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Solicitors & Notaries

URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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In many Western countries since the late 1960s, lawyers have helped public interest groups to obtain judicially ordered protection of the environment when the responsible government agencies have failed to use their powers to do so. More recently, lawyers in some undeveloped countries are following that path. As we discuss below, this has not happened in Hong Kong to any extent!

[The Editors advise that in future each edition of the Quarterly will be identified by the month of publication. Prosecution statistics are for the period stated.]

The Editors

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THE NOBLE ART OF PRACTISING THE LAW: LAWYERS' ROLE IN PROTECTING OUR ENVIRONMENT

The much publicised case, Society for Protection of the Harbour Limited v Town Planning Board, (which recently reached its conclusion in the Court Of Final Appeal) was important for more reasons than the subject matter being litigated. The case is a rare example of Hong Kong's legal profession taking on litigation involving an aspect of environmental protection.

Unlike in the majority of developed countries, our legal profession historically has had little involvement in the implementation of our environmental laws, that is : those laws which - after many years of gestation - Hong Kong has finally put in place to offer a degree of protection of our air, land and water quality and the natural environment. In most developed countries there has evolved over the last 30 years a culture of judicial intervention - and, therefore involvement of lawyers - in the broad area of enforcement of laws designed to protect the environment.

Unfortunately, such is very definitely not the

case in Hong Kong. Whilst occasionally lawyers here become involved in the town planning process - which is closely associated with the wider responsibility of environmental protection - instances of judicial relief being sought by lawyers on behalf of clients, with the aim of conserving some aspect of the environment, are rare. The Victoria Harbour case is one of those. Even so, however, the plaintiff was an apparently well funded, special interest body which had the distinct advantage of relying on a specific - purpose statute. Certainly we should all be grateful that the people behind the corporate plaintiff were willing to commit themselves and resources to litigating the government's controversial reclamation plans. However, when we are reminded daily of other serious environmental problems which the enforcement agencies here are unwilling or unable to deal with, such as enforcing statutory prohibitions (see for example, Hong Kong's Marine Life - stop the plunder of our seas in this edition), it is surprising that little is heard from the legal profession in protesting or attempting to address situations of environmental degradation amounting often to a glaring injustice. Injustice in our treatment of the environment is at least as important as injustice in other fields.

One explanation for the lack of involvement of the legal profession in the field of environmental protection is the absence of clients willing or financially able to challenge agencies' decisions in the courts. Hong Kong's environmental laws are not designed to encourage participation in environmental protection by ordinary members of the community. Our legislation does not confer a cause of action on members of the public, e.g. on the basis of a right to a healthy environment. We do not have statutory citizens' suits rights to sue private polluters or under-performing government agencies, as is the case in the United States and other developed countries (to which *The Quarterly* has referred previously). In Hong Kong's political climate, it is highly unlikely that we shall ever have the benefit of such enlightened legislation. It has to be acknowledged, also, that in the absence of special costs considerations for public interest litigants (which some other jurisdictions apply), legal costs implications are a strong deterrent to seeking judicial relief.

Leaving to one side the legal costs question, there are, nevertheless, existing avenues by which imaginative applicants and their lawyers might be able to challenge the actions (or non-actions) of government agencies in the environmental protection area. Around the world, lawyers are often at the forefront of fighting for a better deal for the environment. We have mentioned developed countries as examples of this. Almost without exception, environmental law is an important facet of legal practice in such countries, and is accorded a prominence in the legal profession it deserves. Many young lawyers aspire to specialise in environmental law as they come into the profession. In Hong Kong, it is more likely to be capital markets. This is a pity, because Hong Kong needs vigilant "third party" protectors of its already ravaged environment, more so than many other countries.

An unflattering comparison with developed countries is one thing, but it is quite alarming to realise that Hong Kong also lags behind some undeveloped countries in this context. Over the last 10 to 20 years, in many resources - poor countries, enormous strides have been made in judicial supervision of environmental protection agencies, developers and others involved in exploiting the environment. Probably the most

stunning example is India. In our article, *Citizens' Suits Rights in Environmental Litigation: a lesson from India (December 2000)*, we highlighted examples of non-government plaintiffs in India obtaining — with the help of lawyers — judicial relief in respect of various kinds of environmental wrongs. The higher courts of India — particularly its final court of appeal, the Supreme Court — foster easy access to the courts for citizens wishing to petition for judicial intervention in environmental cases. It can be as simple as writing a letter to a judge to have the courts step in and consider whether or not a case should be heard. The complaint letter is treated as a petition and the implicated government agency directed to file affidavits in response. Formal procedures are not important; getting to the truth of the substantive issue is, especially as urgent relief is often needed to stop the environmental harm.

**The applicant's member's interest in a healthier environment, as members of the community, was held to be a sufficient interest to bring judicial review proceedings.**

What is instructive for Hong Kong is the capacity of the Indian judicial system to allow correction of patently unjust situations in the context of the environment, as distinct from in the more traditional litigation fields, such as commercial protection, e.g. copyright. In India such judicial and lawyer activism is encouraged and validated by India's constitution, which guarantees a fundamental right to a healthy environment (which is not to say, of course, that they do have a healthy environment yet — far from it).

Hong Kong has no such constitutional guarantee, although it might be worthwhile examining the possibilities of using the Basic Law to mount an argument akin to that which has proven so successful in India and many other developing countries with similar environmental constitutional guarantees, such as Bangladesh, Nepal and the Philippines (although constitutional rights are not necessarily resolutely upheld in these countries).

Even in the United Kingdom — which historically has been far less progressive than some other Western countries, such as Finland, the United States and Canada — V lawyers today are more active in using their professional skills to assist non-government organisations and other concerned parties to litigate to force the government to take more effective steps in protecting the environment. For instance, only recently the *Friends of the Earth* won a High Court order prohibiting a company from dismantling retired ships at an English facility. The judge ruled that the supervising government agency, the Environment Agency, had acted unlawfully in modifying the company's waste disposal licence without first considering the environmental effects of dismantling the ships without a dry dock. The company is now obliged to apply for a new waste management licence, which will involve a full environmental assessment before any work can be carried out.

In this case, known as the *Ghost Ships* case, *Friends of the Earth* applied for judicial review of the Environment Agency's decision on the basis that dismantling the ships — which were sent from the United States — was likely adversely to affect local wild life, including migratory birds. The applicant's member's interest in a healthier environment, as members of the community, was held to be a sufficient interest to apply for judicial review.

Similar arguments could be used in Hong Kong to challenge environmentally harmful decisions made by our government agencies when the decisions do not sufficiently take into account environmental effects. Where the problem is government inaction, as often is the case, this also is arguably reviewable. An agency's decision to take no action (whether it be a formalised decision or one which may be deduced from the fact of no action) arguably amounts to a decision which may be challenged on judicial review. There is a strong body of jurisprudence in other jurisdictions — such as in the United States — to the effect that the lack of a decision by a responsible agency may be treated in certain circumstance as that agency's decision to take no action in respect of the particular matter. This deemed decision is then judicially reviewable.

But it is the comparison with our legal colleagues in the poor, developing countries of the world which should cause us

embarrassed concern. The following are several representative examples of lawyers and the judiciary's active involvement in redressing poor environmental management decisions of government authorities in some of the less well-off nations. Many other examples could also have been drawn on in a wide-range of developing countries in all regions (other than the Middle East, with the exception of Israel).

*Argentina* — In November 2003 a judge in the City of Cordoba ordered city authorities to provide clean drinking water within 24 hours to the local community. The usual source, the Suquia River, had become contaminated due to illegal discharge of untreated sewage from the government's sewage treatment plant. The court ordered that the City provide a minimum of 200 litres of clean water per person per day, and directed meetings be held urgently to determine how to abate the discharges.

*Philippines* — *The Legal Rights and Natural Resources Center* filed a challenge to government assistance to a major Australian mineral exploration company which had been licensed to exploit large, natural areas of the country. After several years travelling through the court system, the challenge was recently upheld by the Supreme Court. The Court ruled that the principle: "beneficial ownership over natural resources that properly belong to the State are intended for the benefit of its citizens" should in future dictate how agencies' determine licencing applications which involve the environment.

*Nepal* - *Propublic*, a NGO, has mounted a challenge in the Supreme Court of Nepal to halt the mining of limestone in an area on which wild life species, including many endangered bird species, depend for food and habitat. The case continues at present (and is being frustrated by a degree of government corruption). An initial challenge by one of the defendants to the standing of the plaintiff was dismissed. The Supreme Court held that the plaintiff has standing because it represents members of the community who have the right to a healthy environment. This fundamental right is guaranteed under Nepal's constitution. The Supreme Court ruled that NGOs or individuals working for the protection of the environment always have broad standing to enforce this right by way of petitioning the Supreme Court.

*India* — Is a beacon for anyone concerned to compel governments to protect the environment, and for an enlightened judicial approach to that fundamentally important issue. Many environmental decisions are given each year by the State and Federal Courts. For example, very recently the Supreme Court ordered that all public transport vehicles in the capital city of Delhi must convert to LPG to assist in reducing air pollution.

*Sri Lanka* — A public interest NGO recently obtained judgment from the Sri Lankan courts to the effect that government authorities had acted unlawfully in authorising the construction of a major highway which partly traverses ecologically important areas. The agencies had failed to take the necessary environmental assessment steps, and had failed in properly consulting with or compensating local villagers. The court ordered substantially increased compensation to be paid to the villagers, but held back from issuing an injunction to restrain continuation of construction.

*Mexico* - Lawyers are assisting NGOs in representing communities threatened by the construction of the Arcediano Dam on the San Tiago River. Their challenge to the construction of the dam also seeks to protect the river itself, as the damming of a river always adversely impacts the river's eco system.

*Belize* — An environmental NGO has taken to the Privy Council its challenge to the construction of a massive hydro- electric scheme on one of the few remaining pristine rivers in that country. If constructed, the dam will completely flood an entire valley which is home to numerous endangered species. The Privy Council rarely considers appeals based on environmental law or environmental issues. In this particular case, recently the Privy Council gave a 3:2 decision against the NGO/Appellant. The dissenting judgments provide very strong language in support of judicial intervention where government supervisory agencies fail adequately to take into account likely adverse environmental impacts of a project.

*Indonesia* — For several years Australian practitioners and judges have conducted intensive courses in Indonesia and Australia training Indonesian judges in environmental law and conservation principles. Those courses have been funded by the Australian

government. Unfortunately, the results are not yet widely seen within Indonesia's judicial system.

Regrettably, in some countries a consequence of increased activism by lawyers in the field of environmental protection is the persecution of these lawyers by governments and their henchmen. For example, during the last two or three years lawyers have been challenging the Tanzanian government in respect of mining licences issued to foreign companies to explore for and mine gold and other precious minerals. The main bases of the challenges have been the failure of the agencies to address adverse environmental impacts, and the agencies' and companies' harsh treatment of people living in the areas covered by the licences. The government's reaction has been to use completely illegal, strong — arm tactics to harass the lawyers, including throwing a number of them into prison without trial or preliminary hearing before a court as is required by Tanzanian law. Similar cases of harassment of lawyers litigating environmental cases occur in numerous other countries.

Responding to this threat to lawyer (and other) environmental defenders, a group of American lawyers has now formed the Environmental Defenders Law Center, which is based in Salt Lake City, Utah. The EDLC (which has financial support from a US charitable foundation) will offer free legal services to help defend "environmental defenders in developing countries who have been subjected to abuses of their human rights, and who would benefit from free legal assistance provided by law firms located in the United States": (press release, EDLC). The EDLC intends to concentrate on those regions where threats to lawyers and other environmental defenders are greatest, particularly Africa, Asia, Central America, Mexico and South America.

These comments provide a brief over-view of different aspects of what might be called *lawyers' environmental activism*, that is: lawyers assisting public interest groups to enforce environmental laws, using the medium of their litigation skills. We do not advocate litigation as the first step in solving environmental problems; but in numerous countries, litigation has been virtually the only means by which governments (including, it must be emphasised, Western governments) and the private parties they

support have been brought to account for transgressing environmental regulations (and science). Somewhat surprisingly, that culture has not developed in Hong Kong, and there are no signs that it will. It is a reflection of our legal profession's lack of interest in environmental law that the numerous annual awards handed out by *Asia Legal Business* - for everything from best banking law firm to having the neatest office desk - do not even obliquely include environmental or planning law!

## LEGISLATION DIGEST

### WASTE DISPOSAL (AMENDMENT) (NO. 2) BILL 2003 ("the Bill")

*Date of Gazette: 5 December 2003*

*Date of First Reading: 17 December 2003*

*Date of Bills Committee Formed: 19 December 2003*

#### Summary

The objects of the Bill are to amend the Waste Disposal Ordinance ("WDO") (Cap. 354): -

- (a) to provide a statutory basis for introducing a charging scheme for the disposal of construction waste at landfills, and the use of sorting facilities and public rubbish reception facilities; and
- (b) to strengthen controls of illegal disposal of waste.

The Bill provides for an accounting arrangement for use of governmental waste sorting facilities which are operated by private sector contractors. The sorting charge will remunerate the operator(s) of the sorting facilities before crediting the remaining proceeds to the general revenue. Details of the charging scheme and its implementation will be provided for in subsidiary legislation to be made under the WDO after enactment of the Bill.

The Bill further proposes to strengthen prohibitions against illegal disposal of waste: -

- (a) by empowering the court to order the person convicted of illegal disposal of waste to remove the waste;

- (b) by empowering the Director of Environmental Protection ("Director") to enter without warrant any places, other than domestic premises, to remove the waste deposited illegally in specified circumstances; and
- (c) by making it an offence for the driver of a vehicle (not being a public transport carrier) and his employer, to deposit waste by use of the vehicle.

## HONG KONG BRIEFING

### Surveys at boundary crossings

Government transport and planning officials conducted surveys of passengers and drivers travelling between the Mainland and Hong Kong at eight immigration control points from 15 November to 28 November 2003. A spokesman for the Planning Department said the Cross-boundary Travel Survey 2003 will produce information about the characteristics of cross-boundary trips, as well as the socio-economic profiles and travelling patterns of cross-border travellers.

The survey obtained information about trip purpose, origin, destination, travelling frequency and some personal particulars of travellers, such as age, sex, marital status and place of residence. In addition, by examining the commuting characteristics and loading conditions of different types of cross-boundary vehicles, the government can gauge with greater accuracy the cross-boundary traffic movement patterns.

This is the third survey of cross-boundary travel by the government. The previous two surveys were conducted in 1999 and 2001. The information collected will provide essential data for cross-boundary infrastructure and land-use planning when formulating long-term development options for Hong Kong.

The eight immigration control points where the surveys were conducted were: Hong Kong International Airport, Lo Wu Terminus, Hung Hom Station, China Ferry Terminal, Macau Ferry Terminal, Lok Ma Chau Control Point, Man Kam To Control Point and Sha Tau Kok Control Point. About 55,000 respondents, including 11,000 drivers, were selected at random for the survey.

The results of the 2003 survey will be available by mid-2004.

[http://www.info.gov.hk/planning/index\\_e.htm](http://www.info.gov.hk/planning/index_e.htm)

### Beach water quality data released

The Environmental Protection Department (EPD) released the latest grading of water quality for the four beaches that are open year round (other beaches are closed for the winter season). Deep Water Bay Beach, Clear Water Bay Second Beach and Golden Beach were rated Good (Grade 1) while Silverstrand Beach was rated Fair (Grade 2). Under the grading system, beaches are classified in four grades according to the level of E. coli in the water. Grades are calculated on the basis of the geometric mean of the E. coli counts on the five most recent sampling occasions. Grade 4 is assigned to beaches whose last E. coli reading exceeded a threshold figure, irrespective of the geometric mean. Swimmers are advised to avoid these beaches until the water quality improves.

Seven gazetted beaches - Anglers', Approach, Ting Kau, Casam, Gemini, Hoi Mei Wan and Lido - are closed to swimmers year round because of poor water quality. The public is advised not to swim at these closed beaches.

The EPD cautioned that many beaches were likely to be more polluted than their grades suggested during and after periods of heavy rain. Bathers should avoid swimming at beaches for up to three days after a storm or heavy rainfall.

[[http://www.epd.gov.hk/epd/textonly/english/news\\_events/press/press\\_040102a.html](http://www.epd.gov.hk/epd/textonly/english/news_events/press/press_040102a.html)]

## HONG KONG DISNEYLAND UPDATE

### Disney decontamination costs HK\$440 million of public money

A report of the Director of Audit submitted to the Legislative Council's Public Accounts Committee has criticised various departments for failing to recover decontamination costs totalling HK\$504.5 million from shipyard operators at Penny's Bay and Tsing Yi north in 2001 and 1997 respectively.

The Director of Lands admitted at the Committee's meeting that the site-surrender contracts in relation to the acquisition of

Penny Bay's shipyard site for Disneyland did not include an indemnity clause concerning decontamination costs. As a result, HK\$440 million of public money has been used to finance attempts to decontaminate the site. However, the Director explained yesterday that had his department insisted on including the indemnity clause in the contract, the shipyard operator probably would not have surrendered the site to the government voluntarily or within the short time-frame required by the Disneyland developers. He further admitted that it was the then Director of Lands' decision — which had been made without seeking higher level approval, despite consultants' warnings that contamination at the site was more serious than expected — which led to the non-inclusion of a suitable indemnity clause.

The report issued by the Director of Audit also urged Lands Department to recover decontamination costs from all tenants if they were considered to be legally liable for the contamination. In reply, the Director said he was seeking legal advice from the Department of Justice on whether there were any legal grounds to recover decontamination costs from tenants.

In April 2001 the Department of Lands resumed possession of the Penny Bay's shipyard site on an "as is" basis. The shipyard operator received compensation of HK\$1.5 billion. Subsequently, the site was found to be highly contaminated with dioxins and other toxic residues. The government was forced to decontaminate the site at cost of HK\$440 million. This compares with the original budgeted cost of HK\$22 million. The government has therefore paid HK\$418 million more than it originally envisaged.

In response to a legislator's question as to why the government rushed into accepting the "as is" clause, the Director said the government needed to speed up the site's acquisition so that construction of the Disney theme park could begin. He explained that the developers (which include the government) had to finish the park project as soon as possible, but construction could not commence unless and until the Penny's Bay site and other land had been surrendered. The legislator responded that the project was being undertaken "at all costs" and without concern for expenditure of public money.

He said that the contract should have included an indemnity clause at least.

The Director of Civil Engineering told the Committee there were no indications that the Penny Bay site was highly contaminated with dioxins. He then clarified this by explaining that his Department had requested the operator to allow them to conduct an in-depth investigation of the site. But this request was rejected and so the Department could only do a preliminary site investigation which did not detect the actual level of dioxins and other contaminant. He added that since there was no evidence to prove that the shipyard operator disposed of waste illegally, the government could not evoke other laws to conduct further, in-depth investigations at the site.

The government was also criticised during the Committee's hearing for failing to enforce demolition provisions in 15 tenancy contracts at another six leased shipyard sites at Tsing Yi north and Kwai Tsing. The failure resulted in the government having to pay HK\$70 million for clearing and decontaminating the sites, even though the tenancy contracts stipulated the tenants were responsible for clearing structures and removing contamination on termination of their leases. The Director of Lands suggested that as the government met with strong opposition from tenants to payment of such costs during the course of the acquisitions, costs and the waste of time would be even greater if the government took legal action to enforce its rights.

The Director added that it was useless for the government to reserve a right to recover clean-up costs because a tenant could disappear once the acquisition compensation payments from the government had been received. [Editors: You might wonder why the clean-up costs cannot be deducted from the compensation.]

One legislator voiced concern that such practice would send a very bad message in the future that tenants could make themselves exempt from those provisions if they raised strong opposition to government demands that they found decontamination work. The Director responded that the department would review the practice to see whether changes were necessary.

*The Standard, 12th December 2003*

## ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

### Hong Kong's transport strategy for the future

(ACE Paper 35/2003)

The government formulated a transport strategy entitled "Hong Kong Moving Ahead: A Transport Strategy for the Future" in 1999 with the objective of providing a safe, efficient and reliable transport system to serve Hong Kong in an environmentally acceptable manner. The Strategy focused on the following approaches:

- Better integration of transport and land use planning
- Better use of railways as the back-bone of our passenger transport system;
- Better public transport services and facilities;
- Better use of advanced technologies in transport management; and
- Better environmental protection.

Progress in implementing the Strategy is summarized as follows:-

#### *Better integration of transport and land use planning*

- (a) Revision of the relevant chapters of Hong Kong Planning Standards and Guidelines, with emphasis on the provision of internal transport facilities;
- (b) Placing intensive developments and employment centres within walking distance of rail stations, e.g., new development areas along the Tung Chung MTR Line;
- (c) Introducing pedestrian precinct zones where vehicles are restricted permanently or for some specified time of the day in busy built-up areas such as Causeway Bay, Central, Wanchai, Mongkok, Jordan, Sham Shui Po and Tsim Sha Tsui;
- (d) Reviewing regularly major highway projects, taking into account the latest developments and changes;
- (e) Planning infrastructure to cope with future cross-boundary passenger and freight demands.

*Better use of railways as the back-bone of our passenger transport system*

The opening of Tseung Kwan O Extension on 18 August 2002 expanded the existing railway network to 150 kilometers. Construction of five more rail lines - including West Rail, Ma On Shan to Tai Wai Rail Link, KCR Extension to Tsim Sha Tsui, Penny's Bay Link and Sheung Shui to Lok Ma Chau Spur Line - will further expand the railway network to more than 200 kilometers. When the Southern Link and the Shatin to Central Link are commissioned, about 45% of the population and 60% of employment sites will be within a 500 metres radius of a railway station. The percentage of total public journeys comprising rail travel is expected to grow from 30% to 40% - 45%. The possibility of merging the West Hong Kong Island Line and the South Hong Kong Island Line will be considered in the longer term.

*Better public transport services and facilities*

Every day more than 11 million passenger journeys are made on our network of trains, buses, minibuses, taxis, trams and ferries. Continuous efforts are being made to upgrade the system by rationalizing and improving coordination of public transport services.

Since 1999, bus services have been improved by various measures including: canceling and reducing the frequencies of 114 bus routes serving Central, Wanchai and Yau Tsim Mong, reorganizing bus stops in busy districts and corridors, and introducing more bus-to-bus interchanges.

The Transport Department has implemented a public transport service plan to enhance the coordination of different transport modes with the opening of new rail routes. Similar plans will also be developed for KCR's Ma On Shan Rail/Tsim Sha Tsui Extension.

Interchange facilities will be included in new and major land-use or transport developments. Existing interchange facilities will be upgraded, if justified. Provision of park-and-ride facilities near several rail stations is being investigated.

*Better use of advanced technologies in transport management*

The government completed the Intelligent

Transport Systems Strategy Review Study in 2001 and is implementing the core projects recommended, including: the Transport Information System, which is a centralized data warehouse for provision of traffic information to public transport users and motorists, and the Journey Time Indication System which is designed to advise motorists of the estimated journey time for each of the three cross-harbour tunnels.

*Better environmental protection Reduction of motor vehicles emissions*

In 1999, the administration announced a comprehensive program to reduce motor vehicle emission. The target is to reduce the emission of particulate matters and nitrogen oxides by 80% and 30% respectively. Measures taken include the following:-

- (a) In July 2000, Hong Kong introduced ultra low sulphur diesel (ULSD), the maximum sulphur content of which is only 0.005% by weight, and encouraged its use through a duty concession.
- (b) All newly registered motor vehicles in Hong Kong have to meet Euro III emission standards, the standards applied in the European Community since 2001.
- (c) A retrofitting program was introduced to improve emissions performance of older vehicles through retrofitting them with particulate traps or catalysts which can reduce particulate matters emissions by more than 30%. The installation of emission reduction devices has become a statutory requirement for prescribed vehicles since 1 December 2003.
- (d) Replacing diesel taxis by providing a one-off grant (August 2000) to each taxi owner to replace his diesel motors/taxis with liquefied petroleum gas (LPG) ones, and amending legislation to require newly registered taxis to use either LPG or petrol.
- (e) In August 2002, another incentive program was implemented to encourage early replacement of in-use diesel light buses with LPG or electric ones. Over 80% of newly registered light buses are now LPG models.
- (f) Enforcement against smoky vehicles has been strengthened by increasing the fixed penalty from \$450 to \$1,000 since December 2000, and implementing a

number of measures to promote more effective vehicles inspection and maintenance.

**Total water management in Hong Kong**

**(ACE Paper 32/2003)**

Estimated fresh water consumption in Hong Kong in 2003 is about 960 million cubic metres. The overall total water consumption is expected to experience a mild growth of about 1.3% per annum during the next 10 years, commensurate with the population growth and increase in economic activities. Fresh water demand is currently met largely by importation of Dongjiang sourced water. The administration pledged in the 2003 Policy Agenda that a Total Water Management (TWM) program would be implemented to enhance water conservation and water resources protection. Actions taken by the government in this field include:-

*1. Water conservation*

The Water Supplies Department ("WSD") plays a major role in water conservation:-

- (a) WSD organizes education and publicity programs to raise public awareness of water conservation.
- (b) About 650,000 cubic metres of seawater is used for flushing toilets every day, which means about 25% of the daily fresh water needs is being saved. WSD will look further at the possibility of using seawater for uses other than toilet flushing whenever it is economically justified.
- (c) WSD also commenced a 20-year plan for large-scale replacement and rehabilitation of aged pipelines throughout the territory. Upon completion of the first stage works by 2007, water leakage in the water supply and distribution system will be reduced significantly. As well, WSD has adopted latest leak detection and reduction technologies, such as continuous pressure monitoring which enables WSD to carry out early repair work to curb pipe leakage, and pressure management, which involves controlling water pressures in response to varying demand patterns. These measures are expected to reduce the current water leakage rate of 25% to 15%.

(d) The introduction of a tiered tariff charging structure encourages water conservation because usage charges increase progressively so discouraging lavish water consumption.

### 2. *Water resources protection*

WSD - together with other departments - has legislative powers to impose stringent pollution controls within water catchments, and to carry out routine maintenance works and major capital projects within catchments.

Guangdong authorities have carried out a number of improvement measures to protect the quality of Dongjiang water delivered to Hong Kong.

### 3. *Alternative water resources*

To reduce reliance on Dongjiang water, WSD completed 3 feasibility studies in 2002 on (i) extension of local water gathering grounds, (ii) reuse of treated sewage effluent and (iii) desalination of seawater. The administration included in the TWM program further studies on the comparative economic advantages of reuse of treated sewage effluent and desalination of seawater.

## TOWN PLANNING

### Planning Board gets bigger say in arts hub development

The Town Planning Board is taking greater control over the controversial West Kowloon cultural hub project by requiring the developer to seek its approval for any changes to the plan, including during construction. It is believed the new arrangements will give the Board greater control over key aspects of the plan, which should help to protect the integrity of the original proposal.

Under a two-stage approach endorsed by the Board, the government will be required to seek "agreement" from the Board in the selection of a developer and its proposals, instead of simply informing the Board of its decision. After agreement is reached, the project enters into a second stage when the government signs a provisional deal with the successful bidder.

The provisional agreement will require the incorporation of development details, such as density and plot ratio, into an outline

zoning plan, which will be put up for public consultation. The Legislative Council will then be consulted before the project gets final approval from the Chief Executive.

The tougher approach by the Board came weeks after it was heavily criticised for giving the government a free hand to develop the 40-hectare site and allowing what critics described as an "unusually flexible" zoning approach to the mammoth \$ 24 billion project. Under that approach, the Board would merely have been informed of the government's decisions. With the new system, the Board will be able to step in if the developer strays from the original plan.

The vice-chairman of the Board, Bosco Fung Chi-keung, said the decision was reached in light of doubts over the Board's regulatory role in relation to the project. Describing the new approach as "tailor-made" for the West Kowloon project, Mr Fung said it could strike a balance between ensuring flexibility in the initial planning stages and maintaining the Board's control over the project. Chan Wai-kwan, vice-chairman of the metro planning committee of the Board, said the arrangement was an improvement over previous proposals, as the public could voice opinions throughout the process.

But Bernard Lim Wan-fung, chairman of the board of local affairs of the Hong Kong Institute of Architects, said the latest arrangement did not go far enough because it did not provide the Board with the ultimate power to overturn proposals. Professor Lim said although the Board had legal power in the second stage, by then the proposal was a fait accompli.

Roger Tang Man-hung, vice-president of the Hong Kong Institute of Planners, welcomed the new approach, saying the government had backed down from an initial attempt to deprive the Board of its power. Mr Tang said that initially the government only needs to "consult" the Board during the initial planning stage, but now it would have to seek its "agreement", which indicates the Board is tightening control over the project.

[SCMP, January 3, 2004]

### CFA's decision dredges up new questions

The verdict by the Court of Final Appeal

on the Wan Chai reclamation dispute might have created as many questions as it has answered, critics warned. They said the ruling would lead to a fresh debate over who has the authority to decide whether any future plan met the needs of the community.

The Court of Final Appeal laid down a revised approach for applying the provisions of the *Harbour Protection Ordinance* for harbour reclamation. It stated that reclamation could not be justified unless it served the overriding public need, replacing the original three tests set down by the High Court in July 2003.

Under the new principle, public need is defined as a "compelling and present" demand. This could be economic, environmental or social. The Court also said reclamation can only be justified if there is no reasonable alternative. All circumstances have to be considered, including costs, time and delay. Other than that, a minimalist approach to reclamation should be adopted.

The judges also spoke of the harbour's wider value. "It is recognised not merely as a public asset but a 'special' one ... It is something extraordinary," they noted. "By representing the harbour in such special terms in the statute, the legislature was giving legal recognition to its unique character."

Hung Wing-tat, a harbour conservationist and lecturer at the Polytechnic University, welcomed the judgment as it provided clearer guidelines on how to interpret the *Harbour Protection Ordinance*. However, he said that the judgment still leaves uncertainties as to what the overriding needs are, and who has the authority to determine. It seems that more has to be clarified during the judicial review of the Central Reclamation plan. Mr Hung added that the outstanding issues would lead to concerns over a lack of public representation on the Town Planning Board, the statutory body which approves reclamation plans and which comprises only appointed members.

Ng Wing-shun, spokesman for the Urban Design Alliance, said the harbour reclamation controversy was an "unfortunate incident" that had turned an architectural design problem into a legal dispute, as the most important thing is to identify what the city needs, rather than turning technical questions into long-winded legal disputes.

Secretary for Housing, Planning and Lands, Michael Suen Ming-Yeung, pledged that the revised reclamation plan for Wan Chai and Southeast Kowloon would go through proper public consultation processes. He said he understood the public's desire to protect the harbour, but that the whole issue should be revisited to find a balanced solution. Mr Suen said the new court guidelines were not just for the Town Planning Board but for all government officials who would be told to adhere to the guidelines. He also said that he was willing to consider setting up a Harbour Authority to oversee projects relating to the harbour.

[SCMP, January 10, 2004]

### **Board confirms zoning blueprint giving West Kowloon developer a free hand**

The Town Planning Board gave up its control over key planning stages of the West Kowloon cultural hub by rejecting all 11 objections filed against the Planning Department's unusually flexible zoning proposal for the 40-hectare site.

Most of the objectors raised doubts about whether there were enough planning controls over the project. Five of the objectors were developers. The rest were individuals or concern groups.

After hearing the objections, the Board upheld the government's view that most aspects of the proposed \$ 24 billion cultural district- including hotels, residential blocks and commercial complexes- did not need its approval. It maintained the site should be zoned under "other specified uses" under *the Town Planning Ordinance*. This means that the developer will be allowed a virtual free hand in designing the development without being restricted by pre-set planning rules. This follows controversy over the government's decision to grant the project to a single developer.

Under the Draft Southwest Kowloon Outline Zoning Plan, no planning control on such things as density, height, plot-ratio and total gross floor space allowed on the site will be stipulated at the moment. Town Planning Board controls will be added to the plan only after the government and its chosen developer reach an agreement on the project. Critics warn that such a move would effectively require any controls to fit the plan.

The public will be given an opportunity to

object to the agreed plan, as it will go through the normal procedures of being gazetted and put up for consultation. Minor amendments will be allowed after the consultation. And future changes to the controls laid down in the plan will still need approval by the Board.

The government is now inviting submissions of interest from developers. At least 10 companies, including Cheung Kong and Sun Hung Kai, have made submissions.

A Board spokeswoman said the zoning plan would allow flexibility for developers to draw up their best development plans for the site. She added that all developers were still bound to follow the government's development guidelines, including ensuring that 55 per cent of the site would be covered by a canopy structure no taller than specified heights.

Wong Wah-sang, chairman of Urban Watch, which filed an objection to the plan, said the Board had lost control of the development by giving up its right to exercise control.

Martin Fung King-heng, a council member of the Institute of Architects, said that the zoning means that the chosen developer will have great bargaining power as to what the planning controls should be.

Legislator Abraham Razack, who represents the real estate sector, expressed concerns about the possibility of giving preferential treatment to a bidder because of their size, which would adversely affect the fairness of the tender process.

[SCMP, December 13, 2003]

### **Removal of unwanted noise barriers costs taxpayers \$42m**

The removal of unwanted and unsightly noise barriers from the Tolo Highway cost taxpayers \$ 42 million, a government audit report has revealed.

The report reveals that the dismantling of the controversial screens, which came after objections from residents, highlighted the problem of pushing ahead with such works when it had not been established whether they were actually required.

The report said dismantling the barriers - which were put up to shield residential developments in Pak Shek Kok and Tai Po - cost the government \$ 13 million and \$ 29 million respectively. Residents said they

wanted the barriers removed because they blocked their sea views.

The report said of the Pak Shek Kok barriers: "This episode has highlighted the risk of procuring noise mitigation measures, such as noise barriers, for screening off traffic noise for undeveloped land, the uses of which may be subject to changes."

The barriers were required by the Territory Development Department in 1997 under the Tolo Highway widening project. However, the Town Planning Board called for the barriers' removal, in light of public complaints.

In the case of the Tai Po barriers, the report revealed that the Highways Department had decided to build them simply because it did not want to wait the eight months which it would take to alter the environmental permit requiring their construction.

To prevent a similar incident, the report said: "The secretary for the environment, transport and works should require all works departments to allow sufficient time in the implementation plans of works contracts so that the relevant statutory requirements, such those relating to a variation of the environmental plan conditions, can be complied with."

The report also highlighted the government's failure to ask developers of private residential developments in Ma On Shan to shoulder the \$ 40 million cost of installing noise barriers. It said this was not "consistent with established public finance policies".

[SCMP, November 27, 2003]

## **REGIONAL & INTERNATIONAL**

### **Australia**

#### **Great Barrier Reef breakthrough**

A new plan to save the famous Great Barrier Reef in Queensland, Australia, reflects shifting economic realities and community priorities.

The tabling in Federal Parliament (3 December 2003) of the new draft Great Barrier Reef Marine Park (GBRMP) management plan marks the creation of the largest network of protected marine areas in the world. Just more than one-third of the GBRMP is scheduled to be declared



pink (no-go) or green (no-take) zones.

Large additional areas are to be off-limits to commercial fishing, whilst a new yellow zoning — you may fish from a small boat but not from a trawler — introduces one-line, one-hook restrictions on recreational anglers and bans commercial fishers. The area previously open to virtually any use - except oil exploration - is to be slashed from more than three-quarters of the park area to just over a third.

The increased protection — only 4.7 per cent of the reef previously had marine national park level protection, most of which was in the inaccessible far north - is being hailed internationally as a stunning scientific and political achievement. Canadian and other governments are keen to apply the precedents and techniques used in the GBRMP management review process in protecting their own coasts and fisheries.

“It has been a huge battle, but I don’t think you can say enough about what this means at the international level,” says World Heritage expert Peter Valentine, a member of the International Union for the Conservation of Nature’s World Commission on Protected Areas. “Most coral reefs around the world are seriously damaged, so this is of enormous importance to their preservation and survival.”

The proposed new plan is a far cry from the early days of Queensland’s settlement, when the Great Barrier Reef was seen as a handy source of lime for use in fertilising Queensland’s vast canefields, and a promising prospect for oil exploration and drilling. Some of that legacy is only just coming to an end; for example, areas covered by the new zoning plans include 28 coastal enclaves extending up to 5 km out to sea, which had been excluded from the marine park since its inception so as to forestall possible Commonwealth government interference with coastal development proposals.

The rezoning of the nearly 2000 km long reef — the culmination of 10 years of study and investigation — is also notable as the largest public consultation process by a Federal authority and, most likely, the largest by any Australian government, with nearly 31,500 submissions were received.

There is strong international interest in how the GBRMP Authority and Australian scientists handled an immense amount of

technical and social information down to the so-called highly confidential revelations of favourite fishing spots disclosed in submissions, then sorted it through state-of-the-art positioning and mapping technologies while remaining true to the scientific and social objectives of the project.

University of Queensland ecologist, mathematician and project adviser, Hugh Possingham, says the Australian experience is “about five years ahead of what they have been just talking about doing” in the Gulf of California in Mexico’s Baja California.

The Federal Environment Minister, who proposed the rezoning project, rejected any talk of fundamental compromises in the thousands of changes between the draft and final zonings. Scientific principles required ecologically realistic minimum protection levels of 20 per cent for each of 70 reef and non-reef bio-regions. The reserves had to be big enough and sufficiently connected to function eco-logically, and the planners had to minimise the social and economic costs.

“If you pick out sites and ignore economic and social factors, you just get into fights,” Possingham says. “And if you go out of your way to avoid fights, you do what we have done on the land, which is to conserve large areas of desert and rocky hills and salt lakes that no one else wants”

However, some discontent will be expected when the fine detail of the maps percolates through to local communities. The most heat - and some light - will come from what is becoming known as the Battle of Repulse Bay, a large indent in the coast south of the Whitsundays. In initial draft plans a significant dugong and fish-breeding area in the Bay and was to be protected from trawling and netting. However, after heavy lobbying by commercial fishing interests, the final zoning is expected to let the trawlers and nets back into much of the Bay.

*[The Australian, 4th December 2003]*

### **Hong Kong’s marine life - stop the plunder of our seas**

Public outcry against the devastating excavation of the Tung Chung river on Lantau should be heeded by the authorities. Hong Kong’s natural heritage is a public asset, and the community has spoken. The government must enforce laws against

destruction of the environment, and must prosecute offenders. The courts (especially the magistracies) must punish offenders; too many still regard these offences as matters of minor significance. Penalties must be increased; fines of \$5,000 are no deterrent when measured against the damage done, and prison sentences have never been imposed for environmental offences.

Deplorable though the plunder of the river is, it is nothing compared to the wanton destruction and environmental vandalism going on in the seas around Hong Kong, out of sight of the public, but under the benign and condoning gaze of the authorities.

For years our fishing fleet has been permitted to trawl our inshore waters, a highly destructive practice that is illegal in many countries, including China. Trawling nets drag along the seabed and leave a wasteland in their wake. Hong Kong’s seabed is trawled an average of 20 times a year, and up to several times a day in some areas. The average around the world is once every 15 years. The intensity of inshore trawling in Hong Kong has made a lifeless desert of many parts of our seabed. Should this vandalism be tolerated?

In the mid-1980s the government created a class of fishing vessel called the P4. These ubiquitous blue, open speedboats were intended to be licensed for use by mariculturalists to service their fish farms. Their engines, by law, are restricted to 15 horsepower. Unfortunately, in blatant disregard of this, very often these boats are equipped with high-powered engines and bring their destructive fishing practices to every corner not already covered by the trawlers. The fishermen use gill nets up to 1,500 metres long and these nets are often discarded. In October, a team of volunteer divers removed nine tonnes of discarded fish nets and other rubbish from Hoi Ha Wan, Tung Peng Chau and Yan Chau Tong marine parks. These discarded nets lie on the seabed, sometimes for years, and continue needlessly to suffocate and kill marine life. It has been estimated by the Agriculture, Fisheries and Conservation Department (AFCD) that the length of discarded fishing nets in Hong Kong is equivalent to 56 times the length of our coastline. Should this vandalism be tolerated?

The effect of all this destruction is that our

fisheries have collapsed. The mean fish size taken in the 1990s by trawlers in Hong Kong waters was less than 10 grammes. Fish caught in Hong Kong are so-called “trash fish”, which are made into fish meal for our fish farms. Hong Kong reefs have among the lowest biomasses of fish per unit area ever recorded from coral habitats. In layman’s terms, it means that we have some nice corals, but no fish living in them.

Nowhere is this vandalism more distressing than in our marine parks. Here, both licensed and illegal fishing continue unabated. When Hoi Ha Wan Marine Park, a stunning bay with some of Hong Kong’s best corals, was created in 1996, the government allowed a certain number of licensed fishermen to continue fishing. No one could have foreseen that they would be laying kilometre-long gill nets and scooping up everything in sight. Clearly, it does not make sense to allow these practices in a marine park; the law needs changing. Existing laws against non-licensed fishing need enforcing.

*[South China Morning Post, December 2003]*

### Timber trade’s unkindest cut

Environmentalists fear Southeast Asia’s already stretched rainforest stocks are to be put under further pressure as a result of China’s booming appetite for raw materials. A tug-of-war is tearing Southeast Asia’s tropical forests apart. The struggle is between the region’s booming economic giant, China, and environmentalists seeking to preserve delicate, life-sustaining ecosystems. With rising mountains of imported timber at China’s customs checkpoints, it is obvious which side is winning.

For environmentalists, the battle is one of life and death. As forests disappear at rates too quick to regrow, so do plants and animals, the fresh water supplies they help replenish, and the livelihoods of the people who depend on them to survive.

Earlier this month, on the Indonesian island of Sumatra, another effect was revealed when more than 200 people were killed as floodwaters ripped through the resort town of Bohorok. Officials blamed illegal logging in the surrounding national park and Forestry Minister Muhammad Prakosa was prompted to order the afforestation of 300,

000 hectares of land across the country.

Although China’s thirst for timber for its thriving construction, furniture and paper industries was not directly implicated, the disaster highlighted a problem mainland authorities have long recognised. With much fanfare last December, they signed with the Indonesian government a memorandum of understanding to take steps to regulate timber imports to prevent illegal logging. Indonesia has made similar pacts with Britain, Japan and Malaysia, among others, over the past two years.

Asian governments have long recognised the importance of tropical forests and have imposed bans on the removal of trees and have implemented programmes for plantations to produce timber for commercial use. In 1989, Thailand banned the logging of natural forests in direct response to floods and landslides which claimed 400 lives the previous year.

China imposed a similar nationwide ban in September 1998 after 6,500 people died in devastating floods on the Yangtze River which were linked to the removal of 85 per cent of the natural tree cover in the river’s upper basin. The southern province of Yunnan pre-empted that decision by imposing a ban two years earlier after 600 people were killed in flash floods.

However, the bans have exposed a problem. China does not produce enough timber from its own commercial forests to meet its demands. The World Wildlife Fund estimates four million cubic metres of logs were imported in 1997 and customs statistics show imports rose to 16.37 million cubic metres in 2001. Environmental groups estimate the figure is now more than 20 million cubic metres. Today more than 60 per cent of China’s timber imports come from softwood forests in Siberia. Environmentalists are greatly concerned by illegal logging of Southeast Asia’s rapidly disappearing ancient tropical trees. The mainland’s increasing demand for timber is largely to blame, they claim.

The trend of diminishing tropical forests is global. Half the world’s forests have now disappeared, and the remainder continue to be cut down at a rate of 15 million hectares a year. The figures are just as horrific in Southeast Asia. The Washington-based environmental group, Earth Policy Institute, said in a report issued last year that in just

50 years, Indonesia’s forest cover fell from 162 million hectares to 98 million hectares. Illegal logging was said to have destroyed 10 million hectares.

The Philippines, which once had 16 million hectares of forests, now has less than 700,000 hectares, the report said. Illegal logging was rampant and the report cited logging as a cause of flooding, water shortages, erosion, river siltation and mudslides. All Southeast Asian countries face similar problems. The report blamed China for much of the problem. It said the mainland consumed nearly 280 million cubic metres of timber a year, but domestic supply provided only 142 million cubic metres.

‘As production shrinks, China is turning to imports and illegal logging to make up for the shortfall,’ the report said. ‘The International Tropical Timber Organisation forecasts that within the next few years China will become the world’s largest log importer, edging out the US and eclipsing Japan, whose massive imports have already destroyed many of the rainforests of the Philippines and much of Borneo.’

Analysts believe that since the creation of modern China in 1949, little attention has been paid to the environment. Efforts are now being made for better environmental protection and the government wants to increase the mainland’s forest cover from the present 16.8 per cent to 22 per cent by 2010. Observers doubt this is possible, however, given the allocated resources. Environmentalists agree that the results of China’s reformed environmental policies are not evident. Instead, they point to increasing degradation of the region’s forests to meet China’s demands.

Activist Faith Doherty, of the Environmental Protection Investigation Agency in London, said smuggling was increasingly hard to detect, with logs coming from Indonesia entering China through Vietnam and Laos. ‘Indonesia is a highly corrupt country and it doesn’t matter how many trees are planted, as long as the corruption exists, addressing a sustaining and legal market will be impossible,’ she said.

That Indonesia and China had signed an agreement acknowledging smuggling was a problem was an important first step, she said. The core issue now was enforcement, which will be difficult, given the complexity of the trade.

Although the two countries have already made efforts to clamp down on the illegal trade, a regional push was the best solution. 'There needs to be a regional protocol on enforcement,' Ms Doherty said. 'Illegal timber might come out of one country and go into another and then to a third. What is

needed is that all enforcement authorities, police and customs officials among them, work together to ensure the illegal trade is stamped out.'

With demand driven by China's seemingly unstoppable economic growth, such a possibility would seem idealistic. Yet at

official levels, the will seems to exist to protect Southeast Asia's forests. The challenge is making that determination filter through to logging companies and smugglers.

[*South China Morning Post, 11th November 2003*]

This Quarterly Report does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to Fred Kan & Co. or any of our following associate firms:

Hong Kong

**FRED KAN & CO.**

Suite 3104-07, Central Plaza  
18 Harbour Road, Hong Kong  
Tel: (852) 2598-1318  
Fax: (852) 2588-1318

Paris, France

**THOMAS, HERBECQ & ASSOCIES**

3 Square Petrarque  
75116 Paris, France  
Tel: (331) 4755-4400  
Fax: (331) 4704-5131

Macau

**THE LAW OFFICE OF DR ANTONIO**

RIBEIRO BAGUINHO & DR JOAO  
MIGUEL BARROS  
Suite 1308, 13th Floor, Landmark Building,  
No 555 Avenida da Amizade, Macau  
Tel: (853) 705352  
Fax: (853) 705351

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Fax: (9122) 22855787

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Level 42, 2 Park Street, Sydney  
NSW 2000, Australia  
Tel: (612) 8281-4555  
Fax: (612) 8281-4567

Beijing, China

**JINCHENG LAW FIRM**

17/F., East Ocean Centre  
No. A24 Jianguomenwai Avenue  
Beijing 100004, P.R. China  
Tel: 86-10-65155566  
Fax: 86-10-65263519

Kuala Lumpur, Malaysia

**CHEANG & ARIFF**

39 Court, 39 Jalan Yap Kwan Seng  
50450 Kuala Lumpur, Malaysia  
Tel: (603) 2161-0803  
Fax: (603) 2162-1533

Colombo, Sri Lanka

**D.N. THURAIRAJAH & CO.**

2nd Floor, Don Carolis Building  
Post Box.1464, No. 64, Keyzer Street  
Colombo-11, Sri Lanka  
Tel: (94)(1) 439-798  
Fax: (94)(1) 448-002

## Convictions under environmental legislation: October - December 2003

The EPD's summary of conviction recorded and fines imposed during the period September to December 2003 is as follows:

### *October 2003*

76 pollution convictions recorded in October

Seventy-six convictions were recorded in October for breach of anti-pollution legislation enforced by the Environmental Protection Department.

Among them, 46 were convictions made under the Air Pollution Control Ordinance, 17 under the Noise Control Ordinance, eight under the Waste Disposal Ordinance and five under the Water Pollution Control Ordinance.

One company was hit with two fines of \$35,000 - the heaviest fine for October - for using powered mechanical equipment and for carrying out prescribed construction works in breach of the conditions of a construction noise permit.

### *November 2003*

Among them, 21 were convictions under the Waste Disposal Ordinance, 11 under the Air Pollution Control Ordinance, four under the Noise Control Ordinance and one under the Water Pollution Control Ordinance.

The heaviest fine was \$50,000, levied against a company that used powered mechanical equipment not in accordance with the conditions of a construction noise permit.

### *December 2003*

40 pollution convictions recorded in December 2003

Forty convictions were recorded in December 2003 for breaches of anti-pollution legislation enforced by the Environmental Protection Department.

There were 19 convictions under the Air Pollution Control Ordinance, nine under the Waste Disposal Ordinance, eight under the Noise Control Ordinance, three under the Water Pollution Control Ordinance and one under the Ozone Layer Protection Ordinance.

The heaviest fine in December was \$100,000, levied against a company that used powered mechanical equipment in breach of the conditions of a construction noise permit.

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Fred Kan & Co.  
Suite 3104-07 Central Plaza  
18 Harbour Road, Wanchai, Hong Kong



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