

Note on Recent Developments



Indonesia's Omnibus Bill on Job Creation: a Setback for Environmental Law?

Raynaldo SEMBIRING

Director, Indonesian Centre for Environmental Law, Jakarta, Indonesia
raynaldo.sembiring@icel.or.id

Isna FATIMAH

Researcher, Indonesian Centre for Environmental Law, Jakarta, Indonesia
isna@icel.or.id

Grita Anindarini WIDYANINGSIH

Researcher, Indonesian Centre for Environmental Law, Jakarta, Indonesia
anindagrita@icel.or.id

1 Introduction

The boosting of investment to accelerate economic development is the main goal of the newly re-elected President of the Republic of Indonesia. In his inauguration speech in October 2019, President Joko Widodo declared five priority development goals comprising human resources development: infrastructure development; deregulation through a proposed 'omnibus' law; bureaucratic reform: and economic reform.¹ He introduced two main laws as a means of boosting investment: a law on job creation and a law on small and middle

1 *The Jakarta Post*, "The main thing is not the process, but the result": Jokowi's full inauguration speech', Sunday, October 20 2019, <https://www.thejakartapost.com/news/2019/10/20/the-main-thing-is-not-the-process-but-the-result-jokowis-full-inauguration-speech.html>.

level business. Other proposed laws were also announced that are intended to use the omnibus method, covering subjects such as taxation and pharmaceuticals. The proposed omnibus law on job creation (generally referred to as the 'Omnibus Bill') has attracted the most attention. This law would amend more than seventy current laws,² including Law No 32/2009 on Environmental Protection and Management (Environmental Law). This note focuses on the implications for environmental regulation as a result of this Omnibus Bill.

The 'Omnibus Bill', covering a range of subject matters, is intended to deregulate the scattered, overlapping, and disharmonious laws related to business activities in Indonesia. Although the enactment was alien to the usual Indonesia regulation-making method,³ the government insists that this is the best way to improve the regulatory framework. It expects the new law to significantly improve the level of ease of doing business in Indonesia. Specifically, the government has announced that the law would improve the economic structure so that it will be capable of reaching Indonesia's economic development target up to 5.7%–6%.⁴ Without the Omnibus Bill, the government predicted that Indonesia would not be able to escape a 'middle income' trap.⁵

The core call of the Omnibus Bill is to shift from a license-based approach to a risk-based approach. Since heavy regulation and bureaucracy on licenses have played a pivotal role in hampering investment growth in Indonesia, the government believes that minimizing the number of licenses and permits, including environmental permits, should prevail. Furthermore, to cope with institutional ego and diverse regulation at provincial and district levels, the Omnibus Bill underlines the centralization of authority pertaining to business facilitation.

With regard to the environmental regulation provisions, rumours spread over the period of drafting the Bill concerning the fundamental changes in the norms of environmental safeguards, such as the cessation of environmental impact assessment requirements. Fortunately, this was later proved incorrect,

2 The recent version of the Bill (12 February 2020 version) would amend 73 laws and encompasses 15 chapters, 174 articles and 1028 pages. The academic paper is 1981 pages long. For comment in English see Esther SAMBOH, 'Guide to omnibus bill on job creation: 1,028 pages in 10 minutes' *The Jakarta Post* <https://www.thejakartapost.com/news/2020/02/21/guide-to-omnibus-bill-on-job-creation-1028-pages-in-8-minutes.html>.

3 The method has not been recognized in the Indonesian regulation system; see in particular, Law No 12/2011 on Establishment of Laws and Regulations; see also: Maria Farida INDRATI, "Omnibus Law", UU Sapu Jagat? (Omnibus Law, a 'one for all' Law?), *Kompas*, Saturday, 4 January 2020, (available in Indonesian only).

4 Coordinating Ministry for Economic Affairs, *An Explanation to Omnibus Law on Job Creation*, Jakarta, January 29, 2020, (in Indonesian only).

5 Ibid.

in the latest version of the Bill (12 February 2020). Among others, the issues of most concern to environmental non-government environmental organizations in the current version are:

- 1) The transparency of the law-drafting process.
- 2) The proposal for environmental permits to be abolished.
- 3) That compliance monitoring will be 'risk-based'. Risks perceived to be lower will lead to lower-level monitoring.
- 4) The winding back of the strict liability provisions.

While it is apparent that environmental regulation is a minor part of the whole Bill, the changed norms of environmental law in the Bill nevertheless pose significant changes to the core of current environmental safeguards. Some of these changes⁶ are explained in the next sections, which encompass: the abolished environmental permit, changes in the environmental compliance monitoring system, and changes in the design of the liability provisions.

2 A Silent Bill

Before discussing the changed norms on environment-related stipulations, this section will depict the participatory aspect of the drafting of the Bill. Despite public demand for scrutiny and open participation in the creation of the Bill, the government completed the draft without formal public consultation of any kind except for the general concept of the Bill. The acting coordinator for drafting the bill, the Coordinating Ministry for Economic Affairs, formed a task force for public participation on 9 December 2019.⁷ The formation of the task force was disappointing for the wider public because it consists only representatives of business-related stakeholders and government. In the middle of December 2019, a draft of the Bill was made available to the public. Having read the draft, many stakeholders, including activists from a range of sectors as well as academicians, criticized the draft. Labour groups from myriad associations began striking from that time.⁸ However, in what seems as an extraordinary

6 This note provides necessarily tentative and preliminary analysis, as the Omnibus Bill is still being developed.

7 The Coordinating Ministry for Economic Affairs Decision No 378/2019 on Joint Task Force of Government and Chamber of Commerce and Industry.

8 For example, see Adrian Wail AKHLAS, 'Labor unions protest Jokowi's omnibus bill' *The Jakarta Post*, January 9, 2020 <https://www.thejakartapost.com/news/2020/01/09/labor-unions-protest-jokowis-omnibus-bill.html>.

move, the government announced in mid-January 2020 that the draft was a hoax.⁹

The current version of the Bill was made available for public scrutiny only on the day that the government delivered it to the Indonesian House of Representatives, on 12 February 2020. Before that, hints about the Bill were alluded to only in Power Point presentations by representatives of the government.

The government's choice to silently develop the bill until it was finalized is inconsistent with the characteristics of good law making. In a democratic society, involving the public at the earliest possible stage is a must. According to Law No 12/2011, all draft of bills must be made easily accessible for public so that they make submissions either verbally or in writing.¹⁰ Involving the public at the earliest stage is in line with the Indonesian Constitution, which ensures that everyone is entitled to find, obtain, have, keep, process, and make information available by any means or channels available.¹¹

Further, the current process, not being transparent, also contradicts the purpose of the Bill itself, namely to spur investment and create jobs. The investors consider transparency in policy making to be a significant problem that needs to be addressed.¹² Furthermore, considering that the current Bill requires the enactment of four hundred and ninety-six current government regulations, ensuring as much legal certainty as possible for investors is clearly important in relation to their investment decisions. As it usually takes some years to finalise a government regulation, it seems impossible for the government to complete all of these implementing laws in the expected timeframe with adequate participatory procedures.

With regard to participation in environmental decision making, this Bill is very restrictive. It poses limitations on the qualifications of which 'people' should be involved in the environmental assessment process. The current provisions stipulate that only people who are *directly* affected by a relevant impact of business plan will be allowed to be involved.¹³ This qualification is in

9 *The Jakarta Post*, 'Be careful, your draft of the omnibus bill might be a hoax: Government', 21 January, 2020 <https://www.thejakartapost.com/news/2020/01/21/be-careful-your-draft-of-the-omnibus-bill-might-be-a-hoax-government.html>.

10 Article 96 Law No 12 Year 2011 on Establishment of Laws and Regulations.

11 Article 28F Indonesian Constitution (UUD 1945).

12 OECD, 'Improving Indonesia's Investment Climate', February 2011, Issue 1, p 4. <https://www.oecd.org/indonesia/indonesia-improving-investment-climate.pdf>, accessed on March 08, 2020.

13 See Article 23 section 5 and 6 of Omnibus Bill regarding the amendment of Article 25 and 26 Environmental Law (page 82–83).

great contrast to that usually stipulated in environmental laws in many jurisdictions. Normally those who can make submissions include people who are directly or indirectly affected, as well as environmentally-concerned people. For Indonesian society, awareness of the impact of environmental decision-making is often lacking, and that is why environmentally aware people and organisations should be involved. Due to the lack of consolidated data, many decisions that have an impact on the environment can affect peoples' rights, such as the right not to be subjected to pollution. Affected people should thus be given the opportunity to be involved in decision-making. While more people are involved in decision-making may increase the initial costs, clearly the overall cost would be reduced if the process is made transparent from the beginning and the database is complete and accessible.

Furthermore, the Bill stipulates that the announcement of environmental feasibility decisions will be made through an electronic system or other ways decided by the central government.¹⁴ The current Environmental Law provision states that announcements must be made using methods that the public can understand easily.¹⁵ The changes in the Bill indicate that there is an intention to shift from an obligation of result to an obligation of conduct. According to the Bill, as long as the government has announced the decision through the designated system, the obligation is considered fulfilled. The greatest threat of this stipulation is that the internet is not yet accessible for the entire Indonesian archipelago. It is difficult enough to expect that people who live in the rural areas would have adequate internet access, let alone proactively accessing the information in circumstances where they have not been made aware of the importance of a decision concerning the environment.

3 Towards One License: Farewell to Environmental Permits

One of the biggest issues of this Omnibus Bill lies in the major changes of Indonesia's permit regime. In the spirit of simplification, this Bill tries to eliminate a range of types of permit, including the environmental permit, and convert all permits to one type, namely the business permit.¹⁶ The current environmental permit would be transformed into an environmental approval, which would then become a pre-requisite for a business permit, along with

14 Article 23 section 18 of Omnibus Bill on Job Creation, which e amend Article 39 of the Environmental Law(page 85).

15 Article 39 Environmental Law, *ibid*.

16 Article 7–11 of Omnibus Bill on Job Creation (page 8–11).

other approvals, for instance the spatial planning approval and the building approval.¹⁷

Furthermore, the Bill also introduces a risk-based approach in determining the type of business permit that businesses need to secure. The risk itself is assessed based on an appraisal conducted by the government, thus increasing the degree of possible damage as well as the possibility that the damage will actually occur.¹⁸ The degree of damage itself will be determined by assessing four aspects: health, safety, the environment, and/or natural resources utilization.¹⁹ However, the proposed business permit is divided into three risk categories, including:

- (a) Low risk activities: For activities that are categorized as low risk, the business permit that will be given is a Business Identification Number.
- (b) Medium risk activities: For activities that are categorized as medium risk, the business permit that will be given include a Business Identification Number and a Standard Certificate. The Standard Certificate itself is a statement that the businessperson already meets the standard prior to starting their business. However, it is still unclear who will grant this certificate.
- (c) High risk activities: For activities that are categorized as high risk, the business permit that will be given include the Business Identification Number and the permit itself.²⁰

On its face, this mechanism seems to offer an answer to the complexity of the permit system in Indonesia. But unfortunately, the Government seems to neglect the fact that this permit regime alteration may bring environmental degradation in Indonesia to the next (lower) level. Historically, environmental permits were established as an instrument to control deterioration of environmental quality by human activities.²¹ On reviewing the academic paper²² prepared for the Bill, the Government apparently altered this 'control' instrument from an environmental permit to an Environmental Impact Assessment and Environmental Management and Monitoring Efforts. However, there are

17 Article 14 Omnibus Bill on Job Creation (page 12).

18 Academic Paper of the Omnibus Bill, page 100.

19 Article 8 Omnibus Bill on Job Creation (page 8–9).

20 Article 8–11 Omnibus Bill on Job Creation (page 8–11).

21 RONA, Donna *Environmental Permits: a time-saving guide*, (London: Chapean and Hall, 1988), vii. and Sundari RANGKUTI (2000), as cited in the Academic Paper of Governmental Regulation No 27 year 2012 on Environmental Permits.

22 In the Indonesian Parliament a bill is generally accompanied by an explanatory description of the proposed law, and/or an academic text that discusses the scope and purposes of the proposed law; see The House Of Representatives of the Republic of Indonesia 'Law-Making' <http://www.dpr.go.id/en/tentang/pembuatan-uu>.

many weaknesses of this approach. Firstly, the activities that will be subject to the EIA process remain unclear. The Bill mentions that activities with a 'significant impact' on the environment and on social, economic and cultural aspects, shall be subject to the EIA process.²³ The specific criteria that govern this significant impact will be stipulated by government regulation. Unfortunately, under this arrangement, it is possible that an activity that may have a significant impact is not deemed a high-risk activity, if the possibility of the damage occurring is infrequent. Thus, it is possible that an activity that has a significant impact will not undergo the EIA process and only needs to secure a Standard Certificate.

If the above argument is correct, the question becomes: can the Government stipulate strong standards to ensure environmental protection? Unfortunately, the answer is uncertain. Basically, the existing environmental law already defines the standards for EIA as well as the Environmental Management and Monitoring Efforts. But the limitation of the available data (ie, the environmental inventory, environmental carrying capacity, etc) still remain a challenge and is reflected in the poor quality of the EIA documents. In the absence of these fundamental data, the idea of strengthening the standards will also be questionable. In the end, with the lack of adequate standards and unclear categorization of high risk and significant impact activities, the narrative that this Bill will bring more stringent environmental protection remains doubtful.

Furthermore, the Bill also downgrades the essence of environmental consideration from a 'permit' regime into an 'approval' regime. Under the Bill, an environmental permit is no longer a requirement to obtain a business permit, yet the decision concerning environmental feasibility²⁴ or Statement of Environmental Management is still required.²⁵ This is actually an idea of the old regime of Indonesia's previous environmental law (Law No 23 of 1997), where the EIA and the Environmental Compliance and Monitoring Effort became a pre-requisite for the business permit. However, this approach has been shown as not capable of preventing damage to the environment from

23 Article 23 section 3 of Omnibus Bill on Job Creation regarding the amendment of Article 23 of Environmental Law (page 81).

24 Decision of Environmental Feasibility is an approval that states the environmental feasibility of activities that undergo the EIA.

25 Statement of Environmental Management is an approval that provides that the environmental feasibility of activities that must undergo the Environmental Management and Monitoring Effort; see Article 23 section 1 of Omnibus Bill, regarding the additional section to Article 1 section 35 Environmental Law (p 80) and Article 23 section 4 of Omnibus Bill regarding the amendment of Article 24 Environmental Law (p 82).

business activities.²⁶ This is because the business permit was regarded as the main permit, while the other components (including the environmental approval) were seen as supporting instruments. When there is a violation of the environmental requirements, it becomes doubtful whether it will not automatically affect the business permit, since the business permit comprises many supporting approvals and the environmental approval is only one of them. We argue that for this reason, environmental permits should stand independently.

Finally, the elimination of the environmental permit has ignored its essence as an administrative instrument. Access for the public to file a lawsuit against a state-administrative decision is proposed to be eliminated by the Bill, and there would be an open door for the Government to conduct compliance monitoring, which will be discussed in the next section. The end result is that the environmental permit is no longer a governmental instrument to determine the legally binding requirements concerning any activity that may have a significant impact on the environment.

4 Shifting Risk Prevention to Environmental Compliance Monitoring

The Omnibus Bill proposes to change the environmental compliance monitoring system in three ways. The first change is related to the proposed abolition of the environmental permit,²⁷ which makes the line of authority for environmental compliance monitoring officers and the decision-making process uncertain. If the authority that issues permits was moved to another institution (because the only permit will be a business permit), while the monitoring officer remains under the Ministry of Environment, the line of coordination will require inter-institutional communications.

The second change is re-centralizing the authority to conduct environmental compliance monitoring to the central government.²⁸ Provincial and district governments will not have authority under the Bill to conduct environmental monitoring for business activities. According to the current Environmental Law, the authority to monitor environmental compliance is given to the environmental monitoring officer based on designation from

26 Academic Paper of Law No 32 Year 2009 on Environmental Protection.

27 As explained in the previous section, although the environmental permit is to be abolished, and the environmental impact assessment and environmental management and monitoring program will remain, with some changes.

28 Article 23 section 26 of Omnibus Bill concerning amendment of Article 71 Environmental Law (page 90–91).

the Ministry for Environment, the Governor or the Regent, according to their respective scope of authority.²⁹ The proposed provision will result in a greater workload of the central government in monitoring all of the environmental problems in Indonesia. Because of this change, it is possible that the monitoring will only focus on high-risk activities, and the monitoring for medium-risk and low-risk activities will be neglected. The definition of 'central government' is unspecified so that it remains unclear which institution will bear the responsibility to conduct environmental monitoring and enforcement.

The third change is in the administrative sanctioning system, which encompasses the form of sanctions, the system of escalating sanctions and the cessation of second-line enforcement by the Ministry.

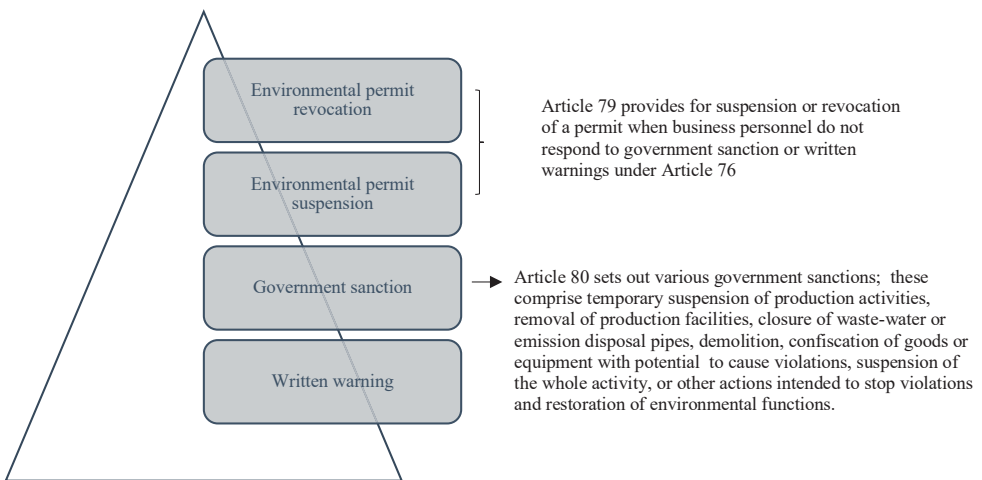


FIGURE 1 Administrative Sanctions in Environmental Law
 SOURCE: FIGURE CREATED BY THE AUTHORS, BASED ON ARTICLES 76, 79, AND 80, ENVIRONMENTAL LAW 2009

In the Omnibus Bill, the types of sanctions include warnings, temporary suspensions, administrative fines, coercion, license/certificate/agreement revocation, and revocation of business licenses. This formulation is applicable to all aspects regulated under the Bill. There is one additional type of sanction for environmental obligations, namely an obligation to restore a damaged environment.³⁰ However, this type of sanction is narrower than in the

29 Article 71, Environmental Law.
 30 Article 168 of Omnibus Bill on Job Creation (page 681).

Environmental Law, which currently allows the application of this sanction to all kinds of alteration to the environment so long as it is deemed as a violation of environmental regulations. The changes in the present bill certainly demonstrate some inconsistencies with the provisions of the Environmental Law.

A primary concern with regard to risk-based regulation is the change in the compliance monitoring strategy. The higher the risk of certain activity, the stricter and more often the monitoring will be. The lower the risk, the more lenient the monitoring will be. At first sight, this does not seem problematic. However, if we look into the classification of business according to its risk, there could be a problem for accumulated and volatile mid- and low-risk business activities.³¹ It is important to ensure the efficacy of preventive measures by regularly calculating the potential impact of all activities within a certain region before issuing new business permits, regardless of the lower risks.³² Regular monitoring for low- and middle-risk businesses are just as important as being cautious prior to issuing a business permit. In the end, the strategy to conduct monitoring for all levels of risk is inevitable. Unfortunately, the two conditions do not appear in the current Bill. The function of environmental permits, which was to prevent volatile and accumulated impacts of business activities, have been removed, while the monitoring system was left uncertain as to which authority should follow up and make decisions when non-compliance is detected.

5 The Downgrading of the Strict Liability Provision

Under this Bill, the provision of strict liability would also change, not only for the Environmental Law but also for the Forestry Law. Under the Forestry Law, the Omnibus Bill would significantly change the terms as follows:

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- 31 Feby IVALERINA, *et al Hukum dan Kebijakan Lingkungan dalam Poros Percepatan Investasi: catatan terhadap wacana Omnibus Law Cipta Lapangan Kerja* (Environmental Law and Policy amidst investment acceleration: a note on the Omnibus Bill on Job Creation), Policy Paper 1st Serial, ICEL: Jakarta, 28 January 2020 (available in Indonesian only). See also: Mohammad Mova AL'AFGHANI, 'Risk-based approach in job creation bill lacks rigor', in *The Jakarta Post*, 3 March 2020.
- 32 See inter alia, Justin TABERHAM, Ed., *Developments in Environmental Regulations: Risk Based Regulation in the UK and Europe*, Palgrave Studies in Environmental Policy and Regulation, 2018, DOI 10.1007/978-3-319-61937-8, p. 71–72.

Law No 41 1999 on Forestry**Omnibus Bill**

The permit holder shall be responsible for the occurrence of forest fires in its working area (Article 49)

The permit holder shall prevent and control forest fires in its working area (Article 37 section 16)

Even though the Forestry Law does not clearly mention 'strict liability', Indonesian legal scholars agree that this provision can be deemed strict liability or even tend towards absolute liability (as it does not include a defence or escape clause). This provision has been frequently used for forest fire cases in peatland areas, for example when the Ministry of Environment and Forestry sued Bumi Mekar Hijau, Ltd (2015–2016). Even in the appeal documents examined by the Palembang High Court, it appears that the Ministry of Environment and Forestry (through its attorneys) regarded that provision as meaning strict liability.³³ The High Court then decided to accept the Ministry's lawsuit and found Bumi Mekar Hijau at fault.

However, under the Omnibus Bill, the provision changes from 'being responsible' to 'shall prevent and control' forest fires. This alteration has the effect of absolutely eliminating strict liability, since the 'responsible' terminology has been deleted and changed into 'shall prevent and control'.

Furthermore, regarding this issue, the Ministry argues that Article 49 still could be used if the corporation continues to cause forest fires, by using criminal law or administrative sanctions.³⁴ This argument actually confirms that the concept of strict liability has been removed, since in Indonesia strict liability is only known in the field of civil liability, not criminal liability.

In the amendment to the Environmental Law in this Omnibus Bill, strict liability is not removed (unlike in the Forestry Law), but it will contribute to confusion in future investigations.

33 *Ministry of Environment and Forestry v Bumi Mekar Hijau, Ltd* (2015–2016), Decision No 51/PDT/2016/PT/PLG, page. 90–91.

34 Ministry of Environment and Forestry, *Frequently Asked Questions* on Omnibus Bill on Job Creation, for environment and forestry section, 29th February 2020.

Existing Environmental Law

Omnibus Bill

Every person whose action, business and/or activity using hazardous and toxic materials, producing and/or managing hazardous and toxic waste and/or causing serious threats to the environment **shall be absolutely responsible for the incurred losses without the need to prove fault**

Every person whose action, business and/or activity using hazardous and toxic materials, producing and/or managing hazardous and toxic waste and/or causing serious threat to the environment **shall be absolutely responsible for the incurred losses from the activities**

The main concern from the alteration is the deletion of the phrase ‘without the need to prove fault’ in the Bill. Under strict liability, there are three components that need to be proved: (i) the activities pose a serious threat to the environment or abnormally dangerous activities, (ii) loss, and (iii) causation.³⁵ The elimination of the ‘without fault’ element results in the possibility that strict liability will be difficult to prove in court. In recent judgments on forest fire cases, the judges considered why the lawsuit must be decided under the liability based on fault regime or the liability without fault regime (strict liability). In their consideration, judges explored whether ‘fault’ should be proven or not. If the judges agree to use strict liability, then generally they no longer considered ‘the fault’ as explicitly stated in the provision.³⁶ Thus, the elimination of ‘without the need to prove fault’ clause will lead to the interpretation that ‘fault’ should be proven, even for the strict liability cases. Then, there will be a blurred line between the liability based on fault regime and the liability without fault regime.

Most importantly, the strict liability provision under existing environmental law is not challenged in practice, thus there is no urgency to change the provision. However, while a change of this provision in Environmental Law is not as fatal as in the case of the Forestry Law, it still could blur the verification process under the strict liability regime.

35 Decision of Supreme Court No 36/KMA/SK/II/2013 on *Environmental Case Handling Guidelines*, page 21.

36 See for instance: *Ministry of Environment and Forests v Waringin Agro Jaya, Ltd* (2016), Decision no 465/Pdt.G-LH/2016/PN Jkt. Sel, page 293–294.

6 Conclusion

Based on the foregoing analysis, it can be seen that the Omnibus Bill in its current form would have significant impacts on the Indonesian legal system, particularly with regard to environmental and natural resources issues. The drafting process of the Bill has clearly contradicted the Law on Establishment of Laws and Regulations, due to the issue of lack of transparency. Also, it is questionable whether the aim of the Bill—to attract more investors—will be achieved, considering the number of implementing regulations that will need to be understood and complied with. As a result, the Bill will actually increase legal uncertainty for the investors.

In summary, this Bill brings fundamental changes to the environmental protection framework of Indonesia. The elimination of the environmental license, and downgrading it into an approval mechanism will reduce the effectiveness of the law enforcement mechanism because, when a violation of the approval occurs, the business permit will not necessarily be affected. Further, the abolition of the environmental license will close off the public opportunity to file law suits against administrative decisions. Additionally, the shifting of compliance monitoring will produce a heavier workload for the central government, as the compliance of the activities over the whole of the Indonesian archipelago will be subject to monitoring. In this manner, the monitoring mechanism will not be as efficient as it could be if the authority was decentralised. Lastly, the Omnibus Bill also downgrades the strength of strict liability. Under the Forestry Law, it will clearly be more difficult to use strict liability in convicting the corporations that burn the forests. On the other hand, under the environmental law, the Omnibus Bill adds to the confusion concerning the implementation of strict liability in the verification process.