

RESEARCH REPORT

Effective governance for the successful long-term operation of local scale wastewater systems

Review of Regulatory Framework for Local Scale “Air Limbah”

REGULATIONS ARE STATED AS OF NOVEMBER 2015





'Community Sanitation Governance' is a joint research project led by the Institute for Sustainable Futures (ISF) at the University of Technology, Sydney, which investigates effective governance for successful long-term operation of community scale wastewater systems in Indonesia. Effective governance refers to the financial, stakeholder, organizational, regulatory, and technical support necessary for successful, long-term service delivery. The research is undertaken in collaboration with BORDA Germany, the Overseas Development Institute (ODI), AKSANSI (Association for Community Based Sanitation Organisations in Indonesia) and the Center for Policy Regulation and Governance at Universitas Ibn Khaldun Bogor (UIKB). The research has been funded through a research grant under the Australian Development Research Awards Scheme (ADRAS), an Australian Aid initiative.

ABOUT THE AUTHORS

The Center for Regulation Policy and Governance (CRPG) is an independent, not for profit organization affiliated to Ibn Khaldun University, Bogor, West Java, Indonesia. CRPG provides research, consulting and training services on all aspects related to policy, regulation and governance, with a goal to contribute in building pillars of good governance in Indonesia.

The Institute for Sustainable Futures (ISF) was established by the University of Technology Sydney (UTS) to work with industry, government and the community to develop sustainable futures through research and consultancy. ISF's mission is to create change toward sustainable futures that protect and enhance the environment, human well-being and social equity.

CITATION

Al'Afghani, MM, Paramita, D, Mitchell, C, Ross, K 2015. Review of Regulatory Framework for Local Scale "Air Limbah". Prepared by the Center for Regulation, Policy and Governance, Universitas Ibn Khaldun Bogor and Institute for Sustainable Futures, UTS under the Australian Development Research Award Scheme (ADRAS) Project: Effective governance for the successful long-term operation of local scale wastewater systems.

ACKNOWLEDGEMENTS

The research team would like to thank our Project Advisory Group and Government of Indonesia representatives for participating in focus group discussions for this Legal Review. We gratefully acknowledge the support of BAPPENAS for their enabling partnership and support for in-country research in Indonesia.

DISCLAIMER

The views and opinions expressed are those of the authors and do not necessarily reflect the views of CPRG, UTS/ISF or the Australian Government. While all due care and attention has been taken to ensure the accuracy of the material published, the Australian Government, CPRG, UTS/ISF and the authors disclaim liability for any loss that may arise from any person acting in reliance upon the contents of this document.



Project background

Our starting point for this project is: Effluent management in dense, low-income urban areas in Indonesia is challenging. Local (community) scale systems offer an affordable way to manage the public health and environmental hazards of untreated wastewater in urban areas. However, in order to operate in the long-term, these systems need effective governance, defined as (Ross et al, 2014):

Functioning technology: Ensuring the physical system delivers the service	Sustainable financing: Sufficient ongoing revenue to cover all short and long-term operational cost elements	Effective management: Accountable and equitable administration and decision making system	Sustaining demand: Maintaining effective community demand for the service over time
---	--	---	---

Finding pathways towards effective governance is especially timely. Reviews of local scale systems in Indonesia found that effective governance is difficult to achieve and the service does not always last as planned (Eales et al. 2013). In addition, connection numbers are as low as half of what was planned (Mitchell et al. 2015). Nonetheless, the Government of Indonesia has committed to local scale wastewater systems as a key component of its commitment to provide 100% of its citizens with access to sanitation. To date, about 13,600 of these systems have been funded for installation, and as many as 100,000 more are needed to meet current targets for access (Mitchell et al. 2015).

In response to this situation, the Institute for Sustainable Futures (ISF) at the University of Technology Sydney (UTS) developed a three-year transdisciplinary action research project that seeks to improve the long-term governance of local scale wastewater services in Indonesia.

This project is a research partnership with the Indonesian Ministry of National Development Planning (BAPPENAS), and is conducted in collaboration with AKSANSI (Association of community based organisations for sanitation), Bremen Overseas Research and Development Association (BORDA) Germany, Center for Regulation Policy and Governance at Universitas Ibn Khaldun Bogor and the UK Overseas Development Institute (ODI). A Project Advisory Group (with members from seven Ministries and six international donors) provides guidance and validation for the research. The 2014-2016 study is supported by the Australian Development Research Awards Scheme (ADRAS).

The four enquiry areas for this project are:

Performance monitoring: What is the volume and quality of data for local scale system performance? How are systems performing?	Legal arrangements: What are the legal and informal arrangements for local scale system governance, and what are the implications for O&M?	Scale and distribution of costs: For a range of sanitation service delivery models, what are the scale and distributions of costs; and what are the implications?
Management partnerships: What are the range of structures and institutional arrangements that could deliver the responsibilities for managing local scale systems?		

This document forms part of the legal arrangements enquiry. It summarises an analysis of the regulatory framework for local scale sanitation service delivery.

Executive Summary

The Indonesian government aimed at achieving universal access to water and sanitation by 2019. The local-scale community based systems are expected to significantly contribute to such universal coverage. Towards a successful long-term operation of the local scale wastewater (*air limbah* system), it requires effective management, which is supported by the clarity of the regulatory framework, ownership and financing to sustain the service, and the forms of operating organisation at the local level. As a basic, concurrent, mandatory affair, local government has legal responsibility for sanitation service delivery.

In terms of regulatory framework, the wastewater is under regulated. There is no comprehensive framework for the wastewater at the national level. The sanitation is regulated only sparsely on the drinking water provision system regulation that is currently being drafted (RPP SPAM). At the local level, although the framework is better than the national level, the regional regulation by law (Perda) has not provided a solution to the fundamental issues of public financing for local scale, the problems of oversight and the question of ownership.

The construction of the local wastewater systems are financed from the various channels such as APBN, APBD or through different programs (e.g. SANIMAS USRI, SANIMAS IDB and DAK SLBM). Nevertheless, the issue of sustainability relates to the ability of the system to operate in order to deliver its service continuously. It is identified that there are limited financial sources to cover the operational and maintenance expenses of the systems, especially those that are “owned” by the community. It is also found that there is a lack of guideline and clarity regarding the government budget expenditure in relation to its availability to finance the operation and maintenance costs of the local waste water system.

It is stated that the 2003 National Policy on Community Based Water and Sanitation stipulates that assets should be owned by “masyarakat”. However, most of the sanitation programs do not specifically provide guidance regarding the transfer mechanism of assets such as land, buildings and inventory involved in the project. In addition, it is not possible for masyarakat to legally own the assets, as the term “masyarakat” is not a legal entity. There is also confusion over the types of entities for the masyarakat that are suitable for the long-term governance of the system which relates to various variables such as the eligibility regarding the transfer of assets, independency, profit generation, and etc.

We sum-up the above problems in the following research question: How can the regulatory framework ensure the effective management for the successful long-term operation of local scale air limbah system? After conducting a lengthy social and regulatory analysis focused on improving the situation if communities retain the lead role in operational phase, we came up with the following recommendations:

[Note: The authors recognise that there are multiple management models for local scale sanitation which fully recognise local government’s responsibility for sanitation service delivery as a ‘basic, mandatory, concurrent affair’, aside from the currently predominant community-management model. For example, there could be a co-management arrangement between communities and local government, or a more institution-led management model of local scale systems (please see the associated Guidance Materials for more information on the spectrum of management models¹). Some of the recommendations in this report are most relevant for the existing community-management model. These recommendations will need to be reconsidered if SANIMAS programs transition to co-management or institution-led management models.]

¹ Ross, K, Mitchell, C, Puspwardoyo P, Rosenqvist, T, Wedahuditama F. 2016. *How to design governance for lasting service? Guidance Material*. Prepared by the Institute for Sustainable Futures, University of Technology Sydney, as part of the Australian Development Research Award Scheme (ADRAS) Project: Effective governance for the successful long-term operation of local scale wastewater systems.

1. Regulatory Framework

- The RPP SPAM should cover provisions regarding sanitation and/or put both drinking water (SPAM) and wastewater (SPAL) on equal proportion. Alternatively, national legislation focused on sanitation could be developed to clarify roles and responsibilities for national and local government for the development and operation phases, as well as a realistic minimum service standard.
- Draft Perda on Wastewater should only refer to legal entities. There should be a clear definition regarding the term “Masyarakat” since it becomes problematic in the legal setting.
- Perda should incorporate NSPK (norms, standards, procedures and criteria) and a minimum service standard provided by national laws.
- There is a need to consolidate and codify all water-services related legislations into a single Perda. This is to avoid the fragmentation of regulatory roles and responsibility and to ensure a coherence of water and sanitation policy.

2. Financing

- There is a need to conduct further study to evaluate the types of government expenditure. A guideline on expenditure should be issued with sufficient coordination between Bappenas, the Ministry of Public Works, the MOHA and the State Audit Agencies. This guideline is important in order to remove ambiguities and provide assurance to local government in utilizing budgets to support operation, management, optimization and rehabilitation of local scale community sanitation.
- The institutional set-up under local government for supporting wastewater services can range (in terms of budgetary and structural independence) from Dinas to UPTD to BLUD. General support and monitoring functions for local scale air limbah can be allocated to an SKPD/Dinas – or the Dinas can also have the specific task of supporting local scale air limbah. Alternatively, an UPTD can potentially be tasked both for centralized and local systems of air limbah, or auxiliary functions of technical support to KSM. The BLUD is usually ring-fenced for centralized system. The government can decide differential tariffs (for IPLT/waste collection) by UPTD or BLUD.
- The Perda or Walikota’s decree regulating SKPD/UPTD must contain detailed descriptions on the duty of relevant SKPD in supporting local scale air limbah.

3. Assets Ownership

If the community management model remains the predominant model in any given local government area:

- CBOs must be incorporated as legal entities as the name registered on land certificate must either be individual or legal entities. [In other management models, local government may own the system].
- Land assets transfer must be conducted between the original owner of the land and the CBO. Surat hibah (letter of grant) is inadequate. It must be further processed to notarial deed and then registered to the land office. The name on the land certificate must be that of the CBO (notwithstanding with the point aforementioned above).
- CBOs must obtain a building permit, specifying both buildings and other installation and infrastructure owned by them.

4. Appropriate Legal Forms

If the community management model remains the predominant model in any given local government area:

- One of the options for the legal form is to create a multiple-tier structure of entities. In this case, one non-profit entity owns a for profit subsidiary. This is mostly feasible with foundation. In addition, the foundation is also able to tap in different sources of funds. In the event that the foundation is liquidated, the assets have to be transfer to other organisations that has similar aims or to government. This will guard the interest for the long-term operation.
- Cooperative may be another option although the regulatory framework governing cooperative is not as clear as foundation. The current cooperative law, 25/1992, does not specify whether cooperatives can create a Limited Liability Company. However, there has been circular letter from the Ministry of Cooperatives which encourage cooperatives to establish a limited liability company, to face the upcoming ASEAN Economic Community, especially for Cooperatives that have assets more than five billion Rupiah.
- It may be conceivable for multiple CBOs (in villages or kelurahan) to be amalgamated into one single legal entity at the kecamatan (or even city) level, in order to simplify the paperwork and procedures for maintaining the legal entity. The barrier to this is hardly a legal one, but rather in the governing process of coordinating between CBOs and the management of the entity as assets owners.

Table of Contents

1. National Regulation of Local Scale Wastewater	1
a. Wastewater in Regional Autonomy Context	1
b. Implications of the Water Law Judicial Review	2
c. The Draft Regulation on Water Services	5
d. Presidential Regulation on the acceleration of Watsan	10
e. Sectoral Rules and Standards	11
f. Three obligations for regulated entities	14
g. Conclusions	14
2. Regional Regulation of Local Scale Wastewater	15
a. Municipal Government’s Regulatory Competence	15
b. Existing Perdas on Water Services	16
c. Overview of Draft Perda Air Limbah (Wastewater Perda)	17
d. Defining regulated actors	18
e. Specification of key regulatory features	20
f. Conclusions	22
3. Public Finance and its Implications	23
a. General Financing Framework	23
b. APBN Sources	27
c. APBD Sources	33
d. Regional Expenditures (Belanja Daerah)	37
e. Institutional Set-up and Budget Consequences	43
f. Conclusions and Recommendation	46
4. Assets Ownership	48
a. Ownership of Assets in Program Documents	48
b. Legal Arrangements for Ownership of Local Scale Systems	52
c. Conclusion and Recommendation	56
5. Appropriate “Legal Forms” of Local Scale Delivery	58
a. Association (Perkumpulan)	58
b. Limited Liability Company (PT)	59
c. BUM Desa	60
d. Foundation	61
e. Cooperative	63
f. Conclusions	64
Annexes	67
a. Air Limbah Regulatory Framework	67
b. Analysis of Draft Government Regulation on Drinking Water	68
c. Analysis of Draft Perda Bogor on Domestic Wastewater Management	72
d. Field Document Inventory	77
e. Document Acquisition Checklist	79

1. National Regulation of Local Scale Wastewater

a. Wastewater in Regional Autonomy Context

The regional autonomy, which started in 1999, put municipalities on the forefront of public services. In order to understand how water services – including sanitation - is located in the regional autonomy framework, it is important to explain several basic concepts in the regional autonomy law. Under the law, competences between regions and central government are described in terms of:

- (i) *absolute competence* (in which, the central government has absolute power such as in matters of defense and foreign policy),
- (ii) *concurrent affairs*, which is a shared competence between regions and central government and
- (iii) *general affairs*, which is a competence owned by the President (and can be carried out by regional heads as well) for affairs pertaining national unity, social conflict, among others well as all other governmental affairs that is not a regional authority (residual role).²

Wastewater is a part of the *concurrent affairs*. To be more precise, within this category the law distinguishes between *mandatory affairs* (in which every region must carry out) and *optional affairs* (such as matter pertaining to fishery, tourism, etc, in which the intensity of power and roles of each region is assessed based on each region's potentials, future projection and land use). Within the *mandatory concurrent affairs*, the law distinguishes between *basic services*, which include education, public works/spatial planning and social affairs, and *non-basic services*, which include workforce, land and environmental affairs.³ Such *basic services* must be prioritized by regional governments. In short, wastewater is a ***basic service-mandatory-concurrent affair***. This category determines both the regulatory competence of each governmental level and the budgeting mechanism which applies.

What role do the central government have in wastewater service? In all concurrent affairs, the central government has the authority to enact norms, standard, procedure and criteria (*Norma, Standard, Prosedur dan Kriteria* or "NSPK"), which must be promulgated through laws and regulation by ministries or agencies subsequent to the issuance of a Government Regulation regulating such matter. In effect, the NSPK is usually promulgated through ministerial regulation.⁴

It is important to emphasize that the central government can invalidate regional policies which do not refer to NSPK.⁵ In addition to NSPK, for basic services, the central government has the competence to enact "minimum service standard" through a governmental regulation.⁶ The law defines minimum service standard as "...the provision regarding the type and quality of basic services which are mandatory Government Affairs in which each citizen is entitled to a minimum."⁷

The position of wastewater in a regional autonomy context is clarified under the attachment of Law 23/2014. Wastewater, in addition to water resources, drinking water, solid waste, drainage, settlement and buildings is a part of attachment C concerning the division of roles between the central, provincial and municipal (city/regency) governments. The role of the central government is in enacting the development of national wastewater management system (and direct provision of such system for inter-provincial and national strategic locations) and the provinces develop and manage at the regional level, whereas the municipal government manage and develop in their respective territories.

² Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah. Article 9

³ ibid. Articles 9 and 11

⁴ ibid. Article 17

⁵ ibid. Article 17

⁶ ibid. Article 18

⁷ ibid. Article 1 (17)

Thus, as a basic service-mandatory-concurrent-affairs, regional governments, especially municipal (Kabupaten/Kota) governments have the obligation to develop the infrastructure (“mandatory”). However, since it is also a “concurrent” affair, the central government have some competence (in standard setting and sectoral regulation). Stakeholders at the Focus Group Discussion realized such policy setting. They thus expect local government to take charge of post construction issues.⁸

It is important to note that although “wastewater” is mentioned in specific, some of the regulatory framework in wastewater are actually scattered on various sectoral rules, such as in building and environment, as well as water resources, in which regions have different competences.

b. Implications of the Water Law Judicial Review

The government has recently aimed at achieving universal access to water and sanitation by 2019.⁹ Since large scale water and sanitation utilities require high investment cost, there have been discussion that local-scale community based system are expected to significantly contribute to such universal coverage¹⁰, reportedly by up to 7.5%. However, on February 18, 2015, the Constitutional Court invalidated Law 7 Year 2004 on Water Resources (the “Water Law”).¹¹ As a consequence, almost all regulatory framework in the Indonesian water sector, which are based on the Water Law – this include the regulation of water supply and sanitation – no longer have any legal basis.

This decision came at no surprise as in a 2005 Judicial Review the Water Law was declared “Conditionally Constitutional”.¹² Conditionally Constitutional meant that the law remain valid, but can be invalidated in the future if the government failed to comply with the Court’s prescriptions in terms of interpreting and implementing the law.¹³

At the crux of the dispute was provisions concerning privatisation, commercialization and commodification of water resources. The Court had been known to be quite stringent in its interpretation that certain vital natural resources must remain under “state control” and *be utilized to advance the people’s welfare*.¹⁴ Water is deemed to be one of such resources. The Court felt that after 10 years following the first Judicial Review in 2005, the Government has done nothing to ensure that the Court’s prescription were heeded. After a petition was submitted by mass organizations, in a 2015 Decision, the Court then decided to invalidate the Water Law in its entirety.

In the 2015 Judicial Review, the Court prescribed the so-called “six basic principles” of Water Management¹⁵:

- 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;

⁸ Mohamad Mova Al’Afghani and Dyah Paramita, ‘Meeting Note Focus Group Discussion on “Regulasi Air Limbah”, Ditjen Cipta Karya, Jakarta, March 8th, 2016’.

⁹ Bappenas, ‘Penyusunan Rencana Pembangunan Jangka Menengah Nasional (RPJMN) 2015-2019’.

¹⁰ ‘Lokakarya Kajian Efektivitas Kinerja Kelembagaan Kelompok Pengguna Sarana Air Minum, Jakarta 2 Desember 2014’.

¹¹ *Putusan Mahkamah Konstitusi Nomor 85/PUU-XI/2013 Tentang Pengujian Undang Undang Nomor 7 Tahun 2004 Tentang Sumber Daya Air*.

¹² Mohamad Mova Al’Afghani, ‘Constitutional Court’s Review and the Future of Water Law in Indonesia’ (2006) 2 Law Env’t & Dev. J. 1.

¹³ *Putusan Mahkamah Konstitusi No 058-059-060-063/PUU-III/2004 Tentang Pengujian Undang Undang Nomor 7 Tahun 2004 Tentang Sumber Daya Air*.

¹⁴ Simon Butt and Tim Lindsey, ‘Economic Reform When the Constitution Matters: Indonesia’s Constitutional Court and Article 33’ (2008) Vol. 44, No. 2 Bulletin of Indonesian Economic Studies.

¹⁵ Mohamad Mova Al’Afghani, ‘Court Decision Brings Water Governance Reforms to a Halt (Part 1 of 2)’ <<http://www.thejakartapost.com/news/2015/03/09/court-decision-brings-water-governance-reforms-a-halt-part-1-2.html>> accessed 19 August 2015.

- 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."
- 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 prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care".
- 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;
- 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);
- 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.

One most important part of the Court Decision was that "state control" as required by the Constitution should be manifested through direct exploitation by State (or Region Owned) Enterprises. How the Court's prescription should be implemented is the subject of an ongoing debate. However, some of the implications may be that water utility companies must be state-owned-- subject to some restrictions and that state owned companies are given the precedence to manage water resources whereas private companies can only apply for them subject to very stringent terms.

The Court also ruled that in order to fill a legal vacuum, Law 11/1974 on Irrigation was reinstated ("Irrigation Law"). By comparison, Water Law consists of 100 articles and Irrigation Law consists of only 17 Articles. Out of 100 articles in the revoked Water Law, only one article is dedicated to specifically regulate water and sanitation.¹⁶ The rest regulates water as resources.

Since Water Law only have one article specifically regulating water and sanitation, more detailed provision on water and sanitation was regulated through an implementing regulation, Government Regulation 16 Year 2005 on the Development of Drinking Water Provision System (*Pengembangan Sistem Penyediaan Air Minum* or "GR 16"), which then became the second most important piece of legislation in the sector. However, with the invalidation of Water Law and the reconstitution of Irrigation Law by the Constitutional Court, GR-16 is no longer valid.

At the time of writing, the government is in the process of drafting a government regulation on Drinking Water Provision System (SPAM Regulation), which will regulate both water supply and sanitation. The draft regulation is meant to replace the extant GR-16 and will be placed as an implementing regulation of the Irrigation Law with respect to Water Supply and Sanitation.

This initiative is plagued with complicated legal problems. None of the 17 Articles on the Irrigation Law was dedicated to drinking water and sanitation. Drinking water is mentioned only three times in the elucidation part of the Law, which means that they do not have the binding force as a legislation and can only be used to aid interpretation. Meanwhile, sanitation or wastewater is nowhere mentioned in Irrigation Law. This means that the Irrigation Law may not be able to stand as the legal basis for sanitation. At one Focus Group Discussion, several stakeholders confirmed that the lack of reference to wastewater in the RPP SPAM was

¹⁶ See Article 40 of Undang Undang No. 7 Tahun 2004 Tentang Sumber Daya Air; Mohamad Mova Al'Afghani, 'Indonesia Needs a Strong Water Services Law' The Jakarta Post, August 31, 2009 <<http://www.thejakartapost.com/news/2009/08/31/indonesia-needs-a-strong-water-services-law.html>> accessed November 26, 2011; Mohamad Mova Al'Afghani, 'Anti-Privatisation Debates, Opaque Rules and 'Privatised' Water Services Provision: Some Lessons from Indonesia' in Alan Nicol, Lyla Mehta and Jeremy Allouche (eds), IDS Buletin: 'Some for All?' Politics and Pathways in Water and Sanitation, vol 43.2 (Institute of Development Studies, Wiley-Blackwell 2012)

because the Irrigation cannot adequately provide legal basis for wastewater services.¹⁷ As the title suggests, Irrigation Law was meant to only regulate irrigation, not water resources as a whole, and especially not water supply and sanitation services. This brings the issue as to whether the Irrigation Law can be positioned as the umbrella legislation for water resources as a whole, including the watsan sector. The ministry of public works' directorate general of water resources is currently preparing a draft law on water resources – which may contain provisions on water services. However, the draft is not yet available to the public and some of the resource persons at the Directorate General of Cipta Karya, at the Ministry of Public Works, are not aware of the contents of the draft.¹⁸ In developed countries, water services (both supply and sanitation) are regulated in separated (but highly related) laws than water resources.¹⁹

The Court decision creates ambiguity as to the role of community based provision. As previously noted, the Court prefers direct exploitation of water resources by State (or Region Owned) Enterprises. In the words of the Court: “... *the main priority that is granted for water commercialization is the BUMN [State Owned Enterprise] or BUMD [Region-Owned Enterprise]*”. The community could be neither private nor public but it is certainly not SoE. Thus, by prioritizing SoE in services provision, the community's role is somewhat marginalized.

It is plausible to argue that sanitation services are not “water resources” per-se, as it merely channels the treatment and disposal of wastewater to the environment. If this is the case then the whole SoE debate may not be relevant to community provision. On the other hand it is also possible to argue that (i) wastewater services are in fact important and vital to the livelihood of the people (and as such has to be controlled by state and managed by SoE) and (ii) the issue of “peak phosphorus”²⁰ mean that such resources (which are contained in human excrement) must be “controlled by state”.

The above discourse aside, the tone and the sentiment subsequent to the judicial review is toward restricting the role of the private actors in services provision and returning control to SoE. In a press release issued in February, the Public Works Ministry was “prepared” to carry out the requirements of the Constitutional Court to return water sector under “state control”.²¹ In March 2015, the Ministry of Law and Human Rights issued a legal opinion, clarifying that the government still can issue licences for the private sector for water commercialization, under very strict terms and conditions.²² A few days later the public works minister issued a circular stating that all licences and contracts involving the private sector are still valid but will be reviewed or renegotiated and that all upcoming projects will have to comply with the Court Decision.²³

It is to be noted that the “community” is not the focus of the Judicial Reviews. However, community provision becomes the innocent bystander of the whole public versus private debate since they cannot be categorized into SoE and somewhat closer to the private sector. The next section will discuss the draft regulation on water services and its preference over large-scale state owned utilities over private or community actors.

¹⁷ AlAfghani and Paramita (n 7).

¹⁸ Personal Communication with a Public Works Official, November, 2015

¹⁹ Sarah Hendry, *Frameworks for Water Law Reform* (Cambridge University Press 2014).

²⁰ Dana Cordell and Stuart White, ‘Peak Phosphorus: Clarifying the Key Issues of a Vigorous Debate about Long-Term Phosphorus Security’ (2011) 3 *Sustainability* 2027.

²¹ ‘Press Release Kementerian Pekerjaan Umum Tanggal 26 Februari 2015’.

²² Yasonna H Laoly, ‘Jawaban Atas Permohonan Pendapat Hukum Tindak Lanjut Putusan MK No. 85/PUU-XI/2013’.

²³ ‘Surat Edaran Menteri Pekerjaan Umum Dan Perumahan Rakyat Nomor 04/SE/M/2015 Tentang Izin Penggunaan Sumber Daya Air Dan Kontrak Kerja Sama Pemerintah Swasta Dalam Sistem Penyediaan Air Minum Perpipaan Setelah Putusan Mahkamah Konstitusi Nomor 85/PUU-XI/2013’.

c. The Draft Regulation on Water Services

At the time of writing, the Draft Government Regulation on The Undertaking of *Drinking Water* Provisions System (“RPP SPAM”, “draft” or “draft regulation” wherever applicable) is in the process of drafting and discussion by inter-ministerial committees. The RPP SPAM is relevant to be discussed here as it reflects the contemporary thinking of policy-makers on the regulation of watsan in Indonesia. Note that although the title is SPAM (Drinking Water Provision System), the Draft Regulation covers also the regulation of wastewater.

For clarity of use, the term *penyelenggara* (undertaker) will be used to describe entities which are authorized to *undertake* water services under the draft regulation or the previous water services regulation, GR 16/2005, which is no longer in force due to the judicial review, discussed earlier. The term “undertaker” is also used to describe similar situation in England and other jurisdiction.

i. Wastewater is under regulated

Water supply dominates the regulatory features of RPP SPAM while sanitation is regulated only sparsely. This can be expected by reading the title of the draft regulation: “Penyelenggaraan Sistem Penyediaan Air Minum” (The Undertaking of Drinking Water Provision System).

It is worth mentioning that in the Indonesian context, “sanitation” often refers to solid waste, drainage and wastewater. Solid waste has its own detailed regulation through Law 18 Year 2008 on the Management of Solid Waste.²⁴

The RPP SPAM actually clearly distinguish drinking water from wastewater by invoking the abbreviation “SPAL” (Sistem Pengolahan Air Limbah or Wastewater Treatment System) to denote a whole range of wastewater infrastructure, both physical and non physical.²⁵ The draft regulation could have put both drinking water (SPAM) and wastewater (SPAL) on equal weight, however, this does not appear to be the case.

ii. Comparing the regulatory features

From 55 articles in the draft, only two articles are dedicated to *specifically* regulating SPAL. In several other articles, SPAL is regulated almost in conjunction with SPAM provisions. Thus, in those articles, a single clause would regulate both drinking water and wastewater. Nevertheless, this is not the case in majority of the articles, which only regulate drinking water. The reason of this may be that the clause would simply be irrelevant if it is to be applied to both drinking and wastewater since the characteristics are different. For detail comparison of the regulatory features, see Annex 6.b.

Regulatory Objectives

The draft regulation clearly states that the purpose of drinking water services is to fulfil human right to water, quality, affordability, creating balance between undertaker and customer, and also to enable effectiveness, efficiency and network expansion.²⁶ By contrast, the purpose of regulating wastewater is not clearly stated. The draft regulation only suggests that “*The undertaking of SPAM must be integrated to the provision of sanitation in order to prevent the contamination of raw water and to ensure the sustainability of drinking water provision system*”.²⁷

On the one hand, this provision appears to ensure that whenever drinking water infrastructure is built, sanitation infrastructure must follow suit, in order to prevent water pollution. On the other hand, reading both clauses (articles 3 and 13 of the draft regulation) above, it would appear that wastewater’s regulatory objectives is secondary and subservient to the regulation of drinking water.

²⁴ Undang Undang Nomor 18 Tahun 2008 Tentang Pengelolaan Sampah

²⁵ Article 1 (6)

²⁶ Draft Government Regulation on Drinking Water Provision System version April 22, 2015 Articles 3 and 13

²⁷ Ibid Article 11(1)

Therefore, regulation on wastewater is deemed important only to the extent that no contamination occurs and that raw water security for drinking water purposes is guaranteed. There are no specific regulatory objectives to ensure that sanitation itself, as a service, would be sustainable. When it comes to drinking water, the draft clearly emphasises the importance of [economic] balance between undertaker and customers. This objective is not found in wastewater.

Production Chain and Stages

Another evidence that the draft is biased towards drinking water is the specification on production chain and stages and the legal implications surrounding them. The draft regulation specifies that the production chain and stages on drinking water into two general categories: development and management.

Development stage consists of planning, execution (physical construction), rehabilitation, uprating and expansion.²⁸ Meanwhile, the management stage consists of operation and maintenance, enhancement of human resources capacity, enhancement of institutional capacity and monitoring and evaluation.²⁹

However, no such provisions on production chain and stages exist for wastewater. The draft regulation could have outlined the chains of processes in wastewater services such as user interface, storage/primary treatment, conveyance/transport, treatment and recycle and disposal.³⁰ Specifications on production stages are important, since it will effect the regulation of water services business processes as a whole.

Planning

There are only two sub-clauses (which, separately, regulates the responsibility of provincial and municipal governments) requiring them to enact an integrated planning for both drinking water and wastewater.³¹ Unfortunately for wastewater, there are no other details regulating the planning exercise. Note that wastewater planning is obligated in another legislation, Presidential Regulation 185/2014, which mandates both RISPAM (Drinking Water Planning) and SSK (*Strategi Sanitasi Kota/Kabupaten* or City/Regency Sanitation Strategy). The Perpres will be discussed in section 1.d. below. For drinking water, the planning exercises are divided into three stages involving different actors: the drafting of master plan, feasibilities and detailed technical plans. The last two can be drafted by water utilities. This is not the case with wastewater.

By specifying that planning mechanism for drinking water should be conducted through “RISPAM” (*Rencana Induk Sistem Penyediaan Air Minum* or The Master Plan for Drinking Water Provision), planning exercise for drinking water becomes obligatory and the RISPAM becomes one authoritative document for such purpose.

However, as this is absent for wastewater, there is no mention on authoritative document upon which planning and execution should be based upon and there is no clarification as to who is authorized to draft such planning document in the draft regulation. Nevertheless, the SSK could still refer to Perpres 185 as a legal basis.

Service Standard

Another important feature that is lacking on wastewater when compared to drinking water is the specification on service standard.

The government issued GR No. 65/2005 regarding a guideline to formulate minimum service standard, and Minister of Public Work Regulation No. 01/PRT/M/2014 regarding minimum service standard of the public work and spatial planning. The GR provides *general framework and principles* for minimum standards of government’s mandatory services, which is very broad and does not specifically regulate standard for the sanitation. The Regulation No. 01/PRT/M/2014 and its attachments includes general guideline pertaining to technical service standard of wastewater (*air limbah*) as part of the sanitation. The guidelines covers: a)

²⁸ IbidArticles 15-19

²⁹ Ibid Articles 21-25

³⁰ SNV Netherlands Development Organisation and Royal HaskoningDHV, Domestic wastewater management in Indonesia: A study of the legal and institutional framework with an emphasis on on-site wastewater management systems (2015)

³¹ Draft Government Regulation on Drinking Water Provision System version April 22, 2015 Article 28

technical and operational definitions regarding waste water management in the residential area (*permukiman*), b) target of the sanitation, c) formula to measure the percentage the residents served by the sanitation service, d) formula for the budget calculation for the sanitation service³². Nevertheless, this does not qualify as “service standard” (despite its title) because it does not specify the quality of the service that should be delivered.

In terms of the draft regulation, the draft specifies that the service standard for drinking water consist of three main criteria: (a) quality, (b) quantity and (c) affordability. These criteria are not satisfactory for consumer’s legal recourse and there are ways to specify service standard in a more detailed manner.³³ Nevertheless, such regulation is desirable to none.

For wastewater, no such provision exists. The draft regulation does require wastewater services to fulfil a service standard, but it does not specify its contents.³⁴ It is worth reiterating that in addition to NSPK, for basic services, the central government must enact a “minimum service standard”, defined as “...*the provision regarding the type and quality of basic services which are mandatory Government Affairs in which each citizen is entitled to a minimum.*” through a governmental regulation.³⁵ The failure to specify minimum service standard for wastewater is somewhat an omission on behalf of the government.

The lack of service standard (Standar Pelayanan Minimum or SPM) and NSPK (Norm, Standard, Procedures and Criteria) is confirmed by the Focus Group Discussion.³⁶ In fact, stakeholders revealed that wastewater in general (both centralized and local/community scale) has no specified service standard and NPSK. During the FGD, there was some agreement that the NPSK and SPM for wastewater need to be immediately addressed by the Ministry of Public Works and the Ministry of Home Affairs.

However, stakeholders aren’t certain as to whether service standard and NPSK should be differentiated between centralized and local/community scale. Some considered that users need to receive the same standard irrespective of the service provider (centralized/government or community) while some suggested that community provisions should have differentiated standard.³⁷ This issue was not resolved during the FGD.

Arguably, more detailed provision can be regulated in regional-by-laws. However, enactment of regional by-laws is time and resources intensive. Only a number of regions have enacted such by-laws in Indonesia, although the trend is increasing.³⁸ Without regional by-laws in place – and without regulating it in the draft national regulation, there will be a regulatory vacuum on service standard. The vacuum will have several legal implications: for customers – since they will have no basis to complain; for the government – since they will have no basis to benchmark monitoring, evaluation and enforcement; and for undertakers or CBO – since they will have no targets to achieve.

Government’s Authorities and Responsibilities

The Draft Regulation stipulates the authorities and responsibilities of the central, provincial, municipal down to village governments along with regional autonomy principles. Provisions that define government’s authorities and responsibilities on SPAM (drinking water) are also valid for SPAL (wastewater). Thus the regulatory features for both sector in the issue of government authorities and responsibilities are quite similar, except for some minor features which are italicized below.

³² Minister of Public Work Regulation No. 01/PRT/M/2014, Attachment I, II and III.

³³ See for example OFWAT, The guaranteed standards scheme (GSS) Applicable to England and Wales from 1 April 2008 (2008) also Essential Services Commission, Customer Service Code Metropolitan Retail and Regional Water Businesses (Issue No 7, 15 October 2010, 2007)

³⁴ Draft Government Regulation on Drinking Water Provision System version April 22, 2015 Article 11(3)(c)

³⁵ Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah (n 1). Articles 18 and 1 (17)

³⁶ AlAfghani and Paramita (n 7).

³⁷ *ibid.*

³⁸ Mohamad Mova AlAfghani and others, The Role of Regulatory Frameworks in Ensuring The Sustainability of Community Based Water And Sanitation (Forthcoming) (AIIRA Project -- CRPG UIKA, 2015)

The central government's role is to enact policy and National Strategy; enact norms, standard, procedure, criteria; conduct special, national strategic and cross provincial services; form State Owned Enterprises and/or UPT (technical units directly under government agency) for drinking water and domestic waste, issue license to business entities (to fulfil their own needs in SPAM and SPAL), conduct monitoring, supervision to regional governments.³⁹

As for provincial government, its role is to conduct inter-municipality domestic SPAM and SPAL; enact SPAM and SPAL policy for province; enact master plan for inter municipality SPAM and SPAL; form Regional SoE or Provincial UPTD; issue license for business entities (to fulfil their own needs in SPAM and SPAL); monitor and evaluate SPAM and SPAL in municipalities and report them to central government; conducts *Pembinaan* (guidance, fostering), controlling, supervision to municipal governments.⁴⁰

For municipal governments, they must undertake domestic SPAM and SPAL; enact domestic SPAM and SPAL policy and strategy; enact SPAM and SPAL master plan (but without mentioning the planning document and system – the SSK – although this is referred in Presidential Regulation 185/2014); form Regional SoE or UPTD for drinking water and domestic waste; *conduct inventarization towards cooperatives/groups/association of SPAM which submit report as Drinking Water Undertaker*; fulfil drinking water for the population in accordance with minimum standard; issue license for business entities (to fulfil their own needs in SPAM and SPAL); fulfil access to wastewater services in accordance to minimum standard; provide “guidance”, control, supervision to village governments and communities within them on the undertaking of SPAM and SPAL; monitor and evaluate SPAM and SPAL; report the result of monitoring and evaluation to provincial governments.⁴¹

Finally, for village governments, its role is to conduct *pembinaan* (fostering/guidance) and supervision of domestic SPAM and SPAL at the community level; *facilitate the reporting of SPAM cooperatives/groups/association to be inventarized by Municipal Governments*; report supervision on SPAM and SPAL in its territory to municipal governments.⁴²

Rights and Obligations of Water Undertaker

Under the draft, the task of “Drinking Water Undertaker” (*penyelenggara air minum*) is to Develop SPAM; Manage SPAM; monitor and evaluate its drinking water provision; implement good corporate governance; draft a standard operating procedure; report transparently and accountably in accordance with Good Corporate Governance and report to central/municipal governments.⁴³ Due to references to Good Corporate Governance in this article, it appears that the government intended to mean “Drinking Water Undertaker” as Regional Water Supply Utilities (*Perusahaan Daerah Air Minum* or PDAM).

More importantly, the Drinking Water Undertaker are entitled to obtain land in accordance with prevailing regulations; receive payment based on tariff/retribution; specify and implement late fees; obtain specific (quantity and quality) raw water supply continually in accordance to license; disconnect customers who does not fulfil their obligations and sue communities or other organisation which cause damage to SPAM infrastructure.⁴⁴

Drinking Water Undertaker are obligated to (i) guarantee quality, quantity, continuity; (ii) provide necessary information to interested parties towards incidents which may potentially affect changes of quality, continuity, quantity; (iii) operate infrastructure and provide services to customers except in the event of force majeure; (iv) provide information on services; (v) prepare infrastructure for customer complaints; (vi) follow and comply with efforts to settle disputes and (vii) take part on protection and conservation of water source.

³⁹ Draft Government Regulation on Drinking Water Provision System version April 22, 2015 Article 27

⁴⁰ Ibid Article 28

⁴¹ Ibid Article 29

⁴² Ibid Article 30

⁴³ Ibid Article 31

⁴⁴ Ibid Article 34

No similar provision is available for wastewater undertaker. In fact, wastewater undertaker is mentioned only three times in the draft regulation and is never defined.

Community Water Supply and local scale air limbah

There are no specific provisions on local scale or community scale Air Limbah in the draft regulation. However, there is a clause which is dedicated specifically for community self supply of drinking water. The regulation on community water supply is a little more detailed than in the repealed GR-16.⁴⁵

The draft regulation states that community groups can participate in the undertaking of SPAM to fulfil their own need in regions not yet covered by “Drinking Water Undertaker”.⁴⁶ There is no explanation as to whether not yet covered here means “service area” or actual coverage.

The draft regulate further that community groups can form cooperatives/groups/association/management body and must report to Municipal Governments through Village Heads in order to be registered as Drinking Water Undertaker (*Pengelola Air Minum*).⁴⁷

The draft clarifies that such groups are entitled to obtain Pendampingan (guidance, support, mentoring) from the local and national government to ensure quality of SPAM in accordance with prevailing regulations. National and/or local governments can provide financial support on the undertaking of SPAM to cooperatives/groups/association (himpunan)/management body. The operationalisation of this clause may be conducted through ministerial regulation or regional by laws.

The most important omission – other than the total absence of the regulation on community and local scale wastewater -- is that the draft regulation does not clarify which of the above regulatory features are applicable to community scale services.

It has been discussed above that community based services (serving water supply) need to report to village heads in order to be registered to as “Drinking Water Undertaker”. Two legal interpretations can be derived from this provision. First, is that since community water supply is categorized as “Drinking Water Undertaker” all regulatory features above is applicable to them. However, it is certain that the provisions on good corporate governance, late fees, and other set of regulatory features above such as the creation of master-plan would be irrelevant for community water supply. Thus, this interpretation is weak.

Secondly, it could be interpreted that only articles discussed in this section are applicable to community water supply. If this course of interpretation is to be taken, it would mean that all of the provisions discussed in above – except for the provision on inventarization for municipal and village governments which are explicit – applies to community water supply. This means that there is a giant lacunae in the regulation of community water supply. This interpretation is stronger than the previous.

The draft could have regulated local scale wastewater in the same detail as community water supply, but this is not the case at hand. Therefore, one can conclude that since the regulatory gap for community water supply is huge, the regulatory gap for local scale wastewater is even bigger.

RUU Sanitasi (Draft Law on Sanitation)

During the Focus Group Discussion, participants realized and confirmed the lack of regulatory frameworks on wastewater as discussed above. They mentioned that there was an initiative toward RUU Sanitasi (Draft Law on Sanitation), which has formed a part of the parliament’s national legislative program. However, the parliament did not prioritize the RUU Sanitasi and thus the latest status of the initiative is unknown.⁴⁸ The RUU Sanitasi is not reviewed by this report and the document is not publicly available. However, one

⁴⁵ Al'Afghani and others, *The Role of Regulatory Frameworks in Ensuring The Sustainability of Community Based Water And Sanitation* (Forthcoming)

⁴⁶ Draft Government Regulation on Drinking Water Provision System version April 22, 2015 Article 35(1)

⁴⁷ Ibid

⁴⁸ AlAfghani and Paramita (n 7).

participant mentioned that community-based water and sanitation is not addressed in detail in the RUU Sanitasi.⁴⁹

Participants mentioned that processing the draft law into legislation would require a significant amount of fund and would probably take a long time. Some of the participants suggested bringing the regulatory features for sanitation under the upcoming draft government regulation on environmental health (RPP Kesehatan Lingkungan).

d. Presidential Regulation on the acceleration of Watsan

One of the earliest legal products enacted by President Joko Widodo was a presidential decree on the acceleration of water and sanitation provision (Perpres 185/2014).⁵⁰ Whether the Perpres remains valid following the Judicial Review is a subject of discussion among several legal scholars, however, in our analysis, the Perpres was based directly on the Constitution (Article 4) which provides executive power to the president to enact rules in the force of a legislation (*Autonome Satzung*).⁵¹ Thus, probably only some parts of the Perpres would be deemed invalid (by interpretation) but the Judicial Review does not in itself invalidate the Perpres as it is based directly on the Constitution.

The Perpres contain several important substances relevant to our discussion: (a) some minor reference to communal scale/local scale water services, (b) some reference to technical standards, (c) emphasis on planning and (d) the formation of a task force.

The Perpres made some minor reference to communal/local scale water services. At article 11 (a), it suggests that in addition to government and the private sector (through cooperation contract), everyone or community groups may develop and provide individual service unit and/or local scale treatment and or communal scale. While the provision does not say much about anything else, it is quite important since it acknowledge and stress that individual and community can provide water services, in addition to government and the private sector.

Secondly, the Perpres mentions about sanitation quality standard. It obligates development and provision of sanitation infrastructure to fulfil technical standards and that the quality of its output must fulfil environmental standard which will be regulated by “relevant ministry”.⁵² What this provision intend to regulate is the “technical standard” and output of sanitation infrastructure. The output needs to comply with effluent or ambient water quality as prescribed by the environmental ministry. It does not explain what it meant by “technical standard” or if such standard refers to engineering/interface design or “service quality”.

Thirdly, planning is emphasized in the Perpres – in addition to the other three aspects: institution, implementation and supervision. The Perpres mentioned several planning exercise: The Roadmap (at National and Provincial level) as well as the RISPAM (for drinking water) and SSK (for sanitation). It further established that the lowest planning document needs to follow higher planning framework.

Finally, the most important feature and the original intention of the Perpres is probably, the formation of the acceleration task force, chaired by the Minister of Human Development and Culture and minister are listed as members. It also mentioned that municipal and provincial government is to form its own working group for drinking water and sanitation or “other working group” (“Pokja”). Perpres 185/2014 does not

⁴⁹ *ibid.*

⁵⁰ Peraturan Presiden Republik Indonesia Nomor 185 Tahun 2014 Tentang Percepatan Penyediaan Air Minum Dan Sanitasi.

⁵¹ The theory of *Autonome Satzung* is derived from Hans Kelsen theory and much of the Austria-German legal thinking which influences the Indonesian Judiciary and Legal Science. For the theory, see Andreas Hamann, *Autonome Satzungen Und Verfassungsrecht* (VerlagGes Recht u Wirtschaft 1958); Walter E Weisflog, *Rechtsvergleichung Und Juristische Übersetzung: Eine Interdisziplinäre Studie* (Schulthess 1996); Hamann. For the Indonesian reception of the theory, see Maria Farida Indrati and Maria Farida, ‘Ilmu Perundang-Undangan (Jenis, Fungsi Dan Materi Muatan)’ [2007] Kanisius, Yogyakarta; Maria Farida Indrati Soeprapto and A Hamid S Attamimi, *Ilmu Perundang-Undangan: Dasar-Dasar Dan Pembentukannya* (Kanisius 1998).

⁵² Peraturan Presiden Republik Indonesia Nomor 185 Tahun 2014 Tentang Percepatan Penyediaan Air Minum Dan Sanitasi (n 49). Article 6

designate a specific name of the Pokja(s), it can be *Pokja Air Minum dan Sanitasi* (Drinking Water and Sanitation Working Group) or other names, but require that both drinking water and sanitation affairs should have a Pokja.

An important role of the task force and in conducting layered supervision of the acceleration program, from Mayor/Regent through the Pokja to the Governor. At the provincial level, the report must be coordinated by the Pokja. The Governor then report to the Chairman of the Task Force through the Minister of Home Affairs. The Chairman in turn, reports everything to the President.⁵³

Note that two years before Perpres 185/2014 was issued, the Ministry of Home Affairs issued a circular, SE-660, obligating the formation of Pokja Sanitasi (*sanitation working group*). However, long before the circular was issued, Bappenas (supported by other institutions including MOHA) already had the initiative to form Pokja AMPL (water supply and environmental health working group) which also deals with sanitation issues. The Pokja was led by Bappenas at the national level and gave birth to the 2003 National Policy on Community Based Water and Environmental Health.⁵⁴ This was followed by formation of similar Pokja AMPLs in provincial and regional level, with the purpose of coordinating aid.

Thus, after SE-660 was issued, there was confusion in the regions, whether to have a double Pokja (Pokja AMPL and Pokja Sanitasi). Some regions such as East Nusa Tenggara Province decided not to form a new Pokja Sanitasi, but take the role and function of the Pokja Sanitasi into Pokja AMPL.⁵⁵ From a legal standpoint the SE-660 is not binding as a regulation, as it is merely a circular. This means that it is not obligatory for regions to form a specific “Pokja Sanitasi” (or to comply with the structure prescribed by SE-660). Regions are only required to form a Pokja (which could be of any name), which covers water supply and sanitation.

e. Sectoral Rules and Standards

A large chunk of the regulatory framework for wastewater is distributed in sectoral rules. Most of these sectoral rules are not focused on regulating wastewater, but contain some clauses on wastewater management. These sectoral rules can be grouped into the following: building and settlement regulations, planning regulations, health regulations and financial regulations. The legal power and degree of relevance of each of these rules to local scale wastewater differs from one another.

Some of these regulations are no longer valid, following the invalidation of the Water Law by the Constitutional Court. For example, Government Regulation on Water Resources Management (“GR 42”, no longer valid) regulates that drainage network must be separated from wastewater collection.⁵⁶ GR 42 mandated for the development of centralized wastewater systems on every neighbourhood and/or the application of environmentally friendly wastewater treatment systems. Only one article on GR 42, Article 54, was designated for regulating wastewater. No specific reference is made towards local or community scale system. A replacement regulation is currently being drafted. It is not known if the new regulation is also prone towards centralized wastewater. This report does not comment on whether the standard used in the regulations and Indonesian National Standard (SNI) below complies with the most recent “best practice”.

i. Building and Settlement Regulations

The law on buildings contain two provisions. The first require “sanitation” as one aspect of health requirement of a building.⁵⁷ The second provision clarifies that “Sanitation” refers to, among other,

⁵³ *ibid.* Article 16-19

⁵⁴ Bappenas and others, ‘Kebijakan Nasional Pembangunan Air Minum Dan Penyehatan Lingkungan Berbasis Masyarakat’ (2003).

⁵⁵ See the mailing list discussion of Pokja AMPL at

https://groups.yahoo.com/neo/groups/milis_ampl/conversations/topics/6597

⁵⁶ Peraturan Pemerintah Nomor 42 Tahun 2008 Tentang Pengelolaan Sumber Daya Air 2008.

⁵⁷ Undang-Undang Republik Indonesia Nomor 28 Tahun 2002 Tentang Bangunan Gedung. Article 21

drainage, water supply, wastewater and solid waste.⁵⁸ Interestingly, the second provision requires that “sanitation” be regulated in a government regulation. There is no specific reference to local scale wastewater.

There are two important implementing regulations for building law, each issued by the Ministry of Public Works in 2006 and 2007. The 2006 regulation mainly regulates the separation between hazardous and non-hazardous wastes and the channeling of such wastes outside of building. The 2006 regulation require that domestic wastewater must be processed in accordance with guidance and technical standards, before they can be conveyed into open channels.⁵⁹

Meanwhile, the 2007 regulation regulates technical conditions for building permits (*Izin Mendirikan Bangunan or IMB*). The term “Sanitation” in the 2007 regulation is differentiated from clean water and drainage.⁶⁰ The 2007 Regulation require building plans to be equipped with drawing design of its “sanitation system”, which in effect comprise of the plan and choice for channeling wastewater along with required equipment and the plan and choice for wastewater treatment and disposal.⁶¹

The regulation is ambiguous as to whether it requires *every* building design to have its own plan for wastewater treatment and disposal. The term used in the regulation is “*bangunan gedung*”, consistent with the term used in the Law on Buildings. Such term covers *every kind* of buildings that is used for human activities, including for houses, apartment or offices.⁶² Judging from the use of term, it appears that such requirement is valid not only for large buildings but also houses. In practice, it could mean that onsite sanitation with regular desludging plan maybe adequate.

The regulation clarifies that the eventual licensing power (except, in rare circumstances, for special buildings) rests on regional governments and that it merely provides technical guideline for building permits.⁶³ It requires that the implementation be regulated in a regional by-law.⁶⁴ Thus, the 2007 regulation does not have any enforcement power on itself, unless if it is adopted by a regional-by-law. The regulation does not contain any clause mandating inspection, thus, supervision is conducted only through the paperwork.

ii. Design Standards

The design standard for wastewater-related infrastructure is comprised of several guidelines and instructions issued by the Ministry of Public Works and the Indonesian National Standards (“SNI”). SNIs which can be considered relevant for wastewater are SNI on septic tank, plumbing system and Public Toilet.⁶⁵

Meanwhile, for wastewater treatment design, the public works issued several instructions and guidance. Those of specific relevance are the technical guidance and instructions for IPLT with Pond, procedures for developing wastewater disposal facilities and on the infrastructure for wastewater disposal.⁶⁶ These

⁵⁸ *ibid.* Article 24

⁵⁹ Peraturan Menteri Pekerjaan Umum Nomor: 29/PRT/M/2006 Tentang Pedoman Persyaratan Teknis Bangunan Gedung. See page III-64

⁶⁰ Peraturan Menteri Pekerjaan Umum Nomor: 18/PRT/M/2007 Tentang Penyelenggaraan Pengembangan Sistem Penyediaan Air Minum. See page 44

⁶¹ *ibid.* See page 49

⁶² Undang-Undang Republik Indonesia Nomor 28 Tahun 2002 Tentang Bangunan Gedung (n 56). See Article

⁶³ Peraturan Menteri Pekerjaan Umum Nomor: 24/PRT/M/2007 Tentang Pedoman Teknis Izin Mendirikan Bangunan Gedung. See Article 1(2)

⁶⁴ *ibid.* See Article 8

⁶⁵ Badan Standardisasi Nasional, ‘SNI 03-2399-2002: Tata Cara Perencanaan Bangunan MCK Umum’ <<https://www.pu.go.id/uploads/services/infopublik20130214154630.pdf>> accessed 1 September 2015; Badan Standardisasi Nasional, ‘SNI 03-2398-2002: Tata Cara Perencanaan Tangki Septik Dengan Sistem Resapan’; Badan Standardisasi Nasional, ‘SNI 03 – 6481 - 2000: Sistem Plambing.’

⁶⁶ Technical Guidance No. CT/AL/ReTC/001/98 about IPLT with Pond, Technical Instructions No. CT/AL/ReTC/003/98 about IPLT with Pond, Technical Instructions No. CT/AL-D/Ba-TC/005/98 on Procedures for Wastewater Disposal

standards are compatible with large scale utilities/IPLT installations but not so relevant for local/community scale “Air Limbah”.

The SNIs are considered voluntary, unless adopted by Ministerial Regulation or Agency Head Regulation.⁶⁷ To complicate the matter, there are different views among Indonesian legal scholars as to whether Ministerial Regulations are binding *per-se*, as “laws and regulation” (*Peraturan Perundang-Undangan*).⁶⁸ However, it is quite agreed that they can become binding if it is based on direct delegation from higher rules in the hierarchy of laws and regulation. Nevertheless, in practice, oftentimes a Ministerial Regulation is not applied in regions, when they contradict with Regional-By-Laws.

iii. Effluent Standard

The umbrella regulation for environmental water quality, Government Regulation 82 was enacted in 2001 (“GR 82”). As GR 82 was issued in 2001 (before the revoked Water Law 7 Year 2004 was enacted) and based on the Environmental Law, it remains valid today and unaffected by the Judicial Review. Both effluent and ambient water quality are regulated by GR 82.

The term used by GR 82 is “Household Waste” (*limbah rumah tangga*). It is to be emphasized that GR 82 requires governments at all levels to manage household waste in an integrated manner.⁶⁹

Effluent standards for domestic wastewater is further regulated in two Ministerial level legal product, Ministerial Regulation 5 Year 2014 (Permen 5) which regulates effluent standard in general and Ministerial Decision 112 Year 2003 (Kepmen 112) which specifies effluent standards for domestic wastewater. Note that since 2003, through Kepmen 112, the term used is “domestic wastewater”.

Kepmen 112 define “domestic wastewater” as wastewater originating from business and/or residential area, restaurant, offices, trade areas, apartments and dormitories.⁷⁰ This definition is unchanged in Permen 5.⁷¹ The Kepmen further clarifies that restaurants are covered by the rule if the building size is more than 1000 sq.m and – for dormitories – when they house more than 100 occupants.⁷² Similar provision is retained by Permen 5.⁷³ Note that the Kepmen 112 is deemed to be valid only for the “*integrated treatment of domestic wastewater (pengolahan air limbah domestik terpadu)*”. The Kepmen state that it does not cover “...domestic waste for household which are individually managed” as it intends to regulate it in a separate regulation. What this means is not really clear but until Permen 5 was enforced, no such regulation was enacted. It is also not really clear what it means by “integrated treatment”, but Article 2 of the Kepmen states that integrated means a system in which wastewater is managed collectively, before disposed to the environment. Permen 5, on the other hand does not determine if the standards are only valid for “integrated” or also “individual” channeling.

⁶⁷ Undang-Undang Republik Indonesia Nomor 20 Tahun 2014 Tentang Standardisasi Dan Penilaian Kesesuaian. Article 24

⁶⁸ Undang Undang No.10 Tahun 2004 Tentang Pembentukan Peraturan Perundang Undangan. See also SH JUNAIDI and others, ‘Analisis Yuridis Keberadaan Peraturan Bersama Menteri Dalam Sistem Peraturan Perundang-Undangan Di Indonesia’ (2014) 3 Jurnal NESTOR Magister Hukum <<http://jurnal.untan.ac.id/index.php/nestor/article/view/4445>> accessed 1 September 2015; ‘Kedudukan Peraturan Menteri Dalam Hierarki Peraturan Perundang-Undangan’ ([hukumonline.com/klinik](http://www.hukumonline.com/klinik)) <<http://www.hukumonline.com/klinik/detail/lt5264d6b08c174/kedudukan-peraturan-menteri-dalam-hierarki-peraturan-perundang-undangan>> accessed 1 September 2015; BIRO HUKUM KEMENTERIAN PPN/BAPPENAS, ‘Kedudukan Hukum Peraturan (regeling) Dan Peraturan Kebijakan (beleidsregel) Di Bawah Peraturan Menteri Ppn/Kepala Bappenas’ <http://birohukum.bappenas.go.id/data/data_kajian/KAJIANKEDUDUKANPERATURAN.pdf> accessed 1 September 2015; *ibid.*

⁶⁹ Peraturan Pemerintah Republik Indonesia Nomor 82 Tahun 2001 Tentang Pengelolaan Kualitas Air Dan Pengendalian Pencemaran Air. Article 43(3)

⁷⁰ Keputusan Menteri Negara Lingkungan Hidup Nomor 112 Tahun 2003 Tentang Baku Mutu Air Limbah Domestik. Article 1(1)

⁷¹ Peraturan Menteri Lingkungan Hidup Republik Indonesia Nomor 5 Tahun 2014 Tentang Baku Mutu Air Limbah. Article 1(30)

⁷² Keputusan Menteri Negara Lingkungan Hidup Nomor 112 Tahun 2003 Tentang Baku Mutu Air Limbah Domestik (n 69). Article 4

⁷³ Peraturan Menteri Lingkungan Hidup Republik Indonesia Nomor 5 Tahun 2014 Tentang Baku Mutu Air Limbah (n 70). Article 3(1)(tt)

f. Three obligations for regulated entities

There are three general obligations for regulated entities (as mentioned above: business and/or residential area, restaurant, offices, trade areas, apartments and dormitories [not 'individual such as KSMS'] under Kepmen 112, namely to (a) conduct treatment so that it complies with effluent standard, (b) develop closed and watertight channels in order to prevent leakage and contamination and (c) provide means to enable sampling at discharge outlets.⁷⁴

g. Conclusions

Wastewater is a mandatory-basic service concurrent affair under the regional autonomy law, which means that local government have ultimate responsibility for infrastructure development in its region, and the central government is responsible for standard setting. There are specific sectoral rules on building, settlement, effluent standard and design standard applicable to wastewater.

However, this chapter concludes that wastewater is under regulated in the national legal system. This is both true for centralized and community wastewater. However, for community wastewater, the regulatory gap is even bigger. This is due to a number of reasons.

First, the Constitutional Court does not perceive the community as a distinct actor in water services management. In its latest Judicial Review which invalidates the Water Law, the Court seeks to maximize the role of state and state-owned/regional owned corporations and restricts the role of private actors in water resources. The community is not specifically mentioned, but since communities are neither state nor state owned enterprises, they are implicitly categorized as the "private" sector.

Secondly, the prevailing water law, the law on Irrigation, contains no provisions on wastewater. As consequence, at present there is no primary legal basis for sanitation. According to some stakeholder, this is the reason why The RPP SPAM (draft regulation on drinking water provision system) contains only minimal provision on wastewater.

The chapter applies several regulatory features common in water services, such as production chain and stages, planning, service standard and rights and obligation of undertakes and discovered that those frameworks are lacking or non-existent for local scale wastewater. Through a Focus Group Discussion it was revealed that at present, there are no NSPK (norm, standard, guidelines, criteria) and minimum service standard for wastewater for both community and centralized wastewater.

Thus, detailed regulation on the effluent standard of domestic wastewater has actually been in existence since 2003. The Permen 5 Year 2014 only amend and consolidates several regulations on industrial standards together with domestic standard into one regulation. However, the effluent parameter for domestic wastewater in both rules remains the same:

Parameter	Unit	Maximum Concentration
pH	-	6-9
BOD	mg/l	100
TSS	mg/l	100
Oil and Fat	mg/l	10

As mentioned above, the Kepmen determines that the above standard is applicable only for "integrated treatment" (*pengolahan air limbah terpadu*) and not individual channeling and Article 2 of the Kepmen states that integrated (*terpadu*) means a system in which wastewater is managed collectively, before disposed to the environment. Since this is the definition provided and the Kepmen does not talk about scale (centralized, local, community systems), then all residential systems irrespective of scale – including community systems – must comply with the above standard.

⁷⁴ Keputusan Menteri Negara Lingkungan Hidup Nomor 112 Tahun 2003 Tentang Baku Mutu Air Limbah Domestik (n 69). Article 8

2. Regional Regulation of Local Scale Wastewater

a. Municipal Government's Regulatory Competence

As explained above, under the Law on Regional Government, except in cases of national strategic interest, municipal government has the obligation to ensure basic services including wastewater services for its citizen, whereas the central government enact norms, standard, procedure and criteria (NSPK) for such services. Municipal governments must thus ensure that appropriate regulatory frameworks are in place. Such regulatory frameworks are also required to implement minimum service standard and NSPK.⁷⁵

While the NSPK is usually enacted by a Ministerial Regulation, legislation requires Minimum Service Standard to be enacted by a Governmental Regulation.⁷⁶ The enforcement of minimum service standard is tied to the Law on Public Services, which provides sanctions for service providers and public officials who failed to comply with service standard requirement.⁷⁷ The regional government law reiterate the Public Service Law by ensuring that citizens has right to complain to Ombudsman, Regional House of Representative and Regional Governments. Regional Heads (Mayors, regents, governors) who failed to adhere to Ombudsman's prescription will be given "special education" (*pembinaan khusus*) by the Ministry of Interior.⁷⁸ This clause has not been really implemented in practice, but considering it is a new law and that an MoU has been recently concluded by the Ministry of Interior and the Ombudsman, the clause may be sufficiently adequate to name and shame regional heads.⁷⁹ Unfortunately, since such standard is absent in the present national draft legislation for drinking water provision system, citizen served by wastewater service may not be able to complain to Ombudsman, unless if such standard is provided by a regional-by-law.

Peraturan Daerah (Regional By-law or "Perda") is recognized in the lowest rung at the hierarchy of laws and regulation in Indonesia.⁸⁰ At the regional level, the Perda is the primary regulatory tool. Draft Perdas are prepared by Mayors or Regents and must be approved by regional house of representative (*Dewan Perwakilan Rakyat Daerah*). After being approved by the House, The Mayors/Regents then enact such rules.⁸¹

The content of the Perda could be many things, among others, in implementing regional autonomy (such as wastewater services) and *Medebewind* (co-governance tasks).⁸² A Perda can contain sanctioning rules. Financial penalties are in most situations limited to IDR 50 million or 6 months imprisonment.⁸³ Administrative penalties can take the form of license suspension or revocation.

Being in the lowest rung of the Indonesian hierarchy of legislation, a Perda must not contradict higher regulations.⁸⁴ It must not contravene public interest and public morality. It is important to mention that the Law mentioned that contravention with public interest can take the form of (a) disturbing public harmony, (b) disturbing access to public services, (c) disturbing public order and public peace, (d) disturbing economic activity and (e) cause racial, religious or gender discrimination.⁸⁵ Perdas which contradict higher regulations or the public interest can be invalidated by the Governor or, in the event the Governor refuse to invalidate,

⁷⁵ Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah (n 1). See Articles 351 and 357 as well as elucidation para 3.

⁷⁶ *ibid.* Article 18

⁷⁷ *ibid.* Article 351 (3) See also the Public Service Law, Undang Undang No. 25 Tahun 2009 Tentang Pelayanan Publik.

⁷⁸ Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah (n 1). Article 351 (5)

⁷⁹ 'Mayoritas Pengaduan Ke Ombudsman Terkait Pemda' (hukumonline.com)

<<http://www.hukumonline.com/berita/baca/lt54924edb9ef32/mayoritas-pengaduan-ke-ombudsman-terkait-pemda>> accessed 3 September 2015.

⁸⁰ Undang Undang No. 12 Tahun 2011 Tentang Pembentukan Perundang Undangan. Article 7

⁸¹ Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah (n 1). Article 65

⁸² *ibid.* Article 65 Article 235

⁸³ *ibid.* Article 238

⁸⁴ *ibid.* Article 250

⁸⁵ *ibid.* Article 250

by the Minister.⁸⁶ If a Mayor or members of Regional House of Representative insist in enforcing Perdas which have been invalidated, they can be subjected to sanctions in the form of salary non-payment for three months.⁸⁷

To conclude, municipal governments have a mandate to provide and regulate wastewater services in its region. Perda is the primary regulatory mechanism for such purpose. However, municipal governments' legislative power through Perda is limited by the national legal framework. The Perda cannot contradict higher rules enacted by national government. Perda should also incorporate NSPK and minimum service standard provided by national laws. In practical terms, Perdas may not be in contradiction with the upcoming Government Regulation on SPAM or any other regulations implementing the GR on SPAM.

b. Existing Perdas on Water Services

Water services at the Municipal level in Indonesia are typically regulated in several types of regional by-laws. The most common type is the regional by-law establishing Region-Owned Water Company (*Perusahaan Air Minum Daerah* or PDAM). The Dutch colonial government built water supply infrastructure in major cities, known as *Waterleiding*⁸⁸ (absorbed into Bahasa Indonesia as "*Air Ledeng*" or piped water). After some times, regional government corporatized the companies by a Perda -- based on the 1962 law on regional corporation.⁸⁹ In some cities such Jakarta or Bogor, the regional government enacted another Perda in addition to the aforementioned, known as Perda Pelayanan Air (Perda on Water Services).⁹⁰ While the former Perdas established PDAM as corporation, the later Perdas set services standards which PDAM must comply.

It is important to note that these Perdas strictly regulate large-scale, natural-monopoly, regional owned water supply companies. Perda PDAM and Perda on Water Supply Services are part of the corporatization agenda, in which, water provision becomes somewhat separated from regional government and become "independent".

Since around 2010, regencies started to enact Perda AMPL (Peraturan Daerah Air Minum dan Penyehatan Lingkungan Berbasis Masyarakat or Regional by-Law on Community Based Water and Sanitation). Several regencies which have enacted the By-Law include Aceh Besar (2010)⁹¹, Bima regency (in East Nusa Tenggara) in 2011⁹², East Sumba⁹³ and Ende.⁹⁴ Meanwhile, East Nusa Tenggara province enacted a Governor Regulation on community based watsan in 2012.

The content of the Perda AMPL are mostly policy statements with some minor operational provisions. Perda AMPL are focused on rural setting with some emphasis on support for community based water supply and Community Led Total Sanitation.⁹⁵ This explains why all of the municipalities mentioned above are *Kabupaten* (regencies). However, regency capitals are often quite urbanized and thus may require some

⁸⁶ *ibid.* Article 251

⁸⁷ *ibid.* Article 252

⁸⁸ See Sumardi, E., 'Ledeng Milik Belanda, PDAM Milik Makassar' *Tribun Timur* (Kamis, 25 Juli 2013)

<<http://makassar.tribunnews.com/2013/07/25/ledeng-milik-belanda-pdam-milik-makassar>> accessed August 29, 2013 also PAM Jaya, 'Sejarah PAM Jaya' (2013) <<http://www.pamjaya.co.id/Sejarah-PAM-JAYA.html>> accessed August 1, 2013

⁸⁹ Peraturan Daerah Khusus Ibukota Jakarta No. 13 Tahun 1992 Tentang Perusahaan Daerah Air Minum Daerah Khusus Ibukota Jakarta (PAM Jaya).

⁹⁰ Peraturan Daerah Khusus Ibukota Jakarta No. 11 Tahun 1993 Tentang Pelayanan Air Minum di Wilayah Daerah Khusus Ibukota Jakarta 1993. Also Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor.

⁹¹ Qanun Kabupaten Aceh Besar Nomor 8 Tahun 2010 Tentang Pembangunan Air Minum dan Penyehatan Lingkungan Berbasis Masyarakat

⁹² *Ibid*

⁹³ Peraturan Daerah Kabupaten Sumba Timur Nomor 2 Tahun 2013 Tentang Air Minum dan Penyehatan Lingkungan Berbasis Masyarakat.

⁹⁴ Peraturan Daerah Kabupaten Ende Nomor 13 Tahun 2014 Tentang Pengelolaan Air Minum dan Penyehatan Lingkungan Berbasis Masyarakat di Kabupaten Ende.

⁹⁵ Mohamad Mova Al'Afghani and others, 'The Role of Regulatory Frameworks in Ensuring The Sustainability of Community Based Water And Sanitation (Forthcoming AIIRA Project -- CRPG UIKA)' (INDII 2015).

regulation on urban sanitation – something not usually covered by Perda AMPL. As discussed by Al’Afghani et al., the purpose of Perda AMPL appears to be in ensuring adequate support mechanism from the regional governments after donor project ends.⁹⁶ The provisions of the Perda AMPLs, nevertheless, may not necessarily enable such purpose.

The Perda AMPL, Perda PDAM and Perda Pelayanan Air (Water Supply Services Perda) are important for the Wastewater Perda initiative, since – for regions that have already enacted them – they determine the regulatory scope for wastewater Perda. Several complications might arise due to the existence of these Perdas. For example, if one region has already enacted a PDAM Perda and a water supply services Perda, then its PDAM may be bound to concentrate on water supply-only provisions and should refrain from undertaking wastewater business. This would bring implication on situations where vertical integration – between water and wastewater services is desirable. In another instance, for regions that have enacted Perda AMPL, the provision of Draft Wastewater Perda may need careful adjustment so that it does not overlap with Perda AMPL.

There is a risk in having various Perdas regulating the same sector. In the future, there may be a need to consolidate and codify all water-services related legislations into a single Perda. This is to avoid the fragmentation of regulatory roles and responsibility and to ensure a coherence of water and sanitation policy. This could be done by merging Perda AMPL, Perda Pelayanan Air and Perda Air Limbah (Wastewater Perda) into a single Perda. In addition, Perda on PDAM could be amended in order to allow PDAM to undertake wastewater service, but this condition may differ from one region to another.

c. Overview of Draft Perda Air Limbah (Wastewater Perda)

i. Regulatory Institutions

We reviewed four documents related to Draft Wastewater Perda: The Bogor Draft Perda, Makassar Draft Perda, IUWASH Draft Perda and Medan’s Academic Draft (*Naskah Akademik*) for of Wastewater Perda. For detail comparison of the regulatory features in Draft Perda Bogor, see Annex 6.c.

The draft Perdas are much better compared to that of the Draft Government regulation on SPAM currently being debated at the national level. However, the Perda still has not provided solution to the fundamental issues of public financing for local scale: the problems of oversight and the question of ownership.

We would like to highlight that the Draft Perda acknowledge local scale wastewater. For example, the IUWASH Perda Template correctly pointed out that there are two systems that needs regulation: local scale and centralized system and recommends them both to be regulated in a single Perda.⁹⁷ Both Draft Perda Bogor and Makassar also recognize local scale wastewater (often interchangeably termed “skala lokal”, “komunal” or “sistem setempat”).

More importantly, the Medan Academic Draft specifically mentioned the need to regulate IPAL Komunal (community scale wastewater treatment system).⁹⁸ It also mentioned the complexity of regulating wastewater, due to different ideas, scale and thinking. Interestingly, the role of PDAM Tirtanadi in wastewater service in Medan will add to this complexity, as this means that Medan *may* need to adjust its Wastewater Perda and amend the statute of PDAM Tirtanadi in order to allow it to undertake wastewater services.

The situation in Medan also brings question in terms of institutional arrangement within a municipality. For example, in the event where PDAMs are undertaking wastewater, the role of UPTD may no longer be necessary. The role of regulator is another important question. A joint study on institutional arrangement by IUWASH, USDP, et al, recommends that the primary SKPD (*Satuan Kerja Perangkat Daerah*/regional

⁹⁶ *ibid.*

⁹⁷ ‘Template Perda Pengelolaan Air Limbah (Revisi I)’.

⁹⁸ ‘Naskah Akademik Perda Pengelolaan Air Limbah Rumah Tangga Kota Medan’.

bureaucracies under the Mayor/Regent which include *Dinas, Sekda, etc*) becomes the regulator and UPTD (Regional Technical Implementation Unit) will act as operator.

Although such arrangements does not constitute the ideal regulation, where regulatory bodies are independent and at arm's length relation with regulated entities, it can still work because UPTD are somewhat separated from their parent SKPD.⁹⁹ Their "independence" can be strengthened through a mayor or regent Regulation. The Wastewater Perdas should have outlined in detail each regulatory arrangement by including the role, function, power and authorities of the SKPD which regulate wastewater.

As mentioned earlier, the fragmentation of regulatory frameworks at the regional level: Perda AMPL, Perda PDAM, Perda Pelayanan Air, will have implication on the scope, roles and function of the regulatory institutions. For example: (i) which SKPD will regulate wastewater? (ii) will such SKPD also regulate water supply/PDAM? (iii) will the same SKPD regulate local scale wastewater and water supply? The condition may be different from one region to another.

ii. Objectives and Regulated Actors

In terms of purpose, the objective is focused on protecting the environment and/or drinking water. A version of Draft Perda Bogor that we reviewed, at Art 2 suggest that its purpose it to "...control the disposal of domestic wastewater; protect ground and surface water quality; increase conservation efforts, especially on water resources".¹⁰⁰ Similar clauses in found in Makassar's Draft Perda and IUWASH Perda Template. It is worth mentioning that the "subjugation" of the wastewater sector to drinking water and the monolithic objective of wastewater regulation is a persistent theme in Indonesian water sector legislation.

According to AlAfghani, legislations should weigh the so called "regulatory quadrangle": tariff/fee, expansion, service quality and the environment – as regulatory objectives -- which means that there are multiple regulatory objective and each of the objectives might be in contradiction.¹⁰¹

In terms of legal drafting, one of the main weaknesses of the Perda is its lack of categorization of both regulated actors and wastewater's business cycle. The Perda does not specifically distinguish actors that are aimed to be regulated; i.e. between community groups, companies, state owned companies, individual, housing developers and which rules, standards and monitoring-evaluation framework that applies to them. This can be seen by the absence of definition of those regulated actors in Article 1.

The patterns and intention to distinguish regulated actors is visible in the Perda, but they are not clearly manifested. As such, there are confusion as to whether certain provisions are applicable only to certain actors or to all actors – or whether certain standards applies only to state owned companies or also applies to community undertaker.

The lack of specification and categorization of regulated actors is presumably caused, not only due to confusion between the role of the state in community scale wastewater but also due to lack of insight on the regulatory frameworks and features that can be applied to them.

d. Defining regulated actors

As previously mentioned, the Draft Perda confuses and obfuscates regulated actors. There are several regulated actors intended by the Perda:

Wastewater operator (Operator Air Limbah): In **Draft Perda Bogor** it is defined in Article 1 to include everything from UPTD, State Owned Enterprise, Cooperatives or User Groups. However, in Article 4, the term Operator Air Limbah is used in opposition to Masyarakat, the same applies to Articles 15, 16, 17. In

⁹⁹ Peraturan Menteri Dalam Negeri Nomor 57 Tahun 2007 Tentang Petunjuk Teknis Penataan Organisasi Perangkat Daerah also Peraturan Pemerintah Nomor 41 Tahun 2007 Tentang Organisasi Perangkat Daerah

¹⁰⁰ 'Rancangan Peraturan Daerah Kota Bogor Tentang Pengelolaan Air Limbah Domestik'. See page I-19

¹⁰¹ Mohamad Mova Al'Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation' (PhD Thesis, University of Dundee 2012)

Article 27, 28 it appears to be referring to centralized scale. On Article 17 however, Operator Air Limbah appears to refer to desludging operator. Elsewhere in Draft Perda Bogor, a different terminology, *Lembaga Pengelola* is used for desludging operator (see below). Thus it is not known if *Lembaga Pengelola* in this context is similar to *Operator Air Limbah*. Meanwhile, **Draft Perda Makassar** clearly distinguishes wastewater operator into two: local scale, which could take the form of UPTD, SOE, etc.; and domestic, which take the form of “community groups” (See Article 1(26)).

Person (*orang*): Defined in article 1 of **Draft Perda Bogor** and **Draft Perda Makassar** as individuals or legal entity.

Masyarakat (which could mean community, society, user group or public at large): In **Draft Perda Bogor** the term is not defined Article 1 – but it is used in several context with various meanings, for example, in Article 17(3) as local user group who undertakes treatment and maintenance of local scale and in Art 16(3) as a user group for communal scale. However, in the context of Art 24 (1) – which regulate financing -- it appears to refer to individual (and not the community as a whole) since it is not feasible to interpret that the community as a collective which must pay for developing an individual wastewater service. In Art 32 (1) (a) of “Masyarakat” appears to refer to KSM. The term Masyarakat in Article 40 – which regulates the obligation to develop local scale system for regions not covered by centralized system – is not really clear; does it mean individual or the community (as a group)? In **Draft Perda Makassar** the term is used interchangeably, in Article 11 and 14 as *kelompok masyarakat* (community groups), in Article 15 as user group, in Article 25 and 47 as the public at large.

The confusion around the term “Masyarakat” is found in other legislations as well and also in the national policy document on community-based water and sanitation.¹⁰² The concept of “community-based” itself has been criticized for lack of clarity.¹⁰³ The use of the term “Masyarakat” becomes problematic in a legal setting, for example, if the regulation prescribe that --“assets should be owned by the Masyarakat” – as it is in the national policy document, it is not clear who actually owns the assets as the “Masyarakat” is such an elusive concept with various meaning depending on context.

The term Masyarakat also makes regulation on community user group such as KSM difficult. The KSM neither fits in the definition of society nor community – it is an entity in itself which can be legalized through notarial acts. As wastewater undertaker, the KSM can be subjected to certain rights and obligation, including licensing mechanism, reporting obligation and performance standard. When the reference to KSM is diluted into the term “Masyarakat”, it becomes unclear on which actors should be held accountable.

Pointing to the “Masyarakat” is like pointing to everyone but no one at the same time. In legal and regulatory term, objects and actors must be specified because regulated actors carry specific obligations and rights and can be subjected to accountability mechanism, which includes sanctions. The term “Masyarakat” must be broken down into other specific terminologies such as customers, user group, the public, community, society, person, or individual depending on the context.

Operating Agency (*Lembaga Pengelola*): This term is introduced by **Draft Perda Bogor** although not defined in Article 1 but appears to be used for desludging operator when used in Article 23 and not very clear when used in Article 37. As it is used in different context than wastewater operator mentioned above, the draft appears to intend to regulate desludging operator. The term is not found in IUWASH Draft Perda and Makassar Perda.

¹⁰² Bappenas and others, *Kebijakan Nasional Pembangunan Air Minum dan Penyehatan Lingkungan Berbasis Masyarakat* (2003)

¹⁰³ Mohamad Mova Al'Afghani and others, *The Role of Regulatory Frameworks in Ensuring The Sustainability of Community Based Water And Sanitation (Forthcoming)* (AIIRA Project -- CRPG UIKA, 2015)

e. Specification of key regulatory features

As discussed earlier, the regulatory features of water services typically consist of service standard, customer rights, monitoring and evaluation, licensing, financing, planning and enforcement.¹⁰⁴ This framework, however, is most relevant for large scale water and wastewater utilities.¹⁰⁵ There is a lack of frame of reference on applying this framework for local scale wastewater.

i. Licences

The failure to distinguish and specify regulated actors brings implication on the licensing mechanism that applies to them. To complicate the matter, it is quite customary for Indonesian legislation to require licence for something, but does not specify the types of licences in such legislation. Thus in practice, business or private entities could be subjected to various licences which are actually not regulated at all, thus contributing to bureaucratic red tape.

There are disagreements in terms of whether KSM (Community Based Organization) for Local Scale Air Limbah should be licensed. Licensing for local scale wastewater is not clear in Draft Perda Bogor (Article 30). However, the Makassar Draft (Article 51) clearly stipulates that licenses would be required for both local scale and centralized system.

Both Draft Perda Bogor and Makassar is also unclear with respect to licensing. The Draft should have enumerated in detail at the very least: (i) the type of licences in the wastewater sector, (ii) ways for obtaining them including the licence conditions, (iii) the consequences for contravening such licence conditions. This should be regulated in the Perda level, although other detail can be regulated in Mayor's regulation.

For example, the licensing framework for local scale must be distinguished from that of the IPLT or desludging operator (if it is to be served by non-state actors), since the subject matter and scale are different. The licensing framework must also pay attention to the capacity of KSMs.

Draft Perda Bogor at Article 30 stipulates that the licence for local scale domestic wastewater would be integrated in building permit. Embedding licensing in IMB (Building Permit) would mean that the licence is constrained for matters related to building technicalities. Operational matters – such as O/M, supervision/monitoring, and reporting obligation of the KSM/Local Scale undertaker are not touched in the licensing framework. Such framework may be appropriate for individual/personal toilet but not community or local scale facilities. Draft Perda Makassar does not contain similar provision.

Note that the licensing framework is highly intertwined with monitoring and evaluation (since licence condition may contain reporting obligations), service standard, enforcement and sanctioning mechanism, redress mechanism.¹⁰⁶ Failure to specify the appropriate licensing framework means that those other factors are affected.

ii. Service Standards and Enforcement

Both Draft Perda Bogor and Makassar talks about service standard several time and also regulate the community's role in supervising service standard – including sanctioning mechanism for violating service standard (which could entail revocation of licence). The Draft Perdas repeat verbatimly IUWASH Perda template which – correctly – define “service standard” as “*a parameter that can be used as a guidance for the undertaking of public service and a reference of service quality as an obligation and promise of an service*”

¹⁰⁴ See Hendry (n 18). and Mohamad Mova Al' Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation' (PhD Thesis, University of Dundee 2012).

¹⁰⁵ OFWAT, 'The Guaranteed Standards Scheme (GSS) Applicable to England and Wales from 1 April 2008' (2008); Essential Services Commission, 'Customer Service Code Metropolitan Retail and Regional Water Businesses' (2007) <<http://www.esc.vic.gov.au/NR/rdonlyres/D8B6324D-1531-4BD2-B9A6-80FE9E0A44D1/0/CustomerServiceCode.pdf>>; The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008, SI 2008 No. 594.

¹⁰⁶ Al' Afghani, 'The Role of Legal Frameworks in Enabling Transparency in Water Utilities Regulation'

provider to the community in order to provide a quality, speedy, easy, affordable and measurable service". From this definition the drafter clearly understand the purpose of having service standard: (i) as an instrument of measurement, (ii) as an instrument of right – in order to provide a basis for claim.

Interestingly, IUWASH template and the Drafts are silent as regards to the content of the standard itself. With the absence of wastewater standard in the draft Government Regulation on SPAM, there is then, a nation-wide legal loophole for wastewater service standards. Arguably, such standard could be regulated in detail through Mayors regulation (since it is more flexible and can be amended from time to time) but the Draft must at least mention the types of the standard and specify the most basic standard. By comparison, the standard for water supply service, including the compensation mechanism are already clearly stipulated by another Perda in Bogor.¹⁰⁷ This Perda was initiated at the involvement of the World Bank.

It is worth mentioning that in Indonesia, service standards are not necessarily enforceable. However, not providing standard means that the public has no right to recourse and thus may constitute a human right violation. From another point of view, the failure to provide standard reflect the government's reluctance to guarantee a functional and sustainable service as zero standard means that citizen have no right to expect anything and the government has nothing to measure.

Different service standard applies to different actors – however, since the regulated actors are not clear, the standards are also not clear. In Draft Perda Bogor, the standard mentioned in Article 28 for example, is aimed towards Wastewater Operator (see para 3). Again, it is not clear if this refers to community scale "wastewater operator" or centralized scale or to desludging operator. However, since para (2) refers to rebate (in retribution), it would appear that it is intended for the centralized system (for community scale, the term is not *retribution* but *iuran*).

This brings the question: does it mean that community scale has no service standard at all? What about desludging trucks, are they subject to certain standard? Note also the linkage between these regulatory features mentioned above: licence, service standard, enforcement/sanctioning, and redress. Without specific standard, there will be no redress mechanism for customers and no sanctions for undertaker.

iii. Monitoring and Evaluation

There appears to be discrepancy in terms of monitoring and evaluation. In Draft Perda Bogor Article 20(4) – regulating local scale -- there is no provision obligating monitoring by local government agency; instead, it must be conducted by community groups themselves with the support of "*...pembinaan and supervision from the government.*" Similar provision is found in Article 24 of Draft Perda Makassar.

It is not clear if this phrase is meant for the government to supervise the supervision conducted by the community. The term "pembinaan" in Indonesian legislation typically cannot be relied upon unless it is enumerated in detail through specific mechanism.

Draft Perda Bogor added another clause Article 20(1) suggesting that monitoring should be conducted towards "overall performance" of the domestic wastewater system. This could be interpreted so as to include also local scale. However, the presence of Article 20(4) nullifies such interpretation.

iv. Financing

At Article 24 (6) the draft Perda Bogor clearly specifies that financing of local system, communal scale wastewater for low income communities are derived from regional budget or other legal sources. This indicates that there are intentions to use regional budgets to finance local scale. The Draft does not specify if such financing is only for development stage or also covers operation/maintenance. In any event, the provision of the Perda cannot derogate the national public finance regulation. This will be discussed in Chapter 3.

¹⁰⁷ See Peraturan Daerah Kota Bogor Nomor 5 Tahun 2006 Tentang Pelayanan Air Minum Perusahaan Daerah Air Minum Tirta Pakuan Kota Bogor regulating water supply services

There is only one clause, at Art 39 (e), regulating *iuran* (fee collection). This clause is insufficient because the issue of *pungutan liar* (illegal fee collection) also affects the CBO in the water sector. More authorization to collect fees is required. As such, there may be a need to mention the fee component (cost recovery, etc) similar to that regulating retribution for wastewater operator under Article 26. There is a need to regulate in detail, who can determine such fees and the mechanism for prescribing fees.

This discussion over fees is impossible without a discussion on the overall KSM/CBO's internal governance mechanism. As such, the KSM/CBO need to be specifically regulated in the Perda and recognized as a separate entity, different from that of the "Masyarakat".

f. Conclusions

This chapter explores the regulatory competence of each region in terms of community scale wastewater. The chapter evaluates the existing draft regional by law on wastewater (Perda Air Limbah) against a set of analytical framework: licensing, service standard, enforcement, monitoring, evaluation and financing. The analysis concludes that the existing drafts lacks all of those features, meaning that the draft was only intended to fill the legal vacuum on centralized wastewater but not on community wastewater.

Furthermore, the unavailability of service standard for community wastewater means that users receive service without any guarantee whatsoever, devoid of complain and redress mechanism. This also entails that regulators have no particular parameters to monitor and evaluate the sustainability of community wastewater.

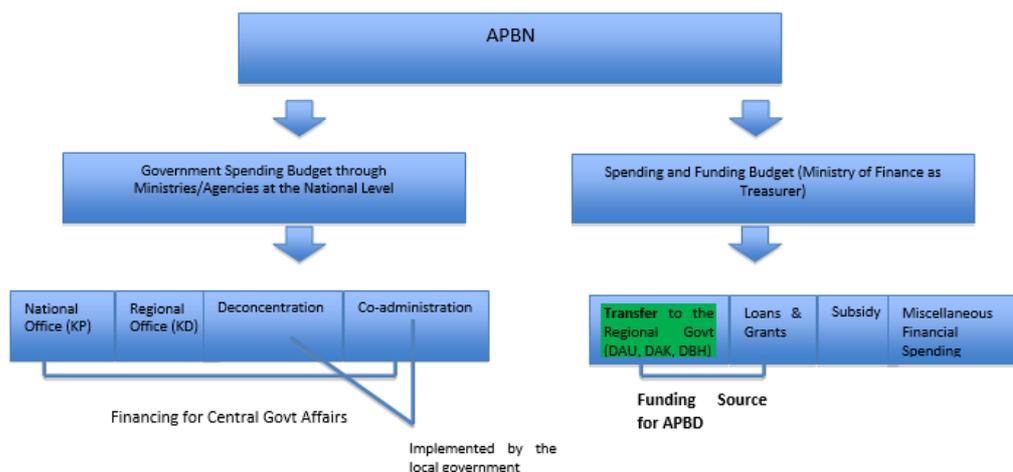
It is recommended that all of the framework for regulation above is fulfilled in any regulatory reform agenda in the future.

3. Public Finance and its Implications

a. General Financing Framework

State financing of sanitation comes from either national state budget (APBN) or regional budgets (APBD Provinsi or APBD *Kabupaten/Kota*). Although this chapter is focused on the role of local (*Kota/Kabupaten*) governments in terms of sanitation financing, the portion of APBN which is earmarked for sanitation in the regions (for example, through the special allocation fund mechanism or “DAK”) often must go through the *Kabupaten/Kota* APBD framework. Discussion pertaining the APBN and APBD Provinsi is thus required, before the analysis can be focused on local financing.

When budget is derived from APBN, the scheme is as follows¹⁰⁸



Note:

Deconcentration and Co-administration are implemented by Pemda

K/L : Ministries/Institutions

DBH/Dana Bagi Hasil: revenue sharing fund

Regional transfers (see the above scheme) is *currently* one of the primary funding source of sanitation, allocated *from* APBN *to* *Kabupaten/Kota* APBD, for example, through the DAK SLBM Program which will be discussed in detail below. From the APBD *Kabupaten/Kota*, the budget will be spent by each *Dinas/SKPD* at the regional level.

In another instances, financing of sanitation at *Kabupaten/Kota* comes directly *from* APBN *to* Ministries at the national level, for instance, to the Directorate General of Cipta Karya at the Ministry of Public Works and Human Settlement, as it is in the Sanimas-USRI Program or the Sanimas IDB Program. Disbursements are made by the Satker PPK at *Kabupaten/Kota* under authorization from the central government. As will be detailed below, the funding sources for these programs come from ADB (or IDB) loans.

It must be emphasized that in a particular sanitation program, funding does not come from single source (e.g. from APBN or APBD) but from multiple source. Indeed, program documents (and loan agreements with foreign entities, if the fund is derived from loan) usually specifies that funding from loans or DAK can only be utilized for the construction of physical infrastructure (or trainings – depending on each program policy), whereas funding from APBD are used for paying TFL salaries and so on.

In 2013, the government issued a guideline for the financing of sanitation – which should be referred in each city’s sanitation strategy document (SSK).¹⁰⁹ Some ministries have been merged since 2013, therefore the

¹⁰⁸ Petunjuk Praktis Identifikasi Sumber Akses Pendanaan Sanitasi

government would need to revise the guideline. The 2013 guideline mentions the financing for local scale system, which it divides into several segments, especially for *physical* and *non-physical* segment.

For example (see table below), household connections (a part of the *physical* segment) are to be financed through either DAK Sanitasi/Grants or from non-government sources (the “Masyarakat” themselves or CSR) but not from APBDs. Meanwhile, APBDs (*Kabupaten/Kota* or *Provinsi*) should be used for pipe network and treatment units (although both can also be tapped from DAK Sanitasi). Meanwhile, Communal MCKs are expected to come from APBDs or from Housing DAKs. It is worth noting that this guideline is a policy paper which is not legally binding. In other words, the local governments can still deviate from this guideline.

Finally, it is important to highlight that the financing for post-construction operation and maintenance in local scale system is hardly mentioned in the 2013 Guideline (see the table below). It appears that this table is meant to address financing during the construction stage (and its preparation). The 2013 guideline is silent on *how* should local government allocate the spending for *any* sanitation’s operation and maintenance. This may be because – as found in various policy documents and discussed later – the government expects the community to finance operation and maintenance of assets.

Financing Guideline for Sanitation (2013)¹¹⁰:

¹⁰⁹ *Petunjuk Praktis Identifikasi Sumber Dan Akses Pendanaan Sanitasi* (Direktorat Jenderal Bina Pembangunan Daerah Kementerian Dalam Negeri 2013).

¹¹⁰ The guideline does mention that the SAIIG program require allocation of budget for maintenance and operation, but is silent on *how* it should be done by local governments

Activities	Government										Non Government										
	APBD	APBN									Corporate Social Responsibility (CSR) Private Sector Community										
		Central Expenditure Budget through K/L					Budget Expenditure and Financing														
	APBD Kabupaten/Kota APBD Propinsi	Ministry of Health	Ministry of Public Work*	Ministry of Environment	Ministry of Housing *	Ministry of Fisheries	Ministry of Public Work*	Ministry of Housing*	Ministry of Environment	Deconcentration				Co-administration	RPIJM	Deconcentration	Central	Central	DAK Sanitasi**	Grant (Penerusan Hibah) ***	DAK Housing**
Deconcentration		Co-administration	RPIJM	Deconcentration	Central	Central	DAK Sanitasi**	Grant (Penerusan Hibah) ***	DAK Housing**												

A. AIR LIMBAH

Non Physical																			
Triggering/Community empowerment																			
Assistance/training/technical assistance																			
Facilitating for the development of the managing organisation																			
Facilitating for the Perda preparation																			
Master Plan/DED																			
Physical																			
Local system:																			
Household connection																			
Pipelines																			
Treatment unit																			
Communal septic tank																			
Centralised system																			
Household connections																			
Pipelines																			
Primary pipeline																			
Secondary pipeline																			
Tertiary pipeline																			
Management Unit																			
Transportation																			

B. WASTE														
	Non physical:													
	Triggering/Community empowerment													
	Assistance/training/technical assistance													
	Facilitating for the development of the managing organisation													
	Facilitating for the Perda preparation													
	Master Plan/DED Formulation													
	Physical:													
	Lug (pewadahan)													
	Local collection													
	Transporting													
	Local Final treatment													
	Transporting from TPS to TPA													
	Recycling/Treatment/TPST													
	Heavy equipment in TPA													
	Final Process													
C. DRAINAGE														
	Non Physical:													
	Triggering/Community empowerment													
	Assistance/training/technical assistance													
	Master Plan/DED Formulation													
	Physical:													
	The establishment of/development of/rehabilitation and primary drainage facilities													
	The establishment of/development of/rehabilitation and secondary drainage facilities													
	The establishment of/development of/rehabilitation and tertiary drainage facilities													

Note:

* Ministry of Housing and Ministry of Public Work have been merged to Ministry of Public Work and Housing since 2014

** Adjusted to the Technical Implementation Guide of DAK Sanitasi, DAK Housing dan DAK Environment (*Disesuaikan dengan Petunjuk Teknis Pelaksanaan DAK Sanitasi, DAK Perumahan, dan DAK Lingkungan Hidup*)

*** Adjusted to the Implementation Guide regarding Grant from Donor (*Disesuaikan dengan Pedoman Pelaksanaan Hibah dari Donor*)

The following sections will discuss two main topics in sanitation financing (i) the source of budget and (ii) how budget can be expended, with a focus on regional governments. As mentioned above, funding sources for sanitation comes generally from APBN, APBD and non government sources.

b. APBN Sources

APBN income is generally categorized into three: tax income, non-tax income and grants. Non-tax incomes could come from various posts: non-tax levies, sales from extractive industries and, if there are deficit in APBN, foreign loans.

Foreign loans deserve special attention here, since they are usually earmarked (for example, for sanitation or other poverty alleviation program) and come with some conditionalities stipulated by the lending party. The conditionalities will shape policies at the technical levels. Sanimas ADB and Sanimas IDB are two programs embedded under the national PNPM.

Another funding sources for local government for sanitation is DAK (The program name is known as DAK Sanitasi or DAK SLBM or Sanimas DAK). The DAKs are transferred by the central government to regions. As such, the central government has some power to shape the rules on the utilization of such funds.

i. Foreign Loan

Foreign loan (*pinjaman luar negeri*) is any debt financing obtained by the Central Government from foreign lenders that are bound by an agreement in the form of loans and government securities that must be paid back¹¹¹ with certain requirements. The loan can be used to pay for APBN deficit, priority activities of ministries/institution, the management of cash portfolio, loaned to the regional government, state owned enterprises, loaned to State Owned Enterprise, and/or granted or loaned to the regional governments.¹¹²

Both Sanimas ADB USRI and Sanimas IDB are foreign loans. Apparently, the government does not further loaned nor grant the funds to regional governments and the funds remained administered by the central government with some direct authorization for disbursement from the central government to PPK Sanitasi (at the *Kabupaten/Kota* level).

SANIMAS ADB USRI support to PNPM Mandiri is a continuation of RIS-PNPM-2 and urban sanitation activities. The program was implemented in 2011-2014¹¹³. It aimed to improve the communities' quality of life both individuals and groups and enable them to participate in solving problems which relates to the improvement of societies' quality of life, independence and well being.¹¹⁴ It is funded by Asian Development Bank loan's to the Indonesian Government (Central Government) Loan No. 2760-INO, signed in 30 September 2011. The amount of the loan is 100,000,000 USD and has a principal repayment period of 20 year, including the interests. The ADB loan is to assist the project that is reflected in the DRPHLNJM (*Dokumen Rencana Pinjaman/ Hibah Luar Negeri Jangka Menengah*) 2011-2014 as: a) Rural Infrastructure Support-National Community Empowerment Program, Phase 3 and b) Community Based Water Supply and Sanitation Project, Phase 1.

The projects covered by the loan covers Urban Sanitation and Rural Infrastructure (USRI) – thus not only for Sanimas, but also other infrastructure such as road -- as the following¹¹⁵:

- Community development grants. It is used to finance the assistance for the communities to conduct poverty mapping, identify problems and needs, evaluate community implementation capacity, establish and manage community implementing organisations, formulate and implement operational and maintenance plans to ensure sustainability of completed facilities, and etc¹¹⁶;

¹¹¹ The foreign lenders includes multilateral creditors, bilateral creditors, foreign private creditor, export credit guarantee agency. See Peraturan Pemerintah Nomor 10/2011 tentang Pinjaman Luar Negeri dan Penerimaan Hibah Article 1 number 1

¹¹² Peraturan Pemerintah No. 10/2011, Article 7

¹¹³ Urban Sanitation and Infrastructure Project (USRI) Support to PNPM Mandiri Project, Loan No. 2768-INO, Kementerian Pekerjaan Umum, Direktorat Jenderal Cipta Karya, Jakarta Indonesia

¹¹⁴ Latar Belakang SPBM USRI, <http://ciptakarya.pu.go.id/spbm-usri/index.php?page=sanitasi/tentang>

¹¹⁵ ADB Loan Agreement Schedule 1

¹¹⁶ Ibid Schedule 5

- Rural infrastructure development. It is used to finance the construction of basic infrastructure (road, irrigation infrastructure, clean water supply system and public sanitation, the rehabilitation of basic social infrastructure such as water supply and sanitation facilities, and etc¹¹⁷;
- Urban sanitation development. It is used to finance the construction of public bathing, toilet, washing facilities, the improvement of communal sewerage system, waste treatment and disposal/reuse systems¹¹⁸;
- Training and workshop;
- Consulting services, and contingencies.

For sanitation, the loan agreement stipulates that “...the Project shall provide block grants to the Participating Neighborhoods to improve community-driven sanitation services”.¹¹⁹ The disbursement mechanism for this is known as Bantuan Langsung Masyarakat (BLM) or “Block Grant”. The term used by the loan agreement is either “Participating Neighborhood” or “Community”. The loan agreement was silent as to the legal status of the “Community”, but required that the project is exercised in accordance with prevailing regulations in Indonesia.

The BLM is a “trust fund” from the central and regional government in order to stimulate the independency that is given to *kelompok masyarakat* (presumably it meant KSM) to fund their planned activities for improving welfare level, especially for the poor¹²⁰. BLM can be funded by APBN, APBD, or both. In the Sanimas USRI Program, the government does not use the subsidiary loan or grant mechanism to regional governments but directly transfers the funds instead through BLM, although some disbursement authority is provided to local officials (PPK Sanitasi). We have discussed in another chapter that latest regulations require recipient of any kinds of grants to be a legal entity. As such, the future of the BLM mechanism is unknown.

Other loan program includes the SANIMAS IDB (Islamic Development Bank), which is quite similar to SANIMAS USRI. It is also a foreign loan (IDB funded) and managed under APBN scheme. It is disbursed to the community members through BLM (Bantuan Langsung Masyarakat) mechanism and is thus quite similar to the Sanimas ADB mechanism.¹²¹

ii. Special Allocation Fund (Dana Alokasi Khusus/DAK)

Dana Alokasi Khusus is a part of fiscal balance funds. DAK is specifically assigned for the development, procurement, and improvement of physical infrastructure for basic community services with a long economic time span.¹²² Regulation stipulates that DAK cannot be used to fund administrative activities, preparation for physical activities, research, training and official travels.¹²³ DAK is sourced from APBN that is allocated to a certain region in order to fund specific (development) activities that are of government affairs under the region’s authority.¹²⁴ DAK is transferred to Regency/City APBD by posting the fund from the state general treasury account (RKUN) to the local government general treasury account (RKUD).¹²⁵

Under the law on fiscal balance, there is no requirement that DAK should be specifically allocated to certain type of sector or expenditure, it requires only that technical minister to propose the use of DAK and further

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid Schedule 1

¹²⁰ Kelompok Program Berbasis Pemberdayaan Masyarakat (PNPM) Mandiri - Klaster II - Tanya Jawab : Tim Nasional Percepatan Penanggulangan Kemiskinan - TNP2K,” accessed November 17, 2015, <http://www.tnp2k.go.id/id/tanya-jawab/klaster-ii/kelompok-program-berbasis-pemberdayaan-masyarakat-program-nasional-pemberdayaan-masyarakat-pnpm-mandiri/>.

¹²¹ <http://ciptakarya.pu.go.id/plp/index.php/blog/baca/97>

¹²² http://www.eaber.org/sites/default/files/documents/SMERU_Usman_2008.pdf

¹²³ GR No. 55/2005 Article 60 (3)

¹²⁴ Law No. 23/2014 Article 1 number 48

¹²⁵ GR No. 55/2005, Article 62

regulate it. Thus, the Ministry of Public Works can oversee the DAK on infrastructure as a whole, including for roads, water supply and wastewater. Since the DAK utilizes APBD (regional budget) mechanism, it is possible that its realization is different than originally planned. In response to this, officials from the Ministry of Public Works commented that the government requires a written statement from the Mayor (Walikota) /Regents (Bupati) that at least 3% of the DAK would be used for sanitation.¹²⁶ The Public Works will then monitor this through each *Dinas/SKPD* (parts of regional bureaucracy) budget plan and implementation. If it is not allocated in the RKPD of each Dinas, they may threaten not provide other DAK funds.¹²⁷ Local governments usually comply with this scheme.

As mentioned earlier, the central government has power to regulate the use of DAKs. In terms of sanitation project, Minister of Public Work and Public Housing issued a Regulation No. 03/PRT/M/2015 on Technical Guideline Regarding the Utilisation of Specialised Budget Allocation (*Dana Alokasi Khusus/DAK*) on Infrastructure (“2015 Guideline”). The 2015 Guideline does not only regulate DAK for wastewater, but also other infrastructure.

Based on Article 5 (2) of the 2015 Guideline, Sanitation and Drinking Water (Air Minum) are included as the national priorities to be funded by DAK. Attachment 2 of the regulation provides guidelines regarding sanitation project namely DAK SLBM (*Sanitasi Lingkungan Berbasis Masyarakat/Community based environmental sanitation*). The main priority of DAK SLBM is to develop the facilities and infrastructure of the “*air limbah komunal berbasis masyarakat*” (community based communal wastewater) towards free open defecation (*Buang Air Besar Sembarangan/BABS*). The options for the management of household wastewater are the networked community-based communal IPAL (*IPAL komunal dengan jaringan perpipaan berbasis masyarakat*), house connections in the community-based district-scale centralised wastewater management system (*sambungan rumah pada system pengelolaan air limbah terpusat skala kawasan berbasis masyarakat*), IPAL communal combined with MCK plus, MCK plus with the service of minimum 100 head of family (KK) and septic tank communal 10 KK (specific for East Indonesia region). In the case of open defecation free status being achieved, the next priority will be the development of the community-based waste reduction (*pengurangan sampah berbasis masyarakat*) facility through 3R (Reduce, Reuse, Recycle).¹²⁸

The criteria of location to receive DAK SLBM are:

1. Have population density with more than 150 inhabitants/ha (permanent user);
2. Availability of water supply;
3. Fulfil the criteria as dense settlement and “sanitation prone” (basically, in danger for contamination) areas/*rawan sanitasi* (should refer to statistic agency/BPS/Health Department recommendations) or traditional market areas and residential areas around the market that is in line with the regent/city spatial planning;
4. Have urgent sanitation problems based on the BPS/PPSP document;
5. Availability of space (land) approximately 50 m² for one unit building of wastewater treatment installation/IPAL, 100 m² for one MCK plus (public bathing, washing, and toilet facility) or 200 m² for 3R (Reduce, Reuse, Recycle) solid waste infrastructure;
6. Availability of electricity supply/power source supply;
7. Availability of drainage/river/water body to channel/contain effluent

¹²⁶ AlAfghani and Paramita (n 7).

¹²⁷ *ibid.*

¹²⁸ Article 11(1) d

The responsible institutions for the implementation of DAK SLBM is as follows¹²⁹:

Level	Institutions
Central Government	Directorate PPLP, Directorate General Cipta Karya, Ministry of Public Works
Province	Working unit/Satker PPLP Province, relevant agencies
Regency/City	Technical SKPD
Community	KSM

¹²⁹ Ibid, page 1-4

The 2015 guideline also stipulates the financing mechanism for projects funded by DAK.

The Financing activities of DAK SLBM program are as follows¹³⁰:

No	Activities	APBN	DAK	APBD	Masyarakat
I	Preparation <ul style="list-style-type: none"> Dissemination Kab/Kota Regional workshop TFL Training 	√ √ √			
II	Selection of the village (Seleksi Kampung) <ul style="list-style-type: none"> Long list Short list Dissemination Rapid participatory assessment 			√ √ √ √	
III	RKM (community work plan) formulation <ul style="list-style-type: none"> Determination of the users Choice of technology DEB + RAB KSM RKM Documentation and legalisation of RKM 			√ √ √ √ √ √	
IV	Community Empowerment <ul style="list-style-type: none"> KSM training Treasurer training Mandor/supervisor training Pelatihan pengelola /training for managers Health campaign 			√ √ √ √ √	
V	Construction <ul style="list-style-type: none"> Material Upah pekerja/honorarium for workers Lahan/land 		√ √	√ √ √	√ √ √
VI	Assistances (<i>Pendampingan</i>) <ul style="list-style-type: none"> TFL masyarakat (social) TFL Pemda (technical) 		√ √		
VII	Operation and Maintenance				√
VIII	Monitoring & Evaluation	√		√	√

¹³⁰ Attachment of the Minister of Public Work and Public Housing No. 03/PRT/M/2015, Section 2

The sources of SLBM fund are from APBN, APBD and community members. In principle, based on Government Regulation No. 55/2005, DAK cannot be used to finance administrative activities, preparation for physical activities, research, training and official travels¹³¹. Therefore, based on the 2015 Guideline, the DAK SLBM is utilised to finance construction phase and provide assistances (see the table above). Below is the detail regarding the SLBM Sources of fund and its transfer based on 2015 Guideline:¹³²

- **APBN Fund.** The fund is transferred through Satker Provinsi which relates to the public work and public housing that is responsible for sanitation.
- **DAK and APBD.** After the RKM has been made, the fund (DAK and APBD) is transferred through *Satuan Kerja Perangkat Daerah* (SKPD) based on prevailing procedure. The Kabupaten/Kota Government is obliged to allocate co-funding (*dana pendamping*) as a physical DAK co-funding (pendamping fisik DAK) that is taken from APBD a minimum of 10% of the total DAK they receive¹³³ (in this case 10% for DAK Regular, and 0-3% for DAK additional SLBM), and to allocate 10% that is also taken from APBD for the non physical co-funding.
- **Contribution from the masyarakat.** Masyarakat provides in-kind contribution e.g. labour, materials, land and cash contribution for the operation and maintenance phase. The cash should be put in a joint account on behalf the chairman of KSM, Regency/City SKPD and Facilitator.
- **A Grant from private or funding institutions (if any).** A Grant from private institutions (e.g. company, funding institution) can be transferred directly to the KSM join account.

In terms of the formulation of the KSM, the 2015 Guideline does not specifically require a legal entity. It states that the KSM is established based on the consensus (*musyawarah mufakat*) by the users (*calon penerima manfaat*). The formation of KSM at the minimum consists of a chairman, treasurer, secretary, technical staff and members. DAK SLBM is implemented in the form of *swakelola* (self-managed) activities managed by the KSM based on the Presidential Regulation No. 54/2010 and its amendment Presidential Regulation No. 70/2012 on Procurement of Government Services and Goods.

As seen on the table, the community is expected to cover for the operation and maintenance of the DAK SLBM Program. What constitutes *operation and maintenance* itself is not specified by the 2015 Guideline.

iii. Ministry Expenditure (Belanja Kementerian)

The development of sanitation project can be funded by Ministry Expenditure budget based on policy, plan/program and budget stipulated by each ministries¹³⁴. In general the source of fund of K/L is mainly from the state revenue, grant and loan. K/L Pekerjaan Umum (PU/Public Work) can allocate budget to finance physical construction for sanitation project. In addition, the relevant K/L such as Ministry of Health, Ministry of Home Affairs, Ministry of Environment, and Bappenas can finance ***non-physical items*** related to the sanitation project¹³⁵.

iv. Deconcentration (*Dekonsentrasi*) and Co-administration (*Tugas Pembantuan*) Funds

Deconcentration principle is an authority assigned by the Central Government to Governor as the Government's representative and/or to any vertical Agency in certain regions and/or to Governor and Mayor as the persons in charge for general government affairs¹³⁶. Deconcentration fund shall be any fund coming from APBN implemented by Governor as the Central Government representative, including all revenues and expenditures in order to implement Deconcentration, excluding any fund allocated for central vertical

¹³¹ GR No. 55/2005 Regarding Balance Fund Article 60 (3)

¹³² Attachment of the Minister of Public Work and Public Housing No. 03/PRT/M/2015, Section 2

¹³³ GR No. 55/2005, Article 61

¹³⁴ Petunjuk Praktis Identifikasi Sumber Akses Pendanaan Sanitasi, p. 16

¹³⁵ Panduan, Sumber dan Mekanisme Pendanaan Sektor Sanitasi 2010, p.15

¹³⁶ Law No. 23/2014 Article 1 number 9

agency in such region¹³⁷. The fund *shall be allocated for non-physical activity only*¹³⁸, for example: planning, training, supervising and controlling to support the sanitation program. Basically, the fund can be used to support sanitation physical program activities as long as it is not more than 25% of the total budget. The fund shall be allocated after the government authority has been devolved via the ministry/institution to governor (as the Government's representative in the region)¹³⁹.

On the other hand, Co-administration principle is an assignment from the Government to autonomous regions to implement certain duties that are under the authority of Government or is an assignment from Provincial Government to Regency or City to implement certain duties that are under the authority of Provincial Government.¹⁴⁰ The assigned party has obligation to report and account for its implementation to the assigning party. The Co-administration fund shall be any fund coming from APBN implemented by region and village, including all revenues and expenditures in order to implement co-administration duties¹⁴¹. The fund shall be allocated for physical activity only¹⁴², for example: buying land, machinery and equipment etc. Funding for co-administration shall be allocated after the government has made an assignment through the ministry/institution to governor/mayor/and or head of the village¹⁴³. In addition, the fund can be used to support sanitation non- physical program activities as long as it is not more than 10% from the total budget.

Any goods purchased or acquired from the implementation of Deconcentration and Co-administration Funds shall become the state's property.¹⁴⁴ SKPD shall administer the state's property pursuant the rule of law¹⁴⁵. The state's property aforementioned may be granted to regions¹⁴⁶. In the event that the state's property is granted to regions, the administration and utilization of the property shall be administered by the provincial or regency/city government and treated as a regional property.¹⁴⁷ Any grant, administration, and utilization of property shall constitute an integral part of the management of state/regional property¹⁴⁸.

c. APBD Sources

i. Grant to Regional Government

Central government can provide grant to regional government. From the regional government's perspective, this grant then becomes its income. The grant fund can be derived from central government's *original* income or from foreign loans.

Loans borrowed by ~~loaned~~ by the central Government can be disbursed to the Regional Government as a grant (*hibah*) based on Minister of Finance Regulation No. 188/PMK.07/2012 regarding The Grant from Central Government to the Regional Government. The grant is one of the sources of regional revenue to fund activities that are under the Regional Government's authority within the framework of the financial relationship between Central Government and Local Government.¹⁴⁹ The grant should be prioritized for the public service purposes.

INDII SAIIG is managed under a grant to the Regional Government. The fund is disbursed through on granting mechanism (*mekanisme penerusan hibah*) based on Minister of Finance Regulation No. 168/2008 regarding regional grant and Minister of Finance Regulation No. 188/PMK.07/2012.

¹³⁷ GR No. 7/2008 on Deconcentration and Co-administration, Article 1 number 14

¹³⁸ GR No. 7/2008, Article 20

¹³⁹ Ibid, Article 20(2)

¹⁴⁰ Article 1 number 11 Law No. 23/2014

¹⁴¹ GR No. 7/2008 on Deconcentration and Co-administration, Article 1 number 15

¹⁴² Ibid, Article 49(2)

¹⁴³ Ibid, Article 49(1)

¹⁴⁴ Ibid, Article 27 (1), Article 56

¹⁴⁵ Ibid, Article 27(3)

¹⁴⁶ Ibid, Article 27 (3), Article 57(1)

¹⁴⁷ Ibid, Article 28(2), Article 57(2)

¹⁴⁸ Ibid, Article 29(2), Article 58 (1)

¹⁴⁹ Ibid, Article 6(1)

Since the fund is coming from overseas, the Central Government and the funding institutions should sign the agreement. After that, the central government transfers the fund to the regional government (APBD). The grant from the central government to other regional government or vice versa, shall be integrated and managed under the APBN and APBD mechanisms.

The criteria of INDII SAIIG recipients are: a) have a regency/city sanitation strategy (SSK/Strategi Sanitasi Kabupaten/Kota), b) have a valid RPIJM Cipta Karya, c) having a program that is in line with the type of SAIIG infrastructure, d) availability of land for the proposed program, e) have institution that is prepared to manage the program¹⁵⁰. In addition, requirements for the recipients are: formulating comprehensive plan on sanitation 2012-2014, budgeting programs that will be proposed in the DPA (*Dokumen Pelaksanaan Anggaran*/budget implementation document) during 2013-2014, willing to extend the scope of services and improve sanitation performances, willing to disseminate equal gender and the sanitation improvement, and willing to improve regulation regarding sanitation and wastes. The SAIIG supports the development of a centralised wastewater treatment system (system pengolahan air limbah) for 200-400 households and for community scale (50 households) which will be connected to the centralised system.

As the grant goes first to the central government, the SAIIG require some formalities from the ministry of finance, in the form of issuance of *Surat Persetujuan Penerusan Hibah* (approval letter regarding on-granting mechanism) the signing of the *Perjanjian Penerusan Hibah/PPH* (agreement regarding the on-granting mechanism). In this case, the Minister of Finance and the Head of the Regional Government as the hibah recipients sign the PPH.¹⁵¹

ii. Regional Loan

Regional loan is all transactions, which caused the region, to receive some amount of money or received benefits of monetary value from other parties in which the region is obligated to pay back.¹⁵² The sources of the regional loan are the central government, other regional government, monetary institution, non-monetary institution, and community members.¹⁵³ We have yet to see example where it is used in sanitation context but there are possibilities that it has been used or will be used in the future.

iii. Regional Retribution (Retribusi)

The liquid waste (*limbah cair*) management and service for septic tank desludging (penyediaan/penyedotan kakus) are examples of the types of *retribusi jasa umum* (general service retribution).¹⁵⁴ General service retribution is charges as payment for services provided or supplied by regional government for the benefit of individuals or an entity. The object of the retribution is the service and/or desludging of the septic tank by the regional government (Pemda). The service provided and/or desludging by, owned and/or managed by BUMN, BUMD or private sector is exempted as an object of retribution. This means that services by KSM cannot be financed through the retribution scheme.

In terms of wastewater management, the object for the retribution is the service for the wastewater management for households, offices, and industries that is provided by, owned by and/or specifically managed by regional government in the form of wastewater treatment facility.¹⁵⁵ When the services are provided by central government, BUMD, private sector, and the wastewater is directly discharged to the river, drainage and/or other disposal facilities, they are exempted as objects of retribution.¹⁵⁶ The implementation of retribution at the local level is regulated under a Perda. In Yogyakarta for example,

¹⁵⁰ Pedoman Pengelolaan Program Hibah Australia-Indonesia untuk Pembangunan Sanitasi, April 2012, Kementerian Pekerjaan Umum Direktorat Jenderal Cipta Karya, p.12, http://ciptakarya.pu.go.id/dok/hukum/pedoman/hibah_australia_sanitasi.pdf

¹⁵¹ Pedoman Pengelolaan Program Hibah Australia-Indonesia untuk Pembangunan Sanitasi, April 2012, Kementerian Pekerjaan Umum Direktorat Jenderal Cipta Karya, p.24, http://ciptakarya.pu.go.id/dok/hukum/pedoman/hibah_australia_sanitasi.pdf

¹⁵² GR No. 30/2011 on Regional Loan, Article 1 (1)

¹⁵³ Ibid, Article 10

¹⁵⁴ Law No. 28/2009 on Regional Tax and Retribution, Article 110 (1)

¹⁵⁵ Law No. 28/2009 on Regional Tax and Retribution, Article 121 (1)

¹⁵⁶ Law No. 28/2009 on Regional Tax and Retribution, Article 120 (1), (2), Article 121 (1), (2)

wastewater retribution is regulated under Perda Kota Yogyakarta No.5/2012 on General Service Retribution. The objects of the retribution are facilities and/or services provided by regional government for the domestic wastewater management, which includes the use/utilisation of wastewater network and treatment (*jaringan dan instalasi pengolah air limbah domestik*).¹⁵⁷

The amount (tariff) of retribution is calculated by considering the cost of service that includes operational and maintenance cost (*biaya operasi dan pemeliharaan*), interest cost (*biaya bunga*) and capital cost (*biaya modal*). In addition it also considers the affordability of community members (*masyarakat*) and justice principle¹⁵⁸. Based on the Perda, the tariffs for the individuals or entities that are using the facilities/services of limbah cair management are as follows¹⁵⁹:

Wastewater Retribution in Yogyakarta

No	Type of Services	Tariff (IDR/Month)	Notes
	Households		
1.	RT 1	3000	Number of occupants between 1-5 people.
2.	RT 2	9000	Number of occupants between 6-10 people.
3.	RT 3	16000	Number of occupants between 10-15 people.
4.	RT 4	22000	Number of occupants more than 15 people.
II	Social		
1.	S1	6000	Worship places, social homes, and museums.
2.	S2	9000	Offices with employees less than 25 people, schools with teachers and students less than 180 people.
3.	S3	22000	Offices with employees of 25 to 50 people, schools with teachers and students of 180 to 240 people.
4.	S4	37500	Offices with employees more than 50 people, schools with teachers and students more than 240 people.
III	Commercials		
1.	K1	9000	Users of the facilities/services of air limbah domestik are up to 10 people and the capital less than Rp. 50,000,000
2.	K2	22000	Users of the facilities/services of air limbah domestik are 11 to 50 people and the capital up to Rp. 100,000,000
3.	K3	45000	Users of the facilities/services of air limbah domestik are 50 to 100 people and the capital is from Rp. 100,000,000 to Rp. 500,000,000
4.	K4	75000	Users are 100 to 150 people and the capital is from Rp. 500,000,000 to Rp. 1,000,000,000.
5.	K5	125000	Users of the facilities/services of air limbah domestik are more than 50 people and the capital is more than Rp. 1,000,000,000.

¹⁵⁷ Perda Kota Yogyakarta No.5/2012 on General Service Retribution, Article 54

¹⁵⁸ Law No. 28/2009 on Regional Tax and Retribution, Article 152 (1), (2)

¹⁵⁹ Perda Kota Yogyakarta No.5/2012 on General Service Retribution, Attachment VIII

No	Type of Services	Tariff (IDR/Month)	Notes
IV	Hotel or lodging		The hotel and lodging are charged based on tariff per room in monthly basis. Per bulan dengan besaran tarif sesuai kelas hotel
	Four and five stars hotels	4500	The amount to be paid per room/monthly
	One to three stars hotels	3500	The amount to be paid per room/monthly
	Melati (medium level) of hotels/lodging	2000	The amount to be paid per room/monthly
	Losmen (low to middle level of lodging)	1000	The amount to be paid per room/monthly

The amount of retribution that has to be paid by customers is stipulated in the SKRD/*Surat Ketetapan Retribusi Daerah* (regional retribution stipulation letter) or another document that is equivalent (e.g. ticket, coupon, subscription card).¹⁶⁰ The revenue is stored in regional cash account (*kas daerah*). The utilization of the revenue from the retribution is prioritized to finance the activities that are related to the services.¹⁶¹ The allocation and spending of the revenue from retribution is further regulated under Perda.

iv. Sources of Fund from other parties (non Governmental institutions)

Grants from Private Institutions

Budget for the operation and maintenance can be obtained through private institutions or individuals (e.g. company, donation from an individual, groups) in the form grant (*hibah*) by transferring the fund directly to the KSM.

Iuran by Community members

The community members may impose a less formal or less structured form of payment (*iuran*) which is based on consensus and manages the fund for operational and maintenance of the infrastructure. This is implemented in almost every program, the most recent one the DAK Sanitasi.¹⁶²

The KSM sets the budget and plan regarding operational and maintenance (it could be included in the RKM/*Rencana Kerja Masyarakat* and supervised by the SKPD). The plan should be discussed with the community members (as users). It should involve the amount of money, period of collection, person in charge for the collection and the management of the fund. After the agreement is reached, it should be written in AD/ART (article of association) of the KSM. Social sanctions (i.e. prohibition to use the facility, shaming) are normally imposed for those who don't pay *iuran*. This mechanism is outside the APBD mechanism.

¹⁶⁰ Law No. 28/2009 on Regional Tax and Retribution, Article 160 (1), (2)

¹⁶¹ Law No. 28/2009 on Regional Tax and Retribution, Article 161 (1)

¹⁶² See for example Peraturan Menteri Pekerjaan Umum Dan Perumahan Rakyat Republik Indonesia Nomor 03 /PRT/M/2015 Tentang Petunjuk Teknis Penggunaan Dana Alokasi Khusus Bidang Infrastruktur. Attachment II.3.3. Dana Masyarakat

d. Regional Expenditures (Belanja Daerah)

One way of looking at sanitation financing is by evaluating its financing source (income side) – as discussed in the previous section – but this is incomplete without the evaluation of *how local governments spend their money* (expenditure side). Regional budget cycle in Indonesia is very complicated, however, in our opinion, there are three categories of documents of utmost importance in evaluating expenditure: (a) RKA-SKPD / PPKD (documents of each SKPD/PPKD on the planning stage – what *will* be financed and spent), (b) DPA-SKPD (approved budget plan for each SKPD) and finally the (c) detail budget realisation report of each SKPD. Although sanitation expenditure spans across several SKPDs, it is possible to analyze the budget of “core” SKPDs tasked with public works, human settlement, environment and public health functions.

Unfortunately, those documents above are usually not publicly disclosed. Regional (and central) governments usually only disclose the abridged form totaling the whole budget. With such bulk presentation, it is not possible to identify which budget line item is utilized for what. Our discussions with several officials revealed that disclosure of detailed budget line items are extremely sensitive “kitchen secret” of each ministry/dinas.¹⁶³ As such, this section will utilise information from interviews and documents which is disclosed, such as Jakarta’s DPA-SKPD, which is disclosed in its governor’s personal website.¹⁶⁴

Regional expenditures (*Belanja Daerah*) are used by Kabupaten/Kota to finance its mandatory (and optional) affairs. It consists of (under a 2006 rule¹⁶⁵) Direct Expenditures and Indirect Expenditures in which each is broken down into several other categories as discussed below.

i. Direct Expenditures (Belanja Langsung)

Direct expenditure is a type of expenditure directly related to the implementation of program and activities.¹⁶⁶ It consists of several categories: employee expenditure, goods and services expenditure and capital expenditure.¹⁶⁷

Employees Expenditure (Belanja Pegawai)

This type of expenditure is used to pay *honorarium* in conjunction with certain program or activities.¹⁶⁸ In this category, the recipient will have to be engaged or involved in certain activities. As an example, one region utilized this line item for paying sanitation meeting *honorarium* (paid at the attendance each meeting) and for paying the *honorarium* of technical implementers.¹⁶⁹

Another interesting and “innovative” use of this line item is in Jakarta, where it is used to pay for the *honorarium* of KSM involved in the management of solid waste.¹⁷⁰ This line item used account code 5.2.1.02.02 (note: account codes may change with latest regulation). Under the regulation on regional finance, this code is used for the expenditure for the remuneration of non-state (non-permanent) employees (known in Indonesia as *pegawai honorer*).¹⁷¹ Interestingly, in Jakarta this code is utilized for paying non-state employees, working on non-state institutions, in this case, KSM operating “waste bank” (*bank sampah*).

¹⁶³ Personal communication with officials from the Central Government, Jakarta, 1/2/2016

¹⁶⁴ ‘Dokumen Pelaksanaan Anggaran Satuan Kerja Perangkat Daerah Provinsi Daerah Khusus Ibukota Jakarta Tahun Anggaran 2013, Dinas Kebersihan’ <<http://ahok.org/apbd/2013/DINAS%20KEBERSIHAN.pdf>> accessed 4 January 2016.

¹⁶⁵ Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah.

¹⁶⁶ *ibid.*, Article 36(3)

¹⁶⁷ Minister of Home Affairs Regulation No. 13/2006 regarding Pedoman Pengelolaan Keuangan Daerah, Article 50

¹⁶⁸ Minister of Home Affairs Regulation No. 13/2006 regarding Pedoman Pengelolaan Keuangan Daerah, Article 51

¹⁶⁹ [http://ppsp.nawasis.info/dokumen/perencanaan/sanitasi/pokja/bp/kab.sukamara/21.14%20koordinasi%20perencanaan%20pembangunan%20bidang%20fisik%20dan%20prasarana\(2\).pdf](http://ppsp.nawasis.info/dokumen/perencanaan/sanitasi/pokja/bp/kab.sukamara/21.14%20koordinasi%20perencanaan%20pembangunan%20bidang%20fisik%20dan%20prasarana(2).pdf)

¹⁷⁰ See ‘Dokumen Pelaksanaan Anggaran Satuan Kerja Perangkat Daerah Provinsi Daerah Khusus Ibukota Jakarta Tahun Anggaran 2013, Dinas Kebersihan’ (n 164).

¹⁷¹ Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 165). Attachment A

We are of the view that such code *could potentially* be used to pay for the remuneration of KSM officers operating in wastewater too. The argument that they do not work for government institution – but for KSM, a non-government entity – carries less weight compared to the argument that they are serving *some* governmental functions as both solid waste and wastewater management are parts of mandatory government affairs under regional autonomy laws. However, this will require more analysis and discussion with the ministry of home affairs and state audit agency.

Goods and services expenditure (Belanja barang dan jasa)

This type of expenditure can be used to pay for logistics whose use-value is less than 12 months, such as consumables, insurances, vehicle maintenance, renting of heavy equipment and office equipment.¹⁷² The regulation stipulates that this type of expenditure can be used to pay for goods and services which will be transferred or sold to “masyarakat” (it does not specify individual or legal entity) or third parties (*barang dan jasa yang diserahkan kepada masyarakat*).

Various types of expenditure in this category can only be used for internal use, for example, expenditures for office supplies (consumables), materials, vehicle services and parts replacements, rents, official travels, assets maintenance, etc. These expenditures can be used to maintain the value of government’s assets, such as wastewater treatment plants and machineries. Thus, these expenditures can be used to support post-construction of local scale sanitation *indirectly*, for example, by facilitating the logistics of SKPD or other entities tasked with overseeing local scale community wastewater. In one Kabupaten, the budget line item for consumables, food and grocery shopping, “services for third parties”, etc have been used to facilitate the Bappeda’s meeting and coordination for drafting *Buku Putih Sanitasi* and buying equipment related to such purpose.¹⁷³

A sub-category of expenditure that is used for *direct* support of local scale community sanitation is goods expenditure to be transferred (granted) or sold to third parties (*Belanja barang untuk diserahkan kepada masyarakat*). We receive information through interview – but unable to validate – that in one city, this line item is used for rehabilitation (painting) and extending household connection.¹⁷⁴ Presumably, this line item is used to procure pipes and paints which will then be transferred to KSMs through grant (*hibah*) scheme (note that there is another budget line for grant scheme, called *belanja bantuan sosial dan hibah* – will be discussed on d.ii below; see Grants Expenditure and Social Assistance Expenditure). Under a 2011 accounting rule, this line item account code is 5.2.2.23.01.¹⁷⁵

The rules on grants are contradictory and ambiguous, as will be explained below. The ambiguity has fostered both corruption and at the same time reluctance from SKPD in using grant mechanism.

A 2007 regulation of regional assets – which does not specifically address the budget line item “goods expenditure to be transferred (granted) or sold to third parties (*Belanja barang untuk diserahkan kepada masyarakat*)” regulates the criteria for the granting goods too “masyarakat”. According to the rule, the goods to be granted shall not pertain to state/regional secret, is not goods that is considered to control the livelihood of many people and that the good(s) is no longer used (*tidak digunakan lagi*) for the undertaking of main tasks and functions of the regional government.¹⁷⁶ There is also a requirement that any grants whose value exceeds IDR 5 billion must obtain the approval of regional parliament (DPRD). Although this rule does not specifically address such line item, by virtue of the definition of grant in that rule, we believe that the line item could be covered.

¹⁷² Peraturan Menteri Dalam Negeri Nomor 21 Tahun 2011 Tentang Perubahan Kedua Atas Peraturan Menteri Dalam Negeri Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah. Article I para 6

¹⁷³ [http://ppsp.nawasis.info/dokumen/perencanaan/sanitasi/pokja/bp/kab.sukamara/21.14%20koordinasi%20perencanaan%20pembangunan%20bidang%20fisik%20dan%20prasarana\(2\).pdf](http://ppsp.nawasis.info/dokumen/perencanaan/sanitasi/pokja/bp/kab.sukamara/21.14%20koordinasi%20perencanaan%20pembangunan%20bidang%20fisik%20dan%20prasarana(2).pdf)

¹⁷⁴ Interview with a government official, ISF Team, 12/18/15

¹⁷⁵ Peraturan Menteri Dalam Negeri Nomor 21 Tahun 2011 Tentang Perubahan Kedua Atas Peraturan Menteri Dalam Negeri Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 172). See attachment A.VIII.a.1

¹⁷⁶ Peraturan Menteri Dalam Negeri Nomor 17 Tahun 2007 Tentang Pedoman Teknis Pengelolaan Barang Milik Daerah. Article 78

Presumably, the clause *is no longer used* intend to regulate that only goods which are no longer used for specific task and functions can be granted to “masyarakat”. For example, if governments are buying pipes and paints for their building, and the repair works have been completed and there are exceed of stocks, they can transfer the goods to the community. The original intention for this was that the government would own the goods.

Nevertheless, in another clause in the 2007 regulation, it is stipulated that there are two kinds of goods which can be granted (i) goods that are transferred to regional heads (meaning, goods that are already available) and (ii) goods that needs to be procured with the intention of granting it to third parties or “masyarakat” (meaning that unlike the pipes and paint example above, the goods are not available during the budget planning stage and needs to be procured).¹⁷⁷ The second category enables an SKPD to plan ahead for grants, but somewhat inconsistent with the clause *is no longer used* above.

The next discussion is going to be rather complicated for non-lawyers, but there is no other way for presenting the analysis:

Other than the 2007 rule, there is a 2011¹⁷⁸ rule on grant and social assistance and the new 2014 Law on Regional Government that also regulates grants by requiring the recipient to be a legal entity. There are disagreement on whether these two rules are also applicable for this budget line item. If the phrase *no longer used* (see above) is taken into account in the legal interpretation, it would appear that the 2007 and 2011 rules regulate two different things. In addition, under the 2007 rule, the goods (or other assets) must first be removed from the government’s assets register list before it can be transferred (through grant, sale or other mechanism) to the “masyarakat” or third parties.¹⁷⁹ This requirement also makes the phrase *no longer used* more reasonable, because it indicate that such goods, before they are transferred, belongs (is in the ownership of) the local government.

On the other hand, if we look at the attachment III B of the 2011 rule, which stipulates that goods and services expenditure – grants of goods/services transferred to third parties and “masyarakat” – it appears somewhat strongly that the budget line item being discussed is covered by the rule.¹⁸⁰ Furthermore, Article 11 of the 2011 rule stated that “...goods grants (*hibah barang*) is included as a part of direct expenditure, formulated into programs and activities, **further detailed into [the account of] goods and services expenditure...**”. Under the accounting rule, the account code for goods and services expenditure (*belanja barang*) is 5.2.2.xx.xx whereas the account code for grant expenditure (*belanja hibah*) is 5.1.5.xx.xx – a separate code. This signifies that the 2011 rule intended to regulate *both* account codes/budget lines.

This interpretation is reasonable because the 2007 rule does not strictly regulate the recipient of the *grant*, which means that, if this rule is taken alone without the 2011 rule, SKPDs can provide grant to any parties they like (to the extent that it is approved) – this could be a recipe for corruption. Therefore, the 2011 rule *must have been intended* to cover also the transfer of goods to “masyarakat” under the 2007 rule. If this interpretation is taken, then, the utilization of this budget line would be very strict: it is regulated by conditions stipulated under two rules: the 2007 rule and the 2011 rule. We shall discuss the 2011 rule in more detail under **Grants Expenditure (Belanja hibah)** below.

Capital Expenditure (Belanja Modal)

Another important budget category is capital expenditure (Belanja Modal). According to a 2006 regulation, this category is used for expenditure involving the purchase/procurement of tangible fixed assets with use

¹⁷⁷ Peraturan Pemerintah Republik Indonesia Nomor 27 Tahun 2014 Tentang Pengelolaan Barang Milik Negara/Daerah. Article 79

¹⁷⁸ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah.

¹⁷⁹ Peraturan Menteri Dalam Negeri Nomor 17 Tahun 2007 Tentang Pedoman Teknis Pengelolaan Barang Milik Daerah (n 176). Article 1 para 24

¹⁸⁰ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178).

value of more than 12 months.¹⁸¹ This category is divided into several budget line items for example land expenditure, machinery and equipment expenditure and building expenditure. The 2011 regulation provides account code 5.2.3.23.xx for capital expenditure of water networks.¹⁸²

Goods that are meant to be transferred to third parties or “masyarakat” should not be categorized as capital expenditure. They should be categorized as goods and services expenditure to be transferred to masyarakat/third parties as discussed earlier above. Goods/assets which are categorized under capital expenditure but are then transferred to the “masyarakat” have, in practice, triggered corruption investigation.¹⁸³

The capital expenditure category can certainly be used for wastewater infrastructure, such as treatment plant, buildings and equipment, including its maintenance, to the extent that the assets are owned by the government. For the central government, the budget line item “road, irrigation and network expenditures” for example, will cover not only maintenance of networks but also replacement and enhancement that adds to the capacity of such network.

ii. Indirect Expenditures

Indirect expenditure is a type of expenditure not directly related to program or activities. It is divided into several categories: employee expenditure, interest expenditure, subsidy expenditure, grants expenditure, social assistance expenditure, profit-sharing expenditure, financial assistance to other local governments or village and contingencies. Some of these categories, which are relevant to local scale community sanitation, will be discuss in more detail.

Employee Expenditures

This type of expenditure is not related to certain activities or program, thus different from honorarium line item discussed in direct expenditure above. Employee expenditure pays for salaries of state employees (which could depend on their levels), regional heads, parliament’s members, etc.¹⁸⁴ These are paid irrespective of productivity or organizational goals. To the extent that it is used to pay for the salaries of SKPD or units tasked with supporting local scale community sanitation, this budget line item could indicate the state of support from local government to local scale sanitation.

Subsidy Expenditure

This expenditure aims to subsidy *production costs* so that the selling price becomes affordable for “masyarakat”.¹⁸⁵ This budget is mainly for "Public Service Obligation" where the government intervenes the selling price.

Typically, subsidies are provided only to support regional or state owned enterprises. However, the 2006 rule on regional finance does not require subsidy recipients to be a region owned enterprise, it only requires that the company/institution (to be subsidized) produce goods or public services.¹⁸⁶ It also requires the recipient to be audited first and later on, deliver accountability report to regional heads. The subsidy scheme is a part of APBD and thus its accountability is a part of APBD accountability procedure.

¹⁸¹ Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 165). Article 53

¹⁸² Peraturan Menteri Dalam Negeri Nomor 21 Tahun 2011 Tentang Perubahan Kedua Atas Peraturan Menteri Dalam Negeri Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 172). See attachment A.VIII.a.1

¹⁸³ ‘Temuan BPK RI Sudah Di Tindaklanjuti - Radar Nusantara’ <<http://www.radarnusantara.com/2013/09/temuan-bpk-ri-sudah-di-tindaklanjuti.html>> accessed 18 December 2015.

¹⁸⁴ Minister of Home Affairs Regulation No. 13/2006 regarding Pedoman Pengelolaan Keuangan Daerah, Article 38 (1)

¹⁸⁵ Minister of Home Affairs Regulation No. 13/2006 regarding Pedoman Pengelolaan Keuangan Daerah, Article 41 (1)

¹⁸⁶ Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 165). Article 41

The 2006 rule authorized regional heads (*walikota/bupati*) to regulate this in more detail in *walikota/bupati* regulation.¹⁸⁷ This provides ample flexibilities for the regional heads in regulating subsidies in its territory.

Since the 2006 regulation leave the regional heads to regulate in detail, the regulatory practice of subsidy are different from region to region. In Natuna, subsidy must be proposed by relevant SKPD/Dinas, specifying the technical consideration for such proposal including presentation of an audit report and other prerequisites.¹⁸⁸ This is preceded by a proposal from candidate recipient and a statement of ultimate responsibility. In Palembang, a specific *Walikota* regulation is issued for the subsidy of a transport company (region-owned).¹⁸⁹ In Pekanbaru, the subsidy regulation also regulates grants and social assistance fund.¹⁹⁰

The subsidy scheme could potentially be used to provide *direct support* to local scale community sanitation because regulation does not strictly regulate the type of recipient. The fact that KSM serve public service function should adequately justify the subsidy. It can also be used to provide *indirect support* if it is allocated to subsidize water treatment facilities (IPLT) so that it can charge more affordable prices to KSMs.

If subsidies are to be used for supporting local scale sanitation, then there are several issues that needs attention: (i) the role of SKPD is proposing and later on supervising the subsidy, (ii) the inclusion in regional budget cycle/APBD and (iii) the reporting capacity of recipient KSMs.

Grants Expenditure (Belanja hibah)

Grants expenditure and social assistance expenditure are the type of budget line items which often provoke corruption investigation as they are prone from being politicized or used as campaign gimmick. As such, in 2014, the new law on regional government stipulates that only organizations with legal entity status can receive grant (hibah).¹⁹¹ The law does not directly require social assistance recipients to fulfill this prerequisite as social assistance recipients are usually individuals or families.

A 2011 regulation on grants and social assistance regulates the detail mechanism for the provision of grants and social assistance.¹⁹² The 2011 rule define grants as the transfer of money or goods and services to other parties, which has been specifically determined, not obligatory in character, not “binding” [for the recipient], temporary and has the purpose of “supporting” program and government activities.¹⁹³ Regulation also stipulates that the grant should come secondary, only after the government prioritized the fulfillment of its “mandatory affairs”.¹⁹⁴

This entails that grants mechanism is considered “auxiliary” to the government; it is only to “support” the attainment of government’s core function. The temporary nature means that grants cannot be relied for continual support of KSMs but would be suitable for incidental and one-time purposes such as on the construction phase. Continuous provision of materials or money to KSMs during post construction phase would be contrary to the 2011 regulation.

Grants recipient under 2011 rule are categorized into two: “masyarakat” and/or mass organizations. “Masyarakat” grant recipients must have clear [organisational] structure and have a seat on that local government’s jurisdiction that provides the grant. Grants to mass organizations require that the organization is registered for at least 3 years and have permanent secretariat.¹⁹⁵ This regulation does not require grant

¹⁸⁷ *ibid.* Article 41

¹⁸⁸ Peraturan Bupati Natuna Nomor 61 Tahun 2014.

¹⁸⁹ Peraturan Walikota Palembang Nomor 9 Tahun 2014 Tentang Tata Cara Penyediaan, Pencairan dan Pertanggungjawaban Belanja Subsidi Angkutan Bus Rapid Transmusi (BRT).

¹⁹⁰ Peraturan Walikota Pekanbaru Nomor 4 Tahun 2011 Tentang Tata Cara Pemberiandan Pertanggungjawaban Belanja Subsidi, Hibah Dan Bantuansosial.

¹⁹¹ Undang Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah (n 1). Article 298 (5)

¹⁹² Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178).

¹⁹³ *ibid.* Article 1 (14)

¹⁹⁴ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178).Article 4

¹⁹⁵ *ibid.*

recipient to be a legal entity. The 2014 Law however, supersedes the 2011 regulation in this respect. The MOHA has issued a circular¹⁹⁶ suggesting that the requirement for legal entity will not be enforced for grants which have been approved and will only cover future grants. There is no guarantee that this would be enforced in practice especially since a circular is not binding as law.

Another important feature of the 2011 regulation is the obligation of grant recipient (together with regional heads) to sign a letter of grant agreement (NPHD), specifying the grantor and the grantee, the purpose of such grant, the amount or detail of the utilization of grant, the rights and obligations of the parties, methods of transfer or disbursement and reporting mechanism.¹⁹⁷ The government must supply evidence of transfer (for monetary grants) or Memorandum of Transfer (Berita Acara Serah Terima) for goods/services. The grant mechanism has been used for local scale sanitation under DAK SLBM scheme. We received sample of NPHD for SLBM in Temanggung for the purpose of monetary grant.¹⁹⁸

Note that previously when discussing *direct expenditure* we have discussed that the 2011 rule can also be applicable for account code goods and services which will be transferred or sold to “masyarakat” (*belanja barang yang diserahkan kepada masyarakat*). The 2011 rule stipulates that when the grant is in the form of money, it must be categorized as *belanja tidak langsung, jenis belanja hibah* (indirect expenditure, hibah expenditure). On the other hand, if it is in the form of goods and services, it must be categorized as *belanja langsung, jenis belanja barang dan jasa* (direct expenditure, goods and services expenditure – the account code of which is 5.1.5.xx.xx according to the accounting rule) – as discussed earlier.

Social assistance expenditure (Bantuan Sosial)

The 2011 regulation also covers social assistance expenditure. It stipulates that the government can provide social assistance to members (individuals) or group of “masyarakat” in accordance with the region’s financial capability.¹⁹⁹

The social assistance can be in monetary or physical form (goods). As this is a part of the APBD, it cannot be promptly disbursed, it must go through several stages: written proposal from individuals/”masyarakat” to regional heads, evaluation from related SKPD, recommendation from SKPD, inclusion in the RKA-SKPD (SKPD budget planning document) and so on until the APBD is finally approved, executed and reported.

One of the important part in the 2011 regulation is that it stipulates²⁰⁰ that social assistance in the form of money should go into the *belanja bantuan sosial* account (social assistant account code is 5.1.5.xx.xx according to the accounting rule²⁰¹) whereas if it is in the form of goods, it must be lodged as goods and services expenditure (more specifically “*belanja barang yang akan diserahkan kepada masyarakat*” the code is 5.2.2.23.xx according to the accounting rule).

This implies that any transfer of goods to the “masyarakat” should go under the account of “*belanja barang yang akan diserahkan kepada masyarakat*” (5.2.2.23.xx). This account, therefore, could be used to cover three types of expenditures: “ordinary” transfer covered under 2007 rule, grant for goods and services under 2011 rule and social assistance in the forms of goods under 2011 rule. As discussed previously (when discussing direct expenditure above), there is disagreement as to whether ordinary “transfer” under 2007 rule are also covered (additionally) by the 2011 rule.

The criteria for recipient are also specified by the 2011 regulation.

¹⁹⁶ Surat Edaran Nomor 900/4627/Sj Tentang Penajaman Ketentuan Pasal 298 Ayat (5) Undang-Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah’. Article 7

¹⁹⁷ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178). Article 13

¹⁹⁸ Naskah Perjanjian Hibah Daerah, SLBM, Temanggung, 2015

¹⁹⁹ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178). Article 22

²⁰⁰ ibid. Article 30

²⁰¹ Peraturan Menteri Dalam Negeri Nomor 21 Tahun 2011 Tentang Perubahan Kedua Atas Peraturan Menteri Dalam Negeri Nomor 13 Tahun 2006 Tentang Pedoman Pengelolaan Keuangan Daerah (n 172). Attachment A.VIII.a.1

There are generally two recipients: individuals/"masyarakat" and organizations. The first category is individuals, families and/or "masyarakat" with unstable condition due to social, economics, political, disaster or natural phenomenon *crisis*, with the purpose of fulfilling their minimum living requirement.²⁰² The 2011 regulation thus require somewhat more restrictive condition, a *crisis* for the use of this expenditure. However, the types of crisis are quite wide, covering economic to natural disaster and also the phrase "minimum living requirement" could potentially cover different basic necessities from food to health and sanitation. As such, this expenditure have been used for various "poverty alleviation" programs. The second category, non government organizations, in the fields of education, religion or other fields who protects individuals/groups/"masyarakat" from "social risks".²⁰³

Additionally, the regulation requires fulfilment of additional criteria for the use of this expenditure category. The first criterion is *selective* which means that the recipient must face "social risks". The second criterion is clear identity (of the recipient) and domiciled in the jurisdiction of the local government. The aid must be temporary and not continual, which means that there is no obligation that it continues to be budgeted every financial year, but it can be budgeted every year until the recipient is free from "social risks".²⁰⁴

The 2011 regulation also stipulates that the use of this expenditure must be for (any) of the purposes which have been restrictively determined. The purposes are as follows: social rehabilitation (the purpose of which is to address social dysfunction; recover and develop a person(s) social function); social protection (the purpose of which is to prevent and mitigate social vulnerabilities so that the individual/community groups can fulfil its minimum basic needs); social empowerment (to enable individuals/groups with capability in fulfilling their own needs); social security (an institutionalized scheme which guarantees its recipient in fulfilling a decent life); poverty alleviation (programs for individuals/families/groups which does not have sustainable means of living or occupation and unable to fulfil basic needs) and disaster mitigation (which are aimed at rehabilitation).²⁰⁵

Basic urban sanitation can fall under various criteria stipulated above. Therefore, this type of expenditure is suitable for the construction phase of local scale community sanitation, or in the event of major structural damage due to disasters. The restriction on this type of expenditure is similar to grant expenditure, namely, that it should be temporary. Furthermore, the expenditure cannot be used to finance ongoing or continuous maintenance and operation as it can only be disbursed if there is a "crisis". This type of expenditure was used **by the central government** for SANIMAS-USRI (thus, under slightly different accounting method and not covered by the 2007 and 2011 rules above).

e. Institutional Set-up and Budget Consequences

i. UPTD

UPTD (Unit Pelaksana Teknis Daerah) is a sub unit of the local agency (dinas). It is formed for the operation (of technical matters) in specific areas. UPTD PAL (*Pengelola Air Limbah*) in principle is an institution responsible for the treatment of *lumpur tinja* (sludge), air limbah and the discharge system at the Kabupaten/Kota, as well as monitors/supervises the system.²⁰⁶ UPTDs are responsible to the head of SKPD that is responsible for the sanitation. As an operator, UPTD PAL has the authority to impose tariff for service. The fund will be transferred to the Pemda (local government)²⁰⁷. UPTD receives operational budget from Kabupaten/Kota government (APBD). It is possible for local government to set differential tariffs for KSMs.

²⁰²Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2011 Tentang Pedoman Pemberian Hibah Dan Bantuan Sosial Yang Bersumber Dari Anggaran Pendapatan Dan Belanja Daerah (n 178). Article 23

²⁰³ibid. Article 23

²⁰⁴ibid. Article 24

²⁰⁵ibid. Article 25

²⁰⁶<http://iuwash.or.id/uptd-pal-bagian-integral-kebijakan-sanitasi-berkelanjutan/>

²⁰⁷<http://iuwash.or.id/uptd-pal-bagian-integral-kebijakan-sanitasi-berkelanjutan/>

ii. BLUD (Badan Layanan Umum Daerah)

BLUD is a regional working unit of a unit within SKPD that is established to provide services/goods that are sold to masyarakat without considering profits but productivity and efficiency principles.²⁰⁸ The sources of revenue of BLUD are coming from²⁰⁹:

- rewards of the services that are provided for the masyarakat. In terms of BLUD sanitation it can be in the form of revenue from tariffs and charges;
- grants (*hibah* from third parties);
- cooperation with other parties such as acquisition from the operational cooperation, lease and other business that support the tasks and functions of BLUD;
- APBD, in the form of revenue that is coming from the authorisation of government credit budget (not from the APBD spending);
- APBN, in the form of revenue that is coming from the government as a result of the implementation of de-concentration and co-administration, and etc;
- Other BLUD revenue such as: a) the indivisible income from the sales of the assets (*hasil penjualan kekayaan yang dipisahkan*), b) the income from the wealth utilisation, c) current account, d) interests, e) currency exchange, f) commissions, g) deduction or other forms as a result of the sale and/or procurement of goods and services by BLUD, h) investment returns.

BLUD only manage public services while the assets are owned by Pemda. The ability of BLUD to manage the income is an important aspect to sustain the service. The sanitation operator can be in the form of BLUD based on Minister Regulation No. 16/PRT/M/2008 regarding the National Strategy Policy on the Development of the Settlement Water Development System. BLUD Sanitasi, as the air limbah operator can fix the broken pipe, fund the operation cost of vehicle even if there is a delay in the annual government budgeting process. BLUD sanitasi can purchase supplies directly without following complicated procedure.

Furthermore, the operator can employ and offer incentive to the professional staff that is very well trained and is not a civil servant. The drawback of BLUD model is the risk regarding its flexibility that can be misused. In addition, there is a possibility that BLUD can be too autonomous and act over its mandates. Intervention from the supervising unit is also a risk for BLUD. However, this risk can be eliminated if the services sold by the BLUD have achieved significant proportion of revenue for BLUD.²¹⁰ The operational costs of BLUD can be allocated from the regional expenditures (i.e. goods and service expenditure, fixed asset expenditure).

The comparison between BLUD and UPTD is as follows²¹¹:

Source: Presentation of Ditjen Bina Bangda, Ministry of Home Affairs

Aspects	UPTD Propinsi	UPTD Kabupaten/Kota	BLUD
Establishment of the organisation	Based Governor Regulation	Based on Bupati/Walikota Regulation (<i>PerWali or PerBup</i>)	Based on Decree of the Head of Regions/ <i>Peraturan Kepala Daerah</i>

²⁰⁸ Minister of Home Affairs Regulation No. 61/2007 tentang Pedoman Teknis Pengelolaan Keuangan Badan Layanan Umum Daerah, Article 1 number 1

²⁰⁹ Minister of Home Affairs Regulation No. 61/2007 tentang Pedoman Teknis Pengelolaan Keuangan Badan Layanan Umum Daerah, Article 60 and 61

²¹⁰ Visi Untuk Layanan Air Limbah yang Fleksibel dan Bertanggung Jawab, Made Bayuasa, Jurnal Prakarsa, Infrastruktur Indonesia, Edisi 7, Juli 2012

²¹¹ Penguatan Kelembagaan Pokja Sanitasi dan Alternatif Institusi Pengelola Pasca Konstruksi, Direktorat Penataan Perkotaan, Ditjen Bina Bangda, Kementerian Dalam Negeri, <http://www.slideshare.net/infosanitasi/penguatan-kelembagaan-pokja-sanitasi-di-daerah>

Aspects	UPTD Propinsi	UPTD Kabupaten/Kota	BLUD
The division of risks	The UPTD Propinsi and the Kabupaten/Kota involved shared the risks	The risks are borne solely by the Kabupaten/Kota	The risks are borne solely by the BLUD
Decision making process	The process of the decision making is long	Relatively shorter than the process at the provincial level	The decision is made independently by BLUD
Service continuity	Guaranteed	Not guaranteed	Fluctuated
Benefit sharing	The benefit is shared based on the agreement	The utilisation of the benefit is regulated	The BLUD has freedom to utilise the benefit
Investment and operational costs	Investment and operational costs are borne by the central government and province	Investment and operational costs are borne by the central government and <i>Kabupaten/Kota</i>	Investment and operational costs are borne by the BLUD but there is a participating fund from the government.
Financial support from the central government (subsidy: production and/or tariff)	High	Low	Very limited
Human resources (potential for a cooperation)	There is a potential to cooperate with the human resources that all involved in Kabupaten/Kota	The cooperation is within the human resources in the Kabupaten/Kota	Potential cooperation with regional civil servants (<i>PNSD/ Pegawai Negeri Sipil Daerah</i>) and private sector
Contribution to the PAD	Relatively low	Low	Low to Medium
Cooperation with related networks	Medium	Low to Medium	High

iii. SKPD

SKPD is a part of local government who – in budgetary sense – are regarded as budget user/goods user of the APBD.²¹² SKPD which is tasked with sanitation can vary from region to regions. In Jakarta, *Dinas Kebersihan* is tasked with monitoring and development of septic tanks and thus can allocate budget to support this function.²¹³ In Kabupaten Bone, the SKPD in charge is the *Dinas Tata Ruang, Permukiman dan Perumahan* (Spatial Planning and Housing Agency).

In Bogor, the *Dinas Pengawasan Bangunan dan Permukiman (Wasbangkim) Kota Bogor* is, in practice tasked with supporting local scale community sanitation. However, under Perda 3/2010, the *Wasbangkim* is not tasked with wastewater. Moreover, the UPTD sanitasi of Bogor is located under Dinas Kebersihan, not Wasbangkim.²¹⁴

The Bogor's Wasbangkim was established based on Perda No. 3/2010 regarding *Organisasi Perangkat Daerah Kota Bogor* (the organisation of regional apparatus in Bogor). The main task of Wasbangkim is to conduct parts of regional's authority regarding supervision of buildings and settlements. Wasbangkim is funded by APBD and/or other legal sources²¹⁵. The functions of Wasbangkim are:

- Formulating technical policies related to the supervision of buildings and settlements
- Implementing the government affairs and public services in the supervision of buildings and settlements
- Assisting and implementing the tasks regarding supervision of buildings and settlements
- Implementing other tasks given by Mayor of Bogor that relates to the Wasbangkim's tasks and functions
- Guiding the technical implementing unit in the local agency (Dinas) within the Wasbangkim's scope.

Clarity of roles and function of each SKPD under the Perda is very important because Indonesian State Finance Law adheres the "money follow function" principles. This means that budget can and should only be allocated to SKPDs that are specifically tasked with such purpose.

Our previous AIIRA research reveals that Community Based Organizations (in rural water supply functions) are often confused on which SKPDs are tasked with supervising and supporting them.²¹⁶ Apparently, this is because the Perda does not specifically define SKPD to be in charge with either community water supply or wastewater.

f. Conclusions and Recommendation

This chapter has discussed wastewater financing from various angle: from the income side (budget source) which, in general comes from either APBN, APBD or private sources, and from the expenditure side. Budgets coming from APBN (DAK or foreign loans) are usually earmarked and comes with caveat that they should be utilized for primarily physical construction and to a limited extent, to conduct trainings and facilitation. APBN source of funds also comes with some conditions that shape policy making at the most technical levels. For example, there are requirements that *operation and maintenance* funds should be derived from "masyarakat". Nevertheless, guidelines rarely mention what constitute *operation and maintenance*. In addition, local governments still have ample discretion on budget utilization, subject to certain restrictions and conditions.

²¹² Ministry of Home Affairs No. 21/2011, Article 1 number 10 on the Second Amendment of Ministry of Home Affairs No. 13/2006

²¹³ 'Dokumen Pelaksanaan Anggaran Satuan Kerja Perangkat Daerah Provinsi Daerah Khusus Ibukota Jakarta Tahun Anggaran 2013, Dinas Kebersihan' (n 164).

²¹⁴ Peraturan Daerah Kota Bogor Nomor 3 Tahun 2010 Tentang Organisasi Perangkat Daerah. Article 17

²¹⁵ Perda No. 3/2010 Article 47 Pembiayaan Organisasi Perangkat Daerah berasal dari Anggaran Pendapatan dan Belanja Daerah dan sumber lain yang sah.

²¹⁶ Al' Afghani and others (n 94).

Several guidelines on the identification of funding sources have been produced by the government, however, there is a lack of study on how government spend the money (the expenditure side). This analysis is crucial, because the expenditure analysis will influence how much support can be provided to local scale air limbah *vis a vis* KSMs. It is also important because the expenditure side is often subject to corruption investigation that in many cases discourages the budget from being utilized.

In terms of expenditure and its relationship with community local scale *air limbah* we categorize types of expenditures into two: potentials for *direct support* and potentials for *indirect support*. *Direct support* are types of expenditures that allocate resources (goods, services or money) directly to external actors, including KSMs.

Types of expenditures which we include as “potential for direct support” are the following: (i) employee expenditure; *honorarium* (they can *potentially* be used to pay for the salary of KSM officials), (ii) goods expenditure to be transferred (granted) or sold to third parties (*Belanja barang untuk diserahkan kepada masyarakat*, they can be used to transfer inventories for maintenance and operation purposes), (iii) subsidy expenditure (they can *potentially* be used to subsidize the operation costs of KSM), (iv) *hibah* (grant) expenditure (they can potentially be used for construction or major repairs – if in the form of goods) and (v) *bantuan sosial* (social assistance expenditure, which can also be used for construction or major repairs). Some of these expenditures come with prerequisites which are often ambiguous.

The other types of expenditures are categorized as “potential for indirect support” to the extent that they are used to finance SKPDs that are tasked with sanitation. For example, employee expenditure can be used to pay for the salaries of SKPD engineers who are tasked with providing technical assistance to KSMs, or in charge of the repairs.

We recommend that further study is conducted to evaluate these types of expenditure and a guideline on expenditure be issued with sufficient coordination between the Bappenas, The Ministry of Public Works, The MOHA and the State Audit Agencies. This guideline is important in order to remove ambiguities and provide assurance to local government in utilizing budgets to support local scale community sanitation.

Expenditure analysis can be used as condition for sanitation financing, in which, local government must pledge and prove in its budget planning documents (RKA SKPD/RKA PPKD) that it will allocate certain budget and expenditure post for local scale air limbah, prior to receiving funds.

Finally, we identify the institutional set-up under local government, ranging (in terms of budgetary and structural independence) from Dinas – UPTD --- to BLUD. General support and monitoring functions for local scale *air limbah* can be allocated to SKPD/Dinas – or the Dinas can also have specific task of supporting local scale air limbah, alternatively, UPTD can potentially be tasked, both for centralized systems of *air limbah* and auxiliary functions of technical support to KSM. The BLUD is usually ring-fenced for centralized system. The government can decide differential tariffs (for IPLT/waste collection) by UPTD or BLUD.

Since the budget law adheres the “money follow function” principle, **we recommend** that the Perda or Walikota’s decree regulating SKPD/UPTD contain detail description on the duty of relevant SKPD in supporting local scale *air limbah*.

4. Assets Ownership

a. Ownership of Assets in Program Documents

Analysis of ownership arrangement in programmatic document is important to describe donor and government policy with respect to the ownership of local scale sanitation infrastructure assets. There are several programs that are or have been implemented by the Indonesian government, namely the SANIMAS DAK SLBM, SANIMAS IDB, SANIMAS ADB (USRI) and SANIMAS Regular, and INDII's SAIIG (*kawasan systems*). Each of the programs *may* have a different scheme, type of funding and approach to ownership.

Nevertheless, the ultimate test of who own sanitation assets *in practice* depends on four legal documents elaborated in the “**The Ownership Test**” table in the next section below. Thus, irrespective of any differences in program documents, what eventually determines ownership of land and building assets are what listed in the The Ownership Test.

Of all four sanitation programs above, we have only been able to obtain, in full, the SANIMAS ADB (USRI) program documents. Documents from other programs could only be obtained partially, or could not be obtained at all.

i. Who should own, maintain and operate assets?

The 2003 National Policy on Community Based Water and Sanitation stipulates that assets should be owned by “masyarakat”. For that purpose, assets transfer mechanism to the “masyarakat” should be developed.²¹⁷

ADB-USRI

The ADB Loan Agreement only emphasizes four items: environment, resettlement, gender and governance/anticorruption issues²¹⁸ which are based on the 2009 ADB Safeguard Policy Statement (“Safeguard”).²¹⁹ The discussion on assets is a part of the resettlement item on ADB Safeguard. The purpose of the resettlement safeguard is to ensure that land acquisitions guarantee the rights of persons with respect to the land they own or occupy. Therefore, the emphasis of the safeguard is to protect those that will be affected by land acquisitions and not on the long term use of the infrastructure built.

ADB's Loan Agreement and the Safeguard are further implemented by the government. The four items above is implemented by including them in the list of documents to be part of the community's project proposal. The resettlement item is implemented through the Land Acquisition and Resettlement Framework (LARF) Forms. The detail concerning LARF will be discussed in the next section.

USRI Program Documents stipulates that after the construction is finished and the infrastructure becomes operational, assets should be transferred to *Kelompok Pemanfaat dan Pemelihara* or “KPP” (literally translated: user and maintenance group).²²⁰ The assets are transferred to KPP through a chain of assets transfer. This USRI policy is consistent with the 2003 National Policy on Community Based Water and Sanitation that stipulates that assets should be owned by “masyarakat”.

According to the USRI document, the KPP membership is to prioritize members of the KSM (*Kelompok Swadaya Masyarakat*) Sanitasi/Sanitation CBO, who had been involved in the planning and development of the sanitation infrastructure.²²¹ The USRI document also mentioned that KSM Sanitasi's Articles of Association should already contain provisions on Operation and Maintenance. There are no further details on Operation and Maintenance financing. In this respect, it is not really clear if the KPP is a legally distinct

²¹⁷ Bappenas and others (n 53).

²¹⁸ 'Loan Agreement (Ordinary Operations) (Urban Sanitation and Rural Infrastructure Support to PNPM Mandiri Project) Between Republic of Indonesia and Asian Development Bank Dated 30 September 2011. LOAN NUMBER 2768-INO'. See Schedule 5

²¹⁹ 'Safeguard Policy Statement'.

²²⁰ 'Pedoman Umum Sanitasi Perkotaan Berbasis Masyarakat'; 'Pedoman Pelaksanaan Sanitasi Perkotaan Berbasis Masyarakat'.

²²¹ 'Pedoman Umum Sanitasi Perkotaan Berbasis Masyarakat' (n 220). Para 4.5.4

organization from the KSM or if they are in fact the same organization but addressed with different terminology.

Judging from the establishment, the KSM was formed during *Rembug Warga II* (second community meeting) – with the purpose of coordinating, overseeing and reporting the progress of construction building, whereas the KPP is formed during *Rembug Warga III* (third community meeting) with the purpose of operating and maintaining the assets. According to one resource person, the KSM in USRI is not notarized.²²²

The role of KPP (vis a vis community) in the operation and maintenance of sanitation assets is clearly stipulated in the USRI program document. Based on the document, the KPP is tasked with: (1) user fees: planning the amount of user fee; collecting user fee; drafting expenditure plans, recording transactions and reporting it; (2) operation and maintenance: operating and maintaining physical infrastructure; routinely controlling pipe infrastructure; improving service quality and extending network; (3) conducting community education and campaigns on sanitary health.²²³

The above policy in which community is tasked with the operation and maintenance of sanitation assets is consistent with and evidence the practical implementation of ADB loan condition schedule 5 as follows²²⁴:

“11. The Borrower shall ensure that each Participating Neighborhood fulfill the following selection criteria:

(a) the neighborhood shall be located in cities with an approved City Sanitation Strategy;

(b) the community members within the neighborhood shall have agreed to design and implement sanitation facilities;

(c) the CIO for the neighborhood shall have been established and accountability and governance mechanism shall have been in place; and

(d) the community members within the neighborhood shall indicate their willingness to improve overall hygiene and health environments in the neighborhood.

12. The Borrower shall engage community facilitators to assist community members to

(a) identify issues and needs related to health, hygiene and sanitation;

(b) formulate inclusive and sustainable sanitation plans with specific investment plans to be financed by block grants;

(c) prepare technical designs;

(d) implement Subproject; and

(e) formulate and implement O&M plans to ensure sustainability of completed sanitation facilities.”

The above paragraph, especially 12(e), clarifies the position of ADB with respect to which party should be responsible with the operation and maintenance of infrastructure assets: the community themselves. The agreement does not specifically state that the community should be in charge of Operation and Maintenance, *but it require the government to engage with facilitators, which is tasked, together with the community, to formulate O&M plans.* However, we can conclude that under the ADB-USRI scheme, the community is expected to own, maintain and operate sanitation assets.

It is worth reminding that the USRI program is a part of the *Program Nasional Pemberdayaan Masyarakat Mandiri* (National Program for the Empowerment of Self-Reliant Community). The national guideline

²²² Email interview with a sanitation consultant, 12/10/15

²²³ 'Pedoman Umum Sanitasi Perkotaan Berbasis Masyarakat' (n 220). Para 4.5.4

²²⁴ 'Loan Agreement (Ordinary Operations) (Urban Sanitation and Rural Infrastructure Support to PNPM Mandiri Project) Between Republic of Indonesia and Asian Development Bank Dated 30 September 2011. LOAN NUMBER 2768-INO' (n 218). Schedule 5

strongly emphasizes community ‘empowerment’ and ‘self-reliance’, which should be manifested in every project stages from planning to utilization and maintenance.²²⁵ The PNPM Community Empowerment paradigm is also in line with the 2003 National Policy on Community Based Water and Sanitation, which stresses that the government’s role should be limited as “facilitator”.²²⁶

DAK SLBM

The DAK SLBM program is regulated in Public Works Ministry Regulation 03/PRT/M/2015 on Technical Guideline for Infrastructure DAK (“2015 Guideline”). DAK SLBM is defined by the Regulation as: “...*activities to develop the “masyarakat’s” behaviour and to organise “masyarakat” independently within the framework to provide “masyarakat”-based communal sanitation through the provision and development of wastewater and solid waste facility using 3R (reduce, reuse dan recycle) pattern*” (emphasis by author). It is important to note that according to the 2015 Guideline, one of the principles of DAK SLBM is that “...*“masyarakat” determine, plan, develop and operate the system which they select, facilitated by TFL... (Tenaga Fasilitator Lapangan) and that “...regional governments is [not positioned as] operator of the infrastructure but merely facilitate the initiative of the “masyarakat” groups to enable them to manage and operative built infrastructure*” (emphasis by author).²²⁷

The statement, that the “masyarakat” –and not the government is responsible for managing and operating the infrastructure is important as it comes from a Ministerial-level Regulation and is thus binding as law, although the title is a “technical guideline”.

The most important part of the Regulation, is that it stipulates that assets which has been built must be transferred to the “Masyarakat”. According to the Regulation: “*DAK SLBM Infrastruktur which has been built, must be immediately transferred to Operating KSM*” (“*Infrastruktur DAK SLBM yang telah terbangun, harus segera diserahkan kepada KSM Pengelola untuk dapat dioperasikan dan dipelihara dengan bimbingan teknis dari SKPD Teknis Kabupaten/Kota dalam rangka keberlanjutan.*”). In the aforementioned quotation, the 2015 Guideline does not stipulates which parties should transfer and receive the assets, but another part of the guideline contain some clarification as discussed below.

ii. Chain of Transfers

Budget Flows: USRI

Funding for the USRI-SPBM projects comes from multiple sources. ADB loan (as central government loan) are used as *block grant* (Bantuan Langsung Masyarakat or BLM), consultant fees, training and workshops.²²⁸ According to one official, the budget post used for this disbursement are *bantuan sosial* or *bansos*.²²⁹ This is consistent with the other PNPM programs which utilized *bansos* as budget post. Meanwhile, other APBN funds are used for facilitator’s salaries, monitoring and supervision whereas APBD funds (province, at least 1% and Kabupaten/Kota at least 5%) are used for operational funds and program support.²³⁰

The funds are disbursed through *rekening khusus* (special account). Each *Satker* (task force – in this case at the Kabupaten/Kota levels) officials, including PPK should provide their names and signature specimen to local Kantor Pelayanan Perbendaharaan Negara office (KPPN/Treasurer – part of the Ministry of Finance). A budget user authority/*Kuasa Pengguna Anggaran* (a member of the *Satker*) then issues payment order (based on the recommendation from TFL) to the local KPPN.²³¹ The funds will then be disbursed directly to a bank account belonging to Badan Keswadayaan Masyarakat/Lembaga Keswadayaan Masyarakat

²²⁵ ‘Pedoman Operasional Umum PNPM Mandiri Perkotaan 2008’.see page I-1

²²⁶ Bappenas and others (n 53). See page 17

²²⁷ Peraturan Menteri Pekerjaan Umum Dan Perumahan Rakyat Republik Indonesia Nomor 03 /PRT/M/2015 Tentang Petunjuk Teknis Penggunaan Dana Alokasi Khusus Bidang Infrastruktur (n 162).

²²⁸ ‘Pedoman Pelaksanaan Sanitasi Perkotaan Berbasis Masyarakat’ (n 220). Page 28

²²⁹ Email discussion with a government official, 12/10/2015

²³⁰ ‘Pedoman Pelaksanaan Sanitasi Perkotaan Berbasis Masyarakat’ (n 220). Page 28

²³¹ *ibid.* Page 31

(BKM/LKM). Note that before this procedure is conducted, the PPK Sanitasi must first sign a contract²³² with BKM/LKM. According to USRI guideline, the aforesaid (summary of) contract and BKM/LKM's bank account in addition to other documents such as the payment order must be provided to KPPN.²³³ The Satker or PPK can decide to hold disbursement if there is fraudulent conduct on the implementation of the project, until the status is cleared by the inspectorate general or the state audit agency.

Budget Flows: DAK SLBM

As in any other program, the DAK SLBM funds are derived from multiple sources, including other APBN budget post (allocated to *Satker P2LP/Satker Pengembangan*

Penyehatan Lingkungan Permukiman) as well as the core DAK and APBD. The DAK fund itself can only be used to finance physical construction.²³⁴ There is little information regarding disbursement in DAK SLBM's guidelines. A 2010 guideline mentioned that the DAK funds will be directly transferred to KSM's bank account.²³⁵ In the 2013 guideline, it is mentioned that the funds are posted as Dana Hibah Bantuan Sosial (*bansos*) thus, similar to the budgeting post for USRI above.²³⁶ For disbursement, the DAK SLBM requires a joint bank account under the name of KSM Chief, TFL and PPK Sanitasi.²³⁷ Presumably, the funds transfer method is less complicated than USRI, because it does not involve foreign funds. The guidelines require KSM to enter into contract with PPK Sanitasi.²³⁸ There is another set of contracts (different from the previous one) which are required for grant disbursement by national regulations, called the *Naskah Perjanjian Hibah Daerah (NPHD)*. We received a sample of such contract signed by grantor (on behalf of the government), a head of local public works *dinas* and grantee, the coordinator of KSM.²³⁹

Assets Transfers: USRI

According to the USRI guideline, a transfer of the infrastructure is to be conducted right after the construction and operationalization of sanitation and the facility is deemed to be completely functional and useful for a maximum of **60 days after the construction** is completed.²⁴⁰ A transfer and acceptance of the infrastructure are conducted from KSM to the coordinator of BKM/LKM, and then from coordinator of BKM/LKM to PPK Sanitasi Kabupaten/kota with the acknowledgement of DPIU (District Project Implementation Unit) and lurah in Rembug Warga IV. Furthermore, PPK Sanitasi Kabupaten/Kota then transfer the infrastructure to the KPP to be utilized.²⁴¹

The USRI guideline also contain standard format of the three infrastructure transfers (i) from KSM to BKM/LKM, (ii) from BKM/LKM to Satker PPK and (iii) from Satker PPK to KPP.²⁴² We are able to obtain executed and signed copies of such transfers occurring in practice.²⁴³ Both the standard form and the executed copies we received do not specify which assets are being transferred.

We are unable to find explanation why this chain of assets transfer is required since – as discussed above – the KPP and KSM could be the same entity with different name. The guideline even mentioned that KPP executives should be selected from KSM. Thus, the KSM is already a *de-facto* caretaker of the assets.

²³² For standard contract format between BKM/LKM with PPK Sanitasi, see 'Lampiran Buku Pedoman Sanitasi Perkotaan Berbasis Masyarakat'. format 7.2 page 111-112

²³³ 'Pedoman Pelaksanaan Sanitasi Perkotaan Berbasis Masyarakat' (n 220). Page 31

²³⁴ 'Dana Alokasi Khusus Sanitasi Lingkungan Berbasis Masyarakat Tahun 2014; Petunjuk Pelaksanaan DAK SLBM'. See page 2-16

²³⁵ 'Petunjuk Pelaksanaan Penggunaan Dana Alokasi Khusus Bidang Infrastruktur Sub Bidang Sanitasi'. P.75

²³⁶ 'Dana Alokasi Khusus Sanitasi Lingkungan Berbasis Masyarakat Tahun 2014; Petunjuk Pelaksanaan DAK SLBM' (n 234). P.2-17

²³⁷ *ibid.* P.2-13

²³⁸ *ibid.* P.2-18; For standard contract, see p. 3-56

²³⁹ 'Naskah Perjanjian Hibah Daerah (Kabupaten Temanggung)'.

²⁴⁰ Pedoman Pelaksanaan SPBM page 92.

²⁴¹ Pedoman Pelaksanaan SPBM page 92.

²⁴² 'Lampiran Buku Pedoman Sanitasi Perkotaan Berbasis Masyarakat' (n 232). See Format 10.10, 10.11 and 10.12

²⁴³ See Annex Document Inventory Table. Berita Acara Serah Terima Infrastruktur Dari BKM Ringinharjo ke Satker PPK Kabupaten Bantul (Signed), 6 Januari 2015; Berita Acara Serah Terima Infrastruktur Dari Satker PPK Kabupaten Bantul ke KPP Gema Lestari (signed), 6 Januari 2015

In order to be legally sound, all of the parties involved in assets transfer must either be a government entity or a legal entity. This is because there are at least three types of assets involved in the project: (i) land, (ii) building or installations and (iii) inventory. Land and building assets can only be transferred to individual, government entity or legal entity (more on this below). The guideline does not mention the requirement that KSM, BKM/LKM and KPP to be a legal entity.

Moreover, transferring the infrastructure to PPK Sanitasi may have some legal consequences. For example, regulation mandates that land and building assets received by the government should be certified (the owner's name in the land certificate must be changed into government) and the government should then be responsible for its security and maintenance.²⁴⁴

If the assets need to be transferred from the government to another party, there are certain rules for regional grants (will be discussed in the next chapter). When the government no longer controls the assets, it will be deleted from the inventory book and the government is no longer responsible for its maintenance. Presumably, this chain of transfer is only for formality and reporting purpose and not for legal purpose, which means that when the PPK receives the assets, they do not list them in the government assets inventory book. This is confirmed by the documents we received from the field, which indicate that the transfer from the BKM to the PPK and further from PPK to KPP take place on the same day. Thus it will not be possible to have the assets inventarized. If that is the case however, then no actual legal transfer ever took place. The eventual owner of the assets will be discussed in section 4.c. (chapter conclusion).

Assets Transfers: DAK SLBM

According to the guideline, once completed, the infrastructure assets needs to be transferred from KSM to PPK Sanitasi and then the PPK Sanitasi should transfer to KSM for the facility to be operated.²⁴⁵ This is less complicated compared to the USRI assets transfer mechanism above because it does not involved LKM/BKM. However, the guidelines only provide one standard form of contract which stipulates the transfer from KSM to PPK Sanitasi ("Format-8").²⁴⁶

We receive two unsigned draft documents from the field: (i) Berita Acara Serah Terima Pekerjaan (assets transfer memorandum) for Program SLBM and (ii) Berita Acara Pengelolaan MCK ++ Program SLBM (MCK operation memorandum).²⁴⁷ The first document is similar to Format-8, as it transfers the infrastructure asset from KSM to PPK Sanitasi, meanwhile, the second document stipulates the transfer from PPK Sanitasi to KSM – something that is required by the SLBM guideline but has no detail standard format. The analysis of the legality of transfers between KSM and the government is thus similar to the USRI above.

b. Legal Arrangements for Ownership of Local Scale Systems

i. Regulation of Land and Building Ownership

Other parts of this research have explained that in general, assets for local scale systems can be divided into three: land assets, building/installation/infrastructure and inventories. For inventory, we don't see any legal problem. Anyone who is in control of a movable property is considered to be its rightful owner, until it is proven otherwise. Meanwhile, land and building are categorized as immovable property under Indonesian Civil Law, in which its transfer to other party must be conducted through a notarial process and registration.²⁴⁸

²⁴⁴ Peraturan Pemerintah Republik Indonesia Nomor 27 Tahun 2014 Tentang Pengelolaan Barang Milik Negara/Daerah (n 177). Articles 43, 42, 46

²⁴⁵ 'Dana Alokasi Khusus Sanitasi Lingkungan Berbasis Masyarakat Tahun 2014; Petunjuk Pelaksanaan DAK SLBM' (n 234). P.2-21

²⁴⁶ ibid. P 3-64 (Format 8)

²⁴⁷ Sampel Dokumen Berita Aca Serah Terima dan Berita Acara Pengelolaan MCK++

²⁴⁸ Indonesian Civil Code, the 'Burgerlijk Wetboek'. Articles 612 and 616 also Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah; Undang-Undang Republik Indonesia Nomor 28 Tahun 2002 Tentang Bangunan Gedung (n 56).

For land, the most valid evidence of ownership would be land certificates and the accompanying *buku tanah* (land book).²⁴⁹ Only persons and legal entities are allowed to own land through Hak Guna Bangunan or HGB. This means that CBOs needs to be incorporated into legal entities if they are to own land. The *HGB* is given for 30 years plus 20 years extension (and can usually be renewed for another 30 years).²⁵⁰

The evidence of ownership for buildings and other infrastructure under Indonesian Law is less clear. Both buildings and infrastructure must obtain building permits (*Izin Mendirikan Bangunan* or IMB) which are granted to buildings (structures which are used for dwelling or common human activities) and “non-buildings” (other structures such as cell tower, electrical installation or water treatment plants). Most of sanitation “non-buildings” assets would be categorized into this, except perhaps the office space. According to one regulation (PP 36/ 2005), the evidence of ownership for buildings is a *Surat Bukti Kepemilikan Bangunan Gedung* or *SBKBG* (certificate of building ownership) issued by regional government.²⁵¹ This is usually applied for tall buildings, whereas, for housing the IMB, land certificate and notarial deeds are usually considered adequate evidence of ownership.

The aforesaid regulation (PP 36/2005) does not, however, stipulates anything on “non-buildings”. The regulatory practices in each region are inconsistent when it comes to “non-buildings”. In one region, cellphone tower and advertising boards are given its own certificates.²⁵² However, there is no mention on other structures such as swimming pool, electrical installations or water infrastructures. In the absence of regulation on non-building certificate in one region, building permits (IMB) could still be used to indicate an ownership of non-buildings.

It is important to note that under Indonesian system, ownership of land can be separated from the ownership of things above it, such as building, plants or other structures. In cases where the person (natural or legal person) who constructs the building does not own the land, they are required to secure “land utilization agreement” with the actual landowner, which must contain provisions on rights, obligations and the duration of the agreement.²⁵³ Only CBOs that are legal entities can enter this agreement. If CBOs are not incorporated, then the agreement would be regarded “personal”, binding only to the person (or CBO executives) who signed it, but not to the CBO as an entity.

ii. The Practice of Land and Building Ownership of Local Scale Sanitation

Unless the land used for sanitation facilities is owned by the government, the legality of land, building and infrastructure ownership is an important question. Most community-oriented programs, such as the ADB-supported SANIMAS USRI, expect land to be acquired from community contribution.²⁵⁴

As the above section explains, there are three types of documents as evidence of ownership of land and building or other infrastructure assets: land certificates (right to build or *hak guna bangunan*), building permit (IMB) and certificate of building ownership, where relevant. Land utilization agreement can also be relevant in cases where CBOs does not own the land. The four most important legal documents in determining ownership is therefore as follows:

The Ownership Test

No.	Legal Document	Purpose
1.	Land Certificate (right to	Evidence of Land Ownership

²⁴⁹ Peraturan Pemerintah Nomor 24 Tahun 1997 Tentang Pendaftaran Tanah
²⁵⁰ Undang-Undang Nomor 5 Tahun 1960 Tentang Peraturan Dasar Pokok-Pokok Agraria. Article 35
²⁵¹ Peraturan Pemerintah Republik Indonesia Nomor 36 Tahun 2005 Tentang Peraturan Pelaksanaan Undang-Undang Nomor 28 Tahun 2002 Tentang Bangunan Gedung. Article 12
²⁵² Peraturan Bupati Gunungkidul Nomor 34 Tahun 2012 Tentang Petunjuk Pelaksanaan Peraturan Daerah Nomor 11 Tahun 2012 Tentang Bangunan Gedung. See *Lampiran*
²⁵³ Peraturan Menteri Dalam Negeri Nomor 32 Tahun 2010 Tentang Pedoman Pemberian Izin Mendirikan Bangunan. Article 9(2)
²⁵⁴ ‘Pedoman Pelaksanaan Sanitasi Perkotaan Berbasis Masyarakat’ (n 220). Para 7.6.1

	build or <i>hak guna bangunan</i>)	
2.	Building Permit (IMB)	Permission to erect a building; could also be used to evidence an ownership of a building
3.	Certificate of building Ownership (SBKBG)	Evidence of building ownership. Usually only applied to tall buildings. Regulation may differ one region to another. Regions may provide certificate for “non-buildings” such as cell tower or advertising billboards.
4.	Land utilization agreement	Agreement to utilize a plot of land where the owner of a building is different from the owner of the land

We conducted a random survey with five contacts in several regions with the purpose of obtaining copies of CBO legal documents (see Annex 6.e. Document Acquisition Checklist), including the above. We receive 55 documents as listed in the Annex (see Annex 6.d. Field Document Inventory).

As listed in the annex, **we found none of the above documents in any of the regions surveyed.** This does not indicate that no single CBO legally own lands, buildings and other infrastructure, but this indicate that documentation of such cases would be a rare circumstances. This conclusion is consistent with various Focus Group Discussions and field research conducted on our AIIRA research.²⁵⁵ The closest documents we found in some locations which indicate some evidence of ownership transfer are *surat hibah* (letter of grant) from grantee to grantor.²⁵⁶ These letter of grants are not notarized. We shall discuss the legality of *surat hibah* below.

The official government guidelines only require *surat hibah* (letter of grant) for the USRI project. No other documents are mentioned, presumably because other documents will require more processing time and cost.

ADB Loan Agreement (for the USRI Project) signed by the Indonesian government requires the project to develop Land Acquisition and Resettlement Framework (LARF) – in accordance with ADB Policies.²⁵⁷ This was implemented by the government by creating LARF Forms to be used as one of the prerequisites for disbursement.²⁵⁸

One LARF Form contain statement of community meeting, signed by various stakeholders, stating the need to acquire land for sanitation facilities and specifying the width and location of such land and its owner. The other LARF Form is the *Surat Hibah* (Letter of Grant) from grantor which states that the land-owner will contribute his/her land to be used for sanitation facilities.²⁵⁹ We have obtained three samples of *Surat Hibah* which are based on this LARF Forms; some with modified formats.²⁶⁰

Under Indonesian law, a Letter of Grant (*Surat Hibah*) is an agreement, whereby the grantor is still living, and transfers the object voluntarily and irrevocably for the benefit of the grantee.²⁶¹ By definition, the grantor does not receive anything from the transaction. A Letter of Grant is valid and prevails to the parties, if the grantee has received a firm statement (in the form of a deed from Land Deed Official (*PPAT*) from the

²⁵⁵ Al’Afghani and others (n 94).

²⁵⁶ See Annex Document Inventory Table,

²⁵⁷ Loan Agreement (Ordinary Operations) (Urban Sanitation and Rural Infrastructure Support to PNPM Mandiri Project) Between Republic of Indonesia and Asian Development Bank Dated 30 September 2011. LOAN NUMBER 2768-INO’ (n 218). Schedule 5 para 14

²⁵⁸ ‘Lampiran Buku Pedoman Sanitasi Perkotaan Berbasis Masyarakat’ (n 232). Format 3.22 and Format 3.33

²⁵⁹ *ibid.* Format 3.22 and Format 3.33

²⁶⁰ See “Surat Hibah” in Annex Document Inventory Table

²⁶¹ Article 1666 KUHPperdata

grantor.²⁶² In regions where no notary office is present, a district head (Camat) may act as Land Deed Official. Grants that are not legalized through Land Deed Officials are void.²⁶³

What would be the legal consequences when grants are improperly processed? Even though grants cannot be revoked or withdrawn, there are certain exceptions:²⁶⁴

- Requirements are not fulfilled when processing the grant, for example, if it is not done through authentic (official) deed
- Grantee has been guilty of committing or helping others to commit crimes with the purpose of taking the life of the grantor;
- If the grantee refuses to provide a living allowance to the grantor, after the grantor is in poverty.

Under government regulation PP No. 24/1997, the grantor and the grantee must sign a deed before Land Official (PPAT) and the grantor must prove that he is authorized to provide such grant. This is called the *Akta Hibah* (Notarized *Hibah* Deed). Unlike the *Surat hibah* the *Akta Hibah* is legally valid. No later than seven working days from the date that the deed is signed, PPAT is obliged to deliver the deed along with the documents to register to the Land Office.²⁶⁵ PPAT is then obliged to notify the parties that the deed is already delivered to the Land Office.

Thus, although the grantor had signed a letter stating that he/she grants his/her land to another party for sanitation purpose in accordance with the LARF Format in Lampiran Pedoman USRI SPBM²⁶⁶, he/she would still be able revoke the grant, as land grants made without official deeds are void.²⁶⁷ This means that such grant letter (*surat hibah*) is without legal validity.

It is worth mentioning that in addition to grants made under Civil Code as explained above, grants can also be made by way of Islamic Endowment (*Waqf or Wakaf*). Endowment is a legal act to separate or transfer land or assets property to be used either permanently or for a specific period of time for a religious or social welfare purposes.²⁶⁸ Any asset intended for social welfare purposes cannot be sold or undergo a change of ownership.²⁶⁹ The Waqf system is administered by the Ministry of Religious Affairs and the Indonesian Wakaf Body for movable properties.

Endowment is done by Wakif (loosely equivalent to trustor under common law) to Nadzhir (loosely equivalent to trustee) in front of Waqf Deed Official (*Pejabat Pembuat Akta Ikrar Wakaf or PPAIW* – at the Ministry of Religious Affairs) and should be witnessed by two people. The Wakaf Deed must be sent by PPAIW to the Land Office within 7 (seven) days after the deed was created.²⁷⁰

The Wakaf system is thus quite similar with the grant system made under Indonesian Civil Code in terms of procedure. Some of the differences are that Wakaf properties cannot be subjected to encumbrance, inherited, granted to other party or in anyway transferred whereas grant can be subjected to these.²⁷¹

The other difference is that wakaf managers (the “Nadzhir”) could either be individual, organisations (its deed of establishment must be notarized) or legal entities.²⁷² Each of these entities could, in theory, manage

²⁶² Article 1683 KUHPer in conjunction with Act 1682 KUHPer in conjunction with Act 37 paragraph (1) PP 24/1997.

²⁶³ Article 1682 KUHPerdata in conjunction with Article 1683 KUHPerdata

²⁶⁴ Article 1688 KUHPer.

²⁶⁵ Article 40 PP No. 24/1997.

²⁶⁶ ‘Lampiran Buku Pedoman Sanitasi Perkotaan Berbasis Masyarakat’ (n 232). Format 3.33

²⁶⁷ Act 37 paragraph (1) PP 24/1997.

²⁶⁸ Article 1 paragraph (1) Law No.41/2004 on endowments.

²⁶⁹ Article 40 of Law No.41/2004.

²⁷⁰ Undang-Undang Republik Indonesia Nomor 41 Tahun 2004 Tentang Wakaf. Article 32

²⁷¹ ibid. Article 40

²⁷² Peraturan Pemerintah Republik Indonesia Nomor 42 Tahun 2006 Tentang Pelaksanaan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf; Peraturan Menteri Agama Republik Indonesia Nomor 73 Tahun 2013 Tentang Tata Cara Perwakafan Benda Tidak Bergerak Dan Benda Bergerak Selain Uang.

wakaf assets, including immovable properties such as land. Thus, by reading the wakaf rules alone, it would appear that there is no urgent need for organization to be incorporated as legal entities for the purpose of receiving and operating wakaf assets. If this is the case, then incorporation may not be necessary for CBOs receiving land assets. However, the regulation in land registration (which is administered by the Ministry of Land Affairs – different from the Wakaf system) only allows individuals or legal entities to bear land certificates. As a result, in practice, CBOs may still be required to incorporate as legal entities in order to control wakaf assets.

c. Conclusion and Recommendation

So eventually, who actually owns the assets?

In section 1 we analyze policy and program documents and conclude that according to those documents assets should be owned, operated and maintained by the communities. Chapter 1a explained that in regional autonomy terms, wastewater is a basic service-mandatory-concurrent affair. Mandatory affairs means that local government cannot opt out from providing the service. However, there is absolutely no prohibition for the *Masyarakat* (local community, building developers or industrial complex) to serve themselves. When the services are self-supplied, they are expected to own, maintain and operate their assets. The problem would be that, once services are delegated to non-government entities, there are various restrictions by public finance rules if the government chooses to intervene financially as explained in chapter 3.

We analyzed USRI guideline and its transfer protocol and conclude that the chain of transfer from KSM to BKM/LKM to PPK and then to KPP is not legally sound. It is to be noted that if KSM, BKM and KPP are not legal entities (which is the commonplace) they cannot, in any event, own land and building assets.

In this case there are two possibilities. If the land assets have been appropriately transferred to the KSM then it will be owned by KSM. If the land assets are not appropriately transferred to KSM then it will still be owned by the original landowner. Building and installation assets follows the legality of land assets whereas, inventories can be physically transferred without any problem. This means that in most situations (except in cases where land utilization agreement is applied) buildings and installation assets are legal if the land ownership is legal.

Section two analyzes actual assets ownership by a conducting a survey of legal documents. The ultimate proof of ownership is elaborated in table “The Ownership Test”. The result was that we obtain neither the samples of land certificates nor building permits. The legal document we found was a general *surat hibah* (letter of grant) which is not evidence of ownership and still require several process before the actual *hibah* (grant) can be completed. If CBOs (or KSM or KPP) do not own land certificates, they have no proof of ownership of such land. If the legality of the land is disputed, the government may not issue building permit (*IMB*).

The consequences of the above is as follows:

1. Land assets are still owned by the original owner. When a dispute arises (between the original owner or their inheritor) in the future, the CBOs position is very weak.
2. Building and installation assets built upon such lands may not be legal, especially since they are not equipped with building permits. They could be subjected to demolition by the government or any third parties.

Stakeholders confirmed that most community based sanitation systems have no appropriate tenure security.²⁷³ But, what are the explanation that there is a lack of requirement and safeguards for tenure security in program documents? Why haven't program documents required all CBOs to be legal entities and that they should bear the evidence of land title through a valid certificate?

²⁷³ AlAfghani and Paramita (n 7).

From the Focus Group Discussion, it turns out that there might be two reasons behind this: (a) the processing of legal entities and land certificates would require a significant amount of time, and more importantly, (b) they expect the community to do it themselves.²⁷⁴ Initially before being replicated into thousands of systems as it is today, the whole program design was premised on “demand responsive approach” (which fits nicely to the “community empowerment” paradigm). Thus, according to some FGD participants, the government, to a largest extent, should only facilitate and provide materials that the community cannot provide themselves. Communities are expected to provide the land that will be used for the facility and in addition, process any legal formalities associated with that.

However, stakeholders also realized that the reality today, is that CBOs are unable to assume the cost of legalization processes. So, some suggested that government should be the one who bears the cost, but others responded that doing so would mean a departure from the original idea of “community empowerment”/“demand responsive approach”. At this juncture, participants reflected on the community empowerment concept and critically pointed out whether there should be a SANIMAS 2.0 (Sanimas is the name of the community based sanitation program) as the old ideas may no longer fit today’s reality.

Finally, as reflected in our analysis above, in order to strengthen CBOs position with respect to assets ownership, the following legal formalities must be completed:

1. CBOs must be incorporated as legal entities (see Chapter 5 on “Legal Forms”). If they are not legal entities, they cannot own assets since the name registered on land certificate must either be individual or legal entities.
2. Land assets transfer must be conducted between the original owner of the land and the CBO. *Surat hibah* (letter of grant) is inadequate. It must be further processed to notarial deed (*Akta Hibah*) and then registered to the land office. The name on the land certificate must that of the CBO (notwithstanding number 1 above).
3. CBOs must obtain building permit, specifying both buildings and other installation and infrastructure owned by them.

²⁷⁴ AlAfghani and Paramita (n 7).

5. Appropriate “Legal Forms” of Local Scale Delivery

a. Association (Perkumpulan)

Association (or *Perkumpulan*) is one of the most common types of “legal forms” used by non-governmental organization. According to Antlov, association is established on the basis of memberships of a group of people who shares cost for a common social service objective and not for profit making purposes.²⁷⁵ Some of the reason why the association is considered as a common “legal form” is the fact that (i) the legislations have been around since the colonial period – and has never been amended ever since and that (ii) applicant could choose whether to create legal entity (incorporated association – requires more stages to be completed) and non-legal entity (ordinary association). Associations can be established as non-legal entities and can afterward be formalized as legal entities. This option provides some flexibility to the applicant. Associations in the form of a legal entity should be established by way of a notarized deed in accordance with the Indonesian Civil Code and *Staatsblad* 1870 No. 64. The deed must then be approved by the Ministry of Law and Human Rights.²⁷⁶

The new law on mass organization require all “mass organizations” to be registered after they are established (this has been criticized as a government control mechanism to civil society organisations).²⁷⁷ For associations with legal entities, registration is deemed to have been completed with the approval of its deed by the Ministry of Law and Human Rights said above while ordinary associations need to register separately to either local (Governor/Mayor/Regents) and national government (depending on the scale of the association).²⁷⁸

Associations with legal entities are permitted to sign agreements with banks or other parties. Non-legal entity associations cannot conduct activities as a legal entity and any action taken on behalf of the association will be considered as an action of an individual member of the association.²⁷⁹ In addition, a non-legal entity cannot own real property (land/building). This carry the implications of access to finance, in which, non-legal entities have difficulty in presenting collateral as a prerequisite for loan. Thus, non-legal entities are often considered as not sufficiently reliable by financial institutions.

Both associations with legal and non-legal entities can receive funds in the forms of *iuran* (less structured or less formal form of payment from *masyarakat*), *infaq* (Islamic charity), grants (*hibah*) and donation from public and/or government. However, KSM cannot sign *akta hibah* (NHPD) if they are not a legal entity.

Staatsblad 1870-64 does not regulate proprietary interests in the assets or income of associations, however under Article 7 of *Staatsblad* 1870-64, assets remaining after liquidation can be owned by the members or divided based on their contributions.

The association (with a legal entity) has the right to own land/building based on Hak Guna Usaha/exploitation right, Hak Guna Bangunan/building utilisation right dan hak pakai/utilisation right over the land.²⁸⁰

Members have equal voting power. The rules on voting in Association is not specified in legislations but regulated privately in the Articles of Association (AD/ART). As any other private entities, the management of the association is determined by their Article of Association and their internal bylaws. The appointed manager is authorized to act for and on behalf of the association pursuant to the provisions of the Articles of

²⁷⁵ Hans Antlov, *et al.*, “NGO Governance and Accountability in Indonesia: Challenges in a Newly Democratizing Country” 2015, hlm. 7.

²⁷⁶ Peraturan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia Nomor 6 Tahun 2014 Tentang Pengesahan Badan Hukum Perkumpulan.

²⁷⁷ Undang Undang 17 Tahun 2013 Tentang Organisasi Kemasyarakatan.

²⁷⁸ *ibid.* See Article 16

²⁷⁹ *Staatsblad* 1870 Nomor 64 Perkumpulan Perkumpulan Berbadan Hukum. Article 8

²⁸⁰ Article 2 (b), 19 (b), 39(b) GR No. 40/1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah

Association and has the responsibilities stated therein. Thus, the members do not personally liable for any contract/agreement made by the association.²⁸¹

In terms of profit generation, the *Staatblad* 1870 No. 64 (the colonial law which governs Association and remain in force until today) does not preclude associations in generating profit. However, the new Law on Mass Organizations and an implementing regulation on Association from Ministry of Law and Human Rights²⁸² discourage such activity.

Associations (both legal and non legal entity) are subject to income tax based on Law No. 36/2008 Article 2 (1)b and Article 4 and it should register for NPWP (tax payer registration number).

b. Limited Liability Company (PT)

Limited Liability Company (PT) is one of the most common forms of business entities in Indonesia. While we have yet to discover any CBO in the form of a limited liability company, the possibilities that CBOs are setup as a limited liability company or that a CBO will evolve into a limited liability company cannot be undermined.

The PT obtains its legal entity status by the date of the issuance of the approval from the Ministry of Law and Human Rights regarding the deed of establishment of the PT²⁸³.

According to act 1 no 1 Law No. 40 of 2007 on Limited Liability Company a PT (“Perseroan Terbatas” or “PT”), is a legal entity which constitutes an amalgamation of capital established pursuant to a contract in order to carry on business activities with an authorized capital all of which is divided into shares. Voting power in a PT depends on the share ownership. The mechanism for the decision making process by the shareholders known as RUPS (*Rapat Umum Pemegang Saham*/general meeting of shareholders). RUPS holds the highest power in the PT. In terms of proprietary interest, the shareholders have the right to receive the dividend and remaining assets if the PT is liquidated²⁸⁴. In the event the PT is liquidated and there are bills that need to be paid to the creditor, the court will order the liquidator to withdraw the remaining assets that had given to the shareholders, and the shareholders have to return it back²⁸⁵.

The interest of PT is usually limited to economic interests; therefore it tends to highlight the economic terms compared to the aspect of community empowerment. PT’s activity is limited to the economic activities in accordance to the operational license that they have. On the other hand, association is limited on non-profit and social activities.

A PT is an independent legal subject who is a legal entity with the main features of separation of assets between the company and private shareholder. Thus, the shareholders are not personally responsible for the engagements made on behalf of the Limited Liability Company and also not responsible for more than the full amount of its share as stated on Article 3 paragraph 1 Law 40 of 2007.

The Board of Directors (BoD), under the supervision of the Board of Commissioners (BoC), is an organ of the company that has full authority to manage the company in all matters related to the company’s interest according to the aims and objectives of the company. The Directors are also personally liable for any loss suffered by the company if they act wrongfully and fail to perform their duties. In the event the BoD consists of more than one member, the liability applies jointly among the members²⁸⁶. The directors will prepare an annual report of the company based on the financial accounting standard and then report it to the board of commissioners to be reviewed, and afterwards, the report will be submitted to General Meeting of Shareholders (GMS). Under the Law No. 40 of 2007, the company is obliged to set aside a certain amount of

²⁸¹ Article 1661 KUHPperdata

²⁸² Peraturan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia Nomor 6 Tahun 2014 Tentang Pengesahan Badan Hukum Perkumpulan (n 275).

²⁸³ Law No.47/2007 Article 7(4)

²⁸⁴ Law No.47/2007 Article 51(1)

²⁸⁵ Law No.47/2007 Article 150 (4),(5)

²⁸⁶ Law No.47/2007 Article 97 (3), (4)

net profits for every financial year as a reserve. Nevertheless, the obligation is only effective if the company has positive earnings. In terms of dividend distribution, as stated on Article 71 paragraph 1 of the Law No. 40 of 2007, the utilization of net profits including determination of the amount of allowance for reserve is decided by the GMS. The entire net profits after deducted with an allowance for reserve is distributed to the shareholders as dividend.

Therefore a PT is the most suitable form of entity for profit organization. A PT as a legal form is accepted in wider community, especially in the business world as one of the legal entity that's professional and profit oriented. It is rare to find a community-based concept in form of PT.

A PT (Limited Liability Company) would be the most ideal form to conduct debt financing. On the other hand, a PT cannot easily tap into government grants such as foundation or association or village finances such as BUMD or endowments/*waqf* as foundations/associations do.

In general PT can own assets under the rights of Hak Guna Bangunan/right of building utilisation (HGB), Hak Guna Usaha/exploitation right (HGU), hak pakai/utilisation right over the land²⁸⁷. A specific PT may have ownership of land if the PT works in banking affairs and it is owned by the state²⁸⁸.

PT is a subject to be taxed, it has to pay corporate income tax (Pajak Penghasilan Wajib Pajak Badan /PPh Badan) and to submit annual report regarding its income received during the tax year.

c. BUM Desa

The lowest level of bureaucracy in Indonesia, its sub-districts, are divided between *Kelurahan* (urban) and *Desa* (Village/rural). While village is autonomous from the *Kecamatan* (District) and regulated by its own legislation²⁸⁹, *Kelurahan* is an integral part of the *Kecamatan*. A village has independency in determining its own budget and selecting its own chief but a *Kelurahan's* budget is a part of the *Kecamatan* and the chief of *Kelurahan* is a government employee.

Although urban sanitation projects will likely to be implemented in urban regions, the borderline between rural versus urban are often not clear and determined solely by administrative status. Thus, there might be cases where communal-urban-sanitation projects are appropriate for "*villages*", which, despite their legal status as villages, are high density neighborhoods. Villages can create their own business entity, called the BUMDes or BUM Desa.

Badan Usaha Milik Desa (BUMDes) is a business entity in which all or part of the capital is owned by the village.²⁹⁰ Although the BUMDes is a business entity, the aim of its establishment is not only for profit but also for the community empowerment (social services). Based on the Ministry Regulation, the aims of the BUMDes among other are to²⁹¹: improve the village's economy, optimise the village's assets towards the wealth of the village, improve the masyarakat's business in managing the economic potential (of the village), increase the income of the masyarakat and village's income.

BUMDes can form a Limited Liability Company (with BUMDes as a major shareholder) or a micro financial institution.²⁹² Any loss suffered by BUMDes will be the liability of BUMDes itself. In case of BUMDes bankruptcy, the decision should be deliberated and stated in *Musyawaharah Desa* (Village Meeting). While a BUM Des must be enacted through a Village Regulation (*Peraturan Desa*)²⁹³, the regulation does not clarify if

²⁸⁷ Article 2 (b), 19 (b), 39(b) GR No. 40/1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah

²⁸⁸ GR No. 38/1963 regarding Penunjukan Badan-badan Hukum Yang Dapat Mempunyai Hak Milik Atas Tanah, Article 1 and 2

²⁸⁹ Undang Undang Nomor 6 Tahun 2014 Tentang Desa.

²⁹⁰ Peraturan Menteri Desa, Pembangunan Daerah Tertinggal, Dan Transmigrasi Republik Indonesia Nomor 4 Tahun 2015 Tentang Pendirian, Pengurusan Dan Pengelolaan, Dan Pembubaran Badan Usaha Milik Desa.

²⁹¹ Peraturan Menteri Desa, Pembangunan Daerah Tertinggal, dan Transmigrasi No. 4/2015 tentang Pendirian, Pengurusan dan Pengelolaan, dan Pembubaran Badan Usaha Milik Desa, Article 3

²⁹² Article 8 Peraturan Menteri Desa, Pembangunan Daerah Tertinggal, Dan Transmigrasi Republik Indonesia Nomor 4 Tahun 2015 Tentang Pendirian, Pengurusan Dan Pengelolaan, Dan Pembubaran Badan Usaha Milik Desa (n 289).

²⁹³ Article 4 *ibid*.

BUM Des' articles of associations and internal bylaws should also be enacted through a village regulation or through village chief decision or village chief regulation.

BUMDes are able to raise capital from the village budget, community donation, government grants and private entities as well as other village assets.²⁹⁴ BUM Des can tap financial resources from village assets or village fund. Unless a BUMDes creates a legal entity (a PT/limited liability company) however, its access to finance is limited, similar to unincorporated associations.

BUMDes organs consist of advisor, operational executives and supervisor.²⁹⁵ The personnel for the management team are elected by the masyarakat based on the musyawarah desa²⁹⁶. The operational executives are reporting their duties regarding the operation of BUMdesa (*melaporkan pertanggungjawaban pelaksanaan BUMDesa*) to the advisor.²⁹⁷ The head of the village is the advisor of BUMDes, in an *ex-officio* capacity.²⁹⁸ The advisor's rights is very broad, including having the final say in the modification of BUMDes articles and internal bylaw, and also protecting BUMDes from activities that might cause BUMDes to suffer losses.

The supervisor represents the masyarakat's interests²⁹⁹ and it has the responsibility to organise a general meeting at least once a year to discuss the performance of the BUMDesa, In addition, the supervisor also has the authority to organise the supervisor general meeting in order to select the members of supervisory team, stipulate the policy regarding BUM Desa business improvement activities, supervise and evaluate the operational executives members performance³⁰⁰.

In BUMDes, all strategic decisions must be consulted through *Musyawarah Desa*.³⁰¹ However, in BUMDes, a village chief has some authority in enacting Village Regulation (*Peraturan Desa*) which may affect BUMDes' independence.

If the BUMDes is in the form of limited liability company (PT), it has the right to own assets under the rights of Hak Guna Bangunan/right of building utilisation (HGB), Hak Guna Usaha/exploitation right (HGU), hak pakai/utilisation right and hak sewa/right of lease. In addition, it must pay corporate income tax (Pajak Penghasilan WP Badan /PPH Badan) and submit annual reports regarding its income received during the tax year.

d. Foundation

In addition to Association, a Foundation is also one of the most common forms of entities dedicated for charity and social purpose. The foundation obtains its legal entity status after by the Minister of Law and Human Rights have approved the deed of establishment (notary deed)³⁰².

According to the 2001 Foundation Law, the foundation is a legal entity which consists of separated wealth and is reserved for certain objectives in the social, religious and humanitarian field.³⁰³

The Foundation does not have membership like "association" and only consists of oversight body, advisory body and executives that have full authority to manage the Foundation.³⁰⁴ Even though the Foundation does not have member, it can have salaried employee to support the operation of the foundation.

²⁹⁴ Article 2 and 3 *ibid*.

²⁹⁵ Article 10 *ibid*.

²⁹⁶ Article 16, *ibid*

²⁹⁷ Article 31, *ibid*

²⁹⁸ Article 11 Peraturan Menteri Desa, Pembangunan Daerah Tertinggal, Dan Transmigrasi Republik Indonesia Nomor 4 Tahun 2015 Tentang Pendirian, Pengurusan Dan Pengelolaan, Dan Pembubaran Badan Usaha Milik Desa (n 289).

²⁹⁹ Article 15(1), *Ibid*

³⁰⁰ Article 15 (3), (4), *Ibid*

³⁰¹ Article 1 point 5 Peraturan Menteri Desa, Pembangunan Daerah Tertinggal, Dan Transmigrasi Republik Indonesia Nomor 4 Tahun 2015 Tentang Pendirian, Pengurusan Dan Pengelolaan, Dan Pembubaran Badan Usaha Milik Desa (n 289).

³⁰² Article 11 (1) UU No. 16/2001 jo UU No. 28/2004

³⁰³ Article 1 (1) UU 16/2001 jo. UU 28/2004

Foundation, although they are designed to be for social purpose, is not considered communitarian. This is because there is no equality in terms of voting. The advisory body, which is the highest organ, has the power to appoint and dismiss the members of the executive and supervisor body.³⁰⁵ In turn, the executive bodies decide internally, on all other aspects pertaining the Foundation. Third parties outside the foundation cannot directly interfere with the decision-making process. According to AlAfghani et al., the modern foundation law designed the foundation as a purely “private charity” model.³⁰⁶

A Foundation’s “initial wealth” is separated from the founder (which means that the founders contribute some capital which becomes the Foundation’s capital). The other sources of the foundation’s capital are donations, endowments, grants, grant probates, and other types of acquisition that does not conflict with the foundation’s article of association and enacted laws and regulations.³⁰⁷

A foundation may also engage in profit-oriented activities as long as the profits are used for financing the main activity of the foundation. Forms of activity that is allowed are establishing business entity. However, the Law limits a Foundation’s capital participation at maximum 25% of its overall assets value.

Foundation boards are jointly and severally liable for all losses of the foundation if the foundation still not yet legally established. If the foundation is facing insolvency, and it was caused by the negligence and error that has been conducted by the executives, advisory or oversight bodies, and the foundation’s assets is not sufficient to pay all the liability, then each member of the board is responsible jointly and severally on this matter.³⁰⁸

Before the reform era, a foundation is often used as a vehicle for money laundering or masquerading assets. Thus, three years after the reform, in 2001, the Foundation Law prohibits the transfer of assets from foundation to its executives including prohibiting the payment of wages to foundation’s executives.³⁰⁹ This provoked a controversy as many of the foundation’s executives rely on salaries. In the 2004 amendment of Foundation Law, this condition was loosened.³¹⁰ Foundations are allowed to pay salaries to its executives, but not to the advisory and oversight bodies.³¹¹ Executives and the board are not authorized to use the wealth of the foundation for other purposes, such as making it as a guarantor of the debt, to transfer foundation’s wealth, or encumber the assets of the foundation for the benefit of others.³¹²

If the foundation is liquidated, the assets should be given to another foundation/legal entity that has similar activities/aims or to be given to the state³¹³. In this case the assets cannot be distributed to the foundation board and/or the management team (advisory, executive).

Based on GR No.38/1963, legal entities for the social purpose can have the right to own the land. However, the entities need to be appointed by the Minister of Agrarian/Minister of Agriculture after hearing from the Minister of Social Affairs³¹⁴. However, in general, the foundation has the right to own land/building based on Hak Guna Usaha/exploitation right, Hak Guna Bangunan/building utilisation right dan hak pakai/utilisation right over the land.³¹⁵ In the event the foundation granted a land/building based on waqf, it can process and possess the hak milik certificate over the land/building.

The foundations can generate profit, but only if such profit is used for charity. The foundation’s executive who does the daily managerial affairs of the Foundation does not have the authority to make the foundation

³⁰⁴ Article 32 (1) UU 16/2001

³⁰⁵ Article 28 point 2(b) Foundation Law.

³⁰⁶ CRPG AIIRA Report Page 89.

³⁰⁷ UU 16/2001

³⁰⁸ Article 25, 39 & 47 UU 16/2001

³⁰⁹ Article 3 and 5 UU 16/2001 and its elucidations.

³¹⁰ Article 5 Foundation Law

³¹¹ Article I UU 28/2004

³¹² Article 5 UU 16/2001

³¹³ Article 68, Foundation Law

³¹⁴ Article 1, 4, GR No.38/1963

³¹⁵ Article 2 (b), 19 (b), 39(b) GR No. 40/1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah

become the debt guarantor, or even to transfer the assets.³¹⁶ Access to finance will also become limited if the foundation's assets come from *waqf*, since for *waqf* assets cannot be used as collateral, or sold.³¹⁷ If the foundation's income source is donations or endowment, they are not taxable. But, if the source of the income is from the operation of the foundation as business entity, the foundation shall pay the related tax.³¹⁸

e. Cooperative

According to act 25/1992 regarding Cooperative,³¹⁹ Cooperative is business entity which consist of individuals which purpose is to increase collective welfare based in family principle and economic democracy.³²⁰ Under the Indonesian Constitution, the Cooperative is mentioned as a form of entity that is considered to reflect the nation's economic ideology.

Cooperatives have the most "communitarian" character. This is evident from the Cooperative's principle, which is based on "*the family principle that support spirit of togetherness and economical democracy*". The most striking reason why it is considered "communitarian" is from its decision making process, in which, every member has – equally – one vote

In order to obtain a legal status, the cooperative's article of establishment (*akta pendirian*) formulated by a notary should be approved by the relevant government agency (Minister for Cooperatives, Small and Medium Enterprises or other government officials assigned by the Minister) .³²¹

The membership of the cooperative is based on the similarity of economic interest. The membership is non-transferable.³²² The members of the cooperative are the owners of the cooperative.³²³ As a legal entity cooperative separates its wealth with its member's assets. This means, cooperative is regarded as legal subject and have its own independence in entering into legal acts on behalf of itself. Any legal acts performed in the name of the Cooperative is the responsibility of the cooperative itself as an entity and any liabilities arising therefrom are limited only to the assets of the cooperative – not its members.³²⁴

The organs of cooperative are members' assembly, executives and oversight body³²⁵. The members' assembly has the highest power in the cooperative³²⁶. The executives are also personally liable for any loss suffered by the cooperative if they act wrongfully and fail to perform their duties. The liability applies jointly among the executive members³²⁷. The executives have the authority to borrow money from the bank on behalf of the cooperative. In this case, it should refer to the provisions at the article of association whether it needs approval from the oversight body or the members' assembly. In addition, the cooperative can received social assistance (*bantuan sosial*) and grant (*hibah*) from the government. There should be surpluses that will be announced every year-end called *Sisa Hasil Usaha* (SHU), SHU is distributed equally to the members based on their contribution to the cooperative after being deduced by retained earnings and distributed through yearly members' assembly.³²⁸ The members' assembly shall take place once a year and

³¹⁶ Article 37 of Foundation Law.

³¹⁷ Article 40 of Waqf Law (Law 41/2004).

³¹⁸ Peraturan Menteri Keuangan No 234/PMK.03/2008

³¹⁹ UU 12/2014 repealed by MK, UU 25/1992 re-enacted. See 'UU Perkoperasian Dibatalkan Karena Berjiwa Korporasi - Hukumonline.com' <<http://www.hukumonline.com/berita/baca/lt5385bfa83b01f/uu-perkoperasian-dibatalkan-karena-berjiwa-korporasi>> accessed 21 September 2015.

³²⁰ Article 1 UU 25/1992

³²¹ Peraturan Menteri Negara Koperasi dan Usaha Kecil Menengah No. 01/Per/M.KUKM/2006

Article 6

³²² Article 19 UU 25/1992

³²³ Article 17 UU 25/1992

³²⁴ 'General Theory of Law and State - Hans Kelsen - Google Books'

<https://books.google.co.id/books?id=D1ERgDXEbkC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> accessed 22 September 2015.

³²⁵ UU No. 25/1992 regarding Cooperative, Article 21

³²⁶ UU No. 25/1992 regarding Cooperative, Article 22 (1)

³²⁷ UU No. 25/1992 regarding Cooperative, Article 34(1) and (2)

³²⁸ Article 45 UU 25/1992

at that time the surplus distribution should be decided.³²⁹ There is still a possibility for the Members' Assembly to derogate the surplus distribution through votes but the article of association of the cooperative could regulate retained earnings and surplus distribution, and decide otherwise.³³⁰

If the cooperative is dissolved, the assets of the cooperative will be used to settle the remaining obligations and the members bear the loss limited to their contribution (simpanan wajib/mandatory deposit, simpanan pokok/main deposit dan modal penyertaan/equity participation)³³¹.

Building utilisation right (Hak Guna Bangunan), exploitation right (Hak Guna Usaha) and hak pakai (utilisation right) over the land can be granted to the Koperasi.³³²

Cooperatives can generate profit. However, the proposal to retain profit under the new 2012 Law were quashed by the Constitutional Court.³³³ As a result, under the prevailing laws, members of the Cooperative can vote to distribute any surpluses they earn (and in practice, this caused Cooperative to be unsustainable). In addition, cooperative is a subject to be taxed. It needs to register to obtain NPWP (tax identity number) at least one month after its establishment and pay the income tax (Pajak Penghasilan/PPh) regarding the income received during the tax year.

f. Conclusions

As we have elaborated above, no entities are legally perfect. In foreign jurisdictions, there may be entities such as "corporation limited by guarantee not for profit" which combines the robust legal model of a corporation with non-profit and social cause. That sort of entity is not possible in Indonesia.

The requirement of legal entity is considered absolute in this case, since it has implications on assets ownership and limitation of liability. In addition, the Law on Regional Government recently requires that recipients of *grants* (hibah) take the form of legal entity. Thus, this overrules ordinary association. However, ordinary association can later be upgraded into incorporated association.

The Bum Des can be set up "as is" or it can also be set-up as cooperatives and limited liability company (PT) – although the process for this is not yet clear. Thus, in many respect, the application of framework above for BUM Des *depends* on the institutional set-up.

Of all the entities listed in the table below, incorporated associations and cooperatives possesses the most basic prerequisite required for the CBO to operate and improve.

Other possible alternative is to create a multiple-tier structure of entities. That is to say, one non-profit entity owns a for-profit subsidiary. This is mostly feasible with Foundation, as according to the Foundation Law, foundation can conduct business activities to support the achievement of the goals and objectives by establishing a legal entity and/or participate in a business entity.³³⁴ However, this structure requires multiple setups and thus could be complicated for CBOs.

For cooperative, the current cooperative law, 25/1992, does not specify whether cooperatives can create a Limited Liability Company. However, there has been circular letter from the Ministry of Cooperatives which

³²⁹ Ibid., Article 45

³³⁰ Ibid., Article 8j

³³¹ Article 54, 55, UU No. 25/1992

³³² Article 2 (b), 19 (b), 39(b) GR No. 40/1996 tentang Hak Guna Usaha, Hak Guna Bangunan dan Hak Pakai Atas Tanah

³³³ *Putusan Mahkamah Konstitusi Nomor 28/PUU-XI/2013 Tentang Pengujian Undang Undang Nomor 17 Tahun 2012 Tentang Perkoperasian.*

³³⁴ Undang Undang Nomor 16 Tahun 2001 Tentang Yayasan; Undang Undang Nomor 28 Tahun 2004 Tentang Perubahan Atas Undang-Undang Nomor 16 Tahun 2001 Tentang Yayasan. See Article 3(1)

encourage cooperatives to establish a limited liability company, to face the upcoming ASEAN Economic Community, especially for Cooperatives that have assets more than five billion Rupiah.³³⁵

Secondly, it may be conceivable for multiple CBOs (in villages or kelurahan) to be amalgamated into one single legal entity at the kecamatan (or even city) level, in order to simplify the paperwork and procedures for maintaining the legal entity. The barrier to this is hardly a legal one, but rather in the governing process of coordinating between CBOs and the management of the entity as assets owners.

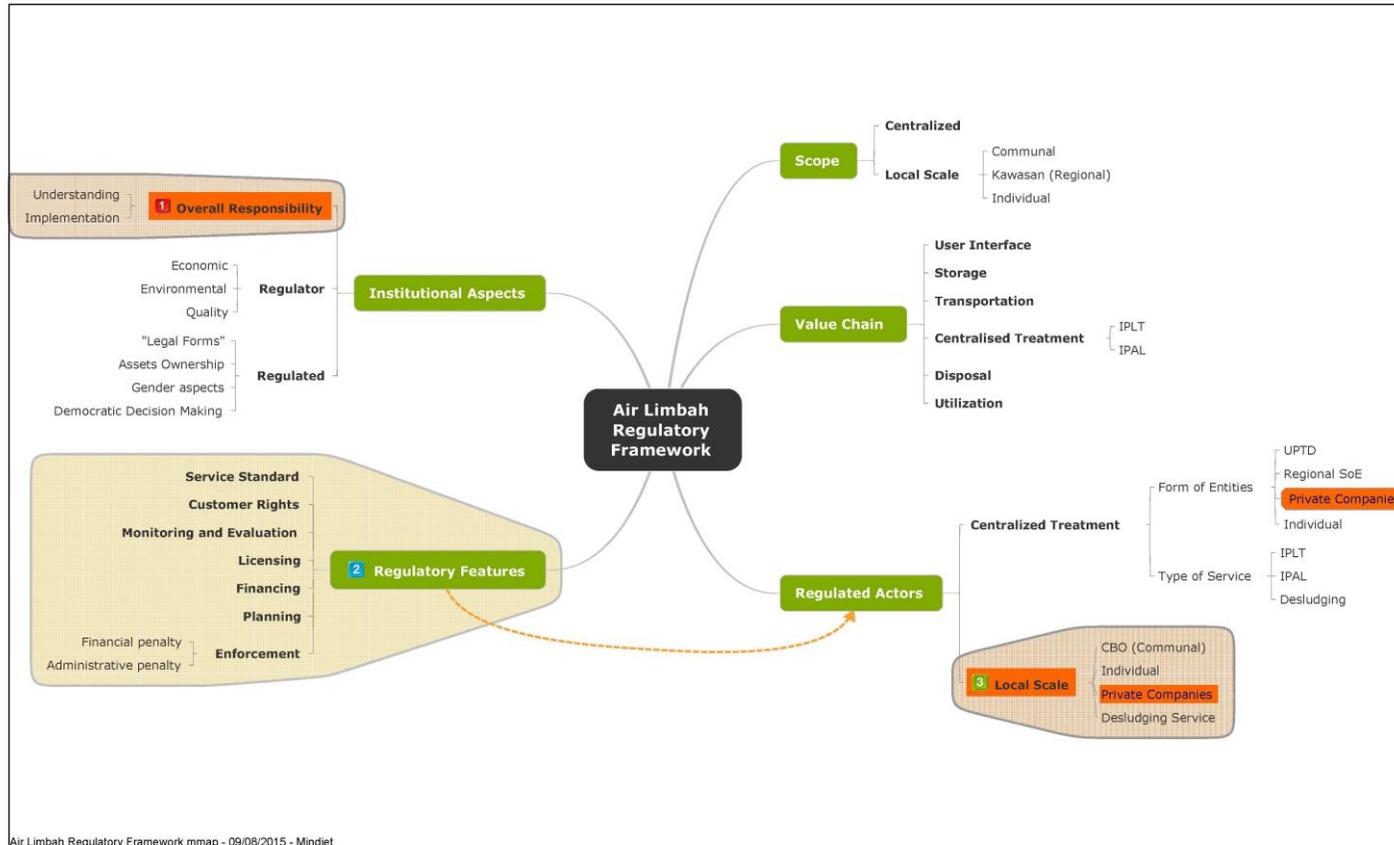
³³⁵ See 'Syarif Hasan: Saya Luruskan, Koperasi Bukan Jadi PT, Tapi Mendirikan Badan Usaha - RMOL.CO' <<http://www.rmol.co/read/2012/09/21/78907/Syarief-Hasan:-Saya-Luruskan,-Koperasi-Bukan-Jadi-PT,-Tapi-Mendirikan-Badan-Usaha->> accessed 29 September 2015.

Summary of legal options for KSMs and their benefits:

Parameter		Incorporated Associations	Ordinary Associations	Limited Liability Company	Bum Des	Foundation	Cooperatives
Purpose	Profit?	NO	NO	YES	Depends	NO	YES
	Can retain profit?			YES			Depends
Establishment	Notarial deed	YES	YES	YES	Depends	YES	YES
	approval by the Govt	YES	NO	YES		YES	YES
Is it a common legal form? (for CBO)		YES	YES	NO	NO (Not yet)	NO	YES
Legal Entity*		YES	NO	YES	Depends	YES	YES
Government Funding Public Funding (<i>iuran</i>)		YES	NO	NO	YES	YES	YES
		YES	YES	NO	YES	YES	YES
Independence		YES	YES	YES	NO	YES	YES
Equal Voting Power		YES	YES	NO	Depends	NO	YES
Proprietary Interest (e.g assets, shares)		YES	NO	YES	YES	NO	YES
Profit Generation		NO	NO	YES	YES	NO	YES
Income Tax Exempt		NO	YES	NO	NO	Depends	NO
*ability to own land/building assets (“right to use, HGU, HGB”); limitation of liability from members/founders							

Annexes

a. Air Limbah Regulatory Framework



b. Analysis of Draft Government Regulation on Drinking Water

Version April 22, 2015

No.	Regulatory Features	Water Supply (SPAM)	Notes	Wastewater (SPAL)	Notes
1.	Title	Government Regulation on Drinking Water Provision System (SPAM)			
2.	Categorization	SPAM (Drinking Water Provision System)		SPAL (Wastewater Provision System)	
3.	Principles	Conservation, balance, public benefit, coherence and harmony (<i>keserasian</i>), sustainability, equity/justice, independence, transparency, accountability (Art 2).		The terminology used is not “principles” but “must take into account” effort to conserve environment, increase health standard and fulfil service standard (Art 11(3))	
4.	Purpose	Fulfil human right to water, quality, affordability, balance between undertaker and customer, effectiveness, efficiency, expansion (Art 3, Art 13)			
	Prevention of Water Contamination			The undertaking of SPAM must be integrated with the provision of sanitation in order to prevent the contamination of raw water and to ensure the sustainability of drinking water provision system (Art 11(1))	
5.	Quality regulator	Ministry of health			
6.	Production chain	Intake (raw water), production/treatment unit, distribution, customer unit (Art 4.2).	Must provide continuity (24h), quantity, quality. (Art 4.2).		
7.	Stages	Development: (Art 15-19)	Planning (e.g. through RISPAM)	RISPAM is enacted by Central or Regional Govts (Art 16b). Feasibility Studies and Detailed Technical Planning are drafted by Govts (Local/Central) and/or undertaker	
Execution (physical construction)					
Rehabilitation,					
Uprating (capacity increase)					
Expansion					
Management (Art 21-25)		Operation and Maintenance	In general, the management (<i>pengelolaan</i>) of SPAM is carried out by undertaker and <u>may involve community</u> (Art 21(4)). O&M must pay attention to justice, conservation, sustainability of water services, improve public health, improve welfare, effectiveness, efficiency (Art 21(2),(3))		
		Enhance HR Capacity			
		Enhance institutional capacity			
	Monitoring and Evaluation				
8.	Authorities and Responsibilities	The responsibility of SPAM lies on Central and Regional Governments. The primary priority of SPAM undertaking is with State and Region Owned Enterprises. When State or Region Owned Enterprises are unable to serve drinking water, Central and Regional Governments can from <i>UPT or UPTD</i> (Technical Units) (Art 26)			
	Authorities and Responsibility of Central Government	Enact Policy and National Strategy; Enact norms, standard, procedure, criteria; conduct special, national strategic and cross provincial services; form SOE and/ <i>UPT</i> for drinking water or domestic waste, issue license to business entities (to fulfill their own needs in SPAM and SPAL), conduct monitoring, supervision to regional govts (Art 27)		Enact Policy and National Strategy; Enact norms, standard, procedure, criteria; conduct special, national strategic and cross provincial services; form SOE and/ <i>UPT</i> for domestic waste, provide license to business entities, conduct monitoring, supervision to regional govts (Art 27)	

No.	Regulatory Features	Water Supply (SPAM)		Notes	Wastewater (SPAL)	Notes
	Authorities and Responsibility of Provincial Government	Conduct inter-municipality domestic SPAM and SPAL; enact SPAM and SPAL policy for province; enact master plan for inter municipality SPAM and SPAL; form Regional SoE or Provincial UPTD; issue license for business entities (to fulfil their own needs in SPAM and SPAL); monitor and evaluate SPAM and SPAL in municipalities and report them to Central Govt; Conducts Pembinaan, controlling, supervision to municipal governments (Art 28).			Conduct inter-municipality domestic SPAM and SPAL; enact SPAM and SPAL policy for province; enact integrated plan for inter municipality SPAM and SPAL; form Regional SoE or Provincial UPTD; issue license for business entities (to fulfil their own needs); monitor and evaluate SPAM and SPAL in municipalities and report them to Central Govt; Conducts Pembinaan, controlling, supervision to regional governments (Art 28).	
	Authorities and Responsibilities of Municipal Government	Undertake domestic SPAM and SPAL; enact domestic SPAM and SPAL policy and strategy; enact SPAM and SPAL master plan; form Regional SoE or UPTD for drinking water and domestic waste; <u>conduct inventarization towards cooperatives/groups/association of SPAM which submit report as Drinking Water Undertaker; fulfil drinking water for the population in accordance with minimum standard</u> ; issue license for business entities (to fulfil their own needs in SPAM and SPAL); <u>fulfil access to wastewater services in accordance to minimum standard</u> ; provide “guidance”, control, supervision to village governments and communities within them on the undertaking of SPAM and SPAL; monitor and evaluate SPAM and SPAL; report the result of monitoring and evaluation to provincial govts (Art 29)			Undertake domestic SPAM and SPAL; enact domestic SPAM and SPAL policy and strategy; enact SPAM and SPAL master plan; form Regional SoE or UPTD for drinking water and domestic waste; <u>conduct inventarization towards cooperatives/groups/association of SPAM which submit report as Drinking Water Undertaker</u> ; issue license for business entities (to fulfil their own needs in SPAM and SPAL); <u>fulfil access to wastewater services in accordance to minimum standard</u> ; provide “guidance”, control, supervision to village governments and communities within them on the undertaking of SPAM and SPAL; monitor and evaluate SPAM and SPAL; report the result of monitoring and evaluation to provincial govts (Art 29)	
	Authorities and Responsibilities of Village Governments	Conduct <i>pembinaan</i> (fostering/guidance) and supervision of domestic SPAM and SPAL at the community level; <u>facilitate the reporting of SPAM cooperatives/groups/association to be inventarized by Municipal Governments</u> ; report supervision on SPAM and SPAL in its territory to municipal govts. (Art 30)			Conduct <i>pembinaan</i> (fostering/guidance) and supervision of domestic SPAM and SPAL at the community level; facilitate the reporting of SPAM cooperatives/groups/association to be inventarized by Municipal Governments; report supervision on SPAM and SPAL in its territory to municipal govts. (Art 30)	
	Drinking Water Undertaker (Art 31)	Functions	Provide drinking water to (members) of the community			
		Tasks	Develop SPAM; Manage SPAM; monitor and evaluate its drinking water provision; implement good corporate governance; draft a standard operating procedure; report transparently and accountably in accordance with GCG; report to central/municipal govt.			
	Rights and Obligations (Art 34)	Rights	Obtain land in accordance with prevailing regulations; receive payment based on tariff/retribution; specify and implement late fees; obtain specific (quantity and quality) raw water supply continually in accordance to license; disconnect customers who does not fulfil their obligations; sue communities or other organisation which cause damage to SPAM infrastructure			
		Obligations	Guarantee quality, quantity, continuity			
			Provide necessary information to interested parties towards incidents which may potentially affect changes of quality, continuity, quantity			
			Operate infrastructure and provide services to customers except in the event of force majeure			
			Provide information on services			
			Prepare infrastructure for customer complaints			
			Follow and comply with efforts to settle disputes			
			Take part on protection and conservation of water source			
	Self-Supply	Community self-supply (Art 35)	Community groups can participate in the undertaking of SPAM to <u>fulfil their own need</u> in regions not yet covered by Drinking Water Undertaker (Pengelola Air Minum)			

No.	Regulatory Features	Water Supply (SPAM)	Notes	Wastewater (SPAL)	Notes
			Community groups can form cooperatives/groups/association/management body		
			Cooperatives/groups/association/management body must report to Municipal Govts through Village Heads in order to be registered as Drinking Water Undertaker (Pengelola Air Minum)		
			Such groups are entitled to obtain <i>Pendampingan</i> (guidance, support, mentoring) from the local and national government to ensure quality of SPAM in accordance with prevailing regulations		
			National and/or local governments can provide financial support on the undertaking of SPAM to cooperatives/groups/association (himpunan)/management body		
	BPPSPAM (SPAM development management body)	General (Art 37)	<u>BPPSPAM is established in order to increase the performance of (healthy and sound quality) drinking water undertaker</u>		
		Status and Position (Art 38); Organisational Structure (Art 39)	BPPSPAM is a non-structural agency formed by the minister and accountable to the Minister. Its membership consists of central government, undertaker and community.		
	Customer's Rights and Obligations (Art 42)	Rights	Obtain drinking water service in accordance with prescribed quality, quantity and continuity (Art 42.1.a)		Obtain services with respect to the disposal of human excrement or desludging (Art 42(1)(c))
			Obtain information on the structure and amount of tariff and bills (Art 42.1.a)		
		Obligations	Paying service bills (Art 42(2)(a))		
			Conserve water use (Art 42(2)(b))		
			Safeguard and maintain SPAM infrastructure (Art 42 (2) (c))		
			Follow guidance and procedure enacted by Drinking Water Undertaker (Art 42(2)(d))		
			Follow and comply with legal dispute settlement process (Art 42(2)(e))		
	Tariff, retribution, fee collection	Definition	Drinking water tariff is the service cost of drinking water/wastewater service which must be paid by customer for every utilization of drinking water which is stipulated by Drinking Water Undertaker (Art 46(1))		Drinking water tariff is the service cost of drinking water/wastewater service which must be paid by customer for every utilization of drinking water which is stipulated by Drinking Water Undertaker (Art 46(1))
		Principles	Affordability; fairness (<i>keadilan</i>); service quality; cost recovery; efficiency; transparency and accountability; raw water conservation		Affordability; fairness (<i>keadilan</i>); service quality; cost recovery; efficiency; transparency and accountability; raw water conservation
		Component	Operation and Maintenance; Depreciation and Amortisation; interest on loan; other costs; "appropriate" profit. Tariff structure must accommodate affordability of low income communities in the fulfilment of their daily basic needs; tariff structure including progressive tariff must be implemented in order to allow cross subsidies		
		UPT/UPTD (Arts 47 and 48)	When SPAM is under UPT, tariffs are determined through a Ministerial Decree. When SPAM is under UPTD, retribution is specified in a regional by law		

No.	Regulatory Features	Water Supply (SPAM)		Notes	Wastewater (SPAL)	Notes
		Community (Art 49)	Members of the community groups can be subjected to fee collection based on consensus. The management of such fee collection is conducted by the community group.			
	Fostering/Guidance (Pembinaan) and Supervision (Art 50)	“Pembinaan” for Regional Governments (Art 50(1))	Coordination in the fulfilment of drinking water; issuance of norms, standard, procedure, criteria; provision of guidance, supervision, consultation; technical assistance and programmatic assistance; education and training			
		“Pembinaan” for Drinking Water Undertaker and community groups in the provision of SPAM (Art 50(2))	issuance of norms, standard, procedure, criteria; provision of guidance, supervision, consultation; technical assistance and programmatic assistance; education and training			
	Supervision	Community (Art 51 (2))	Regional Government carry out supervision towards the undertaking of SPAM by Regional Owned Enterprises, UPTD SPAM and community groups			
		Drinking Water Quality and Effluent (Art 51(3))	Supervision conducted by appropriate agencies			
		Complaints	Supervision must be conducted by involving community participation (Art 51(4)); such participation is performed by submitting report and compliant to Drinking Water Undertaker (Art 51(5). Drinking Water Undertaker must take action towards such complaint and report to the Government. The Government should then supervise Drinking Water Undertaker’s action response.			
	Legal Action	Community (Art 52)	May petition for class action when they suffer loss due to the undertaking of SPAM			
		Organisation (Art 53)	May petition against individual or business entities which conduct activities that are causing damage to SPAM infrastructure. Such claim is limited to specific action in relating to the continuity of SPAM or towards real expenses			

c. Analysis of Draft Perda Bogor on Domestic Wastewater Management

Version circulating on 8/14/2015

No.	Features	Centralized	Local Scale	Commentary
1.	Principles	Fairness/Equity (<i>Keadilan</i>), prudence, benefit, conservation and sustainability (Art 2(1))		
	Purpose/objective	Control the disposal of domestic wastewater; protect ground and surface water quality; increase conservation efforts, especially on water resources (Art 2(2))		No specific regulatory objective on wastewater as a “service”.
	Roles and Authorities of Regional Government	Overall planning; development and/or improvement of domestic wastewater infrastructure; education, counselling, socialization, <i>pembinaan</i> (guidance, support) in order to increase society’s awareness; facilitation, development, implementation, supervision, control, treatment, utilization of wastewater; coordination between government agencies, communities and domestic wastewater operator; enactment of service standard; monitoring of environmental quality (Art 3)		
		Enact policy and strategy for the management of domestic wastewater; Issue licences and recommendation; Conduct fostering/guidance (<i>pembinaan</i>) and supervision on the performance of the management of domestic wastewater conducted by communities and/or wastewater operator; Improve the institutions of domestic wastewater, inter regional cooperation, partnerships, networks on the regency/city level; Draft and implement emergency response in the management of domestic waste; Conduct supervision on the feasibility of wastewater infrastructure (Art 4)		
		Collect retribution (Art 5(1))		
	Scope	Wastewater is channelled to pipe for treatment (Art 7(2))	Individual/communal in which pipe may or may not be used to channel wastewater to treatment (Art 7(2))	
		Implemented to regional, provincial or municipal scale (Art 7(4))		
		Decision to implement the system must pay attention to domestic wastewater management plan; spatial plan; hydrogeology and topographical condition and socioeconomic consideration (Art 7(5))		
		Wastewater transmission and collector and its equipment; IPLT and/or recycling system (Art 8(2))	Covers latrine/toilet, individual septic tanks with <i>resapan</i> (drain field?) or upflow filter and communal with pipe network; Desludging and transportation; Wastewater treatment at IPLT (Art 8(1))	Although toilet in the centralized system are not provided by the government, it is still a part of the system – at least in terms of design interface and quality standard
	Institution	Regional government appoints regional agency tasked with public work to carry out the regulatory function for domestic waste management (Art 9(1))		By default it will have regulatory function. It is more necessary to specify its regulatory function and powers.
		Regional government can form UPTD or Regional Corporation or appoint existing regional corporation (Art 9(2))		

No.	Features	Centralized	Local Scale	Commentary
		Such UPTD or regional corporation shall be given the authority to manage centralized waste management system for city or regional scale; to manage IPLT; to manage sewage service (<i>layanan lumpur tinja</i>) and to collect retribution fees		
	Planning (Art 10)	Planning shall be integrated between physical (infrastructure) and non physical (training institutional issue, etc); such plans shall be stipulated in a Masterplan for Domestic Wastewater System; Such masterplan must contain (a) local and centralized service area, (b) waste collection piping plan, (c) development of centralized, regional and communal IPAL (d) IPLT development plan, (e) service development plan, (f) enactment of standard criteria and minimum service standard, (g) financing and investment plan, (h) institutional development and (i) improvement of community and private sector's participation. Such plans shall be enacted through Mayor's Regulation		This provision contains planning exercise both for local scale and centralized system but does not distinguish if there are different stages or method of planning between local scale vs centralized scale.
		Planning for physical infrastructure must pay attention to bulk water availability, hydrogeological and topographical condition, the characteristic of domestic wastewater, technological choice and local socioeconomic and cultural conditions. Planning for city level is to be aimed, incrementally, towards centralized system. (Art 11)		The term " <i>untuk kawasan perkotaan diarahkan secara bertahap menggunakan sistem terpusat</i> " (aimed, incrementally, towards centralized system) seemed to suggest that the end purpose is overall connection to centralized system. Thus, local scale system appears to be intended for temporary purpose. This interpretation needs to be confirmed to relevant officials.
		Non-physical planning is aimed towards improvement of institutional and human resources capacity, improvement of private sector participation in the development of domestic wastewater and the fulfilment of financial goals for domestic wastewater		
	Developments (Art 13(2))	Covers new development and/or rehabilitation of infrastructure; must be in line with "environmental awareness"		
		Infrastructure developments must be conducted based on Domestic Wastewater Masterplan		
		Development of centralized systems shall be conducted by: (a) individuals, in terms of building toilet and household connection (tertiary pipes?), (b) city government or the private sector for building piping and centralized wastewater installation (Art 14 (3))	Development of local scale system must follow the following requirements: individuals or community groups develop toilet equipped by "treatment unit"; the city government or the private sector provide waste transportation means and builds IPLT (Art 14 (2))	
	Operation and Maintenance	For centralized, regional and city scale systems includes: (a) wastewater treatment, (b) routine checking of pipe network, (c) maintenance of wastewater installation, (d) support facilities and other support infrastructure. Such activities are to be conducted by <u>wastewater operator</u> (<i>operator air limbah</i>) (Article 15)	For <u>local system communal scale</u> (<i>sistem setempat skala komunal</i>): (a) desludging and transportation of human excrement, (b) treatment at IPLT and (c) support facilities. Such activities are to be conducted community user groups (Art 16); For <u>local systems</u> : (1) (a) domestic wastewater treatment; (b) maintenance of wastewater infrastructure based on applied local method; (2) If the facility in 1 (b) uses septic tank, there must be a regular or scheduled desludging; transportation of the sludge to IPLT and the treatment of such sludge at IPLT; Activities in (1) is performed by local community user group whereas activities in (2) is performed by authorized wastewater operator or other person carrying licence (Art 17)	The distinction between local scale (Art 17) and local scale communal systems (Art 16) is interesting, considering that both provisions are almost identical. The only differences is that when referring to communal scale (Art 16) there are reference to support facilities and other buildings while this is absent non communal local systems (Art 17) and that at Art 17 there is a reference to wastewater operator to conduct desludging and conveyance. This reflect that there are more regulated actors in terms of local systems: communal and non communal. Such distinction should have been defined in Article 1
		Anyone conducting activities and/or business must obtain licence from the mayor. Such licence will be regulated in mayor's regulation		This provision should be merged with the licensing section.
	Utilization (Article 19)	(1) Anyone can utilize the residue of domestic wastewater treatment for specific needs as long as quality standard [<i>buku mutu</i>] is fulfilled; (2) the result of domestic wastewater in (1) above must fulfil ambient water quality standard; (3) output of treated water which has fulfilled [<i>buku mutu air limbah domestik</i> , effluent standard?] and not utilized can be discharged to drainage channels		The term <i>buku mutu</i> (quality standard) needs clarification, does it mean effluent standard? Note also that this provision will restrict utilization of "raw" wastewater or sludge.

No.	Features	Centralized	Local Scale	Commentary
	Monitoring and Evaluation	Evaluation is conducted towards the performance of the overall domestic wastewater; evaluation is conducted towards the results of planning, development and operation of the management of wastewater; evaluation is based as a basis to improve domestic wastewater (Article 20, 1-3)	Monitoring of local system domestic wastewater is conducted by individual or community groups [<i>kelompok masyarakat</i>] with <i>pembinaan</i> [supervision/guidance] and supervision from regional government (Art 20(4))	It is not clear if (1) to (3) are applicable to local scale; whereas para (4) clearly state that it applies to community groups.
		The Government conducts overall monitoring and evaluation of domestic wastewater (Art 21 (1))		
		Monitoring and evaluation in centralized, city- scale domestic wastewater, is conducted by local agencies or wastewater operator (Art 21 (2))		There appears to be discrepancy in terms of monitoring and evaluation since there is no local provision on monitoring by local government agency; instead, it is conducted by community groups themselves (See Art 20(4)) whereas the government's role is only in conducting <i>pembinaan</i> .
	Environmental Quality Monitoring (Article 22)	(1) Monitoring of environmental quality caused by domestic wastewater is conducted by relevant regional agencies; (2) monitoring of environmental quality due to treatment of human excrement (<i>pengolahan lumpur tinja</i>) is conducted by operator; Wastewater operator in (2) must report it to relevant local agencies regularly		
	Scheduled desludging (Art 23)		Scheduled desludging is undertaken in stages in line with the availability of infrastructure owned by operating agency (<i>lembaga pengelola</i>); (2) the desludging must be conducted at minimum once in every two years to each customer; (3) operating agency compile database of customer for scheduled desludging; (4) the amount of retribution and the mechanism for scheduled desludging must be regulated further in a mayor's regulation	This provision introduced another regulated actors: <i>lembaga pengelola</i> (operating agency). This was not defined in Article 1. Is Lembaga Pengelola the same as "Pengelola Air Limbah Domestik". Presumably not, since it is aimed for desludging service.
	Financing (Art 24)	(1) The financing of domestic wastewater, individual scale (<i>air limbah domestik skala individu</i>) is derived from the "masyarakat"; (2) for the centralized scale it is financed from regional budget, central government subsidy or province and other legal means; (3) Person or Entity covered (<i>terjangkau</i>) by centralized domestic wastewater must channel their domestic waste to the centralized system; (4) the cost for connecting shall be borne by the "masyarakat" [-- why not directly refer to Person or Entity?]; (5) regional government will assist connection fee, fully or partially for low income "masyarakat" [communities]; (6) financing of local system, communal scale wastewater for low income communities are derived from regional budget or other legal sources.		Masyarakat could mean society, community or individual (everyone, anyone). The term "masyarakat" is often poorly defined in Indonesian legislation. Whom does it aim to address, the society as a whole, a community (living in certain space) or the individual? This article also refers to person or entity – what entity means is not clear. Does it mean legal entity or business entity? The focus of the regulation must be specifically clear. Should the obligation be attached to building ownership or tenancy? Again, this reflects the importance of clearly specifying the regulated actors.
	Retribution	Retribution fees must pay attention to the volume of domestic waste, type of business and or activities, recovery of operation and maintenance, cross subsidy principle and "masyarakat's" purchasing power. The delay in payment can be subjected to fines. (Art 26)		There are no provisions regulating <i>iuran</i> (fees) for community/local scale wastewater
		The regional government and/or domestic wastewater operator can provide incentive to <i>anyone</i> (setiap orang) who has undertaken wastewater management, which can be in the form of reduced retribution, removal of penalty, connection of centralized system to household. (Art 27)		

No.	Features	Centralized	Local Scale	Commentary
		<p>(1) Each person obtaining domestic wastewater service but is not compliant with prescribed standard may forward their 'objection'</p> <p>(2) If such objection is proven; the domestic wastewater operator (<i>operator air limbah</i>) provide compensation in the form reduction in retribution</p> <p>(3) If such compensation is not provided, the regional government may impose administrative sanctions</p> <p>(4) Such administrative sanctions can be in the form of (a) written reprimand, (b) suspension of licence, (c) revocation of licence (Art 48)</p>		<p>The provision does not explicitly clarify to which undertaker does it apply to: centralized wastewater operator or communal or intermediary service such as desludging and conveyance. However, from the reference to <i>operator air limbah</i> it would appear that this provision applies only to centralized wastewater systems. If this interpretation is correct, then other types of undertaker are not subjected to such sanctioning mechanism. Again, this reflects the necessity on specifically defining the regulated actors.</p> <p>The type of administrative sanctions provided in the provision is not likely to be effective. It will not be feasible to suspend or revoke an operator administrative licence only because one or two complainant failed to receive compensation. Monetary sanctions must be contemplated – but embedding such sanctioning framework requires some research into incentive regulation.</p> <p>This section should not be a part of the “retribution” chapter, it should be a part of a sanctioning and enforcement chapter and carefully linked with “service standard” chapter – both of which are currently absent from the draft.</p>
	Licencing (Art 30)		<p>(1) Desludging operator must obtain permission from the Mayor.</p> <p>(2) Such licence must fulfil certain technical and administrative requirements</p> <p>(3) Licencing for domestic wastewater on local scale is integrated with building permit for housing development</p> <p>(4) Regional heads can refuse to issue licence as referred to in para (1) and (2) if there are mistake, abuse, forgery, etc or that some preliminary prerequisites are not fulfilled</p> <p>(5) Licencing will be detailed further by Mayor Regulation</p>	<p>It appears that this provision only regulates desludging operator and does not cover other operator such as IPLT/IPAL or communal wastewater service/KSM.</p> <p>The provision mentions that the licence for local scale domestic wastewater would be integrated in building permit. This provision is not clear with respect to local scale communal sites. The Perda must clarify if it is meant to regulate licencing for communal scale as a part of building permit (IMB) for the local scale wastewater facility.</p> <p>Also, embedding licencing in IMB would mean that the licence are constrained for matters related to building technicalities. Operational matters – such as O/M, supervision/monitoring, reporting obligation of the KSM/Local Scale undertaker are not touched in the licencing framework.</p>
	Society and Private Sector's Role	The community's role in terms of centralized system can include: providing support, suggestion, consideration to the city government or licensed domestic water undertaker and in supervising the performance of city government in the management of domestic wastewater. (Article 32 (2))	For individual, regional and local scale, the “masyarakat” can play a role by: (a) conduct the management of domestic wastewater in accordance with prevailing norms, standards, procedure and criteria; (b) provide support in accordance with the necessity in location; (c) provide suggestion, consideration and suggestion to community groups and (d) by supervising the performance of community groups in charge with communal wastewater service. (Article 32(1))	<p>The description of Masyarakat (community's) role in centralized systems is a good start to kick-start participation in water governance. However, without further detail as to how “suggestion, consideration or supervision” by the community can be performed, such provision will only serve as “lip service”. What regulation must outline is the detail mechanism of participation and the incentives for undertaker to comply and embody participatory mechanisms.</p> <p>The description of community's role for the local and individual scale is less helpful. The language should have been drafted in regulatory context: compliance with norms, standard and criteria is not a role, it is an obligation.</p>
		The private sector can take role as a “partner” in the development of physical infrastructure (Art 33 1 a)	The private sector can conduct cooperation in the provision of vehicles for transport/conveyance for desludging activities (Art 33 1 b)	The provision on private sector's participation must be clarified, again, not only in terms of “taking a role” but also in terms of the detailed mechanism of participation. Which part of the business cycle can the private sector's involved and how it can be implemented must be clarified. Can the private sector runs IPLT/IPAL?
		The private sector can take role through investment in wastewater infrastructure development and socialization of domestic wastewater management to the society		

No.	Features	Centralized	Local Scale	Commentary
	Rights and Obligations	Every person has the right to: enjoy healthy environment, free of contamination from domestic wastewater; obtain services in the management of domestic wastewater from the regional government or other parties assigned with responsibilities; obtain <i>pembinaan</i> (fostering and guidance) for environmentally aware domestic wastewater regulation; obtain environmental rehabilitation due to negative effect of domestic wastewater management; convey suggestions, consideration, proposal to the government or domestic wastewater operator; convey objection to activities which are not in line with standard; report violations to relevant agencies (Art 38)		
		Everyone is obligated to: reduce the quantity of domestic wastewater by conserving drinking water, manage domestic waste resulting from local scale and centralized scale, conduct the conveyance/transport of sludge in accordance with standard; discharge sludge waste at IPLT; pay retribution/fee for centralized and communal system, provide sanitation infrastructure at public places. (Art 39)		The “addressat” of the norm shall not be “everyone” – not everyone should be obligated to conduct conveyance/transport, such obligation belongs to the undertaker. Again, there is a need to clearly define and stipulate the regulated actors.
		<ul style="list-style-type: none"> (1) Each person residing within the coverage of a centralized system must utilize the pipe network (2) The “Masyarakat” is obligated to develop regional or communal scale wastewater infrastructure in regions not covered by the centralized system (3) The city government is obligated to facilitate household connection for centralized system and in the development of local domestic wastewater infrastructure for local system – for low income “masyarakat” (Art 40)		Just to note – putting obligation to “Masyarakat” (community/society) will have no legal implication. This provision also reflects the state’s absolution from building local scale infrastructure.
		<ul style="list-style-type: none"> (1) Anyone building houses (minimum 5 houses), hotel, offices and trade facilities are obligated to build wastewater infrastructure with centralized system in a communal or regional scale. (2) Housing/offices/ trade regions which has not own wastewater facilities are obligated to develop them (3) Such provisions will be detailed further in a mayor’s regulation (Art 41)		
	Administrative Sanctions			
	Criminal Sanctions			

d. Field Document Inventory

No.	Region	Document Type	Remarks
1		Form Surat Pernyataan Minat Berpartisipasi Dalam Program SLBM (Sanitasi Lingkungan Berbasis Masyarakat)	-
2	Desa Bentang, Kec. Galesong Selatan, Kab. Takalar	AD/ART KSM - SLBM 2015 "Paraningai", juni 2015	-
3	Desa Sampulungan, Takalar	AD/ART Takalar - KSM Minasa Baji, tanggal 7 Juni 2013	-
4	Takalar	Akta Pendirian Cabang Asosiasi KSM AKSANSI Daerah Kab. Takalar, No. 34, tanggal 31 Juli 2015	Notarized
5	Makassar	Akta Pendirian Asosiasi KSM Sanitasi Seluruh Indonesia (AKSANSI), No. 1, 2 April 2015	Notarized
6	Tamarunang, Makassar	Akta Pendirian Perkumpulan Badan Keswadayaan Masyarakat, No. 55, tanggal 30 November 2007	Notarized
7		AD KSM SANIMAS	-
8	Parepare, Sulawesi Selatan	Berita Acara Kemajuan Pelaksanaan Kegiatan, 01/BAKPK/SLBM/LK/IV/2015, tanggal 6 April 2015	-
9	Parepare, Sulawesi Selatan	Surat Pernyataan Penyelesaian Pelaksanaan Kegiatan (SP3K), 02/SP3K/SLBM/LK/IV/2015, tanggal 6 April 2015	-
10	Parepare, Sulawesi Selatan	Berita Acara Serah Terima Pekerjaan, 03/BASTP/SLBM/LK/IV/2015, tanggal 6 April 2015	-
11	Parepare, Sulawesi Selatan	Berita Acara Pengelolaan MCK+++ Program SBLM 2012, 04/BAP-MCK/SLBM/LK/IV/2015, tanggal 6 April 2015	-
12	Bogor Timur, Bogor	Surat Pernyataan Hibah Tanah, tanggal 17 Oktober 2012	-
13	Cilendek Barat, Bogor Barat	Surat Pernyataan Hibah Tanah, tanggal 5 Maret 2014	-
14		Form Surat Pernyataan - Penyanding	-
15		Form Surat Pernyataan Lahan/ Berita Acara Kebutuhan Lahan	-
16	Desa Dutohe, Kec. Kabila, Kab. Bone Bolango	Surat Pernyataan Hibah, tanggal 12 Maret 2015	-
17	Jatiwoyo Baru, Kel. Mayungan, Kec. Ngawen, Kab. Klaten	Laporan Akhir Pemberdayaan SLBM 2012 oleh CV. Prasadha Consultant	-
18	Desa Boddia, Kec. Galesong, Kab. Takalar	Surat Keputusan Kepala Desa Boddia No. 06/08/VI/2015 tentang Pembentukan KSM SANIMAS 2015, tanggal 8 Juni 2015	-
19	Desa Boddia, Kec. Galesong, Kab. Takalar	AD KSM SANIMAS LESTARI	-
20	Desa Boddia, Kec. Galesong, Kab. Takalar	ART KSM SANIMAS LESTARI	-
21	Kel. Baji Pamai, Kec. Maros Baru, Kab. Maros	Surat Keputusan tentang Pembentukan KSM SANIMAS No. 11/04.1014/SKP/BP/V/2013 tanggal 15 Mei 2013	-
22	Kel. Baji Pamai, Kec. Maros Baru, Kab. Maros	Lampiran Susunan Pengurus KSM - Surat Keputusan tentang Pembentukan KSM SANIMAS No. 11/04.1014/SKP/BP/V/2013 tanggal 15 Mei 2013	-
23	Desa Candiroto, Kec. Candiroto, Kab. Temanggung	Naskah Perjanjian Hibah Daerah No. 056.6/01/SLBM/2015	-
24	Kel. Gending, Kec. Kebomas, Kab. Gresik	AD KPP SIWALAN WONOKITRI No. 115/.../N.SKM/15, tanggal 10 April 2015	Notarized
25	Kel. Gending, Kec. Kebomas, Kab. Gresik	ART KPP SIWALAN WONOKITRI, April 2015	Notarized
26	Kel. Kotalama, Kec. Kedungkandang, Malang	Berita Acara Serah Terima Infrastruktru dari KSM ke BKM, tanggal 11 Februari 2015	-
27	Kel. Kotalama, Kec. Kedungkandang, Malang	Berita Acara Serah Terima Infrastruktur dari BKM ke SATKER/PPK Kota Malang, tanggal 11 Februari 2015	-
28	Kel. Kotalama, Kec. Kedungkandang, Malang	Berita Acara Serah Terima Infrastruktur dari SATKER PPK KOTA KE KPP, tanggal 11 Februari 2015	-
29	Desa Paguyuban, Kec. Way Lima, Kab. Pesawaran	ART Kelompok Pemanfaat dan Pemelihara Juni 2014	-
30	Desa Paguyuban, Kec. Way Lima, Kab. Pesawaran	Berita Acara Serah Terima Pekerjaan No. 474/17/BASTP/RIS-PNPM/OMS-PG/XII/2014 tanggal 12 Desember 2014	-
31	Desa Paguyuban, Kec. Way Lima, Kab. Pesawaran	Berita Acara Serah Terima Pekerjaan No. 014/BASTP/RIS-PNPM/PU/PSW/2014 tanggal 12 Desember 2014	-
32	Desa Paguyuban, Kec. Way Lima, Kab. Pesawaran	Berita Acara Serah Terima Pekerjaan No. 014/BASTP/RIS-PNPM/III.01/PSW/2014 tanggal 12 Desember 2014	-
33	Desa Paguyuban, Kec. Way Lima, Kab. Pesawaran	Berita Acara Serah Terima Pekerjaan No. 474/18/BASTP/RIS-PNPM/KD=PG/XII/2014 tanggal 12 Desember 2014	-
34	Kp. Jatiwoyo Baru, Kel. Mayungan, Kec. Ngawen, Kab. Klaten, Jawa Tengah	Rencana Pembangunan SLBM Kabupaten Klaten Tahun 2012	-
35	" (as above)	AD/ART BINA SEHAT	-
36	"	Dokumen Rapid Participatory Assesment	-

37	"	Surat Pengantar Rencana Kerja Masyarakat No. /KSM-SLBM/2012	-
38	"	Lembar Pengesahan Rencana Kerja Masyarakat	-
39	"	Notulensi CPA I BINA SEHAT tanggal 18 September 2012	-
40	"	Notulensi CPA II BINA SEHAT tanggal 18 September 2012	-
41	"	Notulensi Komisioning tanggal 25 April 2013	-
42	"	Notulensi Pertemuan O&M tanggal 1 April 2013	-
43	"	Notulensi Penjelasan DED dan RAB SLBM 2012	-
44	"	Notulensi Pertemuan RPA BINA SEHAT tanggal 18 September 2012	-
45	"	Notulensi Sosialisasi SLBM 2012 tanggal 17 Juli 2012	-
46	"	Surat Keputusan Kepala Desa Mayungan, Kec. Klaten, Kab. Klaten No. .../.../2012 tanggal 27 September 2012	-
47	"	Peta Lokasi Pelaksanaan Pekerjaan SLBM 2012	-
48		Siapa Melakukan Apa (Who Does What) BINA SEHAT	-
49		Pengumpulan Data Teknis BINA SEHAT	-
50		Klasifikasi Kesejahteraan (Wealth Classification)	-
51	Temanggung	AD/ART SANIMAS TIRTA GUNA	-
52		Contoh Format Berita Acara Serah Terima Infrastruktur dari SATKER PPK Kabupaten/Kota ke KPP (Format 10.12)	
53	Desa Ringinharjo, Kabupaten Bantul	Laporan Penyelesaian Pelaksanaan Kegiatan, Ringinharjo, 28 Desember 2014	
54	Desa Ringinharjo, Kecamatan Bantul	Berita Acara Serah Terima Infrastruktur Dari BKM Ringinharjo ke Satker PPK Kabupaten Bantul (Signed), 6 Januari 2015	
55	Desa Ringinharjo Kabupaten Bantul	Berita Acara Serah Terima Infrastruktur Dari Satker PPK Kabupaten Bantul ke KPP Gema Lestari (signed), 6 Januari 2015	

e. Document Acquisition Checklist

Category	Document	Remarks
Tata Kelola Internal (Internal Governance)	Anggaran Dasar/Anggaran Rumah Tangga (Article of Association/Charter/Deed of Establishment)	Is it notarized? (Y/N)
	Approval/Certification from the Ministry of Human Rights on Legal Status	
Assets Transfer (Penyerahaan Aset)	Protokol Serah Terima Aset (Transfer of Assets Protocol)	
	Dokumen/Berita Acara Serah Terima Aset (Transfer of Assets Documents)	
Perjanjian (Agreements)	Nota Kesepahaman (Memorandum of Understanding)	
	Surat Perjanjian Pemberian Bantuan (SPPB) – BLM APBD	Agreement for financial assistance with local government
	Surat Perjanjian Penggunaan Tanah (Land Utilization Agreement)	
Tanah (Land)	Surat Hibah (Grant Letter)	
	Akta Hibah (Grant Deed)	
	Perjanjian Pengikatan Jual Beli/PPJB (Sales of Purchase Agreement)	
	Sertifikat Tanah (Land Certificates)	
	Surat Izin Penggunaan Tanah (Land Utilization Permission)	
Bangunan (Building)	Izin Mendirikan Bangunan (Building Permit) or Izin Membangun Bangun-Bangunan (IMBB/Another variance of building permit)	
	SBKBG (Surat Kepemilikan Bangunan Gedung/Building ownership certificate)	
Other type of documents?		