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Averting Deforestation: Designing the Model of a Public Participation-Based Environmental Agreement of Shifting Functionality of Forest

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ABSTRACT

This research highlights the shifting concepts and mechanisms in business licensing in forest areas from environmental licensing to an environmental agreement following the effectuation of Indonesia's Job Creation Law. It is important to investigate this change, considering that it may involve environmental damage or deforestation in forest areas, which tends to be pro-businesses. With the normative-juridical method that incorporates statutory, conceptual, and analytical approaches, This research aims to analyze



the concept of the integration of an environmental agreement in risk-based business licensing that has changed business licensing into an environmental agreement in forestry. This study also analyzes the concept of an environmental agreement concept regarding the likelihood of deforestation and the shifting functionality of forest areas. The last important point is that it is paramount to set an ideal legal construction in the environmental agreement in risk-based business licensing in forestry businesses by employing a restorative justice approach and public participation. The research results recommend an ideal legal concept in the integration of an environmental agreement into risk-based business licensing by taking into account public participation, as outlined in Environmental Protection and Management Law, implying citizens to have both public and private rights, enabling them to participate. Moreover, the public role can adjust to the need and risk levels developed with varied concepts of the development of public participation by considering theories and practices in other countries.

Keywords: Job Creation Law, Environmental Agreement, Risk-Based Business Licensing, Forest Area Function, Public Participation

INTRODUCTION

Impacts on the environment caused by business activities are inevitable, indicating that environmental licensing is vital to allow businesses to operate.¹ In general terms, environmental licensing is given to persons running their businesses, and it requires them to

¹ The provision of Article 40 (1) of Law Number 32 of 2009 concerning Environmental Protection and Management, stating: “an environmental license is required to gain a business permit and/or to be allowed to conduct business activities”.

carry out an “Environmental Impact Analysis”.² This matter should also take into account “the measures to Manage and Supervise the Environment”³ as the requirement to obtain a business license⁴ to ensure that environmental protection and management are appropriately performed. However, the validation of the Job Creation Law of 2023 has changed the nomenclature and mechanism of environmental licensing to an environmental agreement. This shift has also left an impact on forestry business sectors, changing them from environmental-based licensing to risk-based licensing.⁵

In a general scope, this environmental agreement can be given in the form of the decision of environmental worthiness or the statement declaring the capability to manage the environment approved of by the government.⁶ However, the existence of this environmental agreement has been lambasted by the members of the public and environmentalists. Principally, a license represents a one-dimensional aspect of state administrative law made as a requirement and procedure that comply with the legislation. When this permit is replaced by an agreement, this seemingly indicates that an action of administrative law of particular licensing that carries civil aspect is changed, considering that the environment agreement is given in a

² In Indonesia, the Environmental Impact Analysis is locally termed “Analisis Mengenai Dampak Lingkungan Hidup” (AMDAL).

³ Measures taken to manage and supervise the environment, known as “Upaya Pengelolaan Lingkungan-Upaya Pemantauan Lingkungan” (UKL-UPL)

⁴ Environmental licensing as referred to in Article 1 point 35 of Environmental Law is defined as a permit granted for every person who runs his/her business and/or activities that require him/her to perform AMDAL or UKL-UPL to support environmental protection and management to allow for business/activity permit issuance.

⁵ Jeis Montesori, Konsep Persetujuan Lingkungan: Amankah untuk Lingkungan?, <https://www.forestdigest.com/detail/1259/apa-itu-persetujuan-lingkungan>, accessed on 2 March 2022

⁶ The environmental agreement as referred to in Article 1 point 4 of Government Regulation of the Republic of Indonesia Number 22 of 2021 concerning Environmental Protection and Management is defined as “the Decision declaring environmental worthiness or the statement declaring the capability of managing the environment with the approval of the Central and Regional Governments.”

statement of the capability to manage the environment as approved of by the government.⁷ The environmental agreement is intended to simplify the requirements of licensing and land procurement⁸ while it also eases forestry business requirements, which may trigger the shift in the use and functionality of forests, leading further to environmental damage.

Job Creation Law was welcomed with open arms by business people regarding the change in the regulation of business licensing. The difference in licensing in forestry lies in environmental licenses integrated into business permits. AMDAL and UKL-UPL, and Environmental Management Statement⁹ are classified into an environmental agreement such as the Decision of Environmental Worthiness.¹⁰ The Statement of Capability to Manage Environment¹¹, and Business Registration Number¹² refer to the risk levels comprising high, medium, and low.

The utilization of forest areas, forest conservation, takes place in all areas except nature reserve, core zone, and wilderness zone in a national park.¹³ Forest use can involve area utilization; environmental service utilization; forest product utilization such as wood and non-wood products; and the collection of wood forest and non-wood

⁷ Ridwan, *Hukum Administrasi Negara* (Depok: Rajawali Pers, 2020).

⁸ Rofiq Hidayat, "Polemik Penghapusan Izin Lingkungan," February 14, 2020, <https://www.hukumonline.com/berita/a/polemik-penghapusan-izin-lingkungan-lt5e46907726a4b>.

⁹ Environmental Management Statement in Indonesia is termed *SPPL*: "*Surat Pernyataan Pengelolaan Lingkungan*"

¹⁰ Decision of Environmental Worthiness in Indonesia is termed *SKKL*: "*Surat Keputusan Kelayakan Lingkungan*"

¹¹ The Statement of Capability to Manage Environment in Indonesia is termed *PKPLH*: "*Pernyataan Kesanggupan Pengelolaan Lingkungan Hidup*"

¹² Business Registration Number in Indonesia is termed *NIB*: *Nomor Induk Berusaha*

¹³ Shivani Agarwal et al., "Effectiveness of Community Forests for Forest Conservation in Nan Province, Thailand," *Journal of Land Use Science* 17, No. 1 (January 2, 2022): 307–23.

forest products. Every forest-related activity should come with a utilization license¹⁴ and involve communities around the forest.¹⁵

Environmental license is the last determining aspect to decide whether a company is eligible to run a related business.¹⁶ An environmental license is needed by a company to gain access to a business license. Licensing is generally intended to give protection to the environment and human beings, control business activities that may negatively impact the environment, and assure legal certainty to enable business activities to take place.¹⁷ Environmental licensing for related businesses has a juridical implication, involving control conducted by related ministers, governors, and regents/mayors to supervise business actors following the license issued as governed by the provision of Article 72 of the Law concerning Environment. With this environmental licensing, supervision over business activities can be conducted, considering that these activities may damage the environment. A changing mechanism and nomenclature have led to pros and cons especially when it is linked to the impacts on environmental vulnerability, deforestation, and shifting land function due to its utilization for business and investment.¹⁸

From the above background, this research has three primary issues to be further analyzed and discussed. First, it critically analyses the integrating concept of environmental agreement regarding risk-

¹⁴ Pramono Dwi Susetyo, "Beda Penggunaan Dan Pemanfaatan Hutan," 2021, <https://www.forestdigest.com/detail/1051/apa-itu-penggunaan-dan-pemanfaatan-hutan>.

¹⁵ Susan Charnley and Melissa R. Poe, "Community Forestry in Theory and Practice: Where Are We Now?," *Annual Review of Anthropology* 36, No. 1 (September 1, 2007): 301–36.

¹⁶ Danilo Urzedo, Michelle Westerlaken, and Jennifer Gabrys, "Digitalizing Forest Landscape Restoration: A Social and Political Analysis of Emerging Technological Practices," *Environmental Politics* 32, No. 3 (April 16, 2023): 485–510.

¹⁷ Waty Suwarty Haryono, "Pelaksanaan Izin Lingkungan Oleh Kegiatan Wajibamdal Atau Wajib UKL-UPL," *IUS CONSTITUTUM* 1, No. 2 (2015): 3.

¹⁸ Johan A. Oldekop et al., "Reductions in Deforestation and Poverty from Decentralized Forest Management in Nepal," *Nature Sustainability* 2, No. 5 (May 6, 2019): 421–28.

based business license linked to the changing concept of environmental license turning to an environmental agreement for the functionality and the role of forest areas according to Job Creation Law. Second, it analyses the concept of environmental agreement regarding risk-based business license linked to the likelihood of deforestation and shifting functionality of land to increase investment in forestry. Third, it proposes the ideal legal construction regarding the concept of the integration of environmental agreement in risk-based business license over the shifting functionality and role of forest within the purview of restorative justice and public participation.

THE SHIFTING CONCEPT OF ENVIRONMENT LICENSE TO ENVIRONMENTAL AGREEMENT OVER FUNCTIONALITY AND ROLE OF FOREST AREAS AS IN JOB CREATION LAW

A. The Fundamental Concept of Environmental License Prior to Its Change to An Environmental Agreement as In Law Number 6 of 2023 concerning Job Creation

Since the issuance of Law Number 5 of 1967 on Primary Provisions of Forestry, Law Number 41 of 1999 on Forestry, and Law Number 6 of 2023 on Job Creation, the Government has given wider access to business licensing with varied scales and kinds.¹⁹ Environmental license is now changing to the environmental agreement in Risk-

¹⁹ Sugiarto, "Perizinan Berusaha Di Bidang Kehutanan," 2021, <https://agroindonesia.co.id/perizinan-berusaha-di-bidang-kehutanan/>. See also I Gusti Ayu Ketut Rachmi Handayani, Lego Karjoko, Abdul Kadir Jaelani, and Jaco Barkhuizen. "The Politics Settlement of Land Tenure Conflicts During Jokowi's Presidency". *Journal of Indonesian Legal Studies* 7, No. 2 (2022): 487-524.

Based Business License principally refers to the concept of risk-based licensing concept that complies with the principle approaches outlined in Law Number 32 of 2009 on Protection and Environmental Management, taking into account the conditions of natural resource and environment, health, and safety. The determining factors of the type of business licensing involve the mapping of risk-based criteria and business risk levels. Risk-based licensing stages involve: (1) preparation; (2) identification of risk and probability; (3) risk level setting; and (4) business license. However, Job Creation law has reformed business permits from license-based to risk-based. Business license reform lies in three different business stages: 1) establishing the business; 2) starting the business; 3) operating the business. This scope of business license reform ranges from the time the business is started to some principal requirements and risk-based business permits. When the business operates, a business permit needs to remain to support the business activities and supervision, and the business still has to comply with the principal requirements of The Proper Spatial Utilization²⁰, environmental agreement, and agreement of worthiness-certified building.

According to the term in a law dictionary, licensing (*vergunning*) is defined as a permit issued by the government, and licensing requires special supervision over matters that are not always unacceptable.²¹ Ateng Syafrudin once argued that the license had the intention and it averted barriers, emphasizing that what is forbidden is now allowed following the licensing. Sjahran Basah, on the other hand, argued that state administrative law had one dimension, applying a concrete regulation according to the requirements and procedures set forth in the legislation.²²

Furthermore, Bagir Manan viewed a license as an agreement granted by a government according to law to allow the parties

²⁰ The Proper Spatial Utilization in Indonesia known as *KKPR: Kesesuaian Kegiatan Pemanfaatan Ruang*

²¹ Susan Baker, Katarina Eckerberg, and Anna Zachrisson, "Political Science and Ecological Restoration," *Environmental Politics* 23, No. 3 (May 4, 2014): 509–24.

²² Ridwan HR, *Hukum Administrasi Negara* (Yogyakarta: UII Press, 2003).

concerned to do activities or take particular steps that are generally violated.²³ N.M spelt and J.B.J.M ten Berge share the same perspective about the definition of license in both broad and narrow scopes as follows:²⁴

A license, from a wide perspective, is an instrument frequently referred to in administrative law. The government uses licenses as a juridical instrument to help control people's attitudes. A license, in a narrow scope, refers to binding rules in regulation according to the expectation of legal drafters to reach a particular structure or to set a barrier to unexpected possibilities. This aims to regulate actions that are not always viewed as immoral by legal drafters, while they still expect to conduct supervision over this matter.

Aligning to this notion, aspects of license involve the following criteria/aspects/factors.²⁵ *First*, juridical instrument in which license is a juridical instrument in the form of a constitutive decision used by the government to face or set a concrete event. As a decision, the license is made with provisions and requirements that apply to the decision in general. *Second*, legislation as the government gains authority to issue a permit strictly decided under the legislation that sets a basis for this license. However, in terms of its application, the authority regarding this license is referred to as *diskresionare* power or free authority, meaning that the government is given authority to decide the license-related matters independently.

Third, governmental organs that are responsible to perform government tasks at both local and central levels, ranging from the highest government administration to the lowest one authorized to issue a license. That is, several levels of stage administration can issue a license according to the official position at both central and local levels. apart from the governmental organs or state administration in

²³ Vera Rimbawani Sushanty, *Buku Ajar Hukum Perijinan*, (Surabaya: UBHARA Press, 2020).

²⁴ HR, *Hukum Administrasi Negara*.

²⁵ Gardenio Diogo Pimentel Da Silva et al., "Environmental Licensing and Energy Policy Regulating Utility-Scale Solar Photovoltaic Installations in Brazil: Status and Future Perspectives," *Impact Assessment and Project Appraisal* 37, No. 6 (November 2, 2019): 503–15.

licensing, licenses can only be issued by the governmental organs. *Fourth*, concrete events that refer to certain moments, certain people, certain venues, and certain facts of law. Thus, these concrete events vary, parallel to the diverse rate of growing society, and licenses vary as well. License with its varied forms is made with the procedures depending on the authority given by the license issuer, the types of the license, and the organizational structure of the institution that issues it. *Fifth*, procedures and requirements. In general, a request for a license should fulfill particular procedures set by the government as the license issuer. Moreover, this request must also meet the requirements partially set by the government as the issuer. The procedures and requirements of licensing vary, depending on the type and objective of the license and the institution that grants the license.

The objectives of licensing consist of 1) the expectation to direct particular activities such as the permit to build; 2) to avert danger impacting the environment; 3) to protect certain objects such as demolishing a monument; 4) to distribute a small portion, such as in giving permit to a resident in a densely populated neighborhood; 5) to direct and select people and activities where the person in charge should meet particular requirements.²⁶

Permitting means allowing, enabling, and not proscribing.²⁷ In a general scope, licensing is a law that regulates the connection between

²⁶ I Made Arya Utama, "Sistem Hukum Perizinan Berwawasan Lingkungan Hidup Dalam Mewujudkan Pembangunan Daerah yang Berkelanjutan (Studi Terhadap Pemerintahan di Wilayah Pemerintah Daerah Provinsi Bali)," *Dissertation*, (Bandung: Universitas Padjajaran, 2006).

²⁷ Kulsum Ahmed and Ernesto Sánchez-Triana, "Strategic Environmental Assessment for Policies: An Instrument for Good Governance" (Washington, DC: The World Bank, 2008), <https://openknowledge.worldbank.org/server/api/core/bitstreams/6f2b8383-a7ea-5f72-a77a-1ba4854e834b/content>.

people and the state where the people are in the position of requesting a license.²⁸

Prior to the effectuation of the Job Creation Law, an environmental license was governed in Law Number 32 of 2009 on Environmental Protection and Management. This law was initiated to send a signal implying that a good and healthy environment is part of human rights in Indonesia, which is congruous with Article 28H of the 1945 Constitution, while environmental quality that is increasingly worsening has posed a threat to human life and the life of other forms of life, especially when it is linked to worsening global warming causing climate change that also reduces environmental quality.²⁹ The General Provisions of Article 1 point 35 defines license as follows:

“A license is issued for every person who runs a business and/or an activity that requires an environmental impact analysis or UKL-UPL to assure environmental protection and management as the prerequisite to obtain a license to run a business and/or an activity.”

The scope of licensing governed in Law Number 32 of 2009 concerning Environmental protection and management involves prevention, environmental quality standard, licensing, Hazardous and Toxic Waste Management and Recovery, dumping, the task and authority of the government and local governments, prohibition, control, administrative sanctions, administrative charges, criminal provisions, transitional provisions.

The shifting functionality of forest areas and/or land are governed in Strategic Environmental Assessments specifically in Article 15:

²⁸ Troy Sternberg, Kemel Toktomushev, and Byambabaatar Ichinkhorloo, *The Impact of Mining Lifecycles in Mongolia and Kyrgyzstan: Routledge Studies of the Extractive Industries and Sustainable Development* (London: Routledge, 2022).

²⁹ Analyzed from the considering part of “Law of the Republic of Indonesia Concerning Environmental Protection and Management,” Pub. L. No. 32 (2009).

(1) Central and local governments are required to conduct KLHS to ensure that sustainable development principles are set as the basis and integrated into the development of an area and/or policy, plan, and/or program.

“Area” represents a space of geographical unity along with its related elements whose borders and systems depend on administrative aspects and/or functional aspects. In this study, the area concerned specifically refers to Forest Area, a particular area determined by the Government as a Permanent Forest by keeping its existence.³⁰

The above provision is highlighted in Article (2), that the Governments are required to conduct a Strategic Environmental Assessment³¹ into the preparation or evaluation of: a) Regional Spatial Plans³², Long Term Development Plans,³³ and Medium Term Development Plans³⁴ at national, provincial, regency/municipal levels; and b) Policy, plan, and/or program potential to raise the impacts and/or risk on the environment.

Point b implies that environmental impacts and/or risks involve impacts and/or risks on the growing tendency of shifting functionality of forest areas and/or land.

As outlined in Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia stating “Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and receive medical care” and Article 33 Paragraph (4) of the 1945 Constitution stating “The organization of the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-

³⁰ “Government Regulation of the Republic of Indonesia Concerning Forestry Administration,” 23 § Article 1 point 3 (2021).

³¹ Strategic Environmental Assessment in Indonesia is termed *KLHS: Kajian Lingkungan Hidup Strategis*

³² Regional Spatial Plans in Indonesia is termed *RTRW: Rencana Tata Ruang Wilayah*

³³ Long Term Development Plans in Indonesia is termed *RPJP: Rencana Pembangunan Jangka Panjang*

³⁴ Medium Term Development Plans in Indonesia is termed *RPJM*

sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy”, Law Number 32 of 2009 concerning Environmental Protection and Management was drafted as to respond to the mandate of the 1945 Constitution of the Republic of Indonesia intended to present guidance of the regulation to ensure the rights of every person to healthy and good environment.

B. The Concept of Change in Environmental Licensing to Environmental Agreement as in Law Number 6 of 2023 concerning Job Creation

Job Creation Law has changed the licensing mechanism from environmental licensing to an environmental law. This change involves the shift in the substances in Environmental Protection and Management Law , Forestry Law and Law governing the Prevention and Eradication of Destruction , especially in terms of adjusting to sanctions imposed on violations committed in forest areas.

Although the reform of omnibus law seems to have simplified environmental reporting and licensing procedures, the government argues that this change as in the law concerned will not undermine its efforts to protect the environment. In terms of the increasing global focus on businesses, the government ensures that supervision by related parties will take place at local and global levels if the reform is duly performed.

The change in the forestry regime is likely to relax the restriction of permit issuance in forestry for the sake of investment and development in Indonesia. Before the evaluation of environmental impacts and the substances of the change in the mechanism and nomenclature in the legislation, the following analyses should take place.

TABLE 1. Differences between Environmental License & Environmental Agreement

Indicator	Environmental License	Environmental Agreement
Legal Basis	Government Regulation Number 27 of 2012 concerning Environmental License	Government Regulation Number 22 of 2021 concerning Environmental Protection and Management
Definition	This license is given to every person who runs his/her business and/or conducts an activity that requires environmental impact analysis or UKL-UPL regarding environmental protection and management as a prerequisite to obtaining the license for business and/or activity	The decision regarding Environmental Worthiness or the statement regarding the capability to manage the environment with the approval from the central and local governments.
Requirement	The documents of environmental impact analysis or UKL-UPL forms The documents of business establishment or activity; and company and/or activity profile	Environmental impact analysis, UKL-UPL; SPPL reintegrated into a business license
Pathway	Preparing environmental impact analysis and UKL-UPL; Assessing environmental impact analysis and UKL-UP; and Requesting and publishing environmental license	Preparing environmental impact analysis and fit and proper test for environmental impact analysis; or Preparing UKL-UPL forms and assessing UKL-UPL forms
Output	License	Agreement
Nature	Fictitious negative; involving a condition where a request for a	Fictitious positive: a condition where a decision and/or an action is regarded as generally

Indicator	Environmental License	Environmental Agreement
	license is submitted to a government official for a decision or an action but the official concerned gives no responses. This condition is referred to as "request denied"	granted, which can be understood as legally granted (fictitious positive) because the request is not set forth and/or not performed within a certain length of time as a responsibility as governed in the legislation within at least 10 (ten) working days after the request was completely received by a government institution and/or government official.

An environmental agreement is, without doubt, required to help minimize the risk of environmental damage caused by development. The Indonesian government requires related businesses to meet the requirements set by environmental impact analysis, UKL-UPL, and SPPL regarding licensing process that gives the approval for development. This regulation is expected to raise the awareness of the people to put the concept of responsible development to the fore. The main objective of this approach is to bring the likelihood of environmental damage down to the lowest level possible since its impacts could harm human life throughout generations.

The procedures and stages of an Environmental Agreement involve the following stages. First, Environmental Agreement with the drafting of environmental impact analysis and fit and proper test for environmental impact analysis. Second, Environmental Agreement with the drafting of UKL-UPL forms and the assessment of the forms. Third, the change in Environmental Agreement (ownership transfer). Fourth, amendment made in the Agreement on Addendum of Environmental Impact Analysis and Environmental Management Plan and Environmental Control Plan (henceforth referred to as RKL-RPL).

The simplification of the requirements in an environmental agreement should be followed by the study on environmental

impacts. One of the obligations that a company operating in Indonesia should carry out is assessing the environmental impacts caused by its business activities. Prior to the stipulation of Omnibus Law, companies were required to arrange studies on environmental impacts (Environmental Impact Analysis Document (“AMDAL”), and the Management/Environmental Monitoring Program (“UKL-UPL”). When AMDAL or UKL-UPL are not needed because a company only poses low-risk impacts, the government will require the company concerned to issue a written statement declaring the capability of managing and supervising the environment (“SPPL”). The obligations that companies must comply with will depend on the types of businesses and the risk level of impacts on the environment. Following the simplification of the licensing mechanism by Omnibus Law, the environmental agreement may require the following pathways: 1) the government requires companies to issue a written statement declaring the commitment to environmental management as proof indicating the fulfilment of the standards of the study of UKL-UPL; 2) integrating the SPPL into Business Registration Number (NIB) of a company.

The concept of an environmental agreement in Omnibus Law does not highlight whether the written statement is included in the NIB of the company. Under the mechanism of an environmental agreement, the author believes that the ‘secondary’ category is absent in the assessment of environmental impacts, delineating the conditions where the impacts exist although insignificant. AMDAL is only for those posing significant impacts on the environment. In an environmental agreement, businesses may include a business statement unless environmental impacts exist. This is likely to extend the non-AMDAL operational category. Further analyses, however, need to be taken into account regarding the integration of the mechanism of SPPL into the NIB, whether ‘low risk’ activities require self-assessment; whether Online Single Submission will automatically issue integrated NIB and SPPL, or whether pre-assessment will be first given by authorities before the issuance of the integrated NIB and SPPL.

C. Criticism over the Simplification of Requirements and Procedures for Licensing through the Integration of an Environmental Agreement in Business Licensing

The integration of the environmental agreement into a business license regarded as a solution to help simplify the regulation regarding licensing that is deemed too complicated. This simplification is intended to accelerate the process and also expedites economic, social, and environmental development that is harmonious and sustainable.³⁵

The Ministry of Environment and Forestry, Siti Nurbaya, held that Job Creation Law, especially regarding environment and forestry, was drafted by considering restorative justice. Job Creation Law regarding environment and forestry is intended to make things simpler for more efficient and effective utilization. In this case, environmental licensing remains in existence, but its function is integrated into business licenses. Moreover, the integration of an environmental license into a business license is deemed to strengthen environmental protection. Environmental requirements and obligations can still be enforced since they are integrated into a business license.³⁶

In terms of Environmental Impact Analysis, the preparation of fit and proper test for the environment, which was formerly referred to as Komisi Penilaian Amdal (KPA) (Environmental Impact Analysis Assessor Commission) and now as “Lembaga Uji Kelayakan” (Worthiness Test Center) consisting of the testing team at central,

³⁵ Kementerian Lingkungan Hidup dan Kehutanan, “Integrasi Persetujuan Lingkungan Dalam Perizinan Berusaha,” December 7, 2020, <http://ppid.menlhk.go.id/berita/siaran-pers/5736/integrasi-persetujuan-lingkungan-dalam-perizinan-berusaha>.

³⁶ Kementerian Lingkungan Hidup dan Kehutanan. *See also* Andika Bangun Sanjaya, “Socio-Economic and Legal Analysis on Forest Protection”. *Journal of Law and Legal Reform* 2, No. 4 (2021): 493-504.

provincial, and regency/municipal levels and ad hoc assigned accordingly.

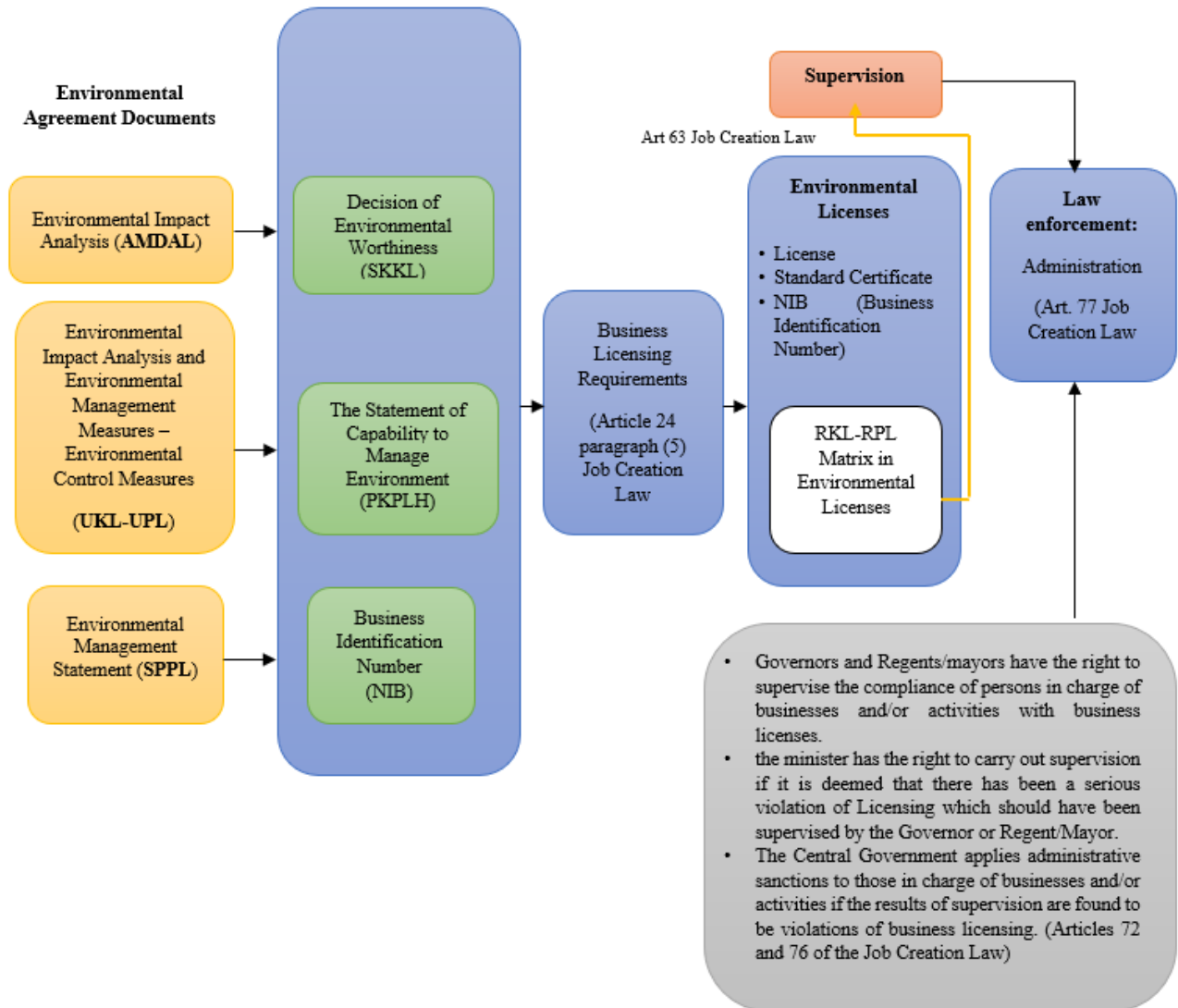


FIGURE 1. The Process of Integration from Environmental License to Business License

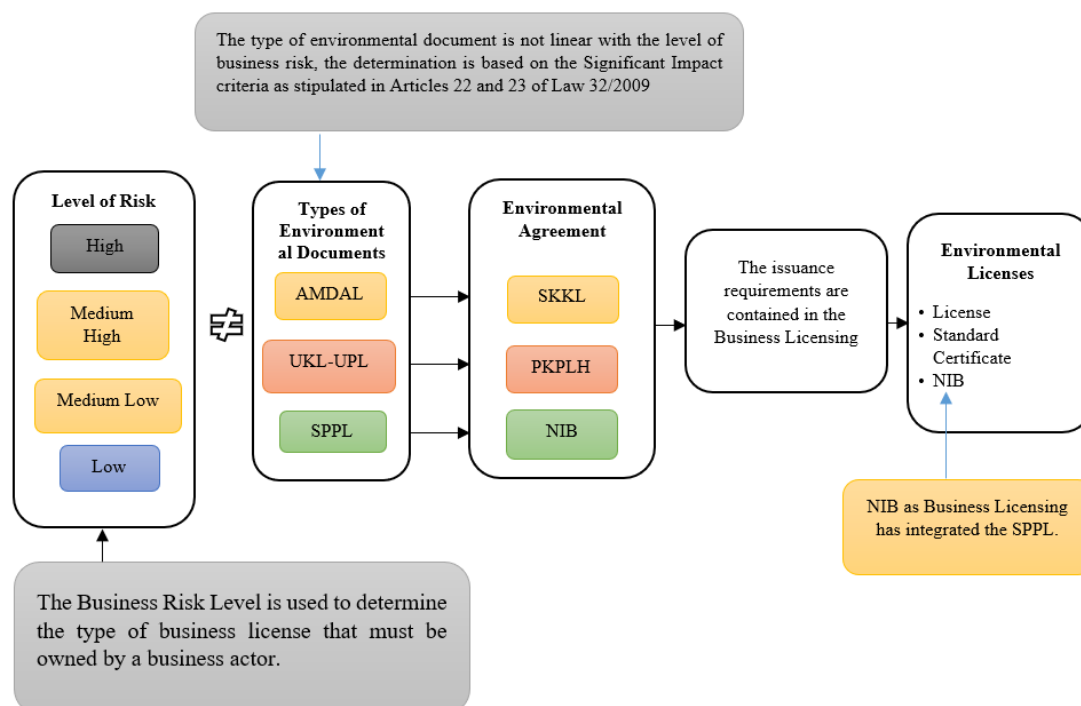


FIGURE 2. Risk Level in Environmental License

Risk levels regarding an environmental agreement highlight slight differences, where every business plan and/or activity must hold an environmental impact analysis for the significant impacts left by the business and/or activity concerned. Every business plan and/or activity must also hold the UKL-UPL if the plan has no significant impacts on the environment. The SPPL is, on the other hand, for the plan that leaves no significant impacts on the environment and for the plan not required to hold UKL-UPL. Business license/government agreement involves compulsory requirements and environmental aspects resulting from the administrative processes of environmental documents.

Before the stipulation of Omnibus Law took place, environmental licensing was the prerequisite to allow businesses to obtain business permits. That is, the revocation of an environmental permit poorly affects the validity of business permits. In addition, business changes will need environmental license renewal. According to Omnibus Law, the environmental licensing was revoked because it would be integrated into business licenses. As a consequence,

companies are required to obtain AMDAL or UKL-UPL before permits are granted. This matter will require further analyses to find out whether every business change (either businesses posing considerable or insignificant impacts) needs to adjust to the business license. However, what impacts are caused by the violations of the obligations to the environment on business permits is still questioned.

Principally, when an environmental agreement is set for the forestry business sector, there should be some adjustment to technical procedures in Forestry Law or delegated regulations below it. For instance, the Government Regulation of the Republic of Indonesia Number 23 of 2021 concerning Forest Management mentions four utilizations of protection and production forests:³⁷ 1) forest area utilization permit; 2) environmental services utilization permit; 3) non-timber/timber forest product collection permit; and 4) non-timber/timber forest product utilization permit. The concept of an environmental agreement in Omnibus Law integrates all these permits into business permits granted by the central government for entities planning to utilize protection and production forests. Nevertheless, this mechanism is considered murky regarding whether every permit will cover all activities of forest utilization or whether each permit only refers to each activity.^{38,39}

Furthermore, in terms of the Use of Forest Areas for Development Purposes Outside Forestry Activities, Omnibus Law eliminates the following obligations: 1) acquiring a lend-use agreement granted by the Minister of Environment and Forestry; and

³⁷ The mechanism is specifically governed in the Government Regulation of the Republic of Indonesia Number 23 of 2021 concerning Forestry Management.

³⁸ Norman S. Bissett et al., "Indonesia: Omnibus Law – Impacts on Environment and Forestry," November 14, 2020, <https://www.globalcompliancenews.com/2020/11/14/indonesia-omnibus-law-impacts-on-environment-and-forestry-12102020/>.

³⁹ Baker McKenzie, "Indonesia: Omnibus Law - Impacts on Environment and Forestry," October 9, 2020, https://insightplus.bakermckenzie.com/bm/environment-climate-change_1/indonesia-omnibus-law-impacts-on-environment-and-forestry#cntAnchor2.

2) acquiring approval from the House of Representatives of Indonesia to grant this agreement that carries essential impacts, coverage, and strategic values. This indicates that licensing requirements for particular development activities outside of forestry purposes seem to be further relaxed. Moreover, Forestry Law requires an area to at least have 30% of forest areas at watersheds of the total areas to ensure that the water system is controlled, and flood, erosion, sedimentation, and water shortage are prevented. These requirements, however, have been omitted under Omnibus Law. The central government is authorized to determine the areas maintained for forests (including the areas for national strategic projects) relevant to the physical and geographical nature of watershed areas and nearby islands.⁴⁰

Another issue is that public participation is minimal. Omnibus Law restricts public participation only to those immediately affected by the activities suggested by entities, and the public will no longer be involved in 'decision-making' related to AMDAL simply because the provisions in Environmental Law that form the commission responsible for the assessment of AMDAL consisting of experts, environmental organizations, and the people likely to be affected have been scrapped.

CRITICAL ANALYSIS OF CHANGING ENVIRONMENTAL POLICY IN JOB CREATION LAW: THE POTENTIAL OF DEFORESTATION & LAND FUNCTION SHIFTING TO BOOST INVESTMENT IN FORESTRY

Job Creation Law has triggered a significant change in Law Number 32 of 2009 concerning Environmental Protection and Management ("UU PPLH") and Law Number 41 of 1999 concerning Forestry ("UU Kehutanan"), especially regarding the environmental agreement. The

⁴⁰ See also the elucidation in the Government Regulation of the Republic of Indonesia Number 23 of 2021 concerning Forestry Management

environmental agreement concept is basically to weaken the concept of environmental agreement set by the Indonesian Government.⁴¹

The environmental agreement governed by Job Creation law is likely to erode the norms of environmental protection. According to the fact sheet of Job Creation law published by Forest Digest in the forest sector, two key articles have revised two statutes; Article 36 revised 19 articles in Forestry Law, and Article 37 revised 37 articles in Law Number 18 of 2013 concerning the Prevention and Eradication of Forest Damage (henceforth referred to as "UU P3H").⁴² These two articles in Job Creation Law significantly affect forest management in Indonesia. The provisions in this regulation reduce the role of the local governments directly reinforcing the role of the central government in forest management.⁴³ This approach is considered a step back from the vigor of reform that expects the reinforcement of the authority of regional autonomy. As a consequence, deforestation is predicted to rise along with obvious threats to biodiversity, directly contributing to the increasing greenhouse gas emission due to the shifting land function.⁴⁴

Moreover, several conflicting norms in Job Creation Law will be elaborated, and these norms, directly and indirectly, serve as indicators of regressive measures for environmental protection in a specific scope and the protection of biodiversity in a general scope:

⁴¹ I Gusti Ngurah Parikesit Widiatedja, "FDI in Tourism and the Feasibility of Incorporating the UN Guiding Principles on Business and Human Rights in Indonesia," *Yuridika* 37, No. 2 (August 29, 2022): 433–56

⁴² Hasbi Assidiq and Maskun, *Perlindungan Hukum Keanekaragaman Hayati (Relasi Sawit Dan Deforestasi)* (Gowa: Jariah Publishing Intermedia, 2020).

⁴³ Makarim & Taira S Counsellors, "Brief Introduction to Indonesia's Job Creation / Omnibus Law on Broadening of the Investment Ecosystem and Business Activities, the Ease of Doing Business and Acceleration of National Strategic Projects Oriented Towards National Interests," November 2020, [https://www.makarim.com/storage/uploads/a7e54d81-0b5e-4af4-af3d-09b1f1d1299c/489753_Advisory---Brief-Intro-to-Indonesia's-Job-Creation-\(November-2020\).pdf](https://www.makarim.com/storage/uploads/a7e54d81-0b5e-4af4-af3d-09b1f1d1299c/489753_Advisory---Brief-Intro-to-Indonesia's-Job-Creation-(November-2020).pdf).

⁴⁴ Hariadi Kartodiharjo, *Lembar Fakta Omnibus Law UU Cipta Kerja* (Bogor: Forest Digest, 2020).

1. *Relaxation of Request for a Business License*

The government has simplified the bureaucracy and procedures required in the request to get a business license, from a permit-based license to a risk-based license.⁴⁵ Previously four stages are shortened down to three stages, and fourteen types of licenses to allow for forest utilization are simplified into only one type, except for social forestry.⁴⁶

The risk-based business license is based on the risk levels in businesses and these levels will determine the types of business license. The government has also mapped the risk levels according to Business Standard Classification in Indonesia 2020.

Low-risk businesses and medium and low-risk businesses only require the Online Single Submission without any verification or approval from a Ministry/Institution/Regional Government, while medium and high-risk businesses still require verification or approval from a Ministry/Institution/Regional Government. With the application of risk-based business activities, the control will be focused more on the business activities to meet the standards and requirements of an activity.⁴⁷

2. *Shifting Regulation from Environmental License to Environmental Agreement*

Requirements regarding an environmental license serve as the instrument to avert the likelihood of pollution and destruction. Five

⁴⁵ Kementerian Komunikasi dan Informatika, "UU Cipta Kerja Beri Kepastian Dan Penegakan Hukum Dalam Proses Perizinan Berusaha," December 23, 2020, <https://www.kominfo.go.id/content/detail/31693/uu-cipta-kerja-beri-kepastian-dan-penegakan-hukum-dalam-prosesperizinan-berusaha/0/berita>.

⁴⁶ Cindy Junicke Simangunsong, *UU Cipta Kerja Dan Implikasinya Kepada Hutan, Lingkungan Hidup, Dan Masyarakat Hukum Adat Di Tanah Papua* (Jakarta: EcoNusa: Alam, Budaya, dan Konservasi, 2020).

⁴⁷ Kementerian Investasi, "Penyelenggaraan Perizinan Berusaha Berbasis Risiko Melalui Sistem Online Single Submission (OSS) Merupakan Pelaksanaan Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," accessed May 15, 2023, <https://web.dpmpptsp.jatengprov.go.id/packages/upload/portal/files/Infografis%20Perizinan%20Berusaha%20Berbasis%20Risiko.pdf>.

environmental licensing requirements serve as the key components in environmental protection: (a) standard conditions; b limit conditions; (c) operating conditions; (d) monitoring conditions; (e) reporting conditions.⁴⁸

The changing provisions from an environmental license to an environmental agreement are viewed by Wahyu Yun Santoso as something that brings significant impacts, considering that this licensing and its requirements are part of the products of administrative law, unlike the “agreement” that tends to represent discretion of the authority. One of the significant impacts is the missing right to administrative charges regarding the issuance of an environmental agreement.⁴⁹ Thus, this changing norm can weaken the controlling function over an activity that affects the environment. Instead of reinforcing the environmental norms and standards as responses to climate change, the Indonesian Government also weakens the environmental norms and standards.

3. *Flexible Spatial Planning Congruous with Economic Interest*

The aforementioned changing norms can weaken the spatial planning function in terms of assuring a harmonious relationship between humans and their environment. Following the national strategic policy amendments, spatial planning can take place more than once every five years. This provision can weaken the spatial planning function that is intended to establish a harmonious connection between natural and artificial environments.⁵⁰

The change in regional planning taking place more than once in five years due to the national and strategic policy certainly violates

⁴⁸ Suparto Wijoyo, “Persyaratan Perizinan Lingkungan Dan Arti Pentingnya Bagi Upaya Pengelolaan Lingkungan Di Indonesia,” *Yuridika* 27, No. 2 (May 7, 2012).

⁴⁹ Sigit Riyanto, “Catatan Kritis Terhadap UU No 11 Tahun 2020 Tentang Cipta Kerja (Pengesahan DPR 5 Oktober 2020),” *Kertas Kebijakan* (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, November 2020), <https://rispub.law.ugm.ac.id/wp-content/uploads/sites/1049/2020/11/Kertas-kebijakan-analisis-UU-Cipta-Kerja-FH-UGM-5-November-2020-rev-1.pdf>.

⁵⁰ Article 3 of “Law of the Republic of Indonesia Concerning Spatial Planning,” Pub. L. No. 26, § Article 3 (2007).

spatial planning principles aiming to establish a harmonious relationship between humans and their environment.⁵¹

4. *Missing Minimum Barrier in Forest Areas*

Before the Job Creation Law was passed, the government, as in Forestry Law, strictly asserted that forest areas should at least comprise 30% of the area of watershed and or an island with a proportional width. However, Job Creation Law revoked the minimum proportion of forest areas that need to be kept. Of course, this missing provision has certainly narrowed the chance of limitless exploitation that may spoil the sustainability of freshwater availability for the people living in and around the forest or urban areas.

In the Province of Papua, for example, Provincial Regulation Number 23 of 2013 implies that Papua will have to retain 90% of forest areas and 60% of protected areas. Furthermore, Papua and West Papua have been committed to protecting at least 70% of land under Manokwari Declaration. The provisions of the Job Creation Law have placed the commitment in a quandary, setting the standard of this commitment too high compared to the commitment set by the Central Government.

5. *The Shifting functionality and Role of Forest Areas into Simplified Procedures*

The central government holds the authority to change the functionality and role of forest areas. However, Forestry Law, before the effectuation of Job Creation Law, regulated these shifting forest functions according to aspects such as significant impacts, wide scope, and strategic characteristics compared to the changes that cause no significant impacts, strategic and wide scope. The changing function and role require the procedures set by the Government with the approval of Dewan Perwakilan Rakyat (DPR) (the House of Representatives). This regulation certainly assures safety regarding the shifting tendency above. With the missing differentiating factors

⁵¹ Kartodiharjo, *Lembar Fakta Omnibus Law UU Cipta Kerja*.

and stricter procedures, in the time to come, the process of the shifting functionality and role of the forest areas will comprise more simplified and faster procedures simply because it will not require approval from the DPR, but the DPR will only need to consider the integrated research results.

6. *Weakening Sanctions Imposed on Violations*

Job Creation law prioritizes the imposition of administrative sanctions since it refers to the *ultimum remedium* principle that puts the criminal sanction as a last resort in law enforcement. In terms of strict liability in Job Creation Law, the provision “without proof of guilt” has also been omitted. This omitted provision can weaken the implementation of the strict liability principle because it can lead to ambiguity and uncertainty in its implementation. In addition, this missing provision can be used as the ground of clemency, which may also weaken deterring effects for companies committing violations.

7. *Impunity Enjoyed by Plantation Companies Operating within Forest Areas without Permits*

The impunity enjoyed by businesses doing illegal activities within forest areas must be reported by Forest Rangers as they have reported individuals exploiting the forests. Surprisingly, the Government has set a regulation that seems to guarantee businesses doing illegal forest activities with impunity, and this approach has also been legalized by local governments. There have been around 7 million hectares of the total forest areas in which businesses such as agriculture and mining, among others, are operating.⁵² According to UU P3H, those illegal businesses operating inside the forests must be subject to criminal sanctions to deter them. Forest destruction is considered an offense against the environment; this is also considered a public crime that deserves strict sanctions.⁵³

⁵² Kartodiharjo.

⁵³ Francisco Magno, “Forest Devolution and Social Capital: State—Civil Society Relations in the Philippines,” *Environmental History* 6, No. 2 (April 1, 2001): 264–86. See also Erla Sari Dekiawati, “Law Enforcement of Illegal Logging in

8. *The Centralization of Authority in Natural Resources Governance*

Licensing policy held under the authority of the central government has eroded democracy and been deemed to be a setback from the legal system of reform in Indonesia. The vigor of reform back in 1998 stimulating local autonomy must remain. The failure to execute regional autonomy in several regions seems to be deemed a reference for the government to take back its authority, which is obvious in the settlement of issues regarding inappropriate spatial planning of forest areas governed in the Government Regulation. This provision is specifically regulated in Article 6 Paragraph 8 of Job Creation Law, indicating that the role of the central government in resolving the disharmony in spatial planning in forest areas is reinforced. The discretion of the central government is getting more significant if regional governments at either regency or municipal level do not set a Detailed Plan of Spatial Planning (RDTR).⁵⁴

9. *Weakening Norms of Strategic Environmental Assessment (KLHS) in Spatial Planning*

Normatively, the KLHS, initially serving as the basis for spatial planning, was omitted from Job Creation law, and the norm was changed to “giving attention”. This phrase loses its binding force. That is, the KLHS is no longer a compulsory requirement in spatial planning. Moreover, the KLHS is only referred to for regional planning, while the Government Regulation 46 of 2016 concerning KLHS positions the KLHS in evaluating the execution of regional planning.⁵⁵

Indonesia: Problems and Challenges in Present and the Future”. *Indonesian Journal of Environmental Law and Sustainable Development* 1, No. 1 (2022): 47-68; Winda Indah Wardani, “How Can the Law Protect the Forest?”. *Journal of Law and Legal Reform* 2, No. 4 (2021): 527-38.

⁵⁴ Assidiq and Maskun, *Perlindungan Hukum Keanekaragaman Hayati (Relasi Sawit dan Deforestasi)*. See also Arief Ryadi, and Ali Masyhar. “Forest Fires and Law Enforcement: The Capture of Indonesian Contemporary Condition”. *Journal of Law and Legal Reform* 2, No. 1 (2021): 39-50.

⁵⁵ Assidiq and Maskun.

THE URGENCY OF THE REGULATION REGARDING PUBLIC PARTICIPATION IN ENVIRONMENTAL AGREEMENT FOLLOWING THE SHIFTING FUNCTIONALITY & ROLE OF FOREST AREAS

A. Regulation of Existing Public Participation in Environmental Protection and Management according to the 1945 Constitution of Indonesia

Public participation in environmental management is closely related to the rights to the environment. The provisions outlined in the 1945 Constitution of the Republic of Indonesia Article 28H paragraph (1) after the amendment states: *“Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and receive medical care”*.

Principally, human rights refer to a set of rights attached to human beings as the followers of God as His grace that has to be respected, upheld, and protected by the state of law, the Government, and every person for the protection of the dignity of every human being.⁵⁶ These human rights also carry a significant meaning regarding how the measures taken by the State can fulfill those human rights.⁵⁷

In terms of the rights to the environment, Koesnadi Hardjasoemantri holds that the rights to the environment are

⁵⁶ “Law of the Republic of Indonesia Number 39 of Year 1999 on Human Rights” (1999).

⁵⁷ Siti Sundari Rangkuti, *Hukum Lingkungan Dan Kebijakan Lingkungan Nasional*, 4th Edition (Surabaya: Airlangga University Press, 2015).

subjective rights embedded in every human being. The appropriate realization of these rights is the effort of the government to fulfill the other forms of human rights, especially the right to life, decent living standards, and health, among others. Siti Sundari Rangkuti also argues that embedding juridical meaning in the right to a clean and healthy environment must come with the establishment of varied channels of laws to give legal protection to the people within the context of the environment.⁵⁸ Legal protection can be given to the right to take part in the procedures of administrative law, including the right to participate (*inspraak*, public hearing) or to file an appeal (*beroep*) against the administrative decision (state administrative law).

At an international level, the public role in making decisions on the environment is recognized as one of the main principles in environmental governance as in Rio Declaration 1992. Principle Number 10 of the Rio Declaration states that environmental problems can be ideally resolved by the participation of all the citizens of the state who demonstrate relevant awareness of the issue. Rio Declaration also requires every state concerned to ensure that every individual has proper access to information on the environment owned by public authority, including the information on hazardous substances or activities in the community, and access to opportunities to participate in the process of decision making.⁵⁹ Furthermore, every state is required to facilitate and encourage awareness and the participation of the public by appropriately providing related information.⁶⁰

From a historical perspective, the rights to the environment are categorized as human rights of the third generation, where these rights come with their derivative rights that should determine to what

⁵⁸ Rangkuti.

⁵⁹ I. B. Schmidt et al., "Community-based Native Seed Production for Restoration in Brazil – the Role of Science and Policy," ed. H. Pritchard, *Plant Biology* 21, No. 3 (May 2019): 389–97.

⁶⁰ United Nations Conference on Environment and Development, "The Rio Declaration on Environment and Development" (1992), https://www.un.org/en/development/desa/population/migration/generalassemblies/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

extent these environmental rights can be fulfilled.⁶¹ Two aspects shape environmental rights: substantive and procedural aspects, where the former involves the right to life, the right to a decent standard of living, the right to a healthy life, and the right to receive inter- and across-generation justice. The procedural aspect is defined as a supplementary element in the fulfillment of substantive rights, such as the right to get information, the right to participate in decision-making, and the right to gain access to justice.⁶²

These days, the procedural rights in terms of fulfilling environmental rights are governed in the Convention on Access to Information, Participation, and Decision Making and Access to Justice in Environmental Matters, Article 1:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

The provision of this article requires the states to guarantee the fulfillment of rights to access to information, participation in decision-making, and access to justice regarding environmental matters as part of fulfilling the rights to the environment by the state. Thus, the measures taken to provide access to participation for people in the context of environmental management are the prerequisites for the

⁶¹ Truly Santika et al., “Community Forest Management in Indonesia: Avoided Deforestation in the Context of Anthropogenic and Climate Complexities,” *Global Environmental Change* 46 (September 2017): 60–71, <https://doi.org/10.1016/j.gloenvcha.2017.08.002>.

⁶² Agung Wardana, “Hak Atas Lingkungan: Sebuah Pengantar Diskusi” (Karya Latihan Bantuan Hukum (Kalabahu) Lembaga Bantuan Hukum (LBH) Bali, Denpasar, April 20, 2012), <https://media.neliti.com/media/publications/29371-ID-hak-atas-lingkungan-sebuah-pengantar-diskusi.pdf>.

fulfillment of the rights to a healthy and proper environment as outlined in the 1945 Constitution of the Republic of Indonesia.

B. People's Rights & Obligations in Environmental Management & Protection according to Environmental Protection & Management Law

The rights and obligations in environmental protection and management are principally inseparable; one right puts an obligation on the other side. The rights of the people in Environmental Protection and Management Law 2009 cover civil and public rights:

1) *The right to enjoy*

Every person has the right to a good and healthy environment in Indonesia. That is, people deserve a good and healthy environment, and this right is part of human rights as intended in Article 28H of the 1945 Constitution and Article 65 of Environmental Protection and Management of 2009.

The Article emphasizes that every individual in Indonesia is entitled to enjoy a good and healthy environment as a fundamental right. This right is explicitly recognized and protected within the legal framework of Indonesia. The reference to Article 28H of the 1945 Constitution and Article 65 of the Environmental Protection and Management Law of 2009 underscores the legal foundation for this entitlement. Article 28H of the 1945 Constitution of Indonesia outlines the nation's commitment to protecting human rights, ensuring that every person has the right to live in prosperity and to have a good and healthy environment. This constitutional provision reflects the acknowledgment that a healthy environment is an integral aspect of human well-being and quality of life.

Additionally, Article 65 of the Environmental Protection and Management Law of 2009 further reinforces this right by specifically addressing environmental concerns. It signifies the legal recognition

that individuals not only possess a general right to a good and healthy environment but also have legal mechanisms and protections in place to ensure the enforcement and preservation of this right.

2) *The Right to Information on the Environment*

Every person has a right to access information to meet the right to a proper and healthy environment (Article 65 Paragraph (2) of Environmental Protection and Management Law). Article 5 Paragraph (2) of Environmental Protection and Management states that every person has a right to information on the environment regarding the role in environmental management. The information on the environment as intended in this article can be presented in the form of data and information on environmental protection and management since all the documents such as environmental impact analysis, report, and evaluation of environmental monitoring—planning monitoring and environmental quality change monitoring—and spatial planning are open to the public.⁶³

3) *The right to legal protection*

Article 66 of the Environmental Protection and Management of 2009 implies that every person fighting for their right to a proper and healthy environment cannot be punished or charged within the scope of civil law. This provision is intended to protect victims and/or whistleblowers that consider litigation following environmental pollution and/or destruction and also to protect them from any act of revenge from the accused that may involve punishment and/or a civil charge without overlooking the judicial independence.⁶⁴ This provision is intended to encourage people who are impacted by environmental pollution or witness the impact of the pollution to call for responsibility without a doubt.

⁶³ Elucidation of Article 65 paragraph (2) jo Article 5 paragraph (2) of “Law of the Republic of Indonesia Concerning Environmental Protection And Management,” Pub. L. No. 32 (2009).

⁶⁴ Article 66 of Law of the Republic of Indonesia concerning Environmental Protection And Management.

4) *The right to participate*

People have an equal and limitless right and opportunity to actively participate in environmental protection and management as governed in Article 70 Paragraph (1) of Environmental Protection and Management in 2009, implying that people have an equal and limitless right and opportunity to active participation in environmental protection and management.

C. Public Participation in Environmental Management and Protection

Article 70 Paragraph (1) of Environmental Protection and Management Law states that people have equal and limitless rights to actively participate in environmental protection and management. This right is also related to the responsibility to maintain the environmental function (Article 67 of Environmental Protection and Management). Participation can be given through the following activities as regulated in Article 70 Paragraph (2) of Environmental Protection and Management:

a. Social monitoring

The members of the public should jointly monitor, watch, guard, and observe suspicious conduct (informally) and report it in case of violations to ensure that the businesses and activities concerned can properly run and they do not pollute and/or damage the environment.

b. Suggestions/recommendations, opinions, objections, and grievances

This point is intended to democratize decision-making. This role is also seen to help in decision-making at a governmental level so that all the measures taken can be accepted and useful.

c. Information and/or reports.

This point is related to rapid responses, where information dissemination should be quickly performed regarding environmental problems for immediate follow-up. Information coming from the public to the government is very important to give

additional knowledge about environmental problems built by the knowledge of the locals (more like local wisdom) or sourced from experts contributing opinions to the public.

LEGAL CONSTRUCTION OF PUBLIC PARTICIPATION REGARDING ENVIRONMENTAL AGREEMENT OVER SHIFTING FUNCTIONALITY & ROLE OF FOREST AREAS

A. Comparative Concept of Public Participation according to the Concept introduced by Arnstein's Ladder in America

Public participation is an essential element in democratic decision-making in the context of a proper and healthy environment. Sherry R. Arnstein in his paper entitled "A Ladder of Citizen Participation" published in 1969 states: "The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you." In other words, public participation is a good idea, it is analogous to "eating spinach" in which no one will refuse to eat it.

Public order in the planning process in the US is illustrated by Arnsteins with a participation ladder commonly known as the "Arnstein's Ladder". This concept is intended to describe how a community that has no influence (the have-not citizens) tends to be exploited in the process of decision-making by authorities. Moreover, Arnstein also describes how big the power held by stakeholders is in determining the final product or decision-making.⁶⁵

⁶⁵ Pusat Studi Lingkungan Hidup Universitas Gadjah Mada, "Peran Serta Masyarakat Dalam Pengelolaan Lingkungan Hidup," January 11, 2022,

Arnstein's ladder can show the levels of public participation ranging from the lowest to the highest ones. The ladder is built with eight levels indicating to what extent the public participates and how big the power is given to the people through the participation process in society. The following represents Arnstein's Ladder of Participation.

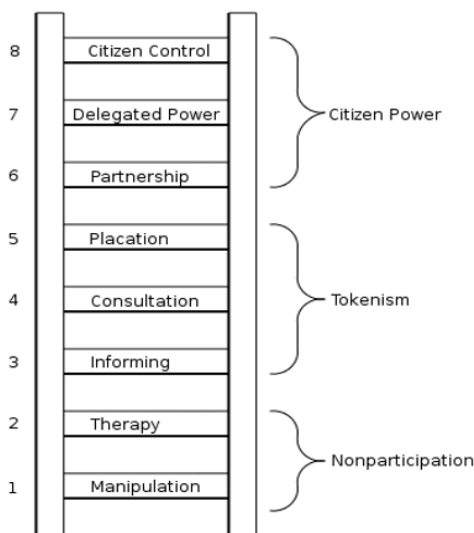


FIGURE 3. Arnstein's Participation Ladder

All the eight steps in the figure are categorized based on three different types of the nature of power held by the people in the process of participation in decision-making: 1. Non-participation, 2 tokenism, and 3. Citizen power.

If Arnstein's illustration is implemented in public participation in environmental agreement in terms of the shifting functionality and role of forest areas, the lowest point will be manipulation and therapy. The non-participation describes how small the power is given to the people. Power holders believe that the decision they make is the "best" for citizens, and they attempt to influence participation by educating people and providing a cure for them. This participation is intended to raise awareness believing that the participation has taken place.

<https://pslh.ugm.ac.id/peran-serta-masyarakat-dalam-pengelolaan-lingkungan-hidup/>.

The next steps are categorized into tokenism, indicating that things are only to meet the formality. These steps consist of informing and consultation, allowing citizens to be more heard by those holding power in decision-making. These steps also give information to people on rights, obligations, and their choice can set the first essential step to ideal public participation.

In the step of consultation, people are required by power holders to express their views. With this, people seem to have participated and been heard, but if they do not have access to making sure that they are heard, this participation is of no avail. That is, there is nothing that can guarantee that the previous situation has changed (*status quo*).

The fifth step is placation or participation aiming to calm citizens and prevent rejection, confrontation, and conflict. The public can give recommendations or opinions, but the power to make decisions remains with those holding power.

The last three steps represent the highest power of participation in decision-making. People participating in the sixth step, the partnership, will get their chance to negotiate and participate in the information or knowledge exchange with power holders.

The seventh step—delegated power—is described through an organizational structure of decision-making, where most power is delegated to citizens. That is, the citizens will hold a dominant influence on every event of decision-making.

The last step—citizen control—gives people the power to control, allowing them to adjust the program or institution formed. They are also fully responsible for policy and managerial aspects and can negotiate the condition where “other parties” can change the thoughts of the citizens.

Although Arnstein’s ladder is considered simple in terms of varied kinds of public participation, the qualification of eight steps is considered useful as a guideline to see what kind of participation can be given by the public and who holds the power in the process of public participation in the context of environmental agreement regarding the shifting functionality and role of forest areas.

B. The Principle of Public Participation according to the Aarhus Convention

Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (commonly known as Aarhus Convention) was held on 25 June 1998 by the United Nations Economic Commission for Europe (UNECE) in Aarhus, Denmark. This convention aims to contribute to the protection of the right of every person of present and future generations to ensure that they live in a proper environment, health, and welfare.

The Aarhus Convention has set several rights to a healthy environment for citizens, either individually or collectively. Each party involved in this convention is required to guarantee the right to access information, public participation in decision-making, and access to justice regarding environmental matters according to the provisions of this convention. The Aarhus Convention sets the following provisions:⁶⁶

- 1) The right of every person to receive information on the environment via public authority.

This right covers information on environmental conditions, policies, or actions taken, health conditions, and the safety of human beings, all of which can be affected by environmental conditions.

- 2) The right to participate in environmental decision-making.

This right implies that public policy allows non-governmental organizations affected by the environment to express their views regarding the proposal of the project affecting the environment, plans, and programs related to the environment.

⁶⁶ United Nations, "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" (1998), <https://unece.org/DAM/env/pp/documents/cep43e.pdf>.

- 3) The right to review the procedures of filing a charge against the public decision made without respecting the two rights above or environmental law (access to justice).

Although the Aarhus Convention is for Europeans, the signatures of 39 European countries (European Community) have politically reinforced the recognition of the substance, including the principles set in the convention. For example, Indonesia, although not ratifying this convention, has adopted the substances and principles of the Aarhus Convention in Article 65 and Article 68 of Law Number 32 of 2009 concerning Environmental Protection and Management.

In line with Aarhus Convention, Koesnadi Hardjosoemantri argues that public participation needs useful information dissemination to citizens:

- 1) Assurance of Information Receipt

The legislation in several states covers the provisions that require relevant institutions to officially announce programs on mass media at local and national levels. These institutions are also required to show documents such as project details, a request for a license up to a certain period, reports, study results, opinions, and recommendations.

- 2) Transfrontier Information

A particular kind of pollution at a border is a critical issue that may spark transboundary pollution and affect the neighboring country. This issue requires institutions to set procedures regarding how the neighboring country concerned can be informed on the impacts caused.

- 3) Timely Information

Useful public participation requires immediate and accurate information. This information should be given before a binding decision is made so that this timely moment will give opportunities to contribute some alternatives. Giving information as early as possible is probably one of the purposes of the legislation concerning the environment.

4) Comprehensive Information

There have been varied substances from country to country. The matters regarding public participation are more comprehensively regulated in American Legislation. EIS draft should consider other alternatives regarding the plans.

5) Comprehensible Information.

Information should be comprehended by the locals, or the information will not be useful. Decision-making regarding the environment often covers complex, technical, and scientific issues. However, information on these matters should still be fully understood by people. Therefore, legislations in several countries comprise provisions regarding the importance of the information presented in a language that can be easily understood.

B. The Implementation of Public Participation Regarding the Shifting Functionality and Role of Forest Areas in Environmental Agreement

Following the effectuation of the Job Creation Law, an environmental license is governed by Law Number 32 of 2009 concerning Environmental Protection and Management. This law was passed according to the fact that a proper and healthy environment is the right of every human being in Indonesia, as mandated in Article 28H of the 1945 Constitution. Following the effectuation of the Job Creation Law, the mechanism of environmental license shifted to an environmental agreement. The legal basis of the environmental agreement is regulated in Government Regulation Number 22 of 2021 concerning the Administration of Environmental Protection and Management, while the shifting functionality and role of forest areas are governed in the Government Regulation Number 23 of 2021 concerning Forest Administration.

The essence of the agreement of the shifting functionality and role of forest areas seems to have not spared any adequate room for public participation, while public participation is regulated in Law

Number 32 of 2009 concerning Environmental Protection and management. The ideal legal construction of the concept of integration of environmental agreement in risk-based business license should be congruous with public participation as outlined in Environmental Protection and Management Law, in which people have several rights, both private and public rights, including the right to participate as governed in Article 70 Paragraph (1) of Environmental Protection and Management Law of 2009 implying that people have equal and limitless right and opportunity to actively participate in environmental protection and management. "Public Participation" can involve social monitoring, suggestions, opinions, recommendations, objections, grievances, and/or; providing information and/or reports regarding the shifting functionality and role of forest areas. In a wider scope, public participation can adjust to what is needed and risk levels that can develop further into several concepts of the development of public participation from theories and practices that apply in other countries.

CONCLUSION

Omnibus Law on Job Creation has changed Environmental licensing to an environmental agreement integrated into business permits, including the permits for forestry businesses. This shift is intended to simplify the licensing mechanism and procedure without weakening economic, environmental, and social development but rather keeping all these aspects balanced and sustainable. However, this shift indicates there are some steps back of Job Creation Law sacrificing the environment for the sake of economic interests. This regression seems to relax business licensing, give more room for pro-business spatial planning, omit the minimal boundaries of forest areas that should be maintained, and weaken the sanctions imposed on related violations. This relaxation certainly leaves impacts on the environment in Indonesia, including deforestation and land-grabbing.

Furthermore, Omnibus Law also restricts participation only to those immediately affected, while they used to be involved also at the preparation stage of AMDAL. The ideal legal construction for the concept of the integration of an environmental agreement in risk-based business licensing should be congruous with the participation rights of the people in Environmental Protection and Management, asserting that people are entitled to varied rights, both private and public rights, including the rights to fully participate in environmental protection and management. This participation may involve social supervision; recommendations, opinions, objections, grievances and/or; dissemination of information and/or reporting on account of the shift in functionality in forest areas. In a wider scope, public participation can be adjusted to the needs and risk levels, and it can be further developed by taking into account several concepts of the development of public participation by adopting theories and practices running in other countries.

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