

CLIENT ALERT

**Langkah Advokasi Pencabutan Perizinan Usaha
Sumber Daya Alam**

***[Legal Measures on Revocation of Natural
Resources Business Permits]***

JAKARTA, 15 JANUARI 2022

INTEGRITY CLIENT ALERT

Oleh:

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Langkah Advokasi Pencabutan Perizinan Usaha Sumber Daya Alam **[Legal Measures on Revocation of Natural Resources Business Permits]**

Pemerintah mengeluarkan kebijakan pencabutan ribuan perizinan terkait dengan usaha Sumber Daya Alam (“SDA”). Berdasarkan keterangan Menteri Investasi RI, Bahlil Lahadalia perizinan yang dicabut oleh Pemerintah sejumlah 2.097 IUP seluas 3.201.046 hektar, 192 izin sektor kehutanan (IPPKH, HPH, HTI) dengan total luas 3.126.439 hektar, dan HGU Perkebunan dengan total luas 34.448 hektar. Alasannya, izin-izin tersebut tidak dijalankan dengan baik, tidak produktif, atau malah dialihkan ke pihak lainnya.

Pada dasarnya pemerintah sebagai pemegang kekuasaan eksekutif memiliki kewenangan untuk memberikan dan mencabut perizinan yang diberikan. Konsep ini dikenal dengan istilah *contrarius actus*. Namun, penting untuk diperhatikan bahwa pencabutan perizinan harus dilakukan dengan cara menerbitkan Keputusan Tata Usaha Negara (“KTUN”) pencabutan izin, yang mana penerbitannya harus memenuhi kaidah hukum administrasi yang diatur dalam Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan (“UU AP”). Selain UU AP, regulasi spesifik mengenai masing-masing perizinan dan tata cara penjatuhan sanksi pun perlu ditaati. Jika tidak, maka pihak-pihak yang tercabut izinnya tanpa mengindahkan pengaturan dalam UU AP dan aturan spesifik, dapat menempuh upaya hukum ke Pengadilan Tata Usaha Negara (“PTUN”) Jakarta.

KESESUAIAN DENGAN UU ADMINISTRASI PEMERINTAHAN

UU AP memberikan *guidance* bagi pemerintah dalam menerbitkan/mencabut sebuah izin, hal itu sebagaimana diatur dalam Pasal 52 dan 64 UU AP sebagai berikut:

PASAL 52 UU AP:

- (1) Syarat sahnya Keputusan meliputi:
 - a. ditetapkan oleh pejabat yang berwenang;
 - b. **dibuat sesuai prosedur; dan**
 - c. **substansi yang sesuai dengan objek Keputusan.**
- (2) Sahnya Keputusan sebagaimana dimaksud pada ayat (1) didasarkan pada ketentuan peraturan perundang-undangan dan AUPB.

PASAL 64 UU AP:

- (1) Keputusan hanya dapat dilakukan pencabutan apabila terdapat cacat:
 - a. wewenang;
 - b. **prosedur; dan/atau**
 - c. **substansi.**

- (2) Dalam hal Keputusan dicabut, harus diterbitkan Keputusan baru dengan mencantumkan dasar hukum pencabutan dan memperhatikan AUPB.

PROSEDUR PENCABUTAN HARUS DILAKUKAN SECARA BERJENJANG

Sebagaimana diatur dalam UU AP, salah satu syarat penerbitan KTUN pencabutan izin harus dilakukan sesuai dengan prosedur yang tepat. Dalam rezim hukum administrasi, pencabutan perizinan seringkali dijadikan *ultimum remedium* sebagai langkah akhir pembinaan dan sanksi administrasi. Contohnya dalam hal pencabutan Izin Usaha Pertambangan (“IUP”) sebagaimana diatur dalam Bab VIII Peraturan Menteri ESDM Nomor 7 Tahun 2020 sebagaimana telah diubah dengan Peraturan Menteri ESDM Nomor 16 tahun 2021 tentang Tata Cara Pemberian Wilayah, Perizinan, Dan Pelaporan Pada Kegiatan Usaha Pertambangan Mineral Dan Batubara (“**Permen ESDM 7/2020**”), menyatakan bahwa pengenaan sanksi administrasi dilakukan secara berjenjang mulai dari Teguran Tertulis, Penghentian Sementara, baru ke Pencabutan Izin Usaha. Hanya dalam hal-hal tertentu saja, pencabutan izin dapat dilakukan tanpa melalui tahapan teguran dan penghentian sementara. Perusahaan memiliki hak untuk mengajukan upaya hukum ke PTUN Jakarta apabila serta merta dicabut perizinannya tanpa didahului teguran tertulis dan/atau penghentian sementara, jika tidak termasuk ke dalam klasifikasi perizinan yang dapat langsung dicabut.

SUBSTANSI PENCABUTAN HARUS SESUAI DENGAN UU ADMINISTRASI PEMERINTAHAN

Pemerintah menyampaikan terdapat perizinan usaha SDA yang dicabut akibat tidak melaksanakan kegiatan usaha atau menelantarkan perizinan yang diberikan. Logika tersebut sesuai dengan dasar pencabutan KTUN berupa cacat substansi. Untuk lebih lengkap dapat disimak penjelasan Pasal 64 ayat (1) huruf c UU AP sebagai berikut:

PENJELASAN PASAL 64 AYAT (1) HURUF C UU AP:

Yang dimaksud dengan “cacat substansi” antara lain:

1. **Keputusan tidak dilaksanakan oleh penerima Keputusan sampai batas waktu yang ditentukan;**
2. fakta-fakta dan syarat-syarat hukum yang menjadi dasar Keputusan telah berubah;
3. Keputusan dapat membahayakan dan merugikan kepentingan umum; atau
4. Keputusan tidak digunakan sesuai dengan tujuan yang tercantum dalam isi Keputusan.

Namun, bagi perusahaan-perusahaan yang belum melakukan produksi akibat terhambat peliknya proses untuk mendapatkan sub-perizinan penunjang, tidak dapat diklasifikasi sebagai perusahaan yang menelantarkan perizinan miliknya. Justru sebaliknya, pemerintah harus memberikan kemudahan agar perusahaan-perusahaan tersebut dapat memperoleh sub-perizinan sehingga segera melakukan kegiatan operasi dengan baik, dan tentunya memberikan pemasukan kepada negara dan membawa kesejahteraan bagi masyarakat sekitar.

BATAS WAKTU PENGAJUAN GUGATAN

Hukum acara PTUN memiliki karakteristik khusus, salah satunya adalah batas daluarsa pengajuan gugatan yang lebih sempit dari karakter hukum lainnya, seperti perdata dan pidana. Berdasarkan UU PTUN, pihak yang dirugikan akibat diterbitkannya suatu KTUN dapat mengajukan gugatan paling lambat 90 (sembilan puluh) sejak diterimanya KTUN tersebut. Namun, penting untuk diketahui bahwa sebelum mengajukan gugatan, calon penggugat wajib mengajukan upaya administrasi berupa keberatan dan/atau banding administrasi ke penerbit KTUN. Berdasarkan UU AP, pengajuan upaya administrasi dapat

dilakukan paling lambat 21 (dua puluh satu) hari kerja setelah diterimanya KTUN. Hal ini sebagaimana diatur sebagai berikut:

PASAL 77 AYAT (1) UU AP:

Keputusan dapat diajukan keberatan dalam waktu paling lama 21 (dua puluh satu) hari kerja sejak diumumkannya Keputusan tersebut oleh Badan dan/atau Pejabat Pemerintahan.

Sebelumnya, jika dalam jangka waktu 21 (dua puluh satu) hari kerja, KTUN tidak diajukan keberatan ke penerbit, maka calon penggugat dianggap telah menerima keputusan pemerintah tersebut sehingga kehilangan haknya. Namun, baru-baru ini diterbitkan Surat Edaran Mahkamah Agung RI Nomor 5 Tahun 2021 ("**SEMA 5/2021**") yang menyatakan sebagai berikut:

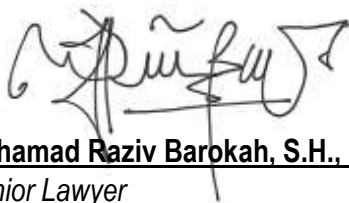
HALAMAN 9, HURUF E, SEMA 5/2021:

Upaya administratif berdasarkan Perma Nomor 6 Tahun 2018 tentang Pedoman Penyelesaian Sengketa Administrasi Pemerintahan Setelah Menempuh Upaya Administratif yang dilakukan melebihi tenggang waktu 21 (dua puluh satu) hari kerja sejak diterimanya atau diumumkannya Surat Keputusan dan/atau Tindakan, tidak menghilangkan hak untuk mengajukan gugatan, apabila gugatan masih diajukan dalam tenggang waktu 90 (sembilan puluh) hari kerja sejak mengetahui adanya keputusan dan/atau tindakan tersebut.

Esensi SEMA 5/2021 memberikan kelonggaran waktu pengajuan upaya administratif. Meski demikian, substansinya tidak menghapuskan kewajiban untuk melakukan upaya administratif terlebih dahulu. Oleh sebab itu, INTEGRITY menyarankan untuk segera dilakukan keberatan administrasi agar tidak ada kendala perihal tenggang waktu ketika mengajukan gugatan ke PTUN.

Demikian **INTEGRITY Client Alert** ini kami sampaikan, semoga bermanfaat.

Salam Integritas,
INTEGRITY Law Firm



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TURUT MENYETUJUI

Lawyers INTEGRITY lainnya:

1. Dra. Wigati Ningsih, S.H., LL.M.
2. Zamrony, S.H., M.Kn., CRA.
3. Harimuddin, S.H.
4. Wafdah Zikra Yuniarsyah, S.H., M.H.
5. Muhtadin, S.H.
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9. Musthakim Alghosyaly, S.H.
10. Caisa Aamuliadiga, S.H., M.H.

TENTANG INTEGRITY



Indrayana Centre for Government, Constitution and Society (INTEGRITY) Law Firm diinisiasi oleh Denny Indrayana, Guru Besar Hukum Tata Negara, yang telah berpengalaman sebagai penasihat khusus Presiden Republik Indonesia untuk bidang Hukum, HAM dan Pemberantasan KKN (2008 – 2011); dan Wakil Menteri Hukum dan HAM (2011 – 2014). Sejak

2015, Denny Indrayana pernah menjadi Guru Besar Tamu (Visiting Professor) di Melbourne University Law School (2016 – 2019), sekolah hukum terbaik di Australia.

PRAKTIS AREA

Business Competition Disputes | Corporate Law | Investment Law | Capital Market Law | Business Licensing | Tax Law | Banking Law | Asset Recovery | Bankruptcy Law | Labour Law | Immigration Law | Land Disputes | Civil Law | Criminal Law | General Election Disputes | State Administrative Claims | Constitutional Law Disputes | Constitutional Review at the Constitutional Court | Judicial Review at the Supreme Court | Good Governance | Good Corporate Governance | Drafting of Public & Corporate Regulations | Natural Resources Disputes | Intellectual Property Rights | Environmental Law | Family Law

PROGRAM

Selain bergerak di bidang Litigasi, Konsultasi dan Riset, INTEGRITY juga mempunyai program-program rutin berupa:

1. **INTEGRITY Constitutional Advocacy** adalah litigasi yang diinisiasi oleh INTEGRITY terkait isu publik, termasuk pengujian peraturan perundangan di MK atau MA.
2. **INTEGRITY Constitutional Discussion** adalah diskusi rutin yang membahas isu-isu hukum aktual, dan mencari solusi.
3. **INTEGRITY Legal Training** adalah pendidikan dan pelatihan keahlian hukum praktis seperti *legal audit*, *legal writing*, *anti-corruption training*, *legal drafting*, dan pelatihan hukum lainnya.
4. **INTEGRITY Legal Update** adalah kajian tentang isu hukum aktual, baik dalam bentuk artikel singkat maupun bentuk lainnya.
5. **INTEGRITY Scholarship** adalah beasiswa tahunan yang diperebutkan melalui lomba karya tulis ilmiah yang finalisnya diundang untuk mempresentasikan dan memperdebatkan topiknya melawan finalis lainnya.

Legal Measures on Revocation of Natural Resources Business Permits

Recently, the Indonesian government revoked thousands of natural resource business permits. According to Bahlil Lahadalia, the Indonesian Minister of Investment, there are as many as 2,097 permits covering a total area of 3,201,046 hectares, comprising of 192 forestry permits (*IPPKH, HPH, HTI*) totaling 3,126,439 hectares, and plantation with 34,448 hectares total area covered. The policy was implemented owing to noncompliance or unproductivity, and it was even transferred to other entities.

The government, as the holder of executive power, has the authority to grant and revoke business permits. This concept is commonly known as *contrarius actus*. Nonetheless, the revocation must be carried out through the issuance of Administrative Decision (*KTUN*), in accordance with Law Number 30 of 2014 on Government Administration. Furthermore, additional special sanctions and procedures must be complied with. If not, then parties whose permits are revoked in violation of the provisions of the Government Administration Law and specific rules can take legal measures to the Jakarta Administrative Court.

CONFORMITY WITH THE GOVERNMENT ADMINISTRATION LAW

The Government Administration Law provides guidelines for issuing/revoking permits, as outlined in Articles 52 and 64, as follows:

Article 52 of the Government Administration Law:

- (1) The conditions for the validity of the decision include:
 - d. being determined by competent authority;
 - e. being issued according to procedures; and**
 - f. substance conforming to the object of Decision.**
- (2) The legitimacy of the Decision referred to in paragraph (1) is based on legislative provisions and Good Governance principles.

Article 64 of the Government Administration Law:

- (1) Decisions can only be revoked if there are defects in the following areas:
 - d. authority;
 - e. procedure; and/or**
 - f. substance.**
- (2) If a Decision is revoked, a new one must be issued, specifying the legal basis for the revocation and taking Good Governance principles into account.

REVOCATION PROCEDURES MUST BE PERFORMED GRADUALLY

One condition for issuing a revocation Decision based on Government Administration Law is a proper procedure. Permit revocation is viewed by the Law as the *ultimum remedium*, the last resort for educating and imposing sanctions. For example, in the case of revocation of a mining business permit, as regulated in Chapter VIII of Minister of Energy and Mineral Resources Regulation Number 7 of 2020 as amended by Regulation Number 16 of 2021 concerning Procedures for Grants of Area, Permit, and Reporting on Mineral and Coal Mining Business Activities, sanctions are imposed in stages, beginning with a Warning Letter, followed by a Temporary Suspension, and finally a permit revocation. The Warning Letters and Temporary Suspensions are only excluded in specified circumstances. Corporations, on the other hand,

have the rights to initiate a lawsuit in the Jakarta Administrative Court if they are not classified as an exemption.

SUBSTANCE OF REVOCATION MUST CONFORM WITH GOVERNMENT ADMINISTRATION LAW

The government conveys that business permits are revoked as a result of inactivity or neglect of the granted permits. This policy considers a substantial deficiency to be the foundation for revoking an Administrative Decision which is detailed in Article 64 paragraph 1 letter c of the Government Administration Law, as follows:

Elucidation of Article 64 paragraph 1 letter c of the Government Administration Law:

"Substance defects" include, but are not limited to, the following:

1. **Decision is not executed by the recipient within the specified time limit;**
2. the changing of facts and legal conditions of the Decision;
3. Decision can be detrimental and harmful for the public interest; or
4. Decision is executed outside of the purpose stated in it.

Corporations that have not yet commenced business activities due to bureaucracy challenges in obtaining supporting sub-permits, on the other hand, cannot be listed as inactive or neglecting the permits. In contrast, the government must provide relaxation for them to obtain sub-permits. This way, corporations can then immediately proceed with the business, generating the state's revenue and bringing prosperity to the locals.

DEADLINE FOR SUBMISSION OF LAWSUIT

The Administrative Court procedural law contains special rules governing the deadline for filing a lawsuit, which is narrower than the deadlines for civil and criminal procedural laws. Parties who have been harmed by the issuance of an Administrative Decision can file a lawsuit within 90 (ninety) days of receiving the Decision, based on the Administrative Court Law. However, before the lawsuit can be brought to the Court, the parties must take administrative measure in the form of filing objection and/or appeal to the issuer of the Decision. This measure can be implemented within 21 (twenty-one) working days of receiving the Decision, as further outlined in Government Administration Law below:

Article 77 paragraph (1) of the Government Administration Law:

Objections can be filed within 21 (twenty-one) working days since the announcement of the Decision by the Board and/or Government Officials.

If no objection is filed to the issuer of the Decision within 21 (twenty-one) working days, the parties are deemed to accept the Decision, and the potential plaintiff loses the rights to file a lawsuit to the Administrative Court. Nonetheless, the Supreme Court recently issued a Circular Letter Number 5 of 2021 (SEMA 5/2021) which states the following:

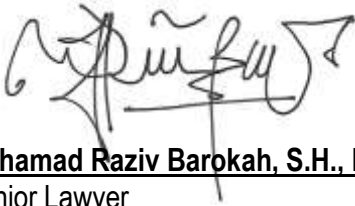
Page 9 Letter E of SEMA 5/2021:

Administrative measures based on the Supreme Court Regulation Number 6 of 2018 concerning Guidelines for Settlement of Government Administration Disputes after Taking Administrative Measures that are carried out passing the period of 21 (twenty-one) working days of deadline since the receipt or announcement of Decision Letters and/or Actions, do not eliminate the right to file a lawsuit, if the lawsuit is still filed within a period of 90 (ninety) working days from the date of known of the said decision and/or action.

SEMA 5/2021 allows for the filing of administrative measures; however, it does not eliminate the obligation to carry out the measures. Therefore, INTEGRITY advises immediately filing objections in an effort to avoid deficiencies in filing a lawsuit to the Administrative Court.

Thus, this **INTEGRITY Client Alert** is conveyed, we hope it will be useful.

Salam Integritas,
INTEGRITY Law Firm



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ALSO AGREED

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ABOUT INTEGRITY



Indrayana Centre for Government, Constitution and Society (INTEGRITY) Law Firm was initiated by Denny Indrayana, a Professor of Constitutional Law, who has experience as a Special Staff for Law, Human Rights, and Anticorruption to the President of the Republic of Indonesia (2008 – 2011); and Deputy Minister of Law and Human Rights (2011 –

2014). Since 2015, Denny Indrayana has been a Visiting Professor at Melbourne University Law School (2016 – 2019), the best law school in Australia.

PRACTICE AREAS

Business Competition Disputes | Corporate Law | Investment Law | Capital Market Law | Business Licensing | Tax Law | Banking Law | Asset Recovery | Bankruptcy Law | Labour Law | Immigration Law | Land Disputes | Civil Law | Criminal Law | General Election Disputes | State Administrative Claims | Constitutional Law Disputes | Constitutional Review at the Constitutional Court | Judicial Review at the Supreme Court | Good Governance | Good Corporate Governance | Drafting of Public & Corporate Regulations | Natural Resources Disputes | Intellectual Property Rights | Environmental Law | Family Law

PROGRAMS

Apart from engaging in Litigation, Consulting, and Research, INTEGRITY has regular programs such as:

1. **INTEGRITY Constitutional Advocacy** is a litigation measure initiated by INTEGRITY related to public issues, including judicial reviews in the Constitutional Court or Supreme Court of the Republic of Indonesia.
2. **INTEGRITY Constitutional Discussion** is a regular discussion that addresses actual legal issues and seeks solutions.
3. **INTEGRITY Legal Training** is a legal education and training in practical legal skills such as legal auditing, legal writing, anticorruption workshop, legal drafting, and other legal training.
4. **INTEGRITY Legal Update** is a research of actual legal issues, both in the form of short articles and other forms.
5. **INTEGRITY Scholarship** is an annual scholarship that is contested through a scientific writing competition in which finalists are invited to present and debate their topic against other finalists.

INTEGRITY

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