

## *Decentralising Environmental Management in Indonesia: Impacts on EIA and Industrial Water Pollution*

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Until 2001 Indonesian environmental management was an almost exclusively central government affair, certainly on paper. Environmental law and policies were made by sectoral government departments in Jakarta, notably industries, forestry and mining. Policy directives and implementing decrees were passed on to the branch offices of these departments, the so-called *kantor wilayah*, which were to further implement and enforce them. The State Ministry of the Environment attempted to co-ordinate the law- and policy making process at the central level, but had little say over the sectoral Ministries (Bedner 2003a, Otto 2003). Likewise, the State Ministry's operational counterpart, the national Environmental Impact agency *Bapedal* attempted to co-ordinate implementation and enforcement, but had neither a clear legal mandate nor branch offices – in 1998 it disposed of only three *kantor wilayah* for the entire territory of the archipelago. As a result, environmental regulation, policies, implementation and enforcement were both centralised and fragmented.

Environmentalists within and outside the government criticised this situation – in particular in the field of forestry – but decentralisation never became a major objective of environmental NGOs (Colombijn 1998, Cribb 2003).<sup>1</sup> At the time this was a pragmatic approach, but

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<sup>1</sup> This may also have to do with the fact that decentralisation would not be much in the interest of the national environmental NGOs. Colombijn has described how these are brokers between the local and the international level (1998: 324–327), and decentralisation would reduce their position in both ways.

the political situation under the New Order which so much favoured centralism may in fact have precluded environmentalist forces from fully appreciating the potential advantages of decentralised, democratic environmental management. In addition national environmental NGOs may have had doubts about local environmental management capacity similar to those of the government, while decentralisation could potentially also reduce their own position and influence (cf. Colombijn 1998: 324–327).

Nonetheless, from a theoretical perspective the advantages of decentralisation in this field are obvious, including accountability to constituencies directly affected by environmental damage, first-hand knowledge of the local situation, and shorter lines of communication between state agencies and the local population. Pursuing decentralisation therefore does make sense from an environmentalist perspective.

The promulgation of Act no. 22 of 1999 on regional autonomy of 1999 took most environmentalists by surprise and made them face a situation where decentralisation of the environment was to be a reality within two years time (Bedner 2000: 1). Seven years have passed since, another Act (no. 32 of 2004) on regional autonomy has replaced the one of 1999, and the main question this article intends to answer is whether the decentralisation process has led to any substantial changes in environmental management at the district level, the intended centre of gravity of the new system of regional autonomy. As environmental management in general is too ambitious for the limitations of an article such as this one, its focus will be on two aspects of environmental management which have changed most due to the new system: enforcement of water pollution regulation and Environmental Impact Assessment. The second question dealt with is whether as a result some of the potential advantages listed above have been realised, or whether enforcement of environmental law has deteriorated and EIA-practice has become less effective.

To answer these questions the article first analyses the general division of authority in environmental management, before looking at the data available concerning water pollution regulation enforcement and EIA in practice. The reader should be aware that the data on practice are patchy, as few materials are available. Much of the evidence presented will therefore be circumstantial, based on a search of the literature,

supplied with data from limited fieldwork in Bandung, West Java, and Jakarta. The intention is to offer a point of departure for further inquiry on the subjects discussed rather than a full-fledged evaluation.

The article proceeds as follows. The first part presents an overview of the legal structure underpinning environmental law enforcement and EIA. After a brief description of the centralised system that still was in place after the Environmental Management Act was enacted in 1997, it continues to discuss the legal consequences of the Regional Autonomy Acts of 1999 and 2004 on this framework. The article then goes on to consider how the law at the provincial and district level has changed, before taking a more empirical perspective by looking at the developments in practice following the implementation of the RAA. After presenting some conclusions, it will end with a few suggestions for improvement.

### **EIA and Enforcement in the Environmental Management Act of 1997**

One of the New Order's last major pieces of legislation was the Environmental Management Act (EMA) of 1997, which replaced Indonesia's first EMA of 1982. It intended to repair several flaws of its predecessor statute and introduced a number of new environmental law tools developed since 1982, such as the environmental audit and the class action.

An important concern of the drafters was to increase the influence of the State Minister of the Environment vis-à-vis his powerful colleagues in charge of sectors as forestry, mining and industries. To this end the EMA indeed attributed some operational powers to the State Minister, thus enabling him to play a more direct role in enforcement. Much hope was invested in the newly acquired power of the State Minister to appoint his own special investigators (*Penyidik Pegawai Negeri Sipil* or *PPNS*) who could undertake investigation independently from the police and from the officials charged with supervision of firms in sectors such as mining, forestry and industries (Bedner 2003b: 91 ff.).

In addition, the EMA brought several changes regarding enforcement generally. Most conspicuous was a section on administrative enforcement, which up until then had never been regulated in any act of a general nature. The EMA also considerably expanded the

opportunities for citizens to lodge complaints or bring suit before a court in case of suffering from environmental pollution or damage, including suits brought by NGOs who – according to Article 38(1) – were unequivocally allowed to act on behalf of environmental interests. Environmental criminal law enforcement was further invigorated, with higher sentences and a new section added on corporate crime – the first one in Indonesian law.

Regarding EIA the EMA brought nothing new, stipulating in Article 15 that every plan for an activity with potentially serious impact on the environment needed an EIA and that this subject would be further regulated by Government Regulation. Article 18 (1) added that without an EIA no permit could be obtained.

Decentralisation was not a major subject in the EMA. Article 12 clearly indicates that deconcentration – implementation of central laws and policies by central state branch offices – was to be the primary mechanism for environmental management. Article 13 does open the possibility for the central government to delegate certain tasks and authorities to lower levels of government, but contains no incentives to further this aim. Hence, for the most part enforcement remained a central government affair: by far most enforcement agents were part of the central government structure of sectoral *kantor wilayah* or belonged to the police, which to this day is a centralised organisation. Thus, both administrative enforcement in the fields of forestry and nature protection, mining, and industries, and criminal law enforcement were to be carried out by the central state.

The EMA created one exception to this rule, concerning the powers attributed to the governor to use administrative coercion against someone causing environmental distress (art. 25 EMA). This gave rise to – probably unintended – overlapping competences in some cases. For instance, if a logging company would damage the forest by causing fires, both the forest department and the governor of the province where the logging activities take place could come into action (Bedner 2003b: 82–83).

At the time there were three more exceptions to this general rule of central state authority in enforcement, but these did not originate from the EMA. First, from 1990 onwards the provinces have been responsible for the *Prokasih* programme, which intends to counter river pollution by

industries. Although guided by the central government agency *Bapedal* until approximately 2000, the provinces have always held the authority for supervision and enforcement in the framework of this programme. This has been an obvious choice, given that the governors – the heads of the provinces – were in charge of issuing the waste water license to firms disposing of polluting substances into rivers. The authority to supervise the use of this license was, at least in theory, the tool to enforce compliance with *Prokasih*, and therefore primary responsibility for the programme lay with the provinces.<sup>2</sup>

The second exception concerned the supervision by provinces and districts of their respective spatial plans. If activities were conducted which violated such plans, for instance illegal building, the authority whose spatial plan had been violated could act against the trespasser on the basis of Art. 18 of the Spatial Planning Act (no. 24 of 1992). A related issue is the Environmental Impact Assessment, which for projects below a certain size (Art. 1-8 of GR no. 29 of 1986) fell within the authority of the provinces.

Finally, the district head issued and was authorised to enforce the so-called nuisance license, which still dated from colonial times and had been the only tool for managing industrial pollution and damage of the environment at this level.

This legal framework was affected in several ways by the Regional Autonomy Acts.

### **The RAA's Impact on the EMA's Division of Powers**

In 1999 all of those concerned with environmental law and management experienced quite a shock when they discovered that the newly promulgated RAA seemed to completely exclude environmental management from the central government's authority. Almost forgotten today, the RAA's Article 7 limited the role of the central government to foreign and monetary affairs, defence and security, justice administration, religion, national planning, strategic national resource exploitation, conservation and standard-setting. The logical outcome would be that

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<sup>2</sup> Initially, *Prokasih* mainly concerned a transfer of funds from the centre to the provinces in order to stimulate the provincial government to manage and supervise its waste water licenses in a proper manner. Later on the provinces have had to perform these activities from their own budgets.

environmental management was henceforth a district government affair, with only residual roles for the provinces and the central government. However, with the promulgation of GR no. 25 of 2000 the government reappropriated much of what had in fact been given away by Act of Parliament. For environmental management the main implication seemed that environmental quality standards continued to be determined by Government Regulation (Art. 14[2] of the 1997 EMA jo. Article 2(18) of GR no. 25 of 2000), even if the provinces can adapt them (Art. 3[16]). This raised immediate suspicions that the government intended to immediately return to its former dominant position. As a senior member of *Bapedalda* of Jakarta Special Province (*Daerah Khusus Ibukota*) commented:

'Did you already see GR no.25 of 2000? There is no decentralisation at all! Look, in the RAA only five fields are held by the central government. And here ....! [..] And look here for instance, in the field of exploration the central government determines the policy, and in a Ministerial Decree or something they'll just determine that licensing still falls under the central government. That is my prediction...'<sup>3</sup>

As indeed turned out to be largely the case. The crucial sectors of forestry and mining, including law enforcement, have remained almost completely within the powers of the central government. The same applies to the National Land Agency (*Badan Pertanahan Nasional*), which plays an important role in spatial planning through the land rights it issues (Warlan 2003: 64) and which has continued to remain a central government branch office.

However, one important change did occur. With the transfer of the authority from the Minister of Industries to the District Head, pollution control for most industries now is the full responsibility of the provinces and the districts, with the governor providing the waste water license, and the district head the nuisance license and the business permit.

In fact, as indicated above, the EMA had already taken one step in this direction, by delegating the power to use administrative coercion in case of an environmental infringement to the Governor (*Gubernur*

<sup>3</sup> Interview, May 2000.

*/Kepala Daerah Tingkat I*), who can further delegate this power to the regencies or municipalities. However, the revocation of a permit as an administrative sanction is *not* within his power: just as the Regent and the Mayor, the Governor can only suggest revoking a license to the ‘competent official’ – here the old pattern was left untouched.

This system contained an important legal flaw: since operational permits were provided and supervised by sectoral Ministers, the stage seemed set for conflicts between the Governor on the one hand and the competent sectoral Minister on the other. To be sure, this problem of mixing up powers of licensing and revocation was not entirely new, as GR no. 20 of 1990 about the Management of Water Pollution stipulated that the Governor provided the liquid waste license (Art. 26[2]), but that the Regent held the power to revoke it by way of sanction (Art. 37).

The implementation of the RAA has changed this system. As the RAA attributes the power to issue operational licenses for industries to the district level, it devolves potential conflicts to a lower level. The Governor must now submit his proposal for revocation of a business permit to the Regent or the Mayor, instead of to the Minister.

The second problem recorded above has been purposively improved: GR no. 82 of 2001 about the Management of Water Pollution gives both the power to issue the license and the powers of supervision and sanctioning to the Governor. Again, this seems wise if we take into account that districts usually lack the greater picture of water management, larger rivers almost always running through more than one district. The new system therefore offers the province an opportunity to balance the powers of the lower level.

The last issue is whether under the decentralisation scheme the Minister of the Environment lost the authority to ‘supervise the compliance of those responsible for business and/or other activities to the provisions already stipulated in environmental legislation.’ (Article 22[1] EMA), which underlies the activities of *Bapedal*’s Compliance and Enforcement Unit. Looking at both the RAA and GR no. 25 of 2000, this seems indeed the case. Nowhere is a basis for such activity to be found, and the said authority will thus automatically fall within

the competence of the districts and the provinces.<sup>4</sup> In practice this will make little difference, however. Even if *Bapedal* is important in getting parties to environmental conflicts around the table and may exercise influence over local governments in this matter (Nicholson forthcoming, Bedner 2007), such influence is of an informal nature and does not need a basis in law. Whilst many had expected that Article 22(1) of the EMA would render *Bapedal* truly operational, by allowing the State Minister of the Environment to send his own special investigators around in US EPA-style, this has not happened (Bedner 2003a: 6). In practice *Bapedal* has continued to co-operate with the competent authorities in order to avoid its actions from being sabotaged. Still, the agency (which has been integrated now with the State Ministry of the Environment) has moreover continued to have its own *PPNS*.<sup>5</sup>

We will now turn to practice.

### **Decentralisation's Impact on Water Pollution Control<sup>6</sup>**

The fact that under the pre-RAA system the Department of Industries carried the primary responsibility for enforcing pollution control on the basis of the business permit does not mean that provincial and district agencies were not involved. From the mid-1980s onwards, some actors at these levels did take initiatives to get enforcement off the ground, on the basis of limited authorities, responding to societal distress caused by industrial pollution. These initiatives had much to do with the situation that regular monitoring and enforcement by the Department of Industries functioned poorly, to the extent that even

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<sup>4</sup> It is moreover remarkable that GR no. 25 of 2000 at this point seems to constrain the provincial ambit of authority, since the RAA did contain a provision which seemed to provide the province with such a general power for monitoring (see the RAA's Elucidation to Article 9(1) at d).

<sup>5</sup> According to State Minister of the Environment Rachmat Witoelar, there are altogether 180 special investigators in Indonesia (*Kompas* 29-11-2005).

<sup>6</sup> Although Indonesia does have air pollution standards, for both stationary and moving sources, these are hardly monitored. This is not surprising given the fact that most air pollution is probably not of an industrial origin but from traffic and forest fires (little is known about the contribution of industries to air pollution, Worldbank 2003), while monitoring air pollution is renowned for being difficult and expensive. Although domestic waste is estimated to account for 25 to 50% of water pollution on Java (World Bank 2003, 1997 figure), the amount caused by industries is much more significant than is likely in the case of air pollution).

many larger factories held no pollution abatement equipment.<sup>7</sup>

The best-known example of such a response at the provincial level is no doubt the *Prokasih* programme itself, which was first developed in East Java, before it was adopted by the central government (Lucas & Djati 2000). With strong support from the Vice-Governor, the programme led to a significant reduction in toxic waste water emissions by factories within East Java province. As mentioned earlier, the provinces could use their authority to monitor the waste water license in implementing the programme. However, at its inception inclusion in *Prokasih* was voluntary, thus ensuring the co-operation of the firms involved in monitoring. Gradually the programme has moved from voluntary to obligatory and thus provided the provinces an increasingly serious role in monitoring and enforcement.<sup>8</sup>

Another example is the anti-pollution teams, established in some regions in the early 1990s. Thus, in West Java the provincial environmental bureau co-operated with some environmentally-minded police officers and public prosecutors to take action against polluting firms. It is hard to measure the effects of this type of initiatives, by lack of information. They are unlikely to have been substantial, as such teams generally did not dispose of the budget required for monitoring and investigation. Most were disbanded after a few years, with the police and the public prosecutor no longer involved in investigating and prosecuting environmental crime at all.<sup>9</sup>

By contrast, *Prokasih* seems to have had significant impact, even if we take into account that the programme has allegedly suffered from underreporting by participating industries and that some observers have raised doubts about the reliability of the data reported (Bräuer 2003, *Kompas* 5-10-2002, Afsah, Laplante and Makarim 1996). As from 1989, the provinces have produced reports on the *Prokasih* programme, which contain a wealth of information on pollution of waterways. It is beyond this article to analyse this information in detail, but a few conclusions stand out.

<sup>7</sup> Figures on actual monitoring and imposing sanctions are not available.

<sup>8</sup> It should be noted, however, that monitoring of effluent was much more difficult for the provincial authorities than for the Department of Industries, as the latter did have access to the plants, whereas the former could only monitor their performance from taking samples of river water (Rock and Aden 1998: 360).

<sup>9</sup> Interview with senior *BPLHD* official Wisandana, July 1999.

First, if we look at the outcomes of *Prokasih* from 1989 until 1997, the number of industries that invested in pollution abatement equipment consistently increased. That many of them have also used this equipment<sup>10</sup> is witnessed by the increasing number of industries in compliance with official effluent standards. A good indication is offered by the data of *Proper*, a public disclosure system of environmental data from *Prokasih*, which started to run in 1995. The *Proper* data show that the number of firms in compliance with environmental standards increased from 36% in 1995 to 55% in 1997 (Makarim 2006). The only in-depth study of *Prokasih* by Lucas & Djati (2000), in the province of East Java, confirms this favourable outcome.

Second, and important in the context of decentralisation, there was a serious disparity in results between provinces. While in some of them *Prokasih* managed to reduce pollution substantially, notably in East and Central Java, other regions were much less successful, for instance West Java.<sup>11</sup> The reports contain no explanation regarding the reasons for success, but a brief analysis indicates that the degree of monitoring by the government in combination with the willingness of the provincial government to impose sanctions have been the key to success or failure.<sup>12</sup> Java as a whole did better than Sumatra and the other outer regions. According to Afsah, Garcia and Sterner (2004), the reasons are likely to be more community presence and more government presence. This already foreshadows one of the obvious consequences of decentralisation, which has been an increasing diversity in environmental performance from one province or district to the other.

Remarkably, more recent figures (2004-2005) indicate that Java has started to lag behind Sumatra and the outer provinces. This cannot be reduced to a better coverage of Java by the programme, with higher relative numbers also potentially including more environmental laggards, since Sumatra seems to be well represented with 28 % of the total number of factories. It seems unlikely, however, that the reason would be changes due to decentralisation. It seems to me that it is rather the

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<sup>10</sup> That industries fail to do this has been a regular complaint of environmental officials and NGOs. For instance, the *Jakarta Post* of 23-4-2002 reports that only 60% of the industries in Jakarta actually operate their water treatment installations.

<sup>11</sup> *Prokasih* reports of 1995 of these provinces.

<sup>12</sup> This is most clearly visible in the 1995 report on West Java.

nature of the factories on Java. With a relatively high number of textile firms and similar manufacturers, Java seems to have suffered more from the economic crisis and increased competition than Sumatra. That economic reasons are overriding in any case is clear from the sharp drop in compliance rates just after the crisis (Makarim 2006).

To what extent has decentralisation changed the practice of water pollution enforcement? At first glance it seems not much. The *Prokasih* and *Proper* programmes have continued to be the spearheads of pollution control efforts. Data from *Proper* indicate that after very bad compliance rates following the economic crisis of 1997-1998, when the number of firms in compliance dropped from 55 to 35 percent, there has been significant improvement again. The latest figure available is of 2005, which shows that the rate has almost risen to the pre-crisis figure with 52.5 percent (Makarim 2006).

The continuing importance of these programmes shows that regular enforcement of water pollution regulation has not really come off the ground yet. On the other hand, if the district government is willing to co-operate with the provincial authorities responsible for *Prokasih* – as indeed seems to be the case<sup>13</sup> – the enforcement power supporting the programme has become stronger. Since the districts have acquired the monitoring powers of the Department of Industries, their enforcement agents now have access to plants, rendering their tasks much easier than under the old regime.<sup>14</sup> Moreover, the environmental part of these is performed by the district environmental departments *Bapedalda* (*Badan Pengendalian Dampak Lingkungan Daerah*).<sup>15</sup> These bring in environmental knowledge and focus that lacked when the Department of Industries was in charge of control. That monitoring and enforcement are important for the success of the *Prokasih* programme not only follows from the *Prokasih* record of West Java mentioned above, but has also been emphasised by the study of Rock and Aden on *Prokasih* in Semarang. These authors noted a strong correlation between enforcement actions

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<sup>13</sup> Interview with the heads of the *Bapedalda* of Bandung city and Bandung district (July 1999 and July 2001).

<sup>14</sup> It is not that the Department of Industries did not perform its monitoring functions, but rather that its focus was health and safety regulations rather than environment (Kemp 2001: 32).

<sup>15</sup> They may carry other names as well.

and investment in pollution abatement equipment.<sup>16</sup> On the other hand, one needs to be cautious, since the current compliance rates of *Prokasih* are still below those of just before the economic crisis.

A major factor putting the district government in action is public pressure. While studies conducted in western settings indicate that such pressure may be an independent force affecting environmental performance by polluting plants (Gunningham, Kagan and Thornton 2005), Nicholson has shown how in Indonesia such pressure only seems to work if protesters succeed in getting the government involved somehow (Nicholson forthcoming, Bedner 2007).<sup>17</sup> It seems that there are two sides to this issue. First, firms are either arrogant or convinced of their capacity to keep protesters at bay, but are more concerned about their relations with the government. The other is that in the Indonesian legal system circumstantial evidence of pollution is not much valued and that the only way for protesters to mount material against the firm accused of polluting is to get such data from the government.

Before decentralisation district governments responded in various ways to such public appeals, sometimes invoking their lack of powers in monitoring and enforcement to justify their non-intervention. A positive effect of decentralisation is that this route of escape has been cut off. A good example is a case in Bekasi, where after prolonged protests from local communities the district government asked the State Minister of the Environment to take action against two firms causing pollution because their waste water overflowed the neighbourhood, due to limited storage capacity. While the State Minister did warn the firms concerned, he returned the case to the Bekasi district government as it was beyond his power to impose any sanctions. In what seemed a fortunate and rather exceptional decision, the Bekasi government then issued a prohibition for the firms concerned to operate as long as they had not improved their performance.<sup>18</sup>

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<sup>16</sup> However, they found no correlation between enforcement and increased expenditure for environmental management.

<sup>17</sup> On the other hand, the threat of potential enforcement actions seems to always play a role in the behaviour of plants confronted with complaints. Cf. Aalders 2003, who explores this issue for success or failure of mediation.

<sup>18</sup> Tempo 5-5-2002. According to a local NGO, the government failed to implement this sanction, however.

While the general opinion among observers of Indonesian local politics seems to be that democracy is not functioning as it should (e.g. Schulte Nordholt & Van Klinken 2007), one can still find support for the thesis that district governments have to take local protests more serious than they did under the New Order (Reerink forthcoming).<sup>19</sup> As Nicholson has indicated, this has had positive effects on environmental dispute resolution from an environmental perspective.

This overview indicates that so far decentralisation has only caused some potentially significant changes regarding the practice of water pollution control, and not an overhaul. The practices existing before the implementation of the RAA have continued, with the provinces still in the driver's seat role as the centre of the *Prokasih* programme efforts. The major shifts recorded in performance seem to bear no relation to decentralisation. Economic factors override governmental or legal ones, or, to put it more precisely, these become of importance only when basic economic conditions are fulfilled.

However, the main shifts caused by decentralisation, being the transfer of enforcement authority to the districts and increased accountability of the regional governments to their constituencies, may turn out to have a more impact in the longer run. This issue deserves more in-depth field studies in the near future.

### **The RAA's Impact on Environmental Impact Assessment**

Indonesian EIAs are quite significant because they provide the basis for monitoring and enforcement. Each EIA contains the environmental management plan, which subsequently becomes part of the business permit and is binding upon the firm carrying out the activities concerned. It thus constitutes the point of departure for supervision and enforcement, and to a large extent determines what can be enforced and how enforcement will be structured.

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<sup>19</sup> Of course this differs strongly from one district to the other. For instance, in a recent report by Human Rights Watch the major conclusion was that forced evictions in Jakarta had become both more frequent and more brutal after 1998 (HRW 2006). Still, there is lots of evidence showing that district governments simply need to be more responsive to their constituencies, even if it is only because government power is not taken for granted as before.

The EMA does not refer to the authority for making an EIA, laying down in Article 18 solely the obligation for firms to obtain an EIA in case their activities will have an important impact on the environment. The current Government Regulation on EIA, no. 27 of 1999, provides the details on the EIA-committees at the central and the provincial level,<sup>20</sup> while for their jurisdiction it refers to Decrees by the Minister of the Environment (Art.2 [2]).

Drafted parallel to the RAA, the said Government Regulation is remarkable in its absence of any decentralising tendency. This may be attributed to the general uncertainty about the direction decentralisation would take, and the fact that the drafters departed from the situation as it was under the EMA. On the other hand, the drafters may also have considered – and probably rightly so – that at that time most districts had insufficient capacity for evaluating EIAs.

The authority to conduct EIAs on projects confined within district boundaries has been attributed to the EIA-committee at the provincial level, while projects stretching across district boundaries fall within the purview of the central government. Unlike in the case of environmental quality standards, GR no. 25 of 2000 has discontinued this system, in principle giving the power to conduct EIA to the district where the activity is to take place – unless it potentially affects a large number of people or crosses district borders.<sup>21</sup> This has generated a practical problem, as GR on EIA no. 27 of 1999 neither provides for EIA-committees nor procedures at the district level. As a solution to fill this legal and institutional vacuum,<sup>22</sup> the EIA-committees at the provincial

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<sup>20</sup> A major change by GG no. 27 of 1999 is that the EIA-committees are no longer headed by an official from the sectoral department concerned, but by an official of the environmental agency (see also Bedner forthcoming).

<sup>21</sup> Article 2(3) under 18.c.>[...] activities which potentially have a negative impact on many people and/or cohere with defence and security, whose location includes more than one Province, activities located in an area subject to a dispute with another state, or at sea within the twelve miles> zone and on the state border' and Article 3(3) under 16.d.>Penilaian analisis mengenai dampak lingkungan (AMDAL) bagi kegiatan-kegiatan yang potensial berdampaknegatif pada masyarakat luas yang lokasinya meliputi lebih dari satu Kabupaten/Kota.>

<sup>22</sup> As acknowledged by the State Ministry, which has listed GR no. 27 of 1999 as one of the regulations which needs to be adjusted to the RAA (Rapat Kerja Prokasih November 2000, accessed on the Internet on 15-8-2003 [http://www.menlh.go.id/airnet/ProsedNov2000\\_02A.htm](http://www.menlh.go.id/airnet/ProsedNov2000_02A.htm)).

level have continued to evaluate the EIAs as they did before, on the basis of transitional Article 9 of GR no. 25 of 2000.<sup>23</sup>

However, an increasing number of districts have by now established their own EIA-committees. This means that the province is no longer involved in the effort, which may potentially lead to serious disputes. That this danger is not unwarranted will be demonstrated below, in a discussion of the Jakarta Pantura case.

Decentralisation has caused one other fundamental change in EIA-procedures: following the implementation of the RAA in 2000, some districts adjusted the rules for the size and scope of projects in need of an EIA. As a result, fewer projects than before have to submit to the procedure. As a manager of a developing firm active in the Bogor district told me:

We applied for an EIA for a new developing project, but we were told by the district government that we no longer needed to do so, as Bogor had changed its regulations and such smaller real estate projects as this one no longer needed an EIA – at least not in Bogor district.<sup>24</sup>

The Vice-Head of the EIA Department of the Environmental Impact Agency of West Java province confirmed that this was the case for several districts within his province.<sup>25</sup> In response to this situation, the State Minister of the Environment issued a new decree about the kind of activities in need of an EIA in 2001. This action was not entirely successful, however, for some of the districts concerned denied that they were bound by the said decree, which they considered of lower status than their own district regulations.<sup>26</sup> At least in West Java the situation has therefore remained the same.

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<sup>23</sup> Interview with the Vice-Head of the EIA-department of the BPLHD West Java, Pak Wisandana (July 2001).

<sup>24</sup> Interview with Pak Martin (July 2001).

<sup>25</sup> Interview (July 2001).

<sup>26</sup> Id. The issue of legal hierarchy has always given problems in Indonesia (Damian & Hornick), but they have been exacerbated by the decentralisation efforts. In 2003 a special Act on Legal Hierarchy was promulgated, but it has failed to clarify the relation between regional regulations and national regulations below the level of government regulation.

Similar problems have emerged between the central and the provincial level, on account of a discrepancy between GR no. 25 of 2000 and GR no. 27 of 1999 (on EIA). They have come to the fore in a rather dramatic way in the widely publicised North Jakarta Coast Reclamation Project (NJRCP) and led to a widely publicised conflict between former Governor Sutiyoso of Jakarta Province and former State Minister of the Environment Nabel Makarim, at that time both still in office.

The conflict concerned the EIA for a huge project to expand Jakarta's north coast across 15 miles, adding 2700 ha of new land to the city. Having Presidential Decree no. 52 of 1995 as its basis, the project initially came to a halt during the economic crisis, but was given new life by Jakarta's Governor Sutiyoso, who claimed that the city needs the reclamation to accommodate its increasing population. Environmental groups have vehemently opposed the plan, as they think it will negatively impact on the marine environment, cause severe flooding during the rainy season in what is now North Jakarta, and be detrimental to the livelihood of thousands of fishermen. In February 2003 the controversy grew into a real conflict, after State Minister of the Environment Nabel Makarim's rejected the project's EIA in his capacity as Head of the (national) EIA-committee. At the basis of this committee's jurisdiction is the fact that the reclamation stretches beyond Jakarta province into the provinces of Banten and West Java. Sutiyoso, who already held an approved EIA from Jakarta province,<sup>27</sup> in fact meaning one from himself, retorted that he did not care what the State Minister thought about the EIA, since these were the days of regional autonomy. When shortly thereafter he backed down, apparently deciding that he should avoid a head-on confrontation, it seemed that the matter had been settled in favour of the central EIA-committee.

This turned out to be incorrect, however. At Sutiyoso's initiative, the six firms involved in the project took the State Minister to the administrative court, which then passed a legally incomprehensible judgment. In the first place, the judges assumed jurisdiction over an administrative decision which is neither general nor final, two demands set by the Administrative Court Act (no. 5 of 1986, Article 47).<sup>28</sup>

<sup>27</sup> *Tempo* 22-2-2004.

<sup>28</sup> See e.g. Wijoyo 2004.

Secondly, the decision by the Committee was annulled because the project found its legal basis in a Presidential Decree, and the Minister of Environment would not be allowed to go against the wishes of the President.<sup>29</sup> The consequence of this line of thinking would be that Presidential projects are above acts of parliament, since the EIA finds its basis in the EMA of 1997. Fortunately the Administrative High Court overturned this decision and the case is now pending for cassation at the Supreme Court.<sup>30</sup>

It seems that apart from these jurisdictional problems the practice of EIA has not changed much. In a recent study the World Bank noted that due to the variation in capacity between regions and districts the implementation of EIA 'is likely to remain patchy for the foreseeable future.' The same report notes that one of the key challenges is 'to reform the existing mechanisms for public involvement in order to encourage greater public engagement.'

To this end the Bank supports a programme called 'Revitalisasi AMDAL', which builds on the experience in South Sulawesi that fear for public unrest afterwards was an important reason for the South Sulawesi Provincial Environmental Agency (*BPLHD*) to make sure that public consultation occurred during the EIA-procedure for a new power plant in Bangkala (World Bank 2005: 10). Meetings were widely announced and information was spread among the potentially affected communities in advance. A project which paid similar attention to this issue concerned a chemical plant in Jakarta. A striking remark by the report related to this project is the observation that the *BPLHD* attached particular value to the public consultation because it recognised its own lack of capacity to carry out adequate monitoring. This remark underlines the particular importance of the link between public involvement and enforcement. Although this issue is not directly linked to the process of decentralisation, at least there is a potential link. It would take more in depth research to test this hypothesis.

A few other findings fall into the same category. The first is that while the majority of the districts have adopted the national guidelines on EIA-procedures some have adjusted them procedurally to the district or provincial regulations already in place. This was in fact

<sup>29</sup> *Suara Pembaruan* 1-7-2003 and *Tempo* 22-2-2004.

<sup>30</sup> Press release by a number of NGOs involved, 13-8-2006.

already possible under the former, centralised regime, but it likely that the general increase in authority has supported this development. The report also cites Jakarta and Surabaya as examples of regions where due to water management problems certain projects are also liable to an EIA which normally would have been exempted from this procedure (World Bank 2005: 11-12).

The second concerns the Jakartan innovation to impose a duty to self-monitoring in the environmental plan. This reduces the monitoring burden of the Jakarta environmental agency, which now can limit itself to checking whether the self reporting has been adequate. Such a measure would have had little effect in the previous situation, as the provincial government would have lacked the authority to integrate this device with the monitoring practice of the Department of Industries. Given the lack of capacity acknowledged in the previous section this seems a helpful approach indeed (World Bank 2005: 14). A similar approach is now taken in Yogyakarta (World Bank 2005: 21).<sup>31</sup> However, whereas the Jakarta environmental agency tends to take a more 'conciliatory' approach, its Yogyakarta counterpart relies more on administrative sanctions. To what extent this leads to different outcomes is as yet unclear.

The other major factors identified by Suhadi and Oktaviany in the study underlying the above report bear no relation to decentralisation. They include the technical capacity of the Technical Team, the quality of the consultant, good leadership, the question whether the firm concerned held an ISO certificate 14001, and the involvement of an international donor.

In summary, we may conclude that regional autonomy has not led to clearly identifiable changes in the implementation of the EIA-regime. The new authority at the district level may work in favour of the influence of local constituencies, but this neither needs to work for the environment nor for the quality of EIA-procedures. Moreover, such a constituency may consist of local elites rather than of those poor who are afflicted by the project.

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<sup>31</sup> We should take into account, however, that Jakarta and Yogya are special cases, since here the province basically overlaps with the district. and therefore gives the province more of a say over the latter. Normally, the province has little control over the districts' monitoring functions, which means that districts can simply disregard the wishes of the province (although the RAA no. 32 of 2004 has redressed this situation to some extent).

There are two other reasons why it might have been wise to leave the responsibility for EIA at the provincial level rather than give it to the districts. The first is the inherent danger that district governments approve of their own projects for financial reasons, and the second that they lack sufficient capacity. Until the present there are no indications that this has had serious consequences, as in several reported cases districts have invoked provincial expertise in EIA-procedures (World Bank 2005). However, if we look at the expanding list of district EIA-committees on the website of Bapedal, one wonders about the near future.

### Conclusion

The effects of decentralisation on environmental law and management of water pollution and EIA have been limited. The 1997 EMA is in need of adjustment, but most of its elements can function well under the RAA scheme, while some of its problems have even been solved inadvertently by the new law. This also applies to the changes in practice regarding water pollution control and EIA, the two issues discussed in this article.

This indicates as unfounded the near panic on the part of many Indonesian environmentalists and some donors regarding the adverse effects decentralisation would have on environmental conditions, at the time when the RAA was adopted (Bedner 2000: 1, Niessen & Van Lotringen 2000: 10). The picture presently emerging is still unclear, but it certainly is varied.

Differences between provinces and districts have certainly increased, with several positive developments standing out. Some reports confirm that various district governments are more attentive towards their environment (The Asia Foundation 2003: 40, Nicholson forthcoming). The decentralisation dynamics have also provided a new impetus to environmental law development, e.g. the suggestion of the Provincial Parliament of North Sumatra to make *Bapedalda* an independent body with the power to take polluters to court without involving the police or the public prosecutor,<sup>32</sup> the emergence of public-private monitoring of potentially polluting firms,<sup>33</sup> and the establishment of intergovernment

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<sup>32</sup> Jakarta Post 5-9-2003.

<sup>33</sup> For instance in Cirebon, by a coalition of the YBHL Cirebon, *Bapedalda* and a branch from the social security agency *PT Jamsostek* (Jakarta Post 15-7-2003).

– civil society forums, for instance for integrated river basin management (The Asia Foundation 2003: 40).

In this context special reference ought to be made to the opportunities for civil action in the courts. Some of the 1997 EMA's most radical changes were in opening up new legal avenues for citizens suffering from environmental pollution or damage, including a class action and mechanism for environmental mediation (Nicholson 2003). In practice, these have only started to blossom after the decentralisation process got underway (Nicholson forthcoming).<sup>34</sup>

On the other hand, there are serious problems, perhaps not caused but certainly linked to decentralisation. Water pollution levels continue to be high and few EIAs are up to the standards. More in depth studies of environmental law practices at the district level are badly needed, in particular to evaluate what will happen in the longer run. As noted above, economic concerns seem to be tilted clearly against the chances for effective water pollution control and this may be reinforced by regional autonomy. Likewise, the shift in EIA-authority for many projects from the provincial to the district level carries serious dangers. It is of much importance to evaluate the results of decentralisation in the longer run in order to define adequate responses.

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<sup>34</sup> It is likely that part of this success is also due to AusAid's training programme for Indonesian judges.

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