Addressing industrial pollution in Indonesia: The nexus between regulation and redress seeking

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3 The development of the legal and institutional frameworks

Regulating environmental pollution in Indonesia

Creating a coherent legislative and institutional framework for the regulation of environmental matters is quite a challenge. It involves bringing together new and existing norms, mechanisms, and institutional structures in a coherent manner. This synthesis includes the legal mechanisms of administrative, criminal and civil law, as well as legal and institutional structures that focus on other policy fields, such as public works, industry, forestry and spatial planning.

Since colonial times, Indonesia has had some legislation concerning environmental matters, such as the nuisance-license (*hinder ordonnantie*). However, in the 1970s and 1980s the legislature for the first time acted towards a more coherent legal and institutional framework to enhance public environmental interests. At that time, the environmental consequences of Indonesia's rapid industrialisation became apparent, and the international attention to environmental matters had increased. Indonesia's first Minister of Environment had hardly any administrative power, depending on other Ministries to implement environmental legislation and adjust their sectoral legislation. Therefore, the first Environmental Management Act (EMA) in 1982 was a milestone, showing Indonesia's high ambitions in the field (Bedner, 2008: 189).

The legislature revised the EMA 1982, first in 1997 and again in 2009. Many factors influenced the revisions, including the (limited) effectiveness of the previous Act and changes in the institutional landscape. Both the establishment of environmental agencies in all Provinces and Districts, along with the decentralisation process that began in 1999 particularly influenced the current situation. The revisions also reflected the shifting ideas on how to best govern environmental matters and the roles that the state, market actors, citizens and civil society organisations should play in it.

This chapter identifies the strengths and weaknesses of the current legal framework relevant to the regulation of and redress for industrial water pollution. Section 1 reflects briefly upon how the EMAs have developed. Section 2 focuses on the impact of decentralisation on how environmental problems are addressed. Section 3 discusses, in particular, regulations relevant to water. Section 4 goes more in-depth into the 2009 EMA, and section 5 sums up some of the crucial problems in the current legal framework. Section 6

draws some general conclusions about how the institutional and legal frameworks have developed, and their strengths and weaknesses.[1]

1 The first Environmental Management Acts of 1982 and 1997

In the 1970s, Indonesia witnessed both major industrial developments under the Suharto regime and their environmental consequences. The Ministry of Environment and an Environmental Act did not yet exist. In the highly centralised government structure, the powerful Ministries of Mining, Forestry, Industry and Agriculture established the regulations and policies for their sectors, including those dealing with the environment. The ministries' regional branch offices implemented these regulations and policies at the local level.[2] That provisions related to environmental issues were spread out across various sectoral regulations meant it was difficult to get an overview of environmental standards. The procedures and contents of various sectoral regulations were poorly coordinated and sometimes contradictory. These regulations were designed primarily to serve sectoral interests, ignoring environmental interests and lacking substantive and procedural qualities (Bedner, 2003b: 1-4).

During the 1970s, the political will to improve the environmental legal framework grew, partially because of increased domestic environmental problems. Indonesia's participation in the U.N.'s first major conference on international environmental issues (i.e., the 1982 Stockholm conference) contributed to placing the environment on the national agenda (Niessen, 2003: 66-68). Indonesia's 1973-1978 State Policy Guidelines dedicated a special section to 'Natural Resources and Living Environment', after which the environment remained a topic in general policy guidelines for many years (Hardjasoemantri, 1996: 86-7).[3]

In 1978, Indonesia appointed its first Minister of Environment (Niessen, 2003: 66). However, for over a decade, the Minister merely made policy and coordinated tasks, depending on other ministries to adjust their legislation and implement the regulatory tasks related to the environment. Nevertheless,

1 This chapter focuses on the most relevant legislation concerning industrial water pollution. It is beyond its scope to consider all environmental regulations. These are spread out over various bodies of legislation on specific sectors and policy fields, such as forestry, conservation of natural resources and ecosystems, agriculture, mineral and coal mining, industry and spatial planning (Kartikasari, 2016).

2 EMA 1982: art 18, and EMA 1997: artt 8-12.

3 The State Policy Guidelines of 1978-1983, 1983-1988, 1988-1993 all contained a special chapter on Natural Resources and the Living Environment. The Five-Year Development plans further elaborated the issue. The 'Second Long Term Development' plan for the period between 1993 and 2018 also recognised the importance of environmental preservation (Hardjasoemantri, 1996: 87).

his appointment marked the government's growing consideration of environmental protection (Bedner, 2003b: 4; Rahmadi, 2006: 131; Otto, 2003: 17).

1.1 Environmental Management Act 1982

In 1982, Indonesia's first Environmental Management Act (EMA 1982) was promulgated.[4] It had great symbolic value (Bedner, 2008: 194). Its mere 24 articles were an 'umbrella Act', setting the agenda for further legal drafting. The EMA 1982 also contained general principles, serving as a foundation for evaluating and adjusting all environmental sectoral legislation (Niessen, 2006: 171; Bedner, 2008: 190). However, the general character of the provisions was a considerable weakness, as the Act lacked mechanisms for implementation. As a result, implementation regulations were enacted years after the EMA or never at all[5] (Peeters, 2006; Bedner, 2003b; Otto, 2003).

EMA 1982 nevertheless mentioned the basic elements of the regulatory chain. The Act referred to environmental quality standards as a basis for environmental protection and required that every business license should include the licensee's obligation to preserve the environment.[6] Furthermore, the Act explicitly required firms to conduct an Environmental Impact Assessment.[7] It did not specify the meaning of monitoring ('*pengawasan*'), other than that it was part of 'environmental management', to be carried out along sectoral lines.[8] EMA 1982 did not arrange for administrative sanctioning or civil law instruments. It did list criminal sanctions, but prosecution depended on the police, public prosecutors and judges, who were generally unfamiliar with environmental matters. Furthermore, criminal procedures were time-consuming and expensive, and evidence was difficult to obtain (Bedner, 2008: 190; Nicole Niessen, 2003: 67-8). On the issue of citizen participation, EMA 1982 formulated the right and obligation of every person to participate in environmental management and emphasised the supporting role that NGOs should play.[9] However, the legislature did not enact implementation regulation on these issues.

The powerful ministries on which the Minister of Environment depended continued prioritising their own sectoral, economic interests over environmental stakes. In response, the government first established the Environmental Impact Agency (BAPEDAL) in the early 1990s and later established regional

4 Law 4/1982.

5 Moreover, case law hardly offered any explanation of how people should interpret the Act's general principles in concrete situations. The Indorayon case of 1988 is an exception, which acknowledged the legal standing of NGOs acting on behalf of victims of environmental damage (Niessen, 2003: 66-7).

6 EMA 1982; artt 1 (6) and 15 in conjunction with art 7 (1, 2).

7 EMA 1982: artt 1 (10) and 16.

8 EMA 1982: artt 1(s), and 17-18.

9 EMA 1982: art 6, in conjunction with artt 1 (12) and 19.

environmental offices (BAPEDALDA's). Thereby, the implementing capacity of the Minister of Environment increased considerably (Rahmadi, 2006; Hardjasoemantri, 1994; 2006). The Minister and BAPEDAL came up with clever ways to expand their regulatory influence. They developed parallel regulatory initiatives to influence industrial behaviour, such as the Clean River Programme (PROKASIH) and the public disclosure programme, PROPER. They used these programmes as alternatives for administrative law enforcement, monitoring industries to pressure them towards improving their behaviour. Section 5 of this chapter, along with chapter 4, both discuss PROPER, because it still plays an important role in the Ministry's regulatory activities and environmental agencies.

1.2 Environment Management Act 1997

EMA 1982 failed to significantly impact industrial behaviour (Hardjasoemantri, 1996; Otto, 2003; Bedner, 2003b: 8). Meanwhile, policy makers and academia were developing new ideas on environmental management elsewhere in the world.[10] These developments eventually made their way to Indonesia, where the legislature enacted EMA 1997.

EMA 1997 improved the legal framework for environmental regulation in various respects. It was more specific and had a broader scope than its predecessor. The Act was praised for the way in which it embraced international concepts and ideas, without losing sight of the particularities of the Indonesian context (Bedner, 2008: 192). The Act introduced the sustainability principle[11] and strengthened certain environmental rights and duties, such as the right to environmental information for communities,[12] and the duties of firms to provide true and adequate information and to manage their waste and hazardous and toxic materials.[13]

EMA 1997 increased the regulatory requirements for individual firms. When applying for a business license, firms had to consider spatial management plans and public opinion.[14] They also had to conduct an Environmental Impact Assessment (EIA).[15] The fact that BAPEDAL or BAPELDADA would chair the EIA

10 Indonesia sought knowledge and inspiration from other countries to improve its environmental governance, particularly in Canada and the Netherlands. Intensive cooperation projects with these countries led to new attempts to establish effective environmental regulation (Bedner, 2008: 180-1).

11 EMA 1997: art 3(1).

12 EMA 1997: art 5(2) and its elucidation.

13 EMA 1997: artt 6 (2), 16 and 17. Furthermore, see art 6(1), which arranges that every person has the duty to preserve and protect the environment, while only mentioning the duty of firms to do so (EMA 1982: art 7).

14 EMA 1997: artt 18-19.

15 EMA 1997: artt 15 and 18(1) and elucidations, and art 23.

commission that assessed the applications was a victory for the environmental sector (Bedner, 2008: 181).

Under EMA 1997, the Minister of Environment acquired the authority to monitor firms and delegate this task to officials. These officials could then take samples as well as check equipment, installations and documents.[16] The environmental audit further expanded the monitoring repertoire.[17]

The introduction of administrative sanctions was a major improvement.[18] EMA 1997's provisions on administrative sanctioning allowed the Governor – or the delegated District Head – to prevent or halt violations. They could also carry out safeguarding, mitigating and remedial measures at the violator's expense.[19] In that way, the Governor's dependency on other sectors decreased considerably. The Act also explicated the right of citizens with a direct interest to request the Governor or District Head to impose administrative coercion or revoke the business license of a violating industry.[20]

The Act also expanded the possibilities for criminal law enforcement. The number of criminal law enforcement provisions increased from 1 to 8, criminal sanctions intensified, and special civil servants were given the authority to carry out criminal investigations. Criminal investigations seemingly became less dependent on the police. However, the special investigators could not report to the public prosecutor independently from the police, as they had to inform the latter first.[21]

The possibilities for recovering damages through the private law framework also improved. The Act strengthened provisions on both strict liability and the 'polluter pays' principle (Sakumoto, 2007: 216-20).[22] The Act's introduction of out-of-court dispute settlement intended to make dispute settlement more accessible for citizens affected by pollution, offering an alternative to going to court. EMA 1997 even made it obligatory to attempt out-of-court dispute settlement before bringing a case to court.[23] The Act strengthened the positions of citizens and civil society organisations. Citizens should have a role in decision-making and other environmental preservation efforts.[24] The Act

16 EMA 1997: artt 22 and 24.

17 Notably, the environmental audit (EMA 1997: artt 28-29) is not part of the Act's monitoring chapter, but directly follows the chapter on administrative sanctions. This position in the Act's structure suggests that the environmental audit is associated more with the system of sanctions than as a monitoring instrument. There are indications that, in practice, the audit is considered to be a type of administrative sanction or substitute.

18 EMA 1997: artt 25-27. The possibility to impose administrative sanctions is an indispensable aspect of regulation, offering the tools for the authorised government institution to immediately take measures to halt violations (Stroink, 2006: 183).

19 EMA 1997: art 25.

20 EMA 1997: artt 25(3) and 27(3).

21 EMA 1997: artt 40-48.

22 EMA 1982: art 20(1) and EMA 1997: art 34(1), EMA 1982: art 21 and EMA 1997: art 35.

23 EMA 1997: artt 31-33.

24 EMA 1997: art 10(c) and elucidation.

recognised class action as a legal proceeding and codified the legal standing of NGOs (EMA 1997: art 37-38). Citizens, communities or NGOs could take legal action against environmental problems through the private law framework.[25] Besides that, they could request the government to take enforcement measures through administrative law mechanisms.[26] As we will see later, in reality, cases are often dealt with through the private law framework, and particularly through out-of-court dispute settlement or mediation, and policy-makers and officials frequently consider such resolutions as substitutes for regulation based on the administrative law framework.

Despite its improvements, various scholars criticised EMA 1997 for providing insufficiently concrete economic-technical norms. For example, in the area of licensing, the Act did not specify the required level of environmental protection (Peeters, 2006: 117-9), and it did not provide details on how public opinions should be taken into account. Although the general rules in the Act occasionally provided further implementation guidance, it was often formulated in too broad terms, delaying the enactment of implementing regulations and sometimes hindering their enactment all together (Niessen, 2003; Bedner, 2003a).[27]

Furthermore, scholars criticised EMA 1997 for not clearly allocating authorities, both vertically (i.e., between the sectoral institutions) and horizontally (i.e., between the various administrative levels) (Niessen, 2006: 168-70; Peeters, 2006: 117-9). Norm-setting, monitoring and enforcement authorities were not in the hands of one institution. For example, the Minister of Environment had monitoring authority,[28] while the Governor had administrative sanctioning authority. However, in practice, the Governor was unlikely to use this power because, in the centralised government structure of that time, he was prone to encounter resistance from the powerful sectoral Ministries at the central level. Support from the Minister of Environment to the Governor would be of little help given the unwritten departmental hierarchy in which the Ministry of Environment could not measure up against Ministries with more economic importance. Indeed, it made it hard to effectuate the administrative sanctioning power. Even more problematic was the division of authority between the various sectors, which resulted in a situation in which an industry was required to have at least seven types of licenses issued by various institutions (Rahmadi, 2006: 136-7).

25 EMA 1997: art 39.

26 EMA 1997: art 27(3).

27 Some authors have argued that the EMA, as primary legislation, should more specifically define the scope of environmental protection and decision-making criteria (Niessen, 2006; Peeters, 2006: 117-9). However, others have argued that a general Act should not be too detailed regarding norms because it would make the primary legislation very extensive (Rahmadi, 2006: 136) and the legislation less flexible towards adjusting to new circumstances. Furthermore, it is difficult to pass such a detailed Act through parliament (Bedner 2008).

28 EMA 1997: art 22.

EMA 1982 recognised the importance of coherency in environmental legislation. It mentioned 'integration' repeatedly, but failed to specify its meaning and outline mechanisms for achieving it (Bedner, 2003b: 3; Otto, 2003).[29] Although EMA 1997 was even more explicit in its ambitions for coherency, it also lacked the mechanisms to realise them.[30] This topic dominated the debate on environmental management for years. 'Integration' was the magical recipe that would solve many, if not all, environmental management problems (see, e.g., Rahmadi, 2006). However, it was also unclear in these debates what 'integration' (or, e.g., 'harmonisation') referred to exactly (Berge and De Waal, 1988; Otto, 2003: 15-6; Bedner, 2003b: 8). Moreover, the debate seemed to hardly consider the legal and institutional Indonesian context (Bedner, 2003b: 7; Peeters, 2006: 93-4). A lack of conceptual clarity made it difficult to think through all the details, the necessary steps, the consequences and the potential difficulties that were particular to the Indonesian context (Otto, 2003).

2 DECENTRALISATION AND ENVIRONMENTAL REGULATION

The EMAs of 1982 and 1997 reflect that the legislature drafted them at a time when Indonesia had a highly centralised government structure. However, after three decades of Suharto's centralised regime, there was a growing desire for more regional autonomy (Niessen, 2006: 143, 159-60). A decentralised system was believed to offer a 'people-centred' approach to local problems. Democracy would be more effective when the government would be more accountable to its constituency, leading to more economic and social justice (Kothari, 1996: 35-41; Niessen, 2006: 144-5). Some warned that decentralisation could increase regional differences and give power to local elites without holding them accountable. It was also highly uncertain if the local governments, particularly the Districts, had sufficient capacity and expertise to carry out their new tasks (Bedner, 2010: 40-1).

Only one year after the enactment of EMA 1997, Suharto was forced to step down. In 1999, a sweeping process of decentralisation began. The process had significant consequences for environmental regulation and created new challenges in the area of dividing authority. Environmental regulation already lacked horizontal coherency between sectoral ministries, and now decentralisation demanded also vertical coherency between Districts, Provinces and the Central Government (Niessen, 2006: 169).

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29 Provisions of the EMA were integrated into sectoral legislation at a very slow pace. For example, the 1967 Forestry Act was replaced in 1999 and the 1974 Water Act was revised in 2004 (Act 7/2004). However, consistent use of terminology throughout these acts remained problematic (Rahmadi, 2006: 134-5).

30 EMA 1997: Considerations letter b, artt 1(2), 9(2), (3) and (4), and elucidation, general, point 3.

2.1 Regional Government Act 1999

The Regional Government Act of 1999 (RGA 1999)[31] introduced a radically decentralised government model. Regional governments, especially District-level governments, gained more power[32] and became more self-reliant[33] (Niessen, 2006: 141; Van Klinken and Nordholt, 2007; Barr, Resosudarmo, McCarthy and Dermawan, 2006: 2-3). The Provincial positions changed significantly.[34] During the Suharto era, Provinces were important regional representatives of the Central Government and implementers of national policy. As such, the Provinces had expertise in many policy fields, including environmental regulation. With the enactment of RGA 1999, the Provincial authorities were reduced to cross-District matters, tasks delegated from the Central Government, or Districts lagging in their duties[35] (Aspinall and Fealy, 2003: 4).

RGA 1999 was inconsistent in dividing authority on environmental matters. In principle, 'the environment' became a policy field under the Districts' authorities, but Provinces gained authority on 'environmental control'.[36] Meanwhile, the Act gave Districts general licensing and implementation powers.[37] It was unclear what the Provincial authority to conduct 'environmental control' entailed.[38]

Government Regulation (GR) 25/2000 elaborated how 'environmental' authorities were divided but was occasionally inconsistent with RGA 1999. The Central Government received more powers than RGA 1999 had arranged.[39] Furthermore, the GR determined that, in line with RGA 1999, the Province was authorised to conduct 'environmental control' in 'transboundary' (i.e., cross-

31 Law 22/1999.

32 In principle, the Central Government remained authorised in only a few fields, including the exploitation of natural resources and conservation (RGA 1999: art 7). In all other policy fields, regional governments became authorised.

33 Act 25/1999 on 'Fiscal Balance between Centre and Regions' and Government Regulation 25/2000 on 'Authority of the Government and the Authority of the Provinces as Autonomous Regions' further strengthened the idea that the Districts needed to be self-sufficient (Niessen, 2006: 161).

34 RGA 1999, art 11 states that the authority of the Districts includes all authority, except those authorities that are mentioned in art 7 and 9, describing the authorities of the Central Government and Provinces (RGA elucidation: 'general', letter h; Niessen, 2006: 143).

35 RGA 1999: art 9 and its elucidation.

36 RGA 1999: art 9 and its elucidation.

37 RGA 1999: art 8 and its elucidation.

38 Other examples of inconsistent or at least confusing division of authority arrangements are that regional governments became responsible for maintaining environmental sustainability (RGA 1999: art 10), but natural resources and conservation remained under the authority of the Central Government (RGA 1999: art 7 (1) and (2)). Regional governments would at the same time manage the natural resources within their territory.

39 RGA 1999 arranged that five core policy fields remained under the authority of the Central Government, plus eight other fields. In contrast, article 2 of GR 25/2000 summed up twenty-five policy fields in which the Central Government had standard-setting authority.

District) cases.[40] The GR did not explain the extent this meant a shift in all norm-setting authorities (including licensing), monitoring and administrative law enforcement and how, if at all, such a shift should occur. It also remained unclear whether the 'transboundary' character of a case referred merely to the location of a particular firm or activity, or also to its impact.

GR 25/2000 elaborated on the RGA 1999 arrangement that authorised a Province when a District did not meet the minimum service standards.[41] This arrangement seemed to offer an opening for 'second line enforcement', meaning that a higher administrative level would take over the authority of a lower administrative level. However, such a shift of authority could only occur with District-level and presidential permissions.[42] Finally, 'in agreement' with the Districts, the Province was allowed to implement the Districts' authorities.[43]

Soon after, many legislators and officials at Central Government level considered the decentralisation process, initiated in 1999, as too drastic and sudden. Districts were often incapable of executing their tasks properly. Moreover, their financial independence led to abuses of power and corruption (Van Klinken and Nordholt, 2007; Niessen, 2006). GR 25/2000's rather loose formulations allowed for multiple interpretations, and districts used it to enlarge their powers and sometimes even went as far as to enact local legislation that was not in line with higher legislation, in violation of article 70 of RGA 1999 that assumes that lower legislation will be in line with higher legislation. Districts became more inward looking, uninterested in collaborating with other Districts and reluctant to obey higher levels of government (Niessen, 2006: 168-9). Therefore, the Central Government deemed a revision of the RGA 1999 necessary, and the RGA 2004 was enacted.

2.2 Regional Government Acts of 2004 and 2014

Under the new Regional Government Act (RGA 2004),[44] the Central Government retained authority in the same fields of government as under RGA 1999,[45] and regained some grip on the Districts, gaining the authority to suspend District Heads in cases of corruption (Van Klinken and Nordholt, 2007: 14-5).[46]

The Provinces retained authority over several policy fields, including environmental control. They lost the purview over certain policies, including energy, and gained authority over others, such as public order and tranquillity,

40 RGA 1999: art 9 and GR 25/2000: art. 3(3).
41 RGA 1999: art 9 and GR 25/2000: art 3(3).
42 GR 25/2000: artt 3 and 4.
43 GR 25/2000: art 3(4).
44 Law 33/2004.
45 RGA 2004: art 10.
46 The regional parliaments became less powerful because both District heads and governors were no longer elected by the regional parliaments, but through direct elections.

and public facilities and infrastructure.[47] Overall, Provinces regained power at the expense of the Districts (Aspinall and Fealy, 2003: 4). However, RGA used different terminology to indicate which government level it was authorised in a particular matter. The Act simply spoke of 'Provincial' and 'District scale' affairs.[48] However, the Act did not define these concepts further.[49] RGA 2004 did not clarify what the Provincial authorities in 'environmental control' entailed. It merely stated that the decisive factor was the 'Provincial' or 'District scale'.[50] Regarding the division of government affairs between the Central Government and the regional governments, Government Regulation 38/2007 only mentions that 'environment' is under the authority of the regional governments.[51] Court decisions and the resulting body of case law do not offer relief in interpreting the legislation and providing clarity, as the role of case law in Indonesia is generally minimal (Bedner, 2013).

The legislature revised the Regional Government Act again in 2014. Since it was enacted after I conducted fieldwork for this study, it is beyond the scope of this research to discuss it in detail. Nevertheless, future research should note that the Act appears to arrange for Provincial licensing authority in cases with cross-District impacts.[52] During discussions with the Ministry of Environment and Forestry, it became apparent that officials had not generally recognised this consequence of RGA 2014 and that, in practice, Districts continue to issue licenses to these firms along 'transboundary' rivers.[53] This can be problematic because a licensing District may tend not to take into account the

47 RGA 2004 art 13.

48 RGA 2004: artt 13 and 14.

49 RGA 2004: art 11(4) states that implementation should be based on the minimum service standards. However, it is unclear what the implications are when these standards are not met, and whether authority then shifts to a higher administrative government level. The implementing regulation on these minimum service standards (Ministry of Environment Regulation (PerMenLH) 19/2008) mentions in art 1(5) and (6) that Provincial environmental agencies conduct government affairs at Provincial environmental fields, and District agencies do this at the District environmental field, but does not refer to the possibility of an authority shift if the District does not implement according to the minimum service standards. However, Article 2 states that one of the obligations of the Provinces is to follow up on environmental complaints, but it is unclear how this relates to a possible shift of authorities. For example, it is unclear whether and to what extent a Province can (or should) handle a complaint that concerns a firm or activity that, in principle, falls under the District's authority.

50 RGA 2004: artt 13(1) j and 14(1).

51 GR 38/2007: art 2.

52 RGA 23/2014: Annex 1K (*Lapiran: Pembagian Urusan Pemerintahan Bidang Lingkungan Hidup*) states that in 'cross District border' cases, the Province is authorised to conduct 'prevention', 'mitigation' and 'recovery'. According to the EMA 2009 as well as GR 82/2001, which will be discussed below, 'prevention' includes licensing authority.

53 This stems from a discussion with officials from the Directorate for Water Pollution Control of the Ministry of Environment and Forestry and team of 'Making Environmental Regulation Work for the People' (MERW) project, including the author, on 3 October 2017, in Jakarta.

effects of discharged wastewater further downstream, across its District borders.

In sum, after the decentralisation was set in motion, the details of the precise divisions of environmental regulatory authority between the administrative levels of Districts, Provinces and the Central Government remain unclear.

3 WATER LEGISLATION

While the EMAs of 1982 and 1997 hardly paid specific attention to water quality issues, the Ministry of Public Works developed legislation that did. The Government Regulation 82/2001 (GR 82/2001) on Water Quality Management and the Control of Water Pollution is of particular relevance. It is still in force today and is based on the Water Act of 1974.

3.1 Water Act of 1974

During colonial times, the General Water Regulation (*Algemene Waterreglement*) of 1936 consolidated disparate water legislation. Its focus was not on water quality, but rather on issues surrounding water quantity. More specifically, it arranged irrigation systems that were important for sugarcane production.

In 1974, the Water Act was promulgated. It was an 'umbrella act', consisting of only 17 articles that required many implementation regulations. The Act's preamble appeared ambitious, covering a wide spectrum of water resource management issues such as river basins, irrigation, water supply and water pollution control. However, the Act only focused on surface water and not on groundwater.[54] Furthermore, the Ministry of Public Works had prepared the Act. It focused on aspects of water quantity, specifically irrigation, rather than on water quality. The Province was generally the institution authorised to issue water usage licenses (Teeuwen, 2016), and it has remained so throughout the years.

3.2 Government Regulation on Water Quality Management and Pollution Control of 2001

Despite the Water Act 1974's limited attention to water quality issues, one of its implementing regulations is the Government Regulation on Water Quality Management and Water Pollution Control (GR 82/2001). This GR is also an

54 The Ministry of Public Works had prepared the Water Act. However, groundwater fell under the authority of the Ministry of Energy and Natural Resources.

implementing regulation of EMA 1997. Both of these Acts offered limited guidance on the interpretation of some vital concepts. As a result, the GR's interpretation of these concepts has been influential, especially for the regulation of industrial water pollution.

'Management' (*pengelolaan*) in GR 82/2001 refers to the management of the river's general water quality.[55] 'Control' (*pengendalian*) on the other hand refers to the regulation of individual firms and activities. In the norm-setting phase, 'management' and 'control' are closely related. The river's quality standards determine whether Districts can issue additional licenses to firms. However, Kartikasari (2016) argued that, in practice, this regulatory mechanism often fails because the Governor frequently neglects his obligation to calculate the carrying capacity of the river. Moreover, Districts do not have complete inventories of firms to whom they have issued a license. As a result, the Districts are unable to calculate whether they may issue more licenses without exceeding the river's general quality standards. Furthermore, Kartikasari claimed that the Districts poorly integrate monitoring of the river's overall quality (*pemantauan*) and the behaviour of individual licensees. For example, when overall river quality monitoring shows that the quality is below standard, no mechanism can increase the monitoring of individual licensees to detect possible violating behaviour (Kartikasari, 2016).

'Water pollution control' (*pengendalian kwalitas air*) in the GR 82/2001 refers to the regulation of individual licensee behaviour. It consists of 'prevention', 'mitigation' of damages by the violator or the government and 'recovery' of damages.[56] The GR 82/2001 does not define 'prevention', but it is usually understood to mean norm-setting mechanisms, such as planning and licensing.[57] It is important to note that, although GR 82/2001 arranges for the monitoring of firms and activities (*pengawasan*),[58] and for law enforcement (*penegakan hukum*), the regulation does not frame these arrangements as part of 'control'.[59]

GR 82/2001 is still in force today, but at the time of writing this book in 2018, the Ministry of Environment and Forestry is preparing a revision. A revision is important because the GR needs to be made coherent with the EMA

55 'Management' mainly refers to standard setting mechanisms for the overall quality of river water. These mechanisms include arrangements on classifying rivers into four categories according to the purpose of water usage. The governor also has an obligation to calculate the carrying capacity of a river in relation to its category and determine the general standards for particular parameters (GR 82/2001: artt 8-12, 18, 20 and 22). 'Management' also concerns the monitoring of the river water's overall quality (*pemantauan)* (GR 82/2001, art 13).

56 GR 82/2001: art. 1(4). 'Prevention', 'mitigation' and 'recovery' translate respectively as *pencegahan, penanggulangan* and *pemulihan.*

57 See, for example, EMA 2009: artt 14-52.

58 GR 82/2001: art 44-47.

59 GR 82/2001: art 48-49.

2009 and the Regional Government Act of 2014. However, in the current revision discussions, stakeholders adopt the limited scope of the term 'control' without much discussion, excluding licensee monitoring and law enforcement. Such exclusions further marginalise the importance of these phases of the regulation process. On the other hand, there is a call to increase citizen participation in the monitoring phase. Section 5 provides a further discussion of the potentially negative consequences of the adaptation of the terminology as used in GR 82/2001 for the regulation of industrial pollution.

3.3 Water Act of 2004

Partially as a result of the World Bank's efforts to stimulate reforms after Suharto's fall, a new Water Act was promulgated in 2004. Although the Act remained a 'framework act' that depended heavily on implementing regulations, its content was more substantial, and its scope was broader than that of its predecessor (Teeuwen, 2016).

A few issues stand out when assessing the norm-setting, monitoring and enforcement elements of the 2004 Water Act. Regarding norm-setting, the 2004 Act introduced new planning instruments.[60] According to Teeuwen, these offered an opportunity to better integrate quantity and quality aspects of surface and groundwater management. However, the Act's licensing arrangements merely concern water quantity issues, especially water utilisation.[61] The Act does not pay specific attention to water quality issues such as water discharge (Teeuwen, 2011). Furthermore, it contains a chapter on monitoring and 'empowerment'.[62] Although the government is responsible for monitoring,[63] the Act suggests a considerable role for 'the community' as well. The Act also explicitly mentions the possibility of a criminal investigation when administrative norms are violated,[64] but it does not arrange for administrative sanctions. By contrast, several implementing regulations of the Act, including Government Regulation 82/2001 on Water Quality Management and Pollution Control, do indeed provide for administrative sanctions.[65]

Like its predecessor, the 2004 Water Act was progressive in the sense that the division of authority was not based on administrative borders, but on

60 Act 7/2004: artt 51 and 59-62.
61 Act 7/2004: artt 8, 9, 14, 15, 16, 38, 39, 45, 46, 47 and 49.
62 Act 7/2004: Chapter IX on 'Empowerment and Supervision' (*Pemberdayaan dan Pengawasan)*, art 70 et seq.
63 Act 7/2004: art 75.
64 Act 7/2004: artt 93-95.
65 GR 82/2001: artt 48-49. See also Government Regulation on Water Resource Management (PP 42/2008): artt 121-123.

natural river basin boundaries[66] (Teeuwen, 2016). The introduction of 'rivers of national strategic interest' was of particular importance. The Central Government then had the authority to license the utilisation of water from such rivers.[67] However, the relation between this arrangement and the divisions of the licensing arrangements in the EMAs of 1997 and 2009, as well as well the Local Government Acts, remained unclear. Section 5 discusses this topic in more detail.

However, the 2004 Water Act is currently no longer in force. In 2015, the Constitutional Court took a drastic decision to annul the Act. Already in 2004, this Court ruled that the 2004 Water Act might conflict with the Constitution because private actors could be granted exclusive rights to particular water resources, while the Constitution guarantees access to clean water to the whole population. The Court ruled that, therefore, the Act's implementing regulations would have to meet certain conditions limiting the power of the private sector. In 2015, the Constitutional Court decided that the implementing regulations had not met those conditions. As a consequence of the annulment, the implementing regulations based on the Water Act 2004 also became invalid.[68] To prevent a legal vacuum, the Constitutional Court reinstated the Water Act of 1974 (Teeuwen, 2016; Johnson, 2015).[69]

4 The Environmental Management Act of 2009

The critiques of EMA 1997, the required adjustments to the decentralised governance model and the development of new environmental management ideas all justified a revision of environmental regulations (Niessen, 2006: 170-182). In October 2009, the political circumstances were right for the enactment of the Environmental Management Act of 2009 (EMA 2009, i.e., Act 32/2009).

EMA 2009 purported to be 'fundamentally' different from EMA 1997, stating that it strengthens the principles of environmental protection and management, and is 'based on good governance because in every formulation and in the

66 One of the main reasons to take a river basin approach was to establish more coherencies in water management. The Central Government became authorised to oversee 69 river basins that crossed Provincial borders or that were of national strategic importance. The Province became responsible for 51 river basins that crossed District borders, and the District authority oversaw 13 river basins (Act 7/2004: artt 13-19, and PerMen11A/PRT/M/2006). The procedure for establishing the division of authority is not clear (Teeuwen 2011).

67 Act 7/2004: art 14.

68 These include GR 42/2008 on Water Resource Management and GR on 38/2011 on Rivers.

69 At the time of writing, a new Water Act had not yet been enacted. However, insiders of the drafting process claim that the draft of the new Water Act resembles the Act of 2004, but without the provisions that attribute a large role to the private sector. This means that the current framework on water pollution control, as based on the Water Act of 2004 will likely largely remain in place (Discussion between Bart Teeuwen and Budi Kurniawan, held within the context of the MERW project, 8 September 2016, Leiden).

implementation process of prevention and enforcement instruments, integration is required regarding aspects of transparency, participation, accountability, and fairness'.[70]

Indeed, EMA 2009 is quite progressive. In the continuous battle between conflicting environmental and economic interests, the Act offers a legal framework that has a greater potential to protect environmental interests than its predecessors. For Parliament to be able to pass such a progressive act, the timing was crucial. In April 2009, elections were held for the National Parliament and the People's Representatives Council (DPR). On 1 October of that year, the newly elected representatives were to be sworn in. Some say that the departing parliamentary members were willing to pass the progressive new EMA because they wanted to leave a legacy. The parliament accepted EMA 2009 right before the newly elected members took office. EMA 2009 came into force on the day of its promulgation, 3 October 2009.[71]

EMA 2009 is much more elaborate than its predecessors. It offers better possibilities for direct implementation. However, the Act still depends heavily on implementing regulations. The Act repeatedly states (i.e., twenty-nine times) that either a Government or Ministerial regulation will provide further details.[72] However, as had been the case in the past, there are no clear guidelines regarding the substance of such implementing regulations. The Act prescribes that the implementing regulations should be in force within one year after the Act's enactment (EMA 2009: art 126). However, after nearly five years, only five of the regulations had indeed come into force (Sembiring, Rahman, Napitupulu, Quina and Fajrini, 2014: 4).

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70 EMA 2009: elucidation, general point 7.

71 Informal discussion with Prayekti Murharjanti, ICEL (Indonesian Centre for Environmental Law), 22 March 2011.

72 The EMA 2009 requires further implementing regulations on matters of planning (art 11), carrying capacity (art 12 (4)), planning procedures (art 18 (2)), quality standards (artt 20(4) and 20(5)), criteria for environmental damage standards (art 21(5)), types of firms that require an EIA (art 23(2)), certification and competency criteria for the EIA (art 28(4)), the EIA in general (art 33), environmental assessments for small firms (art 35(3)), environmental license (art 41), economic instruments (art 43(4)), risk analysis (art 47(3)), environmental audit (art 52), procedures pollution prevention or damage (art 53(3)), procedures for restoration of environmental functions (art 54(3)), guarantee fund restoration (art 55(4)), pollution or damage control (art 56), natural resources conservation and preservation of the atmosphere (art 57(5)), toxic and hazardous waste import (art 58 (2)), toxic and hazardous waste management (art 59(7)), procedures and requirements for dumping waste or materials (art 61(3)), information system (art 62(4)), complaint procedures (art 65(6)), procedures appointment of official environmental watchdog and monitoring (art 75), administrative sanctions (art 83), institutions as dispute resolution service providers (art 86(3)), government responsibility for tort (art 90 (2)), and implementation integrated law enforcement (art 95(2)). Strategic Environmental Assessment and the Environmental Protection and Management Plan (EMA 2009: artt 1(10), 9, 10, 14-19 and 63).

EMA 2009 has a different structure and approach to regulation. It introduces new planning instruments[73] and the environmental license. It also elaborates the articles on 'economic instruments'.[74] The provisions on planning, licensing and economic instruments together form an extensive 'Prevention' chapter.[75] It also contains a chapter on 'Monitoring and Administrative Law Enforcement'. However, these chapters are not ordered in a sequential manner.[76]

By contrast, the EMA 1997 provided arrangements concerning licensing, monitoring and administrative law enforcement sequentially, all within the chapter titled 'Compliance' (*penaatan*),[77] emphasizing the links between these different regulatory phases. EMA 2009's structure does not accentuate the sequential link between these phases of regulation, implying a subtle abandonment of 'command and control' regulation based on administrative law.

Other features of the EMA 2009 also indicate that it weakened arrangements for 'command and control' regulation based on administrative law while strengthening arrangements for alternative approaches to violations.[78] Likewise, the EMA 2009's sections on dispute settlement and criminal sanctioning were lengthier than those of its predecessor.[79] Additionally, as mentioned earlier, the more recent EMA pays substantial attention to alternative forms of regulation (e.g., through its sections on 'economic instruments'). The next section will elaborate on how the neglect of command and control regulation and focus on alternatives approaches may negatively impact the effectiveness of regulatory efforts.

The legislature adopted the EMA 1997 when Indonesia still had a centralised government structure. The legislature then adjusted the EMA 2009 to suit the decentralised government structure. The Act states that 'in accordance with his authority', the District Head, the Governor or the Minister could exercise power to, e.g., issue a license or impose an administrative sanction.[80] As mentioned earlier, the EMA 2009 does not emphasize the links between the different regulatory phases. Nevertheless, it still departs from the principle that the license-issuing government institution is also authorised to monitor and enforce the law. However, this is not the case in 'transboundary' cases and when the lower government does not sufficiently implement its tasks. Initially, the EMA 2009 seems to be in line with the RGA 2004 on this issue. Nevertheless, the

73 Strategic Environmental Assessment and the Environmental Protection and Management Plan (EMA 2009: artt 1(10), 9, 10, 14-19 and 63).
74 EMA 2009: artt 37-43.
75 The chapter 'Prevention' (*pencegahan)* in EMA 2009 runs from article 14 until 52.
76 EMA 2009: artt 71-83
77 EMA 1997; chapter VI on Compliance (*penaatan*), art 18-29
78 Economic instruments are arranged in the EMA 2009 in artt 37-43. Other example of an alternative regulatory approach in the EMA is the information system (art 62). Furthermore, international trademarks (e.g., ISO trademarks), including environmental standards and assessment procedures, have become popular in Indonesia (Rahmadi, 2006: 140).
79 EMA 2009: artt 84-93 and 97-120.
80 See, for example, EMA 2009: artt 10, 29, 31, 36, 37, 39, 55, 59, 61, 71, 72, 76, 82, and 123.

next section will explain that several unclear points remain regarding the division of authority. The next chapters of this book will, moreover, demonstrate that such vagueness leads to problematic practices.

The following section will also elaborate on the above-mentioned features of the EMA 2009 by contextualising them alongside other relevant legislation for regulating industrial pollution and highlighting some of the main weaknesses of the current legal framework.

5 PROBLEMS IN THE CURRENT LEGAL FRAMEWORK TO REGULATE INDUSTRIAL WATER POLLUTION

This section moves beyond just the EMA 2009 to focus on some of the main weaknesses of the most relevant laws and regulations for regulating industrial water pollution. It will consider the use of terminology and its implications, at aspects of planning, licensing, monitoring and administrative law enforcement, as well as the division of regulatory authorities and the tendency to focus on alternatives for administrative law based 'command and control' to regulate industrial water pollution.

5.1 'Control' or 'Management'?

Both EMA 2009 and GR 82/2001 define 'control' (*pengendalian*) as consisting of 'prevention' (*pencegahan*) -including planning, licensing and economic instruments- 'recovery' (*penanggulangan*) and 'mitigation' (*pemulihan*).[81] The latter two notably concern situations where the damage has already occurred or is expected to occur. However, 'control' does not cover aspects of monitoring and enforcement. In the EMA 2009, monitoring and enforcement are part of 'protection and management' (*perlindungan dan pengelolaan)*.[82] However, two features of the legal framework contribute to the neglect of monitoring and enforcement in the regulation process. First, the EMA 2009 does not establish a clear sequential link between norm-setting, monitoring and enforcement. Unlike in the EMA 1997, the EMA 2009 addresses these regulatory phases in separate parts of the Act. Second, the Ministry of Environment and Forestry is currently preparing a revision of Government Regulation 82/2001 on Water Quality Management and Pollution Control. The Ministry's discussions with regional environmental officers, scholars and NGOs usually take 'management' (*pengelolaan*) to concern the definition in GR 82/2001, i.e., general river quality. The discussants do not understand 'management' as the EMA 2009 defines it. As a result, current discussions do not consider 'control' or 'management' to

81 EMA 2009: art 13.
82 EMA 2009: art 1(2).

concern monitoring of and enforcement against industries.[83] This lack of consideration influences the focus and scope of the discussions and reflects the tendency to neglect aspects of monitoring and enforcement in the government's regulation of industries.

5.2 Norm-setting through planning and licensing

The EMAs of 1982 and 1997 have been criticised for lacking mechanisms promoting coherency between all of the disparate environment-related norms (Otto, 2003; Niessen, 2003). The EMA 2009 addresses this issue by expanding the planning instruments, such as the Strategic Environmental Assessment and the Environmental Protection and Management Plan.[84] Nevertheless, Kartikasari (2016) noticed that in practice, there are many problems in the planning phase. For example, Provinces often do not calculate the specific quality standards of a river based on its carrying capacity. Districts usually do not have complete inventories of industrial sources of pollution located along the river. As a result, the licensing government – usually the District – cannot properly determine whether it can issue new licenses without exceeding a river's carrying capacity.

In their critique of the EMA 1997, some authors argued that the introduction of an environmental license could resolve many inconsistencies related to the division of authorities (Peeters, 2006: 117-9). Such a license could replace other environment-related licenses. However, others argued that an integrated environmental license would be a step too far for Indonesia's complex institutional and legislative framework. Bedner (2003) argued that coordinating or harmonising licensing mechanisms could achieve more coherency (Bedner, 2003b: 8, 19).

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83 Discussions with the Ministry of Environment and Forestry, 4 and 5 October 2017, within the context of MERW project and public consultations on the draft revision of GR 82/2001.

84 The Environmental Protection and Management Plan (*Penyusunan Rencana Perlindungan dan Pengelolaan Lingkungan Hidup* or *RPPLH*) is regulated in the EMA 2009; artt 9-10 and 63. As a result, Districts, Provinces and the Central Government are required to describe their efforts to protect and manage the environment. The Strategic Environmental Assessment and the Environmental Protection and Management Plan (*Kajian lingkungan hidup strategis* or *KLHS*) is regulated in the EMA 2009: artt 1(10), 14-19 and 63. Governments are, therefore, obligated to integrate the sustainable development principle into their plans and policies.
Furthermore, the concept of 'ecoregion' was introduced, allowing ecological regions that cross administrative boundaries to be considered in the planning phase (EMA 2009: artt 1(9), (29), 7, and 8). The implementing regulations on these planning instruments are not yet in force or do not provide sufficient guidelines.

Despite these reservations, the EMA 2009 introduced the environmental license.[85] However, several problems still exist. First, the government has found it difficult to integrate all of the environment-related licenses. The different licensing institutions have an interest in keeping their licensing authority, not least because they can charge license fees. On the positive side, the wastewater license might be integrated with the environmental license when the legislature revises GR 82/2001. Meanwhile, GR 27/2012, concerned with the environmental license, introduced a new license. This new 'environmental protection and management license' does not have a legal basis in the EMA 2009, and it is unclear how it relates to the environmental license (Indonesian Center for Environmental Law (ICEL) and Van Vollenhoven Institute, 2017; Kartikasari, 2016).

The second problem is that the legal framework is not entirely clear on which government it authorises to issue the environmental license. In principle, it authorises the District. However, when a firm's location, activity or impact will cross District or Provincial borders, then the Province or the Central Government has the licensing authority, respectively.[86] However, no criteria exist to define a 'transboundary impact', and there are no clear mechanisms for shifting the licensing authority to the Province or Central Government (e.g., when an Environmental Impact Assessment (EIA) shows that the impact will cross administrative borders).

Thirdly, the relation between the environmental license and the business license is problematic. A technical, sectoral, government institution (e.g., the Ministry of Mining or Energy) or one of their regional branch offices issues a business license.[87] However, the EMA 2009 stipulates that a firm needs to obtain an environmental license before it can obtain a business license.[88] In practice, officials often believe that even if an agency revokes a firm's environmental license, that firm is still allowed to operate as long as it has its business license. Therefore, the environmental license does not have an independent position, as revocation in practice does little to stop polluting behaviour. Moreover, an environmental license does not have an expiration date, which means that it is valid as long as the business license is valid. This arrangement leaves few opportunities to tighten any requirements towards a firm or industrial activities when political or technological developments demand or allow for that.

85 EMA 2009: art 1(35). Besides the already existing and mandatory EIA for rather large firms, EMA 2009 introduced the environmental management and monitoring efforts (*UPL-UKL*) for smaller types of firms (EMA 2009: artt 1(12) and 34-38).

86 EMA 2009: art 63 (1)m and (2)g, in conjunction with artt 13 and 14; RGA 2014.

87 EMA 2009: art 1(36). Business licenses include industrial licenses and mining and logging concessions (Rahmadi, 2003: 137).

88 EMA 2009: art 40 (1).

One may argue that the environmental license is little more than the formalisation of the EIA approval that the EMA 1997 required,[89] and that, therefore, the introduction of the environmental license has not added much to the existing regulatory instruments. Nonetheless, its introduction has potentially produced some positive effects. First, its existence stresses the importance of the EIA as one of the few moments – if not the only moment – in which the government sits down with the industry to assess the environmental standards it has to comply with and the implications of such an assessment for the firm's environmental management. In many cases, the government initiates no further communication on this issue (e.g., as a result of monitoring activity). Second, the existence of the environmental license makes explicit that the licensing institution in principle is also authorised to and responsible for monitoring the licensee's behaviour and for enforcing the law. In fact, despite the problematic relation between the business license and the environmental license, the latter can strengthen the position of environmental institutions. If the District Heads, Governors or the Minister delegated their full regulatory authorities to their environmental institutions, the latter would have more power to enforce the law, particularly because they could suspend or revoke the environmental license.[90]

5.3 Monitoring instruments

This section reflects on the most relevant manners to monitoring and detecting violations. Besides 'regular monitoring', which the licensing government is theoretically supposed to carry out, complaint verification has in recent years become an important way to detect violations. Finally, this section discusses the Ministerial programme PROPER, which can be characterised as an 'ad hoc' regulatory programme that exists parallel to the standard system of regulation. This section will highlight the strengths and weaknesses of these monitoring efforts and pay special attention to the coherency between them.

5.3.1 Regular monitoring, self-monitoring and self-reporting

The government institution that issued the licence has, in principle, the obligation to monitor the firms and activities under its authority. However, several obstacles hinder effective implementation of this obligation. The first is a practical one and concerns the fact that regional environmental agencies often

89 See GR 27/2012 on the environmental license.

90 These heads of the administrative level may delegate the licensing and monitoring power to the environmental agencies. This means a considerable increase in power for these agencies.

lack inventories of the industries that they have licenced (Fatimah, 2017). They do not precisely know whom they should monitor.

Second, national policies are severely limited in providing guidelines on how and how frequently a government institution should monitor (specific) industries.[91] Although the licensing government – usually the District – is primarily responsible for determining monitoring policies and budgets, they often lack policies on this issue. They do not determine such policies partially because there is no incentive, e.g., from the Ministry or local parliament, to draft them. As a result, environmental agencies and individual officials have considerable discretion to decide whether to inspect an industry. Due to the limited staff and budget, the agencies and officials are likely to prioritise only the monitoring of industries they suspect of non-compliance. If there are no direct indications of non-compliance, the government is unlikely ever to monitor such industries.

5.3.2 Complaint verification

The EMA 2009 emphasised the right for citizens to complain.[92] Complaint verification is an important way to detect violations (Santosa, 2014: 185). The EMA does not provide further details on what the right to complain entails. The 2010 Ministerial Regulation on Complaint Handling provided more details, which the relevant Ministry replaced in 2017 with an even more detailed regulation.[93] These relatively swift developments indicate the importance the government gives to handling complaints.

The implementing regulation on complaint handling – both from 2010 and 2017 – clearly describes the responsibility of environmental institutions to verify complaints. It explicitly mentions the forms in which citizens may bring complaints to the attention of an environmental institution (e.g., through a text message or a newspaper article). The institutions should verify the complaint within ten working days, and issue a follow-up recommendation to the administrative head in the following ten days, all while informing the complainant of the progress. These clear environmental institution requirements appear, in practice, to stimulate the institutions to execute their post-complaint monitoring tasks adequately.

What is less clear is what the follow-up options are regarding a detected violation through complaint verification, and who is authorised to do so. The complaint handling regulation does not provide any guidance about whether, and under which circumstances, an institution should respond to violations

91 Standard Operational Procedures (SOPs) do exist and give technical instructions for inspections, e.g., that an inspection is to be announced by a letter.

92 EMA 2009: artt 65(5) and 70(5)b.

93 Ministry of Environment Regulation (PerMenLH) 9/20100 and Ministry of Environment and Forestry Regulation (PerMenLHK) 22/2017, respectively.

with a particular administrative sanction, whether they should initiate criminal prosecution, or whether they should initiate mediation between the complainants and the violator. Moreover, the licensing institution is, in principle, authorised to monitor and verify complaints. However, the complaint handling regulation allows for shifts of authority to monitoring and enforcement between the District, Provincial and Central Government, for which the EMA 2009 provides no legal basis. The two issues will be further discussed below.

5.3.3 PROPER: an 'ad hoc' Ministerial programme

The Ministry of Environment in 1995 introduced the monitoring programme, PROPER[94] At that time, the Ministry had little regulatory authority to address non-compliant industries. The programme allowed the Ministry to circumvent their limited authorities. Within PROPER, the Ministry monitors industries thoroughly and regularly. The Ministry takes water and emission samples and implements inspections every one or two years.[95] They publicly disclose their findings,[96] in the hopes that 'naming and shaming' will motivate industries to become or remain compliant. They rate the performance of individual industries and colour-code individual compliance levels. Black and red mean an industry is (severely) non-compliant, while blue, green and gold mean it is compliant or goes beyond regulatory requirements.

Two decades later, PROPER is still running. The Ministry often praises the programme because it covers over two thousand industries across Indonesia[97] and has seen overall compliance rates improve over the years.[98] However,

94 PROPER is an acronym for *Program Penilaian Peringkat Kinerja Perusahaan* or 'Program for Pollution Control Evaluation and Rating'. It is the successor of the PROKASIH programme that had originated in East Java in 1989. In 1992, PROKASIH had expanded to include the monitoring of industries along twenty-seven rivers in twelve Provinces. PROKASIH did not aim for industrial compliance, but rather built on the voluntary commitment to reduce pollution levels by fifty per cent. The PROKASIH working teams were authorised to monitor, give warnings and bring cases before the court, although the latter never occurred (Lucas and Djati, 2000: 37-42).

95 Ministry of Environment regulation 06/2013 (PerMenLH 06/2013), (http://proper.menlh.go.id/portal/pubpdf/Kriteria%20dan%20Mekanisme%20PROPER%20(Permen%2006%202013).pdf (last accessed on 30 July 2018).

96 The ratings are published, initially only through a paper report but more recently on the programme's website. See http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI\ and http://proper.menlh.go.id/portal/ (last accessed on 30 July 2018).

97 In 2015, 2137 industries were monitored within the context of PROPER.

98 The Ministry states that the compliance rate between 2004 and 2015 increased from 49 to 74 per cent. See http://proper.menlh.go.id/portal/ and http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI\ (last accessed on 30 July 2018). Various scholars are positive about effectiveness as well (see Afsah, Blackman, Garcia and Sterner, 2013; Santosa, 2014: 116). It appears that the Ministry itself has an interest in presenting PROPER as a successful programme. A similar situation occurred with PROPER's predecessor, the programme PROKASIH. Regional governments had an interest in making

the programme has also received criticisms. NGOs commented that the Ministry should also publicly disclose the inspection reports that inform their ratings.[99] After receiving complaints about 'green'-rated industries, the NGOs also questioned the accuracy of PROPER inspections and ratings.[100]

Another issue is that environmental factors do not solely determine the rating. In order to receive a 'green' or 'gold' rating, the industry must act towards 'community empowerment'. The Ministry assesses the Corporate Social Responsibility (CSR) funding that an industry provides.[101] As a result, the meaning of the ratings has become blurred, potentially implying that CSR can compensate for poor environmental behaviour.

Public disclosure remains important in the PROPER programme. However, its attention has shifted from 'shaming' all non-compliant industries to focusing on exceptionally well- and poorly-performing industries. For example, in 2015, the Ministry found a quarter of the participating industries to be non-compliant and ranked them as 'red'.[102] While the Ministry's website showcased the names of the 'gold' and 'black' industries, the names of the non-compliant 'red' industries were difficult to find.[103] Moreover, the website is not designed for the public to easily look up how a particular industry has performed over the years.

The vague relationship between PROPER and the standard regulatory mechanism is also problematic, particularly because PROPER currently also involves administrative and criminal law enforcement. This vagueness raises questions about whether the license-issuing District Head or the violation-detecting Minister is authorised and responsible for following up on violations. In practice, both seem to follow up on violations at random. Section 5.6.1 discusses this issue further.

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industries under their authority appear to be performing well, as this made the institution that regulated them look good too. It led to the manipulation of monitoring data by the government (Lucas and Djati, 2000: 17).

99 Between 2006 and 2009, two categories were added: 'red minus' and 'blue minus'. Both categories no longer exist, perhaps because they caused confusion regarding their precise meaning. One can particularly question the blue minus category, because it suggests that the company is indeed non-compliant but that the government still more or less approves of its performance (see 'Laporan hasil penilaian PROPER 2006-2007').

100 See, for example, 'Perbaiki Program Proper, KLH Siap Terapkan Sistem Informasi Lingkungan Proaktif' 1 May 2013 (http://www.mongabay.co.id/2013/05/01/perbaiki-program-proper-klh-siap-terapkan-sistem-informasi-lingkungan-proaktif/) and 'Kementerian Lingkungan Hidup Perbaiki Proper Melalui PRTR', 2 May 2013 (http://icel.or.id/2013/05/02/kementerian-lingkungan-hidup-perbaiki-proper-melalui-prtr/).

101 Ministry of Environment Regulation (PerMenLH) 6/2013, article 8 and 9(1).

102 In 2015, for example, nearly a quarter of the more than two thousand inspected industries (529 of 2137 industries) were rated 'red' (i.e., non-compliant).

103 Furthermore, the 2015 report mentions that the inspection results of 61 industries will not be made public, for reasons that remain unclear. This is quite surprising, considering the fact that PROPER is primarily a public disclosure programme.

5.4 Inconsistencies in administrative law enforcement instruments

The EMA 2009 lists the four types of administrative sanctions: a written warning, administrative coercion, the suspension of the environmental license or the revocation of this license.[104] These sanctions seem to be an improvement, especially considering that the EMA 1982 did not allow imposing administrative sanctions and the EMA 1997 did not describe them clearly. However, a closer look reveals several weaknesses in the more recent EMA.

This section first discusses the prevailing ideas about the function and principle aims of administrative enforcement. It then takes a closer look at 'administrative coercion' and the 'fine' and focuses on how 'escalation' of increasingly severe sanctions has taken shape in the current legal framework. The next chapters of this book will demonstrate that in practice, officials rarely consider administrative sanctions as an appropriate tool for halting violations or restoring situations.

5.4.1 The function and aim of administrative sanctioning

The EMA 1997 did not explicitly mention various types of administrative sanctions, but it did clearly state that administrative sanctions aim to enable the authorised government institution to prevent or halt violations, and to take recovery measures at the violator's expense.[105] The EMA 2009 no longer explicitly mentions that administrative sanctions have these aims.[106]

As the following chapters will demonstrate, current practices and environmental regulation debates usually consider administrative sanctions to be a weak response to environmental violations. A telling example is a policy from the East Java environmental agency. It prescribes that criminal law enforcement is an appropriate response to a serious environmental violation with victims. If the violation only caused damage, the victims and the violator should negotiate reparations. However, when there is no environmental damage, an administrative law sanction is appropriate.[107] This policy lost sight of administrative law enforcement's original reparatory aim.

The obvious question is why a policy may consider administrative law enforcement to be an inappropriate response to environmental violations. An important part of the explanation involves the weak structure of administrative sanction arrangements, especially the concepts of 'administrative coercion' and the 'fine'.

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104 EMA 2009: art 76(2).

105 EMA 1997: art 25.

106 However, Ministerial of Environment Regulation on Administrative Sanctions (PerMenLH 2/2013) nevertheless briefly mentions the reparatory aim of administrative sanctions in one of its annexes (Annex 1, A 1(c)).

107 Presentation by the East Java Environmental Agency, 2012, 'Evalusi Pelaksanaan Patroli Air'.

5.4.2 *Administrative coercion and the fine*

The EMA 2009 mentions the administrative sanction of administrative coercion (i.e., *paksaan pemerintah)*. However, administrative coercion in the EMA 2009 has a different meaning than in most countries. A comparison with the Netherlands is particularly relevant because the concept *paksaan pemerintah* originates from the Dutch concept *bestuursdwang*. People in Indonesia still occasionally use the latter term. However, in the Netherlands, administrative coercion (*bestuursdwang*) refers to the authorised government institution's power to carry out concrete actions to end a violation or restore a situation at the violator's expense. When halting the violation is less urgent, the government can order the violator to take the prescribed measures, with the threat of using administrative coercion after a certain time. The relevant Dutch phrase for this is '*last onder bestuursdwang*'.[108]

In the Indonesian EMA 2009, administrative coercion does not refer to concrete government action, but rather to the government ordering the violator to take certain measures.[109] This coercion resembles the *last onder bestuursdwang,* rather than *bestuursdwang.* This approach is problematic because when the violator does not carry out the order(s), the government has no other option than to suspend or revoke the license. However, in practice, the government rarely suspends or revokes the license because they usually consider that to be disproportionate. Thus, administrative coercion in Indonesia is not a powerful instrument for (swiftly) ending a violation and recovering damages. In some circumstances, the government concludes that when the violator does not comply, it has no more possibilities for administrative sanctions and needs to move to criminal prosecution.[110] However, as the previous chapter explained, criminal prosecution is often expensive, time-consuming, and is meant to be punitive rather than that it primarily aims to halt the violation.

The 'fine' is another administrative law enforcement instrument that article 81 of the EMA 2009 mentions. However, it is unclear whether the fine intends to be primarily punitive, or whether it is meant to be reparatory (i.e., aiming to end violations and restore the situation as soon as possible). Article 82 states: 'Anyone carrying responsibility for a firm or activity who does not implement administrative coercion is fined for delaying the implementation of the administrative coercive sanction'.

108Algemene wet bestuursrecht (Dutch General Administrative Law Act), art 5:21.

109 Both articles 79 and 81 of the EMA 2009 state – indirectly – that the violator is to carry out administrative coercion. Article 79 does so by stating that the environmental license may be suspended or revoked when the violator does not implement administrative coercion, while article 81 states that in such a case a fine can be imposed.

110 EMA 2009: elucidation, I(6).

The government has not yet developed implementing regulation for the fine. However, the regulation could considerably strengthen the framework for administrative sanctioning. If the fine primarily has a reparatory function, it could be a daily fine (or *dwangsom* in Dutch). Such a fine would increase every day a violation would continue. The fine thereby functions as an incentive for the violator to swiftly stop its violating behaviour and take measures to restore the situation. However, the government should carefully consider how this type of fine would relate to administrative coercion, as the EMA defines it. Due to the formulation of article 82, the authorised government cannot use the daily fine as an alternative for administrative coercion. It can only impose a fine after the violator fails to implement the government's orders. Due to the weak administrative coercion that depends on the violator's cooperation, it becomes even more important to have a well-functioning seizure system to be able to collect the fine.

If the fine in article 82 has a primarily punitive aim, it could be a punitive fine imposed by the government (or *bestuurlijke boete* in Dutch). This fine is particularly useful in situations where the violating behaviour has already ended. It gives the executive government the possibility of creating a deterrent effect.[111] However, one should be careful when introducing this type of fine in Indonesia, because it can incentivise environmental institutions to impose administrative fines instead of taking concrete measures to end violations. However, the fine that article 82 mentions could also refer to a criminal fine, as in article 114 of the EMA 2009. In that case, the executive government institutions will not have the authority to impose it.

Until now, it remains unclear which position the fine can fulfil in the frameworks for administrative and criminal sanctioning. In any case, the weak formulation of administrative coercion considerably deteriorated the overall potential effectiveness of the framework's administrative sanctioning power.

5.4.3 Escalation by imposing increasingly severe sanctions

In line with the idea of the 'enforcement pyramid' (Ayres and Braithwaite, 1992), the current system of administrative sanctions in the EMA 2009 allows for an 'escalation' of sanctions.[112] This system allows the government to gradually impose more intrusive sanctions when 'light' administrative sanctions prove ineffective. However, several obscurities in the legal framework hinder effective escalation.

First, the legal framework for administrative sanctioning does not adequately instruct the government on how to respond to a violator who does not

111 In the Netherlands, such a fine is referred to as *bestuurlijke boete.* It was introduced only recently in the Netherlands after a long debate because many argued that it is not in line with the primary goal of administrative sanctions to halt violations and restore situations.

112 EMA 2009: art 79.

implement the 'administrative coercion' (i.e., the orders they receive). The District Head, the Governor or the Minister can impose a fine or suspend or revoke an environmental license.[113] However, in practice, he is unlikely to choose these options because implementing regulation about the fine does not yet exist, and the government usually considers license suspension and revocation to be overly heavy sanctions that require support from institutions that often have an interest in keeping an industry operational. The West Java officials I interviewed on this matter for instance, reasoned that when the violator does not implement the 'administrative coercion', the government has exhausted the administrative law enforcement system's possibilities. Therefore, in line with the 'ultimum remedium' principle, the government may initiate criminal law enforcement.[114] However, responding to violations with criminal prosecution rather than with administrative sanctioning has considerable downfalls, as previously explained.

The ambiguity of '*pembinaan*' (i.e., 'guidance' or 'persuasion') is another weakness in the escalation mechanism. This term may refer to two different situations. It can refer to the government giving technical guidance to a compliant licensee on how to perform even better.[115] However, *pembinaan* can also refer to the government attempting to persuade a violator to change its behaviour, rather than imposing an administrative sanction. In practice, the fact that the government uses the same term for both situations leads to obscurities and inconsistencies in addressing non-compliant behaviour. The next chapter demonstrates that, for example, a West Java environmental agency's unit focuses on giving *pembinaan* to both compliant and non-compliant licensees. However, this unit functions separately from the 'Law Enforcement' unit. One of the 'Guidance' unit's officials justified this practice by stating that imposing sanctions is generally ineffective. He claimed it is the regulator's task to help licensees improve their behaviour. Consequently, there is a risk that 'guidance' will be given continuously, without the government ever taking more intrusive measures to halt a violation.

In sum, it does not come as a surprise that many Indonesian officials believe that administrative sanctioning is a weak response to non-compliant behaviour because, in the current legal framework, it is. However, it does not need to be. Nevertheless, as long as there is no recognition that administrative

113 EMA 2009: artt 81 and 76.

114 EMA 2009: elucidation.

115 Government Regulation 82/2001 on Water Quality Management and Water Pollution Control of 2001 defines '*pembinaan*' or 'guidance' as efforts 'to improve compliance', e.g., by informing licensees of the legal requirements and implementing incentive and disincentive policies. One of its chapters is entitled 'Monitoring and guidance', suggesting that these two concepts are closely related. The fact that 'guidance' is mentioned prior to 'monitoring' suggests that 'guidance' is intended as a preventive measure, and not as a type of 'persuasion' that is used after a violation is detected and prior to imposing an administrative sanction.

law enforcement can be a powerful tool for protecting the public interest in a clean environment, it is unlikely that scholars, policy-makers and officials will critically reflect on the legal framework and make the required improvements.

5.5 Division of authority

The division of regulatory authorities regarding environmental matters is a complicated matter. As the previous chapter explained, global environmental regulation is a new policy field that needs to be integrated into existing legal and institutional structures. Nevertheless, Indonesian environmental institutions nowadays have considerable regulatory authorities. However, since decentralisation, the division of authority between the environmental institutions at the various administrative levels of government is not always clear.

This section focuses on the division of authority between the administrative levels, starting from the EMA 2009 and moving to other relevant regulations. It concludes that problems in this framework help explain current regulatory practice inefficiencies and the lack of possibilities to pressure the government to take action and hold it accountable when it fails regulatory tasks.

The general systematics of administrative regulation dictates that, in principle, the same institution implements the full 'regulatory chain'. It sets the norms through planning and determines the directly applicable standards for individual licensees through general standards and specific licensing. It monitors the behaviour of the licensee and takes enforcement measures in cases of noncompliance. The EMA 2009 follows this systematics. In most cases, the Districts are authorised to issue the environmental license, and so are also authorised, in principle, to monitor and enforce standards.[116] However, there are a few exceptions. The programme PROPER, which was discussed previously, is not in line with the systematics, and it is unclear what the legal basis is for the shift of authority as it occurs in PROPER. However, the EMA 2009 does provide a few possibilities for shifting authorities between Districts, Provinces and the Ministry.

The first possibility involves the lower administrative level government lacking qualified staff, and asking a higher administrative level for monitoring assistance.[117] In these cases, the lower-level government remains responsible for properly implementing the regulatory 'chain'. The second possibility involves an authority shift in a 'transboundary' case, meaning that a firm's location, activity or impact crosses the administrative borders of a District or Province. A final exception involves the licensing government, at the District or Provincial level, failing to conduct its regulatory tasks sufficiently, leading

116 EMA 2009: artt 10, 12, 20, 29, 30, 31, 36, 37, 39, 55, 59, 61, 71, 72, 76, 82, and 123.
117 EMA 2009: artt 63(2)l; Ministry of Environment Regulation (PerMenLH) 9/2010: art 14.

to the Minister taking over the monitoring ('oversight') and enforcement ('second line enforcement'). The latter two exceptions are examined more in depth below.

5.5.1 Shifting authorities in transboundary cases?

The EMA 2009 authorises the Province and makes it responsible for coordinating and controlling environmental damage or pollution that crosses District boundaries.[118] Indeed, chapter 5 will demonstrate that, in practice, officials often assume that monitoring and enforcement authorities shift from the District to the Province in 'transboundary' (*lintas batas*) cases. However, as previously explained, the authority to 'control' includes 'prevention' such as licensing, 'mitigation' and 'recovery', but excludes monitoring and enforcement authorities.[119] Furthermore, since the EMA 2009 does not provide for a shift of authority from the Province to the Ministry in cross-Provincial impact cases, we can conclude that its authority to shift regulatory authority in transboundary cases is limited.

Although the Regional Government Act (RGA) 2014 provides more options to shift authorities to higher administrative levels in transboundary cases, it does so only in cases where a complaint has been filed. The Central Government and the Province are authorised to 'settle' or 'close' (*penyelesaian)* complaints in cases where the impact crosses Provincial and District borders, respectively.[120] However, it is unclear whether the authority to 'settle the complaint' includes enforcement power. Nevertheless, the next chapters will demonstrate that before the promulgation of the RGA 2014, Provinces and the Ministry already imposed sanctions in such cases, and acted as a mediator between complainants and violators.

Moreover, the 2015 Ministerial Regulation of Public Works on River Areas arranges that a river that crosses Provincial or District borders and is appointed as a river of national strategic interest – such as the Brantas and Ciliwung rivers – the Minister of Public Works or the Governor, respectively, are authorised to manage the water resources (*pelaksanaan pengelolaan sumber daya air*).[121] This management includes monitoring (*pemantauan*) the implementation of water resources conservation and 'control' of water damages.[122] However, it is unclear to what extent the Governor and Minister have authority to monitor individual licensees and use enforcement in these cases.

In sum, in transboundary cases, the possibilities to shift regulatory authorities to a higher administrative government level are limited, particularly when

118 EMA 2009: art 63(2)g.
119 See section 5.1 of this chapter.
120 Regional Government Act 2014 (Act 23/2014) art 13 and annex 1.k.
121 Ministry of Public Works Regulation (PerMenPU 4/2015): art 5.
122 Ministry of Public Works Regulation (PerMenPU 4/2015): art 1(4).

it concerns monitoring and enforcement. Nevertheless, chapters 4 and 5, on the regulatory practice of Provincial agencies and a pollution case in West Java, respectively, will illustrate that in practice officials quickly assume that the transboundary character of a case results in a shift of authority, especially monitoring authority, to a higher administrative government level.

5.5.2 *Oversight, second line enforcement and complaint handling*

A licensing government institution that fails its monitoring and enforcement responsibilities can also lead to a shift in authority. Oversight and second-line enforcement refer to the Minister taking over monitoring and enforcement authority, respectively, from a lower administrative government level. However, the criteria are rigorous. The violation must be serious, and the regional government must intentionally not take proper measures.[123]

Despite lacking monitoring authority, the Minister can identify a serious violation through complaints that are filed to the Ministry. However, when we look at the Ministerial Regulation on Complaint Handling 2010, we see it is not entirely consistent with the EMA 2009. In some ways, it increases the possibilities for complainants to express their concerns. For example, while oversight and second-line enforcement imply that regulatory authorities shift to the Minister, the Ministerial Regulation allows for both the Minister and Governor to 'handle the complaint'.[124] Furthermore, the Ministerial Regulation does not require that the complaint concerns a serious violation before the complaint-handlers can get involved. Instead, the Minister and the Governor are authorised to 'handle' a complaint when the lower administrative government level has not 'followed up' on it within ten working days. However, several arrangements are unclear or not in line with the EMA 2009.

The Ministerial Regulation's definition of 'complaint handling' is narrow, to the disadvantage of the complainant. It includes verifying the complaint and a recommendation on how to following up on the case to the authorised authority,[125] but it does not mention an enforcement authority shift to the higher administrative level. As a consequence, it is unclear which administrative government level is authorized and in fact has the duty to take measures.

The complainant faces problems in the inconsistencies between the Ministerial Regulation on Complaint Handling and the EMA 2009 and in the lack of arranged shifts of enforcement authority. The vagueness and inconsistencies in the legal framework decrease the complainant's opportunities to pressure the government to carry out its responsibility to protect the public interest in a clean environment, particularly its enforcement power to halt a violation and restore the situation. The Indonesian General Administrative Act of 2014

123 EMA 2009: art 77 and Ministry of Environment Regulation (PerMenLH) 2/2013.
124 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 8 and 9.
125 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 11, 13 and 14.

allows citizens to request enforcement, and to object and appeal to government decisions.[126] However, due to vagueness about which government institution can or should take certain actions, it is difficult for citizens to appeal to the government and hold it accountable.[127] Even for industries, the unclear division of authority can be problematic, as they do not know to which institution they are accountable.

The next chapter will demonstrate that while the Provinces have limited regulatory tasks, in practice, they do play a considerable role in regulating industries, even though the legal basis for their involvement is often unclear.

5.6 Alternatives for administrative law based 'command and control' regulation

There is a strong tendency in Indonesia to turn away from administrative law based 'command and control' regulation and rely on alternatives instead (Wibisana, 2016).

This chapter has already discussed some of these alternatives. Section 5.4.3 discussed '*pembinaan*', or 'guidance'. The concept appears to match the idea of 'responsive regulation' that the previous chapter discussed. However, the unclear position of 'guidance' in the system of administrative sanction escalations can result in ineffective enforcement. The next chapter covers environmental agency practices and demonstrates that there are examples where the government was reluctant to respond to continuous or serious non-compliant behaviour with coercive measures, preferring to use guidance. One explanation for the government's behaviour is the unclear status of 'guidance' in the mechanisms of escalation through different types of administrative law enforcement.

This section will also highlight other alternatives for administrative law based 'command and control' regulation, namely economic instruments, criminal law approaches and violator-victim mediation (i.e., alternative dispute resolution). In Indonesia, mediation is also considered an alternative form of regulation. Section 5.7 elaborates further on this issue.

5.6.1 Economic instruments and the standard regulatory mechanism

The EMA's attention to economic instruments reflects the tendency to rely on alternatives for administrative law based 'command and control' regulation. Economic instruments are part of the EMA 2009's chapter on 'Prevention', which

126 General Administrative Act 2014 (Act 30/2014): artt 7j and 75-77.

127 In fact, the term 'accountability' in the Indonesian context of environmental regulation is limited to a narrow form of financial accountability. In the yearly 'accountability' reports (LAKIP), agencies do not motivate their policy choices (Fatimah, 2016).

mainly covers norm-setting instruments that the EMA does not clearly link to its monitoring and enforcement arrangements.[128] The EMA 2009's definition of economic instruments is quite broad, covering a wide range of economic policies that encourage environmental conservation, including incentives -such as performance awards- and disincentives.[129] This broad definition provides regulatory approach flexibility but does not clarify how economic instruments relate to the standard regulation mechanism.

For example, the EMA defines PROPER as an economic instrument.[130] Section 5.3.3 explains that when PROPER was established in the mid-1990s, environmental institutions had barely any regulatory authority. The programme existed parallel to the standard regulatory mechanism in which other Ministries were responsible for regulating the environmental behaviour of the industries within their sector. PROPER was the Ministry of Environment's clever way of trying to influence industrial environmental performance. Industrial participation in the monitoring and public disclosure programme was voluntary.

By contrast, today the standard regulatory mechanism provides environmental institutions with many more norm-setting, monitoring and enforcement instruments to regulate industrial behaviour. Therefore, one might expect that there is no longer a need for an ad hoc programme such as PROPER. However, as previously mentioned, PROPER has been widely hailed as a success, and the scope of the programme now encompasses enforcement, as well as monitoring and public disclosure.[131]

So as a ministerial programme, PROPER exists parallel to the standard regulatory mechanism, where the District usually has licensing, monitoring and enforcement authorities. However, the EMA 2009 does not clarify how these parallel regulatory mechanisms relate to one another. It also does not clarify how the mechanisms should divide the regulatory authorities and duties of detecting and halting violations between the Ministerial, Provincial and District levels.

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128 International trademarks (e.g., several ISO trademarks), environmental standards and assessment procedures also became more popular as alternatives to classic command and control (Rahmadi, 2006: 140).

129 The EMA 2009 defines environmental economic instruments as economic policies for encouraging governments and any other party or persons to conserve the environment. Such instruments include development planning and economic activities, environmental funds, incentives and disincentives (e.g., taxes, subsidies and tradable permits), a labelling system for environmentally friendly behaviour and performance awards (art 1(33) and 42-43). The introduction of economic instruments provides flexibility in the regulatory approaches. Nevertheless, the understanding of economic instruments as incentives and disincentives is very broad. Such an understanding informs and justifies the government's awareness of and inaction towards non-compliant behaviour.

130 Ministry of Environment Regulation (PerMenLH) 6/2013 on PROPER (consideration a) in conjunction with EMA 2009: art 43(3).

131 Ministry Regulation on PROPER states that industries that have been rated red and black are subject to 'sanctions in accordance with laws and regulations' (Ministry of Environment Regulation (PerMenLH) 6/2013, article 9 (3)).

The next chapter will show how, in practice, the Minister has imposed administrative sanctions on several occasions, but has not done so consistently. In some cases, Districts and Provinces have imposed sanctions. However, in most cases where PROPER has detected a violation, no sanction was imposed at all. It is unclear which institution was responsible for the lack of enforcement.

The Ministry refers to PROPER as an economic instrument to justify its involvement in cases where, in principle, the District is authorised to act,[132] as well as to explain the success of the programme (Santosa, 2016). However, Wibisana (2017) is critical of both these issues. He argues that the Indonesian debate on environmental regulation commonly and mistakenly considers that economic instruments oppose 'command and control' types of regulation, exemplifying the dichotomous thinking of which Sinclair (1997) has warned.[133] As a result of this supposed dichotomy, officials, scholars and policy-makers often assume that an economic instrument such as PROPER can exist parallel to command and control and that coherency with the standard regulatory mechanism is not required.

According to Wibisana (2017), PROPER is, in fact, a mix of regulatory instruments. Instead of opposing command and control regulation, it shares many of its characteristics. For example, participation in PROPER is no longer purely voluntary, monitoring takes place on a regular basis, and the Ministry occasionally responds to violations with sanctions. Wibisana argues that assumptions about the ineffectiveness of command and control regulation are made without conducting empirical research, and without recognising that PROPER does, in fact, have many features of command and control regulation. However, not embedding this regulatory programme in the standard regulatory mechanism, has caused a situation which may contribute to ineffective regulatory efforts and legal insecurity for both licensees and (potentially affected) citizens.

To conclude, although PROPER can be occasionally effective, it has downsides. The fact that it exists parallel to the standard regulatory system can negatively affect regulatory efforts. District governments may become reluctant to carry out their standard regulatory tasks because they trust PROPER to do it instead. Furthermore, the authority and responsibility overlap makes it

132 Santosa has argued that 'second line enforcement' is the basis for the shift of authority that occurs within the context of PROPER (2013, 116). However, with the vast majority of industries that participate in PROPER, there is no indication that a serious violation is occurring. The involvement of the Ministry through PROPER may also be based on the right of Districts to ask for technical assistance from the Province (art 63(2)l) or the Ministry's authority to monitor those with a license (art 63(1)o). However, in any case, the EMA 2009 does not offer a basis for a shift in enforcement authorities. The next chapter will demonstrate that the Ministry has, nevertheless, imposed sanctions after detecting violations through PROPER.

133 Chapter 2 discusses Sinclair's work.

difficult to hold them accountable for when they fail in fulfilling their regulatory tasks.

5.6.2 *Criminal law enforcement*

'Control' in 'command and control' can refer to monitoring and enforcement both within the administrative and criminal law framework. As the previous chapter explained, both have their own characteristics and aims. Two notable differences are that administrative law enforcement aims to halt violations and is executed by the executive, while criminal law enforcement aims to punish and is in the hands of the public prosecutor and the criminal court.

In Indonesia, there is a tendency to focus on strengthening the criminal law framework. Compared to the EMA 1997, the EMA 2009 has a more expansive section on criminal sanctioning, contains more severe penalties, and authorises more officials to conduct criminal investigations.[134] Nonetheless, the act states that criminal law enforcement remains an 'ultimum remedium' (i.e., the last resort after administrative law enforcement has failed). It explicitly mentions that this principle is applicable when violations involve wastewater quality, emissions and nuisance.[135] It does not explicitly mention violations related to hazardous and toxic materials, which suggests that for these violations criminal sanctions can be imposed straightaway. The next chapter will show that as a result, officials of the West Java environmental agency – who prefer to respond to violations through criminal prosecution instead of imposing administrative sanctions – focus on detecting violations related to hazardous and toxic waste, instead of on wastewater quality, emissions and nuisance

Struiksma, Ridder and Winter (2007) argue that a combination of administrative and criminal law enforcement can be effective in particular circumstances, but that it requires empirical research to gain insight on this issue. In Indonesia, academics have not conducted such empirical research thus far.

5.7 The role of citizen in environmental regulation

The role of citizens in environmental regulation has increased over the years. However, administrative law mechanisms are not the primary instruments for promoting their interests in a clean environment.

The first EMA of 1982 mentioned that private parties could file complaints requesting compensation against a party responsible for environmental destruction or pollution. Thus, addressing environmental problems was a private law matter. Although the term 'complaints' disappeared in the EMA 1997, the Act gave citizens with a direct interest in a case the right to request the authorised

134 EMA 2009: artt 97-120.
135 EMA 2009: elucidation, 1(6).

government to enforce the law. Hence, complaint handling became a matter of administrative law.[136] The EMA 2009 elaborated on the role of citizens and representative organisations, at least in some respects. The Act confirmed the legal standing of NGOs, explicitly mentioned the participatory principle and established the governmental duty to develop and implement complaint mechanisms.[137] Furthermore, the EMA 2009 and its implementing regulations established the governmental duty to receive and, within a certain time frame, verify complaints. It also established the governmental duty to recommend follow-up actions to the authorised institution and to inform the complainants about its progress.[138]

However, in two respects, the position of citizens has weakened. First, citizens may no longer request the authorised government to take enforcement measures. Second, it has become less clear which government institution is responsible for following up on the complaint and which institution can be held accountable for taking insufficient measures.

Regarding citizen requests for government enforcement, EMA 2009 does not mention the possibility to file an objection against a governmental decision regarding monitoring or enforcement, or against the lack such decisions or actions. At the same time, both the 2010 implementing regulation on complaint handling and its 2017 successor cite administrative sanctions, criminal law enforcement and environmental dispute resolution (inside or outside court) as possible responses to violations.[139] However, the implementing regulations do not explain when a particular follow-up method is appropriate. One might expect that administrative law enforcement follows administrative law norms violations.[140] However, the next chapter will demonstrate that complaints are often dealt with outside the administrative law framework. Governments

136 EMA 1997: art 25(3).

137 EMA 2009: artt 1(31, 32, and 34), 63(1)t, (2)n, and (3)k, 65 and 70.

138 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 4-6, 11-18 and 20; Ministry of Environment and Forestry Regulation (PerMenLHK) 22/2017.

139 Ministry of Environment Regulation (PerMenLH) 9/2010: art 19(2); PerMenLHK 22/2017), art 24(5).

140 Although the EMA mentions the possibility of filing an objection against a government decision, this is only applicable against plans, EIAs, firms or activities that pollute the environment (EMA 2009, art 26(4), art 65(3) and art 70(2)). Filing an objection against a governmental decision regarding monitoring or enforcement is not mentioned in the EMA, because the general administrative law only provides for objecting against a government decision in the form of a written document (a 'beschikking') (Act 5/1896, art 1(3)). In practice, when the government decides not to monitor or enforce, this decision is rarely confirmed in a 'beschikking'. The Act on the Administrative Courts of 1986 offered a way out of this obstacle, stating that an institution or official that does not issue the requested decision within the set period is considered to have refused it (Act 5/1986, art 3), opening the possibility to file an appeal and filing a case before the administrative court. The Administrative Law Act of 2014 has nevertheless erased this possibility because objection against untimely decisions is only possible when it concerns decisions related to licenses, dispensation and concessions (Act 30/2014, art 39(5) and 53).

often prefer to respond by initiating criminal enforcement, through which they offload their regulatory responsibility to the public prosecutor and criminal court. Alternatively, they act as mediators in private law dispute resolution settlements. Citizens then have to negotiate with the violator not only about the type and amount of compensation for the suffered damages, but sometimes also about the required level of compliance going forward.

Environmental agencies consider it an option to engage in mediation between complainants and violators of administrative norms in part because of how officials interpret two of the EMA 2009's provisions. First, it is mandatory for disputing private parties to try to settle their dispute outside a court before a court accepts their case. Second, the EMA 2009 authorises governments to regulate a case and act as dispute settlers in civil quarrels, the latter being an alternative to private courts.[141] The next chapter will demonstrate that, in practice, some environmental officials believe they should mediate disputes before taking administrative law enforcement measures. As a result, the distinction between the regulation to promote the public interest in a clean environment and redress seeking processes by private parties who are affected by pollution becomes blurred. On the one hand, this creates opportunities for citizens to complain about environmental issues to promote their private interests, which have little to do with a clean environment. On the other hand, if citizens are genuinely interested in achieving a cleaner environment, their position is weakened by the fact that they cannot call upon the authorised government to take measures. Instead, such citizens have to negotiate this issue on private law terms, through which an industry usually has a strong position.

Hence, the burden is more on citizens rather than the authorised government to address industrial violations. This burden is also noticeable when it comes to detecting violations. Section 3.2 mentions that current discussions on revising GR 82/2001 formulate the desire to increase citizen regulatory participation in an increased monitoring role. However, the burden to prove the occurrence of non-compliant behaviour may then shift from the authorised government to affected citizens. The alleged increased responsibility of citizens to detect and address violations weakens their position considerably.

Another aspect that weakens the position of citizens is the lack of clarity in the EMA 2009 and implementing regulations on complaint handling about which government has the authority and duty to handle a complaint. In principle, the licensing institution must handle complaints. However, there are exceptions, such as when serious violations occur or when the relevant institution has not followed up on the case within the legally set time frames. In these cases, authority shifts to a higher government level.[142] However, the EMA and regulations provide no further details regarding this issue. Considering that the EMA 2009 may shift regulatory authorities from the licensing

141 EMA 2009: artt 84 (3) and63 (1)q, (2)j, and (3)h.
142 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 9-10.

institution to another institution (see section 5.5), it appears that the implementing regulation on complaint handling provides more detailed criteria for second-line enforcement. However, if this is the case, it means authority would then shift to the Ministry. The next chapters will demonstrate that, in practice, Provinces often carry out regulatory authorities after they have received a complaint. The legal basis for their involvement in such cases is often unclear.

In sum, it is difficult for citizens to pressure governments to act when it is unclear which institution is authorised and has the duty to take regulatory actions, and when it is uncertain what regulatory action can be expected. For example, it is unclear whether citizens may object to a government decision or take a case to the administrative court to request a preliminary injunction. Thus, although increasing citizen participation in monitoring and following up on detected violations may have been intended to strengthen citizens' positions, in practice, it can have the opposite effect. This is because the incentives for the government to properly execute its regulatory tasks have decreased.

6 Conclusion

This chapter has identified the strengths and weaknesses of the current legal and institutional frameworks relevant to the regulation of and redress seeking for, industrial water pollution. Over the past decades, significant legal and institutional changes have occurred. Compared to the first Environmental Management Act (EMA) of 1982, the EMA 2009 contains more arrangements for command and control regulation based on administrative law. Environmental institutions have instruments at hand to plan, set norms, monitor behaviour and enforce the law by imposing administrative sanctions. Economic instruments created room for innovative regulatory approaches and expanded the arrangements for criminal sanctioning. This change potentially enables improved regulation of industrial environmental behaviour. However, it is widely acknowledged that environmental regulatory efforts in Indonesia are still quite ineffective.

As chapter 2 explained, a common explanation for the ineffectiveness is executive government and judiciary corruption. Furthermore, environmental agencies lack capacity, which hinders effective regulation. Santosa's (2014) study on the functioning of environmental agencies at the regional government level argues that the legal framework offers a sufficient basis for the effective promotion of environmental interests, but that the implementation by the regional government agencies requires improvement. The agencies often lack the capacity in staff, expertise and material for effective implementation (Santosa, 2014). Additionally, Districts' direct economic interests in industries located within their territory can also hinder effective regulation. However, this chapter argues that although these implementation problems exist, the

development of the administrative law framework for regulation still has key weaknesses.

First, despite the District-level implementation problems, the EMA 2009 offers only limited opportunities for shifting monitoring and enforcement authorities to the Provincial or Central Government level, and the procedures for shifting authorities are unclear.[143] This lack of clarity leads to inconsistencies and vagueness regarding which institution is authorised to take regulatory measures and makes it difficult to hold an institution accountable when it fails its regulatory task.

Second, while the EMA 1997 stressed the importance of a consistent transition between the norm-setting, monitoring and enforcement phases in the regulation process, the structure of the EMA 2009 no longer emphasises this. Therefore, the licensing institution's responsibility to also monitor and enforce the licensee is less obvious.

Third, the arrangements in the EMA 2009 for administrative law enforcement have weakened because its reference to 'administrative coercion' refers to orders the violator needs to execute, rather than concrete action the authorised government needs to take to halt a violation or restore the situation. When the violator does not execute the orders, the government is unlikely to revoke or suspend their license. Therefore, the 'top of the enforcement pyramid' does not, in reality, exist in Indonesia.

Another weakness is the lack of clarity in how command and control regulation relates to other regulatory approaches (e.g., economic instruments) and ad hoc programmes (e.g., the ministerial programme PROPER and the Water Patrol in East Java[144]). These alternative regulatory approaches exist parallel to the standard regulatory mechanism in which the regional governments are primarily authorised to carry out command and control regulation. This lack of clarity leads to inefficiencies in the regulatory process because monitoring data are not used to their full potential and detected violations are not responded to consistently. The lack of clarity also concerns the division of authority between the involved institutions, which then makes it difficult to hold a particular government institution accountable for not executing its regulatory task.

The relevant relation between administrative, criminal and private law frameworks for addressing environmental pollution is also unclear. In theory, administrative law measures for regulation allow the authorised government to halt violations swiftly and to recover the damage. Criminal law enforcement cannot directly halt a violation. It punishes behaviour after it has taken place

143 However, the implementing regulation on complaint handling has somewhat stretched the possibilities of a monitoring authority shift, while the Regional Government Act of 2014 did so even more. However, field research for this chapter was conducted before the passage of that Act.

144 The Water Patrol in East Java will be further discussed in the next chapter.

and can have a future deterrent effect, but typically only after a long and costly court trial. Nevertheless, the EMA 2009 fails to emphasise this difference in administrative and criminal enforcement as a response to violations.

The quality of EMA 2009's administrative law framework for regulation has some vital shortcomings, while the Act expanded and emphasised the importance of the criminal and private law arrangements for following up on violations. Regarding the latter, the authorised institution can opt to respond to a violation by mediating between the violator and complainants in a private law dispute about the damages. This choice justifies why, in practice, environmental agencies do not take consistent and firm action by using administrative law enforcement instruments to halt violations and restore environmental conditions. Nevertheless, the next chapter shows that there are strong indications that a relatively consistent administrative law based command and control regulation is effective.

Wibisana (2017) has argued that many Indonesian scholars and policymakers consider alternative regulatory approaches as opposing command and control regulation, and prefer to depend on the former. Therefore, they do not see a need to integrate alternative approaches with command and control, and barely any critical debate takes place on how the different regulatory approaches, in theory, and in practice, relate to one another. The debate on regulation in Indonesia is generally dominated by the false dichotomy between command and control regulation and alternatives for it, about which Sinclair (1997) has warned.

A final point of concern is the role of citizens and interest groups in the regulation process. At first sight, their position seems to have improved. They have more opportunities to participate in the regulation process. For example, they need to be consulted when licenses are issued. Another improvement is the increased opportunities for filing complaints. However, in recent debates (e.g., about the revision of Government Regulation 82/2001 on River Pollution Control), there is a tendency to further expand citizen participation in the monitoring and enforcement phases of the regulation process. This can result in a shift of regulatory responsibility from the government to citizens and interest groups. The desire to increase the regulatory role of citizens and interest groups is understandable in the Indonesian context, in which there is generally little trust that the government will properly execute its regulatory task. At the same time, the developments increase the risk that addressing environmental pollution becomes a matter of promoting the private interest of a citizen, rather than considering it as a matter of public interest. Chapter 5 and 6 will demonstrate that the private interest of citizens affected by pollution is not necessarily the same as the public interest in a clean environment.

The next chapter will consider the practical consequences of the legal and institutional frameworks for regulating industrial pollution. It will take a closer look at the Provincial environmental agencies in East and West Java. It will

demonstrate that the weaknesses in the legal framework reflect, or perhaps are at the root of, inconsistent regulatory practices.