

URBAN PLANNING AND
ENVIRONMENTAL
LAW REPORT

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This issue features the second and final part of our report on the recently enacted *Air Pollution Control (Amendment) Ordinance*, parts of which came into force on 6 August this year. In this part we look at the novel provision for technical memoranda, the new power to remove exemptions and tougher penalties for air pollution.

We welcome a new contributor to our *Regional and International* section. Lee & Li Attorneys-at-Law in Taipei and Kaohsiung will keep readers abreast of environmental law developments in Taiwan, ROC. In this issue, Mr. Eddie Liu writes about new requirements for CFC sales permits and new powers to fine air polluters.

Our regular comparative table of environmental convictions appears on page eight and in this issue covers May, June and July 1993. A fine of \$100,000 for a water pollution offence upon fourth conviction is among the highest ever. However, the fines for air pollution offenses have remained low despite a high level of repeat offenses.

The Editors

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Air Pollution Control (Amendment) Ordinance 1993
(This is the second and final part of this report.)

TECHNICAL memoranda are detailed standards for effluent or emissions prepared by the EPD and issued by the Secretary for Planning, Environment and Lands with the approval of the Legislative Council. They are designed to provide a set of technical standards through which to achieve environmental quality objectives.

The use of technical memoranda was first established by the Water Pollution Control (Amendment) Ordinance (1990) and the first technical memorandum was issued in January 1991. In a similar way, technical memoranda for emissions into the air should assist the authority

in achieving the Air Quality Objectives long established under APCO. Under the Amendment Ordinance the definition of air pollution has been expanded to include emissions which exceed the limits prescribed by a technical memorandum. Section 10 also permits an enforcement officer to take the technical memorandum into account in determining whether an emission constitutes air pollution.

All Hong Kong environmental legislation enacted in the 1980s granted existing polluters generous exemptions or licences to continue to pollute the environment with little or no abatement. In APCO, this phenomenon manifested itself in the exemptions from licensing, and thus effectively from regulation, granted by section 20 to

existing 'specified processes', that is, 23 types of industrial polluters which produce noxious or offensive emissions and were already in operation or being developed for operation at the time this part of APCO took effect in 1987.

The Amendment Ordinance has added section 20AA which empowers the Secretary to remove an exemption (s.20AA(1)) from the owner of a specified process without compensation (s.20AA(4)) and require the owner to apply for a licence (s.20AA(2)). In 1991, of a total of 146 factories operating specified processes only 42 were licensed. Having gained the legal authority, it remains to be seen whether the administration will have the political will to take on these remaining 104 industrial polluters.

The final but most important change has been to toughen the penalties for offenses under APCO. We have earlier canvassed arguments that imposing low fines for environmental convictions allows polluters to absorb fines into their operating costs. (March-April 1983) The first step has been to increase fines as, for example, under sub-section 10(7) the maximum fine for failing to cease the polluting operation specified in an air pollution abatement notice has been increased ten times from \$50,000 to \$500,000. There is a further fine of up to \$100,000 (increased from \$9,600) per day for each day the polluting operation continues. Maximum fines in other provisions have been similarly increased.

Penalties for air pollution offenses have in some cases been expanded to include a term of imprisonment. For example,

failure to stop air pollution specified in an abatement notice attracts a penalty of imprisonment for a maximum of 12 months.

Unlike other environmental legislation in Hong Kong, APCO took for granted that *mens rea* is not required for an offence relating to the emission of an air pollutant and this position is supported by good authority. However, does the substantial increase in fines and the introduction of imprisonment alter the strict liability character of air pollution offenses? This question is now particularly relevant in the light of the guarantees of substantive and procedural justice provided by articles 11(1) and 5(1) of the Bill of Rights Ordinance.

'The final but most important change has been to toughen the penalties for offenses under APCO'

It may be that the requirements of justice will be satisfied where a strict liability offence incorporates, to use the Canadian expression, a 'due diligence' defence, that is, a provision which allows the accused to negative liability on the grounds that he/she was not at fault because all reasonable steps had been taken to avoid the commission of the offence.

Section 48 of APCO provides defences of this nature but is limited to the failure of furnaces, chimneys or other relevant plant. Of course, this limitation reflects the narrow focus of APCO when it was first enacted. The legislature's failure to widen the defences to

reflect the expanded definition of air pollution in the Amendment Ordinance will no doubt provide fertile ground for legal challenge under the Bill of Rights.

The third and final step taken by the Amendment Ordinance is to create personal liability for corporate officers. As most prosecutions are taken against corporate polluters where a sentence of imprisonment is impossible and a fine may be absorbed into operating costs.

Under section 47A(1) personal liability is dependent on a conviction for the principal offence by a body corporate. In other words, the company's officers can only be convicted if the company has first itself been convicted. Although the principal pollution offenses are presumably based on strict liability, an offence under section 47A(1) incorporates a clear mental element, that is, 'consent or connivance... or ...neglect or omission'.

There seems to be nothing to prevent a company from indemnifying one of its officers in respect of a fine imposed under section 47A(1). In Ontario Canada, a court has ordered that a convicted company officer not be indemnified by his company but it seems unlikely Hong Kong's courts could make such an order without legislative authority.

There can be no question that the Amendment Ordinance makes important changes to air pollution regulation in Hong Kong but they are, frankly, long overdue. Even so, problems remain. Although expanded in scope, APCO still applies to stationary sources of air pollution. However, pollution from motor vehicles remains a serious problem.

Digest of LEGISLATION

(This digest Legal Supplements to the Gazette Nos. 25/25 June to 34/27 August 1993.)

AIR POLLUTION

(The following legal notices appeared in L.S. No. 2 to GAZETTE No. 31/6 August 1993 pp.B1235-1252.)

Air Pollution Control (Furnaces, Ovens and Chimneys) (Installation and Alteration) (Amendment) Regulation 1993 (L.N. 310 of 1993) This notice amends the Regulation in the light of amendments to the Air Pollution Control Ordinance and the Engineers Registration Ordinance and increases the maximum fines to \$50,000 for a single offence and \$500 per day for a continuing offence.

Air Pollution Control (Specified Processes) (Amendment) Regulation 1993 (L.N. 311 of 1993)

Air Pollution Control (Specified Processes) (Specification of Required Particulars and Information) Order (L.N. 312 of 1993). These notices amend the Regulations in the light of Amendments to the Air Pollution Control Ordinance which provide that specified processes may have their exemptions removed and become regulated dischargers of air pollution.

Air Pollution Control (Amendment) Ordinance 1993 (13 of 1993) (Commencement) Notice 1993 (L.N. 313 of 1993) This notice appoints 6 August 1993 as the commencement date for new ss.51, 55, 56, 58 to 80 which deal with the control of asbestos and amended Schedule 1 in relation to specified processes numbered 25 and 27 to 31.

BUILDING AND LANDS

Resolution of the Legislative Council (L.S. to GAZETTE

No. 29/23 July 1993 p.B1168)

This Resolution makes the necessary transfer of functions from the former Director of Buildings and Lands to the new Director of Building Development upon the abolition of the Department of Buildings and Lands and the creation of the Department of Buildings and the Department of Lands.

Building (Administration) (Amendment) (No. 2) Regulation 1993 (L.S. to GAZETTE No. 34/27 August 1993 p.B1355) This Regulation is to dispense with the prescribed forms under the Building (Planning) Regulations and replace them, where necessary, with specified forms and make a number of related changes in the light of the Buildings (Amendment) (No. 2) Ordinance 1993.

PUBLIC HEALTH

Smoking (Public Health) (Notices) (Amendment) (No.2) Order 1992 (Amendment) Order 1993 (L.S. to GAZETTE 25/25 June 1993 p.B927) This Order provides an amended choice of forms of health warning which to be borne on cigarette packets.

URBAN PLANNING

Shipping and Port Control (Dwelling Vessels) (Closed Areas) Order 1993 (L.S. to GAZETTE No. 32/13 August 1993 p.B1296) This Order closes the Yau Ma Tei and To Kwa Wan typhoon shelters to dwelling vessels pending reclamation.

Port Control (Public Water-Front) Order 1993 (L.S. to GAZETTE No. 32/13 August 1993 p.B1302) This Order revises a previous order with respect to the creation of public water-front from unleased Crown land in West Kowloon.

CASELAW Update

Greenwich London Borough Council v. Secretary of State for the Environment and Another; Yates and Others v. Secretary of State for the Environment and Another (Hutchison J. *Times Law Report* 2 March 1993)

Planning - Acquisition of Land Act 1981 - s.19(1) certificated for exchanges of land - exchanges of open-spaced land equally advantageous to the users of the land and the public at large at the time of exchange - whether 'equally advantageous to be assessed as of date of exchange not some future date - s.23(2) challenges to a certificate granted under s.19(1) not limited to procedural requirements.

The applicants, a local government and several private individuals, challenged the decisions of the Secretaries of State for Environment and Transport to issue certificates for the exchange of open-spaced land, which included an important area of woodland, for open farmland which the applicants argued was not, as required by s.19 of the Acquisition of Land Act 1981, 'equally advantageous to such persons as were entitled to rights of common or other rights over that open-spaced land and to the public'.

The principal issues argued were (1) whether a challenge under s.23 of the Act was limited to procedural matters only or could extend to the substantive question of whether the exchange lands came within the requirements expressed in s.19 and capable of certification; (2) whether the decision to grant a certificate was wrong as a matter of law or unreasonable in the 'Wednesbury Corporation' sense; and

(3) whether predicted developments or future occurrences were relevant considerations in deciding when exchange lands came within the requirements of s.19.

It was argued on behalf of the respondents that because a decision to issue a certificate could only be challenged on the ground that a relevant requirement had not been complied with it was beyond the jurisdiction of the court to entertain applications which did not challenge the omission of any procedural step.

This argument was rejected because the language of s.23 did not suggest any restriction which would prevent challenges to substantive issues.

It was argued by the applicants that the decision to grant a certificate was wrong as a matter of law and unreasonable because there was no factual basis for finding an equal advantage in the proposed exchange of land at the time of the exchange or in the foreseeable future and this and other material considerations were not taken into account.

These arguments were both rejected. First, the judge found there was evidence to support equal advantage because of the plan to plant new woods on the exchange land. It was permissible, he said, to have regard to predicted developments or future occurrences which it was intended or anticipated would affect either or both parcels of land. Second, the fact that the Secretary of State planned to plant new woods showed that he had balanced the disadvantages against the advantages of the exchange land.

The applications were therefore dismissed.

HONG KONG Briefing

ENVIRONMENT AND PUBLIC HEALTH

RECOMMENDATIONS in EPCOM's recent report, *Support to Industry on Environmental Matters*, criticises the Government for failing to plan against the effects of industrial pollution and warns it of an urgent need to provide industry with financial and technical support to reduce pollution. EPCOM has also recommended that the first registration tax be waived for electric motor vehicles to encourage the switch from fuel engines. (SCMP 7 September & 20 July 1993)

EPD is to establish an office in the Tsing Yi/Kwai Chung area to monitor various large-scale construction projects in the area. (SCMP 27 July 1993)

NOISE from dredging is causing anger at Rennie's Mill where over 100 residents have complained to marine police but only two complaints have been referred to the EPD. (SCMP 11 August 1993)

WATER quality at Hong Kong's beaches has improved according to statistics released by EPD in August. Whilst a number of beaches have been upgraded to good or fair two beaches are still closed because of sewerage contamination. (SCMP 13 August 1993)

AMOEBEA which induced encephalitis and resulted in the death of a 15 year old boy in July was not found in tests of the water in Hong Kong public swimming pools. Health inspectors have now tested water in public toilets in the hunt for

the dangerous amoeba and the results are expected soon. (SCMP 28 July & 24 August 1993)

ENVIRONMENTALISTS have enjoyed mixed success in the battle to conserve natural beauty spots. The Government has ordered a clean-up of one of its own sites near the Mui Woo public pool on Lantau which had become a dumping ground for illegal building waste. At the same time, however, it is feared that the Water Supplies Department may be granted permission to develop part of Lantau's Wong Lung Valley which has been given Countryside Conservation status. (19 July & 23 August 1993)

SMOG in late August was double the seasonal average and transboundary air pollution appears to have contributed to the problem which was solved only by high winds brought by Typhoon Winona. (SCMP 26 August 1993)

HK's GENERAL Chamber of Commerce has come out in support of the Government's proposal to levy fees on businesses for sewerage and effluent disposal. It also recommended other means for improving waste disposal and saving water. (7 July 1993)

RECOMMENDED CHARGES for disposing of construction waste at landfills have been set at about \$350 for loads of more than five tonnes, or about half the actual cost to the taxpayer. Environmentalists believe the costs must be higher so as to make the industry recycle waste but an industry spokesman emphasised the need for fairness. (13 July 1993)

PREDICTIONS by Chinese

scientists that rising sea levels could cover 35 per cent of the Pearl River Delta in only 50 years have been confirmed by Hong Kong experts. They have called for increased investment in anti-flooding measures. (SCMP 2 July 1993)

THE GOVERNMENT'S sequel to the 1989 White Paper on Pollution will be released soon but may not satisfy environmentalists for lack of concrete policies. (1 July 1993)

LEGISLATORS have called for a study into the physiological effects of electromagnetic fields from power lines. In the meantime, China Light and Power has been granted permission to run new power lines through country parks along revised routes which minimise the impact on ecologically sensitive sites. (SCMP 29 June 1993)

\$5.25 MILLION will be spent on a study of the effects of contaminated water leaking from landfills. A contract has been signed between consultants and EPD for the study which will take nine months. The study will include the on-site removal of pollutants from leachate. (SCMP 29 June 1993)

HELICOPTERS are now being used twice a month by the EPD to police and deter illegal dumping and dredging in Hong Kong waters. There are 187 dumping barges in Hong Kong and this year there have been 20 prosecutions for illegal dumping, almost as many as in the whole of 1992 but far fewer than in 1991. (SCMP 25 June 1993)

ENVIRONMENT branch has proposed an energy tax to control air pollution emissions from burning fossil fuels which

are most closely related to motor vehicles and the production of electricity. (SCMP 23 June 1993)

CHEMICAL waste levy proposals are on the table again since the proposal to levy a 0.75 per cent ad valorem tax on chemical imports was dropped last year. The new proposals suggest a range of charges from \$400 to about \$2,500 per tonne, depending on the type of chemical waste. (SCMP 26 June 1993)

PLANNING AND LAND USE

TSING YI Island residents' concern over bulk fuel and chemical storage on the island has only increased in the light of the recent, disastrous explosions and fires in Shenzhen. The Government has conceded that it would be impossible to evacuate 170,000 Tsing Yi residents in a few hours should there be a major accident. Instead, it has agreed to relocate the existing oil depots to the Soko Islands, two outlying islands south of Lantau, after Vietnamese refugees have been moved out. (SCMP 11 & 19 August 1993)

OLD RECLAIMED land may be subsiding at an alarming rate because it is being overtaken by more new reclamations which result in troughs. A HKU scientist has called for the government to collect more data on the question so that serious flooding may be avoided in the future. (SCMP 2 September 1993)

ILLEGAL container sites which dot the New Territories' landscape are contributing to flooding in an area already susceptible to flooding after heavy rain. The Government

admits it is having difficulty controlling the illegal sites. (SCMP 18 June 1993)

MILITARY sites which may be freed up in the transitional period are being eyed by property developers as potential key developments but some warn that sites formerly occupied by the military must be released gradually so as not to destabilise the property market. (SCMP 21 July 1993)

'PADS' UPDATE

THE STALEMATE over the \$7.6 billion Western Harbour tunnel project was broken by China's approval given just after our last report went to press. It is hoped that China's approval of the tunnel crossing will help break the deadlock over all the ten core airport projects contained in the Airport Memorandum of Understanding. (SCMP 19 June 1993)

THE TUNNEL franchise was decided by LEGCO in July but only among liberal legislators' accusations that the Government and pro-China legislators had sold out to China backed developers. The toll will be \$30 when the tunnel opens in 1997. (SCMP 22 July 1993)

New Publications

Environment Hong Kong 1993: A Review of 1992 (Environmental Protection Department ed.) Hong Kong: Government Printer 1993 183pp. including appendices \$30.

Diary

(See *DIGEST OF LEGISLATION FOR DETAILS*.)

6 August 1993: ss.51, 55, 56, 58 to 80 of the Air Pollution Control Ordinance.

REGIONAL AND INTERNATIONAL

TAIWAN, ROC

Special Permit Required for CFC Sales

The Environmental Protection Administration is drafting guidelines which will effectively regulate the sale of CFC Products. The *Guidelines Governing the Issuance of Special Permits for the Sale of Chemical Materials Listed in the Montreal Protocol* require prior approval in the sale of all kinds of CFC products. Violators are liable to a fine between NT\$5,000 and NT\$1million in accordance with the Air Pollution Control Act.

Disciplinary Action Against Extraordinary and Openair Burnings

When a pollution source or combination of sources is causing an extraordinary or openair burning, the competent authority may order the individual responsible for such pollution immediately to take remedial measures or to extinguish such burning if it can be immediately remedied. Under any of the following circumstances, the competent authority may issue a written notice to the violator to take and complete remedial measures within a time limit and if he fails to remedy the emission within the time limit given in the notice he shall be fined continuously on a daily basis:

1. Where the results of inspection, test or survey of the emitted pollutants or the fuel or raw materials used under normal or routine operation reveal that the emission constitutes a violation of the

Air Pollution Control Act (the Act). The inspection, test or survey may be conducted either by the local competent authority or by an inspection test institute, under the supervision of the local competent authority, which has been approved by the central competent authority;

2. Where such violation is deemed by the local competent authority as a consecutive act or even if the violation occurs occasionally but is deemed as a usual practice of the violator in the course of its production, operation or other activities;
3. Where in the judgment of the local competent authority that violation cannot be corrected to the extent of ensuring the emission to meet the requirements set forth in the Act unless methods of production, operation, processing or management are improved, or unless a part or the entire production equipment is improved, removed or deactivated, or unless the pollution control equipment or facilities are modified or increased;
4. Where notwithstanding the availability of adequate pollution control equipment or facilities at the workshop or plant of the pollution source, an extraordinary emission of pollutants as described in paragraph two and three above would still occur occasionally as a result of improper design, operation, maintenance or management thereof, and the extraordinary emission, if any, has not been corrected within the time limit set in the notice of correction issued to the polluter by

the local competent authority.

This report was written by Eddie Liu from Lee and Li, Attorneys-at-Law, Taipei.

CANADA

Lender Liability for Environmental Harm

In our last issue we featured a report on secured lender liability in the USA. Now we consider the Canadian position on lender liability for environmental harm with special references to recent legislation and new cases.

With the passage of Bill 220 in June 1990, the potential for lender liability in Ontario has been significantly increased. The most important amendments are to the circumstances in which regional directors of the Ministry of the Environment (MOE) can issue Orders ('Directors' Orders') requiring measures to address environmental contamination and waste by polluters or other persons related to the polluter or his property and also the consequences of non-compliance with such orders.

Under Bill 220, former owners of property and persons who had management or control of property in the past can now be subject to Director's Orders. For example, such an order can require expenditure to purchase and maintain equipment, to retain personnel, to monitor and record discharges and to conduct studies in order to prevent a discharge into the natural environment. An order requiring the removal of waste from land or a building and the restoration of property to an acceptable condition can now be made against an 'owner or previous owner, an occupant or

previous occupant or a person who has or had charge and control of land or a building.'

Any party who fails to comply with a Director's Order is subject to prosecution and a government claim for compliance and response costs. Bill 220 introduced an automatic cost recovery mechanism which permits the MOE to carry out the work prescribed by a Director's Order.

The costs of such work can be charged to the recipient of the Order by issue of a 'cost recovery order' which may be appealed only on the question of quantum and may be filed with the court and enforced directly as a judgment.

Bill 220 provides a new cost recovery mechanism which creates an additional form of strict liability in favour of the Crown for the cost of certain measures which in most cases depends only on proof of past ownership, management or control of property.

Against this regulatory background, secured lenders have become potential targets for the recover of costs of remediation of contaminated property. They frequently hold legal title to property by way of mortgage or other security and may exercise a degree of management control of the borrower's property and therefore become subject to certain Directors' Orders. The risk is that, under the current regime, they can become responsible for any pre-existing environmental condition associated with the secured property when realising the security on default.

Unlike the U.S., the Ontario legislation does not contain a secured lender exception. The

criteria are broad enough to catch lenders who acquire contaminated property through the process of law, exposing them to potentially huge remedial costs.

We have little guidance from the Ontario courts as to what acts of a lender will constitute management or control of property or an undertaking within the meaning of the legislation. What is clear, however, is that a secured lender will not be liable under a Director's Order because it is a mortgagee of the affected property: *C.N. Railway Co. v. Ontario (EPA Director)*. Moreover, even where the loan in default the mortgagee must have taken steps to realise its security: *Ontario A-G v. Tyre King Recycling*.

One Canadian jurisdiction is attempting to clarify the liability of a secured lender for contaminated property held as security. the British Columbia legislature in its comprehensive new *Waste Management Amendment Bill 1993* has specified that a secured creditor will be exempt from liability for remediation of contaminated land where it is acting primarily to protect a security interest, including specifically where the secured creditor:

1. participates only in financial matters to protect the security interest;
2. could but does not exercise the capacity to influence the borrower's operations in such a way as to cause or increase contamination;
3. imposes requirements on the borrower that do not have an effect of causing or increasing contamination; or
4. with the written consent of a

regional waste manager, appoints a person to inspect or investigate a contaminated site to determine future steps or action that the secured creditor might take.

The Bill provides that the exemption will be lost where the secured creditor:

1. participated in or consented to the treatment, disposal or handling of a substance by another person that has resulted in any contamination at the site;
2. did anything without the written consent of the regional waste manager that results in
 - i any diminution of assets that could be used to remediate or satisfy terms and conditions of a remediation order or voluntary remediation agreement, including without limitation
 - A. disposal of real or personal assets, or
 - B. subdivision of land;
 - ii reduced financial or other ability of a person to remediate or satisfy the terms of a remediation order or voluntary remediation agreement.

The B.C. Bill is not yet law but it provides some direction for secured lenders in all provinces as to what might be considered action which will not attract liability.

From a report by K. van Rensburg at Smith Lyons.

In the next issue we shall consider the affect of environmental claims on the priorities in bankruptcy.

**Comparative Table of Environmental Convictions:
May, June and July 1993**

	Number	First Offence	Second Offence	Third + Offence	Maximum Fine
Air	27	19	3	5	\$20,000
	31	14	8	9	\$19,000
	21	11	5	5	\$18,000
Dumping at Sea	8	5	1	2	\$ 5,000
	1	-	-	1	\$ 1,500
	-	-	-	-	-
Noise	27	25	1	1	\$20,000
	15	9	5	1	\$54,000
	21	18	1	2	\$30,000
Waste	-	-	-	-	-
	1	1	-	-	\$ 2,500
	-	-	-	-	-
Water	10	7	2	1	\$25,000
	6	3	1	2	\$50,000
	7	4	1	2	\$100,000
Total	72	56	7	9	
	54	27	14	13	
	49	33	7	9	

ABBREVIATIONS

AFD	Agriculture & Fisheries Department
APCO	Air Pollution Control Ordinance
CFCs	Chlorofluorocarbons
EC	European Community
EPCOM	Environmental Pollution Advisory Committee
EPD	Environmental Protection Department
EXCO	Executive Council
FEER	Far Eastern Economic Review
HKU	University of Hong Kong
JLG	Joint Liaison Group
LDC	Land Development Corporation
LEGCO	Legislative Council
LS	Legal Supplement
NCO	Noise Control Ordinance
NT	New Territories
PAA	Provisional Airport Authority
PADS	Port and Airport Development Strategy
SCMP	South China Morning Post
SMP	Sunday Morning Post
WDO	Waste Disposal Ordinance
WPCO	Water Pollution Control Ordinance

May figures appear on the first line and July figures on the third line of each item.
Source: EPD, Anti-Pollution Prosecution Figures (15 June, 20 July & 17 August 1993).

This report does not constitute advice of a legal nature. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors or omissions. Further information, inquiries and advice in respect of this report should be directed to:

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