

The Sustainable Environmental Protection Deregulation Concept During the Covid-19 Pandemic

Imamulhadi*

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Abstract

The economic recession due to the Covid-19 pandemic has forced several countries to deregulate environmental protection. In response to such policy, many environmental activists and environmentalists worry that deregulation will cause a negative impact on the mitigation of climate change's effects. Therefore, it is necessary to examine whether or not the deregulation of environmental protection in Indonesia is in line with the objectives of sustainable development. The provisions of the deregulation of environmental protection in Indonesia aims to encourage and accelerate investment through the simplification of licensing procedures, eradicating corruption in the licensing sector, increasing economic growth and gross domestic product, encouraging equitable development, and providing employment opportunities. This study concludes that Indonesia's deregulation policy does not violate the minimum tolerance standard of environmental protection. It also does not eliminate the precautionary principle and environmental impact analysis as a preventive measure. In addition, it does not revoke environmental quality standards and damage quality standards as monitoring, control, and enforcement instruments. The deregulation accordingly still adheres to the three pillars of sustainable development.

Keywords: deregulation, environmental protection, sustainability.

A. Introduction

The Covid-19 Pandemic has disrupted almost all human activities. It even causes economic recession in many countries like America, Germany, France, Italy, Japan, Korea, including Indonesia. Singapore, who has excellent economic endurance in Southeast Asia, has also been weakened by the pandemic. On the other hand, lockdown policy adopted by affected countries which restricts regional business and industrial activities had inadvertently succeeded in reducing air pollution. This certainly is helping countries to handle climate change as shown through 7% reduction of carbon dioxide (CO₂).¹ Carbon reduction target imposed on Annex I of

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* Lecturer of the Department of Environmental, Spatial, and Agrarian Law, Faculty of Law, Universitas Padjadjaran, Jalan Dipati Ukur No. 35, Bandung, Dr. (Universitas Padjadjaran), S.H. (Universitas Padjadjaran), M.H. (Universitas Padjadjaran), imamulhadi@unpad.ac.id.

¹ BBC Indonesia, "Selama Pandemi Covid-19, Emisi Karbon Global Turun 2,4 Miliar Ton", December 13, 2020, <https://www.kompas.com/sains/read/2020/12/13/130400623/selama-pandemi-covid-19-emisi-karbon-global-turun-2-4-miliar-ton?page=all#page2>, accessed on May, 2021.

Kyoto Protocol upon countries have helped to fulfill states' obligations as stipulated in the Protocol. It also has an impact on the achievement of the objectives of sustainable development goals related to climate change countermeasures.² France and Britain have successfully cut their CO₂ emission by 15% and 13% respectively. Although the role of industry in reducing CO₂ is not as large as that of the transportation sector, the decline is surely momentous.³

Efforts to tackle climate change are required by the United Nations Framework Convention on Climate Change (UNFCCC), the Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD), and the Reducing Emissions from Deforestation and Forest Degradation (REDD+). They are programs designed to reduce emissions from greenhouse gases. However, they do not seem able to achieve their expected targets since forest and land fires easily reverse the efforts to generate positive impacts. Ramon Vallejo, an ecologist from the University of Barcelona, states that forest and land fires around the world have increased CO₂ emissions. The continuation of such disasters is a serious obstacle for the success of Paris Agreement.⁴

According to the Greenpeace records, annually, there are eight billion tons of CO₂ emitted due to wildfires.⁵ It is a warning for earth's and organisms' survival. It proves that climate change countermeasures faced obstacles in the form of natural and man-made disasters. For example, Paris Agreement requires State-Parties to prevent global average temperature increase at least 2° Celsius.⁶ However, disasters like forest and land fires still continue. The disasters have the potential to disrupt the efforts to limit the increase of global average temperatures.

During the pandemic, NASA's Earth Observatory Satellite Image revealed a reduction of nitrogen dioxide (NO₂) pollution in Wuhan and 50% reduction of NO₂ emissions in New York. The decrease of NO₂ also found in Jakarta by 40%.⁷ At the end of 2020 evaluation, the Global Carbon Project Team reports that during the pandemic, global greenhouse gas emissions declined by roughly 2.4 billion tons.

² Yulinda Adharani, "Pemanfaatan Energi New Normal Menuju Better Normal", September 29, 2020, <https://ketik.unpad.ac.id/posts/112/pemanfaatan-energi-new-normal-menuju-better-normal-2>, accessed on May, 2021.

³ BBC Indonesia, *op.cit.*

⁴ Dedy Darmawan Nasution, "Ilmuwan: Kebakaran Hutan Tingkatkan Emisi CO₂", November 16, 2018, <https://www.republika.co.id/berita/trendtek/sains-trendtek/18/11/16/pi9ckq366-ilmuwan-kebakaran-hutan-tingkatkan-emisi-co2>, accessed on May, 2021.

⁵ Schauenberg Team, "Perubahan Iklim: Kebakaran Hutan Jadi Risiko Global", January 11, 2020, <https://www.dw.com/id/perubahan-iklim-kebakaran-hutan-jadi-risiko-global-masa-depan/a-51956922>, accessed on May 2021.

⁶ Andreas Fischlin, *Background and Role of Science in The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford: Oxford University Press, 2017, p. 15.

⁷ Arifin Rudiyanto (et.al.), *Republik Indonesia*, Speech Delivered in the Sustainability Talk Webinar under Agenda "Menjaga Momentum Pencapaian SDGs Pasca Corona: Pengaruh COVID-19 terhadap Tujuan Pembangunan Berkelanjutan", held by Ministry of National Development Planning/National Development Planning Agency (Bapennas), Jakarta, May 8, 2020, <https://kkp.go.id/an-component/media/upload-gambar-pendukung/DitJaskel/publikasi-materi-2/SDGs-Talks-Menjaga-Momentum/20200506%20Final%20Paparan%20Deputi%20KSDA%20SDG%20IPB%20-%20sec.pdf>, accessed on May, 2021.

Despite the positive impacts of the pandemic on the environment, there is a trend among states to overcome economic downturn by opening investment as inclusive as possible. Deregulation in investment is an effort to revive the economy. However, environmental and climate activists consider that deregulation might annul the current reduction of CO₂ emissions level. They are sure that it possibly will result in higher emission level compared to pre-pandemic state to compensate less-productive period during the pandemic. Despite possible counter productivity towards environmental protection, several countries, such as Indonesia, America, and India have adopted deregulation policies to address their economic issues.

To address the issue, this study analyzed the implementation of the pillars of sustainable development. They consist of economic, social, and environmental sustainability. The analysis aims to answer whether the Indonesian deregulation concept in the field of environmental protection to boost investment is in line with sustainable development goals (SDGs). It also revealed whether the concept can be used as an example for policy model to overcome the economic crisis caused by the pandemic. It can be justified for its sustainability from a sustainable development perspective. The result of the analysis can be an important reference for affected countries to revive their economy.

B. Post-Covid-19 Deregulation of Environmental Protection

1. Global Notion of Environmental Protection

States of the world currently faces environmental issues that consist of degradation of natural resources, soil, water, forests, and various species of flora and fauna. The issues are the significant background behind the construction and the promotion of concept and discourse of environmental protection. Almost every decade, the governments and the people discuss the issue of environmental protection as an interesting issue. People now urge the need of massive prevention and remedies to ensure beneficial environmental conditions for human life and well-being.⁸

Environmental protection refers to all activities to manage or restore environmental quality. It includes efforts like reducing emissions or hazardous pollutants in the environment. To be specific, the efforts include:⁹

- 1) changing the characteristics of goods and services;
- 2) changing consumption patterns;
- 3) changing production techniques;
- 4) caring for or disposing of wastes in environmental protection facilities;
- 5) recycling; and
- 6) preventing environmental and ecosystem degradation.

Conceptually, environmental protection can be interpreted as preventing changes in ecosystems and environmental elements from unwanted substance or phenomena, such as environmental damage caused by human activities. The

⁸ Donald K. Anton and Dinah L. Shelton, *Environmental Protection and Human Rights*, New York: Cambridge University Press, 2011, p. 1.

⁹ United Nations, *Glossary of Environment Statistics*, New York: United Nations, 1997, p. 30.

environmental protection does not only focus on the relationship between humans and their communities. It also covers the relationship between humans and the environment.¹⁰ In short, environmental protection is an effort to protect the preservation of environmental functions from human practices through some instruments as follows.

a. Environmental use control

Environmental use control is carried out through environmental quality standards as the benchmarks for environmental aspects of business activities. It generated environmental protection guidelines as boundaries to avoid excessive negative impacts during the preparation of, during, and after business activities. The environmental use control requirements in granting environmental permit/license for business activities are effective instruments due to their preventive nature. Compliance to such requirements before being handed environmental license greatly affects the sustainability of environment.

b. Supervision

An environmental supervisor carries out supervision after a permit is granted as an environmental protection effort. In carrying out supervision, environmental supervisor detects early potential violations of environmental protection regulations and permits. The supervisor is given the authority to monitor, inspect, and report business activities.

c. Enforcement

Enforcement is the last layer of an environmental protection instrument after supervision towards business activities suspected of committing violations. The enforcement may come in the form of (1) warning letter to the person in charge of business activities to comply with the requirements; or (2) government coercion by termination or temporary cessation of activities or forced environmental remedy/recovery, permit revocation, and filing suspected criminal offense to the authority or civil lawsuit to courthouse.

In several states, either civil law or common law traditions, it is certain that environmental protection measures have been permanently regulated to prevent negative impacts towards natural resource exploitation. The Rio Declaration stipulates that parties have the sovereign right to exploit their natural resources in their jurisdiction and are responsible to prevent environmental pollution and

¹⁰ Clive Hamilton (et al)., "Environmental Protection and Ecology", *Encyclopedia of Ecology*, January Edition, 2018, p. 1342.

damage that crosses their national borders.¹¹ Consequently, the parties must regulate environmental protection.¹²

States that protect their environment strictly has a positive impact on environmental sustainability in its territory. On the contrary, states that protect the environment loosely have a negative impact on the environment. The discrepancies have arisen since strong positive relation between environmental protection and sustainability exists. Based on this relationship, deregulation that tends to relax environmental protection potentially has negative impacts on environmental preservation.

In the United States, for instance, Clean Air Act (CAA) separates two types of states' business permit requirement based on air pollution level. The first includes states with "attainment" status: states with safe level of air pollution can be allowed to open new industries and new sources of pollution. The second covers states with "non-attainment" status: states with level of air pollution that have the potential to endanger daily activities must comply more regulations or go through a lengthy licensing process.¹³ Many states in the United States are struggling to obtain such attainment status. One of them is Southern California with its high population, significant production intensity and level, automobile dependence, and unfavorable climatic conditions. However, CAA shifted paradigm in the American industry, especially for the states, to be more environmentally friendly to gain attainment status for their economy continuation.

In India, the environmental protection regulations are also divided into two phases that prioritize liberalization based on international negotiations. Economic liberalization is directed at the expansion of the private industry, including the small-scale sector, the numbers of vehicles, and consumption in general as follows.¹⁴

a. Indian Environmental Regulations in Pre-liberalization Era (from 1947 to early 1990)

Substantial environmental considerations were made for the first time in a federal policy document in India's Fourth Five-Year Plan from 1969 to 1974. It stipulated that "planning for harmonious development is only possible based on a comprehensive assessment of environmental concerns". It was the first time for the term "environmental protection" to be recognized as an integral part of the development process. The reorientation of ecology and the environment in the field of economic policy took place under the leadership of Prime Minister Indira Gandhi in 1966-1977 and 1980-1984.

¹¹ See Laode M. Syarif (et.al.), *Evolusi Kebijakan dan Prinsip-Prinsip Lingkungan Global* in Laode M. Syarif and Andri G. Wibisana, *Hukum Lingkungan: Teori, Legislasi dan Studi Kasus*, Jakarta: USAID Indonesia, 2015, p. 64.

¹² United Nations, "A/CONF.151/26/Vol.I: Rio Declaration on Environment and Development", 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>., accessed on May, 2021.

¹³ Arden Rowell, "COVID-19 and Environmental Law", *Environmental Law Reporter*, Vol. 50, 2020, p. 10883.

¹⁴ Rama Mohana R Turaga and Anish Sugathan, "Environmental Regulations in India", *Oxford Research Encyclopedia of Environmental Science*, 2020, p. 3.

b. Post-Liberalization Era

The existence of economic reforms in 1991 opened the door to private participation in the economic sector. It made India the fastest growing economy. However, the exploitation of natural resources also increased and caused environmental degradation. In the Statement on Industrial Policy in 1991 during economic reform, it was promised that industrialization would be balanced by environmental protection and efficient use of natural resources. Three years later, in 1994, the Environmental Impact Assessment (EIA) came into effect and became one of the most significant and often controversial environmental regulations of the post-liberalization era. The 1994 EIA notification required the MoEF approval to regulate 29 types of industry. However, in 2006, the types were changed to Category A and B based on project size or capacity. For example, a coal-fired power plant with a capacity of equal to or more than 500 MW is considered Category A; while a power plant of less than 500 MW is considered Category B. The licensing process is delegated to local governments. The EIA regulations required project holders to conduct *ex ante* assessments of the biophysical (on air, water, land, and natural ecosystems such as forests, marine ecosystems, and coastal zones) as well as social impacts to analyze potential impacts. Then the EIA is submitted to an expert committee for evaluation.

2. Deregulation of Environmental Protection in Indonesia

Indonesia is one of the countries suffering from the recession resulted from the pandemic. In the first and second quarters of 2020, Indonesia's economic growth was -5.32%. To overcome the recession, Indonesia adopted several policies, including providing tax stimulus, capital boost, credit restructuring, and waiving electricity fees.¹⁵ At the end of the fourth quarters of 2020, Indonesia took a big step to increase the economic growth. The step aims to re-foster investment by simplify and accelerate investment through deregulation of business permit.

Indonesian deregulation of business permit has the potential to harm environmental protection strengths. For that reason, environmental activists mockingly refer to the policy as "deregulation of investment in natural resources". The deregulation was initiated on October 5, 2020, when the Law Number 11 of 2020 on Job Creation (Job Creation Bill) was promulgated. The Law revises 79 statutory-level regulations considered to hinder investment. Several laws governing the core points of environmental protection efforts (instruments for controlling environmental use, environmental permit requirements, monitoring, and enforcement for non-compliance), such as the Law Number 32 of 2009 on Environmental Protection and Management, the Law Number 26 of 2007 on Spatial Planning, the Law Number 41 of 1999 on Forestry, the Law Number 18 of 2013 on

¹⁵ Dewi Wuryandani, "Dampak Pandemi Covid-19 terhadap Pertumbuhan Ekonomi Indonesia", *Info Singkat*, 2020, p. 20, https://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-XII-15-I-P3DI-Agustus-2020-206.pdf, accessed on May 2021.

Prevention and Eradication of Forest Destruction, the Law Number 39 of 2014 on Plantations, and the Law Number 32 of 2014 on Marine Affairs.

As a part of the deregulation package, the Draft of the Job Creation Law revises the regulatory objectives to “providing convenience and protection to industrial and trading investors” (including small and medium enterprises). It also aims to boost the investment climate and accelerating national strategic projects. Unfortunately, the draft does not regulate compliance with sustainable development principles in business permit aspect. Environmentalists suspect that the draft will be used as a basis for ruling out ecological sustainability to prioritize business permits.

The deregulation of environmental protection became more evident after the adoption of numerous implementing regulations of the Law. In less than four months, forty-nine government regulations have been enacted as the implementing regulations as follows.

a. Relaxation of Obligations and Responsibilities of Investors on Environmental Protection

The change of paragraph (1) letter (b) of the Law on Plantation from “to the lowest” to “around 20%” may relax the company’s obligation to make plasma gardens with farmers (smallholders). The obliteration of paragraphs (3) and (4) of the Law on Plantation relaxes up plantation entrepreneurs in preparing and implementing environmental impact analysis as part of the requirements for a business permit.¹⁶

Revisions on the Law on Spatial Planning have implications on the relaxation of obligations of investors to comply with spatial plans stipulated by the local governments since. In the Draft of Job Creation Law, the spatial planning chapter provides the government discretionary power to prioritize investment when there is a dissonance between local/regional spatial plans and investment plans, especially national-strategic-projects-related investment plans. This extensive discretion lies under Article 18(4) and Article 34A of the Draft.

In relation with the deregulation of environmental protection, the Government Regulation Number 22 of 2021 on the Implementation of Environmental Protection and Management has issued new rock waste of fly ash and bottom ash, hence the resulted coal waste no longer needs to be tested for its use. The regulation will cut the obligations and costs incurred by the coal-fired power plant in coal waste management to have emergency response system (emergency control system to deal with accident[s]) for coal ash management whereas obligation to have such

¹⁶ Forest Digest, “Dampak UU Cipta Kerja terhadap Lingkungan”, November 5, 2020, <https://www.forestdigest.com/detail/842/analisis-isi-uu-cipta-kerja>, accessed on May, 2021.

emergency response system is what sets management of hazardous waste apart from management of non-hazardous waste.¹⁷

b. Simplifying and Expediting Investment Procedure

The Draft of Job Creation Law and the Government Regulation Number 5 of 2021 on the Implementation of Risk-based Business Permit (GR 5/2021) indeed has a significant impact on economic growth in Indonesia. Simplification of overlapping regulations and expediting administrative procedures were adopted for more efficient and effective investment process by still prioritizing commitment for environmental protection.¹⁸

One of the government's commitments to improve the economy in Indonesia is to assist and to develop potential micro and small businesses through simplifying investment procedures.¹⁹ The government provides facilities for business actors to ease their activities, such as integration of permit request application into an online single submission system, the absence of a minimum capital limit for the establishment of a limited liability company, and repealing permit requirement for micro-businesses. In addition, the government also provides various facilities and incentives for those who invest in Special Economic Zones (SEZs), Free Trade Zones (FTZs), and Free Ports.²⁰

c. Integrating Environmental Permits in Business Permit

Environmental permit previously was a requirement for obtaining a business permit. In the development, it has been repealed and replaced by *environmental approvals*. As an instrument of environmental use control, the environmental approval is less desirable compared to environmental permits. Unlike environmental permit, the approval means the document cannot be a legal foundation for administrative litigation if the business is suspected to conduct any activities potentially harming the environment and communities. Environmental approval is the merge between Decision Statement of Environmental Feasibility and Environmental Permit into *business permit*. Thus, if there is a fallacy when environmental approval is given, the environmental guardian and the affected community cannot interfere with the status of the environmental approval. However, the business permit may be challenged.

d. Relaxation of Supervision

¹⁷ ICEL, "[Siaran Pers] Kembalikan Abu Batubara Sebagai Limbah B3: Utamakan Pertimbangan Lingkungan dan Kesehatan Masyarakat", March 12, 2021, <https://icel.or.id/berita/siaran-perskembalikan-abu-batubara-sebagai-limbah-b3-utamakan-pertimbangan-lingkungan-dan-kesehatan-masyarakat/>, accessed on May, 2021.

¹⁸ BPMI Transcript, "Keynote Speech Presiden Joko Widodo Pada APEC CEO Dialogues 2020", Sekretariat Kabinet RI, November 19, 2020, <https://setkab.go.id/gallery/keynote-speech-presiden-joko-widodo-pada-apec-ceo-dialogues-2020-kamis-19-11/>, accessed on May, 2021.

¹⁹ *Ibid.*

²⁰ *Ibid.*

The Draft of Job Creation Law includes the principles of equal rights, legal certainty, togetherness, ease of business practice, and independence. The Draft is projected to be omnibus law. It revises 79 laws at the same level. The draft also changes existing principles to make them more harmonious. However, since the principle of public participation is not included, the compliance with such principles in environmental protection and management is problematic. Thus, communities and Non-governmental Organizations (NGOs) that have no direct interest can no longer participate in supervising the business actors' practice of environmental.

The Draft of Job Creation Law limits the scope of supervision for environmental inspectors. The draft revised Article 76 of the Law on Environmental Protection and Management and makes environmental inspectors unable to report all related findings on suspected violations of business permit and environmental requirements to the environmental investigators. The inspectors only have option to implement state administrative sanctions if environmental investigators find a violation. Additionally, in GR 5/2021, sudden inspections can only be done once during the valid period of the business permit.

e. Cutting off Types of Permits in the Environmental Sector

Numerous types of permits in the environmental sector have been repealed. They are, among others, environmental permit, temporary storage for hazardous and toxic waste permit, and transport of hazardous and toxic waste permit. In forestry utilization sector, the mechanism for forest utilization permit, according to the Draft of Job Creation Law and its subsidiaries only valid to the utilization of timber forests. Initially, based on the Law on Forestry, the types of forest area utilization permits consist of eight types of permits. However, after the enactment of the Draft, these permits are repealed and merged into one type of permit, namely business permits. Thus, Article 27-29 of the Law on Forestry is implicitly revoked.²¹

f. Simplification of the EIA

The Draft of Job Creation Law repeals environmental permits and the EIA. It is replaced by Environmental Feasibility Test that is published in Jakarta. After the Law has been enacted, NGOs' participation was revoked in the EIA Commission since it became an obstacle for the government and investors. Thus, only directly affected communities were involved in the Commission (*see* Article 25 point (c) and Article 26 paragraph (2) and paragraph (3) of the Draft). Article 26 paragraph (4) of the Draft abolishes the initial provision in the Law on Environmental Protection and Management, which stipulated the right to object to the EIA document. This means

²¹ Fitria Dewi Susanti and Sadam Afian Richwanudin, "Empat Potensi Dampak Kebijakan Omnibus Law di Sektor Kehutanan dan Lingkungan", *Sebijak Institute*, October 6, 2020, <https://sebijak.fkt.ugm.ac.id/2020/10/06/empat-potensi-dampak-kebijakan-omnibus-law-di-sektor-kehutanan-dan-lingkungan/>, accessed on May, 2021.

that if the EIA document has been drafted, there will be no opportunity for the community and the NGOs to thwart the permit.²²

g. Decriminalization

One of the concerns for investors to invest in Indonesia is the situation where criminal provisions can be imposed on business actors due to misconducts with criminal elements. Thus, in the Draft of Job Creation Law, the government deregulates environmental protection by decriminalizing misconducts and replacing them with administrative sanctions. The revision is related to violations of standards of water quality, seawater quality, ambient air quality, damage, and management of temporary storage of hazardous and toxic waste without permission. Previously, criminal sanctions were imposed on unlicensed business operations based on strict liability approach. According to the draft, unlicensed business can only be punished based on fault-based liability. In addition, the issuance of EIA without having a competency certificate can no longer be penalized. Officials who give a business permit without an environmental permit can no longer be penalized due the revision to Article 111(2) of the Law on Environmental Protection and Management. The violation, however, may still be subject to administrative penalties and compensation.

h. Removing Strict Liability

Reforming strict liability approach in the enforcement of environmental protection is also a part of the revised norms. The drafters of the Draft of Job Creation Law wanted to reform the norms, which consist of strict liability, since almost-annually forest and land fires in plantation areas has caused many plantation companies to suffer loss and being punished by courts to pay compensation.²³ By reforming strict liability approach, plantation companies no longer need to be concerned with prolonged drought and *El Nino* disasters, which often cause forest and land fires in Indonesia and not strictly the fault of the companies.

i. Centralized Business Licensing Policy

Articles 4 and 6 of GR 5/2021 have withdrawn certain licensing authority from regional government and establish the power for central authority. Some of these sectors, include maritime affairs and fisheries, agriculture, environmental and forestry, energy and mineral resources, nuclear power, industry, trading, public works and housing, transportation, health and medicine, food, education and culture, tourism, religious, post, telecommunication, broadcasting, defense and

²² Mufti F. Barri, "Hilangnya Fungsi Perlindungan dan Pengelolaan Lingkungan dalam Era Omnibus Law", Mongabay Indonesia, November 4, 2020, <https://www.mongabay.co.id/2020/11/04/hilangnya-fungsi-perlindungan-dan-pengelolaan-lingkungan-dalam-era-omnibus-law/>, accessed on May, 2021.

²³ Sigit Riyanto (et.al)., "Kertas Kebijakan: Catatan Kritis Terhadap UU No 11 Tahun 2020 Tentang Cipta Kerja", 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>., accessed on May, 2021.

security, and employment. Likewise, the power to publish and grant Environmental Feasibility Test now is bestowed upon Jakarta. Local governments are now limited to being part of the testing team.

j. Cut-off of Administrative Sanction

To protect investors from foreclosure of business and as a part of the incentives provided by the government, the deregulation repeals permit suspension and revocation as sanctions. This policy certainly guarantees business continuity even though a company violates laws and regulations. It will become hard to stop industrial business halfway through their permit validity period.

3. The Deregulation of Environmental Protection in Some Countries

The pandemic has greatly affected various sectors in numerous countries, from governments, businesses, to general human activities. The conditions are not 'normal' and could potentially lead to a recession. It has the potential to force governments to make an unprecedented policy that prioritizes economic growth by suspending various policies and regulations, especially regarding environmental protection perceived as barrier to a much-needed short-term economic growth.²⁴

The process of expediting bureaucracy or administrative processes to resolve overlapping arrangements is one example of deregulation. However, deregulation should be carried out without total abandonment to environmental-protection-related regulations since it may lead to acceleration of human-activities-induced environmental degradation.²⁵

Environmental policies and regulations during the pandemic have been relaxed in the United States. On March 26, 2020, the Environmental Protection Agency (EPA) has issued the Covid-19 Implications for EPA's Enforcement and Compliance Assurance Program, which retroactively came into effect on March 13. It states that the "EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the non-compliance".²⁶

In the United States, more than 3,000 polluters have made pandemic-based request documents addressed to the EPA regarding environmental requirement relief. Several states have also adopted and implemented relaxation policy during the pandemic.²⁷ They are as follows.

²⁴ Maik Kecinski (et.al)., "Environmental and Regulatory Concerns During the COVID-19 Pandemic: Results from the Pandemic Food and Stigma Survey", *Environmental and Resource Economics*, Vol. 76, No. 4, 2020, p. 1140.

²⁵ Andrew Farmer, *Handbook of Environmental Protection and Enforcement Principles and Practice*, Sterling: Earthscan, 2007, p. 24.

²⁶ Maik Kecinski (et.al)., *op.cit.*, p. 1140.

²⁷ Joel A. Mintz and Victor B. Flatt, "Pandemic Spawns Dangerous Relaxation of Environmental Regulations", *The Revelator*, September 14, 2020, <https://therevelator.org/pandemic-environmental-regulations/>, accessed on May, 2021.

1. Policymakers suspended independent inspections of nuclear test sites in Nevada.
2. North Dakota officials granted requests to suspend groundwater sampling at natural gas processing plants, where 837,000 gallons of liquefied natural gas had been spilled from leaks over the preceding five years.
3. Arkansas grants a long-term safety test waiver for abandoning oil and gas wells.
4. Wyoming gives (mostly) oil and gas companies to break regulations on air emission rule.
5. Michigan approved requests from cities to suspend testing of drinking water and replacement of lead pipe causing serious health problems at Flint.

The existence of relaxation of environmental policies made by the EPA has the potential to cause long-term environmental pollution and can have a negative impact on human and animal health, cultural and customary injustice, and significant decrease of the value of property located near the pollution site.²⁸

The pandemic has also made the Indian government to encourage alarming projects that can harm the environment, especially biodiversity and natural resources. The Indian Ministry of Environment, Forest, and Climate Change consistently authorize controversial projects, such as granting coal mining permits in elephant conservation areas, initial drilling within fauna captive area, the home to lion-tailed macaques and great Indian hornbills, continuing the project to rebuild the parliament building in New Delhi, plans for hydropower development within the biodiversity area of northeast India, and uranium mining in a tiger sanctuary in central India.²⁹ The Ministry has also drafted environmental regulations that benefit big projects by cut-off public consultation, expert input, and even allowing projects without proper environmental permits.³⁰

4. Deregulation in a Sustainability Perspective

Environmentalists believe that deregulation policies in Indonesia will have a negative effect on the environment since even the previous regulatory and supervisory models were unable to lead to better environmental conditions. They argue that the previous policy was not adequate since the root of environmental issues in Indonesia was not in the regulation but in the massive corruption tradition in the forestry and natural resources sectors leading to *modus operandi* of corruption through regulations and administrative processes and instruments (state capture corruption).³¹ The Corruption Eradication Commission (KPK –*Komisi Pemberantasan Korupsi*) also believes that the exhaustive bureaucracy creates

²⁸ Maik Kecinski (et.al), *op.cit.*, p. 1141.

²⁹ Sustainability Times, "From India to Indonesia Environmental Laws Are Being Relaxed", May 9, 2020, <https://www.sustainability-times.com/environmental-protection/from-india-to-indonesia-environmental-laws-are-being-relaxed/>, accessed on May, 2021.

³⁰ Vaishnavi Chandrashekhar, "India's Push to Relax Environmental Assessment Rules amid Pandemic Draws Criticism", *Science*, May 7, 2020, <https://doi.org/10.1126/science.abc6828>, accessed on May, 2021.

³¹ Forest Digest, *op.cit.*

corruption practices that can hinder investment in Indonesia. Thus, the necessary improvements in the legal system are, in fact, to eradicate corruption.

The Indonesian Center of Environmental Law (ICEL) provides an analysis that the deregulation of environmental protection through the Draft of Job Creation Law has ignored the problems of sustainable development, law enforcement, and corruption as the main factors inhibiting investment in Indonesia. Evidently, in the process of the drafting, the government and the parliament raised only indicators of complex licensing systems and over-regulation problems. According to ICEL, the government has neglected these factors as they did not highlight other important indicators, such as Ease of Doing Business and incidence of corruption in the Global Competitiveness Index. According to ICEL, various research results have reported that good governance and corruption greatly affect the value of an investment in a country. This indicator should be an indicator in solving investment problems.

Contrary to Forest Digest's and ICEL's skeptic attitude, Djalil is optimistic about the Draft. He states that the Draft is able to open more job opportunity to eradicate unemployment, a prolonged serious issue encountered by Indonesia.³² Deregulation concept within the Draft of the Omnibus Law may be the sufficient vessel to resolve regulation overlaps and disorganization that hinder investment. The Draft serves as a driving factor for Indonesia's bureaucracy to swiftly accommodate the country's development, such as reformation in spatial planning regulation.³³

Objectively, this study is of the position that regulatory policies on environmental protection must not neglect the intended target of sustainable development. The government has a big responsibility to alleviate poverty and suffering due to unemployment by opening investment as a positive effort to create jobs. The government claims that of the 22 million new workforces each year, only 2.5 million are absorbed. Currently, there are 7.05 million unemployed people and 8.14 million people with uncertain job due to the pandemic. The government hopes that the deregulation will generate per capita income of Rp 27 million per month.³⁴

The problem behind the deregulation policy is logical and objective. The government, the parliament, and the industrial sector bear the responsibility to promote economic growth and safeguard people's income. However, the deregulation is perilous if the environment should be sacrificed for investment. The unintended positive impact of the pandemic towards the environment will be in

³² Based on 2020 – 2021 data provided by Statistic Indonesia, unemployment rate in Indonesia reached 7.07%. Additionally, 29.21 million people (14.28%) in their productive age are affected by the pandemic and out of that amount, 2.56 million people are laid off, 0.76 million people are not in the workforce, 1.77 million people are unemployed, and 24.03 million people suffered from work hours reduction due to pandemic.

³³ Sofyan Djalil, "Sofyan Djalil Ungkap Tujuan Dibentuknya UUCK", <https://rri.co.id/nasional/peristiwa/919542/sofyan-djalil-ungkap-tujuan-dibentuknya-uuck>, accessed on November, 2021.

³⁴ Academic Manuscript of the Law Number 11 of 2020 on Job Creation, p. 3.

if, for the sake of national income, the deregulation abandons environmental interest all together.

Indonesia is committed to reduce carbon emissions and reduce the rate of deforestation as a realization of its obligations under UNFCCC.³⁵ Indonesia's commitment to reduce carbon emissions by 17.2% in the forestry sector, 11%, in the energy sector, 0.32% in the waste sector, 0.13% in the agriculture sector, and 0.11% in the industrial and transportation sector. Moratorium on permits for the use of, primarily, natural forests and peatlands and on the practice of forest and land fires for land preparation is an effort to reduce the rate of deforestation with a target of above 75% each year.³⁶ During 2019-2020, Indonesia succeeded in reducing the rate of deforestation from 462.46 to 115.45 hectares. However, it will be insignificant if the commitment of the moratorium and its success are followed by counterproductive policies that have the potential to increase CO₂ emissions and increase the deforestation rate.

The concept of sustainable development as presented by the World Commission on Environment and Development has three main pillars: ecological sustainability, economic sustainability, and social sustainability.³⁷ The three pillars serve as the basic framework for the preparation of sustainable development goals so that every government's policy can be accounted for as a policy in accordance with the concept of sustainable development.³⁸

Indonesia's environmental protection deregulation is a policy model in overcoming post-Covid-19 economic recession. The deregulation have been in accordance with the concept of sustainable development. Therefore, it can be used as a reference and comparison for other pandemic-affected countries. Covid-19 pandemic is the driving factor for Indonesia to deregulate certain regulations. The pandemic has toppled world's economy and investment, hindered economic growth, and increased unemployment rate and poverty. The Draft implicit deregulation provisions are Indonesia's answer to this economic downturn.

If economic development is defined as efforts to improve the community living standard and to equalize people's income for social welfare,³⁹ then the deregulation is in line with the pillars of economic and social sustainability. It

³⁵ Indonesia's commitment to reduce carbon emissions by 17.2%, in the forestry sector, 11% in the energy sector, 0.32% in the waste sector, 0.13% in the agriculture sector, and 0.11% in the industrial and transport sector. See also Muhammad Khadafi, "Menteri KLHK Sebut Perpres Perdagangan Karbon Rampung Agustus", July 6, 2020, <https://ekonomi.bisnis.com/read/20200706/44/1262174/menteri-klhk-sebut-perpres-perdagangan-karbon-rampung-agustus>, accessed on May, 2021.

³⁶ Zubi Mahrofi, "KLHK: Penurunan Deforestasi Bukti Komitmen Pemerintah Turunkan Emisi", March 3, 2021, <https://www.antaraneews.com/berita/2025528/klhk-penurunan-deforestasi-bukti-komitmen-pemerintah-turunkan-emisi>, accessed on May, 2021.

³⁷ United Nations, "A/CONF.151/26/Vol.I: Rio Declaration on Environment and Development", 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, accessed on May, 2021.

³⁸ Moh. Fadli (et.al.), *Hukum & Kebijakan Lingkungan*, Malang: UB Press, 2016, p. 156.

³⁹ Badan Pusat Statistik, "Indikator Pembangunan Berkelanjutan 2015", <https://www.bps.go.id/publication/2015/12/18/deae14f74b249127ba342cb/indikator-pembangunan-berkelanjutan-2015.html>, accessed on May, 2021.

simplifies and accelerates investment procedures. It is not erroneous to adopt such policy. During the pandemic, there is no single country in the world that does not need investment for the people's sake and welfare and think of such deregulation as an inappropriate "cure".

Investment is a *condicio sine qua non* in a country. It can provide at least three benefits: reducing unemployment, ensuring the country's long-term economic growth, and increasing per capita income. Further, investment has a bond with gross domestic product. If investment increases, the gross domestic product will also increase and *vice versa*.⁴⁰ The existence of investment can automatically increase taxes collection and foreign exchange. Both of which can be used to finance the development of infrastructure, health facilities, and other public services.

The shift of investors to invest in Vietnam is a disadvantage for Indonesia. It forces the government to adopt adequate policies to be more competitive. The deregulation reduces the types of permits in the environmental sector to facilitate and accelerate investment by integrating certain permits (before the Draft of Job Creation Law) into one permit. This simple licensing procedure is highly desired by investors and the objective and provisions are in line with the government's efforts to eradicate corrupt practices in the administrative system that are detrimental to the state and society. The policy of removing multiple permits into a single permit is evidence of the government's seriousness to eradicate corruption.

Further, according to GR 5/2021, to invest, investors only need to have a Business Identification Number and administer only business permit. In the plantation sector, investors no longer need to take care of principle permits, location permits, environmental permits, plantation business permits, and operational permits. These permits have been integrated into an Environmental Impact Analysis or an Environmental Management Effort and Environmental Monitoring Efforts that were prepared and assessed in the preparation stage. In the industrial sector, investors no longer need to administer permits of principal, location, environmental, site disturbance, building, operational, liquid waste disposal, and temporary storage for hazardous and toxic waste.

Additionally, the deregulation is intended to simplify the preparation and assessment of EIA, including incentives to boost economic growth. Typically, one of many obstacles is the exhaustive waiting period for the assessment process since NGOs tend to be skeptical and even reject large industrial developments by filing a lawsuit to courthouse. Eliminating participation of NGOs in the EIA does not mean that the government easily passes the EIA. Instead, the assessment team that is comprised of competent experts can provide solutions objectively.

Investors are reluctant to invest their capital in Indonesia. One of the reasons is due to the existence of criminal sanctions for corporations, even though the

⁴⁰ Elva Mustika Rini, "Manfaat Investasi untuk Indonesia", *Phillup Sekuritas Indonesia*, August 2019, https://www.poems.co.id/html/Freeducation/LPNewsletter/v76/news02_vol76_ManfaatInvestasiPasarmodal.html, accessed on May, 2021.

violations are administrative in-nature. Therefore, the deregulation is also intended to decriminalize certain misconducts. Decriminalization as part of the deregulation in environmental protection is in accordance with the principle of *ultimum remedium* and the theory of environmental law jurisdiction, which emphasizes that criminal law, is a last resort if civil and administrative-legal instruments have failed. Accordingly, criminal sanctions must only be imposed on acts that only have the potential to cause damage and pollution that endanger safety that are exercised on purpose or difficult to recover. The revision of certain criminal provisions for misconducts that do not cause serious consequences and victims as regulated in the Draft of Job Creation Law turns out to strengthen state administrative policy. The revision is also in accordance with the theory of environmental law jurisdiction of Addink that the main jurisdiction of environmental law is administrative law. Therefore, the enforcement to the law uses administrative-legal instruments that are preventive in-nature.⁴¹

Maddox's theory also supports decriminalization policy in environmental protection. Environmental issues are economic problems, so the solution must use a cost and benefit approach. If the pollution can be recovered and the polluter is able to pay the cost of recovery, there is no need for a legal approach.⁴² The revisions of certain criminal provisions, especially those based on state administration law, is right when it aims to attract investors.

Another thing that discourages investors from Indonesia is the implementation of strict liability approach in environmental protection. In the case of land fires, plantation investors claim that they frequently suffer terrible loss and are threatened with insolvency since the amount of compensation and environmental restoration costs can exceed the company's assets, even though the fire is often caused by natural disasters. To accommodate investor complaints, the Draft of Job Creation Law states that strict liability must be followed by proving the elements of error. The elimination of the phrase "without needing to prove the element of error" is intended by the legislators as an erasing quote. By the drafters of the strict liability law, it was to be eliminated.⁴³ With the elimination of a strict liability approach, such approach attains higher standard to be applied in passing on environmental disputes judicially in court.

In the context of environmental licensing process, local authority is one of the obstacles of infestation. Practice of collusion and corruption is a common to become a means of political funding. Local governments are often reluctant to issue permits for political reasons. Article 4 and 6 of GR 5/2021 handed over the authority for certain business licensing related to environmental utilization to Jakarta. The local governments only accompany Jakarta in issuing permits and/or approvals. Hence, certainty over the running of national strategic projects is

⁴¹ Imamulhadi, *Pokok-Pokok Hukum Lingkungan*, Bandung: Unpad Press, 2016, p. 128.

⁴² Daud Silalahi, *Hukum Lingkungan dan Sistem Penagakannya*, Bandung: Alumni, 2002, p. 14.

⁴³ Andri W. Gunawan, *Catatan Kritis Atas Ketentuan Mengenai Lingkungan Hidup dalam Pasal 23 Rancangan Undang-Undang Cipta Kerja 2020*, Working Paper for Traction Energy Asia, Jakarta, April 2020, p. 21.

guaranteed and provides a motivation for economic growth, equitable development, labor absorption, and people's welfare improvement.

Deregulation of environmental protection in the Draft of Job Creation Law and its subsidiaries are also directed at administrative sanctions. It aligns with the pillars of economic sustainability. In the perspective of economic sustainability, companies must be able to guarantee economic growth and employment opportunity for present and future generations. Business foreclosure sanctions are sanctions that are contrary to the efforts to increase economic growth and community income. In addition, they are contrary to the pillars of economic sustainability. Therefore, the policy of eliminating administrative sanctions that forecloses the company is in line with economic sustainability.

The concept of deregulation of environmental protection in Indonesia is to integrate environmental permits into business licensing. The EIA was changed to environmental approval as a requirement for granting business permits and to strengthen the *ultimum remedium* principle.⁴⁴ Deregulation aims to support economic growth, equitable development, employment opportunities, and people's welfare improvement. Deregulation has not changed the vanguard of environmental protection. A business permit is granted after an environmental study by the environmental feasibility team as a form of EIA simplification. Therefore, the granting of permits still rests on the precautionary principle. In the business and industry operation, instruments for wastewater standards, emission standards, disturbance standards, and damage standards remain guidelines for monitoring, controlling, and prosecuting violations. Companies that deliberately violate the quality standards and damage standards resulting in pollution and/or environmental damage are threatened with imprisonment. They are required to pay compensation and forced to carry out environmental restoration. Simultaneously, they may be subject to administrative sanctions.

The Draft of Job Creation Law and its subsidiaries still pay attention to ecological sustainability and do not change every existing environmental protection arrangement. Companies that produce waste, both hazardous and toxic waste as well as non-hazardous and toxic waste are still required to manage their wastes. Companies are prohibited, and will be punished by law, if they dump their waste without processing it. The ecoregion approach in granting mining, plantation, and forestry business permits has not changed and still based on the carrying capacity of the environment, conservation, and protection zones. Indeed, a business permit is not possible to be granted in conservation and protection zones. Violation of granting business permits in conservation and protection zones those results in damage is subject to criminal, civil, and administrative sanctions. The government's

⁴⁴ Ministry of Environment and Forestry of the Republic Indonesia, *Perlindungan dan Pengelolaan Lingkungan Hidup Saat Ini dan Masa Depan*, Speech Delivered in Seminar Nasional Tantangan Pengelolaan Lingkungan Pasca Pandemi Covid-19, held by Pembina Hukum Lingkungan Indonesia (PHLI) in Cooperation with Faculty of Law Padjadjaran University, March 24, 2021.

commitment to reduce CO₂ and deforestation rate in the framework of tackling climate change as implemented in legislation has not been changed at all.

Based on the elaboration, this study is of the position that deregulation in environmental protection to overcome the financial crisis resulted from the pandemic does not neglect ecological sustainability. Deregulation only aligns environmental protection with economic and social aspects. Before the revision, the Law on Environmental Protection and Management was very strict in providing environmental protection. Negatively-impacted investment and hampered economic growth was then exacerbated by the pandemic. To revive national economy, the government adopted a policy of deregulating environmental protection while still paying attention to ecological sustainability. Although the results are still not visible, optimism for the success of achieving the goals and targets is predicted to be achieved since deregulation does not violate the minimum tolerance standard of environmental protection. The deregulation does not remove the precautionary principle. It does not revoke environmental quality standards and environmental damage standards as instruments of supervision, control, and enforcement. Environmental impact analysis as a preventive instrument is not removed. Therefore, deregulation is still within the corridor of the three pillars of sustainable development.

C. Conclusion

The deregulation policy in environmental protection adopted by Indonesia is an effort to revive economy from the recession due to Covid-19 Pandemic. The deregulation policy is still in accordance with the three pillars of sustainable development. It does not violate the minimum standard of environmental protection. It is an effort to align and balance the implementation of economic, social, and ecological sustainability in regulations, which previously tended to be more ecologically sustainable. It aims to eradicate corruption in environmental licensing, getting rid of the licensing mafia, reforming the bureaucracy, speeding up investment time and processes, increasing people's per capita income, achieving equitable development, and increasing economic growth. Hence, Indonesia's deregulation in environmental protection can be used as a reference and comparison for pandemic-affected countries to boost economy during the economic recession.

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