these issues in a more consistent manner and to encourage the administrative law approach, it was decided to develop a handbook for environmental officials, involved in monitoring and law enforcement. Draft versions of the handbook were intensively discussed during the missions in January 2017 and May 2017.

Due to the limited time, the draft version of the handbook itself was not further discussed during the October 2017 mission. However, there is still confusion about the meaning of some specific issues such as administrative coercion, fine, and internal acceleration. Therefore, these issues will be addressed in a separate policy brief. See section 2.4. hereafter.

### 2.3. Handbook for CSOs on Complaints Handling

The case study research showed that there are limited possibilities for CSOs to pressure the government and force it to take action against violating industries. At the same time, complaint handling mechanisms have gained a prominent place in regulatory processes to address water

pollution violations by industries. These mechanisms however often create confusion in practice, particularly regarding what the responsibilities are of the complainants and what the government should do. In fact, complaints are usually directed at the polluting industries, and are not considered as requests to the government to take regulatory measures. On the contrary, in response to a complaint the government in practice may demand from the complainant that the latter gathers sufficient proof rather than investigating itself whether violations are taking place. Or when violations are detected, the government may facilitate negotiations between the complainant and the violator, rather than taking (administrative law) measures itself to halt the violation.

At the start of the October 2017 mission, the development of the handbook was only in a starting phase. To accelerate the preparation of the handbook, the mission was used to discuss with ICEL the outline and contents of the handbook in some specific meetings.

The handbook for CSOs will take into account the new regulation on complaints handling that was enacted this year (Ministry Regulation (Permen LH) 3/2017, that replaces Ministry Regulation (Permen LH) 9/2010). But more importantly, the handbook will explicitly pay attention to the responsibilities of the government in responding to complaints, and –based on general administrative law- describe the possibilities for citizens and CSO to file objections and file law suits against the government when it does not fulfil its obligations to protect the general interest in clean river water. The handbook will furthermore describe extra-legal manners to put pressure on the government to take adequate measures, including seeking media attention and filing a case to the Ombudsman.

#### 2.4. Policy Brief

During the drafting of the handbook for environmental officials, ICEL and the VVI came across several issues that in the current regulations create confusion or need considerable reconsideration. The handbook was not the appropriate place to address these issues, and therefore it was decided to address them separately in a policy brief. It concerns the issues administrative coercion (*paksaan pemerintah* or *bestuursdwang*), fine (*denda*, *administratieve boete* or *dwangsom*) and internal accumulation (*kumulatif internal* or *cumulatieve inzet sancties*).

A draft version had been already prepared by VVI and was extensively discussed during the mission week with ICEL. The discussions clarified the large differences in basic concepts in the counties' administrative legal framework underlying environmental regulation and law enforcement in particular. Once again it became clear that intense discussions are required to come to these insights, as practitioners are often unaware that these differences exist and find it difficult to imagine that basic concepts in fact differ at all.

ICEL and the Dutch team jointly formulated some of the core recommendations of the policy brief.

##### **Administrative coercion (*Paksaan pemerintah* or *Bestuursdwang*)**

Administrative coercion (*bestuursdwang*) is a classic, already long-standing enforcement instrument in the Dutch enforcement pyramid that the Competent Authority (CA) may use to end a violation and/or restore the situation. If the situation is not urgent, the CA may order the violator to conduct restorative actions within a certain timeframe. If the violator does not carry out the actions, the CA will carry out the concrete actions itself. The costs will be recovered from the violator.

The Indonesian Environmental Management Act 2009 (EMA 2009) also addresses the administrative coercion (*paksaan pemerintah*) in Article 80, but it is unclear whether it is a concrete action by the CA (just as in the Dutch system) or only an order to the violator to take action. Article 81 gives the impression that it is only an order. Ministry regulation on administrative sanctions (Permen LH 2/2013) confirms it is in fact an order to the violator, and in practice *paksaan pemerintah* is usually

understood in this manner as well.<sup>1</sup> This interpretation makes the executive government dependent on the actions of the violator and thereby severely weakens the system of administrative sanctions. Therefore it is recommended to reconsider the meaning (and formulation in the EMA) in order to make the administrative law framework more effective.

### **Fine (*Denda* or *Dwangsom* / *Administratieve boete*)**

In the Dutch enforcement system, the daily fine (*dwangsom*) is an administrative sanction with the goal to stop a violation. Thereby it aims to be reparatory, being a strong incentive for the violator to halt the violation swiftly and restore the conditions to the situation prior to the violation. Thus, the *dwangsom* does not aim to punish. Only recently, the administrative fine was introduced in the Dutch system, which – in contrast to the primary aim of administrative sanctions- does have a punitive aim. In the Netherlands, such a fine is applied only in specific situations (mainly traffic violations and tax related affairs). Because this administrative sanction does not have a reparatory aim, it was introduced only after a long debate among legal scholars and policy makers, because it is not in line with the primary goal of administrative sanctions, that is to end violations and restore conditions.

The Indonesian enforcement system for environmental regulation mentions the fine (*denda*) in article 81 of EMA 2009, stating that a company that does not carry out the administrative coercion (within the set time limit) shall be liable to a fine. It is however unclear whether this ‘fine’ is intended to be primary reparatory or punitive, and therefore whether this fine resembles more the concept of the *dwangsom* or that of the administrative fine as it exists in the Netherlands. In fact, following the system of the Environmental Management Act, the fine as mentioned in article 81 could even refer to a criminal sanction (as mentioned in article 114 of the EMA 2009). However, in practice, the fine is usually considered to be an administrative sanction.

The Ministry regulation on administrative sanctions (Permen LH2/2013) does not provide clarity on this issue, but in its elucidation emphasizes that the administrative sanctions aim to be primarily reparatory, which points towards the fine to resemble the concepts of the *dwangsom* as it exists in the Netherlands.

The inconsistencies regarding the fine should be revised. It is recommended to already create clearness about this issue in the new Government Regulation on WPC (see section 2.5 below).

### **Internal accumulation/Kumulatif internal**

The draft version of the handbook on monitoring and law enforcement describes the idea of *kumulatif internal*, meaning that multiple administrative sanctions can be imposed for the same violation. This concept is not clear and creates confusion.

In the Dutch system, multiple sanctions can only be imposed at the same time when the sanctions have different aims: to halt violation or to punish. This is for example the case when administrative coercion is used to halt the violation, and at the same time an administrative fine is imposed which aims to punish.

The administrative sanctions mentioned in Article 76 of the EMA 2009 all aim to halt violations. If so, it should be clear that they cannot simultaneously imposed. Only when the fine (*denda*) as mentioned in article 81 would be interpreted as an administrative fine –rather than as a *dwangsom*- it could be imposed with another –reparatory- sanction. Again, this requires to clarify the concept of the fine as mentioned in article 81.<sup>2</sup>

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<sup>1</sup> It is noted that the Environmental Management Act of 1997 explicitly defines administrative coercion in Article 25 as an instrument to be carried out by the CA. It is unclear why a fundamentally different interpretation of the concept was adopted in the Environmental Management Act of 2009.

<sup>2</sup> The general Administrative Law Act (Law 30/2014) unfortunately does not provide more clarity on the concepts or ideas behind the administrative sanctions, as the relevant section in this Act only concerns administrative sanctions that can be imposed to government officials, and does not provide guidance on the general system of administrative sanctions.

### **Relation administrative, criminal and private law approaches to follow up on violations**

A topic that requires considerable (re)consideration is how in the Indonesian practice administrative, criminal and private law approaches are used –or can be used more effectively- to achieve better compliance by industries. In the current practice, criminal and private law (the latter in the form of mediation) is often preferred over the use of administrative law mechanisms to achieve compliance, for they are considered to be more effective. However, more legal and empirical research is required to assess the validity of this assumption.

### **2.5. Draft Government Regulation (RPP) on Water Pollution Control (WPC)**

The existing Government Regulation (PP) on WPC is based on the Environmental Management Act 1997 (Law 23/1997). The PP needs to be revised to be brought in line with the Environmental Management Act of 2009 (UU 32/2009), as well as with recent Laws that concern the division of authority between different governments following the decentralisation process, and in particular Law 32/2014 on Local Government.

During the May 2017 mission, the RPP version of January 2017 was intensively discussed with the Ministry of Environment and Forestry (KLHK). Unfortunately, a new RPP version was not yet available at the start of the October 2017 mission. KLHK decided to firstly hold five public consultations. The revised RPP will be available at the end of this year. Nevertheless, KLHK indicated it was interested to -during the October mission- discuss with the Dutch team some issues that in recent months had come in discussions with other KLHK Directorates. The most essential issues will be briefly discussed below.

The Dutch team furthermore attended a public consultation on the RPP on WPC. A short impression of the consultation is provided at the end of this section.

#### **Title and scope of the Government Regulation**

The title of the Government Regulation (PP) should express its content and scope as much as possible. Using the same title as the existing PP 82/2001 ('Management of water quality and water pollution control') is acceptable if the terms 'management' (*pengelolaan*) and 'control' (*pengendalian*) are sufficiently clear, which is not the case currently.

The definitions of the terms 'management' and 'control' as used in the current Government Regulation on WPC (PP 82/2001) and in the Environmental Management Act (EMA) of 2009 are not in line with one another. 'Management' in EMA 2009 includes monitoring (inspections) of industries and enforcement. 'Management' in PP 82/2001 however refers to the general management of water quality, concerning primarily standard setting of the general river quality as well as some monitoring of the general river quality (*pemantauan*), but not so much of individual industries. The term 'control' on the other hand has a limited scope in both the EMA 2009 as well as in the PP 82/2001. In both regulations it only includes 'prevention' (that mainly concerns standard setting instruments and economic instruments), recovery and mitigation, but excludes monitoring of industries and enforcement. In current debates –for example on the RPP on WPC- the focus is on 'control' and sometimes on 'management' but as used in PP 82/2001 and not the broader definition in EMA 2009.

To ensure consistency in terminology in the legal framework, as well as taking into account the importance on strengthening the regulatory practice around industrial pollution –as empirical research has indicated-, it is vital that the revised Government Regulation will provide a good framework for monitoring (inspections) of industries and enforcement. Therefore, it is recommended it adopts the term 'management' as used in the EMA 2009.

Overall, during the revision of the GR on WPC it is recommendable that the used terminology is carefully (re)considered. This does not only concern the terms 'management' (*pengelolaan*) and 'control' (*pendendalian*), but also 'prevention' (*pencegahan*), recovery (*pemulihan*) and mitigation (*penanggulangan*). In order to emphasize the importance of consistent norm-setting (for example through licensing), monitoring of compliance by licensees and enforcement it can be reconsidered whether the term '*penaatan*' (or compliance) as it was defined in the EMA 1997 can be adopted.

Another issue that concerns the scope of the Government Regulation deals with the question whether it should concern both issues related to surface water as well as groundwater. It is recommended to explicitly stipulate in the article on definitions that the Government Regulation also includes groundwater. However, it should be noted that protection of groundwater is to some extent already regulated in the Government Regulation on Groundwater (PP 43/2008). The latter is based on the Law on Water Resources 2004 (Law 7/2004) and mainly focuses on the quantitative dimension of groundwater management through the license instrument for extractions of groundwater. In principle, every extraction requires a license. The license conditions can also be oriented on the protection of groundwater to ensure that all interests concerned (quantitative and qualitative interests), will be protected.

The Government Regulation on WPC should be made consistent with the GR on Groundwater, but make explicit it deals with –other than the GR on Groundwater- with the quality dimensions of groundwater issues.

### **Authority division**

The division of authorities and responsibilities between the different government levels should be clear and consistent. This is of particular importance for the licensing, monitoring and enforcement. In practice, it is often unclear who is the competent authority (CA). The reason may be that various licenses have been issued by different governments.

Another reason for an unclear division is that the environmental impact of a particular licensee can be (potentially) transboundary, for example because the licenced industry discharges wastewater on a river that crosses district borders. In this respect, special attention should be paid to bringing the Government Regulation on WPC in line with Law 32/2014 on the Local Government. The latter suggests that when industries have a transboundary impact, the licensing authority shifts to a higher government level. The GR should clarify to what extent this means that in particular provinces have more licensing authority –and therefore also monitoring and enforcement authority- than currently is acknowledged.

The EMA 2009 furthermore provides the possibility for a shift of authority from a local government to the central government on the basis of second line enforcement. The mechanisms of second line enforcement and the consequences in practice have however not been clearly established, and as a result there occur many inconsistencies in the division of authority and it becomes unclear which government is responsible.

It is recommended to explicitly address the institutional framework on water pollution control in a specific chapter of the Government Regulation.

### **Public participation**

Public participation is a crucial element of the environmental management concept. It expresses that the public in general, and potentially affected communities in particular, should be involved in all stages of decision making. The concept is addressed in only broad terms in article 70 of EMA 2009. One of the questions that remains is how to implement this concept, in particular at the operational level of monitoring and enforcement of water pollution control.

In the current Indonesian debate, community participation is often considered to potentially function as a substitute for the government that executes its regulatory task poor, and in particularly its monitoring and enforcement powers. It should however be avoided that the role of local communities will be ‘institutionalized’ in such a manner that it replaces the responsibility of the competent local government regarding monitoring and enforcement activities.

When comparing Indonesia and the Netherlands in this respect, it becomes clear that in the Netherlands public participation is primarily important in the planning and licensing phase. In the monitoring and enforcement phase, the CA plays a dominant role, although stakeholders may pressure the government to execute its monitoring and enforcement authority, for example by filing an objection to the decision of the government not to monitor or enforce. In Indonesia however, the involvement of the community is considered particularly relevant in the monitoring and enforcement. However, as the research by Laure d’Hondt indicated, there are considerable



disadvantages attached to this type of community participation. Therefore, the way in which public participation in Indonesia can indeed contribute to a better protection of environmental public interests requires further debate and research.

### **Impression of the public consultation**

The Dutch team attended a public consultation on the RPP on WPC, which was the fourth of the total of five consultations that the KLHK has planned. This fourth consultation was directed at representatives of local governments, industries and NGOs from Kalimantan and DKI Jakarta. The goal of these meetings is both to inform the participants about the draft Government Regulation and to ask feedback and discuss it with them.

The discussion session showed that the local government agencies have too little (quantitative and qualitative) capacity to carry out their monitoring and enforcement duties properly. This is one of the reasons why the Government would like to strengthen and institutionalize the role of the local communities in this process. However, as discussed above, it is questionable if this approach should be continued. It is recommended to make a shift to the administrative law approach.

Notably, representatives of the industry also prefer the administrative law approach as they expect that this indeed will be a strong incentive to become compliant, but also because it would create more legal certainty for them. Despite the importance of further developing and strengthening the administrative law framework, and in particular monitoring and enforcement aspects within it, the discussion during the public consultation focussed on issues related to the term 'control', and therefore –as explained above- did not focus on the administrative law arrangements for monitoring and enforcement of industries.

### 3. Conclusions and Recommendations

During the October 2017 mission, the Dutch team had several intense discussions with ICEL as well as KLHK, to discuss the handbooks for environmental officials and CSOs, a policy brief and to provide input for the draft government regulation on water pollution control.

During these discussions, the Dutch team emphasized the importance of strengthening the legal and institutional framework for industrial pollution control, and in particular the components of monitoring industries and law enforcement based on administrative law.

This mission report identified some essential topics that need to be developed and discussed further to come to a more solid legal framework, for example the system of administrative sanctions and the position of administrative coercion and fines in it, and the importance of a clear and consistent division of regulatory authorities between various governments.

Overall, in future debates regarding these specific topics as well as other topics relevant for the regulation of water pollution control, the Dutch team strongly recommends that there is considerable attention for consistency in terminology and concepts between various relevant regulations, while keeping in mind basic legal principles. An example of basic principles that should be considered more carefully in the current debate, are the core aims and features of administrative, criminal and private law enforcement, and the consequences for how public participation should be positioned in the regulatory framework.

Furthermore, and the empirical goals should be kept in mind when further developing the legal and institutional framework. More empirical research on how the regulation of industrial pollution currently takes place in practice and to what extent it indeed contributes to the protection of environmental and other public interests, is indispensable.

During this mission, the Dutch team once again notices that it requires time and intense discussions to make progress on these issues. However, the exchange between Dutch and Indonesian expertise and experience can be valuable, as long as there is sufficient time and willingness to engage in such debates, and the discussions are informed by proper legal and empirical knowledge.

## **Annex 1: List of people met during the October 2017 mission week**

### **Indonesian Center for Environmental Law (ICEL)**

Henri Subagiyo	Director ICEL
Raynaldo G. Sembring	Deputy Director
Shafira Hexagraha	Staff member
Fajri Fadhilla	Staff member

### **Ministry of Environment and Forestry (KLHK)**

Ibu Budisusanti	Director Directorate for Water Pollution Control
Bapak Budi Kurniawan	Head Sub-Directorate on inventory and allocation of waste load & Project leader draft PP Water Pollution Control
Ibu Noor Rachmaniah	Head Sub-Directorate for domestic water pollution control
Ibu Netti	Head Sub-Directorate for water planning management

## **Annex 2: Programme of the Mission**

Monday 2 October	Preparatory discussions with ICEL
Tuesday 3 October	Discussion with KLHK (Directorate for Water Pollution Control) on RPP on WPC
Wednesday 4 October	Public consultation on the RPP on WPC
Thursday 5 October	Discussion on issues in Policy Brief with ICEL
Friday 6 October	Discussion on issues in Policy Brief with ICEL
Monday 9 October	Discussions on setup and outline CSO Handbook with ICEL
Tuesday 10 October	Discussions on setup and outline CSO Handbook with ICEL