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Research report within the context of the project:
Making Environmental Regulation Work for the People

REGULATING WATER POLLUTION THROUGH THE ADMINISTRATIVE LAW FRAMEWORK

Research and report

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Supervision

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Summary

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This paper focuses on the administrative law approach to regulate industrial water pollution. Regulation through administrative law is potentially more effective than criminal law, in particular because administrative law enforcement primarily aims to recover the initial situation, allowing to take direct measures against polluting industries, such as halting violations.¹ The author notes that in Indonesia, administrative sanctioning is however not applied optimally and sometimes not considered as a serious response to violating behavior by industries. This is partially due to poor implementation,² but also due to flaws in the legal framework for regulation.

A patchwork of relevant legislation

In Indonesia, various pieces of legislation are relevant for the regulation of water pollution by industries. The patchwork they form makes it difficult to get an overview of the various regulatory instruments. They sometimes overlap, conflict with one another, or leave gaps in setting concrete norms, providing procedures and measures, and in terminology. As one of the consequences, problems may occur regarding the division of authority and tasks between government bodies- both horizontally between the sectors, as well as vertically between the administrative levels of central, provincial and district governments.

¹ Enforcement may occur through imposing administrative sanctions, criminal prosecution and/or recovery of the damages through the civil law framework. Furthermore, there are alternative forms of regulation, such as voluntary forms of regulation, self-monitoring, and efforts of officials to persuade a violator to become compliant.

² The author mentions several implementing problems, and refers to the empirical research conducted in the Deli and Brantas watersheds. This research has also been carried out within the context of the 'Making Environmental Regulation Work for the People' project. Regarding licensing, the author criticizes that in practice the licensing procedure is not transparent, and that licensing institutions have an interest in granting the licenses because of the levy they will obtain. The Environmental Impact Assessment is often merely a formality, rather than that it leads to setting concrete norms for the regulate. Monitoring the performance of industries is lacking due to limited (human) resources and inadequate procedures. Furthermore, administrative sanctions are rarely imposed because there is a lack of knowledge and willingness to impose them in response to violating behaviour.

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The paper provides a short overview of the sectoral legislation relevant for environmental and water pollution regulation,³ and the effect on the division of authority. For example, although environmental institutions –the Ministry of Environmental and Forestry or the regional Environmental Agencies– have authority to regulate the environmental performance of many industries, the environmental performance of agricultural business is primarily regulated by the Ministry of Agriculture. Another example, the Minister of Public Works and the Minister of Environment and Forestry have overlapping responsibilities in regulating the water quality of rivers. However, unlike the overlap of authorities with Industrial and Agricultural institutions, the overlap with Public Works does not need to be problematic since the Minister of Public Works and Environment and Forestry share the interest in clean rivers, and so they can cooperate to achieve this common goal.⁴ Nevertheless, to bring coherency in the tasks and authorities of the various sectors, coordination between the sectors should occur, particularly in the planning phase of the regulatory process. Although coordinating regulating exists, the author nevertheless concludes that at present coordination is limited between the sectors, as well as between the various levels of government.

Regulating industries according to EMA 2009 and GR 82/2001

The paper focuses on the Environmental Management Act 32/2009 (EMA 2009) and on Government Regulation on Water Quality Management and Water Pollution Control (GR 82/2001). In order to make the regulatory process of river water quality and industrial water pollution understandable, the author identifies the various norm-setting elements –including planning and licensing–, monitoring and enforcement aspects of the regulatory process.

GR 82/2001 defines ‘water pollution control’ (*pengendalian*) as consisting of prevention (*pencegahan*, which refers to norm-setting aspects such as planning and licensing), recovery (*pemulihan*) and ‘mitigation’ (*penanggulangan*).⁵ Although GR 82/2001 provides monitoring and enforcement instruments, the fact that they are not included in the definition of ‘water pollution control’ suggests that they are not essential in regulating water pollution, while in fact they are. EMA 2009 does however clearly define ‘Environmental Management’ to include aspects of norm-setting (or ‘prevention’), monitoring and enforcement.

The terms ‘control’ (*pengendalian*) and ‘management’ (*pengelolaan*) are not used consistently in the GR 82/2001 and the EMA 2009. In the EMA 2009, ‘(environmental) management’ includes ‘(environmental) control’ and its norm-setting instruments, as well as monitoring and enforcement. GR 82/2001 on the other hand defines ‘(water) management’ and ‘(water pollution) control’ as separate processes; management

³ The legislation on development planning, notably the National Long and Medium-Term Development Plans clearly placed environmental protection and water pollution control the national development agenda for the years to come

⁴ Editorial remark: The empirical research in the Brantas watershed showed however that legislation prepared by the Ministry of Public Works –and particularly the Water Act of 2004 and its implementing regulations – introduced the notion of rivers of ‘national strategic’ interest. In practice this causes officials of regional environmental agencies –notably of the East Java agency– to assume that regulatory authorities regarding industries located along such rivers of national strategic interest, shifted to the central government level. This conflicts with the EMA 2009 as well as Government Regulation 82/2001 that state that the province is authorized in case of a river crossing district borders, such as the Brantas river.

⁵ Government Regulation 82/2001 on Water Quality Management and Water Pollution Control (GR 82/2001) art 1 (4), and Environmental Management Act of 2009 (EMA 2009 or UU32/2009, art. 1(2))

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concerns the regulation of the general water quality (not aimed at regulating individual industries) and ‘control’ concerns the regulation of individual actors that discharge wastewater.

In addition, the EMA and the GR are not consistent regarding who is responsible for ‘recovery’ and ‘mitigation’. According to GR 82/2001 it is the responsibility of the government as well as the violator to conduct recovery and mitigation, while EMA 2009 stipulates that only the violator is responsible for this. This potentially lifts the responsibility of the government to take recovery and mitigating measures in case the source of pollution is unknown.

The author furthermore argues that the definitions of ‘pollution’ in EMA 2009, GR 82/2001 and the Regulation of the Ministry of Environment 1/2001 differ. The latter defines pollution as a violation of the wastewater standards, while the EMA considers it a violation of any environmental quality standard. GR 82/2001 however sets the bar for pollution higher, as it defines pollution to occur when the river water cannot be used according to the purpose as classified. It is important to define ‘pollution’ in a coherent manner as it may influence if and what kind of follow up can be given to certain behavior that impacts the environment.

Norm-setting: General quality standards and licensing in GR 82/2001 and EMA 2009

Both the GR 82/2001 and the EMA 2009 contain licensing arrangements for respectively the wastewater license and the environmental license. GR 82/2001 arranges that the standards for the general water quality of a river are based on the classification of the rivers according to their purpose of usage, and based there upon the calculation of the river’s carrying capacity. This is thereafter translated into general wastewater standards, and eventually into wastewater licenses for individual industries.

The EMA 2009 aims to integrate various environmental quality standards, including the wastewater standards.⁶ The EMA 2009 introduced the environmental license,⁷ which initially was intended to integrate all environment related licenses. The fact that eventually the environmental license did not replace other licenses may lead to problems because other provisions on the EMA –such as those on monitoring and enforcement arrangement- only recognize the environmental license. This would mean that for example monitoring of wastewater discharge and enforcement cannot occur on the basis on the EMA.

⁶ The author nevertheless criticizes the fact that Government Regulation 27/2012 on the environmental license does not require the environmental license to include the environmental quality standards.

⁷ Government Regulation 27/2012 is in several respects not consistent with the EMA. Unlike the EMA, the GR 27/2012 allows for exemption of conducting an EIA, and the implementing regulation should have provided a more detailed mechanism for public participation in the EIA process. Furthermore, GR 27/2012 does not require that the approval of the EIA and granting the environmental license is based on the outcome of the EIA that the decision is ‘environmentally feasible’. Finally, next to the environmental license, the GR 27/2012 recognizes the environmental protection and management license (PPLH), which is not mentioned in the EMA 2009.

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Furthermore, more than one government body may be authorized to issue environment related licenses. For example, GR 82/2001 stipulates that the district is authorized to issue the wastewater license, while EMA 2009 arranges that –depending on the type of business- the environmental license may be issued by the governor or minister (see also Ministry of Environment Regulation No. 8/2013).

The author notes that the environmental license has a more important position than the wastewater license because a revocation of the environmental license leads to a cancelation of the business license. This is not the case when a wastewater license is revoked.

Regarding the Environmental Impact Assessment (EIA) the companies are required to carry out before they can be granted an environmental license the author assesses Government Regulation 27/2012 and Ministry of Environment Regulation 16/2012, both on the Environmental license. She notes that they are not coherent with the EMA 2009 (article 25). For example, the EMA requires public participation in the EIA process, while the implementing regulations do not mention this issue.

Monitoring

Both GR 82/2001 and EMA 2009 refer to the monitoring of industries as *pengawasan*. The EMA states that the monitoring authority may be delegated by the authorized district head, governor or minister to the environmental agencies, notably to environmental monitoring officials (PPLH, *Pejabat Pengawas Lingkungan Hidup*). The authority to enforce can however not be delegated to these officials, probably to avoid that officials will abuse this far-reaching authority. Remarkably, article 74 of EMA 2009 on the monitoring powers - allows officials to stop violations. This is an extensive authority that in fact resembles ‘administrative coercion’ as it means that the government takes concrete action to halt a violation. In order to prevent officials from abusing this power, the author argues that the authority to halt a violation should be further explained in a Government Regulation. In fact, monitoring should be described more in detail in an implementing regulation as it will be helpful to arrange how and when to monitor. This may also resolve the lack of clarity regarding the division of authority.

Enforcement

The author criticizes article 81 in the EMA 2009, which stipulates that an administrative fine can be imposed when the violator does not execute the imposed government coercion. First, it suggests that government coercion is not to be carried out by the violator while in fact government coercion is concrete action by the government to halt a violation. Second, the author suggests to -instead of the administrative fine- introduce a daily fine (*uang paksa*) as an alternative to government coercion.

EMA 2009 stipulates that criminal law enforcement in principle is an *ultimum remedium*, which may only be used after administrative sanctioning has not been effective. There are a few exceptions, such as when the ‘water quality standards’ are violated. Water quality standards as defined by Government Regulation 82/2001 however refer to the general water quality standards of a river –based upon which the standards

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for individual regulatees are calculated and formulated in their wastewater license. The author argues that criminal law enforcement should also be possible based on a violation of standards as set for individual regulates, such as the wastewater standards as provided in the wastewater license.

Division of authority

The involvement of various sectors in environmental regulation particularly concern the planning aspects of regulation. Therefore drafting implementing regulation concerning planning should involve all relevant sectors. The licensing arrangements of the various sectors should furthermore be harmonized, and coordination between the sectors should be improved.

The author furthermore notes that the division of authority between the district, provincial and central level are often unclear. In principle the districts are the authorized body to issue both the wastewater license and the environmental license, to monitor compliance and enforce the law. However, in certain occasions the districts are not authorized to issue the environmental license, and therefore to monitor and enforce the law.

As mentioned earlier, the type of business and the environmental impact determines whether the district, province or central government is authorized to issue the environmental license. The author furthermore pays special attention to situations in which the environmental impact crosses the administrative borders of a district or province. According to the EMA 2009, in those cases a higher level of authority becomes authorized (see also Ministry of Environment Regulation No. 8/2013). Clear mechanisms to transfer authority are lacking. The Regional Government Act 23/2014 arranges that in cases of trans-boundary pollution, the authority between the administrative levels is to be shared. The division is determined, among other things, based on national strategic interests.⁸ The author argues that the authority to issue a wastewater license –which now lays with the district head– should, like the environmental license, depend on whether the impact crosses administrative borders. In any case, cooperation between the various government institutions is important.

The author furthermore states that there are insufficient mechanisms for ‘oversight’ that arrange that the central government takes over monitoring and enforcement authority of a lower administrative level when the latter does not conduct its task properly.

The author concludes that in the norm-setting, monitoring and enforcement aspects of the regulation of water pollution, as well as regarding the division of authority –between the sectors as well as the between the administrative government levels–, the administrative law framework can be improved.

This paper was prepared and written as part of the Making Environmental Regulation Work project, supported by Dutch Rule of Law Fund Indonesia, managed by IDLO. The project aims to improve the environmental framework and its implementation in Indonesia, by strengthening regulatory capacity of government, and enhancing the capacity of civil society and scholars to hold the government accountable. The full article is available in Indonesian Language (upon request).

⁸ Editorial note: Although the Regional Government Act provides general principles based on which the authority is to be shared, such as good governance, it is not clear how this translates into practice and in which cases and how authority transfers from one government body to another.