JOB CREATION LAW and SUSTAINABLE PALM OIL

A Legal Opinion

HICON Law & Policy Strategies

SPOS INDONESIA

JOB CREATION LAW AND SUSTAINABLE PALM OIL: A LEGAL OPINION

Law Number 11 of 2020 concerning Job Creation – hereinafter shall be referred to as Law on Job Creation is a legal instrument which amends, adds, and supersedes several provisions in 79 Laws. Some of those laws amended, added, and superseded their provisions consist of at least amendment of five laws to which has an influence to the palm oil management model. As for those five laws are: (i) Law Number 41 of 1999 concerning Forestry, (ii) Law Number 32 of 2009 concerning Environmental Protection and Management (PPLH), (iii) Law Number 18 of 2013 concerning Prevention and Eradication on Forest Destruction (P3H), (iv) Law Number 23 of 2014 concerning Local Government, and (v) Law Number 39 of 2014 concerning Estate Crops.

These opportunities and challenges are presented in the form of legal opinions and advices below:

The Gazettement on Forest Areas

Does not settle the issues in forest areas gazettement. The implementation is also potentially not transparent and multi-interpretative

Legal Advice

Detailing the indicators of "strategic areas" and "the physical condition of watersheds and/or islands" in a Government Regulation.

Environmental Risk

There is no "form of obligation" on the maintenance of environment until it is issued a Government regulation which explains and gives a detail on it.

Legal Advice

To make sure a form of obligation to maintain the environment's functions that pertain to the Business Permit in plantation sector in a Government Regulation.

Social Forestry

Oil palm is still prohibited in Social Forestry as long as those prohibitive provisions are not amended yet in a Government regulation.

Legal Advice

Utilizing the provisions in post-amendment Article 29B of Law on Forestry to change the provisions that prohibit oil palm in the areas of social forestry right.

The Welfare of Oil Palm Smallholders

The width of smallholders' plantation area obtained from the allocation of a Plantation Company's land is guaranteed through plasma mechanism.

The partnership pattern which is based on Law on Capital Investment is potentially not implemented.

Legal Advice

To re-confirm the necessity of any foreign capital investment to establish a partnership with domestic plantations entrepreneurs.

Forest Damage Preventive Measures

NSPK is expected to become a reference that is able to synchronize forest damage preventive programs.

Legal Advice

To create an NSPK which has a forest damage preventive nuance containing:

- Correlation between the impact of violation and Business Permit.
- Connection between environmental institution and institution issuing Business Permit when there occurs an environmental violation.
- Transparency and accountability of system to trace any environmental violation upon which it did not take any action.
- The accountability of supervision and environmental violation.
- The filing mechanism of the people's objections or complaints.

Seeds of Plantation Crops that Originate from Overseas

Any importation of palm oil seeds the distribution of which tends to be easy to do.

Legal Advice

Detailing any provisions on the mechanism of business permit issuance for the distribution of varieties that originate from overseas.

Amdal (Environmental Impacts Assessment) Preparation and Test

Does not solve environmental issues since it reduces the participation of public and independent experts.

Legal Advice

- To revise the provisions in post-amendment Article 63 paragraph (2) letter i of Law PPLH by adding "Business Permit" clause as a nurturing and supervisory instrument in addition to the requirements of statutory regulation.
- To revise the provisions in Article 39 of Law PPLH by re-inserting "mandatory" or "shall have to" phrase in doing the dissemination of information in relation to the issuance of a business permit.
- To revise the provisions in Article 39 of Law PPLH by re-inserting "any application" phrase, in order that everyone is aware that in their location it shall be conducted an activity and/or business.

Re-arrangement on Forest Areas and Plantation Lands

The People living within and/or around forest areas to obtain a guarantee of their right and protection in forest management

Legal Advice

Socialization about any acts permitted and prohibited in respect of forest management to the people living within and/or around forest areas to avoid any misperception to the exceptions on sanction imposition.

Determination on the Types of Business

The business requirements imposed are potential being not proportional since the determination on the types of business is made on unclear, not flexible, and multi-interpretative indicators.

Legal Advice

Giving a clear indicator on the types of business which are "having non-material impacts on the environment" and the types of business which are "having a low risk" in a Government Regulation.

Plantation Funds Management

Plantation funds management practice needs a clear and proportional regulation to prevent any improper fund allocation.

Legal Advice

Allocating palm oil plantation funds for the research in plant breeding sector in order to create a modern superior variety which has the expected characteristics.

Determination on the Parameters of Maximum and Minimum Areas of Plantation Lands

The determination is made by not paying an attention to the economic, social, and environmental aspects so that it is potentially creating an economic, social, and environmental problem

Legal Advice

Paying an attention to the correlation between any impact of violation and the Business Permit and to clarify the connection between environmental instances and business permit issuing instances in the event of an environmental violation.

The Enforcement of Environmental Law

There is an inconsistency of sanction regulation.

Legal Advice

Creating a sanction that conforms to the normalization used.

Defective Legal Products

the elimination of lawsuit channel to State Administrative Court (PTUN) and the Officials' obligation to refuse any application that is not equipped with an Amdal are potential to create a defective legal product.

Legal Advice

Creating a mechanism to file objections or complaints for the people on the issuance of a Business Permit.

Further, it is conveyed legal opinions on the Job Creation Law which are framed by four principles in oil palm management as mentioned previously.

1. Opinions on the Confirmation of Forest Areas

Article 15 paragraphs (1) and (2) of Law on Forestry, either prior to or after the changes, does not suffer any amendment to norms. This absence of any change to norms has to do with the absence of any influence on its implementation. However, prior to the amendment to said article, there were some problems that pertained to the accountability of forest areas gazettement.

Prof. Sudarsono Soedomo in his presentation titled "Smallholders' Oil Palm Plantation are Annexed by Forest Areas" and Prof. Dr. Maria SW. Sumardjono in her presentation titled "The Legal Certainty of Smallholders' Oil Palm Plantation: Between Regulation and Implementation" which was presented in HICON coffee Zone activity on August 24, 2020, stated that many of confirmation processes of forest areas were done in a non-transparent manner. Eventually, many smallholders' plantation which were actually not included in forest areas be included within forest areas.

This means that in the event of a problem in the implementation of Article 15 paragraphs (1) and(2) of Law on Forestry prior to the change, but there does not occur any change of norms in the Job Creation Law which amends Law on Forestry, a chance to the re-occurrence of such same problem will occur. By the absence of any amendment to those provisions, a perception that the Government has done a legal annexation to people's plantation will not change either.

Furthermore, post-amendment Article 15 paragraph (4) of Law on Forestry instructs the acceleration of forest areas in "strategic areas". Unfortunately, Job Creation Law which amends the provision does not give a definition on those "strategic areas", so the Government has the right – or what's usually called "discretion" to determine an area considered as "strategic".

This article actually has a good intention to accelerate the confirmation on forest areas in order to implement forest rehabilitation. However, a non-transparent practice of forest area gazettement, makes this forest rehabilitation plan being feared of going to strengthen the practice of legal annexation to the people's plantation.

The government is not only assigned the authority to interpret "strategic areas" but also the authority to regulate the width of forest areas that must be retained with multi-interpretative indicators. Post-amendment Article 18 paragraph (2) of Law on PPLH assigns an authority to the central government to regulate the width of forest areas that must be retained according to the physical and geographical conditions of watershed and/or islands.

Job Creation Law does not give a definition or any derivative point of said "physical condition" indicator, so the government has the right to interpret the physical condition of watershed and/or islands to be made as the basis to determine the minimum width of forest areas that must be retained. At least there are 3 (three) possibilities in its implementation.

Firstly, the results of government's assessment on the physical condition of watershed and/or islands. The government determines the width


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of forest areas of less than 30%. Secondly, the results of government's assessment on the physical condition of watershed and/or islands, the Government determines the width of forest areas of 30%. Thirdly, the results of government's assessment on the physical condition of watershed and/or islands, the government determines the width of forest areas of more than 30%.

Consequences of those possibilities are among others as follows:

a. The determination of forest areas is potential to become not proportional. The government may judge that a region the watershed and/or islands of which is quite good, but the Government determines that the minimum area that must be retained is 30%, because it wishes that said "good" region be used for business activities. Yet, there is also a possibility that the government will determine that the minimum width of forest areas that must be retained is more than 30% under the same reason. So, there is no clarity in determining the minimum forest areas and the people have no reference either to judge the objectivity of said government's act.

b. For regions the forest areas of which are determined as less than 30%, will face a challenge in implementing the social forestry program.[1] 36 As for those regions the forest areas of which are determined as more than 30%, any people's settlements, public facilities, arable lands and /or forests managed by the people are potentially included in forest areas.

Therefore, the provisions in Article 15 paragraphs (1) and (2) of Law on Forestry are potentially affect oil palm plantation.

2. Opinions on Social Forestry

Article 29 A of Law on Forestry introduces Social Forestry as a form of Protected Forest and Production Forest utilization activity that can be granted to individuals, forest farmers' groups and cooperatives.

This Article constitutes an additional provision which confirms the social and economic spirits in a forest. By referring to the Regulation of the Minister of Environment and Forestry Number P.83/MENLHK/SETJEN. KUM.1/10/2016 concerning Social Forestry (Permen/Regulation of Minister ofLHK P.83), the Government wants to confirm that forests have such functions that must be preserved and distributed evenly to all of the Indonesian people, especially for the people living within and/or around a forest area.

Accordingly, by the inclusion of Social Forestry Activity, it is expected that local people shall have a legal access. If in previous regulations, Social Forestry comprises of several forms of right, such as Village forest, Community Forest Utilization Business Permit, People's Crops Forest Business Permit, Forestry Partnership, and Custom Forest, are replaced with Forest Utilization Business and Social Forestry Activity Licensing.

However it needs to review some of the provisions in said Permen LHK P.83 which prohibit the planting of palm oil. Article 56 paragraph (5) of Permen LHK P.83 expressly prohibits a social forestry concession holder to plant palm oil, regardless the types of right. So, when there are people who want to plant palm oil within a social forestry concession area, the people will not be able to obtain a Forest Utilization business and Social Forestry Activity License.

3. Opinions on the Synchronization of Forest Damage Preventive Measures

Post-amendment Article 48 of Law on PPLH talks about the Central Government's and Local Governments' obligations to regulate forest protection, both inside and outside of forest areas according to the norms, standard, procedure and criteria (NSPK). NSPK constitutes a document serving as a government's reference in administering the governmental affairs, both at the central and local levels. Which means that in case of forest protection, the central and local governments are expected to find a harmonious point through the determination of NSPK.

This measure finds an increasingly brighter

1. Fact Sheet on the Omnibus Law on Job Creation, (Forest Digest: 2020),

spot since Job Creation Law spells out such provisions similar to said Article 48 of Law on PPLH. Post-amendment Article 16 paragraph (4) of Law of Local Government states that the Central Government may delegate the implementing regulation of NSPK to the local heads which is determined by Local Head's Regulation. This article strengthens more an expectation on the synchronization of policy making and implementation, particularly in respect of forest damage protection and prevention sector.

However, the quality of a forest damage preventive policies synchronization will be influenced by how far NSPK developed is take side by the Central Government to the environmental damage protection. If the developed NSPK does not have a spirit or is not oriented to the environmental protection, particularly forest, then a minimum quality of forest damage prevention will also occur in regions.

Additionally, post-amendment Article 63 paragraph (2) letter i of Law on PPLH talks about the Central Government's duty to conduct the nurturing and supervision on a business and/or activity person-in-charge's compliance with the requirements of statutory regulation. Previously, the Central Government is assigned with a duty to conduct the nurturing and supervision on a business and/or activity person-in-charge's compliance with the environmental permit and the requirements of statutory regulation.

It means that this Article has clearly reduced the provisions in Article 34 paragraphs (2) and (5), as well as post-amendment Article 35 paragraph (1) of Law on PPLH, in which the three articles talk about the fulfillment of UKL-UPL standard or is stated in the Statement of Readiness to manage Environment. Based on such Statement of Readiness to manage Environment, the Central Government or Local Governments issue a Business Permit, or a Central Government's or Local Governments' approval.

Said Statement of Readiness to Manage Environment is intended to supervise the standard of UKL-UPL that has been stipulated by the Initiator, so it is the standard that must be made as the central government's reference in conducting the nurturing and supervision in addition to having referred to the requirements of statutory regulation.

If such business permit, which contains the Statement of readiness to manage environment and UKL-UPL standard, is not referred as the basis in conducting the nurturing and supervision, then a business permit in environmental sector will not have any influence to the environmental protection.

Actually there is a criminal provision that can be charged on any authorized official who deliberately does not conduct a supervision on a business and/or activity person-in-charge's compliance with the statutory regulation and business licensing, or a central or regional government's approval. However, how can it be possible to impose a criminal provision to anyone who is never been obliged to do a certain matter that relates to said criminal sanction. Certainly, this model of regulation causes a paradox in its implementation.

4. Opinions on the Opportunity to Re-arrange Forest areas and Plantation Lands

Post-amendment Article 50A of Law on Forestry talks about the exclusions of imposing an administrative sanction to any individuals or groups of communities who (i) harvest or collect forest products in a forest; (ii) keep forest products which are known or reasonably alleged as originating from a forest area, and/or (iii) herd livestocks inside a forest area. These exclusions can be implemented as long as those individuals or groups of communities live inside and/or around the forest area for at least 5 (five) years in succession and are registered in the Forest Area Arrangement Policy. Said arrangement of forest area is the area of land owned is maximum 5 (five) hectares, as set forth in post-amendment Article 110B paragraph (2) of Law on P3H.

Similar provisions are included in post-amendment Article 12A and 17A of Law on P3H. Those two articles exclude the imposition of administrative sanction on anyone doing a forest exploitation activity and doing a plantation activity within a forest area to any individuals who live inside and/or around the forest area for at least 5 (five) years in succession and are registered in the

Forest Area Arrangement policy.
However, this exclusion is only granted in several certain articles, as follows:

a. harvesting o r collecting forest products in a forest without having the right or approval from the authorized officer (Article 50 paragraph (2) letter c of Law on Forestry);

b. keeping forest products which are known or reasonably alleged as originating from a forest area, which are taken illegally (Article 50 paragraph (2) letter d of Law on Forestry);

c. herding livestocks inside a forest area which is not specifically designated for said purpose by the authorized officer (Article 50 paragraph (2) letter e of Law on Forestry);

d. doing a trees felling inside a forest area which does not conform to the Business Permit relating to forest utilization (Article 12 letter a of Law on P3H);

e. doing a trees felling inside a forest area without having a business permit from the central government (Article 12 letter b of Law on P3H);

f. doing a trees felling inside a forest area illegally (Article 12 letter c of Law on P3H);

g. loading, unloading, releasing, transporting, possessing, and/or owning tree felling results in a forest area without having a Business Permit from the Central Government (Article 12 letter d of Law on P3H);

h. transporting, possessing, or owning wood forest product which is not equipped with a legal forest product certificate (Article 12 letter e of Law on P3H);

i. carrying tools normally used to fell, chop, or split trees inside a forest area without having a Business Permit from the Central Government (Article 12 letter f of Law on P3H);

j. utilizing wood forest products which are allegedly deriving from an illegal logging (Article 12 letter h of Law on P3H);

k. doing a plantation activity, without having a Business Permit from the Central Government, inside a forest area (Article 17 paragraph (2) letter b of Law on P3H);

l.. transporting and/or receiving a consignment of plantation products originating from a plantation activity inside a forest area without having a Business Permit from the Central Government (Article 17 paragraph (2) letter c of Law on P3H); and/or

m. selling, posessing, owning, and/or keeping any plantation products originating from a plantation activity inside a forest area without having a Business Permit from the Central Government (Article 17 paragraph (2) letter d of Law on P3H);

In addition to the abovementioned provisions, such exclusions set forth in Article 50A of Law on Forestry, Article 12A of Law on P3H, and Article 17A of Law on P3H are not applied.

In addition, there is an article on the takeover of a plantation land not undertaken by the state. Post-amendment Article 16 of Law on Estate Crops states that, a plantation company is obliged to undertake the plantation land no later than 2 years since the granting of right on land status. If the plantation land is not undertaken, then the plantation land not undertaken yet will be taken over by the state.

The provisions in this article differ to that in pre-amendment Article 16, in which it is stated that a plantation company is obliged to undertake a plantation land: (i) at least 30% of the area of right on land status, no later than 3 years since the granting of right on land status, and (ii) the whole area of right on land which is technically plantable with plantation crops, no later than 6 years since the granting of right on land status

This amendment gives a chance to the re-arrangement on plantation lands and prevents a land abandonment. Because, within 2 years period since the granting of right on land status, a plantation land not undertaken yet by the company, shall be taken over by the state.

5. Opinions on the Preparation and Test of Amdal

Post-amendment Article 24 of Law on PPLH explains about the functions of Amdal document being the grounds of environment feasibility test for a business and/or activity plan. This feasibility test is conducted by a team of environment feasibility test formed by the Central Government's environment feasibility test institution. The team of environment feasibility test comprises of Central Government, Local Government, and certified experts elements.

Upon the completion of environmental feasibility test. the Central Government or Local Governments to stipulate a Decision on Environmental Feasibility based on the results of said feasibility test. Said Decision on Environmental feasibility is used as the requirements for the issuance of a Busness Permit, or a Central Government's or Local Government's approval.

The substance of a quo Article is to supersede the pre-amendment Articles 29 and 30 of Law on PPLH and merged into post-amendment Article 24 of Law on PPLH. However, there are some differences in the substance ot its regulation.

Firstly, the party assigned with the duty to do an assessment to Amdal, in Job Creation Law, is a team formed by the central government. Before, the form of this team was an Amdal assessment Commission formed by the Minister, Governor, or Regent/Mayor.

Secondly, elements of the Amdal Assessment Commission comprise of : environmental institution, the related technical institution, experts in the disciplines that pertain to the types of business under review, experts in the disciplines that pertain to any impacts arising from a business, representatives from the communities potentially impacted, and environmental organizations. While, the Team of Environment Feasibility Test comprises of Central Government, Local Government, and certified experts elements.

Thirdly, in performing its duty, Amdal assessment Commission was assisted by a technical team comprising of independent expers who conducted a technical review and a secretariate which was formed for that purpose. Those independent experts were designated by the Minister, Governor, or Regent / Mayor. While in Job Creation Law, it is not stated that the Team of Environment Feasibility Test is assisted by independent experts.

A crucial point in this Amdal-based assessment on environmental feasibility test is no involvement of independent experts, environmental organizations and representatives from the communities potentially affecred by the impact. By the absence of those 3 elements' involvement in a environmental feasibility test, it is most likely that the results of an environmental feasibility test are not independent and interest biased, since there is no check and balance in the environmental feasibility test.

In addition, post-amendment Article 25 letter c and Article 26 paragraph (2) of Law on PPLH impose a restriction on those parties required to participate in the preparation of an Amdal and the responses as well as suggestions included in Amdal, which only involve the communities affected by the direct impact which is relevant to the business and/or activity plan.

Previously, the parties required to participate in an Amdal preparation were among others: those affected by the impact, environment observers, and/or those who were affected by any kind of decision in an Amdal process.

This restriction is potential to waive any long-term impact on the environment and reduce the balance principle and proportionality principle in Amdal preparation. Because, the parties directly impacted need an accompaniment in giving the responses to the business plan.

Basically, those who are directly affected by an activity or business plan have an inferior position politically, When they are not given an accompaniment, it is feared that the conveyance of information by the initiating party is done in-transparently. As the result., the preparation of Amdal will be unfair and set aside the role of independent groups and at the same time halting the distribution and

utilization of science.
Issues in respect of business permit in environment sector are not only such issues that pertain to the preparation and test and Amdal, but also the lack of instruments used by the government to disseminate the information on any decision on environmental feasibility.

Post-amendment Article 39 of Law on PPLH talks about a Decision on Environmental Feasibility is announced to the people and made by electronic system and/or in other means designated by the Central Government. Previously, the Articles obliges that the Minister, Governor, or Regent / Mayor announcing any application and decision on environment. The mechanism of announcement was done by a means easily known by the people.

The difference is, post-amendment Article 39 of Law on PPLH does not oblige or require the government to announce a Decision on environmental feasibility, This differs from the pre-amendment Law on PPLH which expressly stated that it is required that the Minister, governor, or Regent / Mayor to announce any application and decision on environmental permit.

In addition, Job Creation Law does not eliminate such expression of obligation to disseminate any information on environmental permit, but also eliminates the obligation to announce any application for Environment Permit and Business Permit to the people.

As having been described in the impact of amendment to Article 24 of Law on PPLH that a Decision on environmental feasibility is the downstream of an Amdal-based feasibility testing process, which means that the people will be only aware of the end result of such test without ever knowing that an application for business permit is being filed at the Government and its feasibility testing process.

In addition, the model of announcement set forth in Job Creation Law is of top-down nature, i.e. only by other manners stipulated by the Central Government. While Law on PPLH is more responsive since it is of bottom-up nature, i.e. the model of announcement is made by a means easily known by the people.

Notwithstanding some problems which are still found in several provisions as described above, there is one article which is deemed as giving a clarity on who are capable of being assisted the preparation of their Amdal by the Central Government and Local Governments.

Post-amendment Article 32 of Law on PPLH confirms that the Central Government and Local Governments assist the preparation of an Amdal for any business and /or activity of Micro and Small Business having a material impact on environment. This assistance may take the form of facilitation, cost, and/or the preparation of Amdal. A change occurs to "weak economic class" phrase to become 'micro and small business activities'. Which means that there is a standardization on the businesses assisted by the central government and local governments from the types of business categorized as weak economic class to become UKM.

Indirectly, the change of this article uses a phrase known in a statutory regulation applicable in Indonesia, ie. Law Number 20 of 2008 concerning Micro, Small and Middle Business (UU UMKM).

UU UMKM gives a standard definition on small business and micro business along with their criteria. So this standardization is expected to help the central government or local governments in giving the assistance in preparing an Amdal and UKL-UPL to those types of business that suit their criteria.

6. Opinions on the Determination of Types of Business which is Flexible and Multi-Interpretative

Post-amendment Articles 34 and 35 of UU on PPLH have some crucial changes that can give a material influence to the increase of environmental risk, i.e. (i) any business which is required to have a standard UKL-UPL is the types of business not causing a material impact to the environment, and (ii) any business not required to be equipped with UKL-UPL, is required to make a letter of statement on its readiness to manage and monitor the environment and this determination of business is categorized as

an activity included in low risk category.
The crucial points in post-amendment Articles 34 and 35 of UU on PPLH are a change to the indicators of the types of business required to have UKL-UPL from the previous ones : (i) the types of business not included in having a material impact as referred to in Article 23 paragraph (1) of Law on PPLH (prior to the amendment) ; and (ii) micro and small business activities.

Said Article 23 paragraph (1) is the provisions on the indicators of a business and/or activity which is required to have an Amdal. So the types of business and/or activity not fulfilling such indicators are required to have UKL-UPL.

However, Article 35 of Law on PPLH replaces the two indicators above into a sole indicator which is multi-interpretative, i.e. an activity that is included in "low risk category" and "having no material impact to the environment". Meanwhile there is no explanation on these types of activity of low risk category and having no material impact to the environment. So it is possible for the government to give a subjective assessment on a type of business.

A possibility is open that a type of business which is deemed as high risk but the government determines that type of business as low risk type of business, or vice versa. So, these two articles are feared of going to create a legal carelessness since there is no certain indicators to determine a type of business and becomes a material of assessment by the people.

7. Opinion on Environmental Law Enforcement

Article 63 paragraph (1) letter aa. talking about one of the duties and authorities of the Central Government to enforce environmental law. This article is an additional article which seems to be an affirmation that the Job Creation Law which adds to this provision is not only oriented to improvement of investment climate, but also at protecting toward the environment, through the inclusion of duties and authorities of the Central Government to enforce environmental law.

This model of environmental law enforcement can be examined in Articles 82A, 82B, and 82C of the post-amended Law on PPLH. Article 82A states that administrative sanctions are imposed on every person carrying out a business and/or activity that does not have a business license but has an activity and/or business or has a business license, but does not comply with the obligations in business licensing or the approval of central government or Local Government, and/or violating legislations provisions. Some of the articles referred to in Articles 82A and 82B paragraph (1) include:

a. Decree of Environmental Feasibility as referred to in paragraph (4) is used as a requirement for the issuance of Business Licenses, or approval. Central Government or Local Government (Article 24 paragraph (5) of post-amended Law on PPLH).

b. Based on the Statement of Capability in Environmental Management as referred to in paragraph (2), the Central Government or Regional Government issues Business License, or the approval of the Central Government or Local Government (Article 34 paragraph (3) of PPLH Law after amendments).

c. Every person who generates hazardous Waste is required to carry out the management of hazardous waste it produces (Article 59 paragraph (1) of post-amended Law on PPLH).

d. Hazardous Waste Management must obtain a Business License, or approval from the Central Government or Local Government (Article 59 paragraph (4) of post-amended Law on PPLH).

e. Everyone is allowed to dispose waste into environmental media with the condition of obtaining approval from the Central Government or Local Government (Article 20 paragraph (3) letter b of post-amended Law on PPLH).

f. Dumping as referred to in Article 60 can only be carried out with the approval of the Central Government (Article 61 paragraph (1) of post-amended Law on PPLH).

There are interesting things in this provision, mainly in Article 34 paragraph (3) which is referred to by Article 82A and 82B paragraph

(1). Article 34 paragraph (3) is an article that cannot stand alone, but is an integral part of Article 34 paragraph (1) and (2). Article 34 paragraph (1) states that "Every business and/or activity that does not have a significant impact on the environment must fulfill UKL-UPL standards" (UKL-UPL/ Environmental Management Program/ Environmental Monitoring Program). Then paragraph (2) explains that the fulfillment of these standards is stated in the Statement of Capability in Environmental Management. This statement will be used as the basis for issuing business permits, approval from the central government, or local government.

So, from the beginning, it can be seen that actually business activities must be carried out based on UKL-UPL standards. The Initiator who feels uncomfortable doing this obligation then states his commitment in a statement of compliance to meet UKL-UPL standards. This means that every person carrying out activities and/or businesses shall be obliged to carry out activities and/or businesses in accordance with the business license (or other types of licensing recognized in the Job Creation Law) that have been issued by the Government.

The provisions regarding something that are obligatory always in correlation with criminal sanctions. While for administrative sanctions, generally use the phrase "must". So, by looking at the original intent of Article 34 of post-amended Law on PPLH, those the responsible person for businesses who do not carry out their activities and/or businesses should be subject to criminal sanctions, not administrative sanctions. Criminal sanctions should also be included in Article 82A of post-amended Law on PPLH, not administrative sanctions.

A similar problem also occurs in the provisions of Article 82B paragraph (2). The article talks about every person who violates the prohibition as meant in Article 69 is subject to administrative sanctions. The provisions in Article 69 include:

a. do an action that results environmental pollution and/or destruction;

b. importing hazardous materials which is prohibited according to the law and legislations into the territory of the Republic of Indonesia;

c. importing waste originating from, outside the territory of the Republic of Indonesia into the environmental media of the Republic of Indonesia;

d. importing hazardous materials into the territory of the Republic of Indonesia;

e. disposing waste to environmental media;

f. disposing hazardous materials and B3 waste to environmental media;

g. releasing genetically engineered products into environmental media that are contradicting to the statutory regulations or environmental agreements;

h. Conduct land clearing by burning;

i. preparing an Amdal (Environmental Impacts Assessment) without having a competency certificate on Amdal; and/or

j. give a false information, misleading, omits information, corrupts/damages information, or provide false information,

The provisions in Article 69 have little connection with the provisions in Article 59 of post-amended Law on PPLH. Article 59 regulates the obligations for everyone who generates hazardous waste. Although not all provisions in Article 69 are related to Article 59, there are several related provisions, namely in letter e and letter f.

Everyone may be able to dispose waste into environmental media, but it needs to be realized that waste will not appear without an activity and/or effort. Therefore, people carrying out activities and/or businesses that produce waste are also responsible for the waste they produce. But the problem is whether this accountability is in the form of criminal or administrative responsibility.

The answer of this question can be returned to the basic law on hazardous waste management, which is obligatory for everyone who generates hazardous waste. In other words, if someone who is obliged to manage/treat hazardous waste, but instead

discharges the waste to the environmental media, of course the responsibility imposed is criminal responsibility, not administrative responsibility.

Disposal of waste to environmental media is considered the easiest and cheapest way to reduce the operational burden of a business. Apart from the matter of economic calculations that are the background for a person to discharge hazardous waste to environmental media, there are political and policy calculations.

This can be seen in Article 59 paragraph (4) which requires hazardous waste management activities to first obtain a Business License or approval from the Central Government or Regional Government. This obligation is also considered to increase the operational burden for activities that will carry out hazardous waste management because they have to prepare all the requirements that take a long time, such as the preparation and testing of Amdal, UKL-UPL, and a statement of compliance with environmental management.

Therefore, people who carry out activities and/or businesses that produce hazardous waste prefer to dispose it in environmental media. Because, whether the processing is carried out with or without a permit, or discharges waste that violates the business license, the responsibility imposed is the same, namely administrative responsibility. So, the calculation used is a more efficient calculation, that is, it does not make business permits for hazardous waste management and dump it into environmental media.

Apart from that, there are also provisions that open opportunities as well as foster the practice of drafting Amdal by uncertified Amdal drafter. This is because article 82B paragraph (2) letter b of post-amended Law on PPLH only provides administrative sanctions for Amdal drafter who do not have an Amdal drafting certificate. Meanwhile, the certificate is mandatory for Amdal drafter, as stipulated in Article 28 paragraph (1) of post-amended Law on PPLH. Previously, the sanctions for Amdal drafter without an Amdal certificate were criminal sanctions, but after the change the sanctions were only in the form of administrative sanctions.

Another problem was also contributed by the provisions in Article 88 of post-amended Law on PPLH. The article removes the phrase "without the need to prove any element of error". Previously, Article 88 imposed absolute responsibility for losses incurred due to actions, business and/or activities using B3, and/or which pose a serious threat to the environment, without the need to prove the element of wrongdoing. However, after the amendment, these actions are still subject to absolute responsibility, however, they cannot be imposed immediately, but must first pass the proof of element of fault.

The concept of responsibility used in Article 88 prior to the amendment is strict liability where a person who because of his actions brings loss is subject to absolute responsibility without having to be proven. But now the concept of accountability is being removed.

As a consequence, the elimination of the concept of strict liability is the imposition of administrative sanctions if a person commits an action that causes pollution and/or environmental damage caused by negligence and does not cause human health hazards, injuries, serious injuries, and/or death of a person. This provision is contained in article 82B paragraph (2) of post-amended Law on PPLH.

Meanwhile, for activities that result in victims/damage to the health, safety, and/or environment that do not have a Business License, approval from the Central or Local Government, can then be subject to criminal sanctions.

This criminal provision is also a form of environmental law enforcement setback. This is because Article 109 pre-amendment prior to the amendment, criminal sanctions are imposed to the every person conducting business and/or activities without having an environmental permit. Meanwhile, the regulation of Article 109 of post-amended Law on PPLH, criminal sanctions are imposed if activities that do not have a permit have a damaging impact on health, safety and/or the environment. This regulation shifts the types of offenses, from those that were formal offenses to material offenses.

8. Opinion on the Determination of Maximum and Minimum Area Limits for Plantation Land

Article 14 of the Estate Crops Law, both pre- and post-amendment, talks about the authority of the Central Government to determine the maximum and minimum area limits for land use for plantation businesses. However, the difference of its contents material lies in paragraph (2) of Article a quo. Article 14 paragraph (2) of the Pre-amendment Estate Crops Law provides a number of things that must be considered by the Central Government before determining land area limits for plantation business, including: (i) types of plants; (ii) availability of suitable land in an agro-climatic manner; (iii) capital; (iv) factory capacity; (v) population density level; (vi) business development patterns; (vii) geographical conditions; (ix) technological developments; and (x) land use based on spatial function in accordance with the statutory provisions in the spatial planning sector. Meanwhile, Article 14 paragraph (2) of the Post-amendment Estate Crops Law only provides two variables that must be considered, namely the types of plants and/or availability of land that are suitable for agro-climatic ways.

Another difference is, Article 14 paragraph (2) of the Pre-amendment of Estate Crops Law uses the phrase "and" which indicates that all these variables cumulatively must be considered before setting limits on land area. Meanwhile, Article 14 paragraph (2) of the Post-amended Estate Crops Law uses the phrase "and/or" which indicates that the Central Government can choose one or the two variables to be considered.

Unfortunately, the seven things that were removed are closely related to social impacts, production impacts and environmental impacts. For example, the matter of capital, factory capacity, and business development patterns, the three of which are benchmarks of the ability of a business to manage a certain land area. If this provision is removed, it is possible that in the future the business owner will no longer be able to manage the land that becomes his plantation business due to limited capital and minimum capacity of factory, while the land to be cultivated is very large.

Another simulation of the social impacts that may arise is to see the possibility of eliminating population density, geographical conditions, and land use based on spatial functions. The government may issue a stipulation that essentially provides land area for businesses that are in densely populated areas, because the government considers the land to be fertile.

Not only that, neglecting the spatial function in determining land area has the potential to cause damage to the nature. Because, spatial planning has an equalizing function for areas that can be utilized, not only for plantations, but also for living areas and water catchment areas. It is also possible that the government will designate water catchment areas as plantation areas.

So eliminating the density calculation of geographic conditions, and land use based on spatial planning functions is the same as inviting problems with social, economic, and environmental dimensions. In other words, eliminating these seven variables is an entry point to thwart the Sustainable Palm Oil Plantation Certification System (ISPO) program.

9. Opinion Against Flawed Legal Products

Article 37 of the post-amended Law on PPLH regulates several measures of Business Licensing that can be cancelled. Starting from: (i) the requirements submitted in the application for Business Licensing contain legal flaws, mistakes, misuse, as well as untruth and/or falsification of data, documents, and/or information; (ii) the issuance is without meeting the requirements as stated in the Decree of Environmental Feasibility or Statement of Environmental Management Commitment; or (iii) the obligations stipulated in the Amdal or UKL-UPL document are not carried out by the person in charge of the business and/or activity.

Before the amendment of a quo article, there is a provision that obligates the Minister, Governor, or Regent/Mayor to reject the application for an environmental permit if the application is not accompanied by an Amdal

or UKL-UPL. Therefore, the amended Article 37 of Law on PPLH deletes the provisions regarding the obligations.

With the deletion of such provision, it is possible for the authorized Official to accept the application for business licensing even without being furnished with an Amdal. This possibility is corroborated by the next provision whereby a business licensing can be cancelled if it is issued without meeting the conditions. But it needs to be re-examined, the cancellation is an administrative legal effort that can only be done after the business licensing has been issued. It is impossible that an application for licensing is cancelled, because the application has not received approval from the authorized official.

In addition, the settlement channel through cancellation due to non-fulfillment of conditions can only be submitted by the subjects that are affected by the enactment of a State Administrative (TUN) Decision and can only be cancelled by the official issuing the decision or the higher structural official. This cancellation is known as the contrarius actus principle.

The party affected by the issuance of a TUN decision or business licensing is the initiator. So that the party that is allowed to propose the administrative effort is the initiator itself. But is it possible that the business owner desires to cancel the business licensing that has been issued for the benefit of its business?

The community around the location of the activity is actually also the subject affected by the issuance of the business licensing. However, the community can be the party proposing administrative effort as long as the business licensing is issued with an environmental feasibility decision. Because, the environmental feasibility decision is issued on the basis of an environmental feasibility test, and an environmental feasibility test is carried out on the Amdal. The only instrument that includes responses and directly includes the community is Amdal.

Whereas for Business Licensing that is issued on the basis of UKL-UPL and Statement of Environmental Management Commitment, the community does not have a legal standing to apply for administrative efforts. Because, Article 1 point 12 of the post-amended Law on PPLH states that UKL-UPL is a series of environmental management and monitoring processes that are set forth in a standard form to be used as a prerequisite for decision making, as well as contained in the Business Licensing.

Likewise with the Statement of Environmental Management Commitment that is only a statement letter explaining that the initiator is able to carry out the standards that have been set. Therefore, the community is not involved in the drafting process.

The position of the community is also vulnerable because UKL-UPL and the Statement of Environmental Management Commitment are considered as instruments needed for types of businesses that are low risk and have no significant impact on the environment, as stated in Article 34 paragraph (1) and Article 35 paragraph (2) of the post-amended Law on PPLH.

With this definition, the Government can use the argument that the efforts of the initiator have no risk of having a significant impact on the environment and is of low risk, so that it will not also having an impact on the community. Finally, the community does not have the legal standing to carry out administrative efforts.

In addition, the cancellation of business licensing through the State Administrative Court is deleted by Article 38 and Article 93 of the post-amended Law on PPLH. As a result, the business licensing issued subjectively can survive even though it has formal defects in it. Another consequence is that business actors are allowed to do business without preparing and taking steps to mitigate potential environmental risks.

10. Opinion Against Environmental Risks in the Issuance of Business Licensing and Plantation Business Management

Article 67 of Law on Estate Crops amends the provisions in the same article, namely to delete several provisions concerning: (i) making an analysis on environmental impacts or environmental management efforts and

environmental monitoring efforts; (ii) having an analysis and risk management for those using genetic engineering products; and (iii) making a statement of commitment to provide adequate facilities, infrastructure and emergency response systems to cope with the occurrence of fires.

These three matters constitute a form of obligation to preserve environmental functions. However, the deletion of this provision does not automatically eliminate the obligation to maintain environmental functions. But the form of maintenance will be stated in a Government Regulation.

Based on such matter, there is no provision regarding the form of obligation to maintain environmental functions until the Government Regulation is issued.

11. Opinion Against Welfare Insurance of Oil Palm Smallholders

Article 15 of the post-amended Law on Estate Crops talks about the prohibition for plantation companies carrying out partnership activities or plasma nucleus to transfer their rights to Plantation Business land that leads to the lack of business units and the minimum size set by the Central Government. Prior to the amendment, Article 15 does not add the phrase "those carrying out partnership activities or plasma nucleus" so that all plantation companies, including those carrying out partnership activities or plasma nucleus, could transfer their rights to their plantation business lands.

This article seems desiring to protect the land rights that have been allocated by Plantation Companies to the community through a plasma mechanism as well as facilitating plantation companies to exercise their civil rights to transfer their rights to their Plantation Business lands.

In addition, Article 39 of the post-amended Law on Estate Crops contains a provision that eliminates the requirement for foreign investment in plantation businesses to cooperate with domestic plantation business operators. Previously, this cooperation was required and carried out by forming an Indonesian legal entity. However, this provision is simplified by "foreign investment activities in plantation land are carried out by referring to the Law on Investment".
Law Number 25 Year 2007 regarding Investment (Law on Investment), to be precise in Article 13 paragraph (2) of the post-amended Law on Investment, gives authority to the Central Government or Local Governments to provide convenience, empowerment and protection for cooperatives and micro, small, and medium enterprises through a mechanism, one of which is done through a partnership program. Article 18 paragraph (3) letter i of the post-amended Law on Investment also includes investment criteria that are granted business expansion facilities or new investment by the Central Government, namely partnering with micro, small, medium enterprises or cooperatives.

However, what must be observed in this provision of this partnership is that there are only one and eleven criteria that can be selected cumulatively-alternatively by foreign investors in order to obtain business expansion and new investment facilities.

Some of these criteria are among others:

a. absorb a lot of labor;
b. including high priority scale;
c. including infrastructure development;
d. transferring technology;
e. doing pioneer industry;
f. located in remote areas, underdeveloped areas, border areas, or other areas deemed necessary;
g. preserving the environment;
h. carry out research, development and innovation activities;
i. partnering with micro, small, medium enterprises or cooperatives;
j. industries that use domestically produced capital goods or machinery or equipment; and/or
k. including tourism business development.

This means that one or more of the eleven criteria can be selected by foreign investors and/or all of them in order to obtain business expansion and new investment facilities.

Given the massive infrastructure development program carried out by the Government, it is likely that the criteria for partnering with

MSMEs or cooperatives are not selected by foreign investors, but rather by selecting the criteria for infrastructure development or high priority scale.

Thus, the simplification of this provision has an effect on the obligation to establish intimacy between foreign investors and domestic Plantation Business Operators.

12. Opinion on Monopolistic Potential of Plantation Plant Seeds from Abroad

Article 24 paragraph (1) and paragraph (2) of the post-amended Law on Plantation states that the Central Government shall determine the types of plantation plant seeds in which the export from and/or importation into the territory of the Republic of Indonesia requires approval. Previously, the export from and/or importation require and must obtain the permit of the Minister.

Changing the phrase "permit" to "approval" has different consequences. Although both have the same meaning, namely giving an exception to a certain activity.

Permit (vergunning) is an approval from the ruler based on law or government regulation for in certain circumstances as a form of dispensation or release/freedom from a ban that is implemented through a decision or ruling of the ruler.

Article 1 point 19 of Law 30/2014 regarding Government Administration defines a permit as a decision of an authorized Government Official as a form of approval to a request from a citizen in accordance with the provisions of laws and regulations.

Therefore, permit is a more formal approval, because it has a form and specified in a decision. If interpreted a contrario, the approval of a government official cannot be said to be a license if it is not stated in a decision.

Based on this, it appears that this Article facilitates the provision of dispensation in the release and/or entry of plantation plant seeds.

In the context of oil palm, the ease of importing oil palm seeds will add new challenges to the absorption of oil palm seeds in the market. Because, the regulations for oil palm plantation land are tighter and more difficult to find land availability for oil palm plantations, as another reason that the absorption of national superior palm seeds will decline.

In 2016, the production capacity of national oil palm seeds reached 200 million seeds, while the absorption is only around 80 million. Even though it is considered over supply, the national oil palm seed industry faces various obstacles, such as the circulation of uncertified palm oil and the importation of oil palm seeds.[2]

This problem is related to the distribution permit of introduced and foreign varieties that have been released but only required to fulfill the Business Licensing and the Central Government. This provision is contained in Article 30 paragraph (3) of the post-amended Law on Plantation that replaces the provision in Article 31 paragraph (2) of the pre-amended Law on Plantation that requires the variety be certified first.

The attachment to the Decree of the Minister of Agriculture of the Republic of Indonesia Number 321/Kpts/KB. 020/10/2015 regarding Guidelines for Production, Certification, Distribution and Control of Oil Palm Plant Seeds, states that certification is an activity that is carried out for inspection of the quality requirements of varieties through field inspection, laboratory test, and supervision as well as fulfilling the requirements for differentiation. Meanwhile, business licensing that is required to be fulfilled before distributing the variety does not explain further about the issuance mechanism and what conditions are required to be fulfilled before the issuance of a business licensing.

13. Opinion on Plantation Fund Management

Article 93 of the post-amended Law on Estate Crops addresses the financing of plantation business by the Central Government. The

2. "Stop Importation of Oil Palm Seeds", https:/ /www.infosawit.corn/ news/ 6422 / stop-impor-benih-sawit. Accessed on Wednesday, 18 November 2020.

financing is carried out in the context of administering a plantation in which the costs come from the State Revenues and Expenditures Budget. Apart from being carried out by the Central Government, plantation management is also carried out by Plantation Business Operators, however, the funds come from funds collection by Plantation Business Operators, funds from financial institutions, community funds, and other legitimate funds.

Funds collected shall be used for human resource development, research and development, Plantation promotion, rejuvenation of Plantation Plants, Plantation facilities and infrastructure, Plantation development, and/or fulfillment of Plantation products for food, biofuel, and downstream Plantation industries.

Funds collected by Plantation Business Operators are managed by the plantation fund management agency, which is authorized to collect, administer, manage, store and distribute these funds. This provision is an addition to the provisions and Article 93 of the pre-amended Law on Estate Crops that later the model of collection and the agency assigned to manage plantation funds will be regulated in a Government Regulation.

This additional provision constitutes an opportunity for the productivity of oil palm plantations so that the management of fresh fruit bunches can reach the downstream industry. However, what needs to be observed is the practice of managing oil palm plantation funds managed by the Palm Oil Fund Management Agency (BPD-PKS), which is allocated to subsidize giant palm oil companies that are producers of biodiesel.[3]

In addition, the Supreme Audit Agency (BPK) has also criticized the oil palm plantation funds management. BPK assesses that the fees and use of plantation funds managed by BPD-PKS are not in accordance with laws and regulations and do not have an adequate internal control system.[4]

CIFOR sees that the management of oil palm plantation funds has not been able to lead to intensification or increase in plantation production practices. Meanwhile, through the placement of funds for oil palm plantations aimed at increasing oil palm productivity, it could become a disincentive to inhibit the expansion of oil palm plantations into forest areas.[5]

3. "Free the Palm Oil Fund from Conglomerate Interests! #KonglomeratKokDisubsidi", https: / / www. change . org / / bebaskan-baclan-dana-sawit-dari-kepentinzan-konglomerat-konglomeratkokdisubsidi. Access on Monday, 16th November 2020. See also "7000 Oil Palm Farmers Sign Online Petitions to Free Oil Palm Funds and Interests ", https: / www.infosawit.com / news / 10050/7000-petani-sawit-tanda-tanganipetisi-online--bebaskan-dana-sawit-dari-kepentingan. Access on Monday, 16th November 2020.

4. "BPK Criticizes Palm Oil Fund Management", https:/ [www.cnbcindonesia.com/ news / 20180405151207-4-9835 / bpk-kritik-pengelolaandana-perkebunan-kelapa-sawit. Access on Wednesday, 18th November 2020.

5. Working Paper 238 CIFOR, "Optimizing Palm Oil Funds and Regulating Fiscal Instruments on the Use of Forest Land for Plantations in Efforts to Reduce Deforestation",

LEGAL ADVICE

Legal advice is given based on legal opinions of all aspects related to the regulations in association to the administration of oil palm in forest areas in Law Number 11 Year 2020 regarding Job Creation. Based on the legal opinions that have been previously submitted, the legal advice given shall be as follows:

1. Specify the indicators of "strategic areas" and "physical condition of watersheds and/or islands" in Government Regulations to serve as a reference for government policy selection in establishing forest areas as well as means for the community to monitor these activities.

2. Make use of the provisions in Article 29B of the post-amended Law on Forestry that delegates further provisions regarding Forest Utilization Business Licenses and Social Forestry Activities in a Government Regulation by amending the provisions prohibiting oil palm planting in areas with social forestry rights.

3. Creating a NSPK that is oriented towards preventing forest destruction. At least the material that must be included

    a. The relationship between the impact of environmental violations and Business Licensing;
    b. Relationship arrangement between environmental agencies and the agency granting Business Licensing in the occurrence of environmental violations;
    c. System accountability to track environmental violations where no action is taken against these violations by the Business Licensing issuing agency;
    d. Transparency on monitoring actions and environmental violations; as well as
    e. An objection or complaint mechanism for the public in the event of an environmental violation.

4. Revise the provision in article 63 paragraph (2) letter i of the post-amendment Law on PPLH by adding the clause "Business Licensing" as an instrument that must be used to carry out guidance and supervision in addition to using the provisions of laws and regulations.

5. Dissemination of allowed and prohibited actions related to forest management to communities living in and/or around forest areas to avoid misperceptions about exceptions to the imposition of sanctions.

6. Include provisions regarding the need to involve independent experts, representatives of environmental organizations, and representatives of potentially affected communities and an activity and/or effort to present a check and balance in the preparation and testing of Amdal.

7. Revise the provisions of Article 39 of Law on PPLH by re-entering the phrase "mandatory" or "must" in disseminating information related to the issuance of business licenses. In addition, restoring the provisions on "every request", so that everyone - especially the community – that is directly affected knows that activities and/or businesses will be carried out at their location.

8. Drawing new provisions, either by revising Article 39 of Law on PPLH or introducing it into government regulations regarding ways of disseminating information that are easily known and accessed by the public regarding each application and decision on environmental feasibility.

9. Provide clear indicators to the types of business that do not have significant impact on the environment and types of business with low risk in Government Regulations.

10. Detail the models for management and governance of Palm Oil Fund that are oriented towards the spirit of palm oil sustainability and productivity, for example allocating oil palm plantation funds to conduct research in the field of plant breeding in order to create modern superior varieties and have desirable characteristics.

11. Increase the productivity of oil palm plantations to increase absorption of oil palm seeds.

12. Allocating funds for oil palm plantations to conduct research in the field of plant breeding in order to create modern superior varieties that have the desired properties.

13. Detailed provisions regarding mechanism for issuing business licensing for the distribution of varieties originating from abroad.

14. Reaffirming the requirement for foreign investors to enter into partnerships with domestic plantation business operators.

15. Include the form of obligation to maintain environmental functions related to Business Licensing in the plantation sector in Government Regulations.

16. Consistency in environmental law enforcement by synchronizing mandatory provisions with criminal sanctions provisions.

2021