

Working paper

# The Terpercaya Initiative

**Environmental instruments to support  
Indonesia's NDC at the district level**

March 2021

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## Executive Summary

Legally based environmental instruments can be used to measure the performance of jurisdictions towards environmental sustainability, which in turn supports the achievement of the NDC target at the national level. These instruments include environmental carrying capacity tools (*Daya Dukung dan Daya Tampung Lingkungan Hidup*, DDDTLH), the Strategic Environmental Assessment (SEA), the Environmental Protection and Management Plan (*Rencana Perlindungan dan Pengelolaan Lingkungan Hidup*, RPPLH), and the Environmental Impact Assessment (EIA).

DDDTLH works at the jurisdictional scale with the objective of providing environmental data and information to set up development planning documents, such as the mid-term development plan and spatial plan. The DDDTLH functions as a baseline for decision makers and ensures that environmental thresholds in a jurisdiction are known and officially recognised. However, DDDTLH's role is limited to policy research that is formally recognised by the Government to support policy planning. However, local governments have to provide DDDTLH before spatial planning is drafted.

The DDDTLH results are followed up by SEA, which is specifically designed to assess programmes and activities in development and spatial planning. SEA works at the jurisdictional scale and is carried out by the Government. SEA assesses whether a proposed programme is in line with environmental capacity. The results are presented as recommendations to revise, develop mitigation activities, or even revoke the proposed programme and activities. However, similarly to the DDDTLH, SEA results are inconsistently enforced. Although law enforcement efforts can build on SEA, there is no precedent of local governments found to be in breach of the law for developing plans that were not in line with the SEA's recommendations. Currently, the regulations only outline the procedure to ensure that SEA is completed. It does not contain provisions on the legal implications if SEA recommendations are not implemented by government entities.

The legally binding instruments are RPPLH and EIA. The RPPLH is a long-term environmental management plan that the government needs to refer to in other plans. It has to be stipulated as a Local Regulation (PERDA), thus requiring the local government to comply, as it provides sanctions in case of non-compliance. Therefore, once RPPLH is established, government entities have to comply with the targets therein. However, although local governments can develop local-based RPPLH, the national government should establish a national one as a baseline for local government's RPPLH. According to Law 39/2009 (Environmental Law), the national government has to issue a regulation on the national RPPLH.

At present, such a national regulation on RPPLH has not been adopted yet. Local governments are therefore unsure whether to wait for the national regulation or implement and eventually enforce their own interpretation of the plan at their jurisdictional level.

The EIA grants law enforcement officers the power to bring non-compliance cases to the courts. However, the recent Law No 11 of 2020 on Job Creation (UU 11/2020) has revoked the requirement to hold an environmental licence, a key aspect of EIA enforcement. The EIA's long-term role as an independent tool for environmental safeguarding has been

reduced to an integrated package of business permits. Nonetheless, the EIA is still a valid tool to prevent and address illegalities.

With the issuance of recent investment policies (not only the job creation law), the EIA's role in preventing land-use illegalities at the site level has been reduced. Nevertheless, other environmental instruments still provide some legal safeguards to prevent illegalities that could impact environmental sustainability.

These instruments cannot be treated simply as environmental tools for exclusive use by certain environmental agencies. For them to work properly, stronger policies on transparency and accountability should be enacted by the Ministry of Environment and Forestry and implemented by local governments. In this context, a recent initiative by the government to develop an online environmental monitoring platform could provide a strategic starting point for stakeholders to collaboratively work on the issue of compliance, policy synchronisation and other governance issues. Indicators from these environmental instruments should be taken into account in the development of such a monitoring platform. Ongoing efforts to involve jurisdictions in achieving Indonesia's NDC targets should use these environmental instruments, not only to avoid reinventing the wheel, but also to strengthen existing efforts to improve local governments' law enforcement and compliance.

# 1. Introduction

A significant number of legal instruments in Indonesia aim to ensure land-use activities' legality. Initially, compliance efforts aimed to prevent individual illegal activities and relied on permits. Permits have become the main legal instrument to ensure business actors' behaviour is in line with laws and regulations.<sup>1</sup> The most common permit is an operational permit that should be obtained prior to clearing lands for plantations, logging and fishing activities.

In the 1980s, environmental requirements were developed to accompany investment permits. In 1982, the Environmental Impact Assessment was introduced and was recognised as the instrument to prevent environmental degradation.<sup>2</sup> The EIA's main function was to control that business operations are in line with environmental standards. In addition, specific environmental permits were developed for particular operations, such as the toxic waste permit or the application of hazardous material permit.

In 2009, the environmental permit was enacted. It applied a new standard for investments, requiring environmental considerations to be taken into account when applying for a permit to invest. Without an environmental permit, a company cannot operate. Before 2009, the EIA was the only environmental control tool, but was not treated as a permit. Investment proposals only needed a business permit to operate. Environmental concerns were noted preventively and could be addressed through the development of the environmental management plan. As a result, in some cases, the EIAs were adopted after the company started its operations. The 2009 Law introduced a radical change by imposing the deliverance of an environmental permit where certain environmental requirements had to be met before a company could obtain a business permit. Through the obligation to obtain an environmental permit, environmental concerns have to be addressed prior to the start of activities. If the operator fails to address environmental issues, his or her business permit could be revoked. In addition, based on the environmental permit, the general public and impacted communities can file suits to defend their environmental rights.

However, the recent Job Creation Law repealed the Law 32/2009, as well as the environmental permit and evaluation it contained. As a result, the EIA is only integrated in the process of obtaining a business permit. Environmental concerns are no longer independent from the economic considerations of a business investment. As criticised by environmental NGOs, the Job Creation Law poses high environmental risks.<sup>3</sup> If the environmental assessment process is not in line with the law during the application for a business permit, the permit will not necessarily be revoked. In addition, the suppression of the environmental permit reduces the opportunities for public and impacted communities to appeal against administrative decisions.<sup>4</sup>

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<sup>1</sup> Arie Sukantie Hutagalung et al, 2012, *Hukum pertanahan di Belanda dan Indonesia*, Denpasar: Pustaka Larasan; Jakarta: University of Indonesia, Leiden University, Groningen University, pp. 133-148

<sup>2</sup> Hardjosoemantri, Koesnadi, 1999, *Hukum Tata Lingkungan*, Seventh Edition, Fourteenth Printing, Yogyakarta: Gadjah Mada University Press

<sup>3</sup> Sembiring, R., Fatimah, I., & Widyaningsih, G. A. (2020). Indonesia's Omnibus Bill on Job Creation: a Setback for Environmental Law?. *Chinese Journal of Environmental Law*, 4(1), 97-109.

<sup>4</sup> Ibid

Nonetheless, other instruments exist to prevent environmental damage from the early stages of activities, namely through mid-term development planning (RPJM) and spatial planning (RTRW). These are the reference policies for the government to allocate development programmes and land areas for investment. They indicate whether the government authorises forest conversion for food security, energy production or infrastructure. The RPJM and RTRW are subject to environmental requirements that are to prevent environmental harm.

The RPJM and RTRW are based on the Strategic Environmental Assessment (SEA), which was not repealed by the Job Creation Law. Currently, SEA is the mandatory environmental instrument for all line ministers involved in planning, including the Ministry of Home Affairs, the Planning Agency (Bappenas), and the spatial planning Agency (under the Ministry of Agrarian and Spatial Planning). If properly designed, the SEA will play its intended preventive role, since it will provide the basis for these ministries' programmes and activities, before business permits are granted.

Another instrument is environment-based budgeting, which is relatively new in the government budget system. Inclusion of environment-based budgeting in local governments' performance review is under discussion. In addition, the Job Creation Law maintains the environmental carrying capacity, the environmental audit, the environmental risk analysis and the environmental quality standards. If these instruments indicate that the environmental risk of a proposed activity is high, the government will either apply strict environmental protection standards or prohibit the activity in the area. These instruments will be applied at the jurisdictional scale as well as at the project scale, through instruments such as the EIA and the Environmental Management Measures-Environmental Monitoring Measures (UKL-UPL).

While there are still many limitations, these instruments have begun to fill their respective roles from the micro to the jurisdictional level. At the micro scale, for example, an EIA and UKL-UPL applies in the permit application procedures, according to the criteria based on the characteristics of the business operations. The permits also have to be in line with the results of the risk assessment of jurisdictional instruments such as the SEA, DDDTLH and RPPLH. At the macro scale, the SEA and the Environmental Protection and Management Plan (RPPLH) oversee development and spatial planning. The role of each instrument is specific and is maintained under the Job Creation Law.

The government also has to transpose into law some of its international obligations. For instance, it has to transpose its nationally determined targets under the Paris Agreement into long-term policies. In doing so, the government could build on existing institutions and normative frameworks rather than creating new ones.

Despite some weaknesses, the existing environmental instruments have been structured into strategic policies, such as the RPJM and RTRW. However, most policies adopted to align the national legal framework with international commitments do not take into account the existing DDDTLH, RPPLH and SEA, though there has been some progress. After years of discussions, local governments have recently incorporated a climate change section into the SEA process. Despite this progress, climate change has still to be linked to DDDTLH. Existing legal environmental instruments should provide the point of departure to implement international commitments, including those enshrined in Indonesia' NDC.

Currently, the SEA framework is expected to direct development activities in accordance with environmental protection. Climate change is one of the SEA's criteria and is supposed to reflect NDC commitments. NDC commitments can also be implemented through RPPLH, which is a more long-term environmental instrument. According to the Job Creation Law, RPPLH is to shift the development paradigm from an extractive approach to sustainability.

Although not many jurisdictions have not initiated the drafting of the regulations to transpose their RPPLHs and DDDTLHs, growing environmental concerns, such as forest fires and climate change, put these instruments at the centre of Indonesia's environmental policy. It is therefore timely for a public discussion of these instruments.

This report will elaborate on the functions and applicability of environmental instruments in the current changing policies of Indonesia. The adoption of the Job Creation Law has made some strategic changes to the EIA, but it does not reduce the essence of other environmental instruments. Most of the unchanged environmental instruments are the ones with jurisdictional scope. They should therefore be used to align national policies with NDC targets.

## 2. The scope

The following analysis focuses on the main legal instruments listed under the Law on Environment No. 32/2009. According to this law, environmental protection and management covers six major stages, namely planning, utilisation, control, maintenance, supervision and law enforcement (see table 1). Each stage is governed by a legal instrument to ensure that the planning and utilisation of natural resources are carried out according to conservation criteria.

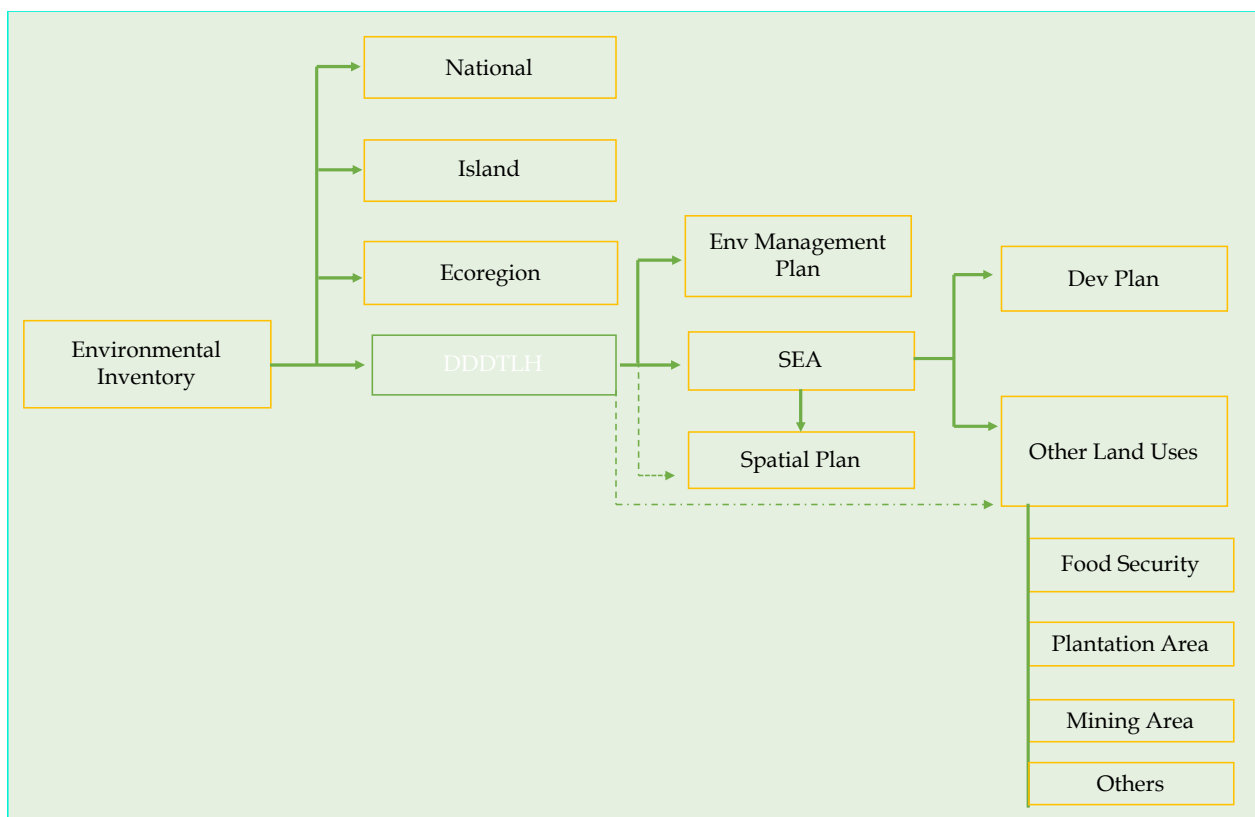
**Table 1. Stages at which environmental instruments are used, from planning to law enforcement**

Planning	Utilisation	Control	Maintenance	Supervision	Law Enforcement
<ul style="list-style-type: none"> <li>• Environmental inventory</li> <li>• Ecoregion area stipulation</li> <li>• RPPLH</li> </ul>	<ul style="list-style-type: none"> <li>• Utilisation by the sector and Local Government</li> <li>• If there is no RPPLH available, environmental carrying capacity can be applied</li> </ul>	<ul style="list-style-type: none"> <li>• Prevention instruments: SEA, AMDAL, UKL-UPL, standard, environmental audit, spatial plan</li> <li>• Management</li> <li>• Recovery</li> </ul>	<ul style="list-style-type: none"> <li>• Conservation</li> <li>• Natural resources reserve</li> <li>• Conservation of atmosphere function</li> </ul>	<ul style="list-style-type: none"> <li>• Minister/ Governor/ Regent/Mayor</li> <li>• Community participation</li> <li>• Environmental inspector officer</li> <li>• Administrative sanction</li> </ul>	<ul style="list-style-type: none"> <li>• Civil investigator (PPNS)</li> <li>• Legal Standing</li> <li>• Civil Lawsuit (CLS)</li> <li>• Non-litigation</li> <li>• Strict liability</li> <li>• Compensation and rehabilitation</li> </ul>

This analysis focuses on the planning stage, which includes an environmental inventory, an ecoregional area designation and RPPLH. Environmental inventory and the ecoregion area designation are not specifically examined because various sectors, such as mining and plantations, do not widely use them. However, one of the outputs of the environmental inventory process, the environmental carrying capacity (DDDTLH), is the basis for establishing RPPLH.<sup>5</sup> In addition, this instrument also contains climate change aspects that have not been accommodated in other environmental instruments. According to Law 2009 and Job Creation Law, RPPLH is a mandatory policy that has to be built by all provinces and districts, and eventually used as environmental safeguards in development plans.

As illustrated in table 2 below, DDDTLH is a central instrument that provides data and information that will be used by other instruments, including planning instruments such as RPPLH and RTRW, as well as controlling instruments such as SEA. It can also be directly used in land-use planning for specific purposes, such as allocating areas for plantations, mining or subsistence agriculture.

**Table 2. DDDTLH within planning policies**



Source: Environmental Law 32/2009

Other analysed instruments are SEA and EIA, which are part of control instruments. These two instruments are influential for all sectors related to land and natural resources as they are mandatory in spatial planning and in various sectoral laws.

<sup>5</sup> Article 8 and article 12 (2) Law No 32/2009



In this analysis, in addition to Law 32/2009, several sectoral laws are analysed, specifically related to plantation, mining and land, to show the extent to which environmental instruments have been considered in the planning and implementation framework of sectoral regulations.

The instruments regulating the settlement of overlapping claims in the forest area are analysed in a different paper.

## **Analytical approach**

This analysis focuses on three main aspects: the scope of the regulation; its function or role; and its implications for law enforcement.

1. The scope of the regulation outlines the issues covered by the instrument, including those related to land allocation planning and its utilisation, as well as the impact of the Job Creation Law.
2. Regulatory function is the role played by the analysed instruments, especially in land-use planning.
3. The instrument's legal implications, whether it is binding or not.

## **3. Analysis**

### **3.1. Environmental carrying capacity (DDDTLH)**

The concept of environmental carrying capacity (DDDTLH) is not new in environmental policy in Indonesia. The first Law on Environment in 1982 included the concept of supportive capacity. Subsequently, through the Law on Spatial Planning of 1992, the concept was complemented by the concept of assimilative capacity as one of the fundamental aspects in formulating spatial planning. The concept is more clearly defined in the Law on Environmental Management of 1997, which defines four terms related to DDDTLH: carrying capacity, assimilative capacity, preservation of carrying capacity and preservation of assimilative capacity. Although theoretically assimilative capacity is integrated in the concept of carrying capacity, the 1997 law defines each of them separately.

- The carrying capacity of the environment is the ability of the environment to support the lives of humans and other living creatures.
- The assimilative capacity of the environment is the ability of the environment to absorb substances, energy and/or other components that infiltrate or are included in it.
- Preservation of the carrying capacity of the environment is a series of efforts to protect the ability of the environment against the pressure of change and/or negative impacts caused by an activity, so that it is still able to support the lives of humans and other living creatures.
- The preservation of the assimilative capacity of the environment is a series of efforts to protect the ability of the environment to absorb substances, energy and/or other components that are disposed of in it.

While the definition is quite comprehensive, the Law 23/1997 does not detail the application of DDDTLH in practice. DDDTLH is only implicitly mentioned as the basis for establishing the criteria for environmental damage. The practical implementation of the criteria is developed in Government and Ministerial Regulations. These include the 2001 Government Regulation on the Management of Water Quality and Control of Water Pollution, as well as various decrees and regulations from the Environment Ministry on water, wastewater, river and sea waters, and air quality standards. In these regulations, there are criteria for environmental pollution and environmental damage that are used to define violations.

In terms of development planning and land allocation, these regulations and decrees do not explicitly state the stages and functions of DDDTLH in land-use planning formulation and programme development. For instance, it cannot be expected to prevent a programme or activity that consumes too much water or potentially disposes pollutants beyond the assimilative capacity of the environment. Most of these regulations and decrees are used practically in concrete application for operation and supervision. For example, DDDTLH is a reference for the environmental agency's supervision team (*Dinas Lingkungan Hidup*) to control whether a company's wastewater complies with governmental standards. It can also be applied to determine the water quality of rivers, lakes or sea.

In contrast, the 2009 Law on Environment outlines the role of the DDDTLH concept in planning policies with clearer norms through the stages of land-use planning.

Carrying Capacity Pursuant to Law No. 32/2009
<p>The environmental supportive capacity is the ability of the environment to support the lives of humans, other living beings, and the balance between them.</p> <p>Environmental assimilative capacity is the ability of the environment to absorb substances, energy, and/or other components that enter or are introduced into it.</p>

As illustrated by the table 2 above, DDDTLH plays a role in providing data and information before planning policies are adopted. This will be elaborated further below.

### **The Scope of Environmental Carrying Capacity (DDDTLH)**

According to the Law 32/2009, as the Spatial Planning Law 2007, and Spatial Planning Government Regulations 2010 on Spatial Planning Design, DDDTLH will be used as the basis for spatial planning. However, the scope of the environmental carrying capacity study was not explicitly regulated in the Law on Environment of 2009. It was further elaborated in the Minister of Environment Regulation No. 17/2009 (PermenLH 17/2009), which is the basis for the SEA to consolidate and value the carrying capacity of the area. According to spatial planning regulation 2010, environmental capacity and resources that are assessed in the SEA will be limiting factors in allocating land areas.

Following the integration of the Ministries of Environment and Ministry of Forestry, PermenLH 17/2009 is no longer applied. However, most of its content is contained in the DDDTLH guidelines issued by the Ministry of Environment and Forestry in 2019. According to these guidelines, environmental carrying capacity is calculated based on the value of

ecosystem services, mainly the provision of water, land, food and the yearly change in ecosystem services.

One of the results of the DDDTLH assessment is the identification of ecosystem services at the landscape level, which is called strategic area for environmental purpose or KSLH (*Kawasan Strategis Lingkungan Hidup*). Currently, KSLH is the only legal basis provided by spatial planning law to accommodate new ideas of conservation such as ecosystem essential area including corridors for wildlife and primary forests outside of forest area. Government Regulation of 2010 on Spatial Planning Design defines the scope of the KSLH as: (1) protection areas designated for the protection of ecosystems, flora, and/or endangered or almost extinct fauna,; (2) areas that provide protection for the macro climate balance, (3) high priority areas for environmental quality improvement, (4) areas prone to natural disasters; or (5) areas that are critical for environmental changes and have extensive impact on ecosystem adaptation.

## The Function of DDDTLH

### a) Temporary guideline

The DDDTLH is used as a temporary instrument before the RPPLH is established. During that period, DDDTLH will provide guidelines for policymakers in utilising natural resources.<sup>6</sup> Although it is used as an interim policy, DDDTLH draws the attention of policy makers to the sustainability of environmental capacity, productivity, safety, quality of life and welfare of the community.

As a temporary instrument, environmental carrying capacity must be determined by the relevant authorities according to their respective authorities. Before RPPLH is available, the Minister, Governor or Bupati could refer to DDDTLH as the basis for a jurisdiction to design planning instruments, in particular development and spatial plans. Although there is no specific legal provision regarding when the DDDTLH analysis should be carried out, other instruments, such as spatial planning and SEA, are based on DDDTLH information. Currently, the national DDDTLH has two basic information on ecosystem services, namely water and food supply. The minister determines the environmental carrying capacity of the national and island or islands environment, the governor in the scope of province and inter-district/city ecoregion, and the regent/mayor for the area and ecoregions in that region.

### b) Guiding the SEA

Under the Law 32/2009, DDDTLH is a parameter that guides the SEA recommendations. The Law stipulates that if the SEA outcomes indicate that the carrying capacity of an area has been exceeded, the development policies, plans, and/or programmes must be improved in accordance with the SEA's recommendations. If the area has already been granted a business permit or activities are already being carried out, the permit or activities are no longer allowed.<sup>7</sup>

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<sup>6</sup> Article 12 paragraph (2) of Law 32/2009

<sup>7</sup> Article 17 paragraph (2) of Law 32/2009

c) Directing the preparation of spatial planning

Under the Law on Spatial Planning (Law 26/2007), Job Creation Law (Law 11/2020), Government Regulation on Spatial Planning Implementation (PP 15/2010), and Government Regulation on Spatial Planning to Job Creation Law (PP 21/2021), jurisdictions at all scales, whether national, provincial, or district/city, are required to develop a spatial plan that considers the environmental carrying capacity. Furthermore, PP 21/2021 states that jurisdictions at all scales may include in their spatial plans indications regarding KSLH for environmental function and capacity. These areas can be specified by national regulations or separate bylaws at the sub-national level, outside the general spatial planning regulations. Currently, national regulations to determine the KSLH are embedded in Presidential Regulations. For instance, Komodo National Park and Gunung Merapi National Park are designated by Presidential Regulations as national environmental strategic areas. At the subnational level, KSLH can be specified by a variety of legal instruments, such as decrees or province/district regulations. By law, provinces or districts should process the proposals for KSLH through a local regulation or Peraturan Daerah, which is the highest level of regulation to be adopted by local governments.

In 2019, the MoEF developed guidelines for local governments to apply DDDTLH in the planning process. The 2019 guidelines include indicative lists for DDDTLH assessment based on 23 types of ecosystem services, including those related to water, food and land, and external pressures, such as climate change. The guidelines also include a methodology for local governments which covers data types and a data interpretation methodology, including the scoring system for ecosystem services and criteria to define the status of carrying capacity (low, moderate, high).

Another piece of guidance is the spatial guidelines for the formulation of Provincial/District/Urban Spatial Plans (Regulation of Minister of Agrarian Affairs and Spatial Planning Number 1/2018 – MASP Reg 1/2018). It details the scope of carrying capacity. For instance, the analysis should include the land capability unit (SKL) analysis, the essential ecosystem natural resources accounting analysis, and land, sea and air space needs. The scope is supposedly identified by the aforementioned methodology contained in MoEF's 2019 guidelines. Based on this analysis, the land allocation for development purposes, business uses, social distribution (land for the landless), and other land uses (struktur dan pola ruang) shall consider the result of environmental carrying capacity analysis.

In addition, the MASP Reg 1/2018 reaffirms the opportunity for provinces, districts/cities to include KSLH in their spatial plans. The criteria are mostly similar to the aforementioned KSLH criteria with specific criteria for water supply.

In terms of timeframe, there is no regulation about when DDDTLH should be available. But as mentioned above, DDDTLH is embedded in planning instruments. This means that DDDTLH should be carried out prior or during the spatial or development planning process, and prior or during the development of any other strategic land-use plan. Consequently, DDDTLH should be carried out during the development of the proposal for new spatial planning or five-year revisions.

The recent policy of Job Creation Law recognises the role of DDDLTH in spatial planning. Article 14A of the Law mandates all spatial planning processes to consider the DDDLTH as the basis for land/marine/coastal allocation. The Job Creation Law also requires line ministries and local governments to apply a jurisdictional risk assessment rather than a licence-based approach in development plans and investment plans. There is therefore momentum for developing and implementing DDDLTH. Despite the policy support, there are no legal provisions in cases where the DDDLTH is not consistently applied by policy makers. This legal gap may be addressed in the ongoing discussion regarding the implementation of Job Creation Law.

d) Guiding land use for mining

The legal framework for mining, plantation and agricultural activities explicitly refers to the carrying capacity, the supportive capacity or the assimilative capacity to evaluate whether these land uses can continue.

In the mining sector, regulations provide that the mining business licence area must meet the environmental carrying capacity.<sup>8</sup> Other regulations indicate that mining activities can be halted temporarily if the environmental carrying capacity of the region cannot bear the burden of mineral and/or coal production operations in the area.<sup>9</sup> The East Kalimantan Province and East Nusa Tenggara provide examples of how environmental carrying capacity provides grounds for temporarily suspending mining activities.<sup>10</sup> The Governor Regulation of East Kalimantan 17/2015, provides that, one of the reasons for the moratorium on the granting of new coal mining permits is to ensure that natural resource use is supported by sound environmental standards. To ensure these standards, ecosystems have to be rehabilitated before the East Kalimantan Government considers whether new permit will be granted.

In terms of guidelines, the mining sector has its own version of DDDLTH. Ministerial Decision of Ministry of Energy and Mineral Resources Number 1827 K/30/MEM/2018 about the guidance for miners concerning good mining technique has set the scope of carrying capacity identification. It includes the analysis of river capacity, hydrology, hydrogeology, geological structure and lithology. However, unlike MoEF, the Mining Ministry has not detailed how the analysis should be done, the methodology and the score to set the status of carrying capacity of the mining area. The guideline refers to some other standards. For instance, for earthquakes, the guideline refers to the coefficient mentioned in SNI (Indonesia's National Standard) 1726:2012, and the International Cyanide Management Code is referred to for this pollutant.

In the plantation sector, the Law 39/2014 stipulates that plantation planning is based on several considerations, including the environmental carrying capacity.<sup>11</sup> However, the Law also provides that this concept is to be further elaborated in a Government Regulation, which still has not been adopted.

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<sup>8</sup> Government Regulation 22/2010

<sup>9</sup> Article 76 Government Regulation 23/2010

<sup>10</sup> Moratorium Tambang di Kaltim Jalan Terus (<https://kaltimprov.go.id/berita/moratorium-tambang-di-kaltim-jalan-terus>)

<sup>11</sup> Article 6 Law 39/2014

Although it did not specifically refer to the term carrying capacity, the oil palm moratorium policy of 2018 was based on environmental considerations. It is clearly stated that the oil palm moratorium policy is established

‘... to improve the sustainable management of oil palm plantations, provide legal certainty, maintain and protect environmental sustainability, including reducing greenhouse gas emissions, as well as to increase the development of oil palm farmers and increase the productivity of oil palm plantations....’

In addition, land allocation to farmers must also consider environmental carrying capacity. This is explicitly mentioned under Law 19/2013, namely that farmers protection and empowerment planning must be based on the natural resources and the environmental supportive capacity.<sup>12</sup>

### **Legal implications for resolving legality issues**

Environmental carrying capacity has reached many key land-use sectors. However, it does not have a coercive function and its violation does not lead to legal sanctions. It is commonly used as a complementary instrument in planning processes, such as RPPLH, RTRW and RPJM. As such, the environmental carrying capacity is merely an instrument to provide data and information to support research and planning. There is no legal implication if policymakers choose to use other instruments. In the mining sector, even if environmental carrying capacity considerations can temporarily stop mining operations, they must be followed by law enforcement. In cases where the DDDTLH results are not fully taken into account, but no law enforcement follows, the mining operation cannot be stopped. In short, environmental carrying capacity can be used when the inspectors choose to use the instrument as a supervision tool.

However, DDDTLH is a powerful tool for environmental advocacy as it provides data and information regarding spatial and land-use planning. It provides useful indications to the government and environmental groups when considering the allocation of an area for mining, plantation or other uses, whether those areas are appropriate for such purposes. In that role, DDDTLH not only supports the planning process, but it also provides early information for control instruments, such as SEA or the environmental audit, which could lead to sanctions. Similarly, the data and information from the DDDTLH enables environmental organisations to monitor the planning process and check whether it complies with environmental criteria.

## **3.2. the Environmental protection and management plan (RPPLH)**

The RPPLH is a written plan that outlines potential environmental problems and protection and management measures within a certain period. The Law 32/2009 does not specify time limits for RPPLH's validity. However, the RPPLH provides the basis for the Long-Term and Middle-Term Development Plans, which could span between 5 to 20 years. The RPPLH is a new instrument in the environmental law regime, and is not widely known nor implemented in regulations and policies. Although there is a budget line for provinces and districts to set

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<sup>12</sup> Article 5 paragraph 2 Law No 19/2013

up a RPPLH as non-basic mandatory service for environmental performance (*layanan wajib non-dasar*) (Permendagri 86/2017), few take up this opportunity. Up until 2018, out of the 34 Indonesian provinces, only South Kalimantan Province had adopted a RPPLH. And out of 514 districts and municipalities, only Depok had adopted one in 2015. In 2018, Surabaya city had finalised a study on DDDTLH to develop a RPPLH, but information on the political decision on that study is unavailable. Similarly, Seruyan completed a similar study in 2019, but the political process to transpose the study into a district regulation is still ongoing.

### **The Scope<sup>13</sup>**

The RPPLH is prepared by the Minister, Governor, or Regent/Mayor in accordance with their authorities. The aspects that have to be considered as bases for the preparation of this document are:

- a. Diversity of ecological characters and functions
- b. Population distribution
- c. Potential distribution of natural resources
- d. Local wisdom
- e. Community aspirations
- f. Climate change

Most of these aspects are related to environmental carrying capacity that supposedly is established before the RPPLH is developed. Other documents currently under the authority of the district/municipal government based on the Law 23/2014 also provide relevant information for the design of the RPPLH, including the Regional Environmental Status (SLHD), the Environmental Quality Index (IKLH), the Land Cover Information and Long-Term Development Plans.

Interestingly, RPPLH includes climate change as one of the aspects in environmental protection and management at the district level. Since RPPLH is required to be transposed into province/district regulation (PERDA), it is the only policy that takes into accounts climate change as a responsibility of district/municipal government. While some policies on climate change are already in place, they fail to engage with district governments and recognise their authority. For instance, in STRADA GRK (Strategy and District Action Plan for Greenhouse Gas Emissions), the Bupati/Mayor's role is to contribute to the GHG report of the province. In principle, the Bupati/Mayor has a passive mandate. Their powers are listed under Presidential Regulation 71/2011 as delegated from the central government and provinces.<sup>14</sup> In consequence, although a district can report relevant activities of GHG control, there is no public budget provided to finance these activities.

The revision of decentralisation law 2014 does not clarify these delegated powers. The climate change agenda remains centralized and top-down. While district and municipal governments are required to report the GHG-related activities, they have no regular budget for those activities. As recognised by the Ministry of Home Affairs, many districts are confused regarding the legal basis for them to finance the activities related to climate

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<sup>13</sup> Article 10 of Law No 32/2009

<sup>14</sup> Presidential Regulation 71/2011

change.<sup>15</sup> Similarly, the package of REDD+ policies of 2017 (PermenLHK 70, 71, 72, and 73 of 2017) contain no reference to the authority of district/municipal governments. This may be a consequence of removing authority over forests from districts to provinces.<sup>16</sup> Clearly, in relation to the forest area, there is no authority for district/municipal governments to set up programmes and/or activities, which, by law, will be publicly financed. However, REDD+ is not only about forest area but also forest cover outside of forest area which is definitely under the authority of district/municipal government. As a result of the above, districts/municipalities do not mention climate change in their regional planning documents, neither the RPJMD nor the Spatial Planning. This also comes out clearly in the current RPJMD guidelines issued by the Ministry of Home Affairs (MoHA), which does not include climate change as criterion to assess district performance.<sup>17</sup> Consequently, districts and municipal governments have no obligation to include climate change in their regular reporting to MoHA.

Although other instruments such as SEA could provide policy recommendations on climate change, there is no obligation for local governments to take them into account in planning documents, particularly in PERDA. The SEA itself is a mandatory study that formulates recommendations for programme/policy/activities on the consideration of environmental issues (see next section). The SEA validation process is integrated in RPJMD, but the process of assessing the document is mainly a “box ticking” exercise by MoHA to fulfil the administrative complementary requirement of RPJMD approval. It is not a validation on the quality of the SEA content. Therefore, the SEA cannot be relied upon to ensure that district/city governments will take action on climate change. In this case, the RPPLH is the only instrument that explicitly provides a space for districts and municipalities to turn climate change commitments into policy.

## **Function of RPPLH**

Pursuant to the Law 32/2009, the RPPLH contains plans on the utilisation of natural resources and/or reserve, maintenance and protection of the quality and/or functions of the environment, control, supervision, as well as natural resources utilisation and conservation; along with climate change adaptation and mitigation.<sup>18</sup>

The RPPLH also provides the basis for the formulation of the long-term and medium-term development plans. The outcomes of the RPPLH are expected to influence the process and the content of these planning documents.<sup>19</sup> However, there is no evidence yet regarding the effectivity of this strategic function. As mentioned earlier, the RPPLH is new within the environmental legal framework and is subject to continuous improvement. Ideally, the RPPLH should be adopted ahead of RPJMD as a policy guideline for policy makers to refer to when discussing the proposed programme/activities. For instance, granting permission to extend a plantation area should be based on carrying capacity in RPPLH. However, at

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<sup>15</sup> Mongabay, ‘Hadapi Perubahan Iklim, Kesadaran Pemerintah Daerah Terbilang Minim’, (<https://www.mongabay.co.id/2016/11/25/hadapi-perubahan-iklim-kesadaran-pemerintah-daerah-terbilang-minim/>)

<sup>16</sup> Regulation of Minister of Environment and Forestry 70/2017

<sup>17</sup> Regulation of Ministry of Home Affairs 86/2017

<sup>18</sup> Article 10 paragraph 4 Law 32/2009

<sup>19</sup> Article 10 paragraph 5 Law 32/2009



present, the RPPLH is developed late after the RPJMD process has been initiated and the RTRW is implemented.

### **Legal implications**

The RPPLH is regulated and stipulated by government regulation at the national level and bylaws at the provincial, district/city level. It should be reference point for local governments when determining the programme and activities for development planning. For instance, district policy makers have to consider natural forests in RPPLH when they want to extend oil palm plantations. In this case, it has a role as a guiding policy that prevents local governments from potential illegal land use.

Furthermore, RPPLH is also a mandatory instrument that will be used by the Central Government to measure local governments' progress towards environmental sustainability. It is related to policy incentives and disincentives. The form of incentives and disincentives remains unclear, as discussions on this topic are ongoing. Sustainable land-use allocation is one of the heated topics in these discussions.<sup>20</sup>

Currently, the Central Government has a budget line to support the development of RPPLH at the district and municipal level. Unfortunately, the Government Regulation that regulates the RPPLH as mandated by Law 32/2009 has not yet been adopted. This discourages local government to formulate this instrument.

### **3.3. Strategic environmental assessment (SEA)**

Strategic environmental assessment (SEA) is a series of systematic, comprehensive and participatory analyses to ensure that sustainable development principles have been integrated in the development of an area, policy, plan, and/or programme. The SEA was first introduced by Law 32/2009. Implementing regulations were first adopted in 2012, so they are relatively new compared to EIA. It is applied to mid-term development, spatial planning, and by projects application to many strategic development plans such as national infrastructure plan and integrated economic area. Its application in spatial planning was debatable among line ministries mostly for political reasons. One of them was the Ministry of Spatial Planning did not want the MoEF has the authority to develop a SEA for spatial planning. Notwithstanding that, the SEA is currently being accepted as an important and strategic instrument in current development planning and land allocation.

#### **The Scope**

The drafting and implementation of the SEA consist of the following steps:<sup>21</sup>

- a. Assessment of the potential impacts of a policy, plan and/or programme on the environment
- b. Formulation of policy improvements, alternative plans and/or programmes

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<sup>20</sup> Haryanto, J. T., & Martha, L. F. (2017). Kerangka Hukum Instrumen Ekonomi Lingkungan dalam Upaya Penurunan Emisi Gas Rumah Kaca. *Jurnal Konstitusi*, 14(2), 262-294.

<sup>21</sup> Article 6 Government Regulation 46/2016

- c. Formulation of improvement recommendations for policy decision, plan and/or programme that integrate sustainable development principles

The analysis of the policy, plan and/or programmes should result in at least of six studies, namely:<sup>22</sup>

- a. Environmental carrying capacity
- b. Environmental impacts and risks estimate
- c. Ecosystem services performance
- d. Efficiency of natural resources utilisation
- e. Level of vulnerability and adaptive capacity to climate change
- f. Level of biodiversity

The formulation of an alternative policy, plan or programme can be in the form of changes in objectives or targets from those originally planned, or changes in the target achievement strategies. In addition, alternatives may also involve changes or adjustments in size, scale and location that better meet sustainable development considerations. If possible, alternatives formulated in the SEA include changes or adjustments to processes and methods based on the available science and technology. Other alternatives can also be encouraged such as postponement, sequences revision or implementation priority changes. The SEA can also instruct to maintain or improve ecosystem functions or mitigate environmental impacts and risks.<sup>23</sup>

## **The Function of SEA**

- a) Directing the middle term development plan

The SEA leads to recommendations for improvement of policy decisions, plans and/or programmes in line with the Sustainable Development Goals (SDGs). These issues are determined based on priorities of the jurisdictions and related elements, including: socioenvironmental characteristics; the potential impacts; and scope of proposed policies, plans or programmes. These strategic issues can be identified in an environmental carrying capacity assessment, an environmental impact and risk estimation, an assessment of ecosystem service performance, of natural disaster risk, or of biodiversity loss, and other issues referred to in Government Regulation on SEA.<sup>24</sup>

- b) Making scientific analysis the basis for decision making

The SEA outcomes form the basis for the development of policies, plans and/or programmes in an area. The Law 32/2009 stipulates that if the SEA outcomes state that the carrying capacity has been exceeded, the development policy, plan and/or programme must be improved in accordance with the SEA recommendations. In addition, all business and/or activities that have exceeded the environmental carrying capacity are no longer permitted to operate. However, enforcement of these legal

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<sup>22</sup> Article 16 Law 32/2009, Article 13 Government Regulation 46/2016

<sup>23</sup> Article 15 Government Regulation 46/2016

<sup>24</sup> Article 9 Government Regulation 46/2016

provisions is deficient. For example, in Central Java, the governor rejected a SEA recommendation not to operate cement factories in the karst area.<sup>25</sup>

## Legal Implications of SEA

The Law 32/2009 makes the SEA mandatory in spatial planning and middle term development planning.<sup>26</sup> Initially, the introduction of the SEA into spatial planning caused a polemic since the spatial regime was under the responsibility of different ministries. However, the SEA has slowly become accepted as a mandatory instrument before regional spatial planning is endorsed. Government Regulations No. 15/2010 and No 21/2021 accommodate for the SEA in one of the early steps of RTRW drafting (of data management and analysis). One of the components in the SEA is the identification of the status of environmental carrying capacity.<sup>27</sup> Hence, there is a clear connection between DDDTLH and SEA. The result of DDDTLH could be used by the SEA analysis to indicate the environmental risks of the proposed policies, plans and activities. With regards to compliance, the Regulation of the Minister of Agrarian Affairs and Spatial Planning 1/2018 further stipulates that the SEA recommendations should be considered in revising the draft of Spatial Planning (RTRW). This provision is later employed in the verification process of the RTRW. Without a SEA, a proposed spatial planning from districts/municipals cannot be validated by the province. In this case, although there are no criminal sanctions attached to the SEA, in the administrative process, the SEA can prevent the RTRW from being enacted in a regulation. In the absence of stipulated RTRW, Bupati/Mayor cannot allocate any land for business or development activities.

Following the Planning Agency's (BAPPENAS) recommendation of 2018, MoHA uses the SEA to mainstream the SDGs into development indicators. The MoHA endorsed the application of SEA into development planning by MoHA Regulation No 7/2018 that implements the Presidential Regulation on Sustainable Development Goals (Presidential Regulation 59/2017) which translated the 17 SDGs into the 2016-2030 national targets. Based on MoHA's regulation, local governments have to incorporate SDGs indicators in SEA analysis and turn them into development activities. The MoHA Regulation 86/2017 lists SEA as one of the mandatory performances by district/city governments in relation to environmental sustainability (indicators 5.26 to 5.31). Therefore, the preparation of the SEA should be supported by budget allocations and local governments have no reason to neglect this instrument. This coordination between Bappenas and MoHA is one of the good examples of inter-ministerial policy coordination. It is also the best example of the transposition of an international commitment into a national legal instrument.

## 3.4. Environmental impact analysis (EIA)

The Environmental Impact Analysis (EIA), or AMDAL in Bahasa, is a study of the likely significant environmental impacts of a planned business and/or activity, which is required in the permitting process of such business and/or activity. It is a pre-operation requirement for

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<sup>25</sup> ESDM Jateng, 'Pemprov Tolak Rekomendasi KLHS' (<https://esdm.jatengprov.go.id/iNews/pemprov-tolak-rekomendasi-klhs/>)

<sup>26</sup> Article 15 and 19 Law 32/2009

<sup>27</sup> Article 25 paragraph 2 letter c, Article 27 paragraph 2 letter c, Article 32 paragraph 2 letter c, Article 35 paragraph 2 letter c, Article 43 paragraph 2 letter c, Article 67 paragraph 2 letter c, Government Regulation No. 15/2010

a business activity, and therefore has to be done before the business is granted an operation permit.

## The Scope

The EIA applies to activities or businesses of a certain size. According to the Law on Environment of 2009, activities that are likely to have significant impacts are determined based on the following criteria<sup>28</sup>:

- a. A significant number of people will likely be affected by the planned business and/or activity
- b. The extent of the impacted area
- c. The intensity and duration of the impact
- d. The number of hypothetical environmental impacts
- e. The cumulative nature of the impact
- f. The reversibility or irreversibility of the impact; and/or
- g. Other criteria based on the development of science and technology

Concretely, business and/or activity criteria that have significant impacts are activities related to:

- a. A change in landform and landscape
- b. Exploitation of natural resources, both renewable and non-renewable
- c. Processes and activities that may potentially cause environmental pollution and/or degradation, as well as waste and deterioration of natural resources in their utilisation
- d. Processes and activities whose results may affect the environment, the artificial environment, and the social and cultural environment
- e. Processes and activities whose results will affect the preservation of natural resources, conservation areas and/or the protection of cultural heritage
- f. Introduction of species of plants, animals and microorganisms
- g. Production and use of biological and non-biological materials
- h. Hazardous activities that present high risks and/or could affect national defence; and/or
- i. Technological applications that are very likely to affect the environment

This type of business or activity is regulated in a Ministerial Regulation. The latest regulation is Regulation of Minister of Environment and Forestry No 38/MENLHK/SETJEN/Kum.1/7/2019 (PermenLHK 38/2019). It lists the types of business and activities that are subject to EIA in each sector, including multisectoral business/activities, defence, agriculture, fisheries and marine, forestry, transportation, satellite technology, industry, public works, housing and human settlement areas, energy and mineral resources, tourism, nuclear, and management of hazardous and toxic materials.

In addition, this regulation also stipulates that planned businesses and/or activities carried out within protection areas and/or directly adjacent to protection areas are required to carry out an EIA.<sup>29</sup> However, there are exceptions for activities related to exploration for mining, oil and gas, as well as geothermal activities that will not change the landscape. The exception

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<sup>28</sup> UU 32/2009 Article 22 paragraph (2)

<sup>29</sup> Article 3 paragraph 3 letter b Regulation of Minister of Environment and Forestry 38/2019

is also given to activities for scientific research, businesses or activities that support the conservation of protection areas, or those related to national defence and state interests that have no significant impact on the environment. This regulation also supports the exclusion of small-scale cultivation from EIA requirements for farmers and indigenous peoples, as long as the cultivated area is not expanding and does not reduce the bio-physical function of protection areas and be supervised by the district government or relevant authority.<sup>30</sup>

Unlike the previous legal instruments of 2012, PermenLHK 38/2019 groups business plans and activities that require mandatory EIA into three categories, A, B and C.<sup>31</sup> The categories aim to synchronise the EIA requirement with the timeline of the application for business permit that is regulated by the 2018 Government Regulation on the OSS (Online Single Submission). Within the OSS, there is timeframe for a company to obtain a permit and thus a limited time to carry out an EIA. The development of EIA category A is set at a maximum of 180 days; category B, 120 days; and category C, 60 days. The risk criteria in determining these groupings are as follows:

1. Complexity of the business plan and/or activity
2. The impact of the planned business and/or activity on the environment
3. Sensitivity on the location of the business plan and/or activity
4. The environmental carrying capacity at the planned business and/or activity site

These four criteria were further developed into 12 weighed criteria contained in annex I of the regulation of PermenLHK 38/2019. The weighed criteria will be applied to assess the scale of risk of the proposed activities/business. For instance, risk category 4 (environmental carrying capacity) has three weighed criteria: (a) highly exceeding the carrying capacity, (2) moderately exceeding the carrying capacity; (3) do not exceed the carrying capacity. Proposed activities that are expected to highly exceed the carrying capacity are categorised as 'high risk' with a score of 3. Activities that are expected to moderately exceed the carrying capacity are categorised as 'moderate risk' and scored 2. Activities that are not expected to exceed the carrying capacity are categorised as 'low risk' with a score of 1.

Furthermore, the score from each weighed criterion is aggregated into a final score that will determine the category of EIA. The higher numbers are considered high risk. The EIA category A had a cumulative value of > 9 (greater than nine), category B had a cumulative value between 6-9, and category C had a cumulative value of <6 (less than six).

The classification of activities within risk categories is strengthened by the Job Creation Law. How these categories will be used remains unclear, particularly in terms of the requirements for operating business, for instance, whether category A activities are subject to more stringent procedures than category B or C activities.

## **The function of the EIA**

The main function of the EIA is to provide the basis for the different authorities (Minister, Governor, Regent/Mayor), in accordance with their respective mandates, to issue a decision provided by the Job Creation Law as environmental approval decision, that is materialised

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<sup>30</sup> Article 6 paragraph 1 Regulation of Minister of Environment and Forestry 38/2019

<sup>31</sup> Article 4 Regulation of Minister of Environment and Forestry 38/2019, Article 41 and 42, Government Regulation 22/2021

into SKKLH (*Surat Keterangan Kelayakan Lingkungan Hidup*).<sup>32</sup> The SKKLH is part of the environmental procedure and must be included in the business permit.<sup>33</sup>

Another function of EIA is to provide an opportunity for the public to raise concerns, objections and suggestions regarding the proposed planned activity. Public participation is carried out in two steps. The first is organised at the early stage of the drafting of the EIA document, to enable the public to comment. The second is carried out at the final stage of document verification, before it is validated by a relevant authority. Besides raising any comments, at the verification stage, the general public can review whether the proposed document accommodates their concerns. Therefore, transparent and complete information must be provided by the company and notified through public announcement before the consultation is carried out. For instance, the information should be posted on a bill board located strategically nearby the proposed project area. Other channels are the announcement on local media, online media, and any other possible media for the public to read and raise concerns. The community to be informed are those who are directly affected, environmentalists and those who are indirectly affected by all kinds of decisions in the EIA process. During the public participation process, the affected community may submit objections to the proposed planned activities.

Regarding stakeholders to be consulted, Regulation of Minister of Environment and Forestry No. 26 of 2018 indicated that the affected communities include vulnerable groups, indigenous peoples, and men and women's groups, taking into accounts gender equality.<sup>34</sup>

However, the job creation law and Government Regulation 22/2012 limits stakeholders to those directly affected communities that could include vulnerable groups, indigenous peoples, and women based on gender equality considerations (articles 26 and 32). Indirect stakeholders such as environmentalists (experts, NGOs, etc.), the facilitating NGOs and those indirectly affected by the planned business or activities who could also include vulnerable groups and so forth, could be invited.<sup>35</sup> As a result, broad public participation in the EIA process is no longer mandatory as was previously the case under the Law 32/2009 and its implementing regulations.

## Legal Implications

EIA not only prevents environmental risks, it also aims to monitor the implementation of business and activities. EIA violations have legal consequences. According to the Job Creation Law, conducting business without an EIA is punishable by a prison sentence of one to three years and a fine of at least one billion rupiah.<sup>36</sup> The person drafting the EIA report must hold a competency certificate, although this is no longer a punishable offence as it was previously the case under Law 32/2009.<sup>37</sup> In addition, officials who issue a business permit without an EIA are subject to criminal sanctions.<sup>38</sup>

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<sup>32</sup> Article 49 Government Regulation 22/2021

<sup>33</sup> Article 49 Government Regulation 22/2021

<sup>34</sup> Margaretha Quina and Angela Vania, 2019, *Perizinan Lingkungan Melalui Online Single Submission*, Seri Lembar Informasi, April 2019 # 1, ICEL

<sup>35</sup> Article 28 and 29 Government Regulation 22/2021

<sup>36</sup> Article 109 Law 11/2020

<sup>37</sup> Article 110 Law No 32/2009 and Article 28 Law 11/2020

<sup>38</sup> Article 111 Law 11/2020

Some cases of a breach of EIA have been reported in the media. One of the cases is mining operation in South Kalimantan. In the Tanah Bumbu District of this Province, 13 coal companies operated without a proper EIA. The EIA document had been developed by someone uncertified, who copied and pasted from another document, in short, a fraudulent process. Eight of them had no EIA at all. The district government revoked the business permit of these companies. The local government also revoked the certificate of the EIA Commission, which failed to comply with the prescribed procedure to assess, approve, and issue EIA.<sup>39</sup>

The Job Creation Law introduces significant changes in terms of punishment for the perpetrators. For instance, a breach of EIA procedures or the drafting of an EIA by an uncertified person is no longer penalised but only subject to administrative sanction.<sup>40</sup> The most significant change is the possibility of subjecting only to administrative sanctions those companies that operate without a business permit.<sup>41</sup>

Moreover, the OSS policy (PP 24/2018) made several adjustments to the EIA. First is the synchronisation between EIA and Detailed Spatial Planning (RDTR). According to PermenLHK 24/2018 (an operational policy of OSS for EIA), business and activities with significant impacts can be excluded from EIA obligations if the location of the business/activity site is in an area that already has a RDTR document.<sup>42</sup> In these cases, the referred RDTR needs to fulfil the following criteria<sup>43</sup>:

- a. RDTR has been equipped with SEA, which is developed and implemented in a comprehensive and detailed manner. The intention is that the SEA has studied the effect of the RDTR on environmental conditions, it has formulated alternative improvements to the RDTR and improvement recommendations for RDTR decision makers that integrate sustainable development principles.
- b. RDTR has integrated the SEA outcomes.

Secondly, under the Law 32/2009, a business permit cannot be granted before a business actor carries out an EIA.<sup>44</sup> The OSS policy amended this by placing EIA as a part of fulfilling commitments after the OSS body issue the Business Licence.<sup>45</sup> When the commitments have not been fulfilled, business actors are prohibited from starting their main businesses operation.

However, the OSS made some exception for certain activities to be carried out before EIA is given. In this case, a company is allowed to perform several preliminary activities, namely: land acquisition, land cover change, building construction and operation, equipment or facility procurement, human resources procurement, settlement of certification or feasibility study, commissioning, and production operationalisation. This is further justified by the Job Creation Law.

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<sup>39</sup> Kompas.com, 13 Izin AMDAL Tambang Dicabut  
(<https://nasional.kompas.com/read/2011/09/08/19543575/13.Izin.Amdal.Tambang.Dicabut>)

<sup>40</sup> Article 82B Law 11/2020

<sup>41</sup> Article 82A Law 11/2020

<sup>42</sup> Regulation of Minister of Environment and Forestry 24/MENLHK/SETJEN/KUM.1/7/2018 Article 4 paragraph (2)

<sup>43</sup> PermenLHK P.24/MENLHK/SETJEN/KUM.1/7/2018 Article 5

<sup>44</sup> Margaretha Quina and Angela Vania, *ibid.*

<sup>45</sup> Article 38 paragraph 2 Government Regulation 24/2018

## 4. Conclusion

Overall, environmental instruments exist at the jurisdictional scale to prevent environmental damage and provide mechanisms to minimise environmental impact. If risky development activities are inevitable, these instruments are needed to prevent devastating impacts on ecosystems.

Although the Job Creation Law has revoked the requirement to obtain an environmental licence, other instruments are maintained, particularly those that operate at jurisdictional level, such as the environmental carrying capacity (DDDTLH), the environmental protection and management plan (RPPLH), and the Strategic Environmental Assessment (SEA). These are the main environmental safeguards instruments targeted by the current political pressure aimed at minimising the environmental regulation of investment policy.

DDDTLH is a research tool that provides comprehensive data and information at jurisdictional/landscape level. It helps authorities set the environmental baseline before developing any policies and regulations. District/municipal governments are supposed to consider this data and information in formulating policies, especially on land use. With regards to these planning policies, the Job Creation Law maintains the provision of Law 32/2009 making mandatory for governmental entities to carry out a DDDTLH in designing RTRW and as a basis to set up RPPLH. In addition, DDDTLH is also used to guide proposed land allocation for mining, plantation and other land uses. However, its results are not binding on local governments. Compliance with its recommendations depends on district governments' good will. This is particularly the case for Bupati (regency chiefs) and Walikota (mayors), who may fully take into accounts DDDTLH by developing good quality RTRW and RPJMD. While DDDTLH is one of the SEA's product of analysis, the process to produce DDDTLH could be done before SEA study is carried out.

The RPPLH is one of the instruments to translate DDDTLH into policy. The advantage of having RPPLH is that RPPLH is mandatory and has to be adopted in the form of PERDA. Compared to other environmental instruments, RPPLH creates a strong incentive for district governments to design and implement activities in accordance with environmental purposes. Its legal force is all the more important because RPPLH includes climate change considerations and is the only instrument that delegates climate change responsibilities to district/municipal governments. Although other instruments such as SEA could provide policy recommendation on climate change, there is no obligation for local governments to take these into accounts when developing planning documents, particularly in PERDA. The RPPLH's main role is to frame the formulation of the long-term and medium-term development plans. Legally speaking, RPPLH is a mandatory instrument that is used to measure the performance of local governments towards environmental sustainability. Therefore, RPPLH is related to incentives and disincentives. Unfortunately, the national RPPLH has not yet been adopted, which might discourage local governments to take the initiative to adopt the RPPLH instrument at their jurisdictional level.

The SEA assesses whether a proposed programme, policy or activity is in line with environmental criteria. The SEA could use the data from existing DDDTLH or produce an analysis regarding DDDTLH trend and status. Currently, SEA is an influential tool as it is required for designing RPJMD and RTRW. Some strategic development activities also have



to carry out an SEA, such as activities planned in a Special Economic Zone. The SEA could recommend district governments to revise or even change a programme, policy and activity on environmental grounds. The EIA can also formulate recommendations, including pathways and forms of policies to address findings in relation to overlapping land allocation. Obviously, SEA can prevent conflicting policies as well as unsustainable plans, policies, activities at the jurisdictional scale. Although the SEA assessment could be a powerful tool, its findings are not enshrined in PERDA, but integrated in planning documents, namely RPJMD or RTRW. In the end, whether the SEA findings will be seriously considered in planning and implementation depends on district governments' political will.

The EIA assesses the possible impacts of individual projects or activities. At present, the requirement to carry out an EIA depends on a risk category (A to C). Currently, the EIA is the strongest and binding environmental instrument to apply at the project level. Theoretically, projects under the EIA category (risk-based category) have to be prevented or treated carefully. But 2019 Ministerial regulation allows preliminary activities to be carried out before the EIA is carried out, including land cover change, building infrastructure and land acquisition, which are as risky as the main operational activities of the business. Moreover, the Job Creation Law has packed the EIA as one of the necessary elements to obtain a business permit.

Some of the latest developments in investment policies, in addition to the Job Creation Law, could significantly reduce the role of environmental instruments in preventing land use illegalities. Nevertheless, these instruments are legally based safeguards to prevent further illegal land uses that have environmental impacts.

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