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HIGH CONSERVATION VALUE (HCV) CONSIDERATION IN THE EXTRICATION OF FOREST AREA FOR PALM PLANTATION

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Abstract

Planting activities are undergoing in the area of former forest with mechanism of extrication of forest area or non-forest area that commonly has high conservation value or known as High Conservation Value (HCV). However, the extrication of forest area for Palm Plantation has eroded the presence of forest with HCV disrupting ecosystem balance and harming the wellbeing of current and next generations. Legal system does not specifically regulate the limit of application for the use of forest area for palm plantation through the mechanism of forest extrication. Legal provisions at the national and regional levels encounter a difficulty accommodating the existence of area with HCV, especially in terms of regional spatial plans. Moreover, the obscurity of forest distribution and non-forestry areas with HCV also complicates the regulation at the level of imperative provisions.

Keywords: *Extrication; Forest; High Conservation Value; Palm Plantation; Permit*

INTRODUCTION

Background

Indonesia has an oil palm plantation of 12.30 million hectares and produces 34.74 million tons of national production in 2017 which spread across Indonesia's main islands of Kalimantan, Sumatra, Sulawesi and Papua. This fact shows that Indonesia is the largest producer of crude palm oil (CPO) in the world. The province of East Kalimantan alone has been experiencing significant increase and by the end of 2017 it reached 1.208.697 hectares and contributed 7.53% of national product (2017).[1]

From 1987 until the end of 2018 there happened an extrication of

[1] Plantation Office of East Kalimantan Province, December 2018

5.418.413 hectares of forest area while new permit applications for forest area extrication areas for oil palm plantations currently being processed nationwide cover an area of 2.974.529 hectares[2]. The use of forest areas outside the development of forestry sector has consequences on declining forest area, in which East Kalimantan is not an exception.

In accordance with Minister of Forestry Decree No.79 /KPTS-II/2001 concerning Determination of Forest Zones and Water Channels, East Kalimantan forests have an area of 14.651.553 ha. consisting of 2.165.198 ha for conservation areas, 2.751.702 ha of protected forests, 4.612.965 ha of permanent production forests and and 5.121.688 ha. of production forest zone. However, Minister of Forestry Decree No.554/Minister of Forestry-II/2013 concerning the Revised Spatial Plan for the East Kalimantan Regional Spatial Plan (SPEKR) affirming that the size of forest areas ha declined because 395.621 ha of forest zones have become non-forest zones, while 276.290 ha of forest zones have been further modified. The area change has extended due to the merging of East Kalimantan and North Kalimantan's forest areas reaching 13.855.833 hectares.

The declining of forest areas in East Kalimantan and North Kalimantan will affect ecosystem, including the existence of forest areas with High Concervation Value (HCV). East Kalimantan is blessed with 157 large and 18 small rivers, three large lakes, namely Lake Melintang covering an area of 11.000 hectares, Lake Semayang with an area of 13.000 hectares in addition to Lake Jempang with an area of 15.000 hectares. It has as well a high diversity of species including 222 mammal species, 44 of which are endemic species, 13 primate species that are all endemic, 10 species of pig, 420 bird species, 37 of which are endemic species, 166 species of snakes, more than 100 species of amphibians, 394 species of fish, 149 of which are endemic species (Mackinnon, et al., Bappenas, 2000)[3]. Forest areas in North Kalimantan are also quite high from a total area of 83% which is a forest area. North Kalimantan has a Kayan Mentarang National Park with an area of 13,605 Km2, including 5.8 million hectares of forest cover.[4]

As strategic resource for Indonesia, forest has begun to face threat of area

[2] Sigit Hardwinarto, Dirjen Planology Kementerian Kehutan dan Lingkungan Hidup, Available from: https:/bisnis.tempo.co. [accessed February 9, 2019]

[3] John MacKinnon, et.all. (2010) *Burung-Burung di Sumatera, Jawa, Bali dan Kalimantan*. Bogor: BI.

[4] Forest Service of North Kalimantan Province 2018

and quality degradations due to its utilization in a range of activities; one of them is palm plantation. From legal standpoint, there is a reversal of reason from the initial concept of prohibiting the use of primary forest timbers to reversed policies that turn forest areas into plantation area[5]. Plantation practices originating from the extrication of forest areas have the same impact as the activities occurring in the forestry sector in terms of downsizing the number of primary forest areas[6]. The state legal policy which limits natural forest exploitation (forest cover) has gradually changed with the introduction of a new policy of allowing deforestation through oil palm plantation businesses. The pattern of spatial use for land and forest-based sectors are further exacerbated by additional problems outside of deforestation, including tenure issues, conflicts between users, protection of local communities, environmental aspects, neglect of concession areas, land banking practices, and violation of user's commitment for non-destructive activities.

Law as a basis for instruments that bring together a variety of interests proved not always strong in responding to the rate of legal events and legal consequences caused by exploitation of forest committed by palm plantation businesses. Various schemes to strengthen the legal substance in order to prevent the distribution of environmental risks caused by palm plantation businesses must be reconstructed into applicable law through legal permit system. The permit system requires the consent of the community at the initial stage of palm plantation activities. The people should give their consent without coercion, known as the Free Prior Informed Consent (FPIC), prior granting the permit. The application of this principle is needed when there are communities living in and / or around the area of palm plantations, which is in line with the policy of protection of high value forest areas or High Conservation Value (HCV) that must not be shifted by the permit holder for the sake of business interests and so denies the shared wealth.

The existence of HCV outside conservation forest areas for palm plantations through the mechanism of extrication of forest areas raises problems in the perspective of environmental justice, both because it eliminates common property

[5] The prohibition on the use of wood from primary forests has become a policy since the time of President Susilo Bambang Yudhoyono signed the Presidential Instruction Number 6 of 2013 on the Suspension New Licenses and Improving Forest Governance of Primary Forest and Peatland.

[6] Government Regulation Number 60 of 2012 Jo. PP No. 104 of 2015 which states that a forest area that can be converted is a forest area that is not productive, despite the fact that even this provision is not able to mitigate previous events and even the primary forest area is still the target of plantation permit application.

and denies environmental rights in the name of palm business interests. The scheme of changing forest areas into oil palm plantations does not consider the existence of HCV, especially in terms of existing norms, including the existence of HCV in the scope of forest areas being applied for the oil palm plantations.

Based on the description above, this paper tries to investigate two main questions: First, how is the extrication process of the forest area with HCV from the perspective of environmental justice (reconstruction)? Secondly, what scheme should be introduced in order to cover the need of regulation and extrication of forest area with HCV for palm plantations (reconstruction)?

This paper uses a doctrinal approach, especially in measuring the relationship between norms at the national and local levels in palm plantation activities (Chynoweth, 2017). Factual information support has been done by photographing the utilization of forest area through an extrication mechanism taking place in the palm plantations in the Province of East Kalimantan and North Kalimantan Provinces.

CONSIDERATION OF ENVIRONMENTAL JUSTICE IN THE DESIGNATION OF FOREST AREAS FOR OIL PALM PLANTATIONS

The abundant Natural Resources found in one country should be treated as public wealth which should be distributed equally among the people. On the contrary, the distribution of environmental risks is a form of environmental inequity that should be prevented. The legal and political responses to the management of natural resources are often ignore the environmental risk, especially as an instrument that is capable of distributing the economic welfare of natural resources. Nicholas and Gleeson (1998) state that the distribution of environmental quality is the core of environmental justice, so the act of the state neglecting bad environmental management is an act of sponsoring injustice. Cliffford and Gauna (2002) adopted Aristotle's view which declared environmental justice as distributive justice, by interpreting that in the context of environmental law it is not interpreted as an act of distributing risk, moreover turning off their interactions with their environment (David, 2007).

Stakeholders, especially the issuer of oil palm plantation business permits must takes into account the emergence of risks that threaten the environment and the community. Licensors who consider sav-

ing collective interests and maintaining the value of justice should guarantees that everyone shall enjoy a good and healthy environment. If the opposite happens, the licensor has contributed to a moral act, or in Aristotle's view this action is a practice of separating injustice and law (Aristotle in Miller, 1995). The existence of HCV in forest areas is related with the interests of the community because it guarantees the availability of environmental services, important ecosystems to support the needs of the community, cultural value areas, and landscapes important for the dynamics of natural ecology. Giving permits in these areas will directly affect the lives of the surrounding communities and their close access to sustainable forest resources. In terms of environmental justice, the practice of destroying community sustenance by way of destroying their forest is an action that does not take into account ethical, balanced and responsible uses of land and renewable resources.

The State entrusts the responsibility of protecting the environment to palm plantation companies. This fact occurs when plantation permits are granted, and at the same time the obligation to protect the environment and the interests of the community is transferred to plantation companies. Therefore, reluctance to abide by the existing regulations on the reason of "legal certainty" that is put forth by the private sectors is in essence a challenge to the state which is, through the mandate given by the constitution, is obliged to protect the entire nation and all of Indonesia's homeland "and use Nature Resources for the welfare of the people". The meaning of the phrase "the whole homeland of Indonesia" shows the obligation of the state to protect the citizens and the entire regions in which Indonesia territory lies. Law obliges those in power to carry their duty in line with the principles of applicable legal norms and hence protect the citizens against excessive or unfair treatment of both government and the private entities (Mermin, 1982).

The fact that the state is unable to protect the environment and the society is a major setback compared to what the authorities in Babylon did more than 4000 years ago, or long before Rachel Carson published 'The Silent Spring' (1962). As revealed in the Code of Hammurabi, the Babylonian ruler made serious efforts to protect the safety of basic commodities through its control of agricultural land and irrigation (Wilkinson, 2002). The presence of the law should protect collective interest to fulfill the fairness of the use of natural resources, protection for livelihoods

that are not disturbed by plantation activities, and maintaining state authority. Social-economic cost benefit analysis and aspect analysis of the social cost of environmental damage to quality of life including risk analysis should be a consideration, but has yet to be implemented during the process of permit issuance.

The use of primary forests in East Kalimantan which is still going on ~~is~~ should be treated as excessive and destructive exploitative practices. Such irresponsible practices are disturbing and a violation of justice although some would argue with regard to the values under discussion (Edward, at.al. 2016), or inefficient action that might prompt the destructive exploitation (Holder and Lee, 2007). The standard moral obligation should not over-consume environmental resources, that is, not to consume them at a rate higher than their recovery rate (Brennan and Lo, 2010), or not over-exploit (Kraft and Lant, 2007).

Ongoing actions that destroy the forest areas and the 'truly woody forest areas' in East Kalimantan continue, so that the number and quality of the forests deteriorate severely. It is therefore hard to deny that palm plantations which are built in the name of law are one of major contributors to deforestation, particularly in East Kalimantan as shown in several studies conducted by van der Laan, (2016), Indarto, Atal (2012), Aziz Khan, Agung Budi Gunawan, Alex Smajgl (2015), and Muhdar et al. (2015). Allowing deforestation practices to take place will always be read as a form of injustice, measured in various legal perspectives, and legalize the distribution of risks in public sphere.

The Urgency of the HCV Approach in the Use of Forest Areas for Plantations

The constitutional text confirms that the basis of legal politics in the framework of the relations between the state-people and natural resource users is marked by the provisions guaranteeing natural resource utilization that prospers the people while maintaining environmental sustainability. Constitutional formulations generally require specific arrangements regarding environmental protection at the level of a more technical provision, for example establishing a model of regulation in a place where there are communities around the plantation or in contact with HCV.

Arrangements that include HCV considerations are not easy to do with practices that have been placed in the ‘grey area whether it requires a mandatory labeled as a sanction or only a complement to appear to be equipped with as-

pects of society and the environment. The community does not participate and even to consider the risks that will occur during plantation activities or afterward. In such conditions, the community can be ascertained not to have access in the public decision making (Jason and Slocombe, 2012) unless there is political or advocacy intervention from other parties. Political intervention or advocacy that considers society and the environment are very necessary because there are three different interest groups, which are employers, entrepreneurs, and the government (Roberts and Weiss, 2001).

Land and forest utilization conflicts with regard to plantation activities that drag the communities and corporations should not have occured if the communities are involved in the process of determining public policies that evidently concern their rights to life. Muara Tae Village in West Kutai District, for example, which covers only 12.000 ha is now partitioned by six companies which ignited conflicts with the local communities (Komnas HAM, 2016).

Lamin Telihan Village, Kenohan Kukar Sub-District is another example in which a village partly a forest area[7] was turned into a palm plantation on a large scale by private sectors, or corporation, which also involved two other villages namely Teluk Binggai Village, and Lamin Pulut Village. The potential for conflict in this area is quite high, mostly due to tenure, environmental degradation, sedimentation of fishing grounds and hunting areas that are lost, in addition to missing sea access in Paser Mayang Village, Paser Regency (Muhdar et al., 2018). Conflicts over the use of natural resources also occured between permit-holders and local community in 2008-2012 (Muhdar et al. 2012).

In this regard, deforestation issue has become a concern when designing forest space use, discussing about natural resources in academic spaces, and it is also a serious concern of the international community which feels threatened at the loss of the world lungs. However, such concern shall mean very little unless local-level policies address the root causes of such mayhem, especially one that concerns the legality of forest use for plantation activities through licensing mechanisms at technical level. Economic policies targeting the forest, especially primary forests containing HCV, must be re-

[7] M. Muhdar, Rahma. A, and M. Taviv. (2018) "State Failure in Recognition and Protection of Indigenous Peoples over Natural Resource Access in East Kalimantan" This Research supported by The International Development Law Organization (TIRAM Project in East Kalimantan), December 2017-April 2018

viewed. The licensing system for the existing licenses and new applicants for plantations, including other land-based activities above forest areas, needs to be reviewed if further destruction were to be avoided.

As a consequence of the licensing system practice so far, the average rate of deforestation in the Province of East Kalimantan during the period 2005-2015 was 57.954 ha per year. Deforestation in East Kalimantan makes up the biggest contributor to carbon emissions to the atmosphere, which is 56% (20.355.102,20 tons CO2/year), followed by emissions from mangrove land by 21% (7.644.707,64 tons CO2/year). Logging activities accounted for 17% (6.053.610,20 tons CO2/year)[8], forest degradation accounted for 4% (1.480.355,99 tons of CO2/year) and decomposition of peat contributed 2% (608.057,33 tons CO2 year). The total contribution of GHG emissions from various land use and utilization activities is 36.143.844 tons of CO2 per year. On the other hand, the East Kalimantan Provincial Government often participates in various forums on activities related to climate change issues such as the UN Framework on Climate Change (UNFCCC) - Conferences of Parties in Montreal (COP11), Bali (COP13), Copenhagen (COP15), Durban (COP17), Doha (COP18), Warsaw (COP19), Lima (COP20), Paris (COP21), Marrakech (COP22), Bonn (COP 23), and Poland (COP 24). These international commitments must be able to be translated into regional level regulations that enable to slow down deforestation rate significantly.

The rate of deforestation which is still a threat to the future of development in East Kalimantan as the policy at hand still allows the use of forest areas for palm plantations. It is therefore must be reviewed or at least, delayed. Consideration of forest areas containing HCV must be the main variable in determining whether permits to provide locations, land clearing, construction of plantation facilities are issued or not. This argument has an adequate justification basis because the most distinctive function of licensing law is naturally providing the norms on the prohibition of matters that threaten the public interest. HCV forest area will provide guarantee to the collective interest in the long term, for example guaranteeing the availability of water management, good services from forest areas, the presence of flora and fauna to support various lives, contributing to safeguarding of the world's climate governance, creating a

[8] Regional Council for Climate Change in East Kalimantan, April 2018

perception of high moral standards and guarantee justice in one generation or between generations.

Ignoring HCV will risk long-term environmental recovery, including the unpredictable amount of recovery costs. In addition to providing funds for environmental improvements, local government still has to face social and economic problems. The amount of public costs is most likely to disrupt the local government's budget in case the public is not to be borne with such expenses.

The practice of transferring costs from natural resource ~~(polluter)~~ users (polluter) is indisputable when the deterioration of raw material water sources engulfs the community, when natural water sources are disrupted by land-based activities. The company's orientation is basically pursuing profits so that the allocation of environmental recovery costs must be smaller than the profits obtained. Companies that do not have the financial capability for the return of environmental functions will choose to take advantage in advance compared to providing a number of costs for overcoming the improvement and protection of environmental functions.

HCV considerations in licensing also serves to protect investors in the future when there is a conflict over environmental claims from potential parties. The consideration is that the development of the times is inseparable from the development of individual and communal awareness that demands the presence of quality and sustainable life. It is necessary in a quality living that people have the ease in obtaining natural capital such as clean water or clean air, which can be obtained as a by-product of forest cover and HCV. HCV ignorance is therefore to be considered as a deliberate negligence of the potential future conflicts ~~and~~ which can disrupt the company's portfolios in the eyes of the government, the community, and the national/international business community.

Application of HCV for Deforestation of Palm Plantations

Relevance of the current HCV Approach to the Legal System

Policy makers must consider the aspects of social security with an emphasis on the question of how "safe" is safe enough? How "clean" is clean enough? This question is important to ask because the answers are contested in two areas, namely environmental law and environmental policy (Salzman and Thopson, 2003). The position of FPIC and HCV provides both answers to these two questions on the ground that the protection and

management perceptions are limited by the vortex of legal discourse, namely humans as the party that needs sustainability and a guarantee of quality life while potentially destructive at the same time. At the level of environmental law, it is delegated to the question of how to protect and how to manage so that the legal substance contains an instrument to guide how nature can maintain its support of the sustainability of life.

In various legal texts, the definition of HCV is not found limitatively but the principles and substance are adopted in various laws. High Conservation Value is the values contained in an area both in environmental and social senses, such as wildlife habitat, marine protected area or archaeological site where the values are calculated as very significant or very important locally, regionally or globally (Consortium for Revised HCV Indonesia Toolkit, 2008). This definition is quite operational when associated with the design of arrangements for managing forest areas or former forest areas that are converted into oil palm plantations. Decisions concerning forests with high conservation value will always be related to the precautionary approach even though there is no specific regulation that mentions such limitation and is imperative for ignoring HCV considerations during the licensing process.

Although it is not specifically regulated, HCV has been introduced in various legislative provisions in response to the decline in the condition of forest areas, including the protection of living natural resource ecosystems. Based on this, a policy that is directed towards conservation efforts is needed as a strategic choice to maintain and improve the quality and diversity of forest areas.

Palm plantations practices in areas that have HCV in the ex-release/exchange and outside forest areas are not compatible with national policies from the time of the adoption of the international agreements. The agreements include the obligation to protect plant species and animals against 70 species of mammals, 93 species of birds, 31 species of reptiles, 7 species of fish, 20 species of insects, 1 species of *anthozoa* and 14 species of bivalves[9]. Likewise, the arrangements for endangered species are listed in the list of CITES (Convention on International Trade in Endangered Species) of Wild Fauna and Flora and the International Union for Conservation of Nature (IUCN).[10]

[9] Appendix PP No. 7 of 1999 concerning Preservation of Plants and Animals

[10] See also, Law No. 5 of 1994 concerning Endorsement of the United Nations Convention on Biological Diversity (United Nations Convention on Biological Diversity)

Environmental protection and management as stipulated in Law No. 32 of 2009 states that the main reason for the issuance of this regulation is that the declining quality of the environment threatens the survival of humans and other living creatures which renders environmental protection and management a truly important cause that concerns all stakeholders.[11] Based on this provision, HCV must be taken into account if a forest is to be converted into plantation areas or other activities because it has potential for ignoring the right of every individual that entitles to a good and healthy environment, which is an article of human basic right.

One condition needs to bear in mind that prior to the application of plantation business permits, environmental permit must be in place. Environmental permit is granted to businesses and/or any activity that is subject to Environmental Impact Analysis (EIA) or UKL-UPL[12]. EIA as a study of the important impacts of a business and/or planned activities on the environment. It is needed for the decision-making process related to business and/or activities[13]. Business owner who is short of of environmental permit conditions will have to face accountability assessment that can end up in some sort of administrative law and criminal sanctions[14]. Law no. 39 of 2014 concerning Plantation requires the applicant to carry out environmental management, which include:

1. Carry out an analysis of environmental impacts or efforts to manage the environment and efforts to monitor the environment;
2. Prepare analysis and risk management for those who use genetically modified organism; and
3. Sign a statement of readiness to provide adequate facilities, infrastructure, and emergency response systems to combat fires.[15]

The obligation of those in possession of palm plantation business permits also includes a land burning prohibition[16]. This prohibition is regulated in detail through Minister of Agriculture Regulation No.05/Permentan/Kb.410/1/2018 concerning Land Clearance and/or Processing of Plantation Land without Burning. Failure to satisfy this condition can be subject to a criminal charges as stipulated in Article 108 of the Plantation Law which states that plantation business actors who clear and/or process land by

[11] Consideration Section State Gazette No. 32 of 2009 concerning Environmental Protection and Management
[12] Article 1 number 1 PP 27 of 2012 concerning Environmental Permits
[13] Article 1 number 2 1 PP 27 of 2012 concerning Environmental Permits
[14] See Article 71 PP 27 of 2012 concerning Environmental Permits
[15] See Article 67 paragraph (1) of the Plantation Law
[16] See Article 56 paragraph (1) of the Plantation Law

burning as referred to in Article 56 paragraph (1) of the Plantation Law are subject to imprisonment up to 10 (ten) years and a maximum fine of Rp.10.000.000.000 (ten billion rupiah).

Availability of Rules regarding Location Permits in Forest Area containing HCV

Location permits are defined as permits granted to companies to obtain land needed in the context of investment which also applies as a permit to transfer rights, and to use the land for the purposes of their capital investment business. In other parts, location permits are defined as permits granted to companies to obtain land needed in the framework of investment which also applies as a permit to transfer rights, and to use the land for the purposes of its capital investment business. Location permits can come from forest areas through a release scheme. However, the requirement to get an area in a forest area for plantation activities requires various technical considerations.

The intended land can come from forest areas and other allotment areas. Areas originating from forest areas are not necessarily defined as affirmation of land rights. The Regional Government, the Ministry of Environment and Forestry (KLHK), and the National Land Agency examine various complete conditions and procedures including the need for other considerations, for example areas that have HCV.

According to the law, there is a complexity of collaborating with the pull-out of institutional authority over the use of forest areas and other areas of use for palm plantation activities. MEF has the authority over the management of forest areas but in forest areas there is a stretch of land which is under the authority of the National Land Agency. Although this aspect of authority has adequate reasons from the legal side, the existence of HCV in forest areas or forest areas that have been extricated for plantation activities should be of concern to these two institutions.[17]

Technical standardization and containing 'orders' for the urgency of HCV consideration actually emerge from the area of non-forestry cultivation, namely the use of HCV considerations by the Minister of Agrarian and Spatial Planning National Land Agency through Circular Letter Number 10/SE/VII/2015 concern-

[17] Then as a follow up to the regulation of forest area extrication, KLHK issued Minister of LHK Regulation Number P.96/MENLHK/SETJEN/KUM.1/11/2018 concerning Procedures for the Extrication of Production Forest, which stated among other things, applications for the extrication of Production Forests (HPK) for palm plantations that have been submitted before the entry into force of Inpres Number 8 of 2018 can only be processed in HPK areas that are unproductive.

ing Issuance of Permits on High-Value Conservation Forest Areas (High Conservation Value Forest) addressed to Governors, Regents Mayors, Heads of Regional Offices of the National Land Agency, and Heads of Land Offices. The main consideration for this letter is the aspect of protecting areas. Presidential Instruction Number 8 of 2018 concerning Delays and Evaluation of Licensing of Palm Plantations and Increased Productivity of Palm Plantations have the same objective regarding the existence of HCV in the implementation of oil palm plantations.

Although from a legal standpoint, Circular Letter (CL) is not a legal document but internally the position of this letter specifically binds the Governor, Regent/Mayor not to issue location permits in the forest area and other use areas (APL) from the extrication of HCV forest areas. As well, the legal structure in the form of Presidential Instruction above can be seen as a results of 'guerrilla regulation' by wanting to complete the higher rules as a consequence of regulations.[18] In the legal structure, the CL and Presidential Instruction above do not have an element of coercion on the permits that have been issued due to consideration of legal certainty aspect.

The crucial issue of the CL lies in the HCV data before the location permit is issued. The permit applicant, for instance, might not identify the existence of the forest area prior to the submission of a location permit and worse still the state pays very little attention to the presence of HCV. This practice is counterproductive in the efforts to save the forest area and it definitely ignores the principle of prudence. The application of the precautionary principle in granting licenses for palm plantations is in line with the principle of licensing, which is to divide the allocation of natural resources to a limited nature, the nature of the environment and society but also has the aspect of directing and selecting the right people who can receive permission (Spelled and Berge in Pudyatmoko, 2009).

Consideration of the extrication of forest areas for activities outside the forestry sector is based on the demands of national development dynamics and the aspirations of the community based on optimizing the sustainable and sustainable distribution of functions and benefits of the Forest Zone, and the existence of Forest Areas with sufficient area and propor-

[18] 'Guerrilla regulation 'is only to illustrate that when group or individual interests are not accommodated at a higher level of regulation, influencers will try to incorporate them into the rules below because each level of statutory provisions is made by different authorities (see: Indonesian Legal Structure namely Constitution / Constitution, Law / Perpu, PP, Presidential Regulation, Regional Regulation).

tional distribution[19]. Although regulations regarding changes in the designation of forest areas are readily easy, there are provisions that needs further discussion relating to HCV.

Article 48 of Government Regulation Number 104 of 2015 concerning Change of Designation of Area of Forest that Has Significant Impact and Extensive Scope with Strategic Values states:

(1) The change of designation of the area of forest that has significant impact and extensive scope with strategic values shall be the change of designation of area of forest that can generate impacts to: A. bio-physic conditions; or B. social and economic conditions of people.
(2) The change that can generate the impact to the bio-physic conditions as cited in paragraph (1) letter A shall be the change that causes the deterioration or improvement of the quality of climate or ecosystem and/ or water management.
(3) The change that can generate the impact to the social and economic conditions as cited in paragraph (1) letter B shall be the change that causes the deterioration or improvement of the social and economic qualities of people and it is for the sake of current and future generations.
(4) The change that can generate the impact to bio-physic condition or social and economic condition as cited in paragraph (1) shall include 2 (two) categories of being: A. effectual; or B. in-effectual
(5) The change that can generate the impact to bio-physic condition or social and economic condition of people shall be based on guideline and criteria.
(6) Further provision concerning the guideline on and criteria of the categories as cited in paragraphs (4) and (5) shall be regulated under a Ministerial Decree.

Thus, the process of submitting a location permit application is required for technical considerations, which is not to sacrifice public interests including not interfering with the use of the surrounding land, fulfilling the principle of sustainability, and paying attention to the principles of justice.[20]

In the legal standpoint, regulations regarding location permits and decisions regarding the extrication of forest areas do not conform to the requirements to obtain a Plantation Business License (PBL). One of the conditions for obtaining a forest area is when the applicant attaches an PBL, meaning that the permit holder does not yet have a plantation area and is only limited to a map of proposed land requirements, while the available provisions require prior land ownership before carrying out plantation activities.[21]

[19] Article 2 of the Republic of Indonesia Government Regulation Number 104 of 2015 concerning the Procedure to Change the Designation and Function of Forest Areas

[20] Article 3 BPN Head Regulation Number 2 of 2011 concerning Guidelines for Land Technical Consideration in Issuance of Location Permits, Location Determination and Permit to Change Land Use

[21] Article 42 of Law Number 39 of 2004 concerning Plantation

Article 45 of Law Number 2004 concerning Plantation requires the presence of environmental permit in the first place. This obligation means not reaching out to the requirements for obtaining location permits and releasing forest areas even though the object being applied has the potential to produce negative impacts. Environmental aspects are not regulated thoroughly and firmly, for example, whether the release of forest area is still applicable when the area is a HCV area. This fact confirms that there are no clear and binding regulations regarding HCV consideration in the process of granting location permits for oil palm plantations.

LEGAL SCHEME FOR HCV CONSIDERATION ON THE USE OF FOREST AREAS FOR PALM PLANTATIONS

There are at least three prerequisites that must be addressed in the regulatory substance regarding the use of HCV areas through the mechanism of releasing forest areas for oil palm plantations, namely the availability of Forest HCV data, the ability of licensors to recognize and eliminate risks, and the integration of HCV considerations and environmental permits.

Availability of HCV Area data

HCV data should not come from plantation area users but must come from the government. HCV data from the results of identification and verification, including the calculation of intrinsic value from the environment will be useful in supporting the argument that the importance of forest protected areas is of strategic value for environmental protection. If this data comes from the issuer of the forest area (forestry) permit, the head of regency or the governor can propose a reduction and cancellation of the proposed extrication of forest area (before the permit status is issued) - if there is evidence of the existence of HCV.

Decreasing Cultivation Rights owned by permit holders is not easy to do because it is related to land rights, but if the plantation area has HCV, various legal options can be taken. Various options can be chosen including asking the Cultivation Rights holder to issue the HCV section on the Cultivation Rights map on the grounds that the Cultivation Rights on shared assets should not be eliminated in the name of business interests. This is made possible by Article 34 of the LoGA which states that Cultivation Rights is deleted because time expires, terminated before the period expires because something

happens, extricated by the right holder before it ends, revoked in the public interest, abandoned, and the land is destroyed. Permit holders who do not clear land will be burdened with the provisions of Article 16 of the Plantation Law which requires the existence of business activities at certain times with the consequence of returning the area to the government. This option does not mean that there is no legal risk but is better than sustainable risk and has social and environmental dimensions. In addition, the person concerned is not given an extension of the DCR permit on land or does not provide conversion services for other uses (for the same/different commodity) above the same area.[22]

The Ability of The Licensor To Recognize Risk And Willingness To Eliminate Risks

The legal licensing regime was born because there was a norm formulation of acts that were qualified as prohibited acts. Forbidden actions constitutes the opposite of any other action that is allowed by the state. The legal concept concerning the prohibition is known in various fields of law that places high-value influences as a basis for norms. Granting permits for natural resource management confirms that acts of entering forest areas, gardening in forest areas, cutting down the trees in primary forest areas are prohibited unless stated otherwise.

In the legal systems standpoint in various countries natural resources is treated as a common property. However, within certain limits and amounts, each country has limited the access of individuals to natural resources and restricted corporate control to avoid threats to the public interest. Restrictions on the use of natural resources (NR) on the basis of public interest considerations have an adequate basis, namely aspects of limited numbers, sustainability, the nature of hazards contained in prospective user activities, utilization justice, legal protection for those affected, and even protection for NR potential users.

The problem that arises is the ability of the permit provider to have sufficient and sufficient knowledge to recognize the risks of using HCV areas for oil palm plantation activities. A licensor is a person who selects people as recipients of public goods which are scarce in nature. Designation of forest and land resources to a number of licensed recipients will create a

[22] The practice of shared land use for various commodities occurs in East Kalimantan and North Kalimantan. IUP plantation holders have direct contact with other users in public companies in the mining sector. Through a mechanism that is not recognized in the licensing system, mining companies carry out activities on licensed plantations and mining companies that have permits over plantation permits.

risk distribution to the environment and the community. The prerequisite for permit issuer readiness to recognize the risk should be followed by the ability to recognize the right person (prospective recipient of the permits). The applicant's portfolio as an organizer of a plantation business that has a stake in the environment and the community must be the main concern of the permit issuer. The licensor must not neglect the principle of prudence so as not to result in the occurrence of the transfer of public goods to legal subjects who are financially capable but in the meantime threatening public security.

Willingness to give permission to eliminate risks hence means that the permit issuer can reject the application if it is known that there is an HCV element in the requested area. According to the law, this practice can be justified when aspects of technical considerations have set HCV as part of licensing requirements. The technical criteria that include HCV considerations depend on the ability of the permit provider to recognize the risk and practice the principle of prudence.

Integration of HCV Considerations and Environmental Permits

Licensing institutions, especially in the service sector, are not groups of government administrators who may make technical regulations except only to formulate mechanisms and procedures for administering permit services. Authorized institutions, especially the Environment, Forestry, Plantation Agency are the parties giving technical considerations for the adequacy of permit conditions particularly when the HCV aspect is one of the requirements.

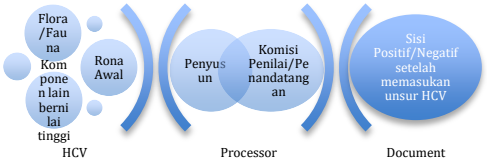
The standard procedure for licensing services that includes HCV requirements will affect the contribution of environmental documents in the form of EIA/Environmental Permits and Land Clearance Permits. Introducing HCV in an EIA/Environmental Permit is not against the law because it will strengthen community and environmental safety network. In terms of authority, local governments can incorporate this requirement as a consequence of the duty of regional heads to protect the environment as intended in Law Number 23 of 2014 concerning Regional Government, especially in the appendix to regional authorities with particular concern of Provincial and District/City.[23]

The EIA does not consider HCV in the reviewing process of palm plantation

[23] Law Number 23 Year 2014 concerning Regional Government

permit, which reveals how EIA documents fail to recognize and anticipate the impacts the palm plantation has on society and the environment. The approved EIA document that did not mention any major and important impacts in the HCV area is a study that needs to be reviewed again.

EIA documents containing HCV considerations also determine the direction of the implementation of palm plantations. The assumptions that have been built in mitigating environmental risk will be clearly illustrated on how to manage large and important impacts on humans and the environment, as illustrated below:



Information of the HCV presence is very important in the EIA study as an object of evaluating the feasibility of activities. From a legal standpoint, this component is the center of legal decisions in general because they are generated out of calculations that negate social and environmental risks. HCV information containing scientific truth must be prepared by the EIA drafting team or certain parties who have the authority to assess and find out the truth of HCV content from forest and land components. Information on HCV data can come from government agencies responsible for forestry or other regional government elements.

EIA compilers or the brains of the formation of documents (processors) must include people who have the potential to assess the impact of a plantation activity. Dropping legal requirements simply by posting notifications through mass media will not help the participation of the public. The position of the representation of potential victims will be smaller if the PFIC study is also not included in the substance of the EIA (chapter measurement of social influence) including the adequacy of representatives and relevant people near palm plantations.

Post-determination of environmental permits/EIA, this document is far from the reach of potential victims due to limited access but from a legal standpoint there is still a mechanism to obtain it, both by ordinary requests and using access tests. EIA documents/important environmental permits for potential victims or parties that have the potential to get impacts from plantation activities are quite important. EIA documents can be used to see the truth of the process, substance, HCV protection and even for the purposes of examination, request cancellations in court, and

request legal accountability to proponents, EIA compilers, EIA Assessment Commission, and authorized agencies that put their signature on environmental permit documents / EIA.

HCV is not only in conservation forest areas but also in other forest areas or even in the APL area. The results of a gap analysis of conservation areas (Ministry of Forestry, 2010) show the existence of high conservation value areas covering an area of 104.9 million ha outside of conservation forest areas (an important ecosystem and connecting ecosystem)[24]. The use of HCV forest areas for palm plantations is unavoidable because the regulations have opened the door, either through schemes of regional swaps or extrications.

The management of plantations requires at least some permits, including location permits, forest area extrication permits, environmental permits, and plantation business permits. Location permit is given by the governor or head of regency based on his authority as part of the condition for obtaining forest area extrication (Article 9 paragraph 1 letter b and c of Ministry Regulations Environmental and Forestry P.51/MinEA/Secretariat General/KUM.1/6/2016 concerning Procedures for Conversion of Production Forest Areas) jo. Law Number 23 of 2014 concerning Regional Government (attachment letter j sub-sector of Land).

The provisions above do not include the element of HCV consideration as a condition for obtaining location permits or conversion of forest areas. There is a ambiguous relations between norms in terms of the purpose of regional use and forest protection. Identification of HCV as referred in Directorate General Regulations NRCE No.P.8/KSDAE/BPE2/KSA.4/9/2016 concerning Guidelines for Determining Corridors of Wildlife as an Essential Ecosystem not as part of the conditions for obtaining location permits and conditions for redesignation of forest areas. This provision is more a function of mitigating risk and as a guideline or reference for stakeholders to find out the criteria in determining the location that will be used as a wildlife corridor outside the nature reserve area and nature conservation area.

Organic norms like this will be effective in the condition of forest areas that do not yet have rights status (permit) even though identification of HCV also can be done in areas that have been converted for plantation activities. On the status of the

[24] Directorate General of KSDAE. (2017). *Working Paper on the Protection of Essential Ecosystem Services on Island.* Available from http://www.forda-mof.org//files/indikasi_KEE_di_pulau_pejantan.pdf. [accessed May 31, 2018]

area that has not been burdened with rights, it should be the obligation of the regional authority to provide HCV information. Data readiness is a form of commitment on the part of regional governments that do not merely entrust environmental safety to holders of plantation permits. The governor or reagent may refuse to give location permits when the area being requested is a HCV zone, but with the absence of local government version of HCV data, the practice of granting location permits will be a lost cause.

Based on the protection needs of important areas, the governor or regent can make arrangements that include the obligation to identify HCV for all forest areas outside the conservation area for the purpose of considering the provision of location permits as well as the need to determine Essential Ecosystem Areas (EEA). Identification can be a guideline or reference for stakeholders to know the criteria in determining the location that will be used as a wildlife corridor outside the preservation area and nature conservation area (GR 28/2011 concerning Preserve Areas (PA) and Natural Conservation Area (NCA). Regional involvement to makes identification of HCV is compatible with current authorities, namely the obligation to make SEA and manage biodiversity both at the provincial and district levels.[25]

The current use of environmental permits does not help save HCV in the area requested for the extrication of forest areas. The consideration is that environmental permit is intended as a condition for obtaining an activity permit (PBP-Plantation) not as a condition for obtaining a location permit or a requirement to obtain a permit to extricate a forest area or permit to clear land. Location permits do not require a temporary EIA to obtain an PBP requiring an EIA in an approved area as referred to in Article 2 paragraph (1) PP 27 of 2012 concerning Environmental Permits. Integration between EIA preparation activities for location permits, land clearing and wildlife corridor identification activities (Directorate General Regulations P.8/2016) does not have sufficient reason because the object (location) being applied for has no legal certainty. Likewise, the applicant does not have a legal obligation to protect HCV in the requested area except after obtaining a location permit, extrication permit/exchange of forest area, environmental permit, and activity permit.

Although the position of Environmental Permit/EIA does not have the same

[25] See Appendix to Law Number 23 Year 2014 in the Appendix to letter K

scope of regulation with Directorate General Regulations P.8/2016, both have the same basic objectives, namely the protection function. With the similarity of regulatory objectives, in fact the local government can still establish complementary criteria for location permit holders, namely when preparing the EIA. In the preparation phase of the EIA, the clarity location of the implementation plantation activities has been determined. Integration of preparation of EIA and identification of HCV can be done at once. All HCV assessment variables are part of the EIA study object. In the end, the results of the EIA study will determine the feasibility plan for HCV management and protection, as well as useful when determining the feasibility of granting plantation business licenses.

This additional requirement needs special arrangements at the level of governor/regent regulations or regional regulations. The new arrangement does not reduce or conflict with the provisions regarding environmental permits. The scope of its regulation complements the environmental permit provisions that have not been sufficiently regulated regarding HCV protection in the area. In terms of the process, identification of HCVs that are integrated with the EIA study will strengthen each other and better guarantee the validity of the data provided by the proponent/compiler of the EIA for the requirements with regard to the application of an activity permit. The PBP approved by considering the HCV aspect at the same time becomes one of the substance permits, which includes the obligation of the permit holder to protect HCV.

CONCLUSION

Plantation business is one of the contributors to the distribution of environmental risk with an indisputable indicator, particularly the decline of forest area (deforestation). The use of HCV areas for palm plantations must consider the environment, especially during the process of forest conversion. Taking into account the aspects of environmental justice, regulations need to be arranged in order to establish a better scheme that would include three regulatory substances, namely the availability of forest HCV data, the readiness of the licensors to recognize potential risks and the willingness to eliminate risks, besides HCV consideration integrated into the environmental permit.

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