

EXPANSION OF MINING AREAS – NEW APPLICATION GUIDELINES¹²³⁴⁵

INTRODUCTION

The Minister of Energy & Mineral Resources has recently issued a decree revising the guidelines for applications to expand certain existing mining concession areas.

The rationale for the new decree is to prioritize the optimization of the development or exploitation of established mineral and coal reserves and/or potential mineral and coal deposits in the case of existing mining concession areas where the remaining established mineral and coal reserves and/or potential mineral and coal deposits make the existing mining concession areas marginal commercial propositions only.

Some opposition has, for a variety of reasons, been expressed to allowing any expansion of existing mining concession areas. Notwithstanding this opposition, however, it is apparent from the new guidelines that the Minister recognizes a legitimate need for Indonesia to make greater and more efficient use of its established mineral and coal reserves as well as of its potential mineral and coal deposits.

In this article, the writer will review the main provisions of the new guidelines before considering how legitimate or otherwise is the opposition to any expansion of existing mining concession areas.

BACKGROUND

The concept of expanding existing Mining Business License Areas (**WIUPs**) and Special Mining Business Licenses Areas (**WIUPKs**) is to be found in Law No. 4 of 2009 re Mineral and Coal Mining, as amended by Law No. 3 of 2020 (**Mining Law**).

On 9 September 2021, the Government issued Government Regulation No. 96 of 2021 re the Implementation of Mineral and Coal Mining Business Activities (**GR 96/2021**), being one of the implementing regulations envisaged by the Mining Law. Pursuant to Article 140 of GR 96/2021, holders of Mining Business Licenses (**IUPs**) and Special Mining Business Licenses (**IUPKs**), for metal minerals and coal, may apply for the expansion of their WIUPs/WIUPKs (i) once they have reached the production operation stage and (ii) for the stated purpose of facilitating the conservation of metal minerals and coal (**WIUP/WIUPK Expansion**).

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On 10 November 2022, the Minister of Energy and Mineral Resources (**MoEMR**) issued MoEMR Decree No. 266.K/MB.01/MEM.B/2022 of 2022 re Guidelines for Applications, Evaluations and Processing of Expansion of Mining Business License Areas and Special Mining Business License Areas for the Conservation of Minerals and Coal (**MoEMR Decree 266/2022**).

MoEMR Decree 266/2022 was intended to provide sufficiently comprehensive guidelines, in respect of applications for WIUP/WIUPK Expansion and the approval of WIUP/WIUPK Expansion applications, so as to ensure legal certainty for the WIUP/WIUPK Expansion process. However, there were too many unresolved issues about the guidelines with the result that MoEMR Decree 266/2022 was quickly regarded as having failed to achieve its intended purpose.

MoEMR has now made a second attempt to ensure legal certainty for the WIUP/WIUPK Expansion process with the issuance, on 23 October 2023, of MoEMR Decree No. 375.K/MB.01/MEM.B/2023 re Guidelines for Applications, Evaluations and Processing of Expansion of Mining Business License Areas and Special Mining Business License Areas for the Conservation of Minerals and Coal (**MoEMR 375/2023**).

ANALYSIS AND DISCUSSION

1. Overview of MoEMR Decree 375/2023

MoEMR Decree 375/2023 revokes MoEMR Decree 266/2022.

MoEMR 375/2023 does not differ greatly from MoEMR Decree 266/2022 in many respects. However, MoEMR 375/2023 now:

- (a) makes clearer the intended objective or purpose of WIUP/WIUPK Expansion;
- (b) provides more specific guidelines for the process of (i) preparing/submitting applications for WIUP/WIUPK Expansion, (ii) evaluating WIUP/WIUPK Expansion applications and (iii) approving/rejecting WIUP/WIUPK Expansion applications; and
- (c) introduces a new and simplified formula for the calculation of information data compensation payable by IUP/IUPK holders applying for WIUP/WIUPK Expansion.

2. Key Provisions of MoEMR Decree 375/2023

- 2.1 **Purpose of WIUP/WIUPK Expansion:** One of the principal weaknesses of now revoked MoEMR Decree 266/2022 was that it did **not** make clear what was the Government's objective or purpose in allowing WIUP/WIUPK Expansion in certain instances. This, inevitably, created uncertainty as to how the WIUP/WIUPK Expansion process would or should work in practice.

MoEMR Decree 375/2023 now makes clear that WIUP/WIUPK Expansion is intended to promote the optimization of (i) the existing and known marginal mineral or coal reserves in the relevant WIUP/WIUPK and (ii) indications of potential and previously unknown

marginal mineral or coal deposits in the relevant WIUP/WIUPK (Second Paragraph of MoEMR Decree 375/2023).

- 2.2 **Increase in WIUP/WIUPK following WIUP/WIUPK Expansion:** Approval of WIUP/WIUPK Expansion results in an increase in the size of the relevant WIUP/WIUPK to become (i) a maximum of 25,000 hectares for metal mineral WIUPs, (ii) a maximum of 15,000 hectares for coal WIUPs and (iii) as determined by MoEMR and based on the results of MoEMR's evaluation in the case of metal mineral and coal WIUPs/WIUPKs (Third Paragraph of MoEMR Decree 375/2023).

The Mining Law already provides that the maximum area of (i) a WIUP for metal mineral mining activities (at the production operation stage) is 25,000 hectares, (ii) a WIUP for coal mining activities (at the production operation stage) is 15,000 hectares and (iii) a WIUPK for metal minerals or coal mining (at the production operation stage) is a matter for the determination of MoEMR having regard to the development plan for the relevant area. Accordingly, it would appear that all MOEMR Decree 375/2023 is really allowing for, in terms of potential WIUP/WIUPK Expansion, is a possible increase in the area of an existing WIUP/WIUPK, that was originally granted for less than the maximum permitted area, such that it becomes up to the maximum area already permitted under the Mining Law. In other words, if an existing WIUP for metal minerals mining (at the production operation stage) was originally granted for, say, 18,000 hectares (as opposed to the maximum permitted 25,000 hectares), it may be subsequently increased, pursuant to a WIUP/WIUPK Expansion, to become some area greater than 18,000 hectares but not more than the already permitted maximum area of 25,000 hectares. This, self-evidently, hardly seems particularly significant as it does not represent any expansion at all of the maximum permitted size of the relevant WIUP/WIUPK.

It is to be noted that WIUPs/WIUPKs for non-metal minerals cannot be the subject of WIUP/WIUPK Expansion applications pursuant to MoEMR Decree 375/2023. This, presumably, reflects the fact that the Government wants to prioritize the optimization of Indonesia's most important and valuable mineral commodities, being metal minerals and coal. Logically, however, if optimization of the development and exploitation of Indonesia's mineral commodities and, consequently, minimizing the risk of existing mining concessions becoming marginal commercial propositions only are legitimate and worthwhile objectives for the Government to be pursuing, the same considerations should equally apply to WIUPs/WIUPKs for non-metal minerals. The differential treatment of non-metal minerals, compared to metal minerals and coal, may well be seen by some observers as, at least, amounting to tacit acknowledgment by the Government that WIUP/WIUPK Expansion is something that should generally be avoided other than in exceptional circumstances.

- 2.3 **Criteria for WIUP/WIUPK Expansion:** In order to be considered for inclusion in a WIUP/WIUPK Expansion, an area must satisfy certain criteria. More particularly, the relevant area must:

- (a) be an area that:
 - (i) “coincides” with (i.e., is immediately adjacent to?) the existing WIUP/WIUPK and has potential for continuity of coal seams or characteristics of mineral deposits as evidenced by the extrapolation of exploration data in respect of the border of the existing WIUP/WIUPK; or

- (ii) “coincides” with (i.e., immediately adjacent to?) the existing WIUP/WIUPK, is a “corridor area” between two or more existing WIUPs/WIUPKs and has potential for continuity of coal seams or characteristics of mineral deposits as evidenced by the extrapolation of exploration data in respect of the border of the existing WIUP/WIUPK; and
- (b) **not** overlap with:
 - (i) another WIUP/WIUPK in respect of the same commodity as the existing WIUP/WIUPK;
 - (ii) State Reserve Areas or People’s Mining Areas;
 - (iii) areas which have already been proposed for designation as a metal mineral WIUP or coal WIUP/WIUPK;
 - (iv) areas over which IUPs have been granted but where the relevant IUP is still in the process of being issued/registered following a decision of the State Administrative Court or the final report of the results of an evaluation/examination carried out by a state institution having the authority to oversee the implementation of public services;
 - (v) areas over which IUPs or IUPKs were formerly granted/issued but have been subsequently revoked and are now undergoing evaluation for future use;
 - (vi) areas that are the subject of WIUP/WIUPK Expansion applications which are still under review or have been approved; and
 - (vii) areas designated as areas for investigation and research assignments for the purpose of preparation of WIUPs/WIUPKs for the development and/or utilization of coal (Fourth Paragraph of MoEMR Decree 375/2023).

The criteria, specified in MoEMR Decree 375/2023 and which must be satisfied in order for a particular area to qualify for consideration for inclusion in a WIUP/WIUPK Expansion (**Expansion Area**), are considerably more detailed than was previously the case with MoEMR Decree 266/2022 which made no mention at all of overlaps as being an excluding factor in determining what can and cannot be an Expansion Area.

2.4 Qualifying IUP/IUPK Holders: For the first time, MoEMR Decree 375/2023 also specifies criteria that must be fulfilled by IUP/IUPK holders wanting to apply for WIUP/WIUPK Expansion. More particularly, in order to qualify to apply for a WIUP/WIUPK Expansion, an IUP/IUPK holder must:

- (a) be the holder of an IUP/IUPK that is listed in the IUP database of the Directorate General of Minerals and Coal (i.e., **Minerba One Data Indonesia** or **MODI**);
- (b) have been in production for at least three consecutive years and have demonstrated good conservation performance; and
- (c) have carried out detailed exploration in all prospective areas in its existing WIUP/WIUPK and submitted the resulting exploration data as part of an

Exploration Data Warehouse (**EDW**) application (Fifth Paragraph of MoEMR Decree 375/2023).

- 2.5 **Requirement for Expansion Area Work Plan Approval:** Prior to submitting an application for WIUP/WIUPK Expansion, the relevant IUP/IUPK holder must, first, obtain approval of the proposed work plan in respect of the proposed Expansion Area to be included in the WIUP/WIUPK Expansion application (Expansion Area Work Plan) from the Director General of Minerals and Coal (**DGoMC**) (Sixth Paragraph of MoEMR Decree 375/2023).

Expansion Area Work Plan approval was also a requirement of now revoked MoEMR Decree 266/2022. However, MoEMR Decree 375/2023 **no** longer refers to the application system for Expansion Area Work Plan approvals being implemented on a “*first come first served*” basis, which “*first come first served*” wording was given some prominence in MoEMR Decree 266/2022. Just how significant or otherwise is the non-appearance of these words in MoEMR Decree 375/2023 remains somewhat unclear to the writer. This change in wording does, however, suggest that, going forward, the focus of DGoMC review of Expansion Area Work Plan approval applications is going to be on the quality and completeness of these applications rather than merely on the timing of submission of applications.

- 2.6 **Application for Expansion Area Work Plan Approval:** The application for approval of the Expansion Area Work Plan comprises:

- (a) an application letter;
- (b) a map and list of coordinate points of the boundaries of the proposed Expansion Area to be included in the WIUP/WIUPK Expansion application;
- (c) WIUP/WIUPK Expansion Area Work Plan documents comprising:
 - (i) a map of the distribution of marginal reserves and/or marginal deposits in the relevant WIUP/WIUPK;
 - (ii) interpretation of cross-sections and geological or mineralisation models in the relevant WIUP/WIUPK showing that there is continuity in the genesis of the proposed Expansion Area;
 - (iii) interpretation of the continuity of the relevant metal mineral and/or coal in the proposed Expansion Area based on extrapolation and accompanied by a map of the distribution of the effect of the continuity of the relevant metal mineral or coal based on observation points and spatial data;
 - (iv) estimate of the amount of the relevant metal mineral or coal potential contained in the proposed Expansion Area; and
 - (v) a statement letter from a competent person in the field of reporting exploration results and estimation of mineral and coal resources regarding the existence of potential marginal reserves and/or indications of marginal deposits in the existing WIUP/WIUPK which are reasonably expected to

continue in the proposed Expansion Area (together, **Expansion Area Work Plan Documents**);

- (vi) a final exploration report and/or further exploration report containing information points in the relevant WIUP/WIUPK;
- (vii) copies of periodic conservation reports accompanied by proof of submission of those reports for at least two years; and
- (viii) a statement letter confirming ability to pay compensation for provided information data in an amount determined by MoEMR (Seventh Paragraph of MoEMR Decree 375/2023).

The MoEMR Decree 375/2023 application documents for Expansion Area Work Plan approval are very similar to those in now revoked MoEMR Decree 266/2022. What is different, however, is that Appendix I to MoEMR Decree 375/2023 imposes more exacting requirements for the evaluation of the past mineral and coal conservation performance of IUP/IUPK holder applicants than was previously the case with MoEMR Decree 266/2022. More particularly, MoEMR Decree 375/2023 now requires (i) **three years** of consecutive production with approval of, among other things, the relevant IUP/IUPK holder's conservation reports, on the achievement of optimal mineral/coal recovery and potential marginal reserves, for those three years, compared to implementation of mineral/coal conservation for the **current year** only under MoEMR Decree 266/2022 and (ii) two consecutive **years** of quarterly reporting of mineral and coal conservation, compared to two consecutive **quarters** only of reporting of mineral and coal conservation under MoEMR Decree 266/2022. These more onerous requirements, in respect of the need for would-be IUP/IUPK holder applicants to be able to evidence past mineral and coal conservation performance, may be seen as an attempt by the Government to make clear that it is becoming increasingly serious about the importance of mineral and coal conservation with the consequence that it is only those IUP/IUPK holders, with the ability to demonstrate extended periods of approved mineral and coal conservation, which will be able to submit WIUP/WIUPK Expansion applications going forward.

2.7 Application Requirements for WIUP/WIUPK Expansion: Applications for WIUP/WIUPK Expansion consist of:

- (a) an application letter submitted through the online single submission licensing system and supported by;
- (b) the Expansion Area Work Plan approval and the accompanying documents as outlined in Part 2.6 above;
- (c) map and boundary coordinates of the proposed Expansion Area in accordance with the evaluation results; and
- (d) proof of payment of information data compensation in the amount determined by MoEMR (Eighth Paragraph of MoEMR Decree 375/2023).

After receiving the WIUP/WIUPK Expansion application:

- (a) DGoMC forwards the application and the relevant supporting documents to the Director of Minerals and Coal Engineering and Environment (**DoMCEE**) for further processing;
- (b) DoMCEE conducts a check of the completeness or otherwise of the documents submitted/relevant IUP/IUPK holder's fulfilment of the application requirements and in the event that:
 - (i) the documents submitted are incomplete/the application requirements have not been fulfilled, DGoMC notifies the relevant IUP/IUPK holder that its application has been rejected, together with the reasons for such rejection; or
 - (ii) the documents submitted are complete/the application requirements have been fulfilled, DoMCEE requests (A) evaluation of the territorial aspects and calculation of the information data compensation amount by the Director of Minerals and Coal Program Development (**DoMCPD**) and (B) evaluation of the exploration aspects by the Director of Business Development (**DoBD**);
- (c) DoMCEE receives the (i) results of evaluation of the territorial aspects and the results of information data compensation amount calculation from DGoMC and (ii) results of the evaluation of exploration aspects from DoBD;
- (d) DoMCEE then proceeds to inform DGoMC of the evaluation results and in the event that:
 - (i) the evaluation results are not in accordance with the applicable requirements/unsatisfactory, DGoMC notifies the relevant IUP/IUPK holder that its application has been rejected, together with the reasons for such rejection; or
 - (ii) the evaluation results are in accordance with the applicable requirements/satisfactory, DGoMC proceeds with the processing of the WIUP/WIUPK Expansion approval; and
- (e) DGoMC issues the WIUP/WIUPK Expansion approval to the relevant IUP/IUPK holder applicant (Appendix I to MoEMR Decree 375/2023).

The MoEMR Decree 375/2023 procedural steps, involved in submitting and processing WIUP/WIUPK Expansion applications, are somewhat more extensive than those previously provided for in MoEMR Decree 266/2022 but are otherwise very similar. There are also some changes in the terminology used by MoEMR 375/2023 to describe various aspects of the application process, which terminology changes may be intended to both make the application process easier to understand and provide greater legal certainty for applicants. This can only be a good thing.

- 2.8 **Information Data Compensation Price Formula:** The formula for the calculation of the Information Data Compensation amount (*Kompensasi Data Informasi* or **KDI**), payable in respect of WIUP/WIUPK Expansion applications, is set out in Appendix III to MoEMR Decree 375/2023 and expressed as being:

$$KDI \text{ of WIUP/WIUPK Expansion} = A \times H \times F$$

Where:

- (a) *WIUP/WIUPK Expansion KDI* is the WIUP/WIUPK Expansion Information Data Compensation Price (in Indonesian Rupiah);
- (b) *A* is the size of the Expansion Area (in Ha);
- (c) *H* is the price of the Expansion Area (in Indonesian Rupiah); and
- (d) *F* is the modifying factor that varies with the type of mineral/coal deposits in the Expansion Area.

The KDI formula has been considerably simplified compared to that which was previously provided for in MoEMR Decree 266/2022. As a consequence, IUP/IUPK applicants for WIUP/WIUPK Expansion will, presumably, find it easier to understand the KDI formula in MoEMR Decree 375/2023 that they did its MoEMR Decree 266/2022 predecessor.

3. **Evaluation of Merits of WIUP/WIUPK Expansion**

The reaction to the issuance of MoEMR Decree 375/2023 has been decidedly mixed, with some observers arguing that allowing WIUP/WIUPK Expansion is inconsistent with other Government policies including (i) reducing mining concession areas when granting IUP/IUPK extensions and upgrades, (ii) promoting greater use of clean energy/reducing reliance upon fossil fuels and (iii) overcoming problems with domestic absorption of metal minerals as part of the promotion of export bans on less than fully refined metal minerals. UGM Energy Economics Observer, Fahmy Radhi, was quoted in the 8 November 2023 edition of online news portal Kontan.co.id as saying that it is only existing investors which stand to benefit from allowing WIUP/WIUPK Expansion and, by implication, suggesting that Indonesia and Indonesians as a whole do not benefit at all or only benefit marginally from allowing WIUP/WIUPK Expansion.

The criticism levelled at MoEMR Decree 375/2023 seems, however, to be somewhat misconceived for at least two reasons which are explained below.

First, as pointed out in Part 2.2 above, the scope of the permitted WIUP/WIUPK Expansion is actually very modest indeed and can never result in a particular IUP/IUPK holder having a WIUP/WIUPK that is larger in size than the maximum permitted area of a WIUP/WIUPK for the purpose of the Mining Law which predates both MoEMR Decree 375/2023 and its predecessor MoEMR Decree 266/2022.

Second, the importance of the local mining industry to the Indonesian economy makes it critically important that mining activities can be carried on in a commercially viable manner. According to Bank Indonesia, the local mining industry contributed (i) 9.3% of the country's GDP and (ii) 21% of the country's total exports by value in the first quarter of 2023. While the local mining industry's overall contribution to the Indonesian economy can vary significantly, from year to year, owing to the volatile nature of mineral commodity prices, its long-term economic importance is undeniable. As Indonesia continues to expand downstream processing and refining of metal minerals domestically, in an attempt to be able to supply many of the critical inputs for electric battery manufacturing and various other

green energy technologies, the economic importance of the local mining industry is only likely to increase over time. Given these economic considerations, it is surely very much in the interests of Indonesia and all Indonesians that the country's metal mineral and coal reserves/deposits are developed and exploited in an efficient manner as well as, of course, with due regard to the importance of doing so in a manner than promotes metal mineral and coal conservation. In this respect, it **cannot** be consistent with either efficiency or the promotion of metal mineral and coal conservation to allow the development and exploitation of existing WIUPs/WIUPKs to become marginal commercial propositions only as a result of declining proven reserves and potential deposits when the expansion of those existing WIUPS/WIUPKs, to include neighbouring undeveloped areas, would enable the development and exploitation of those expanded WIUPs/WIUPKs to continue to be highly commercially attractive propositions. The reality is that, as a major contributor to the Indonesian economy, the local mining industry needs to be managed in a way that encourages and promotes the efficient and optimal development/exploitation of Indonesia's metal mineral and coal reserves/deposits.

A more fruitful area of consideration is whether or not MoEMR Decree 375/2023 does enough to emphasize the importance of demonstrated past performance in mineral and coal conservation as a precondition to any particular IUP/IUPK holder being allowed to apply for WIUP/WIUPK Expansion. Given MoEMR Decree 375/2023 imposes more onerous requirements in this regard than did MoEMR Decree 266/2022, it would seem that the Government is, at the very least, moving in the right direction when it comes to promoting the conservation of Indonesia's established metal mineral and coal reserves as well as its potential metal mineral and coal deposits.

SUMMARY & CONCLUSIONS

Indonesia's initial attempt at allowing WIUP/WIUPK Expansion was widely regarded as having been unsuccessful due to the various perceived problems with MoEMR Decree 266/2022.

A second attempt at allowing WIUP/WIUPK Expansion has now been made in the form of MoEMR Decree 375/2023.

The scope of WIUP/WIUPK Expansion permitted by MoEMR Decree 375/2023 is not particularly significant and, therefore, should not really be considered as being a problem.

In terms of improved clarity and providing greater detail as to the intended objective/purpose of WIUP/WIUPK Expansion, as well as in respect of the procedures to be followed in applying for WIUP/WIUPK Expansion, MoEMR Decree 375/2023 can only be seen as an improvement on MoEMR Decree 266/2022.

Whether or not MoEMR Decree 375/2023 does enough to ensure that it is only those IUP/IUPK holders, with a sufficiently well-established "track record" of promoting mineral and coal conservation, which are able to benefit from WIUP/WIUPK Expansion remains an open question. Achieving the right balance between, on the one hand, making possible the efficient development and exploitation of the country's metal mineral and coal reserves/deposits and, on the other hand, promoting metal mineral and coal conservation is always going to be a serious challenge for the Government.

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