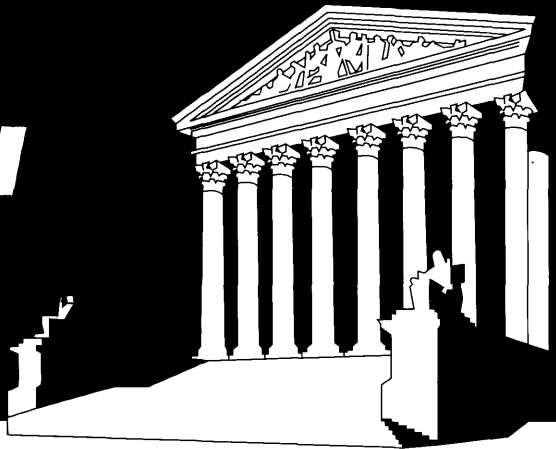


Environmental Impact Assessment: New Law and Procedures



The Government's long awaited environmental impact assessment legislation was enacted in February. Twenty years after legislation was first suggested in Hong Kong it is now becoming a reality. The legislation, perhaps more than any other lately introduced by the government pertaining to the environment, will have a significant affect on qualifying developments. This month J.A. McInnis looks at the background, the new procedures and the consequences for developers.

Background

The advent of environmental impact analysis (EIA) dates back to 1969 when the United States first began to ask for information on the likely environmental consequences of certain land uses and projects. The measures, which were set out in their National Environmental Policy Act of 1969, had a tremendous influence on other countries. Canada was the first to follow the American lead and enacted legislation in 1974. Australia followed suit and the Netherlands became the first country in Europe to adopt legislation in 1981. In Asia, the practice of EIA was introduced very early on by Thailand in 1978 when the National Environmental Quality Act was passed. More recently in Thailand, new legislation was passed in 1992. Japan and the Philippines have long standing practices in this area. Europe as a whole adopted community legislation through a 1985 directive which mandated assessments on a wide variety of projects. Further impetus was given to legislation by other international organisations such as the OECD and the United Nations which have supported recommendations concerning EIA. This legislation and this formal organisational support have fostered development of environmental impact assessments.

Hong Kong Background

Locally, even though no specific legislation was in place, the practice of ad hoc environmental assessments developed. In this regard, occasional high profile developments were viewed as needing such attention. As early as 1990 the Environmental Protection Department (EPD), in an Advice Note (2/90), required developers to notify them at an early stage of project planning if it was likely to have an adverse impact on the environment. This advice was updated in 1992, (2/92) and was entitled *Application of the Environmental Impact Assessment Process to Major Private Sector Projects*. The Advice Note required developers to submit a *project profile* to the EPD. The EPD then undertook the environmental review to decide whether a full scale EIA was required. It has been the government's policy to release public sector EIA reports and encourage the same approach with private sector reports. Guidelines were given in this regard in Appendix D to the 2/92 Advice Note. Examples of EIA reports can thus be found; for instance: *Island East Transfer Station dredging of WENT fairway*; *the Management of Fuel Ash originating from Power Generation* (at Lamma island); *the Mobil Oil Hong Kong Limited Tsing Yi Fuels*

Terminal Project, etc. These are only a few of the more than 300 EIAs which have been done locally under the old procedures. The Advice Note pertains to *private sector* developments. Public sector developments were subject to similar procedures which were set out in a Technical Circular (2/92) issued by the Planning, Environment and Lands Branch entitled *Environmental Impact Assessment of Major Development Projects*. These procedures would have to be supplemented by relevant local legislation; the Hong Kong Planning Standards and Guidelines, and occasional other technical circulars, advice notes and internal memoranda from these and related departments. The EIA would of course not exempt a developer from any relevant permit, license, or approval procedures which might otherwise be required. The EPD itself was fairly proactive in assisting applicants to satisfy these procedures. When it was determined that a full EIA was required a process existed and governed, even in the absence of the new legislation. That precise process is not the focus here; however, it should be underscored that familiarity with the process and past practice will considerably ease one's understanding of the process under the new legislation. This is because the new legislation does not significantly change the procedures which have governed. It is of course also the process that continues to govern until such time as the enacted legislation is brought into force.

New Procedures

The new procedures apply to *designated projects* which are listed in Schedules 2 and 3 of the legislation. The Schedules would have to be consulted as definitions are included which serve to either limit or expand the ordinary meanings given to the terms. Apart from certain large scale industrial, utility, or process plant and civil developments, several other types of designated developments should be noted including those which affect roads; defined community facilities; certain tourist and recreational developments; and residential developments of not less than 2000 flats when not served by public sewerage networks once occupied. In addition, virtually all developments or building works partly or wholly in an existing or gazetted proposed country park or special area as expanded upon qualify as *designated projects*. Certain decommissioning works are also *designated projects*. If the development involves a *designated project* then an *environmental permit* will be required from the EPD. The *environmental permit* is new and the legislation sets out a clear prohibition on carrying out any *designated project* unless it is obtained (s 9). Provision is made in the legislation concerning the suspension, cancellation or variation of such permits.

Designated project

A person who is planning a *designated project* must apply to the Director of the EPD to proceed (s 5). He must submit a *project profile* that complies with the technical memorandum. Power to issue the technical memorandum is given under s 16 and the memorandum will eventually be available through the EPD. The technical memorandum is currently available in draft as it can only be formally

introduced in Legco for negative approval after enactment of the legislation and the Advisory Council on the Environment has been consulted. The terms of the EIA will be set out in a study brief which the Director must give to the applicant within 45 days of the application. Failure on the Director's part to reply within this timelimit results in deemed approval of the application. The Director can also allow the applicant to apply directly for the *environmental permit* if he is satisfied that the project is adequately assessed and the EIA report information and findings are still relevant. Even assuming the grant of an *environmental permit* the Director can still impose conditions on the applicant. Notification is also given as the process proceeds to the ACE. No time limits are imposed in the first place on the applicant to produce his EIA and he will thus be guided by commercial considerations. Once the EIA is submitted the Director must then decide within 60 days whether it meets the requirements of the study brief and technical memorandum or not. If so, the report must be exhibited for public inspection. Once again, a default deemed approval exists if the Director fails to give his answer within the 60 days. The 'where' and 'when' of the public inspection may have to be given in advertisements. The intention is to introduce a modest form of public participation in the process albeit indirectly. Comments can be given both by the public and the ACE which the EPD could use to require further information from the applicant. The question of the extent of public participation in the EIA process itself is controversial and opinions differ widely. Thus, for example, the Hong Kong Institute of Planners calls for greater public participation while industry spokespersons note that it is often time-consuming, costly, and largely complaint driven: see the comments in the *Hong Kong Environmental Law Association Newsletter* (1996) vol. 3.1. At a minimum though public consultation is important for no other reason than that the absence of comments from the public and the ACE deprives the Director of the right to call for any further information from the applicant (s 8(2)) before deciding to issue the *environmental permit* conditionally, unconditionally or not at all. If the EIA report is rejected then reasons must be given. It should be noted that appeal procedures are also set out in the legislation and appeals must be taken from the decision within 30 days. Once issued an *environmental permit* may still be suspended, cancelled or varied. In fact the Director retains a right to re-enter the process when conditions change. In this respect, where the responsibility for a *designated project* itself changes, the person assuming the new responsibility must himself apply for an *environmental permit* (s 12). This does not mean that the process is repeated necessarily though. Instead, if the new person can satisfy the Director *that there has been no material change to the designated project* since the permit was originally issued then the Director will issue a new permit. The 30 day time limit for reply on the part of the Director applies and thus approval will be deemed to have been given in accordance with the original conditions if exceeded. The application process may be shown by way of diagram.

Other features

There are other features of the new legislation which should be mentioned although the focus of this article is upon the application procedures. Thus, in common with other regulatory legislation, there are sanctions for breach. Offences under the legislation relate primarily to the *environmental permit* and as such the carrying out of a *designated project* without such permit or breaching conditions in respect of the permit is punishable by both fine and imprisonment. The fine is heavy and may total \$2 million for a first offence and \$5 million for a second or subsequent offence. Imprisonment may be imposed for up to 6 months or two years respectively. In addition, a person for whom the *designated project* is constructed, operated or decommissioned may similarly be punished. There are nuances involved in these distinctions but space does not permit their full explanation. It may also be noted that other aspects of the legislation empower entry and inspection by authorised public officers and allow for recovery of costs. In conclusion, with these powers and offences, the deterrent features of the legislation are great and should foster compliance.

Summary

The Environmental Impact Assessment Ordinance will have some of the most far reaching consequences of any new regulatory legislation introduced in Hong Kong during the last two decades. The process itself is not entirely new and has been going on in a somewhat modified form under precursors to the legislation. However, now, with the enactment of legislation, the process has been legitimated and publicised. Environmental impact assessments will take on a more visible and, as a result, more important role than they have to date. For developers and others affected by the legislation additional resources and more attention to the evaluation criteria will have to be paid to ensure that projects are approvable or risk the commercial consequences. Eventually, when projects do qualify, one additional significant approval will have to be obtained. It is, as noted, one *additional* approval which we are speaking of and in this respect must be added to other planning and building approvals which are required. If other jurisdictions serve as any guide in this regard, this approval may well end up being the most important.

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The application process may be shown by way of diagram:

Included as a designated project, s 4 and scheds 2 and 3	➔ App must apply for environmental permit, s 5(1)(b)	
App must submit project profile in accordance with technical memorandum, s 5(2)(a)		
↓ Dir may request further information within 14 days, s 5(4)	➔ Dir must notify ACE, s 5(3)	
↓ App prepares EIA in accordance with technical memorandum and study brief, s 6(1)(a),(b)		
↑ Dir must decide whether EIA meets requirements, s 6(3)	➔ If no, then reasons must be given, s 6(6)	
↓ If yes, then public exhibition, s 6(4)	Public inspection and comments back within 30 days, s 7(3)	➔ ACE comments back within 60 days, s 7(5)
↑ Dir may ask for further information within 14 days of comments, s 8(1)		
↓ Dir must approve within 30 days of expiry of public inspection with conditions or reject EIA, s 8(3)	➔ If no, then reasons must be given, s 8(8)	
↓ Dir must place approved EIA on register, s 8(5), 15		
↓ App applies for environmental permit, s 10(1)		
↓ Dir grants or refuses environmental permit having regard to EIA etc s 10(2)	➔ Dir must advise App and ACE of same within 30 days, s 10(3)	➔ App must appeal within 30 days, s 17
↓ Designated projects proceeds	➔ Surrender of environmental permit, s 11	
↓	➔ Suspension, variation, or cancellation of environmental permit, s 14	
↓	➔ Cessation order, s 24	
↓ Issue of further environmental permit when responsibility changes, s 12		