

Pleoi of Defendant I PT Newmont Minahasa Raya

Contents of Pleoi

A. Introduction

1. Word of Thanks and Appreciation to the Court.....	1
2. Investigation by the National Police Headquarters Violated Environmental Criminal Procedure Law	
2.1 Investigation.....	10
2.2 Habeas Corpus was not properly conducted: P-21 came out when P-19 was not yet completed.....	14
3. Summary of Defense.....	17
4. Structure of Pleoi Elaboration.....	19

Table of Contents

B. Facts: Descriptive and Prescriptive

1. Introduction.....	20
2. Overview of PTNMR.....	22
3. Facts in the Indictment: The Process was Inconsistent, The Law Applied was Wrong, the Use of Non-Existent and Wrong Provisions of Law, as well as Inflated Reported Numbers from RKL/RPL.....	26
4. Regarding Articles of Crime in the Notice of Indictment and the Elaboration of Its Elements.....	32

Table of Contents

5. Regarding proving of facts in the Requisitor.....	41
5.1 Regarding witness deposition.....	42
5.2 Regarding expert deposition.....	45
5.3 Regarding documentary evidence.....	46
5.4 Regarding additional documentary evidence.....	47
5.5 Regarding National Police Headquarters Criminal Forensic Laboratory Report	49
5.6 Regarding Articles of Evidence.....	51

Table of Contents

Court Facts: No Acts of Crime Were Found in this Case and There Is No Pollution or Destruction of Environment.....54

6.1 Witness evidence.....54

6.1.1 Ir. David Sompie.....	55
6.1.2 Ir. Jerry Kojansow.....	63
6.1.3 Madjid Esing.....	66
6.1.4 Robert Sasuhuhe.....	67
6.1.5 Rahima.....	69
6.1.6 Haji Dahlan Ibrahim.....	70
6.1.7 Jantje Aring.....	72
6.1.8 Madjid Andaria.....	73
6.1.9 Salam Ani.....	73

Table of Contents

6.2 Expert deposition.....74

- Dr. Keith Bentley.....	75
- Prof. Dr. Sjafri Nugraha, S.p., LL.M.....	78
- Prof. Dr. Andi Hamzah, S.p.....	81
- Prof. Dr. Daud Silalahi.....	84
- Dr. Munim Idris.....	87

Table of Contents

6.3 Witness and Expert Deposition.....89

- Sri Bimo Andi Putro.....	89
- Dr. Sandra Rotty.....	92
- dr. Joy Rattu, PhD.....	95
- Prof. Dr. dr. Winsy Warouw, SpKK.....	96
- Ir Washington Tambunan.....	98
- Ir. Ngadja Ginting Soeka.....	100
- Ir. L.T.X. Lalamentik.....	102
- Ir. Inneke Rumengan.....	104
- DR. Ir. Rudi Sayoga Gautama.....	106
- DR. Ir. Andoyo Wuryanto.....	107
- Ir. James Paulus, M.Si.....	109
- Shakeb Afsah.....	112
- Nabel Makarim.....	116

Table of Contents

6.4 Documentary Evidence118

6.5 Defendant's Testimony evidence.....192

7. Legal Facts.....201

Legal Analysis: Have legal facts matched the elements of crime

- Regarding Environmental Law.....205
- Description of the elements of crime being indicted.....209
- Deposition of evidence: it is not true that the elements of crime have been proven as described in the Requisitor.....214
- Defendant I furthermore proved that it is not true that the Prosecutor's indictment has been proven.....222
- D.Request: Closing Statement and Conclusion.....227

Table of Contents

- E. Attachments
- I. Court Transcripts
- II. List of Documentary Evidence
- III. Ad Informandum
- III.1 Joint Decree if the State Minister of Environment of Republic of Indonesia, Attorney General of Republic of Indonesia, and Chief of the National Police of Republic of Indonesia, number: KEP 04/MENLH/04/2004; KEP-208/A.J.A/04/2004; KEP-19/IV/2004 regarding INTEGRATED ENFORCEMENT of Environmental Law (ONE ROOF).
- III.2 Article 7 (4) Law No. 10 of 2004 regarding the Formation of Law.
- III.3 Gazette of the Deputy Attorney General B-60/E/Ejp/01/2002 regarding Justiciary Technical Guidelines of Environmental Criminal Case Management.
- III.4 Article from Kompas cyber media entitled "Commetering Lapindo Case, Supreme Justice Denounced."
- III.5 Book entitled "Max Havelar," by Multatuli published by Djambatan, seventh edition year 1991 page XX.
- III.6 Family tree diagram of resident fact witnesses from the Public Prosecutor.
- III.7 A request letter from the Legal Counsel Team nomor 68/NMR-TIM/VI/2006 regarding the summons of Prosecution fact witness Masnellyarti Hilman.
- III.8 Comparative table entitled "Contradictions Between Sampling Dossier and Results of PUSLABFOR POLRI Analysis."
- III.9 Map of the place of origin of witnesses as ad informandum.
- III.10 Map illustrating five observation points in Buyat Bay and Totok Bay.

Introduction

.The proceedings of this case have been quite long since it requires expert opinion considering the nature of environmental cases.

.If only *a de charge* witnesses and experts were questioned during investigation, the defendants would not have reached trial in this court.

Introduction continued-1

.Proven Legal Facts:

(1) PTNMR's submarine tailings placement ("STP") was allowed (permitted) by the government as attested to by, among others, the Former Minister of Environment Dr. Sony Keraf (*vide*, transcript p. 469) and Dr. Nabel Makarim (*vide*, transcript p. 1569), Prof. Safri Nugraha S.p., LL.M Ph.D (*vide*, transcript p. 1469), witness Ir. David Sompie (*vide*, transcript p. 961);

Introduction continued-2

(2) tailings are not B3 based on the following articles of evidence:

2.1 TCLP test conducted by, among others, North Sulawesi Provincial Government examination at the Sarpedal Laboratory, ALS Laboratory and examination by PTNMR. (*vide*, documentary evidence, codes T.I-37, T.I-38, T.I-39, T.I-40a. T.I-40b)

pg-13

Introduction continued-3

2.2 Expert depositions: witnesses [sic, experts?] Ir. James Paulus (*vide* transcript p. 1339), Ir. Washington Tambunan (*vide* transcript p. 1230), Ir. David Sompie (*vide* transcript p. 954)

2.3 Witnesses from the Public Prosecutor Team Ir. Dibyo Kuntjoro (*vide* transcript p. 539) and Siegfried Lesiasel (*vide* transcript p. 375).;

pg-14

Introduction continued-4

(3) The ERA study, even though it was not a new legal requirement, nevertheless it was carried out by Defendant I, as evidenced by:

3.1 Witness and Expert Testimonies of: Dr. Nabel Makarim (*vide* transcript page 1569), witness Ir David Sompie (*vide* transcript page 950), witness Dr Sony Keraf (*vide* transcript page 465) and witness dra Masnellyarti Hilman (*vide* transcript page 528)

pg-15

Introduction continued-5

3.2 PTNMR Letter No. 002A-I/NMR/kw/2001 dated 11 January 2001 to the Minister of Environment / Head of Bapedal regarding the submission of ERA study results (*vide*, evidence T.1-86a);

pg-16

Introduction continued-6

(4) PTNMR tailings were placed below the thermocline layer as attested to by among other:

4.1 Expert Dr. Andoyo [sic, Andoyo] Wurjanto (*vide*, transcript p. 1303),

4.2 Documentary evidence in the form of studies published by international research institutions (i) Rescan, with evidence codes T.1-53, T.1-54, T.1-55, T.1-57; (ii) Marine Resources Consultant T.1-56.

pg-17

Introduction continued-7

(5) Buyat Bay seawater samples did not exceed environmental quality standard limits, as evidenced by the following testimonies:

5.1 witness Sri Bimo Andi Putranto [sic, Putro] (*vide*, transcript p. 1643)

pg-18

Introduction continued-8

5.2 Documentary evidence in the form of statements by (i) Department of Mining and Energy, code T.1-42; (ii) Results of the International Smeinar, code T.1-61; (iii) Various research reports published by the Ministry of Environment, with documentary evidence code T.1-14a, b and C;

pg-19

Introduction continued-9

(6) PTNMR tailings did not lower the quality of Buyat Bay seawater, as attested to by witnesses James Paulus (*vide* transcript page 1339), Ir. David Sompie (*vide* transcript page 945) and Sri Bimo Andi Putranto [sic, Putro] (*vide* transcript page 1643);

pg-20

Introduction continued-10

(7) *sludge* from the *sediment pond* did not lower the quality of Buyat River water, as attested to by:

7.1 Expert Dr. Rudi Sayoga Gautama (*vide*, transcript p. 1483) and;

7.2 Documentary evidence published by LPPM ITB, with documentary evidence code T.1-90 and the Technical Review Paper on the Ministry of Environment Report, with documentary evidence code T.1-59;

pg-21

Introduction continued-11

(8) Marine biota samples from Buyat Bay are not contaminated by mercury (Hg) and arsenic (As), as explained by:

8.1 Ahli Dr. Inneke Rumengan (*vide* transcript page 1375), L.T.X. Lalamentik (*vide* transcript page 1289), and documentary evidence consisting of research reports from Ir. L.T.X Lalamentik (*vide*, evidence T.1-29a-n)

pg-22

Introduction continued-12

8.2 And documentary evidence, photographs of tailing placement in Buyat Bay illustrating the marine biota during the placement of tailings disposal pipe (*vide*, evidence T.1-21 and T.1-22) as well as other research reports (*vide*, evidence T.1.-19, T.1-28 and T.1-1)

pg-23

Introduction continued-13

(9) It is not true that residents of Dusun Buyat have been contaminated by mercury (Hg) and arsenic (As) and [that they come] from NMR tailings;

9.1 As attested to by Witness and Ahli dr. Sandra Rotty, dr. Joy Rattu, and Prof. Dr. dr. Winsy Warrouw, as well as Public Prosecutor witness dr. Jane Pangemanan

9.2 As explained also in the documentary evidence in the form of research reports from UNIMA, code T.1-1, letter of police report retraction by dr. Jane Pangemanan ...

pg-24

Introduction continued-14

... Pangemanan, code T.1-2; Copy of settlement between PTNMR with dr. Jane Pangemanan, documentary evidence code T.1-4; Settlement act between Rasit Rahmat & co. and PTNMR, code T.1-5; Photographs of the signing of settlement act, documentary evidence code T.1-6; Draft of settlement agreement between PTNMR and Rasit Rahmat, Juhria Ratunbahe, code T.1-7; Statement by the provincial government, code T.1-10; Results of the International Seminar at Sam Ratulangi University, code T.1-61; Letter of the Head of PUSKESMAS, code T.1-62; and Response of PUSKESMAS Ratatotok, documentary evidence code T.1-63.

pg-25

PROPER Rating Mercury and Arsenic Concentrations in Tailings

Data RKL/RPL Periode:
1 Januari 2002 s.d. 31 September 2004

Effluent Quality

Arsen (As-III) - (mg/L)

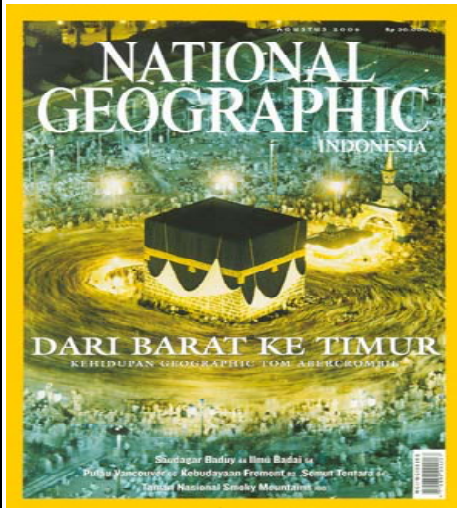
Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2002	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
2003	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
2004	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green

Hg (Merkuri) - (mg/L)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2002	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
2003	Green	Gold	Green	Green	Green	Green	Green	Green	Green	Gold	Green	Gold
2004	Gold	Gold	Gold	Gold	Gold	Gold	Green	Green	Green	Green	Green	Green

pg-26

Buyat Bay is Neither Polluted nor Damaged



ELESTARIAN



Surga Karang-Karang Kubah Setelah Selat Lembeh dan Taman Nasional Laut Bunaken, Sulawesi Utara menjadi perairan "surga" yang baru yang kaya keindahan karang. Bersempangan Turuk, dari Pulau Manado menjadi lebih indah dengan karang-karang yang lebih indah dengan nama Buyat.

Rangkaian 21 pulau yang membentang di perairan ini memiliki keindahan alam yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken. Selain itu, perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken. Selain itu, perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken.

Tak hanya itu saja, di perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken. Selain itu, perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken.

Perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken. Selain itu, perairan ini juga memiliki keindahan karang-karang yang tak kalah dengan Selat Lembeh dan Taman Nasional Laut Bunaken.

pg-27

Fishermen Catch Fish and Earn Rp. 40.000 per day



Seorang nelayan di Teluk Buyat, Kabupaten Minahasa Selatan, Sulawesi Utara, sedang menarik jaring sesuai menangkap ikan, Minggu (7/12). Setiap hari mereka bisa mendapat sekitar delapan keranjang ikan yang dijual Rp. 40.000 per keranjang.

pg-28

B. Facts: Descriptive & Prescriptive

- **Descriptive Facts** are **all information** from evidence items in this pledoi presented as a transcript and is an attachment I to the pledoi. **Prescriptive Facts** are **valid information** so they can be accepted as **legal facts**. In the transcript these legal facts are called **extract** of testimony.
- All forms of evidence submitted in court: 9 witnesses, 5 experts, 13 witness and experts, 109 pieces of documentary evidence.

pg-29

Facts, continued: Descriptive & Prescriptive 1

- Legal facts in court: *First Legal Fact*, it has been proven that PTNMR has made all necessary efforts to ensure the preservation of the functions of the environment as well as to manage waste produced from the activity and/or activity (detoxification) as required with the latest technology in order to prevent destruction and pollution of the environment in Buyat Bay. PTNMR conducted its activities based on a Contract of Work, has AMDAL documents, i.e. ANDAL and RKL/RPL that were approved by the government. Based on the ANDAL document ...

pg-30

Facts, continued: Descriptive & Prescriptive-2

... PTNMR has also obtained various permits required, i.e., beginning from the pre-operational satge (feasibility study), exploration stage, exploitation stage, production stage until mine closure stage. Once again, all those activities had a permit.

- In addition, PTNMR has reported all its activities in the RKL/RPL (vide evidence *T.1-100*) every quarter and examined by the mining inspector once every six months and the monitoring is recorded in the mining book. PTNMR has never received any reprimands ...

pg-31

Facts, continued: Descriptive & Prescriptive-3

... for example, due to violation of quality standards after RKL/RPL was submitted and recorded in the mining book; even the documentary evidence used by the Public Prosecutor Team as the basis to state that there was a reprimand of PTNMR, the writer [of the document] himself, Ir. Isa Karmisa Adiputra, stated that his letter was a recommendation and not a reprimand.

pg-32

Facts, continued: Descriptive & Prescriptive-4

- *Second Legal Fact*, it has been proven that PTNMR, in addition to having all the required permits to conduct every activity, also has a permit to store and process B3 [material]. Specifically for submarine tailings placement (“STP”), the context was a change in the Environmental Management Law, from Law No.4 of 1982 to Law No. 23 of 1997, where this new Environmental Management Law regulates about the permit for waste disposal into the sea, but with a transition provision of 5 years to adjust with the new Environmental Management Law.

pg-33

Facts, continued: Descriptive & Prescriptive-5

So the Environmental Management Law went into effect in 2002. Even though there was time to adjust until 2002, PTNMR has submitted an application in 2000 to adjust to the new permit according to what is required pursuant to the new Environmental Management Law, that is the permit to place tailings in Buyat Bay. So it was earlier that required, and KLH approved it with the letter from Dr. Sony Keraf.

pg-34

Facts, continued: Descriptive & Prescriptive-6

- *Third Legal Fact*, it has been proven that tailings are not categorized as B3 waste based on TCLP testing pursuant to provisions of article 7 ayat (2) Gov’t Regulation No. 85 of 1999. PTNMR tailings are not B3 waste based on the following:
 - (i) PTNMR has conducted its own testing in 1997 until 1999 and the result was that tailings are not B3 (*vide*, documentary evidence T.I-37, T.I-38, T.I-39, T.I-40a. T.I-40b);

pg-35

Facts, continued: Descriptive & Prescriptive-7

- (ii) TCLP testing conducted by North Sulawesi Provincial Government in 1999. The results were similar, that tailings are not B3 waste;
- (iii) Minister of Environment has given the approval to place tailings in Buyat Bay, which means that tailings are not B3, because B3 can never be [allowed] to be disposed into the sea (*vide*, documentary evidence T.I-, T.I-35, T.I-36);

pg-36

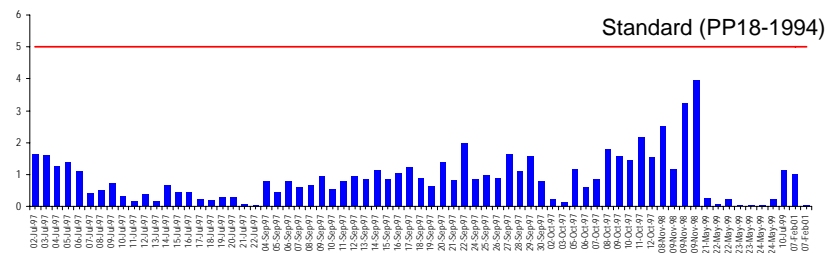
Facts, continued: Descriptive & Prescriptive-8

(iv) In 2004 the North Sulawesi Provincial Government has confirmed again that the condition of Buyat Bay waters in 2004, based on analysis of fish samples and the sediment, the metal contents were still below the [quality standard] limits. So it can be concluded that tailings are not B3.

(v) Witnesses Ir. James Paulus, Ir. David Sompie and witnesses from the Public Prosecutor Team Ir. Dibyo Kuntjoro and Siegfried Lesiasel in the public hearing of the court stated that tailings are not B3.

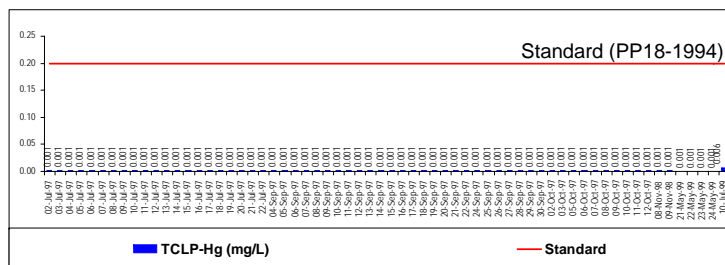
Facts, continued: Descriptive & Prescriptive-9

TCLP Analysis of Tailings Arsenic (mg/L)



Facts, continued: Descriptive & Prescriptive-10

TCLP Analysis of Tailings Mercury (mg/L)

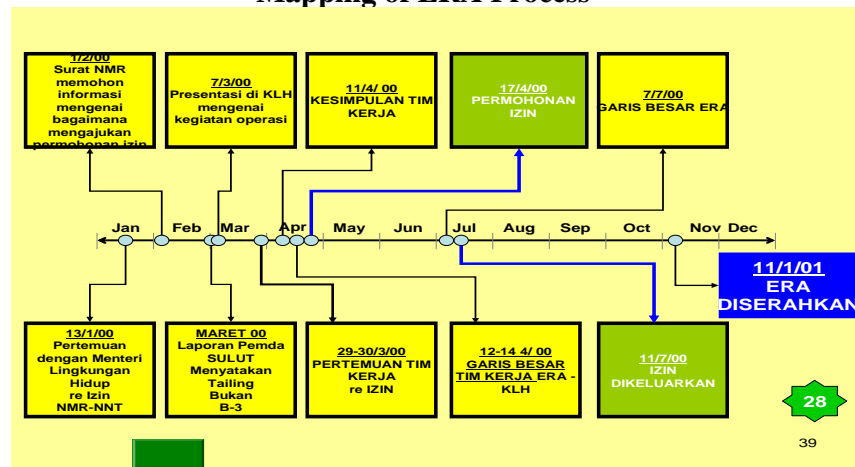


Facts, continued: Descriptive & Prescriptive-12

Witnesses, among others Prof. Dr. Daud Silalahi, Prof. Dr. Safri Nugraha, Dr. Nabel Makarim, or even Public Prosecutor's own witnesses, that is, Dr. Sonny Keraf and Ir. Isa Karmisa Adiputra, have confirmed this fact.

Facts, continued: Descriptive & Prescriptive-13

Mapping of ERA Process



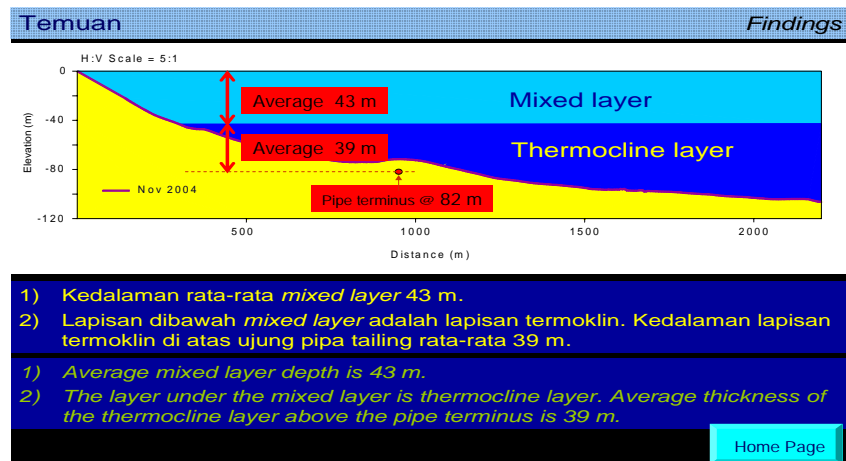
Facts, continued: Descriptive & Prescriptive-14

Fifth Legal Fact, it has been proven that thermocline [layer] was found in Buyat Bay. The thermocline itself is a difference in sea temperature with depth [sic]. Based on empirical data and monthly monitoring data submitted by PTNMR in their RKL/RPL (vide evidence T.1-100), or other international institutions, such as Rescan (vide evidence T.1-49, T.1-50, T.1-51, T.1-52, T.1-53, T.1-54), expert from ITB, Dr. Andoyo [Andojo] Wuryanto have proven that there is thermocline in Buyat Bay.

Facts, continued: Descriptive & Prescriptive-15

Additionally, it was also proven that tailings were placed below the thermocline layer, because, among others, the sea water looks clear from the surface and second of all, no mixed tailings were found in the coral reefs. If tailings were mixed, then the coral reefs would die and it would be measured as solids in the water column.

Facts, continued: Descriptive & Prescriptive-16
Illustration of where the Thermocline is Found in Buyat Bay
 by Dr. Andoyo Wuryanto, from ITB



Facts, continued: Descriptive & Prescriptive-17

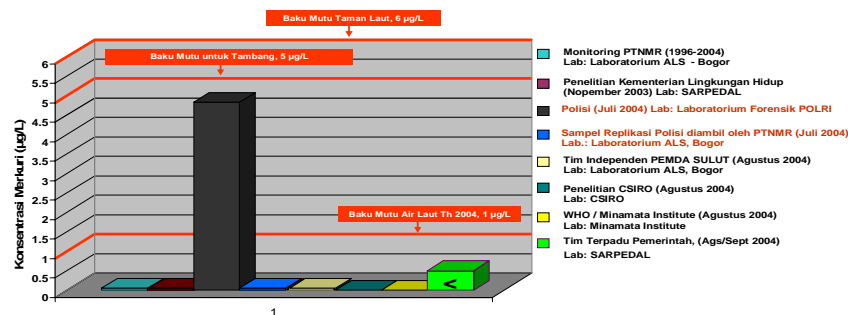
- *Sixth Legal Fact*, it has been proven that samples of Buyat Bay seawater has never exceeded the quality standards limits pursuant to Addendum III to the Decree of the Minister of Environment No. 51/2004. But, in addition, this Ministerial Decree cannot be applied retroactively to RKL/RPLs from 1997 to 2001 as the legal bases to state that there has been an act of crime as elaborated in the Requisitor.
- When the Ministerial Decree No. II/MENLH/1988 is applied voluntarily to this case to measure RKL/RPL reports in 1997 until 2001, the results, taking the monthly average ...

Facts, continued: Descriptive & Prescriptive-18

... Buyat Bay seawater samples do not exceed the quality standards limits as prescribed in the Ministerial Decree. Furthermore, the results of studies by a number of renowned independent institutions, such as CSIRO (vide evidence *T.1-13a* & *T.1-13b*), WHO (vide evidence *T.1-68*) or studies by government-formed teams, such as the North Sulawesi Independent Team (vide evidence *T.1-33a*) and Ministry of Environment 2004 (vide evidence *T.1-13a*) have also confirmed this and the results of ALS laboratories analysis on the split samples taken by the National Police Investigator.

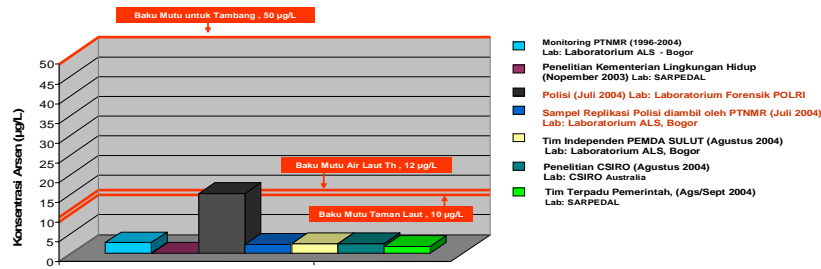
Facts, continued: Descriptive & Prescriptive-19

Air Laut: Kadar Merkuri masih dalam Kisaran Baku Mutu Normal



Facts, continued: Descriptive & Prescriptive-20

Air Laut : Kadar Arsen Masih Dalam Kisaran Baku Mutu Normal



pg-49

Facts, continued: Descriptive & Prescriptive-21

- *Seventh Legal Fact*, it has been proven that it is untrue that PTNMR tailings lowered the quality of Buyat Bay seawater, since the quality of Buyat Bay seawater was still below the quality standard limits as evidenced by, among others, results of ALS laboratory examinations of additional samples taken that were refused by the Public Prosecutor Team. The same results were also obtained from a number of renowned international institutions, such as WHO/Institute of Minamata Disease (vide evidence *T.1-68*), and Lorax (vide evidence *T.1-59*) ...

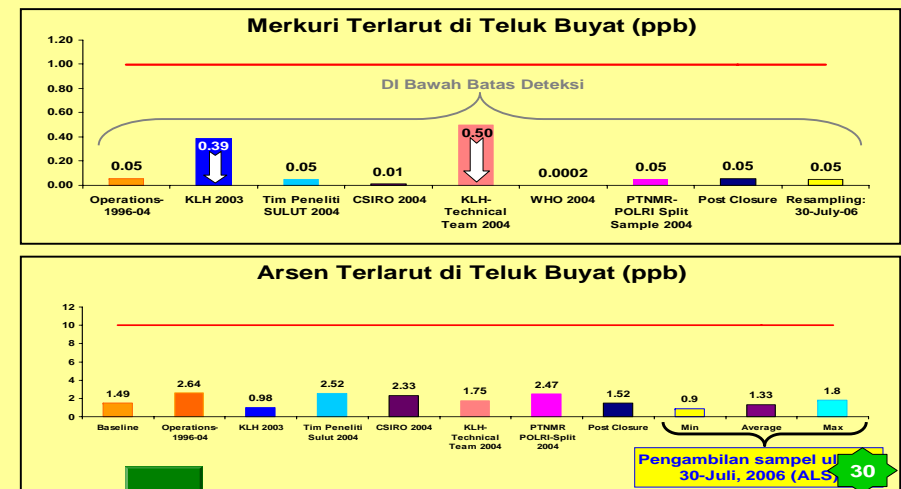
pg-50

Facts, continued: Descriptive & Prescriptive-22

... or government-formed teams, such as the North Sulawesi Independent Team (vide evidence *T.1-33a*) and Ministry of Environment (vide evidence *T.1-13a*). It was even proven in court too that PROPER method from KLH is applied to PTNMR using data from RKL/RPL reports of the last three years, then PTNMR would be in the **Green** category, which means [that PTNMR] “has carried out environmental management efforts and obtained better results than what is prescribed in the law.”

pg-51

Facts, continued: Descriptive & Prescriptive-23



pg-52

Facts, continued: Descriptive & Prescriptive-24

- *Eighth [Legal Fact]*, it has been proven that it is not true that the *sludge* from *sediment pond* has lowered the quality of Buyat River water. Based on the results of study by Expert and Witness Dr. Rudi Sayoga from ITB and results of resampling by Expert and Witness Sri Bimo Andi from ALS. In addition it has been proven that the groundwater flow from PTNMR is not connected to Buyat River and there is not water from PTNMR flowing into the river. In addition, the *sediment pond* does not have anything to do with the mining production activity or mechanism of PTNMR. The *sediment pond* is provided to fulfil the requirement of ESDM ministry [sic, department] that must ...

pg-53

Facts, continued: Descriptive & Prescriptive-25

... be made available by a mining company for environmental interests. The function of the sediment pond is to collect the mud and material eroded by the water flow, including rain water and natural runoff crossing the mine site before that water reaches Buyat River.

With the sediment pond the mud and material carried will be first settled in the reservoir so that Buyat River water will not turn murky by the natural flow of water going through the mine and then polluting the environment.

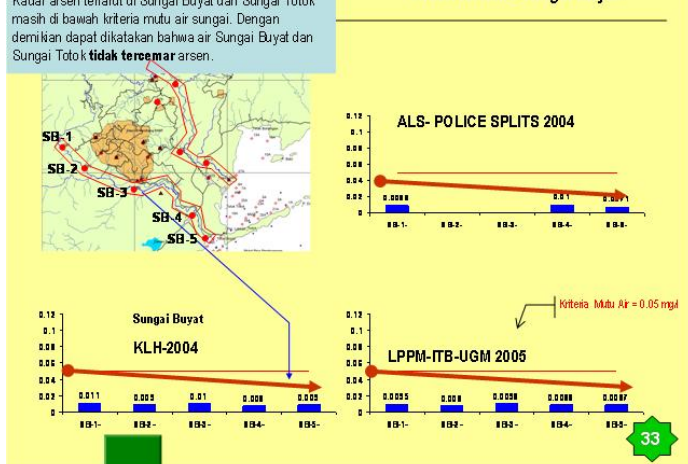
pg-54

Facts, continued: Descriptive & Prescriptive-26 Illustration of ALS, LPPM ITB-UGM, KLH Research Results

Kesimpulan:

Kadar arsen terlarut di Sungai Buyat dan Sungai Totok masih di bawah kriteria mutu air sungai. Dengan demikian dapat dikatakan bahwa air Sungai Buyat dan Sungai Totok **tidak tercemar** arsen.

Arsen terlarut-Sungai Buyat



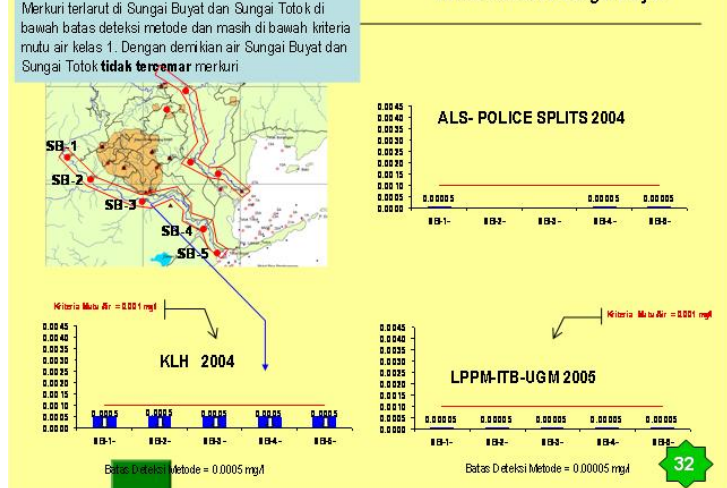
pg-55

Facts, continued: Descriptive & Prescriptive-27

Kesimpulan:

Merkuri terlarut di Sungai Buyat dan Sungai Totok di bawah batas deteksi metode dan masih di bawah kriteria mutu air kelas 1. Dengan demikian air Sungai Buyat dan Sungai Totok **tidak tercemar** merkuri.

Merkuri terlarut-Sungai Buyat



pg-56

Facts, continued: Descriptive & Prescriptive-28

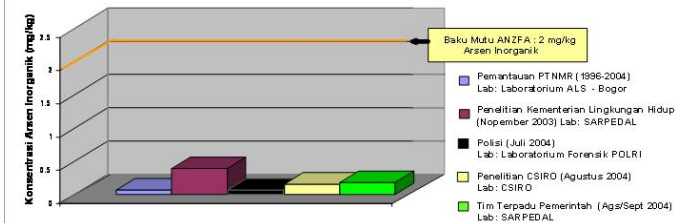
- *Ninth Legal Fact*, it has been proven that it is not true that marine biota samples from Buuyat Bay have been polluted by mercury (Hg) and arsenic (As) as [confirmed] by the results of CSIRO study (*vide*, evidence T.1-13a & 13b), Institute of Minamata Disease (*vide* evidence T.1-68), the 14 October 2004 Report of the Ministry of Environment (*vide* evidence T.1-14a), which has also been confirmed by Prosecution witness Rachmansyah as well as NMR witnesses Dr. Inneke Rumengan, Dr. Keith Bentley, and Ir. Lalamentik.

pg-57

Facts, continued: Descriptive & Prescriptive-29

Ikan: Kadar Arsen masih dalam Kisaran Baku Mutu Normal

Arsen dalam Jaringan Tubuh Ikan



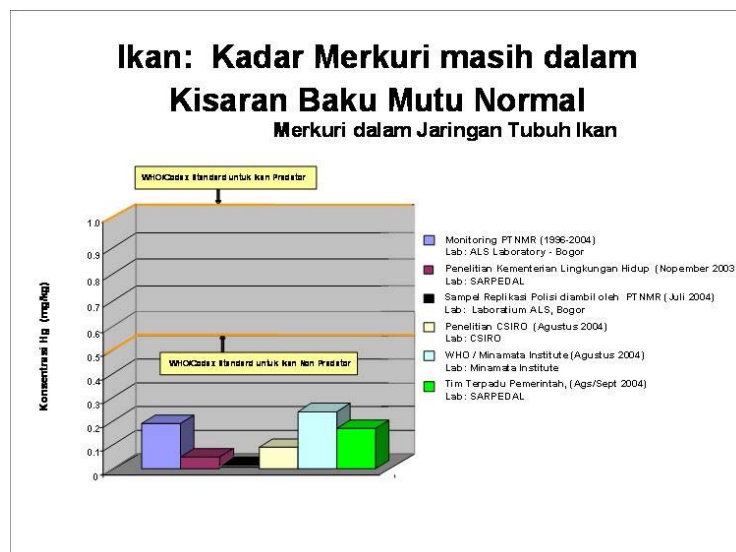
Catatan A: WHO tidak memiliki standar kadar arsen pada ikan
Catatan B: Asumsi 10% total arsen adalah inorganik

pg-58

Facts, continued: Descriptive & Prescriptive-30

Ikan: Kadar Merkuri masih dalam Kisaran Baku Mutu Normal

Merkuri dalam Jaringan Tubuh Ikan

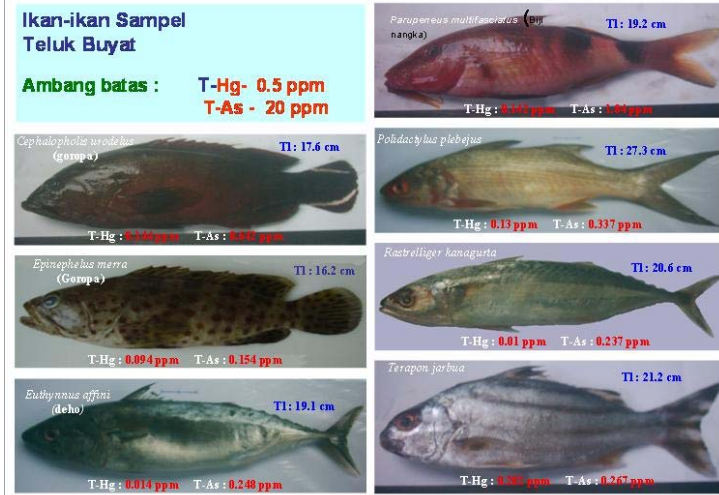


pg-59

Facts, continued: Descriptive & Prescriptive-31

Ikan-ikan Sampel Teluk Buyat

Ambang batas : T-Hg- 0.5 ppm
T-As - 20 ppm



pg-60

Facts, continued: Descriptive & Prescriptive-32

- *Tenth Legal Fact*, it has been proven that the residents of Dusun Buyat are not contaminated by mercury (Hg) and arsenic (As), as shown by the results of ALS laboratory (vide evidence *T.1-37, T.1-38, and T.1-39*), KLH (vide evidence *T.1-35 and T.1-36*), Polri, CSIRO (vide evidence *T.1-13a&b*), WHO/Institute of Minamata Disease (vide evidence *T.1-68*) in cooperation with the Department of Healht of RI, UNSRAT, and Puskesmas Ratatotok, and dr. Sandra Rotty, the Head of Puskesmas Ratatotok.

pg-61

Facts, continued: Descriptive & Prescriptive-33

Testimony of witnesses and experts who conducted studies directly, Prof. Dr. dr. Winsy Warrow [sic, Warouw] and dr. Joy Rattu, Ph.D, even a number of residents, i.e., Dahlan Ibrahim, Jantje Aring, Madjid Andaria, and Salam Ani, who were also witnesses in this court, who also stated the same.

pg-62

C. Legal Analysis: How the Legal Facts fit with the Elements of Crime

- Environmental Law: an Environmental case is a “dispute” and not an act of crime [sic, not a criminal case]. As such, in the Environmental Management Law, criminal [provisions] only [serve] as *ultimum remedium*. A dispute is settled following the subsidiarity principle, meaning, when an administrative measure has been concluded (effective) then the criminal process will be in violation of the Environmental Management Law.

pg-63

Legal Analysis continued-1

- Goodwill Agreement has been signed [by] the government and PTNMR, Defendant I. [They have] agreed to conduct monitoring in Buyat Bay for ten years into the future with the help of a panel of experts, to see if there is pollution in Buyat Bay. Thereby, this criminal proceeding is in violation the Environmental Management Law.

pg-64

Legal Analysis continued-2

- Elements of crime of article 41 (1) of UUPH being charged consist of, (i) any person, (ii) who in contravention of the law, (iii) commits an act, (iv) causing pollution and or destruction of the environment.
- The legal analysis of how the proven legal facts fit with the four elements of crime charged according to the law of evidence must not always start with number 1, but can be started from number 4. This means that the Legal Analysis can be started by addressing the question of whether there is pollution and or ...

pg-65

Legal Analysis continued-3

... Destruction of the environment in Buyat Bay by PTNMR and then continued with the next question, that is, by what means that act was committed so there is pollution and or destruction of the environment if the legal facts indeed exist.

- Dr. Chairul Huda: a corporation can only be incriminated and held criminally liable as a participant in crime (*delneming*).

pg-66

Legal Analysis continued-3 Response to the Requisitor analysis

- Public Prosecutor's Requisitor pages 148, 153, 159, 167, 174, state that PTNMR has conducted tailings waste disposal with the volume of 3500 m3 per day. Therefore, tailings placement by PTNMR is still within the allowed limit pursuant to the Letter from the Minister of Environment No. B-1456/Bapedal/07/2000 (*vide*, evidence P-TT) dated 11 July 2000, which is 5000 m3.

pg-67

C. Legal Analysis continued (3) Response to the Requisitor analysis

- Public Prosecutor's Requisitor on pages 148, 157, 160 stated that documentary evidence code P-15, i.e. letter from PTNMR: 038/III/rn-ki/NMR/01 dated 16 April 2001 shows that PTNMR felt [it] did not yet have the permanent permit to conduct submarine tailings placement in Buyat Bay. Whereas actually this letter from PTNMR affirmed that the ERA study conducted by PTNMR was actually not intended to obtain a permanent permit but to [determine] the extent [sic] of quality standards to be established by the Minister of Environment. The letter from the Minister of Environment, Dr. Sonny Keraf, itself stated that: "*Further provisions regarding the quality standards and tailings disposal will be established based on the results of ERA study.*"

pg-68

C. Legal Analysis continued (4)
Response to the Requisitor analysis

- Public Prosecutor's Requisitor on pages 148, 158 and 159 state that based on the article of Kompas daily on 24 December 2004 PTNMR has disposed of 33 tons of mercury in 4.5 years. This news clipping has been submitted by the Public Prosecutor Team as documentary evidence in the court session on 1 September 2006. This newsclipping does not meet the requirements of article 184 ayat (1) *jo* 187 KUHAP as valid documentary evidence, much less one that is submitted as a photocopy.

pg-69

C. Legal Analysis continued (5)
Response to the analysis in the Requisitor

- Public Prosecutor's Requisitor on pages 150, 156 stated that according to witnesses Dr. Sonny Keraf [and] dra. Masnellyarti Hilman, PTNMR does not yet have the permit to conduct tailings placement in Buyat Bay pursuant to the provisions of article 20 (1) of the Environmental Management Law. Whereas in the court session on 27 January 2006 (*vide* transcript page 192) witness Dr. Sonny Keraf stated that letter No B-1456 was a permit to conduct tailings placement in Buyat Bay.

pg-70

C. Legal Analysis continued (6)
Response to the Requisitor analysis

- Public Prosecutor's Requisitor on pages 150, 156 stated that according to witnesses Dr. Sonny keraf, dra. Masnellyarti Hilman, and Ir. Isa Karmisa, the letter B-1456 was not a permit but a request from KLH to PTNMR, among others, to conduct the ERA study. This statement is mistaken because this information did not come from either Dr. Sonny Keraf, dra. Masnellyarti Hilman or Ir. Isa Karmisa but from Expert Asep Warlan Yusup (*vide*, transcript page 1692). Dr. Sony Keraf actually stated that PTNMR already had a permit to place tailings in the sea.

pg-71

C. Legal Analysis continued (7)
Response to the legal analysis [in the Requisitor]

- Requisitor on pages 151, 157, quoting the testimony of witness Ir. Witoro Soelarno that as though there was a violation of RKL/RPL implementation was found by a Mining Inspector on 13 July 2000. A quote from the mining book on 13 July 2000 is as follows:
- To immediately make mine closure plans and submit it to the Director General of General Mining.
- To remove the drums containing used oil from the workshop location of PT Petrosea to the storage facility in the lay down area.
- To continue reclamation and revegetation activity on the south dyke of the sediment pond I (main)
- Performance of the tailings detoxification unit shall refer to the quality standards of tailings which has been established by the Letter of the Minister of Environment/Head of Bapedal No.: B-1456/Bapedal/07/2000 dated 11 July 2000.
- To conduct monitoring of the quality of gas emissions from the ore processing plant smokestack. The parameter to be monitored include mercury vapor, arsenic gas, SO₂ and NH₃.
- The implementation of the orders in points 2, 3 and 4 shall be reported to the Chief Mining Inspector/Technical Director of General Mining in the RKL/RPL implementation report for quarter III of 2000.
- Therefore, it is clear that in the mining book records dates 13 July 2000, there has never been a reprimand, much less a sanction. The Requisitor is mistaken and misleading in stating that there has been a reprimand.

pg-72

C. Legal Analysis continued (8). Response to the Requisitor analysis

- Requisitor on page 152, 163 and 170 stated that according to witness Ir. Sofyan Simangunsong, as though the detoxification process was not working as intended and that sometimes the concentration of heavy metals exceed the quality standards. Such an information is wrong because what the witness said was that no equipment can work at 100%, therefore on a daily basis the concentration of heavy metals may exceed the quality standards. But that is not a problem as long as the monthly average does not exceed quality standards established (*vide*, transcript page 594).
- In this part the Public Prosecutor also quoted information from the Dossier of Investigation of Erdiansyah Tahir (evidence P-0000), and Public Prosecutor Team calls it documentary evidence. This is wrong. Besides the fact that it does not meet the requirements of article 184 (1) letter *c jo* article 187 KUHAP, this letter was never submitted in court and is not included in the list of documentary evidence from the Public Prosecutor Team.

pg-73

C. Legal Analysis continued (9). Response to the requisitor analysis

- Requisitor on pages 152, 158, 166, 173 by quoting the opinion of Expert Ir. Sulistyowati, M.M. who stated that PTNMR tailings contained B3 elements, therefore PTNMR is not allowed to dispose of its waste directly into the environment as provided by Gov't Regulation No.18 of 1999 and Gov't Regulation No. 19 of 1999. Based on this information, it seems as though tailings are B3 and PTNMR is disposing of it directly into the environment.
- First of all, it needs to be noted that this witness did not say that tailings are B3, but that it contained B3 elements. Even here there is already an error. Because there are indeed metals in the tailings, but toxic or not, that would depend on the chemistry and the size [sic, amount]. According to the Gov't Regulation, in order to determine one needs to perform a test called TCLP. Based on the testimony of witness from Public Prosecutor Team, Ir. Sofyan Simangunsong, in the hearing on 10 February 2006, witness Ir. David Sompie (transcript page 196) in the hearing on 5 May 2006 and Defendant II in the hearing on 1 September 2006, explaining that PTNMR tailings are not disposed of directly into the environment but processed first through a detoxification process. And PTNMR tailings placed in the sea are B3 based on that TCLP test.

pg-74

C. Legal Analysis continued (10). response to the requisitor analysis

- Requisitor on pages 152, 158 quoting the opinion of Expert Dr. Asep Warlan Yusup who stated that the letter from the former Minister of Environment Sonny Keraf No. B-1456/Bapedal/07/2000 is not a permit and according to provisions of State Administrative Law, when an application is not responded to in 4 months then the application can be considered as rejected. This opinion is [contrary to] the opinion of Public Prosecutor's own witness, Dr. Sonny Keraf, who is authorized to issue such a permit, who stated that the letter No. B-1456 was a permit. In addition, Expert Prof. Safri Nugraha, S.p. Ph.D, Ph.D in the court session on 30 June 2006 stated that the letter from Dr. Sonny Keraf was a permit. Specifically in the field of Environmental Law, according to the expert, when the government does not communicate a specific rejection then [this application] can be considered as approved.

pg-75

Legal Analysis continued (11). Response to the Requisitor analysis

- Requisitor pages 153, 166, 173 quoting the opinion of Expert Dr. Abdul Gani Illahude as the only Expert opinion stating that no thermocline is found in Buyat Bay. Such a one-sided statement goes against the principles of honest, impartial and objective trial. Moreover, considering that this Expert only based his opinion on the results of his study using interpolation method, which means that he never conducted studies in Buyat Bay directly, but only [drew] an analogy with Maluku Sea. Such an opinion is different than the testimony from Expert Dr. Andoyo Wuryanto from ITB, who detected the presence of thermocline in Buyat Bay directly (empirically). In addition, the results of AMDAL study as stipulated in the ANDAL document on page 6-26 stated that thermocline is detected at depths between 50 to 60 meters.

pg-76

**C. Legal Analysis continued (12).
Response to Notice of Charges**

- Requisitor on page 156 stated that according to witnesses Dr. Sonny Keraf, dra. Masnellyarti Hilman, and Ir. Isa Karmisa PTNMR did not meet the requirement to obtain permanent permit for tailings placement in Buyat Bay because the ERA study did not meet the requirements of an ERA study. However, the Public Prosecutor Team failed to inform that the three witnesses were asked whether the Indonesian government has issued a legal basis for an ERA study, so that the requirements can be reviewed. The three witnesses admitted never seen any, and there is no law thus far regulating the specific requirements for an ERA study in the form of a law or regulation. Expert Prof. Dr. Daud Silalahi explained that currently a draft regarding ERA study is being worked on at the KLH. The fact is that ERA has been conducted with good will and on time.

pg-77

**C. Legal Analysis continued (13).
Response to Notice of Charges**

- Requisitor on pages 154, 166, 174 quoting the opinion of Expert Dr. Abdul Ganie Illahude and Ir. Rahmansyah who said that Buyat Bay waters has a character of having rather big waves and as a result tailings can be mixed both horizontally and vertically, thus affecting marine biota organisms [sic] and humans through the food chain. In the hearing on 17 February 2006 Ahli Dr. A. G. Illahude never talked about the food chain, but only about the presence of a thermocline layer. Expert Ir. Rahmansyah in the hearing on 24 February 2006 stated that having rather big waves, aquaculture cannot be done in Buyat Bay. He did not say anything about big waves causing the transfer of tailings through the food chain into humans.

pg-78

**C. Legal Analysis continued (14)
Response to the Requisitor analysis**

- Requisitor on page 163 and 170 stated that the allocation of Buyat Bay was for marine biota. This statement is not based in any legal provision. Because according to provisions of Law No.24 of 1992 and Gov't Regulation No.47 of 1997 regarding National Spatial Planning, to determine the allocation of a certain region on the national level, the implementation is coordinated by the relevant minister. While on the regional level, it is coordinated as established by the Governor or the District Administrator. Thus, the allocation of Buyat Bay must be based by a decree of the North Sulawesi Government or South Minahasa District Government, and not on an opinion.

pg-79

**C. Legal Analysis continued (15)
Response to the Requisitor analysis**

.The Requisitor on page 171 stated that witness Sigit Reliantoro and Ir. Isa Karmisa Adiputra have issued a reprimand with regard to finding arsenic concentrations in the tailing of PTNMR which has exceeded the quality standards in 2001. This Requisitor also stated that Expert Munawardin has given the same opinion. This information is incorrect because they did not say so. Even the letter from Ir. Isa Karmisa did not contain any word "reprimand". Moreover, witness Sigit Reliantoro was only asked to evaluate the RKL/RPL from 1999 until 2001 by dra. Masnellyarti in 2004. Munawardin's statement is irrelevant because he is not authorized to issue reprimands.

pg-80

**C. Legal Analysis continued (16).
Response to Requisitor analysis**

.Requisitor on page 166 quoted information from PTNMR AMDAL on page 6-35 which read: "There are metals in the tailings in the concentration which need to be noted, that is, mercury, arsenic, antimony, that can accumulate in the body of certain marine organisms such as shells [molluscs]." But when the sentence is read further in the AMDAL document on the same page, it says that Hg, As and Sb should not cause any concern in PTNMR's mining activity. But this part was intentionally left out [by the Prosecutors] in order to mislead this court.

pg-81

**C. Legal Analysis continued (17)
Response to the Requisitor analysis**

- Requisitor on page 166 quoted information from PTNMR's AMDAL on page 6-39 that "*tailings accumulation will cause the majority of marine organisms with sufficient mobility to escape to be buried and killed. Fish and other organisms with higher mobility will escape from the accumulation zone but will not be able to survive in the competition with the native species of their refuge area. This impact will cause...*" This quote was interrupted leaving a different impression. Whereas when it is read further, on page 6-42, that tailings accumulation will happen very slowly, that is, several millimeters per year, and benthic organisms can overcome this. This part was also intentionally left out in order to mislead this court.

pg-82

**Legal Analysis continued (18)
Response to the Requisitor analysis**

- Requisitor on page 128 stated that one of the *a de charge* witnesses in court was Hardoyo Wiryanto. PTNMR never presented anyone with the name Hardoyo Wiryanto.

pg-83

**C. Legal Analysis continued (19).
Response to the Requisitor analysis**

- The Indictment quoted by the Public Prosecutor in full in this Requisitor still included the quotation errors as taken from RKL/RPL. This means that the Requisitor continued to use the wrong data, that is, the ones with elevated metal concentrations from the actual values, in order to create the impression that PTNMR has committed wrongdoing.

pg-84

C. Legal Analysis continued Conclusion

- The ten legal facts that were proven convincingly and elaborated above are a response to the four elements of crime being charged, that is, that PTNMR has committed an act (“STP”) which has caused pollution and/or destruction of the environment in Buyat Bay. This has not been proven based on valid evidence and convincingly. Therefore, according to law of evidence, it has not been proven that there are Legal facts of the act as an act of crime charged. Therefore by itself, it is no longer relevant to elaborate the other elements, such as (1) any person, (2) who in contravention of the law, (3) intentionally, from article 41 (1) of UUPH being charge as having been proven by the Public Prosecutor Team. It has been proven that Buyat Bay is not polluted and/or damaged.

pg-85

D. Request

- **Since it has been proven that there are no legal facts of a criminal act of pollution and or destruction of the environment which has caused harm on humans or the environment as an act and the wrongdoing of Defendant I in Buyat Bay, then there is no environmental crime that needs to be held liable for.**
- **Therefore, pursuant to the provisions of article 191 (1) of KUHP, that is “If from the examination in court the defendant’s wrongdoing of the act being charged against him is not proven legally and convincingly, then the defendant must be freed.” Or at least, as provided by article 191 (2), if the court is of the opinion that the act being charged to the defendant has been proven, but it is not an act of crime, then the defendant must be freed from all legal charges.”**
- **Based on the above, then we kindly request (1) to state that Defendant I PTNMR has not been proven legally and convincingly of having committed the criminal act of “pollution and destruction of the environment,” (2) to free Defendant I PTNMR of all indictments and charges or at the very least free [the Defendant] from all legal charges, as well as (3) establish the right to compensation and rehabilitation as provided by the law.**

pg-86