

Untouchable

The Vulnerability of Reclamation and
Post-mining Guarantees to Corruption

#BERSIHKAN
INDONESIA

auriga

GREENPEACE



INDONESIA
CORRUPTION WATCH



JARINGAN ADVOKASI TAMBANG
MINING ADVOCACY NETWORK

TREND Asia

WALHI



YLBHI
Yayasan Lembaga Bantuan Hukum Indonesia

CITATION

Bersihkan Indonesia. 2020. *Untouchable; The Vulnerability of Reclamation and Post-mining Guarantees to Corruption*. Jakarta, Indonesia.

This report is also published in Bahasa Indonesia, as follows:

Bersihkan Indonesia. 2020. *Curang di Lubang Tambang; Kerentanan Korupsi Jaminan Reklamasi dan Pascatambang*. Jakarta, Indonesia.

©Auriga Nusantara

Recommendations

1. Maximize licensing instruments to strengthen reclamation and post-mining guarantee fund compliance.

Non-compliance with obligations to guarantee reclamation and carry out reclamation and post-mining activities is encouraged by regulations that fail to position these obligations within licensing instruments. Consequently, any non-compliance has no adverse effects on mining operations.

Licensing could be done by:

- a. Making compliance a condition if a company wants to upgrade its business status from exploration to production operations - Successful reclamation implementation in a company's exploration stage should be made a precondition for upgrading its exploration license to a production operations license. This should be enforced so obligations for each stage are executed in advance. This would also reduce non-compliance with the obligation to carry out reclamation concurrently with exploitation.
- b. Making compliance a condition for securing approval of annual work and budget plans (RKAB) - Current regulations do not oblige the depositing of reclamation guarantee funds as a precondition for RKAB approval, and even provide room for reclamation guarantee funds to be deposited after RKAB approval, despite the same regulations stipulating that an RKAB must contain a reclamation plan. If reclamation guarantee funds were positioned as a precondition, there would be an instrument obliging reclamation guarantee fund deposit before mining operations can commence.

2. Position reclamation guarantee funds as state finances so accountability over their use and allocation is adjusted to state budget accountability mechanisms.

Reclamation guarantee funds are positioned as being separate from regional (APBD) and state (APBN) fiscal systems, so reclamation and post-mining violations and non-compliance are not considered state finance contraventions. If reclamation guarantee funds were deposited and positioned within the fiscal system (in regional or state finance accounts), they would be more accountable, and could be used in regions where the need for reclamation is most pressing, and not only for the mining pits of particular companies.

3. Stipulate billing procedures for when reclamations costs exceed already deposited guarantee funds.

Companies frequently consider their depositing of reclamation and post-mining guarantee funds as releasing them from their obligations to implement reclamation and post-mining activities. Frequently, the costs of implementing these obligations exceed the value of reclamation guarantee funds companies deposit. If instruments were in place to force companies to make up shortfalls for reclamation and post-mining activities after the appointment of third parties, then license holders/contractors would not be able to avoid their obligations.

4. Stipulate harsher administrative penalties including fines and enforced penalty payments when guarantee fund and reclamation obligations are not complied with.

Penalties for violations of reclamation and post-mining obligations in the form of administrative sanctions, such as written warnings, cessation of activities, and license revocation are not accompanied by other penalties, such as fines and criminal charges. Under the current situation, license holders/contractors just abandon mining pits when their licenses expire, which means the heaviest administrative penalty, i.e. license revocation has no effect whatsoever. Forceful sanctions, such as fines or even cessation of coal sales should be imposed annually if companies fail to implement the reclamation plans in their RKABs.



Background

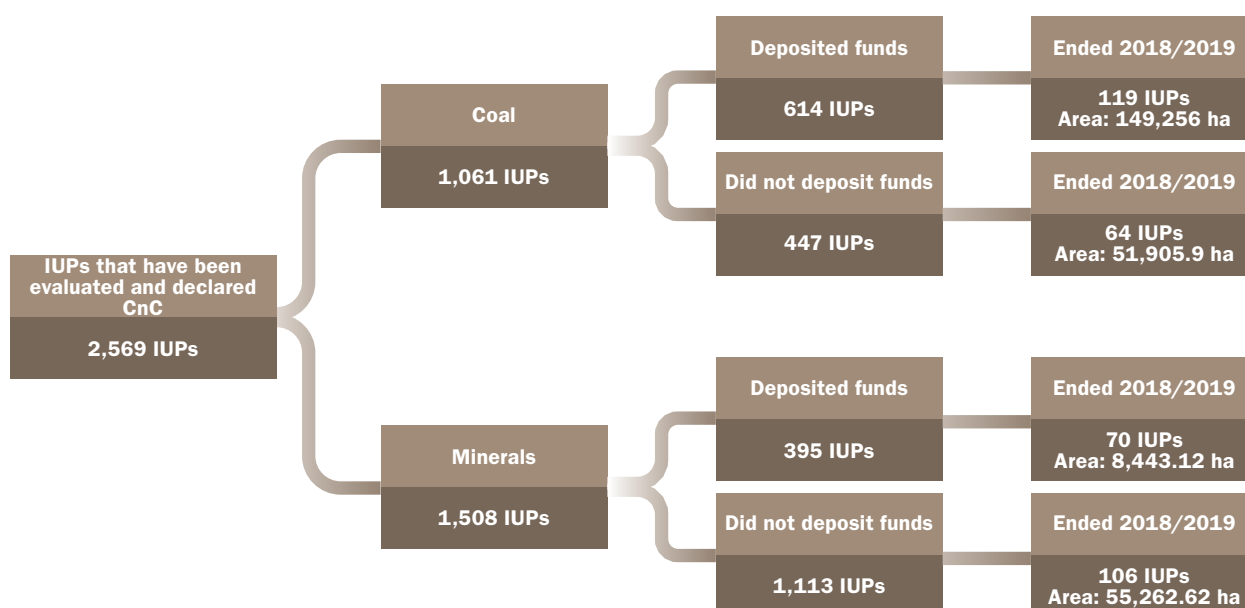
A requirement for a mining operation being granted a concession license or *Izin Usaha Pertambangan* (IUP) is its meeting the obligation to set aside reclamation and post-mining guarantee funds. The obligation to deposit these funds is coupled with post-mining and reclamation obligations. This guarantee fund arrangement is logical, because in practice, compliance with post-mining recovery is itself low, with minimal monitoring and mining governance in general. If an IUP concession holding company fails to implement reclamation and post-mining activities in accordance with its approved work and budget plan, then the Minister, or relevant governor, district head or mayor can assign a third party to implement reclamation and post-mining activities using guarantee funds deposited by the company in question.

are a guarantee mechanism for when business practitioners fail to carry out their reclamation and post-mining obligations. The problem is that companies frequently fail to comply with the requirement to deposit guarantee funds, even though doing so is a precondition for issuing a license. The Directorate General of Minerals and Coal under the Ministry of Energy and Mineral Resources (*Ditjen Minerba ESDM*) has recorded minimal compliance among IUP concession holder companies obliged to deposit reclamation and post-mining guarantee funds. A total of 2,569 IUP concessions had secured Clear and Clean (CnC) certificates by June 2018. Of this total, 1,569 (447 IUPs for coal, and 1,122 IUPs for minerals), or around 60% had yet to comply with obligations to deposit reclamation guarantee funds, despite doing so being a condition for securing CnC certification¹.

With this arrangement, the assumption is that deposited funds

¹ (Directorate General of Minerals and Coal, July 2018)

Figure 1. IUP reclamation guarantee fund recapitulation for concessions with CnC certification per July 2018



SOURCE: Ministry of Energy and Mineral Resources, processed

Table 1. Summary of company reclamation and post-mining funds reported to EITI, 2016

Explanation	Reported in ID (x million)	Reported in USD		TOTAL (IDR x million)
		USD	(USD 1 = IDR 13,436)	
Reclamation guarantee funds	369,534	58,275,291	782,987	1,152,521
Post-mining guarantee funds	42,928	25,253,456	339,305	382,2333
TOTAL	412,462	83,528,746	1,122,292	1,534,754

SOURCE: EITI Indonesia, Contextual Report, 2016

Aware of this issue, the Ministry of Energy and Mineral Resources (ESDM) issued Minister of Energy and Mineral Resources Regulation No. 43/2015 on Procedures for Evaluating the Issuance of Mining Licenses. This regulation forms the legal basis for testing license holder compliance. All licenses are evaluated and classified into 2 (two) categories: CnC (clean and clear) and Non-CnC IUPs. Despite many business practitioners being pressured to deposit reclamation guarantee funds, many companies still ignore this stipulation. This shows mining license governance remains deficient, and even vulnerable to corruption.

Another indication reinforcing this assumption is a lack of transparency in providing information on the amounts of reclamation and post-mining guarantee funds a company has deposited, both among the Directorate General of Minerals and Coal and regional governments². Extractive Industry Transparency Initiative (EITI) reports only gather information on the numbers of reclamation and post-mining guarantee funds coal and mineral mining companies report to the EITI Indonesia secretariat. Another unknown is the amounts already used for reclamation and post-mining activities. With the lack of available information, not knowing the amounts of funds deposited is not the only issue, it is also impossible to be sure how

² (EITI Indonesia, Contextual Report, 2016)

effectively reclamation and post-mining policies have been applied, and the environmental degradation already caused by mining operations.

In an evaluation report for the National Movement for the Rescue of Natural Resources (*Gerakan Nasional Penyelamatan Sumber Daya Alam* (GNPSDA), the Corruption Eradication Commission (KPK) shows that these mining governance issues cannot be underestimated as they constitute a phase of corruption, particularly as they cause risks to be passed on to the general public in various forms, including environmental degradation.³

With this backdrop, this study aims to map corruption vulnerability in reclamation and post-mining guarantee fund policies by considering factors that enable corruption in various provisions and pieces of legislation. This analysis investigates practical opportunities and corruption risks in reclamation guarantee fund processes, beginning with planning, through the guarantee fund depositing process, and reclamation and post-mining implementation, up to disbursement. This includes looking at structural issues that render the aims of reclamation and post-mining policy almost impossible to achieve.

³ (KPK, National Movement for the Rescue of Natural Resources Evaluation, 2019)

Methodology

Table 2. Corruption impact assessment criteria

CRITERIA	EXPLANATION
Ease of Meeting Obligations	Examine whether regulations can be carried out effectively, by looking at the rationality, burden and scope of implementation, and also the suitability of the mandated entity's capacity to handle the burden placed on it.
Appropriateness of Policy Implementation	Assess whether regulations have sufficient quality to ensure their implementation is not open to multiple interpretations and opens significant room for discretion.
Reliability of Administrative Procedures	Assess whether regulations are reliable enough for ensuring implementation accountability is established with a variety of standard instruments, such as transparency and predictability.

THE instrument used for analyses in this qualitative research was a Corruption Impact Assessment (CIA); an analytical framework designed to identify and eradicate factors causing corruption from legislation. With criteria laid out in the “Handbook for the Corruption Impact Assessment” prepared by the Anti-Corruption and Civil Rights Commission of the Republic of Korea, this research examines stages in mining business operations relating to the depositing of reclamation guarantee funds up to the implementation of reclamation and post-mining activities.

The criteria within the CIA function to examine articles in legislation that form the legal framework for policy, and then look at their impacts on corruption. However, this study has not used all CIA criteria in full, but looks at the main phenomena and issues regulated in the stages of reclamation and post-mining. From its findings, this paper classifies corruptive regulation typologies⁴ as references for illustrating the gradation of issues in reclamation and post-mining guarantee arrangements.

⁴ Nagara, 2017, What Lies Under Eradicating Corruptive Norms. Paper on the IANC International Conference on Socio Legal Studies: Legal Reform in Indonesia

Reclamation and Post-Mining Guarantee Fund Provisions

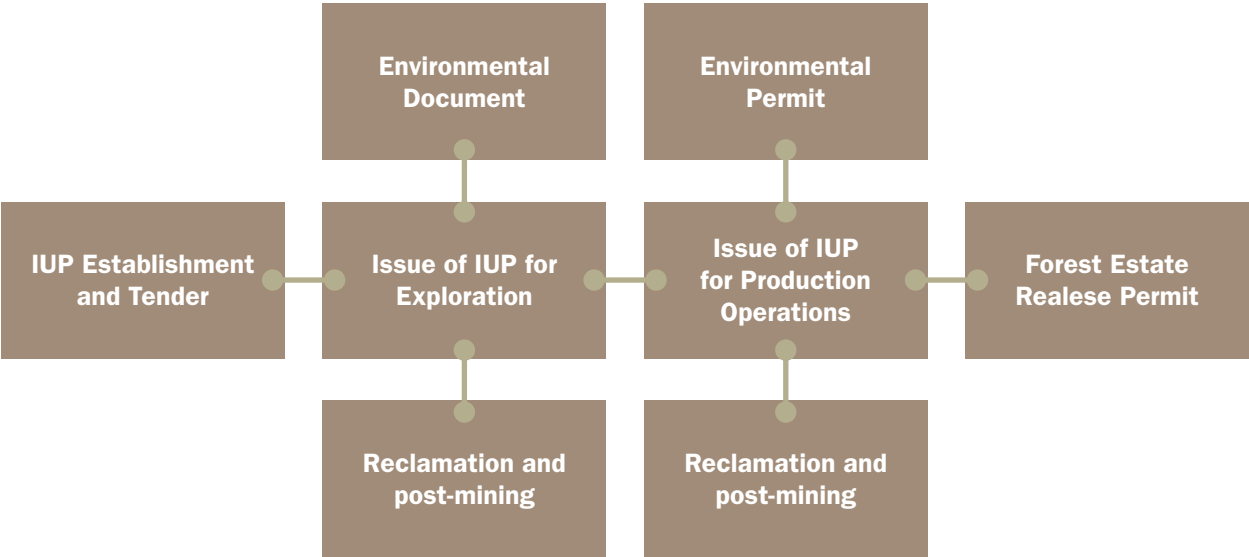
PROVISIONS further regulating the mandates of articles 99 and 100 of Law No. 4/2009 on Mineral and Coal Mining are laid out in Government Regulation (PP) No. 78/2010 on Reclamation and Post-Mining, and Minister of Energy and Mineral Resources Regulation No. 26/2018 on Good Governance and Supervision of Mineral and Coal Mining Operations. Generally, these regulations are aimed at ensuring mining companies have the discipline to meet environmental revitalization targets, and making companies responsible for environmental repair through reclamation and post-mining implementation.

Mineral and coal mining companies are obliged to deposit two types of guarantee funds: reclamation guarantee funds (for exploration and production operations), and post-harvest guarantee funds in accordance with Minister of Energy and Mineral Resources Regulation No. 7/2014 as amended by Minister of Energy and Mineral Resources Regulation No. 26/2018.

Exploration stage reclamation guarantee fund deposits are determined by the Directorate General of Minerals and Coal on behalf of the Minister, or by the relevant governor, district head or mayor in accordance with their authority. All guarantee funds are listed in a preliminary exploration Work and Budget Plan (RKAB). Once the plan is approved by the Directorate General of Minerals and Coal, the Exploration IUP/ IUPK permit holder is obliged to deposit funds in the form of a term deposit within 30 days of approval. The term deposit is held by a state bank jointly under the names of the Directorate General of Minerals and Coal, governor, district head or mayor in accordance with their authority and the Exploration IUP/ IUPK permit holder.

All reclamation guarantee funds for the first five-year production operations period must be deposited during that period. However, if the mining operation lasts for less than five years, the production operations stage reclamation guarantee funds are deposited for the operational timeframe.

Figure 2. Mining license issuance flow chart UP



As with exploration stage reclamation guarantee funds, these are also set by the Directorate General of Minerals and Coal on behalf of the Minister, or relevant governor, district head or mayor, and laid out in annual production operations RKAB plans. These guarantees can take the form of:

1. A joint account, where funds are deposited in a state bank joint account under the name of the Directorate General of Minerals and Coal, governor, district head or mayor and the Production Operations IUP/IUPK holder.
2. A time deposit, deposited in a state bank under the name of the Directorate General of Minerals and Coal, governor, district head or mayor and the Production Operations IUP/IUPK holder.
3. A bank guarantee issued by an Indonesian state bank, or a national private bank in Indonesia.
4. Reclamation guarantee funds can take the form of

an accounting reserve, if the Production Operations IUP/IUPK license holder is listed on the Indonesian Stock Exchange (by depositing >40% of shares), and depositing a minimum capital amount of USD 50 million

Post-mining guarantee funds must be collected in full two years before post-mining implementation commences.

Post-mining guarantee funds are deposited in the form of a term deposit held by a state bank jointly under the names of the Directorate General of Minerals and Coal, governor, district head or mayor in accordance with their authority and the Production Operations IUP/IUPK permit holder. The amounts of post-mining guarantee funds are set by the Director General of Minerals and Coal on behalf of the Minister, or the relevant governor, district head or mayor in accordance with their authority.

Figure 3. Provisions for depositing reclamation and post-mining guarantee funds from Annex VI of Minister of Energy and Mineral Resources Decree No. 1827 K/30/MEM/2018

RECLAMATION GUARANTEE FUNDS	POST-MINING GUARANTEE FUNDS
<ul style="list-style-type: none"> • Exploration IUP and IUPK holders are obliged to deposit the reclamation guarantee funds laid out in their annual exploration work and budget plans from the outset. • Reclamation guarantee funds are deposited within 30 days of an exploration stage work and budget plan being approved. • Reclamation guarantee funds are deposited in an Indonesian state bank in the form of a term deposit in the name of the Director General/governor and the Exploration IUP or IUPK license holder with a guarantee period according with the reclamation schedule. • Depositing reclamation guarantee funds does not obviate the obligation to carry out reclamation. Any reclamation cost shortfall from the guarantee funds is the responsibility of the IUP/IUPK holder. 	<ul style="list-style-type: none"> • Production Operations IUP and IUPK holders are obliged to deposit post-mining guarantee funds annually, and include them in annual production operations work and budget plans. • Reclamation guarantee funds are deposited within 30 days in accordance with the post-mining guarantee fund deposit schedule in the post-mining plan approval. Post-mining guarantee funds must be collected two years before post-mining implementation. • Post-mining guarantee funds are deposited in an Indonesian state bank in the form of a term deposit in the name of the Director General/governor and the Production Operations IUP or IUPK license holder with a guarantee period according with the post-mining schedule. Post-mining guarantee funds can be in IDR or USD, but the once the currency has been set, it cannot be changed. • Depositing post-mining guarantee funds does not obviate the IUP/IUPK's obligation to carry out post-mining activities. Any post-mining cost shortfall from the guarantee funds is the responsibility of the Production Operations IUP/IUPK holder.

Reclamation and Post-Mining Funding Arrangements' Vulnerability to Corruption

FINDING 1. Mining business licensing mechanisms do not test reclamation and post-mining guarantee fund deposit compliance.

FINDING 2. Monitoring and control of reclamation and post-mining obligations and guarantee fund deposits are inadequate.

FINDING 3. Arrangements regarding reclamation and post-mining obligations are not directed at being an integral part of business operations.

FINDING 4. Arrangements regarding the scope of reclamation activities provide room to evade the obligation to restore the environment to its original condition.

FINDING 5. Guarantee fund arrangements are not designed as instruments for ensuring environmental protection.

Of all objects analysed, provisions regulating reclamation and post-mining guarantee funds are the most vulnerable

to corruption. This vulnerability can take the form of opportunities to not carry out or to avoid obligations, which leads to bribery and blackmail in monitoring and control activities, and the weakening of set norms from both procedural and legal provisions. Ultimately this results in state losses, which have to be borne by the general public. Several findings illustrate at least 2 (two) major issues in reclamation and post-mining policy arrangements:

1. Stipulations on reclamation and post-mining obligations, as well as the depositing of guarantee funds not being positioned as main preconditions for mining enterprises, with some provisions actually providing room for avoiding such obligations; and
2. Stipulations on reclamation and post-mining guarantee funds not being formulated with sufficient quality, rendering them unable to become effective instruments for protecting the environment. Instead of strengthening the objectives of those guarantee arrangements, some technical procedures actually weaken them.

These two major issues are explained in sub-sections 1 to 5 below.

In principle, these major issues provide room for avoidance and corruption occurring in the

regulation of reclamation and post-mining obligations. Negative impacts arising from mining activities are not only driven by non-compliance from license holders, but are also caused by regulations that make it easy for license holders to avoid meeting obligations.

Analyses of reclamation and post-mining activity value chains reveal points at which activity stages are problematic. These are divided into two problem categories: Firstly, regulations that are criminogenic or defective when permit holders try to evade their obligations; and secondly, regulations that cause structural issues, in the form of those that cannot resolve problems, or those that provide possibilities for actors involved to create negative discretion and conflicts of interest.

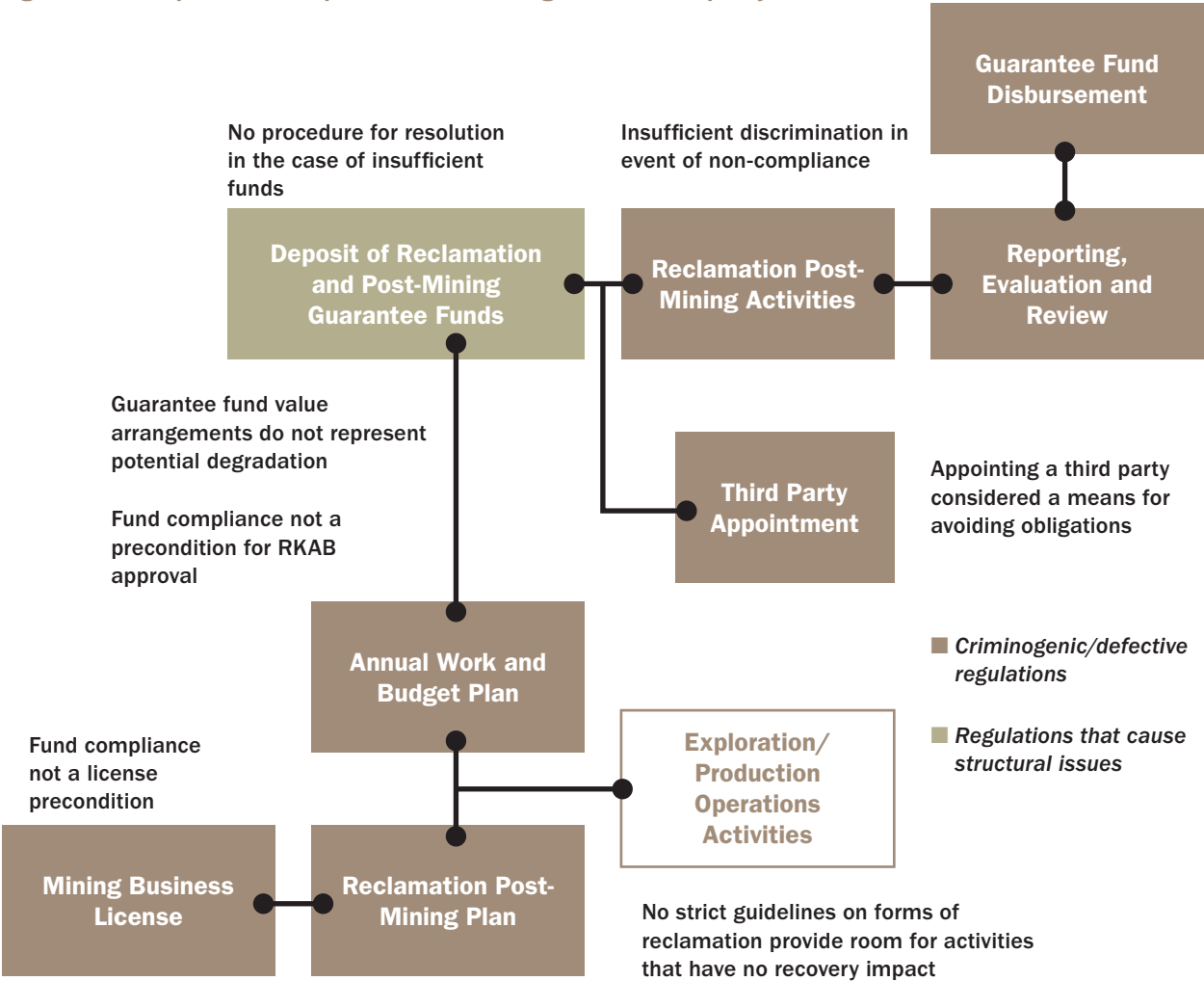
Almost all stages of reclamation and post-mining guarantee processes, are stipulated by defective regulations; starting from the license receipt stage, through the preparation of RKAB annual work and budget plans, and the preparation and implementation of reclamation and post-mining plans, up to third-party appointments. There is not even a provision stipulating what happens when deposited funds are insufficient to cover reclamation and post-mining needs.

FINDING 1. Mining business licensing mechanisms do not test reclamation and post-mining guarantee fund deposit compliance.

Reclamation and post-mining activity compliance is obligatory for license holders in both exploration and production operations businesses. Therefore, the Government should be able to ascertain mining business license holders' behaviour from their performance during exploration activities. If

Criminogenic regulations lead to avoidance by license holders.

Figure 4. Points prone to corruption in reclamation guarantee fund policy



an Exploration IUP holder fails to carry out reclamation, then their license should not be upgraded to a Production Operations IUP.

Minister of Energy and Mineral Resources Decree No. 1796/2018 on Guidance on the Implementation of Application, Evaluation, and Issuance of Licenses in the Mineral and Coal Sector does not maximize licensing mechanisms as instruments for structuring compliance with obligations for activities and the depositing of reclamation and post-mining guarantee funds. Technical environmental requirements for license issuance only consider reclamation plan documents submitted by companies, with no consideration of those companies' performance.

Different treatment is stipulated for Production Operations IUP extensions, which also consider final reports on companies' reclamation activities. However, it is unclear whether reclamation performance in a final report can become a main consideration for decision making on a license extension.

The Government does not make use of the opportunity to conduct license evaluations through Clean and Clear (CnC) mechanisms in order to enforce reclamation obligations. Evaluation provisions in Minister of Energy and Mineral Resources Regulation No. 43/2015 overlook reclamation obligation compliance as a pre-condition for securing CnC certification status. Referring to Supreme Audit Agency (BPK) Semester Inspection

Table 3. Technical environmental requirements for issuance of mining licenses

Exploration IUP	Production Operations IUP
A duty stamped statement letter to comply with provisions in legislation on environmental protection and management;	Final report on environmental management implementation, including reclamation;
Environmental document and approval from the relevant authority in accordance with provisions in legislation;	Copy of proof of depositing reclamation guarantee funds;
An environment permit for mining activities issued by the relevant authority in accordance with provisions in legislation; and	Copy of proof of depositing post-mining guarantee funds;
Reclamation and post-mining plan documents.	A duty stamped statement letter to comply with provisions in legislation on environmental protection and management;
	Environmental document and approval from the relevant authority in accordance with provisions in legislation; and
	An environment permit for mining activities issued by the relevant authority in accordance with provisions in legislation.

Outcome Overview (Ikhtisar Hasil Pemeriksaan Semester (IHPS) No. 1/2019, only 282 of 4,726 IUP holding companies had deposited reclamation and post-mining guarantee funds. Meanwhile, 983 companies had deposited reclamation guarantee funds only. This means around 72% of IUP holders had yet to deposit any reclamation or post-mining guarantee funds.⁵

Environmental degradation risk from this non-compliance is also apparent even with licenses about to expire, where many actors do not comply with their reclamation implementation and guarantee fund obligations.

At least 189 IUPs that ended in 2018-2019 have yet to meet their obligations to deposit reclamation guarantee funds.⁶

⁵ Supreme Audit Agency IHPS report 1/2019, processed

⁶ Directorate General of Minerals and Coal, 2018

FINDING 2. Monitoring and control of reclamation and post-mining obligations and guarantee fund deposits are inadequate.

Instruments for monitoring and controlling reclamation and post-mining obligations are wholly dependent on reclamation and post-mining performance evaluations, which result in the disbursement or suspension of guarantee funds, and administrative penalties. Minister of Energy and Mineral Resources Decree No. 1827, obliges every business practitioner to report their reclamation performance and progress each year.

However, the regulation does not explain clearly how evaluations of reports take place. For instance, there are no standard times for inspections of conditions on the ground, let alone standard costs and public accountability mechanisms.

In addition to regulatory issues, a common complaint about

The five provinces with the greatest numbers of mining pits are East Kalimantan (1,735), South Kalimantan (814), South Sumatra (163), Central Kalimantan (163), and Jambi (59).

SOURCE: *Harian Kompas*, 13 January 2020

Under provisions in Law No. 4/2009, violations of reclamation and post-mining obligations can result in administrative sanctions for both Exploration IUP and Production Operations IUP license holders. However, these are extremely limited, and only include written warnings, cessation of operations, and license revocation, despite other types of administrative sanctions, such as fines, enforced penalty payments, and orders to carry out certain activities being available.

Law No. 4/2009 does not even stipulate external cumulation with criminal rules, like those usually found in rules regulating natural resources.

FINDING 3. Arrangements regarding reclamation and post-mining obligations are not directed at being an integral part of business operations

monitoring such activities is the lack of available human resources for mining inspections and insufficient budgets for monitoring considering the range of things mining inspectors have to examine, beginning with the technical aspects of mining, right up to safety and environmental issues.

Under Minister of Energy and Mineral Resources Regulation No. 26/2018, an RKAB is a mineral and coal mining operations annual work and budget plan for the ongoing

Table 4. Violations that can lead to administrative sanctions for Exploration IUP and Production Operations IUP license holders

Exploration IUP	Production Operations IUP
Administrative sanctions are imposed on license holders that fail to:	Administrative sanctions are imposed on license holders that fail to:
a. Submit exploration stage reclamation plans in accordance with Environmental Documents;	a. Deposit production operations stage reclamation guarantee funds and post-mining guarantee funds in accordance with stipulations by the Minister or governor in accordance with their authority;
b. Deposit exploration stage reclamation guarantee funds in accordance with stipulations by the Minister or governor in accordance with their authority;	b. Submit periodic production operations stage reclamation plans;
c. Implement exploration stage reclamation;	c. Implement production operations stage reclamation and post-mining activities;
d. Report on exploration stage reclamation implementation;	d. Report on production operations stage reclamation and post-mining implementation.
e. Submit a production operations stage reclamation plan when submitting an application to upgrade to IUP Production Operations or IUPK Production Operations status; and	
f. Submit a post-mining plan when submitting an application to upgrade to IUP Production Operations or IUPK Production Operations status.	

Until now communities still use water from mining pits abandoned by PT Multi Harapan Utama for bathing and washing. Yet, laboratory tests show the water is not fit for consumption.

SOURCE: Majalah Tempo investigative report entitled "Lubang Maut Sisa Tambang" (8/5/2017)

year, covering business, technical, and environmental arrangements. Every year, a license holder/contractor must prepare an RKAB and secure its approval from the license issuer before a company can carry out any activities. Even though a reclamation plan is a different document, it must still be included in an RKAB.⁷ Contradictorily, an RKAB can be approved before reclamation guarantee funds are deposited, so this obligation can be avoided and mining operations can still go ahead. If this process flow were reversed, with the depositing of reclamation guarantee funds becoming a precondition for an RKAB being issued, the level of reclamation guarantee fund compliance would be higher, as mining operations would be unable to go ahead without a deposit being made.

This issue shows that reclamation and post-mining guarantees are not regulated strictly as a mandatory facet of mining operations.

Various provisions in legislation provide opportunities to avoid this obligation. Such provisions include

⁷ Annex to Minister of Energy and Mineral Resources Decree No. 1827/2018 "Deposits of Exploration/Production stage Reclamation Guarantee Funds are made within 30 (thirty) calendar days of a work and budget plan being approved by the Director General on behalf of the Minister, or governor in accordance with their authority."

those in Minister of Environment and Forestry Regulation No. 27/2018 on Guidelines for Forest Estate Leasing, which provide the opportunity to postpone implementation obligations. This has made reclamation and post-mining implementation extremely poor inside forest estate areas. From spatial analyses of eight Generation I PKP2B concessions in 2019, a total area of 87,307 ha of open pits had yet to be reclaimed, despite their concession periods due to end within around two years of the analyses being carried out. These analyses also found apparent violations, with 23,551 ha of mining pits located in forest estate areas with no IPPKH forest estate lease permits.

Referencing Minister of Energy and Mineral Resources Decree No. 1827/2018, production operations stage reclamation implementation is carried out within 30 (thirty) calendar days after there being no activities on disturbed land. Similarly, Minister of Environment and Forestry Regulation No. 27/2018 states that reclamation and revegetation implementation on forest estate land is carried out without waiting for the IPPKH forest estate lease to expire.

Both regulations explain that reclamation can and should be carried out without waiting for the license or contract period to expire. However, the regulation on reclamation guarantees does not say that reclamation planning already laid out in an RKAB must be carried out during that year, thus providing room to not carry out reclamation immediately on degraded land.

Room for avoiding obligations in IPPKH regions is also opened up by allowing the completion of reclamation and revegetation obligations after license expiry, through the issuance of an IPPKH extension by the Minister for a maximum of 5 (five) years for the purpose of completing obligations. Rather than imposing

Table 5. PKP2Bs soon due to expire

No	Company	Contract ends
1	PT Adaro Indonesia	01/10/2022
2	PT Arutmin Indonesia	01/11/2020
3	PT Berau Coal	26/04/2025
4	PT Kideco Jaya Agung	13/03/2023
5	PT Kaltim Prima Coal	31/12/2021
6	PT Multi Harapan Utama	01/04/2022
7	PT Kendilo Coal Indonesia	13/09/2021
8	PT Tanito Harum	14/01/2019

penalties, this regulation provides room for delaying reclamation implementation.

FINDING 4. Arrangements regarding the scope of reclamation activities provide room to evade the obligation to restore the environment to its original condition

The annex to Minister of Energy and Mineral Resources Decree No. 1827/2018 on Guidelines for Reclamation and Post-Mining Implementation in Mineral and Coal Mining Business Operations states that:

“Production Operations stage Reclamation Programs can take the form of revegetation and/or other designations comprising: a) housing areas; b) tourism sites; c) water sources; or d) cultivation areas.”

Provisions on mining pits in this regulation stipulate that under reclamation obligations, open pit areas can become areas for other forms of utilization/designation. If this is intended as a shifting of reclamation obligations, then this regulation is undeniably erroneous.

It appears the phrase ‘...in accordance with their designation’⁸ in the explanation of reclamation is defined differently at the practical level by regional governments and concession holders.

Old open coal mining pits that leave pools of water of a certain depth are not reclaimed, but recommended for other activities, including tourism areas, reservoirs, and other activities.

Such interpretations are quite well

⁸ Minister of Energy and Mineral Resources Regulation No. 26/2018 Article 1 paragraph 12 “Reclamation is an activity carried out throughout the stages of Mining Business to organize, restore, and repair environmental and ecosystem quality so they can function again in accordance with their designation.”

received by mining companies, because reclamation principles stipulate that they “position ex mining land utilization activities in accordance with their designation”. This condition provides room for avoidance of mining pit reclamation obligations. Arrangements changing reclamation obligations to utilization areas blur the objective of reclamation obligations, i.e. restoring environmental conditions so areas can function as they should.

Changes in area designation as a consequence of the inability to cover excavation areas (mining pits) becomes a justification for mining companies not carrying out their reclamation obligations.

This interpretation of other designations is made the pretext for avoiding reclamation obligations. Many ex mining pit pools are used as irrigation sources and for clean water, and even for breeding fish. In Samarinda municipality and Kutai Kartanegara district, mining companies only submitted designation proposals by installing pumps and building toilets around the mining pits.⁹

PT Belengkong Mineral Resources in West Kutai district left eight open mining pits uncovered claiming local residents wanted to use them as water sources and fish ponds. PT Belengkong did not carry out any reclamation, and did not retrieve any reclamation guarantee funds.¹⁰

Even the allocation of reclamation funds becomes unclear due to them being transformed into funds for tourism activity development, or water provision funds. Companies can even think that by depositing reclamation guarantee funds they have already carried out their reclamation and post-mining obligations.

⁹ Majalah Tempo investigative report from 8 May 2017 entitled “Lubang Maut Sisa Tambang”.

¹⁰ Ibid

Table 6. A range of environmental funding policy instruments

Policy Instrument	Basis for Calculation	Encumbrance	Precondition
Taxes and levies as well as state budgets	Government work budget plans	Government – part of governance of public service	Budget allocation by the government
Charges and fines for polluters	Based on the damage that occurs	Business practitioner - risks from business activities and a means for enforcing recovery obligations	Law enforcement and evidence in court
Environmental damage insurance	Risk formula	Business practitioner - risks from business activities	Business practitioner performance
Guarantee funds	The burden necessary for carrying out recovery based on a particular formula	Business practitioner - a means for enforcing recovery obligations	Business practitioner performance
Royalties	Tariff formula	Government – part of governance of public service	Budget allocation by the government
International funds	International interests	International entity	Performance

FINDING 5. Guarantee fund arrangements are not designed as instruments for ensuring environmental protection.

Put simply, reclamation and post-mining guarantee funds basically constitute forms of environmental guarantee funds for extractive mineral and coal mining activities. Guarantee funds are one of a series of policy instruments commonly used as tools for preventive environmental management.¹¹

The nature of this policy assumes that the business activities being carried out definitely have associated impacts like environmental degradation. Therefore, certain measures need to be undertaken to ensure management and restoration of the degraded environment is carried out.

The specificity of guarantee funds compared to other policy

instruments, is their placing of the payment burden for restoration immediately on business practitioners or activity implementers. Indeed, there is a generally accepted principle, known as the ‘polluter pays principle’, that environmental degradation risks should be borne by those that cause the degradation, and not by the general public. However, in contrast to fines or recovery penalties, which require proof of degradation and causality, with guarantee funds, in this instance reclamation and post-mining guarantee funds, the assumption already exists that it is those activities that have environmental degradation impacts.

The main intention of policy making on reclamation and post-mining guarantee funds is not clearly apparent in various rulings, including Law No. 4/2009 on Mineral and Coal Mining. Provisions on reclamation and post-mining guarantee funds are discussed only fleetingly in this law in 4 (four) articles, all of which can be interpreted with the message that Production Operations IUP holders are obliged to provide reclamation guarantee funds. Even

¹¹ Sigit Santosa, 2005. *Environmental Management Financing and Natural Resource Calculation: Efforts to Maintain Environmental Quality*. Sebelas Maret University lecturer inaugural speech.

Table 7. Coal mining permit companies (with the largest concessions) yet to deposit reclamation guarantee funds by July 2018

NO	COMPANY NAME	TYPE OF IUP	AREA	PROVINCE
1	PT BUKIT ASAM (PERSERO) TBK	PRODUCTION OPERATIONS	18,230	RIAU
2	PT BORNEO PRIMA	PRODUCTION OPERATIONS	15,000	CENTRAL KALIMANTAN
3	PT PUSAKA TANAH PERSADA	PRODUCTION OPERATIONS	15,000	CENTRAL KALIMANTAN
4	PT NUSANTARA SANTAN COAL	PRODUCTION OPERATIONS	14,990	EAST KALIMANTAN
5	PT BARA INTERNATIONAL	PRODUCTION OPERATIONS	14,990	CENTRAL KALIMANTAN
6	PT HANSON ENERGI BATURAJA	PRODUCTION OPERATIONS	14,990	SOUTH SUMATRA
7	PT BUMI BARITO MINERAL	PRODUCTION OPERATIONS	14,980	CENTRAL KALIMANTAN
8	PT ERABARA PERSADA NUSANTARA	PRODUCTION OPERATIONS	14,980	EAST KALIMANTAN
9	PT SUMBER DAYA PERSADA	PRODUCTION OPERATIONS	14,940	SOUTH SUMATRA
10	PT DAYA BUMINDO KARUNIA	PRODUCTION OPERATIONS	14,800	CENTRAL KALIMANTAN

Table 8. Coal mining permit companies (with the largest concessions) whose licenses expired in 2018/2019 but had yet to deposit reclamation guarantee funds by July 2018

NO	COMPANY NAME	TYPE OF IUP	AREA	PROVINCE
1	PT MEGAPURA PRIMA INDUSTRI	PRODUCTION OPERATIONS	8,587	PAPUA BARAT
2	PT KARYA PERMATA PRIMA	PRODUCTION OPERATIONS	6,350	KALIMANTAN TIMUR
3	PT OGAN ENERGI	PRODUCTION OPERATIONS	4,000	SUMATERA SELATAN
4	PT GEOBARA KARUNIA CIPTA LESTARI	PRODUCTION OPERATIONS	3,219	KALIMANTAN TIMUR
5	PT BUANA TAMBANG JAYA	PRODUCTION OPERATIONS	3,000	RIAU
6	PT BUKIT ASAM (PERSERO) TBK	PRODUCTION OPERATIONS	2,935	SUMATERA BARAT
7	PT MITRA TALA	PRODUCTION OPERATIONS	2,659	KALIMANTAN TENGAH
8	PT SARANA PUTRA PERDANA	PRODUCTION OPERATIONS	1,063	KALIMANTAN TENGAH
9	PT BUDIINDAH MULIA COAL	PRODUCTION OPERATIONS	686,0	RIAU
10	PT LAIS COAL MINE	PRODUCTION OPERATIONS	789,4	SUMATERA SELATAN

SOURCE: Ministry of Energy and Mineral Resources

reclamation itself is not explained specifically, except in an insertion in the elucidation of Article 70, which motions reclamation as a part of restoration activities in environmental management for mining activities.

More detailed provisions on reclamation are stipulated in Government Regulation No. 78/2010 on Reclamation and Post-Mining. These include stipulating payment mechanisms for reclamation and post-mining

guarantee funds, including their disbursement and use. These arrangements are consistent with general provisions in Law No. 32/2009 on Environmental Protection and Management, which includes a provision on guarantee funds being positioned as environmental economic incentive instruments, prepared by a business, or an activity to restore an environment degraded as a result of its activities.¹²

¹² Elucidation of Article 43 paragraph (2) letter a of Law No. 32/2009

Table 9. Comparison of PT Bukit Asam and PT Tanito Harum's reclamation costs

Company	PT Bukit Asam	PT Tanito Harum
Reclamation cost	159 million per hectare	37 million per hectare

Looking at this and several examples from other sectors, reclamation and post-mining guarantee funds are aimed at 2 (two) main objectives: Firstly, reclamation and post-mining guarantee funds are supposed to be incentive mechanisms for ensuring companies carry out their environmental restoration obligations following their mining operations; and secondly, reclamation and post-mining guarantee funds are also sources of finance for government to implement recovery measures, in the event of companies reneging on their obligations. Therefore, the assumption is that reclamation and post-mining guarantee funds can answer the environmental degradation risks resulting from business activities. Principally, for mining businesses, the imposition of reclamation and post-mining guarantee funds also internalizes environmental degradation, which until now is still seen as a business activity externality. We can expect this policy to fail, as the available arrangements do not meet this assumption.

The problem is that there is not one available legal provision indicating that guarantee funds are indeed aimed at answering environmental risks that occur. Though reclamation and post-mining plans must accord with their environmental documents, the setting of guarantees considers only 2 (two) things:

(1) Production Operations IUP holder and Production Operations IUPK holder performance, and/or: (2) Production Operations IUP holder and Production Operations

IUPK holder financial capacity.¹³

This problem is apparent from the disparities in guarantee costs set for different mining concession companies.

These disparities not only mean that guarantee cost calculations are too lax, but that they also provide the possibility for guarantee fund values not suiting the potential environmental degradation occurring. Additionally, current rules fail to establish measures that should be taken if the deposited guarantee funds are insufficient for returning the environment back to its original state.

It should also be noted that despite being defined as state finances, reclamation guarantee funds have yet to be positioned that way. If Article 2 letter h of Law No. 17/2003 were used,¹⁴ then their use should also be adjusted to suit state budget accountability mechanisms. The positioning of guarantee funds in state budgeting mechanisms would provide flexibility for the state to manage risks more systematically, particularly as many companies prefer to relinquish their guarantee funds rather than implement reclamation and post-mining activities.

¹³ Annex VI of Minister of Energy and Mineral Resources Decree No. 1827/2018

¹⁴ "Finances in Article 1 number 1, cover... h. riches of another party controlled by the government in a framework of presenting tasks of governance and/or in the public interest."

