

RECLAMATION & POST MINING ACTIVITIES – EXCESSIVE AND UNREALISTIC REGULATION¹²

Introduction

Indonesia’s December 2010 MoEMR Regulation re Reclamation and Post Mining Activities (“**Reclamation & Post Mining Regulation**”) represents a no doubt well-intentioned attempt to give effect to one of the more important objectives of the 2009 Mining Law; namely, better protection and management of the mining environment. Unfortunately, however, the approach to better protection and management of the mining environment, as reflected in the Reclamation & Post Mining Regulation, imposes excessive burdens on mining companies while completely ignoring the practical inability of most Regional Governments to be able to properly supervise the contemplated system of mining environment protection and management. The end result can only be additional costs for mining companies with no real improvement in mining environment protection and management to justify these additional costs.

Background

The approach to better mining environment protection and management, as reflected in the Reclamation & Post Mining Regulation, does not differ substantially from that in place prior to the 2009 Mining Law. This approach has four principal elements to it being (i) the preparation by mine owners of Reclamation Plans and Post Mining Activities Plans incorporating success criteria (“**Plans**”), (ii) the review and approval of the Plans by Regional Governments, (iii) the funding and carrying out of the Plans by mine owners and (iv) providing of alternative means for carrying out the Plans if the mine owners fail to do so.

The way in which the Reclamation & Post Mining Regulation goes about dealing with each of the elements identified above is seriously flawed and suggests that little, if anything, has been learnt from the pre-2009 Mining Law experience.

Analysis

In the analysis which follows, we will briefly address the more obvious weaknesses in each of the principal elements of the current approach to better mining environment protection and management.

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1. Preparation of Plans: Preparation of the Plans is the responsibility of mine owners and Articles 5 to 12 of the Reclamation & Post Mining Regulation set out the detailed requirements for and contents of the Plans. There are at least three obvious flaws with the Plan requirements. First, it is going to be impossible for most of Indonesia's mine owners to prepare the Plans, given the complex and detailed nature of the Plan requirements and contents. Although the comparatively small number of large mine owners in Indonesia may have the internal human and technical resources needed to pull together the large amounts of data required to develop a meaningful Plan which meets the requirements of Articles 5 to 12, this is demonstrably not the case for the vastly greater number of small and medium sized mine owners. Effectively then, in most cases the preparation of the Plans is, as a matter of necessity, going to have to be outsourced to third party consultants, thereby adding further costs to mine owners' operations.

Second, and perhaps more importantly, it is up to the mine owners to set the success criteria by which the implementation of the Plans will be judged. Clearly, this gives mine owners a strong incentive to set very modest, not to say wholly inadequate, success criteria thereby ensuring the "successful" implementation of the Plans according to those modest or inadequate success criteria and at minimum cost to the mine owners. Of course, responsible mine owners will take their Plan preparation obligations seriously and set objectively reasonable success criteria. This, however, just means that, once again, the responsible mine owners in Indonesia will be placed at a competitive disadvantage by specifying Plan success criteria which are demanding and costly to achieve but necessary in terms of proper mining environment protection and management. On the other hand, irresponsible mine owners will keep their costs down by ignoring the realities of proper mining environment protection and management and setting overly modest and inadequate success criteria.

2. Evaluation of Plans: Having the Plans, including the success criteria, vetted and approved by the Regional Governments only makes sense if the Regional Governments have access to the human and technical resources required to be able to evaluate the Plans, including the success criteria, in an informed and meaningful manner. Given the incentive, as highlighted in 1 above, for irresponsible mine owners to only specify success criteria which can definitely be met at a minimum cost, the ability of the Regional Governments, to vet the Plans in an informed and meaningful manner, is particularly important as this is the only real safeguard for ensuring that the Plans are consistent with the level of mining environment protection and management required in individual cases. As, however, must be readily apparent to anyone who has dealt with the Regional Governments, most Regional Governments are very much under-staffed and under-resourced when it comes to the hard technical skills needed to determine whether or not a particular Plan and its associated success criteria make sense in the context of the particular mining environment to be protected and managed. This will, inevitably, result in a "tick the box" approach whereby Plans will be received and approved by the Regional Governments as a mere formality and with the emphasis being on mine owners submitting "a Plan" rather than on mine owners submitting "an appropriate plan in the context of the particular mining environment to be protected and managed".

If most Regional Governments are not going to be in a position to evaluate the Plans, including the success criteria, in an informed and meaningful manner, then the power, which Articles 13 and 16 of the Reclamation & Post Mining Regulation give to the Regional Governments to (i) reject Plans which are deemed to be inadequate and (ii) require the revision and resubmission of inadequate Plans is unlikely to be used or, at least, used for its intended and proper purpose. Rather, it seems more likely the review and approval/disapproval of Plans by Regional Governments will become another potential “choke point” for mining projects open to exploitation by unscrupulous Regional Government officials.

- 3. Funding and Carrying Out of Plans:** It is, of course, entirely appropriate that mine owners be responsible for funding and carrying out the Plans given that it is their activities (or, at least, the activities of their contractors) which have given rise to the need for mining environment protection and management. However, the way in which the funding is to be handled seems seriously deficient for a variety of reasons.

First, the amount of funding (in the form of a budget) required to implement the Plan is to be determined by the mine owner and the budget for the same forms part of the Plan. As the mine owner has to fund the implementation of the Plan, an unscrupulous mine owner has every incentive to (i) set the budget as low as possible and (ii) justify the budget by submitting a very modest Plan with success criteria that are determined by cost considerations only and without regard to what is actually required in terms of proper mining environment protection and management. Because of the likely absence of any meaningful review by the Regional Government of the Plan and its incorporated budget (see 2. above), there would seem to be every chance of the inadequate budget being approved.

Second, the mine owner is obliged to provide a “guarantee” for the performance of the work contemplated by the Plan. The guarantee may take a number of forms including (i) a joint account or time deposit at or a bank guarantee from a government owned bank or (ii) an accounting reserve. Each of these alternatives is flawed for different reasons. In the case of the account/deposit/bank guarantee alternative, no mechanism is provided in the Reclamation & Post Mining Regulation for the gradual release of the account/deposit/bank guarantee amount as and when the Plan work is carried out; rather, it would seem to be the case that the full guarantee amount remains committed until all the Plan work is carried out. This would appear to raise the prospect of the mine owner having to commit, for the life of the Plan, a potentially large sum of money to fund the account/deposit/bank guarantee while, at the same time, having to find a way to pay the contractors which will actually do, on behalf of the mine owner, the work contemplated by the Plan as most mine owners will not be in a position to do the work themselves – thereby effectively imposing a double cost on the mine owner, at least during the life of the Plan. In the case of the accounting reserve alternative, there would seem to be nothing to prevent a mine owner from creating the reserve, providing evidence to the Regional Government of the creation of the reserve and then, immediately thereafter and without the Regional Government’s knowledge, using the reserve for something else or simply doing away with the reserve - thereby completely negating the purpose and effectiveness of the

“guarantee”. It would not be surprising to see most mine owners opting for the accounting reserve alternative with its greater “flexibility”, particularly as the Reclamation & Post Mining Regulation does not provide either (i) any guidance as to how the amount or the guarantee will be determined or by whom or (ii) any assured right to obtain a refund, on a timely basis, of the guarantee once the Plan work is completed but, rather, merely the right to “apply” for the return of the guarantee funds. This will hardly fill most mine owners with a lot of confidence as to the likelihood of a speedy refund once the Plan success criteria have been met.

- 4. Non-Performance of Plan:** Nowhere are the inherent weaknesses of the Reclamation & Post Mining Regulation more apparent than in the provisions the Reclamation & Post Mining Regulation makes for dealing with the failure of mine owners to carry out the Plan and/or otherwise realize the success criteria specified in the Plan. Articles 33 and 39 contemplate that, if the mine owner fails to meet the Plan success criteria, the Regional Government may appoint a third party to carry out the Plan work and using the guarantee funds or impose various sanctions on the mine owner including revocation of the mine owner’s IUP. Query, however, just how this is going to work in practice.

First, it is highly questionable whether it is even legally possible for a third party, which is not the Regional Government, the mine owner or the land owner, to go onto the mine owner’s concession and start carrying out the Plan work without the permission of the mine owner or the land owner and in the absence of a court order.

Second, how is the third party going to get access to the guarantee funds without the cooperation of the mine owner and when the need for the third party was not known or provided for at the time the guarantee was put in place? The legal ability of the Regional Government to assign or transfer the benefit of the guarantee without the co-operation of the mine owner is, again, highly questionable at least where the guarantee is in the form of a joint account or an accounting reserve.

Third, having completed its mining activities and extracted all the economic value from the mining concession, many mine owners will, surely, be wholly indifferent to threats from the Regional Government that it will revoke the mine owner’s IUP if it does not complete the Plan work and deliver on the success criteria.

Summary and Conclusions

The Reclamation & Post Mining Regulation, in its current form, is almost certain to fail in achieving its stated objective of promoting better mining environment protection and management. This is primarily because the drafters of the Reclamation & Post Mining Regulation have not taken into account the chronic lack of relevant human and technical resources in most Regional Governments capable of providing any independent and meaningful assessment of whether or not the Plans, as prepared and submitted to them by mine owners, are appropriate and sufficient for the particular mining environment in question. The problem is only compounded by the very tangible, financial incentives mine owners have to prepare and submit wholly inadequate plans. If mine owners are to prepare and fund the Plans, then the system is

only likely to work if there is some meaningful and technically competent independent review of the adequacy of the Plans; otherwise, the Plans will surely become just “tick the box” exercise with no real substance.

At the same time, the Plan requirements represent an unrealistic additional burden for small and medium sized mine owners which will only serve to increase the operating costs of responsible mine owners trying to fulfill these requirements. Responsible mine owners will then be effectively placed at a competitive disadvantage to unscrupulous mine owners which are given all too many opportunities, by the ill conceived Reclamation & Post Mining Regulation, to easily avoid their mining environment protection and management obligations.

Finally, the supposed sanctions for non-performing mine owners are ineffective while the legal and practical ability of the Regional Governments to get third parties to carry out the Plan work, on behalf of non-performing mine owners, is highly questionable.

What is particularly surprising is how little has, apparently, be learnt from the pre-2009 Mining Law experience.

The Reclamation & Post Mining Regulation is an all too common example in Indonesia of good legislative intentions undermined by inadequate preparation and planning for a workable regulatory framework. Most, if not all, of the identified weaknesses in the Reclamation & Post Mining Regulation would have been uncovered by MoEMR had there been serious consultation, in advance, with the mining industry.

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