

## **POLICY BRIEF**

01/2021

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### **Water Allocation Issues Under Law 17/2019**



#### **Background**

The 2015 Constitutional Court Decision<sup>1</sup> which annuls Law 7/2004 states that:

1. Water commercialization shall not impede, override, and/or abolish the right of the people to the land, water and the natural riches contained therein. They shall be controlled by the State and exploited to the greatest benefit of the people;
2. The state shall fulfill the people's right to water since the access to water is a human right. Article 28 I (4) Constitution 1945 stipulates that "Protecting, advancing, upholding and the fulfilling the human rights are the responsibility of the state, especially the government."
3. Environmental sustainability is a part of human rights; therefore, Article 28H (1) Constitution 1945 states "Every person shall have the right to live in physical and spiritual

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<sup>1</sup> Putusan Mahkamah Konstitusi Nomor 85/PUU-XI/2013 Tentang Pengujian Undang Undang Nomor 7 Tahun 2004 Tentang Sumber Daya Air ("2015 Decision")

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prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care”.

4. Based on Article 33 (3) Constitution 1945, water, which is an important sector of production that affects the lives of the people shall be under the powers of the State, and shall be used to the greatest benefit of the people. Therefore, the supervision and the control by the state regarding water is absolute;
5. Another form of control by the state due to the importance of water that affects the lives of the people, is prioritizing permits for water commercialization to the State Owned Enterprise (BUMN) or Region-Owned Enterprise (BUMD);
6. In the event all the restrictions above have been fulfilled and there is an availability of water, the Government may grant permits to private enterprises to commercialize water based on strict requirements.

This “6 basic principles of water commercialization” in the 2015 Decision is still too general and cannot be directly operationalised. As such, the drafters of Law 17 need to interpret these principles in more detail. This can be seen from Article 8 which regulates the human right to water and Article 46 of the new Water Resources Law No. 17 Year 2019 (Law 17) which regulates licensing for commercial water use.<sup>2</sup>

According to Article 8(2), the state shall prioritize the fulfillment of the following needs:

1. Daily basic needs
2. People’s Farming
3. Daily basic needs through drinking water provision system

Under para (3), in the event that water is inadequate to fulfill all of the above needs on para (2), daily basic needs shall be prioritized against other needs. Para (4) of Article 8 suggest that the next prioritization shall be non-commercial activity for public interest and then other commercial activity with existing license. This means that those with existing license shall be prioritized against new licenses. Although Article 8 is not explicit, it can be concluded by reading the elucidation that ordinary uses for daily basic needs (no more than 60 liter per person per second) and people’s farming within existing irrigation system (no more than 2 litres per second) requires no license.

Article 49 further attempts to operationalizes the 6 Basic Principles by ranking both commercial and non-commercial licenses into the following licensing priority:

1. Daily basic need in large numbers
2. Daily basic need which alters the natural condition of the water source
3. People’s farming outside of existing irrigation system
4. Daily basic needs through drinking water provision system
5. Non-commercial activities for public needs
6. Water utilization for commercial needs by state, region, and village owned enterprise
7. Water utilization for commercial needs by private sector or individuals

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<sup>2</sup> Undang-Undang Republik Indonesia Nomor 17 Tahun 2019 Tentang Sumber Daya Air.

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However, these provisions still carry a number of complexities which still need to be clarified in implementing regulations and water allocation policies.

### **Drinking Water Utilities versus Agriculture**

Conflict between rural agriculture and urban needs is commonplace in Indonesia. Problem may arise when there is a competing need of water between agriculture and drinking water within the same river basin territory. Unfortunately, Law 17 is not clear on this.

It is interesting to note that raw water for drinking water utilities will be categorized as commercial license instead of non-commercial. Further, under Article 49, raw water for drinking water utilities is ranked in number 4 (four), just below people's farming outside of existing irrigation system (rank 3). This means that water for urban needs shall be prioritized *after* new irrigation system.

What about drinking water utilities versus existing irrigation system, which one shall be prioritized? If we look at Article 8(2) drinking water utilities is ranked in number 3, also below existing irrigation system. However, 8(3) does say that if water is inadequate, water for daily basic needs shall be prioritized against other needs. It does not specify *which* daily basic need however as, taking article 8 and article 49 altogether, there are 4 kinds of "daily basic needs": *ordinary* daily basic needs, daily basic needs for large number, daily basic need which alters the natural condition of the water source and daily basic need for drinking water utilities. Law 17 is not clear on this. If the provision of Article 8 is taken literally, it would mean *ordinary* daily basic needs shall be prioritized.

### **Conflict between the same category of uses**

It is also conceivable that conflict arise between the same category of uses. For example, conflict may arise between drinking water utilities PDAM (rank 4 daily basic needs through drinking water provision system) versus community groups or satellite cities which could be categorized as rank 1 (daily basic need in large numbers). If article 49 is to be taken literally then rank 1 should be fulfilled.

Conflict can also arise between state owned enterprises (SoE) and between village owned enterprise (BUMDes) or between SoE and BUMDes, all are under rank 6. There is no mechanism under Law 17 on how this should be settled.

### **Groundwater and Conjunctive Use**

While allocation frameworks under Article 8 and 49 is clearly applicable to surface water, it is arguable that this is also applicable to groundwater. Under Article 8 (elucidation), farmers can claim up to 2 (two) liters per second per family without requiring any license. As Article 8 does not restrict this provision to surface water, it is thus also applicable to groundwater. As such, smallholder farmers are eligible to receive up to 2 lps from groundwater. This could be a serious issue as rampant groundwater abstraction for farming activities may have already cause land subsidence in several regions.

Article 22 of Law 17 states that the management of water resources should take into account the linkage between ground and surface water and shall "*prioritize the utilization of surface water*". It

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is not yet clear as to how this linkage can be implemented in terms of water allocation framework. The important question is whether both surface and interlinked groundwater aquifer shall be calculated under the same water budget or should they be calculated separately. If they are calculated under the same water budget then a single allocation framework needs to be implemented in both surface and interlinked groundwater aquifers.

This may also depend on the level of bureaucratic integration between ground and surface water. Prior to Law 17, groundwater is under ESDM (Ministry of Energy and Mineral Resources) and surface water is under Public Works. Thus, technical recommendation and licensing for water use are issued by different ministries. Law 17 remove the reference to geological affairs in the attachment of Regional Government Law 2014. As such, it is not clear whether ESDM will manage groundwater, or whether it will be transferred to public works. In river basin plan (25 years) there has been attempts to integrate ground and surface water.<sup>3</sup> However, this is less clear in Public Works regulations. Water allocation modules issued by the public works also appear to focus on surface – and not ground—water allocation.

### **Water Footprint**

Another important issue is that the existing allocation framework does not take into account water footprint. It is understood that the water footprint for agriculture (beef, cattle, etc) might be significantly higher than the water footprint for drinking water or fast-moving consumer goods. The present allocation framework however, is focused on (i) type of use (e.g. daily basic need, farming, public interest) and (ii) stakeholders (state owned enterprise, private sector) and ignores water footprint of the product. As such, there maybe situation where water will be allocated to agriculture (albeit with higher water footprint) as opposed to other industries with lower footprint.

### **Impact of Jobs Creation Law (Omnibus)**

Last but not least, the Omnibus Law on Jobs Creation (JCL) fundamentally alters the licensing mechanism under Law 17. The JCL remove water sector license and integrate them with business license. This will mean that under the new framework, businesses will only require to apply for business license in order to obtain water for its operation. It is not yet clear however on whether business license conditions can effectively integrate environmental safeguards required for water conservation as business licenses are designed as initial license on company establishment.

Abstraction licenses have been used as an indicator for assessing water needs in a river basin. Existing and active licenses will be prioritized as compared to new license applications. With this integration to business license, it is not yet clear on how this would affect the water allocation framework. The government regulation on norms, standard, procedure and criteria which is currently being drafted is expected to clarify this issue.

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<sup>3</sup> 'Rencana Pengelolaan Sumber Daya Air Wilayah Sungai Citarum' (Kementerian Pekerjaan Umum 2016).

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## **Conclusion**

This policy brief has raised 5 (five) issues on water allocation under Law 17: prioritization of drinking water utility, conflict between the same category of uses, groundwater and conjunctive uses, water footprint and the impact of jobs creation law. These 5 (five) issues will need to be addressed in the implementing regulation and policy of Law 17.

There are other issues outside of allocation which also needs to be addressed in future policies and regulations. This will be addressed in the next edition of the policy brief.

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