



State Responsibility for Environmental Damage Due to Forest Area Release for the Development of National Strategic Projects

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ABSTRACT

The implementation of the idea of "Nawacita" which departs from the weak national economic cycle, the government has good intentions by accelerating the development of strategic projects through the enactment of laws and regulations related to the ease of implementation, one of which is in the release of forest areas, namely, the Job Creation Law and Government Regulations related to the ease of national strategic projects and the implementation of forestry. In its implementation, developing national strategic projects by releasing forest areas has negatively impacted the environment and local communities. This research aims to find out the mechanism for releasing forest areas for the development of national strategic projects in the legislation and how the state should be responsible for environmental damage caused by the release of forest areas based on applicable laws and regulations. The research method used in this research is normative juridical with statute approach and case approach. The results found that the mechanism for releasing forest areas for the development of national strategic projects is regulated in Permen LHK No. 7 of 2021 with the mechanism for releasing permanent production forest areas and convertible production forests. Then the state's responsibility is carried out based on the principle of strict liability by compensating the losses suffered by the community and restoring environmental functions by stopping the release of forest areas, conducting land remediation, forest rehabilitation and restoration of damaged ecosystems.

Keywords: Forest Area Release; National Strategic Project; State Responsibility

I. INTRODUCTION

Development in various sectors that are considered strategic to fulfill the basic needs of the welfare of the Indonesian people is accelerated to increase global competitiveness (Nawacita[1] initiated by Joko Widodo, This development project is then known as the National Strategic Project (PSN) where in supporting the implementation of national strategic project development, the government provides several facilities through the Job Creation Law including, first, simplifying the environmental approval mechanism by eliminating environmental permits and then replacing them with environmental feasibility decisions, namely environmental approval as a condition for the development of national strategic projects. Second, by giving responsibility to the government to provide land needs as Article 173 (1). This convenience was preceded by PP No. 42 of 2021 which provides convenience in all forms of licensing and non-licensing that can accelerate the stages of national strategic project development, namely planning, preparation, construction, maintenance to funding. In the planning stage, the government provides convenience in the development of national strategic projects which include the use of forest areas. The use of forest areas is then regulated more clearly in PP No. 23 of 2021. Through this regulation, Article 94 paragraph (3) states in essence that the use of forest areas to develop national strategic projects is carried out with a forest area release mechanism.

Coinciding with the Covid-19 outbreak that paralyzed human activities around the world, causing consequences for food security because countries in the world will priorities meeting their own domestic food needs compared to exporting to other countries.[2] In response to the food crisis, the government then promoted the food estate or food security program as one of the national strategic projects.[3]

However, the food estate in Tewai Baru, Gunung Mas did not go as expected, it is not sustainable and tends to damage the peat ecosystem. In addition to the damage to peat ecosystems, the implementation of food estates also eliminates the function of peat forests as a buffer for water management.[2] The loss of water management causes losses for local communities, especially in the rainy season, which causes hydrometeorological disasters. These namely muddy floods damage homes and paralyze their economic activities, which are dominated by plantation activities, considering that the food estate project is located in an area higher than residential areas.[4] The release of forest areas for the benefit of national strategic projects is indeed legal based on PP No. 23 of 2021 and Permen LHK No. 7 of 2021 which regulates the mechanism but in practice, it has negative consequences for the local community of Tewai Baru.

Forest area release must fulfill a statement of commitment that includes the completion of environmental approval and administrative-technical requirements that include a Strategic Environmental Assessment. Both environmental approvals and Strategic Environmental Assessments, referring to the Environmental Law, must be carried out by involving directly affected communities by opening space for the community to provide suggestions and responses related to development planning. However, in practice, the local community of Tewai Baru did not have any space to be involved in either the planning or the implementation of the food estate project.[4] This lack of information meant that the community, who had lived in the forest for a long time and recognized the characteristics of the land, did not have the opportunity to provide advice and feedback regarding the planting of cassava on the peatland as planned, which ultimately led to flooding and the failure of the cassava plantation to be ready for harvest, so the government planted corn in polybags which were then placed in the area.[5] This is nothing more than the government's justification that peatland can be used as plantation land.

II. Legal Review of Forest Area Release Mechanism for National Strategic Project Development

The release of forest areas for the development of national strategic projects is further regulated in technical regulations, namely Permen LHK No. 7 of 2021 concerning Forestry Planning, Changes in Forest Area Designation and Function. This Ministerial Regulation more clearly regulates the mechanism for implementing the release of forest areas to meet the land needs for the development of national strategic projects. The following is a flowchart to make it easier to understand the mechanism that must be carried out before releasing forest areas.

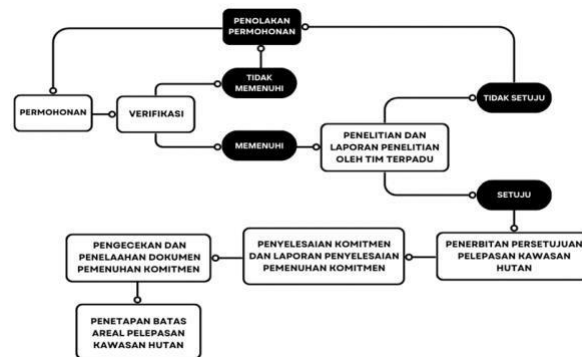


Figure 1: Mechanism for forest area release based on Minister of Environment and Forestry Regulation No. 7 of 2021

a. Application

The release of forest area for development outside forestry, one of which is the development of national strategic projects, is carried out based on an application which, according to Article 287 paragraph (1), can be submitted by, ‘a. minister or head of institution; b. middle high-ranking official of the Ministry; c. governor or regent/mayor; d. authority body; e. head of legal entity; or f. individual, group of people, and/or community.’ To the Minister of Environment and Forestry through the Director General in the field of Forestry Planning and Environmental Management with a statement of commitment and administrative-technical requirements. This is based on Article 281 and Article 282.

b. Verification

Based on the application submission and application requirements, Article 283 paragraph (1), the Director of the forest area confirmation sector is tasked with verifying the statement of commitment and administrative-technical requirements within a maximum period of 24 working days. The verification includes identifying and sorting out data on the completeness of the application requirements, both commitment statements and administrative-technical requirements. The result of the verification conducted by the Director in the field of forest area gazettement may fulfill the requirements or not fulfill the requirements. If the verification results do not fulfill the requirements, the Director General on behalf of the Minister has the right to submit a rejection of the forest area release application.

c. Research and Report of Research Results by the Integrated Team

Meanwhile, if the results of verification of the requirements are fulfilled, they are then submitted to the Director General in the field of Forestry Planning and Environmental Management. Continued after receipt of the results of the verification report of the fulfilled requirements, the Director General forms an Integrated Team that will conduct research on the area of the forest zone release application and stipulates a task order.

d. Issuance of Forest Area Release Approval

Based on the Minister's approval of the Integrated Team's report and recommendations, Article 286 paragraph (1) states that the Director General shall submit a technical review and a map attached to the forest area release approval to the Secretary General. After the technical review and the attachment map are received, the Secretary General is tasked with conducting a legal review, which then submits the draft Decision on Approval of Forest Estate Release and the attachment map of the Approval of Forest Estate Release to the Minister. Within 3 working days of receipt, the Minister shall issue a Ministerial Decree on Approval of Forest Area Release and Map of Approval of Forest Area Release, which decree and its attachment map shall then become the basis for carrying out the next stage, namely Boundary Arrangement of Forest Area Release Approval.

e. Completion of Commitment and Completion Report

Along with the delineation of forest area boundaries, the approval holder must also complete the commitments as stated in the commitment statement mentioned above within a maximum period of 1 year after the issuance of the forest area release approval. After completing the documents in the commitment statement, the approval holder is also obliged to submit a report on the completion of commitment fulfilment to the Minister and submit the original documents to the Director General for checking and review of commitment fulfilment documents.

f. Checking and Reviewing Commitment Completion Documents

After the report on the completion of commitment fulfilment is received, the Director General is obliged to check and review the commitment fulfilment documents. During the checking and review, the Director General may conduct field verification, which includes tracing the position of boundary markers in the forest area release approval area.

g. Determination of Forest Estate Release Area Boundary

Based on the results of verification and review of commitment fulfilment documents, the Director General shall submit a technical review and map of the forest area release approval to the Secretary General. Furthermore, the Secretary General shall conduct a legal review of the forest area release approval map and submit the Minister's draft decision on the determination of forest area release boundaries and the forest area release boundary determination map to the Minister. After receiving the draft decision, the Minister shall issue a Ministerial Decree on the Determination of Forest Area Release Boundaries and Map of Forest Area Release Boundaries.

This is how the state regulates the release of forest areas for the development of national strategic projects through the mechanism of forest area release. In the prescribed procedure, there are several privileges in the development of national strategic projects, including,

- a. Forest areas that can be used are not only convertible production forest areas but also unproductive and productive permanent production forests can also be released, explained in Article 273 paragraph (4) that

‘Approval for the release of forest areas for national strategic project activities; national economic recovery; land acquisition for food security (Food estate) can be carried out in productive and or unproductive production forest areas.’

- b. Free from the imposition of Non-Tax State Revenue (PNBP) as in Article 281 paragraph (3) that ‘In the case of national strategic project activities; national economic recovery; and land acquisition for food security activities, ... and non-commercial activities are exempted from the obligation to pay PNBP.’
- c. The implementation of the development can be carried out without waiting for the completion of forest area boundary demarcation. This is explained in Article 289 paragraph (4) that ‘In the event that activities in forest areas are national strategic programmes, national economic recovery, food security (food estate), the implementation of activities can be carried out simultaneously with the implementation of forest area boundary demarcation.’

At this point, we can see that the release of forest areas for the development of projects that are considered strategic is really facilitated by the state. If the state continues to seek equitable development by removing forest area cover, it is the same as not implementing the mandate of the Constitution of this country. This is certainly based on Article 33 paragraph (4) which explicitly states that ‘The national economy is based on economic democracy with the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining a balance of progress and economic unity’ This article provides a formula for organising the economy to be proenvironmental, namely sustainable and environmentally sound. Jimly Asshiddiqie even said that the 1945 Constitution is a green constitution[6].

Even though Jimly states that our constitution is a green constitution, in practice, the ease of releasing forest areas just to answer the needs of development from an economic perspective, clearly contradicts his commitment as in Article 33 Paragraph (4) of the 1945 Constitution written above. The reason is that environmental problems due to loss of forest cover are also increasingly evident, floods, extreme weather anomalies are even news that can be heard every day. The laws and regulations enacted are not enough to overcome these problems, it requires the values or morals of government officials who are far from anthropocentric. Anthropocentric or shallow ecological ethics is a theory of environmental ethics that places humans at the centre of the universe. Anthropocentric emphasises human needs, interests and interests above all else. Therefore, humans who have anthropocentric ethics always consider themselves as a separate part of the environment, so that the environment is seen as an object intended solely to fulfil human interests, making it weak in its management policy.[7]

III.Regulation of State Responsibility for Environmental Damage Due to the Release of Forest Areas for the Development of National Strategic Projects

The impact that occurred in one of the national strategic project development areas, namely, the food estate in Tewai Baru, Gunung Mas. This food security mega project initially carried out the first phase of deforestation covering an area of 600 hectares, three years later Greenpeace stated that by 2023 the project would have expanded to 760 hectares.[8] In simple terms, this national strategic project for cassava commodity food security is implemented by releasing peat forest areas which are located higher than residential areas so that if the rainy season is light or heavy, it will result in a flood disaster as high as 1.5 meters, a disaster that preceded the development of the national strategic project. food estate has never been felt.[2] Likewise, during the dry season, the potential for land fires will increase. This is due to the characteristics of peat, which according to previous research is that the acidity level is very acidic, poor in nutrient content, prone to drought and fire due to its high level of porosity so that it often experiences land subsidence, and is difficult to return to its original function as a water system buffer. Due to the impact of this national strategic project, several parties stated that the project had failed[9].

Under these conditions, the state should be responsible for releasing forest areas. The state's responsibility for environmental damage resulting from the release of forest areas for the development of national strategic projects in the PPLH Law can be carried out through non-litigation or litigation efforts. a. Non Litigation

Environmental damage is detrimental not only to humans but also to the environment itself, the initial step of state responsibility can be carried out through mediation assisted by a mediator to reach an agreement as in Article 85 paragraph

(1) of the PPLH Law that "Settlement of environmental disputes outside the court is carried out to reach an agreement regarding: a. the form and amount of compensation; b. recovery actions resulting from pollution and/or destruction; c. certain actions to ensure that pollution and/or damage will not recur; and/or d. actions to prevent negative impacts on the environment." Based on this article, the state must at least be responsible for losses experienced by the community due to the release of forest areas which result in environmental damage, carry out restoration as regulated in the Law, or other actions to ensure that environmental damage will not be repeated in the future. . If an agreement and peace is reached during the mediation, it can be confirmed as a Deed of Peace through a court with absolute or relative authority, in order to obtain permanent legal force.

b. Litigation

Through litigation, there are 2 measures of responsibility that can be carried out by the state, namely civil and criminal. In civil terms, the PPLH Law has good intentions in state accountability, namely providing compensation to the community (civil remedy) through absolute responsibility (strict liability) or accountability through filing a lawsuit for an unlawful act which requires proof of an element of fault (liability based on fault). Firstly, filing a lawsuit for an unlawful act is regulated in Article 87 paragraph (1) of the PPLH Law responsibility for a business and/or activity that commits an unlawful act in the form of pollution and/or destruction that causes harm to other people or the environment. This is in line with the polluter pays principle adopted from the Rio Declaration into the principles of environmental protection and management in the PPLH Law.

Second, state responsibility which has the principle of strict liability or absolute responsibility as explained in Article 88 in conjunction with Article 22 number 33 of the Job Creation Law which confirms strict liability for losses arising from its business and/or activities, strict liability is an element of fault that does not need to be proven to pay the amount of compensation.

Unfortunately, the amount of compensation in absolute liability (strict liability) is not regulated in statutory regulations, so this needs to be emphasized more explicitly, the value is sufficient to compensate for losses experienced by the community, for example replacing the total loss of property or double of total assets[10].

Meanwhile, criminal responsibility by the state for environmental damage resulting from the release of forest areas for the development of national strategic projects in the PPLH Law is determined based on proof of the action, namely based on intent or negligence. Actions that cause environmental damage through deliberate action are regulated in Article 98 paragraph (1), "Meanwhile, negligence results in environmental damage. Article 99 paragraph (1)

As part of criminal enforcement, environmental criminal enforcement certainly contains the principle of *ultimum remedium*. The principle of *ultimum remedium* states that criminal measures are the last resort for state responsibility if there are no more effective efforts to hold the state responsible for the act of releasing forest areas. Basically, for environmental damage resulting from the release of forest areas, the principle of *ultimum remedium* is implemented if civil lawsuits and administrative lawsuits are not sufficient to restore community rights lost due to environmental damage caused by the release of forest areas. However, based on the provisions regarding the latest environmental protection and management, namely the Job Creation Law, the article on administrative lawsuits is eliminated, so the *ultimum remedium* principle can be implemented if the state is not also responsible for environmental damage caused by the release of forest areas for the development of national strategic projects either. through mediation or civil proceedings.[11]

Basically, the state's most urgent responsibility to carry out at this time apart from compensating for the losses experienced by the community is to restore environmental functions. Considering that humans are only one of the many links in the chain of life on earth (web of life), forests are the only element supporting human life (life-support system) that will continue to regenerate, so the provisions in Article 54 paragraph (2) of the PPLH Law must be immediately implemented. carried out by the state as a form of state responsibility for environmental damage resulting from the release of forest areas for the development of national strategic projects, namely by,

- a. stopping the release of forest areas
- b. remediate land from pollutants and restore nutrients in it
- c. carrying out forest rehabilitation and ecosystem restoration.

The PPLH Law regulates the basis for implementing environmental protection and management with the principle of state responsibility. The principle of state responsibility is an embodiment of the state as an organization of power which contains the understanding that the state must protect its citizens, natural resources and areas that fall within its jurisdiction.[6] Based on Article 2 letter a in the explanation, what is meant by the principle of state responsibility includes guaranteeing that the use of natural resources will provide maximum benefits for the welfare and quality of life of the people, both current and future generations, guaranteeing citizens' rights to the environment, which is good and healthy. The basic reasons why the state must restore the above environmental functions are in line with efforts to realize ecological justice.[12] Ecological justice, developed by Brian Baxter, demands that humans as a link in a chain who have reason and morals act fairly not only to fellow humans but also to the environment, how a good and healthy environment can be accepted not only by a group of people but also all levels of society between generations, how living creatures other than humans and the environment also get the opportunity to continue living, this is distributive justice as part of ecological justice.

IV. CONCLUSION

Based on the results of the research and discussions carried out, it can be concluded that the release of forest areas has regulations that regulate mechanisms for the development of national strategic projects, namely PP No. 23 of 2021, and is regulated by the Minister of Environment and Forestry Regulation No. 7 of 2021. State responsibility based on the PPLH Law is the state's effort to ensure that natural resources and their utilization provide great benefits for the welfare of the people, fulfill the rights to a good and healthy environment, as well as efforts to prevent utilization activities that cause environmental damage. For environmental damage resulting from the release of forest areas for the development of national strategic projects, referring to the PPLH Law, the state has absolute responsibility (strict liability) to compensate for losses experienced by the community. State responsibility, which is based on the principle of strict liability, does not require proof that there is an element of error, simply put, it only needs to see environmental damage and losses experienced by the community. Apart from compensating for losses to the community, the state is also responsible for restoring damaged environmental functions in released forest areas. Thus, in implementing the development of national strategic projects, with the stipulation of regulations governing the mechanism for releasing areas, the state needs to comply with the mechanisms that have been established, one of which is in the procedures for fulfilling commitment requirements for applications for releasing forest areas which include environmental approval, the state needs to continue to involve the community local people in development target areas by opening up space to provide suggestions and responses because after all, they understand their own local wisdom and the impact of the development will also return to the local community then as soon as possible the state must be responsible for environmental damage and the losses experienced by the community, provide compensation for losses in accordance with the principle of strict liability and restore environmental functions as soon as possible by stopping the source of environmental damage, namely the release of forest areas, carrying out land remediation, forest rehabilitation and ecosystem restoration

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