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URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY

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Hong Kong's water pollution controls were the subject of a recently completed dissertation awarded the Fred Kan & Co. Prize for M.Sc. (Environmental Science) graduates in the 1996/97 course. Our feature article this edition reviews the dissertation, a significant conclusion of which is that Hong Kong lags behind various other Western countries.

The Editors

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A COMPARATIVE REVIEW OF HONG KONG'S WATER POLLUTION CONTROLS

The 1996 *Fred Kan & Co. Prize* for the most meritorious dissertation in the Msc (EnvMan) program, University of Hong Kong, has been awarded to **Wong Wai Yin, Lawrence** for his dissertation entitled *A Review and Comparison of the Organic Effluent Discharge Standards and Requirements of Hong Kong and Other Countries.*

Mr. Wong's study concerns point-source pollution of Hong Kong's marine waters, with particular emphasis on pollution caused by discharges of toxic chemicals. The objectives of the study were:

a) to identify any deficiency in Hong Kong's management of pollution due to chemicals (or toxic substances) discharge;
b) to review and compare policies and regulations adopted by a number of other developed countries; and
c) to suggest any solutions or better approaches the government of Hong Kong might consider.

The comparative countries considered were: Germany, United States of America (US), Australia and China. The first three were selected as being, in the author's opinion, leaders in the field of environmental protection in Europe, North America and the Southern Hemisphere respectively. China was selected because of its proximity to Hong Kong and the fact that it resumed sovereignty over Hong Kong on 1st July, 1997.

The introduction to the dissertation summarizes available data on chemical pollution of Hong Kong's marine waters. Mr. Wong notes with concern that as early as 1983 a survey of 21 ethnic Chinese maternity patients indicated a high level of organochlorine pesticide residues in human breast milk. The result was significantly higher than

for other countries included in that survey (*Phillips*, 1985), such as Demark and Sweden.

Mr. Wong reproduces a number of tables containing data with respect to, for example, organic chemical consumption in Hong Kong and marine water concentration rates for polychlorinated biphenyl (PCB) compounds. However, the author notes that there are no data available for pollution by discharge of common solvents, halogenated solvents and aromatic solvents, notwithstanding that they are toxic to the environment. However, as a rough indication of the seriousness of those potential sources of water pollution, the author suggests that if we assume 1% of such chemicals were discharged into the environment, this would mean approximately 169 tons of halogenated and 2,600 tons of aromatic hydrocarbon chemicals polluting the environment each year, based on consumption statistics.

Mr. Wong identifies the widespread use of pesticides as a major source of chemical pollution, and again points out that insufficient data are available to identify the major polluting sources. It is perhaps surprising to note from a comparative table compiled by the author that Hong Kong's legislation controlling the use of pesticides is weaker than China's, in that China has banned many well known toxic pesticides/herbicides which are merely *severely restricted* in Hong Kong, e.g. Aldrin and Dieldrin.

In both his introduction and conclusions, the author identifies another major weakness of Hong Kong's water pollution control regime, namely the lack of effective enforcement.

In reviewing briefly the history of Hong Kong's water pollution control legislation, the author concludes that Hong Kong has adopted mainly a *command and control* legislative approach which is targeted at "... *end-of-pipe control and dilution of pollutants in the environment*". However, with the introduction of discharge fees for use of the sewerage system, the government has indicated a willingness to employ economic tools as part of its approach to preventing or limiting water pollution.

A major difficulty with Hong Kong's present water pollution control legislation is that the *Technical Memoranda* (TMs) are usually deficient in a number of different ways identified by the author, e.g. they concentrate mainly on physical, biological and chemical characteristics of effluent without taking into account ecological indicators. The scheme of licensing and compliance with TMs is further weakened by the failure of our legislation to require comprehensive self-monitoring by licensed dischargers of pollutants. As partial support for his criticism of the TMs, the author relies on the results of a survey he conducted as part of the dissertation research (a survey which the author readily admits drew limited responses from, particularly, industry and therefore cannot be said to be comprehensive), which indicated that 86% of respondents answered in the affirmative the question: *Do you think the TM should be improved to provide a more practical means for the control of organic chemicals?*

In both his introduction and conclusions, the author identifies another major weakness of Hong Kong's water pollution control regime, namely the lack of effective enforcement:
"... *owners of premises or the person in charge will not normally initiate monitoring programs and compliance with the WPCO* [Water Pollution Control Ordinance] *requirements but will totally rely on the enforcement of the Local Control Office of the EPD.* [Environmental Protection Department] *With the existing manpower this is found to be quite ineffective and inefficient.*"

In summarizing those parts of the abovementioned survey dealing with enforcement, the author notes that "... *most of the respondents indicated that the present enforcement is not effective*". [A significant number of the respondents were government agencies.]

The author reviews in summary form existing policy and legislation in the subject comparative countries, each of which has a different approach (partially, at least) to controlling water pollution. Compared to Hong Kong, their approaches may also differ due to different political structures, e.g. a federal system of government in Australia and the US. The author's main conclusions in respect of each include the following observations:

Australia: has adopted a mixture of regulatory controls and market orientated policies which employ economic incentives or disincentives. Polluting discharges may be licensed, with a preference for technology-based discharge limits. However, not all relevant legislation is considered by the author, who acknowledges that responsibility for environmental legislation is divided between the Federal government on the one hand and the various State and Territory governments on the other, thus making it difficult to identify a single policy or legislative approach. The general aim of Australian legislation, the author observes, is to achieve "*sustainable water quality management*".

Germany: also divides legislative responsibility for environmental issues between governments at different levels, including local governments. Effective use has been made of charging for the right to discharge pollutants

into public waterways (as from 1st January, 1981). The principal approach to control of pollution is by prescriptive regulation *(the command and control approach).* Licences and permits are required to discharge into sewers or directly into any public waters. Legislation emphasises self-monitoring of discharges, and the application of *Best Available Technology* to preventing or reducing discharges of pollutants.

China: has a "... *very comprehensive set of laws and regulations for the control of water pollution*". There has been an attempt to "decentralize" environmental legislation which has created its own difficulties. A mixture of prescriptive regulations and economic incentives is adopted, although incentives are not strong as effluent discharge fees are set very low. However a major problem is "... *the proper implementation of the various laws and regulations in China...*" (i.e. the lack of effective enforcement). China's regulations allow licensed discharge of pollutants below prescribed national or local discharge requirements. If the licensee exceeds these levels, or is likely to, he must provide an "*action plan*" for bringing pollution levels back to under the prescribed maximum level.

United States: has environmental protection laws which are much more centralized than those of Germany or China [and, it could be said, Australia; however, we note that the US is a federal system and all of the 50 states have their own comprehensive environmental protection laws, which must give way to federal laws when in conflict]. In terms of water pollution, a lynch pin of US legislation is the *National Pollutant Discharge Elimination System* pursuant to which any person discharging effluent directly into surface water bodies must apply for a licence. Self-monitoring is imposed in respect of discharges pursuant to the licence. The US applies, in different circumstances, three different methods of setting effluent standards:

a) best practicable control technology;
b) best available control technology; and
c) best conventional technology.

Greater emphasis is now placed on process - oriented controls (i.e. control in respect of use of pollutants in the production process), which represents a shift from the traditional point - source control (or, end-of-pipe control).

When comparing with these countries, the author notes that Hong Kong is "*far behind*". To reverse this situation the recommends are that Hong Kong should adopt a *"goal-based"* approach rather than relying primarily on prescriptive regulations. This approach incorporates four distinct steps (leaving aside a fifth step: enforcement), namely:

a) setting the quality level goal
b) legislating controls
c) legislating for monitoring of discharges
d) providing for regular reviews.

An essential part of a control system, the author suggests, is effective regulation of the importation and use of toxic chemicals. In this regard, the author suggests that legislation, along the lines of laws which are applied in the US, be adopted. Legislation governing effective monitoring of discharges should include self-monitoring requirements. However, notes the author, to conduct effective self-monitoring many small businesses would require assistance from government agencies or public advice organizations, such as the *Hong Kong Productivity Council.*

A final link in the goal-based approach is to provide for regular reviews of how effectively the environmental protection mechanisms are working.

Aside from this suggested broad framework, the author also recommends that Hong Kong must look far more seriously at using economic factors, such as realistic effluent discharge fees, tradeable pollution permits and financial incentives, to encourage the use of less toxic substances. The *incentives* or *economic factors* approach should be an integral component of the overall water pollution control regime.

We congratulate Mr. Wong on his fine dissertation and most useful contribution to the important debate on Hong Kong's attempts to provide more effective environmental protection.

Digest of LEGISLATION

Air Pollution Control (Construction Dust) Regulation (L.S. No.2 to Gazette No.14/1997/L.N. 127 of 1997 p.B522)

This Regulation is to control dust emission from construction work that has dust emission potential. The Regulation requires construction contractors to notify the air pollution control authority (the public officer appointed under Section 4(1) of the Air Pollution Control Ordinance) before they undertake certain construction work specified in the Regulation and sets out control standards that must be met when the work is carried out. The Regulation also creates offences for a failure to give proper notice or to comply with the control standards.

Control of Chemicals (Amendment) Regulation 1997 (L.S. No.2 to Gazette No.20/1997/L.N.230 of 1997 p.B1296)

This Regulation increases the fees payable for the issue and reissue of licences or permits under regulation

6 of the Control of Chemicals Regulations (Cap.145 sub. leg.) and came into operation on 27th June 1997.

Regulation 6 of the Control of Chemicals Regulations (Cap.145 sub. leg.) is repealed and the following substituted:-
"6. Fees

(1) The fee for the issue of :-
(a) a licence, including the issue of a new licence under section 8(5) of the Ordinance, shall be $790 for each year or part of a year for which the licence is issued; and
(b) a permit, including the issue of a new permit under section 8(5) of the Ordinance, shall be $510 for each year or part of a year for which the permit is issued.
(2) The fee payable on the reissue of:-
(a) a licence under section 9(5) of the Ordinance shall be $790; and
(b) a permit under section 9(5) of the Ordinance shall be $510.".

Waste Disposal (Charges for Disposal of Chemical Waste) (Amendment) Regulation 1997 (L.S. No.2 to Gazette No.20/1997/L.N.231 of 1997 p.B1298)
This Regulation increases the charges payable to the Director of Environmental Protection for the disposal of chemical waste at the Chemical Waste Treatment Centre owned by the Government. It came into operation on 27th June 1997.

Environmental Impact Assessment Ordinance No.9 of 1997 (Ord. No.9 of 1997 p.A210)
This is Hong Kong's first piece of environmental impact assessment legislation. [Environmental impacts previously have been assessed/taken into account (if at all) pursuant to government administrative guidelines]. The Ordinance provides for mandatory assessment of the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters. [See our previous article *Hong Kong's Proposed Environmental Impact Assessment Law* in the Autumn 1996 issue of this Quarterly.]

Waste Disposal (Amendment) Ordinance No.10 of 1997 (Ord. No.10 of 1997 p.A284) Section 28 of the Waste Disposal Ordinance (Cap.354) is repealed.
Section 33 is amended by adding various sub-sections in relation to deferral and collection of payment of the charge and in relation to the premises used for or in connection with the collection, removal, transportation, transfer, reception or disposal (including treatment, reprocessing or recycling) of waste.

Noise Control (Amendment) Ordinance No.37 of 1997 (Ord. No.37 of 1997 p.A984)
Section 8(5) of the Noise Control Ordinance (Cap 400) is amended by repealing "any principle or procedure" and substituting "any principle, procedure, guideline, standard or limit".

Section 9 is amended by adding : - *"(1A) Without prejudice to the generality of subsection (1), a Technical Memorandum issued under that subsection may set out different principles, procedures, guidelines, standards and limits in respect of different types of percussive device that may be used in percussive piling".*

HONG KONG Briefing

1. Preservation of natural resources will take priority in the reform of environmental protection laws in China this year. Professor Qu Geping, Chairman of the National People's Congress' Environment and Resources Protection Committee, has indicated that four pieces of legislation for the protection of forests, water and land would be reviewed. Drafting of amendments was expected to be completed by the end of June. Professor Qu was of the opinion that any breakthrough in China's economic development at present relies on a sufficient supply of natural resources. In addition, prevention of water pollution and developing new water supplies were also important to the country's economy. In order to stop pollution, the Chinese government had closed more than 50,000 factories, which had discharged pollutants into rivers, by the end of last year.

The government would spend a total of 400 billion yuan (about HK$373.6 billion) on environmental protection between 1996 and 2000. Since 1995, the Chinese Government has amended two pieces of legislation on air pollution and water pollution, and enacted regulations on solid waste control plus legislation on noise pollution at the end of last year to restrict noise from factories and commercial properties. Professor Qu expected pollution to be under control by 2000, the end of the Ninth Five-Year Plan. (SCMP 4/3/97)

2. Legislator Ip Kwok-him is seeking to improve air quality in three vehicle tunnels by moving a private member's Bill in Legco.The Bill will impose a tighter limit on the concentration of carbon monoxide in Tate's Cairn, the Cross-Harbour and the Eastern Harbour tunnels to bring them in line with current international standards. (SCMP 5/3/97)

3. According to research conducted by the University of Hong Kong, amendments to the Town Planning Ordinance to give the public a greater say could cost Hong Kong $14billion a year, or 1.3 per cent of gross domestic product. Proposed amendments would empower the Town Planning Board to conduct special inquiries into public complaints. The research report states that experience from other countries suggests that this will delay the planning application

process unless very substantial resources are deployed, particularly from the public sector. Developers say they would have to deploy more resources to engage planning, design, environmental and transportation consultants to handle the additional work involved in the planning application process. Such costs are estimated to amount to 2 per cent of a development's market value. Developers would be less certain that projects they propose would be accepted, at least in the form they had envisaged and thus factor in a 2 per cent risk premium. On the other hand, the government would also have to dedicate more resources to processing the additional administrative load.

The research indicates that a 6 months delay, for example, would result in an overall increased costs equivalent to approximately 1 per cent of GDP. For a 12 months delay, the costs to developers, end-users, government and public could total $14billion a year, or 1.3 per cent of GDP.

Developers have proposed that the Government should:
i. create regulatory procedures that are clear-cut and minimise opportunities for bureaucratic discretion and possible corrupt practices;
ii. align planning regulations with the Government's economic developement strategy to provide a clear long-term vision for all concerned;
iii. minimise transaction costs of development imposed by government; and
iv. compensate private sector developers whose interests have been injured and whose rights are restriced, where that occurs without adequate prior notice allowing them to adjust their development strategies.

Robert Lee, a senior government town planner, said responses to the proposed bill had been mixed and the government was carrying out a detailed review. (SCMP 9./3/1997)

4. Local and mainland developers have been snapping up million of square feet of land in the New Territories zoned as conservation area, in anticipation that at some time in the future the land will be rezoned for residential development. Terence Yeung Wing-kwan, investment director with ACN Real Estate Advisers, indicated that much of this buying activity was happening in remote areas of Kam Tin around Yuen Long, and to a lesser extent in Tai Po and Sai Kung, due to the developers' anticipation of infrastructure developments in the area, such as Route 3 and the proposed West Rail line.

In many cases, this land abuts to country park land and functions as a buffer against encroaching development. One real estate agent said developers were buying conservation land because there was a lack of "other good sites" in the New Territories. Areas where sites are particularly sought after by developers include Kam Tin, Tin Shui Wai and Luk Keng. Villagers of these areas were selling this type of land to a middleman, who then approached property agents or developers directly to sell the land. Mr. Yeung also said that mainland investors were also buying up land in these areas. (SCMP 19/3/97)

PADS UPDATE

1. When the airport opens in April 1998, it will have one runway and a capacity for 35 million passengers and three million tonnes of cargo a year. This will increase rapidly with the completion of the northern runway by the end of 1998. Both runways will be 3.8 km long with 300 metres at either end for overruns. The southern runway will be 60 metres wide with 7.5 metres shoulders to be added later.

The airport facilities will also include many "smart" features. High-speed exits will enable aircraft to leave the runway without having to slow to near halts, which means more landings per hour. Large illuminated directional signs then enable pilots to navigate the many taxiways under instructions from the Air Traffic Control Tower. All intersections will have "hold points" so aircraft can wait if another aircraft is crossing. Entry taxiways into the runway zone have stop lights imbedded in the ground and should an aircraft cross when a red light is showing, an alarm will sound in the Air Traffic Control Tower.
[Airport Authority Hong Kong News March 1997]

2. Strict environmental safeguards have been incorporated into the interior design of the Airport. Apart from the high levels of natural light being used in the building, the roof will be up to five times more energy efficient than a conventional flat roof. Another energy saving feature is that cool air will be pumped into large open areas through binnacles. These structures stand about three metres high allowing cooled air to remain only in areas through which people move.
[Airport Authority Hong Kong News March 1997]

3. The Government has invested HK$800.00 million in the Civil Aviation Department Air Traffic Control System for Chek Lap Kok operations. The System comprises more than 20 major items including radar, navigational aids and communication systems. At the heart of the System is the Radar Data Processing and Display System, Flight Data Processing System, and Simulator System. This equipment processes data from various radars and presents information such as aircraft position and callsigns, altitude and ground speeds on the radar displays. Air traffic controllers will use this information to control arriving, departing and en-route traffic. A Primary Surveillance Radar has been installed at nearby

Sha Chau to provide range and bearing information on aircraft within 80 km of Hong Kong. A Doppler Very High Frequency Omnidirectional Range and Distance Measuring Equipment System (a standard radio navigation aid) has been installed at Siu Mo To and another at Lung Kwu Chau. [Airport Authority Hong Kong News March 1997]

ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

The Advisory Council on the Environment (ACE) met on 17th February 1997 to discuss, inter alia, the transboundary movements of waste. Dr. Chiu, Acting Deputy Director of Environmental Protection, explained that a centre was set up recently by an approved agent of the Commodity Inspection Bureau of PRC to ensure that only nine kinds of waste, which PRC had permitted import of and which had passed the commodity inspection test, would be allowed entry into China.

When asked by the ACE committee as to whether waste rejected by the inspection centre would end up in landfills in Hong Kong, Mr. Barclay, Principal Assistant Secretary (Environment), Planning Environment Lands Branch (PELB), said that since "green waste" which was imported to Hong Kong for re-export purpose, did not require a licence, there was the possibility that, if such waste were rejected entry into the PRC upon arrival at Hong Kong, the waste owners would attempt to dispose of "them" at landfills in Hong Kong. Mr. Barclay said that under the current legislation, it was not illegal for the waste owner to do so but the Administration would consider the possibility of making it an offence for any person to dump waste which came from elsewhere into the landfills in Hong Kong, even though the decision was made after the waste had been imported into Hong Kong.

On the availability of contingency plans to prevent this kind of dumping, Dr. Chan, Principal Environmental Protection Officer (Water Management), Environmental Protection Department (EPD), informed the committee that EPD had an understanding with the Yuen Long inspection centre that the latter would ensure that owners of waste which was rejected on commercial grounds (e.g. the quality of the waste did not meet the required PRC standard) would undertake to return the waste to its country of origin or find another buyer. Dr. Chan said that the inspection centre was requested to inform EPD of the kinds of shipment waste they had inspected, details of rejected cases and reasons for rejection. He said the centre had been very co-operative thus far. Moreover, EPD and the Customs and Excise Department would also carry out inspection of imported waste on a random basis.

For waste which was rejected because it was found to contain materials that were subject to control under the Waste Disposal Ordinance other than what were claimed in the manifest, Dr. Chan said that the owners would have committed an offence under that Ordinance and would be subject to prosecution. They could also be required to return the waste to the country of origin.

Regarding whether the movement of waste between the HK SAR and the rest of China would remain subject to control under the provisions of the Basel Convention, Dr. Chiu advised that according to the Basic Law, the relevant laws previously in force in Hong Kong should remain in force. Hong Kong would continue to implement the Waste Disposal Ordinance in the same way as it was doing now, such as by enforcing permit control on waste import and export in line with the requirements of the Basel Convention.

CASELAW UPDATE

Henderson Real Estate Agency Ltd. v Lo Chai Wan (for and on behalf of the Town Planning Board) (1996) 7HKPLR1

Town Planning - Judicial review - Certiorari - Town Planning Appeal Board - Whether "planning intention" misunderstood - Whether Explanatory Statement and subsequent guidelines constituted material considerations - Whether misunderstanding of those documents vitiated decision - Whether Appeal Board bound to accept Town Planning Board's guidelines contained in those documents - Town Planning Ordinance (Cap. 131) ss 3(1), 16, 17A-C, 26A.

The appellant, the agent for the proposed developers, applied for planning permission from the Town Planning Board ("the Board") for a large scale residential development at Nam Sang Wai in the North West New Territories. The proposed development, Sunnyville Estate, comprised 2,550 residential units and a golf course. The site with respect to the application was divided into two parts. The northern part, known as Lut Chau was within *Buffer Zone 1*, which is the inner buffer zone to the Mai Po nature reserve. The proposal was to turn Lut Chau into a nature reserve to complement Mai Po through a land exchange with Government. The southern part, Nam Sang Wai, an area of about 100 hectares, was the proposed development area. This area is due south of Mai Po Marshes Reserve, and on the southern edge of *Buffer Zone 2*. The proposal was to contruct 2,550 residential units (some as 7-8 storey blocks) to house 9,100 people, plus an hole golf course.

The application was rejected by the

Board because, inter alia, "the proposed development was not in line with the planning intention for the area which was primarily to protect and conserve the landscape and ecological value of the area and its scenic quality necessary to sustain Mai Po Nature Reserve", contrary to the then applicable *Draft Development Permission Area Plan* (DPA), in force pursuant to Section 3(1) (b) of the *Town Planning Ordinance (Cap 131).*

The appeal came before the Town Planning Appeal Board ("the Appeal Board") in March 1994. The focus of this appeal turned to the preservation of artificial fish ponds in the proposed development area, and whether the ponds had an intrinsic ecological value.

On 26 August 1994, the Appeal Board allowed the appeal on the ground the development complied with the planning intention of the *DPA*, and granted permission subject to certain planning conditions. The Appeal Board decided that the proposed development did not have any adverse effect on Mai Po Nature Reserve, concluded that there was no indication of a planning intention to retain the fish ponds and was not convinced that the loss of fish ponds in Nam Sang Wai would not be adequately compensated for by the Lut Chau Nature Reserve and the wildlife habitat at the Nam Sang Wai Development.

The Board sought judicial review of the Appeal Board's decision in the High Court. Yam J. dismissed the application, finding that there was no reason to interfere with the Appeal Board's decision (and commenting that the fish ponds appeared not to have any ecological intrinsic value). The Board then appealed to the Court of Appeal.

On 24 January 1996, the Court of Appeal allowed the appeal, holding that the planning intention of the DPA was the one asserted by the Board, namely, to preserve the wetland characteristics of the area under the *DPA* against large-scale development, because such characteristics had environmental intrinsic value and also because they provide an appropriate buffer to the Mai Po Nature Reserve. The Appeal Court did not consider it necessary to rule on the second ground of appeal put forward by the Board, based on the alleged irrationality and unlawfulness of the planning conditions.

The developer appealed to the Judicial Committee of the Privy Council. Before the Privy Council, the only ground pursued was that the Appeal Board had misunderstood the relevant planning intention indicated by the *DPA*.

The decision

Held : allowing the appeal and restoring the decision of the Appeal Board (with Lords Golf and Nicholls dissenting) :

1. The purpose of the *DPA* and the notes attached thereto was to ensure that the development did not take place within the DPA without permission. As there was no specified use for the area included in the application site, the Appeal Board could not be said to have misunderstood the *DPA*.

2. Whilst the *DPA* and the notes attached to it were the most material documents to which the Appeal Board was bound to have regard, the Appeal Board was entitled to consider, but was not bound to follow, the Explanatory Statement or the guidelines, which could not be disregarded altogether.

3. Paragraph 6.25(a)(iii) of the Explanatory Statement, which stated that the "planning intention is primarily to protect and conserve the area's landscape, ecological value and its scenic qualities", did not stand alone and had to be read together with paragraphs 5.2.5(d) and (e) of the *DPA*. The latter showed that comprehensive residential development was not ruled out altogether provided it was low-rise and low-density, and provided "appropriate measures" were taken to minimise the impact on the environment. These essentially were questions for the planning judgment of the Appeal Board, and not for the court.

4. If it had been the intention to preserve the whole of Buffer Zone 2 in its existing condition, it would have been easy enough to say so by designating the whole area a conservation zone. Whilst there was a reference to the retention of fish ponds in paragraph 7(a) of the 1993 guidelines, it was impossible to regard that as applying to the whole of Buffer Zone 2, where the application site was situated. Otherwise there would have been no difference between Buffer Zone 2 and Buffer Zone 1, and there would have been no room for the comprehensive low-rise and low-density residential development contemplated in paragraph 6.2.5(d) of the Explanatory Statement and paragraph 7(c) of the 1993 guidelines and the gradation concept would have meant nothing. In addition, the diagram at Figure 2 of the 1993 guidelines showed conclusively that it had never been the intention of the Board, as planning authority, that the fish ponds, or the existing landscape within the Buffer Zone 2 should be preserved intact. As for the scale of any residential development, this was clearly a matter for planning judgment.

5. Even if there was some misunderstanding on the part of the Appeal Board, it did not assist the appellant as clearly the Appeal Board understood the Board's case and appreciated the importance of wetlands, but it was not bound to accept the guidance contained in the Explanatory Statement and the subsequent guidelines. The Appeal Board dealt fully with every aspect of the Board's case and rejected it on planning grounds.

Lord Goff and Lord Nicholls (dissenting) found that:

1. The consistent thread running through the material planning documents was that no large-scale development was envisaged in the area, because this would defeat the purpose of the area as a buffer between developed areas and Mai Po Nature Reserve.

2. The Appeal Board had failed to take into account the intention that the area itself should remain substantially undeveloped and thereby protect the nature reserve.

3. At the very least the planning intention as expressed or clarified in the Explanatory Statement and the guidelines was a material consideration to which the Appeal Board had failed to give adequate regard.

4. There was a misunderstanding of the real planning intention behind enactment of the *DPA*, in that the Appeal Board's consideration of the so-called "battle of the ponds" resulted in its failure to consider the application against the background that in *"the interests of the nature reserve, the Buffer Zone 2 area was intended to remain substantially undeveloped"*. (emphasis added)

Comment: this decision has potentially disastrous consequences for the ecological integrity of the Mai Po Marshes, and the wider wetlands areas of the locality.

REGIONAL AND INTERNATIONAL

Australia

Major Development Assessment - Environmental Impact

One of the fundamental weaknesses of the recently introduced Environmental Impact Assessment Ordinance in Hong Kong would appear to be the omission of third party rights of appeal. The ability to challenge such an assessment was also absent from recently introduced legislation in South Australia dealing with the assessment of major developments or projects.

The Development (Major Development Assessment) Amendment Act, 1996 also has sought to prevent challenges to decisions under the major project provisions, by introducing Section 48E, which provides:

"No proceeding for judicial review or for a declaration, injunction, writ or other remedy may be brought to challenge or question:
(a) a decision or determination of the Governor, the Minister or the Major Developments Panel under this Division; or
(b) proceedings or procedures under this Division; or
© an act, omission, matter or thing incidental or relating to the operation of this Division."

The scope of this section is very board as, on its face, it prohibits any judicial review of a decision of, amongst others, the Governor or the Minister.

The new "major projects" provisions in the Development Act, 1993 enable the Minister to declare a single development, a form of development within a specified part of the State, or any kind of development within the State, to be a major development. Such proposals are then referred to an Advisory Panel who advise the Minister on whether an environmental impact statement (EIS), a public environmental report (PER) or a development report (DR) should be prepared by the applicant. The principal purpose of an EIS, PAR or DR is to assist the Governor in his ultimate assessment of the development and, in the case of an EIS or PAR, to identify issues of significance relevant to whether the project should proceed and, if so, to identify any conditions that should be imposed. The declaration of a development proposal as a major project takes its assessment outside of the normal approval process.

The Governor must not grant a development authorization to a major development proposal until such time as he has duly considered any relevant EIS, PAR or DR and the associated assessment report prepared by the Minister. No appeal lies against the Governor's decision.

The provisions of Section 48E which purport to prohibit a judicial review of any decision, determination or process under the major development assessment provisions is yet to be tested in the courts. The courts have in the past acknowledged that privitive clauses, such as Section 48E, do not prevent judicial review where a jurisdictional error of law is established.

While economic development must be encouraged for the benefit of the State, the purported exclusion of legitimate challenges to the decision making procedure should not be supported.
[Gavin Leydon, Partner, Norman Waterhouse, Adelaide, Australia]

France

General Ban on Asbestos

With effect from 1st January, 1997, France has introduced a general ban on the manufacture, importation, exportation, sale and transfer under any form of asbestos fiber and any product containing asbestos fibers (decree no. 96-113 of 24th December, 1996).

The December 24, 1996 decree, in further implementing EU Directive 76/769 of 27th July, 1976, as subsequently amended, is a follow up on the restrictions on the sale and use of asbestos products provided under decree no. 88-466 of 28th April, 1988, as

subsequently amended by decree no. 94-645 of 26th July, 1994 and decree no. 96-668 of 26th July, 1996.

The only exception to the general ban is that it does not apply to certain products or existing devices, which are to be specifically listed by ministerial orders, containing chrysotile, where there is no currently available substitute presenting less risk, on condition that such products or devices are safe for their intended use.

Sanctions for Non Compliance

Criminal sanctions for non compliance with the general ban are imposed under Article 5 of the 24th December, 1996 decree which correspond to fines falling under the fifth class (i.e. ranging from FF. 3,000 to FF. 6,000 for each violation, with imprisonment from ten days to one month).

Innocent Owners Not Liable to Administration for Cleanup

By a judgment rendered on 21st February, 1997, the French Conseil d'Etat (France's highest administrative court) overruled a highly controversial administrative appellate court decision rendered on 14th June, 1994, finding that the owner of the land upon which an industrial site was operated by a third party under the classified installation regime could not be required by the administration to cleanup the site. This decision means that an "innocent landowner", i.e. one who had no active part in the operations carried out on his land and who was not connected with the cause of the on-site pollution, cannot be held liable for cleanup requirements normally incumbent upon the operator of the site or "holder" of dangerous material, under the 19th July, 1976 law on classified installations.

Effects of Cancellation of Key Environmental Regulation on Waste and Water Discharges

An administrative Circulaire dated 25th February, 1997, set out the French government's position on the effects of the cancellation of the Arrêté of 1st March, 1993.

As background information, by a decision rendered on 21st October, 1996, the French Conseil d'Etat cancelled the Arrêté of 1st March, 1993 (the Arrêté) which was a key environmental regulation on waste and water management at facilities requiring a permit under the classified installation regime owing to their potentially polluting activities.

The Arrêté laid down, inter alia, specific discharge limits and other technical and legal requirements aimed at assuring the proper management of waste and water discharges at classified installation facilities.

The validity of the Arrêté was challenged by the French Union of Chemical Industries on the ground of excess of power. The Conseil d'Etat, in its decision of 21st October, 1996, agreed with the plaintiff, finding that the Ministry of Environment had exceeded its powers by issuing an Arrêté under the 1976 classified installations law which indiscriminately imposed discharge and other restrictions on practically all permitted facilities, without taking into consideration the specificity of each facility.

The cancellation of the Arrêté has raised a number of legal and practical questions for facilities operating in France which the Circulaire of 25th February, 1997 addresses.

The Circulaire recognizes that the decision of the Conseil d'Etat of 21st October, 1996 is res judicata in all jurisdictions in France, with retroactive effect, with the legal consequence that the Arrêté is deemed never to have existed. One major result of this ab initio cancellation is that all the previous regulations and Circulaires listed under Article 75 of the Arrêté, which were intended to be replaced by the Arrêté, have been brought back to life.

From a practical standpoint, the Circulaire of 25th February, 1997 emphasized that, notwithstanding the ab initio cancellation of the Arrêté, the local Prefectures may continue to be "inspired" by the discharge restrictions contained in the Arrêté but in order to give such discharge restrictions legal effect the Prefectures must incorporate them in the individual facility permits, rather than simply make a reference to the Arrêté.

The Circulaire invites the local Prefectures to apply the "best available techniques" principle referred to in the Arrêté but notes that more stringent restrictions may be required for particularly threatened environments.

New legislation is expected to be passed on the bases of the revised Article 7 of the classification installation law of 19th July, 1976, resulting from the air law of 30th December, 1996, which will allow the Ministries to issue more general regulations such as the 1st March, 1993 Arrêté. Accordingly, it is possible that the Arrêté may be re-born sometime in the future.

[Robert Byrd, Partner, Thomas Herbecq & Associés, Paris, France]

India

Environmental management, a term encompassing environmental planning, protection, monitoring, assessment, research, education, conservation and sustainable use of resources, is now accepted as a major guiding factor for urban planning in India.

In modern urban planning and development, environmental protection through parks and open spaces provides an important place in social ecology. The society at large, public spirited citizens and, most important, the legislature and

courts in India, are all playing an active role in eliminating the misery of disreputable housing conditions caused by urbanisation.

The Supreme Court of India has banned mining and construction carried on by urban developers within the vicinity of tourist resorts, as these activities cause serious impacts on local ecology and are also likely to disturb the water level and hydrology of the area. *(M C Mentha Vs. Union of India* JT 1996 Supreme Court 208) Construction of quarries and cutting of trees are now not permitted for any urban development project. *(T N Godavaran Vs. Union of India & Ors* CWP 202 of 1995 Supreme Court 1196.

In a recent development, the Courts have decided to form "green benches" to deal solely with environment problems. These benches alone would be empowered to deal with all matters, civil and criminal, relating to the environment. The Central and State Governments are strengthening environmental protection machinery by planning to provide more teeth to environmental audits by specialist bodies, which will be given power to inspect, check and take necessary action.

The environmental awakening in India, backed by legal sanctions, is a positive step towards building a healthy and clean society for future generations.
[Gautam Khaitan, Partner, O.P. Khaitan & Co., New Delhi, India]

Vietnam

Vietnam's forests after American war

Vietnam's forests were devastated during the Vietnam war (1961-72). The effects of war, particularly America's large scale application of the herbicide "agent orange", damaged over 2.2 million hectares of forests. This large scale forest defoliation left Vietnam with severe health and environmental problems, including agent orange contamination, soil erosion and significant loss of animal and fish habitat.

After the war, Vietnam carried out a massive mangrove reforestation programme in the south, and established protected forest regions in the central and northern highlands. As a result, the forests in Vietnam were thought to be gradually recovering. However, recovery prospects have been dampened by recent large-scale industrial and infra-structure developments. As a result of these new developments, Vietnam's forests are once again under siege. How is Vietnam's legal system positioned to protect the forests from the familiar threats of irresponsible exploitation?

Legal reform and environmental policy

The legal system has undergone several important changes during the past 20 years. Prior to 1986, Vietnamese legal rights were viewed primarily in terms of citizens' duties to the State and the party. Laws were meant to circumscribe the behaviour and liberties of individuals, not the government. Some of the important reforms of the legal structure, from the point of view of the environment, are:

- In 1992 a new comprehensive environmental agency was created, the Ministry of Science, Technology and Environment (MOSTE), whose responsibilities include environmentally reviewing projects proposed by other state agencies, such as the Ministry of Agriculture and Food Industries and the State Commission on Corporate Investment (SCCI). MOSTE's review and approval is an administrative prerequisite to final project authorisation.

- In 1991 Vietnam adopted the *Law on Forest Protection and Development (Forest Law)* and in 1994 it enacted the *Comprehensive Law on Environment* (the *Law on Environment)*. The *Forest Law* requires the Government to preserve the forest resources of the nation, restore barren lands within the forestry sector, and protect water catchment areas and threatened wildlife. The *Law on Environment* calls upon state agencies to establish plans to prevent environmental degradation and prohibits activities that "... destroy ecological equilibrium." It also provides that "... persons who take advantage of their positions of power to infringe environmental protection laws shall be disciplined or criminally prosecuted."

- In 1993 Vietnam signed the *United Nations Convention on Biological Diversity which* requires signatory nations to promote "... the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."

Rural Poverty and Deforestation

The legal reforms and improvements in the environmental policy field provide a solid regulatory framework to ensure sustainable management of the nations's forests, *if* they are effectively enforced. The process of implementation, however, has been difficult and slow. Rural poverty and population pressures have impeded forest protection efforts and have allowed deforestation and environmental degradation to continue.

The Fate of Vietnam's Forests

The degraded condition of Vietnam's forests shows a clear disparity between official forest management policy and actual

forest management practice. In part, the disparity can perhaps be attributed to corruption and Vietnam's continuing reliance on scientifically outdated and ecologically unsustainable forest management models. It is also a reflection of Vietnam's larger struggle to bring state policy under the rule of law. In this regard, environmental and forestry law are encountering the same basic obstacle as the banking, commercial and corporate fields, namely, difficulty in developing legal mechanisms that allow citizens to ensure that laws are enforced.

In conclusion, without an effective means of ensuring that environmental laws and policies are in fact followed, Vietnam's forests inevitably face a sad future.

[Source: Paul Stanton Kibel, *The Pacific Environment and Resources Centre*, San Francisco, USA.*]*

Comparative Table of Environmental Convictions:
January - March 1997

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	18	10	3	5	$ 60,000
	10	5	3	2	$ 20,000
	11	7	1	3	$ 20,000
WPCO	37	27	6	4	$125,000
	23	18	4	1	$ 60,000
	17	12	1	4	$ 50,000
NCO	36	18	4	14	$100,000
	33	9	6	18	$180,000
	39	15	11	13	$ 180,000
OLPO	3	1	-	2	$ 30,000
	-	-	-	-	-
	1	1	-	-	$ 10,000
DASO	2	2	-	-	$120,000
	-	-	-	-	-
	-	-	-	-	-
WDO	14	14	-	-	$ 25,000
	14	13	1	-	$ 90,000
	11	11	-	-	$ 20,000
Total	110	72	13	25	
	80	45	14	21	
	79	46	13	20	

January figures appear on the first line, February figures on the second, and March figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

ABBREVIATIONS

AFD	Agriculture & Fisheries Department
APCO	Air Pollution Control Ordinance
CFCs	Chlorofluorocarbons
DASO	Dumping At Sea Ordinance
EC	European Community
EE	Estern Express
EPCOM	Environmental Pollution Advisory Committee
EPD	Environmental Protection Department
EXCO	Executive Council
FEER	Far Eastern Economic Review
HKS	Hong Kong Standard
HKU	University of Hong Kong
JLG	Joint Liaise Group
LDC	Land Development Corporation
LEGCO	Legislative Council
LS	Legal Supplement
NCO	Noise Control Ordinance
NT	New Territories
OLPO	Ozone Layer Pollution Ordinance
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

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