

EIA Ordinance – A Useful Tool to Shape Our Future

Introduction

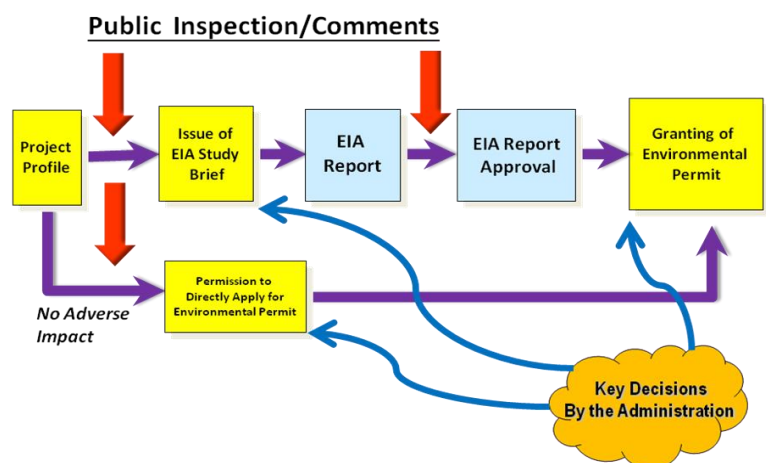
Systematic environmental planning and assessment in Hong Kong started in the 1980s when the process was carried out through administrative channels. In January 1997, the Hong Kong Environmental Impact Assessment Ordinance (EIA Ordinance) was enacted which provides a legal framework for applying the EIA process to certain projects¹ and makes the recommendations in EIA reports legally enforceable through an environmental permit (EP) system. Yet, after receiving thunderous applause when the legislation was launched, the road to put the statutory process into practice has been bumpy. Walking down the road, the EIA authority holds a double-edged sword. On one edge it provides coercive powers for the authority in rejecting substandard reports or taking enforcement actions against violations. On the other, however, there are provisions for project proponents and interest parties to lodge appeals or judicial reviews against decisions made.

The Statutory EIA Process

The Environmental Protection Department (EPD) of the Hong Kong Special Administrative Region (HKSAR) Government is the executive arm of the EIA Ordinance. Under the Ordinance, project proponent submits a project profile to EPD, describing the details of the proposed development. Based on the project profile and any public comments received during the public inspection period, the EPD will issue an EIA study brief to the project proponent setting out the coverage and requirements of the EIA report. After completing the EIA report, it will be submitted to the EPD for review and approval. There will be another stage of public inspection and comments. If the EPD is satisfied that the relevant requirements under the Ordinance are met and that relevant environmental issues raised by the public during the public inspection period have been addressed, then approval will be given to the EIA report. The process is summarized in Figure 1 below.

The EIA Process

The blue arrows in the figure show the key decisions made by the authority in processing the approval applications.



¹ The EIA Ordinance requires that environmental permits are required for the construction and/or operation of designated projects as defined under Schedule 2 and Schedule 3 of the Ordinance. The list of projects is available at <http://www.epd.gov.hk/eia/english/legis/s2.html>

Judicial Review (JR) in Hong Kong

Article 35 of the Basic Law of the HKSAR states: “residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel”. Applicants for JR seek superior jurisdiction over decisions or proceedings of inferior courts or other public bodies or persons, because of flaws in the process that lead to the decision which is impugned. JR is different from an appeal in that it is not concerned with reviewing the merits of the decision in respect of which the application for JR is made, but with the decision-making process itself.

A person may apply for JR only if he has a “sufficient interest” in the matter, as when the decision in question interferes directly with the applicant’s personal or public rights or has adverse financial consequences for him. Unless under very special circumstances, an application for JR should be filed within three months after the said decision was made.

In principle, administrative decisions are subject to control by JR on the grounds of illegality, irrational (a test of *Wednesbury reasonableness*) or procedural impropriety. The application of administrative law principles is dependent upon the context. The court will always respond to the nature and circumstances of the individual case.

Application for leave to apply for the JR must be made to the Court of First Instance (CFI). Merits of the case are subject to the “Arguability Test”. If necessary, a leave hearing may be arranged to consider the “arguability” of the case. When the court grants leave to the JR, the case will be processed according to the established legal proceedings. Upon handing down of the judgment by the CFI, either parties (i.e. the applicant or respondent) may apply leave for a review at the Court of Appeal (CA). Eventually, the parties involved may apply for further escalation for a final judgment at the Court of Final Appeal (CFA).

On an application for JR, the court may grant an order of *mandamus*, *certiorari* or prohibition, an injunction or a declaration. These remedial orders could be claimed as alternatives or in addition to each other and damages could also be sought.

Why EIA-related Decisions are JR-prone?

Over the past years, one can see a general increase in public awareness of environmental protection and the demand for more transparent EIA process and better public engagement. The Hong Kong EIA Ordinance provides a statutory process to ensure high transparency of all EIA reports and related documents. This could facilitate better public engagement but may also attract challenges on EIA reports. Stakeholders with different interests may also resort to legal challenges on projects which they considered as detrimental to their interests. The first judicial review case was lodged in 2003, some six years after the implementation of the EIA Ordinance. Yet, from 2011 to 2013, three judicial reviews have already been heard by the court, involving projects ranged from a \$7.5 billion mega infrastructure project to a local 200m long bathing beach. Table 1 gives an overview of the JR cases handled in recent years.

Table 1

Project Name	JR application	Court Judgment	Key Issues of Dispute
Permanent Aviation Fuel Facility	Nov 2002	CFI: 30 Sep 2003 CA: 18 Mar 2005 CFA: 17 Jul 2006	Risk Assessment
Hongkong-Zhuhai-Macao Bridge	Jan 2010	CFI: 18 Apr 2011 CA: 27 Sep 2011	Air Quality Stand-alone Assessment
Integrated Waste Management Facility	Apr 2012	CFI: 26 Jul 2013 CA: pending	Air Quality Procedural matters
Bathing Beach at Lung Mei	Jun 2013	CFI: 18 Feb 2014	Ecology

Apart from the general increase in public awareness on environmental issues, the surge in number of JR applications against EIA Ordinance related decisions may also be due to the intrinsic nature of EIA itself. As stated above, the prerequisites for a successful JR application include (i) “sufficient interest” in the matter; and (ii) an “arguable” case. On (i), it could be easy to establish that a person will have interests or concerns on the pollution emitted from a chimney, impacted ecosystem or creation of an eye-sore in the country park, even though he may reside far away from the project site. It is also not too difficult to satisfy (ii) as EIA report encompasses a wide spectrum of topics and issues and it is merely impossible or not necessary for an EIA to address every single issue to the farthest extent. It should also be noted that the judges are not experts in environmental science and it would be difficult for them to set a high threshold in granting leave applications.

High legal costs may discourage claimants for bringing in weak or frivolous claims cases for JR, which might affect the smooth running of public services and government projects. Yet, in Hong Kong, legal aid is available to cases in CFI, CA and CFA. Legal aid will be granted if the applicant can satisfy the statutory criteria as to the financial eligibility and the merits for taking the legal proceedings. As a matter of fact, in three out of the four JR cases in Table 1, the applicants obtained legal aids in launching the JR and subsequent appeals.

Recent JR cases on EIAs

Hongkong-Zhuhai-Macao Bridge

The Hong Kong – Zhuhai – Macao Bridge (HZMB) includes 29.6 km dual 3-lane carriageway in the form of bridge-cum-tunnel structure comprising a tunnel of about 6.7 km; two artificial islands for the tunnel landings west of the Hong Kong boundary; and associated works². The EIA reports for the Hong Kong section of the project were approved and the related environmental permits were issued in October and November 2009 respectively. On 22 January 2010, a citizen from Hong Kong filed a JR application on the decisions of EPD in approving the EIA reports relating to the HZMB projects; and in granting the environmental permits for the construction and operation of the said

² The associated works include civil and structural works, environmental mitigation, drainage, electrical and mechanical, traffic control and surveillance system,

projects. On 18 April 2011, the CFI handed down a judgment and held that because of the absence of a quantitative “stand-alone”³ analysis of the projected environmental conditions without the projects in place in the EIA reports, EPD’s said decisions to approve the EIA reports were quashed. On 13 May 2011, EPD then lodged an appeal against the CFI judgment. The appeal was heard from 23-25 August 2011 and the Court of Appeal (CA) handed down a judgment on 27 September 2011 which allowed the Director’s appeal and the Director’s decisions to approve the EIA reports and to grant the related EPs (which had previously quashed by the CFI) were restored. As a result of the legal proceedings, the commencement date for the projects was delayed for about 2 years and an estimated direct economic loss to the Hong Kong Government of US\$ 1 billion, according to the information from the project proponent.

Bathing Beach at Lung Mei

Unlike the HZMB project, the Lung Mei project is rather a small scale local project involving forming an artificial bathing beach of about 200m wide. The EIA report was completed and approved by the Director in November 2008 and EP issued in April 2010. In June 2013, a member of the Save Lung Mei Alliance (an alliance formed to protest against the project) filed a JR application. The reliefs sought, amongst others, include an order of *certiorari* to bring up and quash the decision by the Director because from the recent information, the ecosystem at the project site has changed.

A leave hearing was held in August 2013 and the court granted leave to the JR application. Substantive hearing was heard on 18 Feb 2014 and the judgment is pending.

Practical Means to Avoid Conflicts

JR is useful in a sense that it allows ordinary citizens to monitor the government to prevent abuse of power. However, court proceedings are deemed to be time consuming and costly. As a responsible government, she should explore ways to improve the EIA system and to avoid unnecessary legal challenges in the first place.

Development of Professionalism

EIA professionals, including authorities, project proponents and consultants, should seek to grasp and build up their knowledge on relevant legal aspects, in particular on those areas that might possibly be touched upon in JR cases. For instance, what sort of factors should be taken into account in the decision-making process, how various factors and comments should be thoroughly considered and how the records should be properly kept and referred to so that the decision could be considered as *Wednesbury* reasonable.

A better understanding on the legislative intention when a particular clause in the Ordinance was drafted would certainly be useful and would also help the court and the public in interpreting the provisions.

³ “stand alone” analysis is to compare the environmental impacts of the scenarios with and without the project in place in order to assess the direct impact of the project and propose relevant mitigation measures to minimize the environmental impact to the satisfaction of the authority.

Documents Issued under the Ordinance

Apart from the Ordinance itself, other documents issued during the legal process could become records and evidence in a subsequent JR hearing. For example, the EIA Ordinance requires that an EIA report shall meet the requirements as stipulated in the EIA study brief issued on a case specific basis. Hence the study brief should be carefully prepared to avoid ambiguities or contradictory statements. Similarly, the EP issued should be clear and concise and fully cover relevant recommendations in the EIA report.

Early Public Engagement

Many of the JR cases may have come from misunderstanding or critiques that public comments have not been fully addressed. While the transparency of the EIA system in Hong Kong has already greatly enhanced/enabled public involvement process, project proponents could take one step further to advance the public engagement process to early planning stage when the project location, alignment, design or even the fundamental concept could be modified. There is also a call for mindset change that EIA should not be viewed as hindrance to projects but a convenient pull of public resources to further improve the project. After all, avoiding the need to go through the tedious legal proceedings would surely help the project implementation.

International Connections

No two EIA reports can be identical. There are always new issues arising from every EIA study as well as JR case. Experience sharing with international EIA practitioners will surely improve the quality of EIA reports as well as to enhance confidence of the assessment results. Regular conferences, workshops or even online discussion forums will surely be beneficial to all EIA practitioners in creating a resourceful expert and knowledge base.

Conclusion

The right to institute legal proceedings against the acts of the executive authorities in the courts is deeply rooted in the principle of the rule of law. By guaranteeing such a right, the courts should maintain the principles and parameters of the law, control the exercise of discretionary powers, and provide remedies for unlawful acts of the government. JR should not be perceived as an obstacle to the implementation of projects.

While the court judgments may help clarify possible ambiguities in the Ordinance, many of the legal proceedings (which are time consuming and costly) could in fact be avoided if the EIA professionals can look beyond the EIA report and walk extra miles to address the society's expectations, understand the legal provisions and attend to the concerns/suggestions raised during public engagements and turn EIA report into a useful tool to shape our future.

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 - [Judgment from The High Court for "Hong Kong-Zhuhai-Macao Bridge"](#) (English only) (18 April 2011)
 - [Judgment from The Court of Final Appeal for "Permanent Aviation Fuel Facility"](#) (English only) (17 Jul 2006)
 - [Judgment from The Court of Appeal in The High Court for "Permanent Aviation Fuel Facility"](#) (English only) (18 Mar 2005)
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