

Edition | 11 May 2012



New Environmental Rules Have Potentially Far-Reaching Implications

After a protracted delay, the government has finally acted on the mandate set out in the Environmental Protection and Management Act (No. 32 of 2009) (the “Environment Act”) by issuing a significant new ancillary or implementing instrument in the form of Government Regulation No. 27 of 2012 (the “New Regulation”). The New Regulation was issued and came into effect on 23 February 2012.

The official title of the New Regulation, Government Regulation No. 27 of 2012 on Environmental Licenses, is actually rather misleading as in reality the bulk of the regulation deals with environmental impact documents, rather than environmental licenses, which only account for a small portion of its contents.

While the New Regulation has been warmly welcomed by environmental organizations as strengthening what they often criticized as an ineffective environmental protection regime, the jury is still out among businesspeople as to its precise implications. While on the one hand it streamlines the bureaucratic process for the approval/securing of mandatory environmental documents, it also imposes additional burdens on business. In particular, the New Regulation makes an Environmental License a compulsory requirement for many enterprises in order to obtain a business or operations license (Article 1(1)).

Perhaps most importantly looking ahead, however, the New Regulation gives the Environment Minister the power to establish a general environmental rehabilitation bond scheme which, if acted upon, could require enterprises operating in a wide range of sectors to post rehabilitation bonds with the Environment Ministry.

Who Needs an Environmental License?

Under the New Regulation, the requirement to obtain an Environmental License applies to all enterprises whose “activities/operations” require the preparation and approval of an environmental impact analysis (AMDAL), or environmental monitoring and management plans (UKL-UPL).

In order to ascertain the activities/operations that are subject to the AMDAL or UKL-UPL requirements, as the case may be, we need to consult a number of statutory provisions and regulations, starting with Articles 22 and 23 of the Environment Act. Article 22(1) provides that an AMDAL or UKL-UPL documents are required in the case of activities/operations that have a “significant impact on the environment.” It sets out a list of criteria for determining the meaning of “significant,” including (a) the number of people affected; (b) the geographical extent of the impact; (c) the intensity and duration of the impact; (d) the number of environmental components affected; (e) the cumulative nature of the impact; and (e) whether or not the impact can be reversed.

Article 23 of the Environment Act then proceeds to list a series of criteria for determining which activities/operations have a “significant impact” on the environment. These include: (a) where a change in topography occurs, (b) where the exploitation of natural resources is involved (whether renewable or non-renewable); (c) where there is a potential for pollution or environmental damage, as well the degradation of natural resources; (d) where there is a potential impact on the natural environment; man-made environment or socio-cultural environment; (e) where resource and/or nature conservation areas are affected; and (f) where the introduction of a new species of flora, fauna or microorganism is involved.

In the specific case of an AMDAL, the activities/operations that require such a document are listed in greater detail in State Minister of the Environment Regulation No. 5 of 2012 (see box below for details), which was issued on 12 April 2012 and is one of a series of ancillary/implementing regulations (alongside the New Regulation) that need to be issued in order to give effect to the Environment Law.

Meanwhile, where activities/operations are not expected to create a significant environmental impact, the enterprise must prepare UKL-UPL documents. In reality, this is not a particularly onerous requirement as standard forms are provided for this by the Environment Ministry.

Exemption from AMDAL Requirement

Enterprises are exempt from the AMDAL requirement where their activities/operations are to be conducted in an area in respect of which a generally applicable AMDAL has been issued (such as in the case of an industrial estate or port), or where the municipality or regency (county) in which the activities/operations are to be conducted has adopted a “detailed” or “strategic” spatial zoning plan permitting such activities/operations, provided that the zoning plan has been prepared based on a comprehensive scientific study taking into account the impact of the relevant activities on the environment. However, even in such circumstances, the enterprise will still need to prepare UKL-UPL documents.

Approval of AMDAL/UKL-UPL

Under the New Regulation, an enterprise’s AMDAL is submitted to an AMDAL approval commission for evaluation.

Commissions are to be set up at the central, provincial and regency/municipal levels, with the Central AMDAL Commission being responsible for evaluating AMDAL in the case of, among other things, activities/operations that are of national importance, involve two or more provinces, are located more than 12 nautical miles offshore, or straddle the national frontier.

At the provincial level, the respective Provincial AMDAL commission has jurisdiction over activities/operations that are of provincial importance, involve two or more regencies/municipalities in the same province, or which are located less than 12 nautical miles of the province’s coast.

Finally, at the regency/municipality level, the respective Regency/Municipal AMDAL Commission is responsible for “other activities/operations,” and those activities/operations that take place within one third of the distance to the province’s maritime boundary.

Upon evaluation, the relevant commission forwards its decision to the state minister for the environment, governor or regent/mayor, as the case may be, for final approval.

As for UKL-UPL documents, these are submitted for approval to the state minister for the environment, governor or regent/mayor based on the same division of authority as described above in the case of AMDAL approval.

The New Regulation simplifies the AMDAL requirements and reduces the time permitted for AMDAL approval. Whereas under the previous rules the maximum time allowed was 180 working days, this has now been reduced to 125, including a 10-day public consultation period.

As for UKL-UPL documents, the relevant authority must announce the granting or withholding of approval within 14 working days.

Application for Environmental License

The New Regulation suffers from a lack of clarity as regards the details of the Environmental License application process. At the outset, Article 2 of the New Regulation states that the stages involved are as follows: (1) the enterprise must prepare an AMDAL or UKL-UPL, as the case may be; (2) it must obtain approval for the AMDAL or UKL-UPL; and (3) it must then apply for an Environmental License.

This would logically seem to suggest that the AMDAL or UKL-UPL must be approved first by the relevant authority prior to submission of the application for an Environmental License (accompanied by the approved AMDAL or UKL-UPL as a prerequisite for the issuing of the license). This is precisely what is envisaged by the Environment Act (Article 36 (2) and (3)), which essentially provides that an Environmental License shall be granted on the basis of the approved AMDAL or UKL-UPL documents, and must recite any conditions attached to the approved AMDAL or UKL-UPL documents – in other words, you need to secure approval for your AMDAL or UKL-UPL documents first, and then submit these as part of your application for an Environmental License.

Unfortunately, Article 42 of the New Regulation then proceeds to muddy the waters by stipulating that the application for an Environmental License should be submitted to the relevant authority together with the application for approval of the AMDAL or UKL-UPL (emphasis ours). We can only hope that this obvious confusion will be addressed in the upcoming regulations on Environmental License application procedures to be issued by the Environment Ministry.

The application for an Environmental License is submitted for approval to the state minister for the environment, governor or regent/mayor based on the same division of authority as described above in the section on “Approval of AMDAL/UKL-UPL”.

The documents that must be submitted as part of an Environmental License application consist of the AMDAL/UKL-UPL documents (as explained above, it is not clear whether these need to be approved first), documents evidencing the establishment of the enterprise, and a profile of the enterprise’s operations.

Upon receipt of an application, the relevant authority must announce it to the public, with interested persons then having 10 working days to make submissions in the case of an AMDAL-based application, and 3 working days where a UKL-UPL is involved.

The issuance of an Environmental License must be announced to the public within five working days.

Sanctions for Breach of Environmental License

The New Regulation provides a range of administrative sanctions for breaches of the terms and conditions of an Environmental License, including written warnings, government enforcement action, and the freezing or, ultimately, the revocation of the Environmental License.

The meaning of “government enforcement action” is elaborated on at length in Article 80 of the Environment Act, which sets out a range of possible actions, including the temporary or permanent halting of production, demolition of facilities, the compulsory relocation of facilities, and the seizure of goods and equipment.

Such enforcement actions may be taken in situations where (i) there is a major threat to the safety of the public or the environment; and/or (ii) even greater damage or loss will ensue if the pollution or environmental damage is not immediately addressed.

As regards the ultimate sanction, the revocation of the Environmental License, there is no doubt that this would have serious consequences for an enterprise as it would automatically trigger the cancellation of its business and/or operations license (Article 40 (2) of the Environment Act).

Rehabilitation Bond Scheme

Potentially the most far-reaching aspect of the New Regulation is the power it vests in the Environment Ministry to establish a general environmental rehabilitation bond scheme – something that, if put into effect, could have enormous implications for just about every business sector in Indonesia. The relevant provision of the New Regulation is Article 53(1)(c), which reads as follows:

[The holder of an Environmental License shall be required to] post a bond for the restoration of environmental functions, in accordance with the provisions of the laws and regulations in effect.

Interpreted literally, this would mean that any business that requires an AMDAL, or UKL-UPL documents, would be required to post an environmental rehabilitation bond up front, in the same way as enterprises in the mining or forestry sectors are currently required to do so. Thus, if such a scheme were to come to pass, just about every medium or large-scale enterprise in the country would be burdened with this additional, and potentially ruinous, financial obligation.

As a possible consolation, it should be remembered that such open-ended provisions are not unusual in Indonesian statutory provisions and regulations, and are often significantly watered down at the

implementing regulation stage. However, until the relevant regulations are issued by the Environment Ministry, we have no way of predicting what the likely outcome will be.

Upcoming Regulations

As mentioned earlier, the New Regulation is the first in a long list of ancillary/implementing regulations for the Environment Act that must be drafted by the Environment Ministry. Of particular significance are upcoming regulations on activities/operations that are exempt from AMDAL requirements, procedures for the issuing of Environmental Licenses, and procedures for the evaluation of AMDAL and UPL-UKL documents. There is no news as yet as to when the Ministry is likely to issue regulations on the envisaged rehabilitation bond scheme.

Conclusion

From the environmental perspective, there is no doubt that the New Regulation marks a step forward – for example, it bars civil servants from being involved in the AMDAL preparation process, something that was a major source of abuse in the past. However, from the business perspective, things are not so clear-cut.

While the New Regulation streamlines the overall AMDAL/UPL-UKL process and significantly reduces the time required for securing approvals, it also adds another layer of bureaucracy in the form of the Environmental License, which must be secured before applying for a business or operations license. In addition, there is an apparent conflict between the provisions of Article 2 and Article 42 of the New Regulation in respect of the Environmental License application process, as discussed above.

But perhaps most significant from the business perspective is the potential establishment of a mandatory rehabilitation bond scheme of general application under Article 53(1)(c) of the New Regulation. However, the precise extent of the additional bureaucratic and/or financial burden that is likely to arise as a consequence will not become clear until the necessary ancillary regulations have been issued. Whatever the case, Article 53(1)(c) clearly indicates the current mindset in the Environment Ministry and the general way in which the wind is blowing at the present time.

List of activities/operations that require Environmental Impact Analysis (AMDAL) by sector under State Minister of the Environment Regulation No. 5 of 2012:

Cross-sectoral activities/operations

includes large-scale () coastal land reclamation, excavation work, water extraction, and building construction.*

Agriculture

*industrial-scale (**) food-crop cultivation, horticultural production, and plantation agriculture.*

Fisheries and Marine

industrial-scale freshwater or saltwater aquaculture

Forestry

all types of logging in natural forests and industrial-scale forestry plantations.

Transportation and Communications

Includes development of major railways (underground, above ground, elevated), development of large-scale road transportation passenger and goods terminals, large-scale dredging work, development of large-scale port and airport facilities

Manufacturing

Includes production of cement using clinker, pulp and paper, upstream petrochemical operations, industrial estates (including integrated industrial complexes), shipyards equipped with graving docks, munitions production, lead smelting, and other industrial activities/operations that require large areas of land (as defined by the regulation)

Public Works

Includes construction of large-scale dams/reservoirs, irrigation networks, reclamation of swampland, construction of toll roads and bridges (of stipulated lengths), and development of large-scale garbage and wastewater processing facilities

Housing

Construction of large-scale housing developments

Energy and Mineral Resources

Includes large-scale mineral and coal mining facilities, mining of coal, mining of metal and non-metal ores, processing and refining of metal and non-metal ores, coal and radioactive minerals, mining operations at sea, dumping of tailings at sea, exploitation of oil and natural gas, oil and gas pipelines, oil and gas refineries, and exploitation of coal-bed methane

Electricity

Includes development of power plants and high-voltage transmission facilities

New and Renewable Energy

Includes large-scale exploitation of geothermal energy

Tourism

Development of dedicated tourist resorts, entertainment parks and golf courses (excluding driving ranges)

Hazardous Waste Processing

Includes processing of hazardous waste, use of hazardous waste as fuel or for blending with fuel, and various types of hazardous waste recycling.

() "Large-scale" is as defined by the regulation*

*(**) "Industrial-scale" is as defined by the regulation*

The above description is intended as a guide only and is necessarily very general in nature given the large number of sectors and activities/operations listed in the regulation.

AHP Client Alert is a publication of **Assegaf Hamzah & Partners**. It brings an overview of selected Indonesian laws and regulations to the attention of clients but is not intended to be viewed or relied upon as legal advice. Clients should seek advice of qualified Indonesian legal practitioners with respect to the precise effect of the laws and regulations referred to in **AHP Client Alert**. Whilst care has been taken in the preparation of **AHP Client Alert**, no warranty is given as to the accuracy of the information it contains and no liability is accepted for any statement, opinion, error or omission.



Menara Rajawali 16th Floor
Jalan Mega Kuningan Lot #5.1
Kawasan Mega Kuningan
Jakarta 12950 – INDONESIA

Telephone : (62-21) 25557800
Fax : (62-21) 25557899
E-mail : info@ahp.co.id
Web Site : www.ahp.co.id