

# Civil liability for environmental damage from mining on small islands: PT Gag Nickel Case after Constitutional Court Decision No. 35/PUU-XXI/2023

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## Article Info

### Article history:

Received : Nov 23, 2025

Revised : Dec 16, 2025

Accepted : Jan 25, 2026

### Keywords:

Unlawful Act;  
Strict Liability;  
Protection of Small Islands;

## ABSTRACT

This study aims to examine the qualification of PT Gag Nickel's mining activities as unlawful acts (*perbuatan melawan hukum*) and to formulate the appropriate model of civil environmental liability following Constitutional Court Decision No. 35/PUU-XXI/2023. This research employs normative legal research using a statutory, conceptual, and case approach by analyzing constitutional norms, environmental legislation, and relevant judicial decisions. The analysis demonstrates that the Constitutional Court decision repositions ecological protection as an imperative norm that prevails over administrative compliance. Consequently, mining activities on small islands that result in ecological degradation are materially unlawful, regardless of the existence of formal permits. From the perspective of Indonesian environmental civil law, such activities trigger strict liability as regulated under Article 88 of Law No. 32 of 2009 on Environmental Protection and Management. The study concludes normatively that PT Gag Nickel bears civil liability for environmental damage without the need to prove fault. The liability extends beyond monetary compensation to include full environmental restoration (*restitutio in integrum*) and ecological compensation, in accordance with the polluter pays principle and the constitutional right to a good and healthy environment. This construction affirms that administrative permits do not function as a justification to negate civil responsibility for environmental harm on small islands.

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## 1. INTRODUCTION

Indonesia is constitutionally recognized as the world's largest archipelagic state, composed of thousands of islands with diverse ecological characteristics. Among these, small islands constitute the most environmentally vulnerable territorial units. Their limited land area, fragile freshwater systems, high exposure to climate change, and strong interdependence between terrestrial and marine ecosystems result in a very low environmental carrying capacity. Consequently, any large-scale extractive activity on small islands poses a substantial risk of irreversible ecological damage and the loss of community living space.

The constitutional foundation for the protection of such fragile ecosystems is firmly rooted in Article 33 paragraphs (3) and (4) of the 1945 Constitution of the Republic of Indonesia. These provisions mandate that natural resources are controlled by the state and must be utilized for the greatest prosperity of the people while upholding the principles of sustainability, environmental protection, and intergenerational justice. In this sense, state control over natural resources does not merely imply economic exploitation but imposes a constitutional duty to prevent environmental degradation that may undermine the people's right to a good and healthy environment.

This constitutional mandate is elaborated normatively through Law No. 1 of 2014, which amends Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands. The law explicitly defines a small island as an island with an area of no more than 2,000 km<sup>2</sup> and places small islands within a special protection regime. Article 23 paragraph (2) limits the utilization of small islands to activities such as conservation, education, research, sustainable tourism, and marine and fisheries-based livelihoods. Furthermore, Article 35 letter (k) expressly prohibits mineral mining activities that cause environmental damage or pollution and threaten the sustainability of coastal areas and small island ecosystems. These provisions demonstrate that Indonesian positive law adopts a preventive and protective approach toward small islands, prioritizing ecological integrity over extractive economic interests.

The normative prohibition of mining on small islands has been further strengthened by Constitutional Court Decision No. 35/PUU-XXI/2023. In this landmark ruling, the Court reaffirmed that small islands are not intended for extractive activities, particularly mineral mining, due to their ecological vulnerability. The Court emphasized that state policies permitting mining on small islands contradict constitutional principles when they endanger ecosystems and the livelihoods of local communities. This decision marks a significant constitutional shift by placing ecological protection as a superior norm that cannot be overridden by administrative permits or sectoral economic considerations.

Despite this strengthened legal framework, inconsistencies in its implementation remain evident in practice. One of the most prominent and current examples is found in Raja Ampat Regency, a region globally recognized as the epicenter of marine biodiversity within the Coral Triangle and designated as a UNESCO Global Geopark. Gag Island, a small island with an area of approximately 60–77 km<sup>2</sup>, has been subjected to large-scale nickel mining activities conducted by PT Gag Nikel, a subsidiary of the state-owned enterprise PT Aneka Tambang Tbk (Antam).

In the period of 2024–2025, the central government revoked several Mining Business Permits (IUP) held by private nickel companies operating in Raja Ampat on environmental grounds and to protect the region's geopark status. However, this enforcement approach was not applied uniformly. PT Gag Nikel was allowed to resume its mining operations after a temporary suspension, with the government arguing that the company's activities were legally justified by a Contract of Work and protected under Presidential Decree No. 41 of 2004, which granted mining permits in protected forest areas to a limited number of corporations. This differential treatment raises serious legal concerns regarding equality before the law and the relevance of outdated administrative instruments in the post-Constitutional Court Decision No. 35/PUU-XXI/2023 era.

From the perspective of Indonesian civil law, the existence of formal administrative permits does not automatically negate liability when environmental damage occurs. Article 1365 of the Indonesian Civil Code establishes that any unlawful act causing harm obliges the perpetrator to compensate for the loss. The doctrine of *perbuatan melawan hukum* encompasses not only violations of written law but also acts that contravene legal obligations, infringe upon community rights, violate the precautionary principle, or conflict with standards of propriety and fairness in environmentally sensitive activities.

In addition, Law No. 32 of 2009 on Environmental Protection and Management provides a specific civil liability regime for environmental damage, including the application of strict liability as stipulated in Article 88. This provision removes the requirement to prove fault when environmental harm arises from activities that pose serious threats to the environment. The obligations of mining companies regarding environmental management, reclamation, and restoration are further regulated under Law No. 3 of 2020 on Mineral and Coal Mining and Government Regulation No. 96 of 2021, which function as normative benchmarks for assessing environmental compliance and responsibility.

Accordingly, the central legal problem addressed in this study lies in the gap between *das sollen*, namely the constitutional and statutory obligation to protect small islands from environmental

degradation, and *das sein*, represented by the continued nickel mining activities of PT Gag Nickel under the justification of pre-existing administrative legality. This discrepancy raises fundamental questions concerning the classification of such activities as unlawful acts and the appropriate construction of civil environmental liability. Therefore, this study aims to analyze whether PT Gag Nickel's mining activities on Gag Island constitute an unlawful act and to formulate the proper model of civil liability for environmental damage on small islands under Indonesian law.

## 2. METHOD

This study employs a normative legal research method (doctrinal legal research) that focuses on the analysis of legal norms contained in Indonesian positive law. The research is deliberately confined to the domain of environmental civil law, particularly the construction of unlawful acts (*perbuatan melawan hukum*) and civil liability mechanisms arising from environmental damage on small islands. Accordingly, this study does not examine administrative sanctions or criminal liability, nor does it assess technical or scientific measurements of environmental impact.

The research adopts several complementary approaches. First, a statute approach is used to examine the normative interaction and potential conflict between the mineral and coal mining legal regime and the coastal and small island management regime, especially in relation to constitutional and statutory prohibitions on mining activities on small islands. Second, a conceptual approach is applied to analyze key legal doctrines, including strict liability, the polluter pays principle, and state responsibility in environmental protection. This approach is essential to clarify the theoretical foundations of civil environmental liability within the Indonesian legal system.

Third, a case approach is employed by analyzing Constitutional Court Decision No. 35/PUU-XXI/2023 and relevant Supreme Court jurisprudence, particularly decisions concerning mining activities on Wawonii Island. The selection of Constitutional Court Decision No. 35/PUU-XXI/2023 is justified on the grounds that it constitutes the most recent and authoritative constitutional interpretation regarding the prohibition of mining on small islands and the prioritization of ecological protection over administrative legality. The Wawonii Island cases are used as comparative jurisprudence because they provide concrete judicial reasoning on the application of environmental civil liability in the context of small island mining disputes.

The sources of legal materials used in this research consist exclusively of secondary data. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, the Indonesian Civil Code, Law No. 32 of 2009 on Environmental Protection and Management, Law No. 1 of 2014 on Coastal Areas and Small Islands, Law No. 3 of 2020 on Mineral and Coal Mining, relevant implementing regulations, and judicial decisions. Secondary legal materials comprise legal journals, scholarly writings, expert opinions, and reports issued by credible institutions. Tertiary legal materials are used to support legal interpretation and terminology clarification.

All legal materials were collected through library research. This study does not employ field research, interviews, surveys, or empirical environmental data, as its primary objective is to formulate normative legal arguments and legal prescriptions rather than to measure factual environmental impacts. The collected materials are analyzed qualitatively using deductive legal reasoning through syllogistic analysis to derive normative conclusions regarding the appropriate construction of civil liability for environmental damage on small islands under Indonesian law.

## 3. RESULTS AND DISCUSSION

### 3.1. Constitutional Court Decision Number 35/PUU-XXI/2023 in Assessing the Elements of Unlawful Acts in the Mining Activities of PT GAG Nickel on Gag Island

Indonesia, as a state based on the rule of law (*rechtsstaat*), places the Constitution as the highest legal norm that guides the formation, interpretation, and implementation of laws. Within this constitutional framework, the Constitutional Court functions as the guardian of the Constitution, vested with the authority to ensure that statutory norms and state policies conform to constitutional principles. Constitutional Court decisions are final and binding (*final and binding*), thereby establishing authoritative normative interpretations that must be adhered to by all legal subjects, including state institutions and corporate actors (Asshiddiqie, 2010).

Constitutional Court Decision Number 35/PUU-XXI/2023 represents a pivotal development in Indonesia's environmental constitutional jurisprudence. In its *ratio decidendi*, the Court explicitly rejected interpretations that weaken Article 35 letter (k) of Law No. 27 of 2007 as amended by Law No. 1 of 2014 on the Management of Coastal Areas and Small Islands. The Court clarified that the prohibition of mining on small islands is not conditional upon the existence of environmental permits but is grounded in the inherent ecological vulnerability and limited carrying capacity of such islands (Constitutional Court of the Republic of Indonesia, 2024).

To assess the legal implications of this decision on the mining activities of PT Gag Nickel, the elements of unlawful acts under Article 1365 of the Indonesian Civil Code must be examined systematically.

The element of *acts* refers to concrete conduct attributable to a legal subject. In this case, the relevant acts consist of the continuation of large-scale nickel mining activities conducted by PT Gag Nickel on Gag Island, Raja Ampat Regency. These activities include land clearing, excavation, mineral extraction, and supporting infrastructure development carried out under a Contract of Work and justified administratively by Presidential Decree No. 41 of 2004. As a corporate legal entity, PT Gag Nickel's operational activities constitute legally relevant acts capable of giving rise to civil liability.

Unlawfulness (*onrechtmatigheid*) under Indonesian civil law extends beyond violations of written statutory provisions. It also includes acts that contravene legal obligations, infringe subjective rights of communities, violate the precautionary principle, or conflict with societal norms of propriety and fairness (Fuady, 2013; Subekti & Tjitrosudibio, 2009). Constitutional Court Decision No. 35/PUU-XXI/2023 reinforces this broader conception of unlawfulness by affirming that the primary legal function of small islands is conservation-oriented rather than extractive. Consequently, mining activities that contradict this fundamental purpose are materially unlawful, even when supported by formal administrative permits. The Court emphasized that administrative legality cannot override constitutional and statutory environmental protection norms, particularly when mining activities threaten ecological sustainability and community living spaces (Constitutional Court of the Republic of Indonesia, 2024).

The element of damage in environmental civil law encompasses not only economic loss but also ecological damage and environmental degradation. Law No. 32 of 2009 recognizes environmental damage as a legally cognizable form of loss affecting ecosystems, biodiversity, and environmental functions. Normative assessments supported by reports from civil society organizations indicate potential environmental harm associated with PT Gag Nickel's operations. The Mining Advocacy Network (JATAM) reported that PT Gag Nickel's concession area reaches approximately 13,136 hectares, while the total land area of Gag Island is only around 6,500 hectares. This disproportion suggests a serious risk of exceeding the island's ecological carrying capacity and violating zoning principles mandated under the small island management regime (JATAM, 2025). Similarly, Greenpeace Indonesia documented indications of deforestation and marine ecosystem disruption in the Raja Ampat region, reinforcing concerns regarding environmental degradation (Greenpeace Indonesia, 2025).

Causation requires a legally relevant connection between the acts and the resulting damage. In environmental cases, Indonesian law adopts a precautionary approach that does not demand absolute scientific certainty. Where activities inherently pose serious environmental risks, causal relationships may be inferred normatively. Large-scale mining on small islands has been characterized by the Constitutional Court as an abnormally dangerous activity due to its high probability of causing irreversible ecological harm. Accordingly, the environmental disturbances identified in Gag Island can be normatively attributed to PT Gag Nickel's mining activities, satisfying the causal element of unlawful acts (Constitutional Court of the Republic of Indonesia, 2024).

Traditionally, fault (*schuld*) constitutes an essential element of unlawful acts under Article 1365 of the Civil Code. However, environmental civil law recognizes significant exceptions to this requirement. Article 88 of Law No. 32 of 2009 introduces the principle of strict liability for activities that pose serious threats to the environment, thereby eliminating the need to prove fault. Mining activities on small islands fall within the category of ultra-hazardous activities, as affirmed by the Constitutional Court. Consequently, PT Gag Nickel cannot evade civil liability by invoking compliance with administrative standards or the absence of negligence. The application of strict liability reflects the polluter pays principle and aligns with the constitutional right to a good and healthy environment.

Overall, when assessed cumulatively, PT Gag Nickel's mining activities on Gag Island fulfill all elements of a materially unlawful act. The continued reliance on Presidential Decree No. 41 of 2004 cannot negate civil liability when such activities conflict with higher-ranking environmental protection norms and constitutional mandates. Moreover, selective enforcement practices that differentiate between private corporations and state-owned enterprises undermine legal certainty and violate the principle of equality before the law, as consistently criticized by environmental advocacy organizations (WALHI, 2025).

### **3.2. Civil Liability of PT GAG Nickel for Environmental Damage on Gag Island as a Result of Unlawful Acts**

#### **3.2.1 Strict Liability as the Applicable Civil Liability Regime for Small Island Mining**

Once mining activities conducted by PT Gag Nickel are classified as unlawful acts, civil liability arises as an inevitable legal consequence. Although Article 1365 of the Indonesian Civil Code traditionally requires proof of fault, environmental disputes exhibit unique characteristics that justify the application of a special liability regime. Environmental damage is often cumulative, long-term, and difficult to attribute to a single negligent act. These features make fault-based liability ineffective in ensuring environmental justice. Therefore, Indonesian environmental law adopts strict liability as a corrective mechanism. This approach shifts the focus from fault to risk and impact. As a result, liability arises from the mere occurrence of environmental harm.

Article 88 of Law No. 32 of 2009 on Environmental Protection and Management explicitly codifies strict liability for activities that pose serious threats to the environment. This provision reflects legislative awareness that certain economic activities inherently generate high ecological risks. Mining activities on small islands fall squarely within this category due to limited land area and fragile ecosystems. Laterite nickel mining requires extensive land clearing and soil disturbance, which can disrupt hydrological systems and coastal stability. On small islands, such disturbances may cause irreversible damage. Accordingly, strict liability operates as *lex specialis* overriding general civil liability principles (Wibisana, 2017).

In the context of Gag Island, the application of strict liability is normatively justified. The island's limited ecological carrying capacity amplifies the environmental risks associated with mining operations. Even where operators claim compliance with technical standards, the inherent danger of the activity remains unchanged. Strict liability ensures that the burden of environmental risk is borne by the party that economically benefits from the activity. This construction aligns with the preventive orientation of environmental law. It also reinforces the constitutional obligation to protect environmentally vulnerable territories.

#### **3.2.2 Legal Implications of Strict Liability for Environmental Civil Claims**

The application of strict liability significantly alters the procedural and substantive dynamics of environmental civil litigation. Under this regime, plaintiffs are not required to prove intent, negligence, or lack of due care on the part of the business actor. Instead, liability is established once environmental damage and a causal link to the activity are demonstrated. This legal design reduces evidentiary barriers that often disadvantage affected communities. It also addresses information asymmetry between corporations and plaintiffs. Consequently, access to environmental justice is substantially enhanced.

Administrative permits frequently serve as a central defense in environmental disputes. However, strict liability doctrine rejects the notion that permits can absolve civil responsibility. Environmental permits merely authorize operations within regulatory frameworks. They do not constitute permission to cause environmental harm. Contemporary environmental law doctrine consistently emphasizes that compliance does not equal immunity (Zalil et al., 2026). Therefore, claims of holding valid permits or achieving favorable compliance ratings cannot negate liability.

In the case of PT Gag Nickel, reliance on administrative legality, including a Contract of Work and Presidential Decree No. 41 of 2004, is legally insufficient. Once environmental damage is normatively established, liability follows regardless of such permits. This interpretation prevents the misuse of administrative instruments to legitimize environmental harm. It also ensures that environmental protection norms maintain substantive effectiveness. Ultimately, strict liability strengthens the integrity of environmental governance.

### 3.2.3 Environmental Damage Threshold and the Polluter Pays Principle

Environmental damage in civil law is not limited to direct economic loss suffered by individuals. Law No. 32 of 2009 recognizes ecological damage as a legally relevant form of loss. Such damage includes degradation of ecosystems, loss of biodiversity, and disruption of environmental functions. Environmental law adopts a preventive orientation, meaning that liability may arise even before complete destruction occurs. This approach prioritizes protection over remediation. It also reflects the irreversible nature of many ecological harms.

Civil society reports provide normatively relevant indications of environmental damage associated with mining activities on Gag Island. Reports by JATAM indicate that PT Gag Nickel's concession area exceeds the island's land area, raising serious zoning and ecological concerns (JATAM, 2025). Greenpeace Indonesia has documented deforestation and marine ecosystem disruption in the Raja Ampat region (Greenpeace Indonesia, 2025). These findings are sufficient to establish a credible risk of environmental harm. Under strict liability, such risks are legally significant.

The polluter pays principle reinforces this construction of liability. This principle requires that parties responsible for pollution or environmental degradation bear the costs of prevention, mitigation, and restoration. PT Gag Nickel, as the economic beneficiary of mining activities, must internalize environmental costs. Shifting these burdens to the public would violate environmental justice principles. Therefore, civil liability functions as a mechanism to correct market externalities. It also ensures fairness in the distribution of environmental risks (Rangkuti, 2015).

### 3.2.4 Forms of Civil Remedies: Restoration-Oriented Liability

Environmental civil liability should prioritize restoring damaged ecosystems rather than merely providing monetary compensation. The primary objective is *restitutio in integrum*, namely restoring the environment to its original condition. Minister of Environment Regulation No. 7 of 2014 mandates that environmental loss assessment includes ecological losses and restoration costs. This framework recognizes that environmental value extends beyond economic metrics. It also acknowledges the intrinsic value of ecosystems.

On small islands such as Gag Island, restoration-oriented remedies are particularly crucial. Ecological damage on small islands often affects interconnected systems, including forests, groundwater, and marine environments. Damage to one component may trigger cascading effects. In Raja Ampat, coral reef degradation or hydrological disruption carries global ecological significance. Environmental losses in such areas may be substantial when assessed using environmental economic valuation methods (Ministry of Environment, 2014).

Courts therefore possess broad authority to order restorative measures. These may include land rehabilitation, coastal ecosystem restoration, and reforestation. Judicial supervision may involve independent experts to ensure compliance. Where restoration is technically impossible, courts may impose substitute compensation or ecological offset mechanisms. Such remedies ensure that civil liability fulfills its protective and corrective functions.

### 3.2.5 Judicial Orientation and the Heightened Responsibility of State-Owned Enterprises

Effective enforcement of environmental civil liability depends heavily on judicial orientation. Supreme Court Regulation No. 1 of 2023 strengthens this orientation by directing judges to prioritize environmental protection. The regulation introduces the principle of *in dubio pro natura*, which favors environmental interests in cases of uncertainty. Judges are encouraged to actively assess scientific and ecological evidence. This approach enhances judicial responsiveness to environmental complexity (Supreme Court of the Republic of Indonesia, 2023).

Judges are also empowered to impose coercive measures to ensure compliance. Coercive monetary penalties (*dwangsom*) may be applied to compel timely restoration. Such mechanisms prevent environmental judgments from becoming symbolic. Experience in environmental litigation shows that compliance often requires continuous judicial oversight. Therefore, coercive instruments play a vital role in enforcement.

The status of PT Gag Nickel as a subsidiary of a state-owned enterprise further heightens its responsibility. State-owned enterprises are extensions of state economic activity and should exemplify compliance with constitutional mandates. Using state ownership as a shield against liability contradicts the principles of accountability and equality before the law. It also undermines citizens' constitutional right to a good and healthy environment. Accordingly, civil liability for environmental damage must apply equally, regardless of ownership structure.

#### 4. CONCLUSION

Based on a comprehensive normative legal analysis, this study concludes that Constitutional Court Decision Number 35/PUU-XXI/2023 affirms the prohibition of mining on small islands as an imperative constitutional norm when such activities threaten ecological sustainability. The decision repositions environmental protection as a superior legal value that prevails over sectoral economic interests and administrative legality. Accordingly, the nickel mining activities conducted by PT Gag Nickel on Gag Island, despite being supported by a Contract of Work and Presidential Decree No. 41 of 2004, materially fulfill the elements of an unlawful act (*perbuatan melawan hukum*) under Article 1365 of the Indonesian Civil Code. Administrative permits can no longer function as a justifying ground (*rechtvaardigingsgrond*) when they contradict higher-ranking environmental protection norms, constitutional principles, and standards of public propriety.

From the perspective of environmental civil law, the appropriate form of liability imposed on PT Gag Nickel is strict liability as regulated under Article 88 of Law No. 32 of 2009 on Environmental Protection and Management. Mining activities on small islands with limited ecological carrying capacity constitute abnormally dangerous activities, the risks of which must be borne entirely by the business operator. Consequently, PT Gag Nickel is legally obliged to compensate for all ecological losses and to finance comprehensive environmental restoration measures without requiring the plaintiff to prove fault. This construction reflects the polluter pays principle and strengthens the protection of the constitutional right of citizens to a good and healthy environment.

The legal implications of this conclusion are significant for environmental governance and civil litigation in Indonesia. First, it confirms that administrative legality does not provide immunity from civil liability for environmental damage, particularly in environmentally sensitive areas such as small islands. Second, it reinforces the role of Constitutional Court decisions as binding normative references that must guide judicial reasoning, administrative actions, and corporate conduct. Third, it establishes strict liability as the primary civil liability regime for extractive activities on small islands, thereby lowering evidentiary barriers for affected communities and enhancing access to environmental justice.

In terms of legal policy recommendations, this study suggests several normative directions. The government should immediately harmonize sectoral regulations in the mining and environmental fields to fully reflect the constitutional standards articulated in Constitutional Court Decision No. 35/PUU-XXI/2023. Existing mining permits on small islands should be subject to comprehensive legal review and, where necessary, revoked or terminated to prevent ongoing ecological harm. Furthermore, judicial institutions should consistently apply strict liability and restoration-oriented remedies in environmental cases involving small islands, including the use of coercive measures to ensure compliance with court decisions. Finally, state-owned enterprises must be positioned as role models in environmental compliance, with heightened accountability mechanisms to ensure that state economic activities align with constitutional mandates and sustainable development objectives.

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