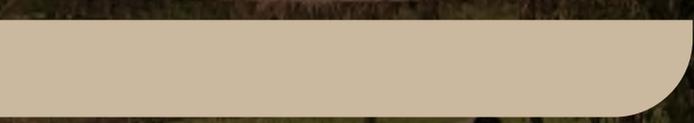




POLICY PAPER

CONSIDERING OPPORTUNITIES FOR SMALLHOLDERS PALM OIL PLANTATION IN FOREST AREAS

**ARRANGEMENT IN LAW NUMBER 11 OF 2020
CONCERNING JOB CREATION**



Introduction

In the past month, the Indonesian people have been frenzied by the discussion about the Job Creation Law, or what is also known as the Omnibus Law on Job Creation, which was ratified by the Indonesian Parliament at the Plenary Meeting on October 5, 2020 and signed by the President on November 2, 2020 as a Law Number 11 of 2020 Concerning Job Creation. The people seemed polarized. Some appreciated the issuance of this regulation, and some refused, until a series of demonstrations took place to have this law annulled. Academics and civil society in general highlighted the process of drafting laws that seemed hasty and untimely at a time when this country was experiencing such a devastating pandemic. Criticism also came from workers and students, who together with academics and civil society criticized some of the main substances of this law, especially those regulating the rights and obligations of workers and employers, as well as the risks of implementing this law on preservation of the environment.

This paper does not intend to discuss the process of the drafting of the said law, nor to highlight various materials that have been widely discussed in the community. This paper seeks to explore and find any potential benefits of this law, especially for the arrangement of unlicensed palm oil plantations, which are often believed by some to be “smallholder palm oil plantation”, in forest areas, which have always been hampered by impracticable laws and regulations. The discussion in this paper will not cover all existing laws, but will focus on the revision of Law Number 18 of 2013 concerning Forest Destruction and Prevention (P3H), which is one of 79 laws revised in this UUCK. However, the discussion and recommendations from this paper can also be related to other parts of the UUCK, or even to other laws and regulations.

Rationale

In the Constitution of the Republic of Indonesia, namely Article 27 paragraph (2) of the 1945 Constitution (UUD 1945), it is stated that “Every citizen has the right to a job and a living that is decent for humanity” then in Article 28A of the 1945 Constitution it is emphasized that “Everyone have the right to live and have the right to preserve their lives and livelihood.” In relation to the management of natural resources, Article 33 paragraph (3) of the 1945 Constitution states that “The land and water and natural resources existing therein are controlled by the state and used for the greatest welfare of the people.” The provisions in the above constitution emphasize that every citizen has the right to get a decent living and the state is obliged to provide a decent source of living for its people.

The concept of prosperity of the people’s as formulated in the 1945 Constitution places the earth, water and natural resources as sources of livelihood that control the lives of many people. Therefore, existing natural resources must be managed to make the community prosperous. The existence of villages in the forest area, which totaled 2,037 villages and those around the forest area, which totaled 19,247 villages based on 2014 BPS data clearly shows that the people are very dependent on forest land and forest resources. Cultivating, hunting and gathering forest products are routine activities for people in sustaining their lives. The spiritual atmosphere of the people living in and around the forest area has made the forest area as their only source of livelihood. Moreover, residents who have activities in the forest, such as cultivating, have invested in various scales, to maximize the benefits of the resources that exist around them. Such investment may take efforts, or also capital investment.

As one of the constitutional mandates regarding the state’s obligation to provide a decent source of livelihood, it is necessary to open access for the community to be able to utilize forest areas. In opening access to forest areas in order to create sustainability and preservation of forests, we should still pay attention to the functions of forest areas. In addition, the Village Government in villages within and around the forest area needs to be involved in the management of forest resources aimed at developing rural areas.

Therefore, in these topics, KEHATI SPOS Indonesia and the JAVLEC Foundation view that the orientation of this regulation must fulfill three main elements, namely ensuring the livelihoods of the people who live in and around the forest, ensuring the sustainability of the people’s investments in their businesses, and maintaining the forest ecosystem functions. And to realize this orientation, there are 3 primary actors that must be taken into account in every action to manage forests, namely people who live depending on natural resources and forests, villages adjacent to the forest areas, and also Forest Management Unit (FMU), as the spearhead of the state in ensuring the sustainability of forest functions for the benefit of citizens in a broad sense.



Current Situation of Unlicensed Palm oil Plantations in Forest Areas

Palm oil is one of Indonesia’s main export products. During the last five years (2015 - 2019), foreign exchange generated from Indonesia’s palm oil exports reached USD 20 million. In fact, this January – February 2020 alone it has reached USD 3.5 billion. In terms of production, Indonesia has produced 51,8 million ton of CPO in 2019, originating from 16.38 million hectares of palm oil plantations in Indonesia, both palm oil plantations owned by state enterprises, large private plantations and smallholders plantations.

The massive production of Indonesian palm oil is marred by various problems, one of which is the existence of palm oil plantations in forest areas, which according to Indonesian law is a phenomenon of illegality. The Corruption Eradication Commission (KPK), in 2019, reported that the area of palm oil cover in forest areas throughout Indonesia reached 3.4 million hectares, scattered in various zoning functions as illustrated in the following figure:

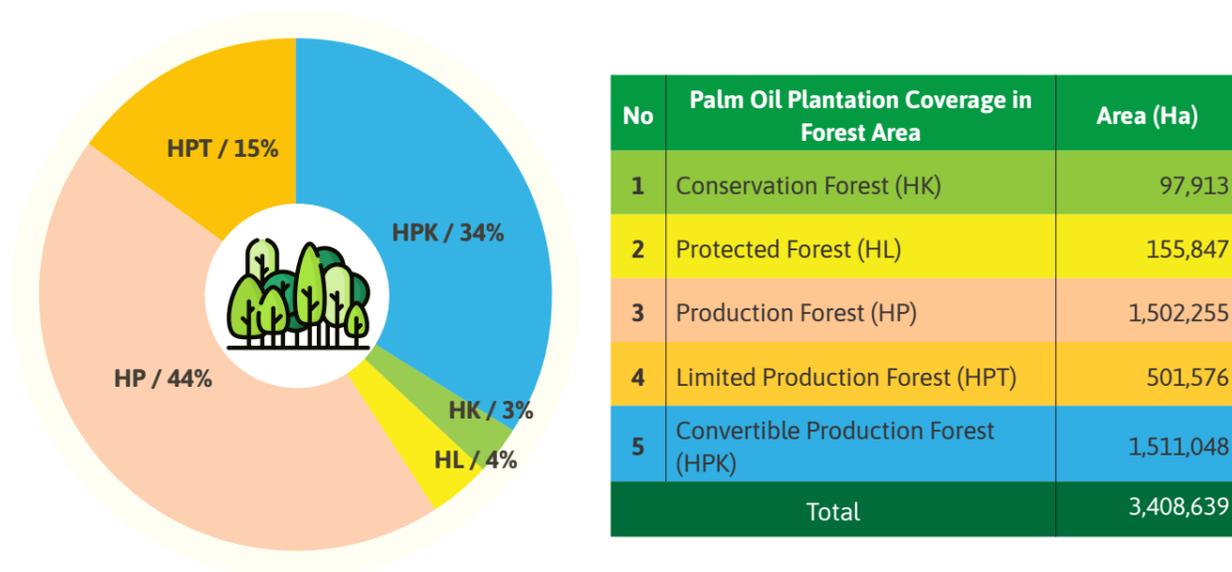


Figure 1. Palm oil Coverage based on Forest Area Function in Indonesia

From the various existing data, the phenomenon of illegality is not only carried out by private large plantations, but also by individuals who do not have palm oil plantation business permits, including smallholders. Although there is no data showing the extent of large private plantations and smallholder palm oil, the magnitude of this figure can be estimated from the applications for forest area release and area swaps that have been submitted to the Ministry of Environment and Forestry. As of 2019, the Ministry of Environment and Forestry has received applications for the release and exchange of forest areas for palm oil plantations covering an area of 1.6 million hectares.

Assuming the proposed figure is the area of palm oil in forest areas owned by companies with business permits, it can be estimated that 1.8 million hectares of palm oil plantations in forest areas are unlicensed palm oil plantations, or often referred to as smallholders palm oil. Since the issuance of Presidential Instruction No. 8 of 2018 concerning Evaluation of Licensing, Suspension of New Licenses, and Increasing Productivity of Palm Oil, the government, coordinated by the Coordinating Ministry for the Economic Affairs, has made efforts to be able to organize and resolve palm oil problems in this forest area. Even so, these efforts have not yet found a solution because they overlap with various existing laws, especially Law No. 18/2013 and also regulations that are derivatives to such laws such as Presidential Regulation No. 88/2017, Minister of Environment and Forestry Regulation 83/2016, and other various regulations.

Arrangement Opportunities in the Job Creation Law

The existence of palm oil plantations in forest areas must be addressed wisely, especially for smallholders plantations that happen to be in forest areas. It cannot be denied that people living in and around forest areas need a decent source of livelihood to continue their lives. Narrow land and difficult community access to legal land have encouraged people to plant in forest areas, but existing regulations still block people’s access to palm oil plantations in forest areas.

The fact that smallholder palm oil plantations in forest areas without any permits should not only be addressed with a criminal law approach as contained in Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction (Law 18/2013), but must be resolved specifically so that the right solution can be found for the common good.

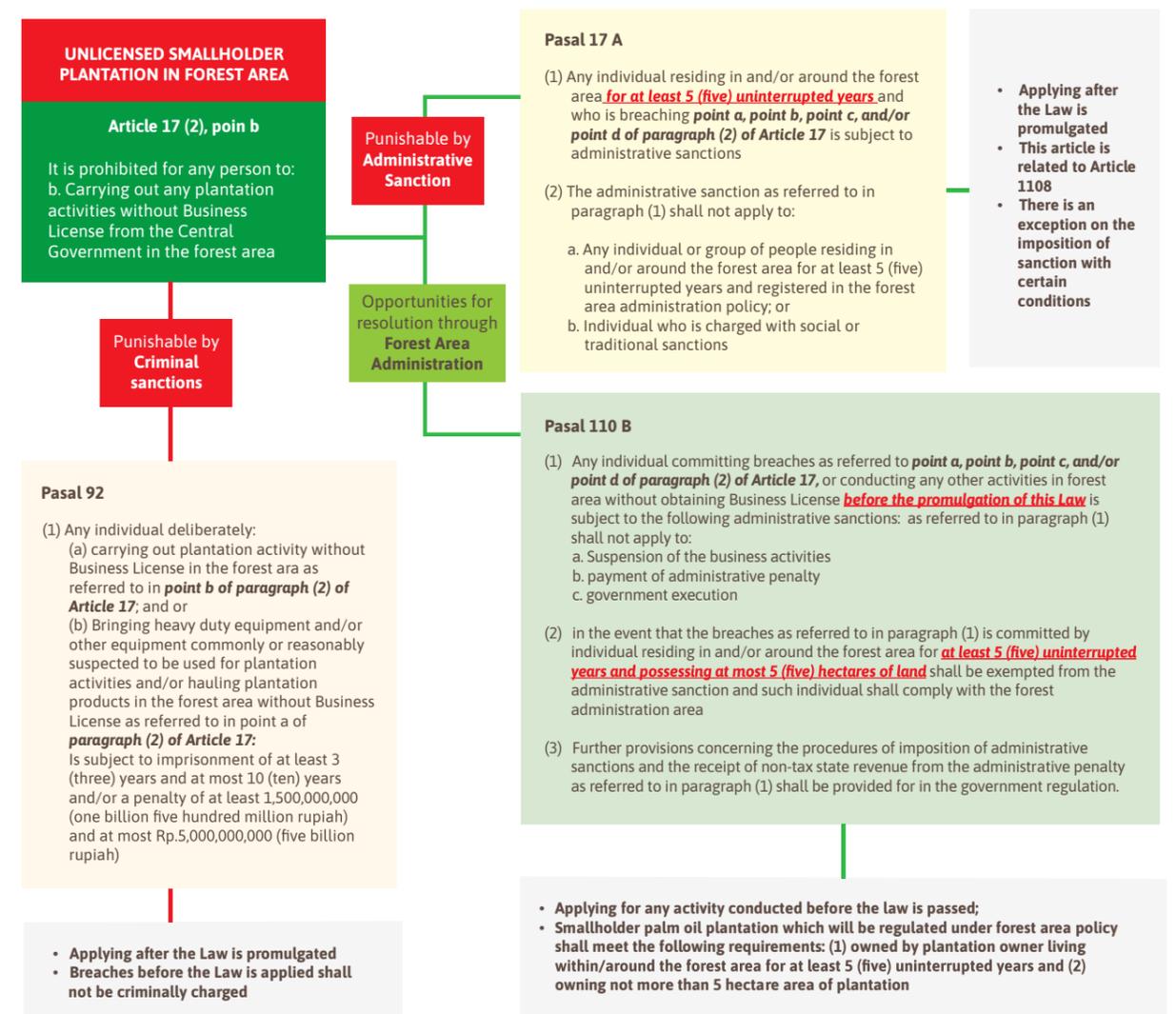


Figure 2. Analysis of Articles of the Job Creation Law relating to Unlicensed Smallholder Plantations in Forest Areas

The promulgation of the Job Creation Law (UU CK) which amended Law No. 18/2013 gave new hope for the arrangement of smallholder palm oil in forest areas. The Cluster of Law No. 18/2013 of the Job Creation Law regulates a new strategy in resolving the benefits of smallholder palm oil in forest areas. Although Article 17 paragraph (2) letter b clearly states the prohibition of carrying out plantation activities without a Business Permit from the Central Government in forest areas and Article 92 paragraph (1) states that plantation without a permit is a criminal offense and is punishable by criminal penalties. However, Articles 17A and 110B provide opportunities for smallholders palm oil settlement through a forest area arrangement policy strategy. The same opportunity also exists in the amendments to Law Number 41 of 1999 concerning Forestry, particularly in Article 50A paragraph (1) and paragraph (2).

Article 17A paragraph (1) regulates the administration of administrative sanctions. Interestingly, the administrative sanction in Article 17 paragraph (2) is excluded for people who have palm oil plantations in forest areas with the condition that they reside in and / or around forest areas for at least 5 (five) years continuously and are registered in forest area arrangement policy.

The clause “registered in the forest area arrangement policy” as contained in Article 17A paragraph (2) is further explained in Article 110B paragraph (2) that what will be resolved through forest area arrangement are plantation owned by residents who live around or in a forest area for at least 5 (five) years with a maximum area of 5 (five) hectares. Thus, the regulation in Article 17 A paragraph (2) and 110B paragraph (2) provides an opportunity for settlement of smallholder palm oil in forest areas with a non-litigation mechanism, namely through a forest area arrangement policy.

Typology of Unlicensed Palm Oil Plantation in Forest Areas

Referring to the regulations in Article 17A paragraph (2) and 110B paragraph of the Job Creation Law Cluster Law 18/2018, there are several typologies of plantations (palm oil) in forest areas. The first typology is a typology based on the perpetrator’s residence. The law clearly divides palm oil plantation actors in forest areas into two, namely people who live in and around forest areas, and people who do not live in and in forest areas. Based on the duration of their activities, the law separates actors who have planted crops for 5 consecutive years and less, counting backward since the law was passed. In other words, this law sets the time limit for the perpetrator to start his plantation to be in 2015 and after 2015. Another most important grouping is that of the plantation area, which is up to 5 hectares, and more than 5 hectares. From these provisions, it can be said that the Job Creation Law, particularly in the revised cluster Law 18/2013, divides unlicensed (palm oil) plantations in forest areas into 4:

- 1) Palm oil plantations carried out by people who did not live in and around forest areas or lived in and around forest areas after 2015;
- 2) Palm oil plantations carried out after 2015;
- 3) Palm oil plantations carried out by people living in and around the forest since 2015, covering an area of more than 5 hectares;
- 4) Palm oil plantations carried out by people living in and around the forest since 2015 which cover no more than 5 hectares.

Of the 4 categories, the last category is the category of palm oil plantations in forest areas that can be resolved through forest area administration. However, considering that palm oil plantations are spread across various forest functions, it is recommended to differentiate the treatment for palm oil plantations located in forest areas with different functions.



Idea of Arrangement and Imposition of Administrative Sanctions

Based on the description above, it is clear that the opportunity for settlement of unlicensed palm oil through forest area management policies is only intended for actors who live in and around the forest for at least 5 consecutive years (as evidenced by an Identity Card / physically residing in location) (Article 17A). A further provision (Article 110B paragraph 2) states that the maximum area of the plantation that can be resolved with a forest management policy is 5 hectares. The question then is, if the local people control the plantation for more than 5 hectares, do they not get the opportunity to participate in forest arrangement at all?

Another question is, for unlicensed plantation that are less than five years old or owned by people other than local settlers, what will happen after administrative sanctions are imposed? As stated in Article 110B paragraph 1, three forms of administrative sanctions will be imposed on them, namely temporary suspension of business activities, payment of administrative fines, and / or government coercion. It is not clear what will happen to the existing plantations and who will manage them. Therefore, further interpretation is needed to answer these two questions in government regulations.

Specifically, SPOS Indonesia, KEHATI Foundation and JAVLEC Indonesia proposed to implement a combination of administrative sanctions and arrangement to answer the two questions above. First, local people who control more than 5 hectares of land for more than 5 years, will be able to follow the arrangement for only 5 hectares of land. Outside the area, sanctions will be imposed on those concerned, and different arrangement’s according to the function of the forest area. Second, for plantations controlled by non-local residents or less than 5 years after being subject to administrative sanctions, the existing plantation is arranged according to the function of the forest area. In detail, the proposed arrangement ideas are outlined in the table below:

Table 2. Recommended Arrangement and Imposition of Administrative Sanctions

	Local People > 5 years, <5 Ha area	Local People > 5 years, >5 Ha area	Non-Local People and/or <5 years
Kawasan Konservasi	Conservation Partnership / Jangka Benah Strategy (SJB) Conservation (gradual restoration)	<ul style="list-style-type: none"> 5 Ha managed with 1 cycle Conservation Partnership / SJB, the rest is rehabilitated / restoration of ecosystem Payment of administrative fines Temporary suspension of business activities Government execution 	<ul style="list-style-type: none"> Payment of administrative penalty Temporary suspension of business activities Government coercion Ecosystem Restoration
Protection Forest / Limited Production Forest	Social Forestry / SJB Agroforestry	<ul style="list-style-type: none"> 5 Ha managed with Social Forestry / SJB Agroforestry. The rest is managed by FMU (KPH), in partnership with the community or local business actors with SJB (agroforestry) Sanctions for temporary suspension of business activities and payment of fines 	<ul style="list-style-type: none"> Sanctions for temporary suspension of business activities and payment of fines Plantation managed by FMU (KPH), in partnership with the community or local business actors with SJB (agroforestry)
Production forest	Area Release and Redistribution (TORA)	<ul style="list-style-type: none"> 5 Ha area release / land redistribution (TORA). The rest are managed by FMU (KPH), in partnership with the community or local business actors with SJB Sanctions for temporary suspension of business activities and payment of fines 	<ul style="list-style-type: none"> Sanctions for temporary suspension of business activities and payment of fines; Plantation managed by FMU (KPH), partnered to do SJB (agroforestry)
Conversion Production Forest	Pelepasan Kawasan dan Redistribusi (TORA)	<ul style="list-style-type: none"> Area release, 5 Ha land redistribution (TORA) to the concerned. The rest is managed by the village through Cultivation Right Title (HGU) to village enterprise (BUMDESA) or other schemes. Villages can partner with the community or local business actors Sanctions for temporary suspension of business activities and payment of fines 	<ul style="list-style-type: none"> Sanctions for temporary suspension of business activities and payment of fines Releasing the area, managed by the village through HGU to BUMDESA or other schemes. Villages can cooperate with the community or business actors

Several important matters to note in the table above are:

- 1) The arrangement stated in the Job Creation Law must be interpreted as an arrangement in accordance with the designation of the area, and cannot be fully interpreted as the release of forest area (changing the function of the area to APL) for all forest areas with palm oil. Thus, the arrangement is adjusted to the function of the area: conservation area, protected forest, limited production forest, forest, production, or conservation area;
- 2) For conservation areas, all efforts are made towards ecosystem restoration. Conservation partnerships, which are proposed as an arrangement option, are strived to be carried out with 2-stage SJB towards conditions that resemble natural forests;
- 3) Social forestry is an arrangement option for plantations <5 hectares in protected and limited production forests;

- 4) Agrarian reform becomes an arrangement option for plantations <5 hectares in production forests and conversion production forests;
- 5) Plantation with > 5 hectares and plantation owned by people who do not live in and around the forest are subject to administrative sanctions;
- 6) After administrative sanctions are applied, the FMU will manage the plantation and implement a Jangka Benah strategy for plantation (palm oil) existing in protected forest areas, limited production forests, and production forests. In implementing this management, FMU partners with the community or local business actors as a third party;
- 7) For plantations (palm oil) that are located in conversion production forest areas, the final step taken after administrative sanctions applied is the release of the area (changes in area boundaries). Villages through BUMDESA can also be the subject of land redistribution / asset legalization in the agrarian reform scheme as regulated in Presidential Regulation Number 86 of 2018 concerning Agrarian Reform. In managing these plantation, the village or BUMDESA partners with the community or local business actors as a third party.

Working Steps for Forest Area Arrangement

To implement the forest area arrangement policy, effective work steps are needed by involving the government at the level of the Central Government, Regional Government and even the Village Government. This involvement is expected to solve the problems of smallholder palm oil in forest areas, besides that good coordination and cooperation from the central government to the village government is expected to be able to obtain correct data and maps according to physical conditions in the field, so that decisions taken can be implemented in the field.

In relation to this, SPOS Indonesia and JAVLEC Indonesia propose Forest Area Arrangement Work Steps with the following main stages:

- 1) Preparation of indicative maps of arrangement of unlicensed palm oil (the people) by overlaying the palm oil cover map, forest area map, and application maps for forest area release and exchange by palm oil plantations. The indicative map is also complemented by a proposal from the provincial government in the form of identification of smallholder palm oil compiled by the village and / or district government;
- 2) Mapping, data collection, and field verification carried out collaboratively between Forestry Boundaries Agency (BPKH), Provincial Forestry Service, Provincial Plantation Service, District Government, and Village Government, coordinated by the Governor;
- 3) Compilation of proposed solutions in the corridor determined by the central government;
- 4) Decision making by a cross-ministerial team at the central level consisting of the Ministry of Agriculture, MOEF, Geospatial Information Agency (BIG), and the Ministry of Agrarian Affairs and Spatial Planning (ATR / BPN), coordinated by the Coordinating Ministry for Economic Affairs or the Coordinating Ministry for Maritime and Investment (Marves);
- 5) Implementation of decisions by related Ministries / Agencies and local governments.

Schematically, these stages can be described as follows:

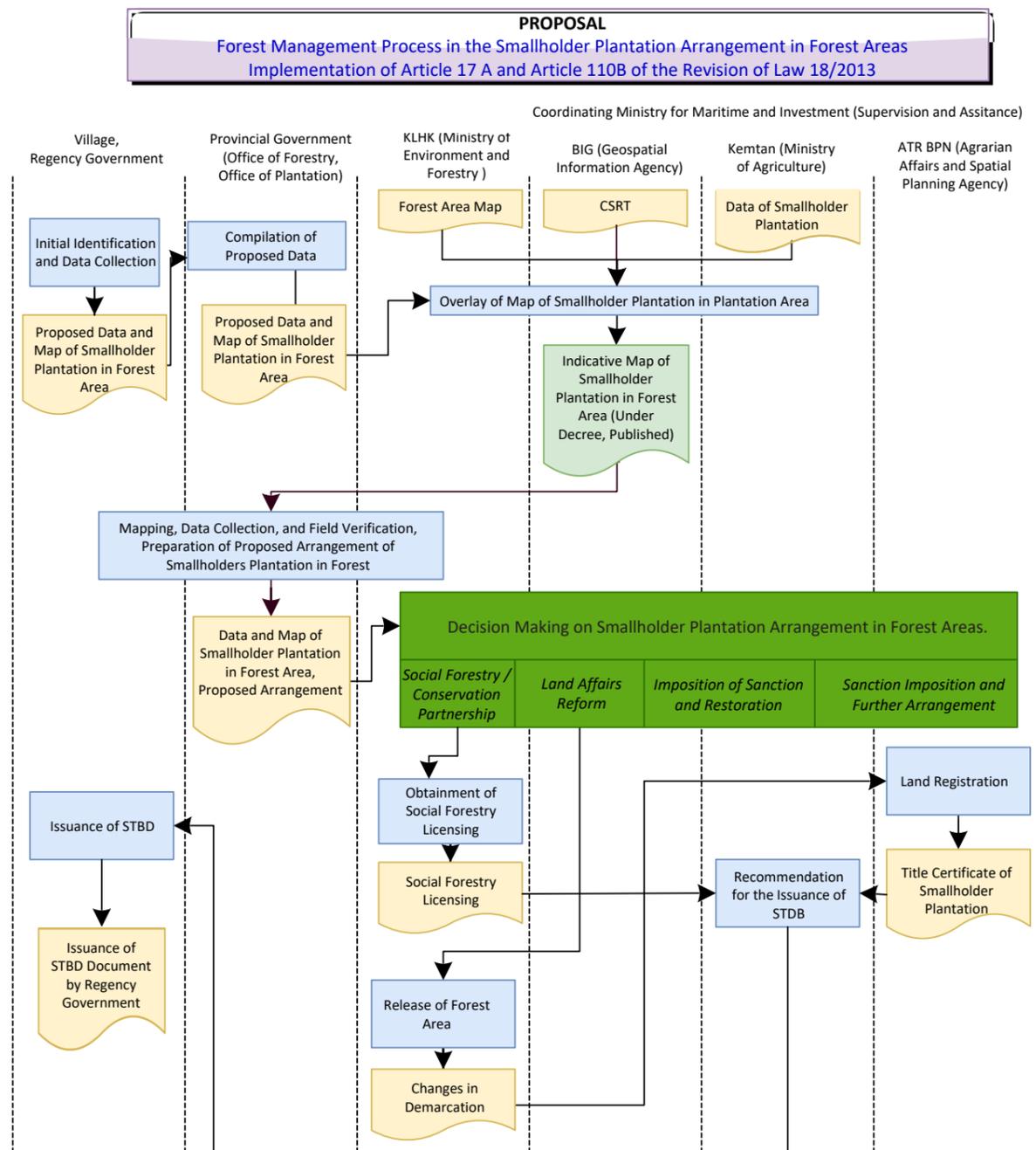


Figure 3. Proposed Action for Forest Area Arrangement

Closing

The mandate of formulating forest area arrangement policies in the Job Creation Law Cluster Law 18/2013 is an opportunity to solve problems for smallholder palm oil plantations in forest areas. The existence of breakthrough new norms in the Job Creation Law must be addressed appropriately so as to produce the right implementing policies as well.

This policy paper is one of the inputs for the formulation of Government Regulations, especially on forest area arrangement policies. In addition, in order for the forest area arrangement program to be carried out properly, adjustments to the old regulations at the level of Government Regulations (PP), Presidential Regulations (PERPRES) and Ministerial Regulations (PERMEN) are deemed necessary.

Several provisions in the regulation that need to be changed include the provisions in Article 24 of Government Regulation Number 24 of 1997 and Regulation of the Minister of Agrarian Affairs / Head of BPN No. 3/1997 regarding the prerequisites for land tenure to be granted land rights, namely 20 years, amended or adjusted to 5 years. Furthermore, the Minister of LHK Regulation P83/MenLHK/Kum.1/10/2016 concerning Social Forestry Article 65 letter h, namely by changing the boundaries of palm oil management in forest areas for 12 years to a minimum of 1 cycle by implementing the Jangka Benah Strategy. Another change is the policy of updating the indicative map of Land for Agrarian Reform Objects (TORA) and the Indicative Map of Social Forestry Areas (PIAPS). Another change needed is the provision of a Cultivation Registration Letter (STDB) which is currently regulated by the Decree of the Director General of Plantation Number 105 of 2018, to accommodate the registration of forest areas with land tenure status in the form of Social Forestry Permits. It does not rule out the possibility of various adjustments as a logical consequence of the enactment of this Job Creation Law.

Without adjusting the various regulations mentioned earlier, the implementation of the Job Creation Law mentioned above will not be able to solve the problem of unlicensed palm oil in forest areas, including those controlled by smallholders who live in and around the forest. By making various adjustments, the implementation of these articles will be able to provide protection for the planters, and at the same time can improve the overall governance of palm oil plantations.

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