

LETTERHEAD OF ADVISORY COUNCIL ON THE ENVIRONMENT

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10 December 2001

Clerk to Panel,
(Attn.: Mrs. Mary Tang)
LegCo Panel on Environmental Affairs
Legislative Council Building,
8 Jackson Road, Central
Hong Kong

Dear Mrs Tang,

**LegCo Panel on Environmental Affairs
Meeting on 13 December**

Thank you for your invitation dated 5 December 2001.

I have consulted the Chairman of the Advisory Council on the Environment (ACE) and would like to inform you that the Council will not send any representative to attend the captioned meeting scheduled for 13 December 2001. Instead, please find enclosed for your reference the following ACE papers/records of meetings that are relevant to the issue in question -

- (a) ACE-EIA Paper 14/2001 entitled "Observations about the statutory environmental impact assessment process arising from the Appeal Board determination";
- (b) ACE Paper 44/2001 entitled "Report of the 63rd and 64th Environmental Impact Assessment Subcommittee meetings";
- (c) Extract of the minutes of the 63rd and 64th meeting of the Environmental Impact Assessment Subcommittee held on 8 October and 5 November 2001 respectively; and
- (d) Extract of the draft minutes of the 90th meeting of the Council held on 27 November 2001.

Yours sincerely,

(Ms Jessie Wong)

Secretary,

Advisory Council on the Environment

**Environmental Impact Assessment Ordinance
Observations About the Statutory EIA Process
Arising from the Appeal Board Determination**

Purpose

The purpose of this paper is to summarize the key observations about the statutory EIA process arising from the Determination handed down by the EIA Appeal Board on 30 July 2001 regarding the Sheung Shui to Lok Ma Chau Spur Line case, and the possible implications for future operation of the EIA Ordinance (EIAO).

Advice Sought

2. Members of the ACE EIA Sub-committee are invited to note the observations.

Background

3. The Spur Line is a Designated Project under Schedule 2 of the EIAO. On 16 October 2000, the Director of Environmental Protection (DEP) decided not to approve the EIA report and not to issue an Environmental Permit for the Spur Line.

4. On 10 November 2000, KCRC lodged two appeals to the EIAO Appeal Board against DEP's decisions not to approve the EIA report and not to issue an Environmental Permit. An Appeal Board was set up and chaired by Mr. Barry Mortimer, with Professor Joseph Lee and Mr. Stanley Yip as members. The Board heard the case for 27 days between April and June 2001, and handed down its Determination on 30 July 2001 dismissing both appeals.

5. EPD has reviewed the implications of the Determination for the statutory EIA process. Upon members' request, this paper is prepared to summarise the key observations arising from the Determination and the suggested follow-ups to facilitate Members' discussion.

General EIA Process Principles Mentioned in the Determination

6. When considering the submissions from both sides and the evidence on appeal, the Appeal Board has mentioned in the Determination some general EIA process principles that are noteworthy:

- (a) the underlying aim of the impact assessment process is to ensure that no designated project is undertaken unless it is shown to be environmentally acceptable;
- (b) while the end result is important, this is achieved by a series of steps in the process which lead to the decision whether to approve the EIA report and grant a permit. Each stage is important. The Technical Memorandum (TM) provides the detailed criteria to be applied to each stage;
- (c) public participation in the process prior to DEP's approval or rejection of the report is an important step in the process;
- (d) the basic principle is that major proposals which are not assessed in the report must at least be the subject of a further assessment and an amended report for further exhibition for public consultation and re-submission to the ACE; and
- (e) it is necessary in the implementation of the EIA process that the public interest in both protecting the environment and ensuring efficiency in decision making for major projects should be kept in mind. It is important that the process is implemented in a certain, efficient and timely manner.

Key Reasons for Dismissing the Two Appeals

7. The Appeal Board had considered substantial submissions from both sides during the appeal process. The two appeals were dismissed by the Appeal Board for the following key reasons which are useful references for the future:

- (a) the report cannot be approved without it being amended to include all new and significant proposals that have emerged since it was prepared;
- (b) the validity of the assessment in the report will be affected by the new proposals. These new matters should be confirmed and assessed as part of the study and report;

- (c) it is not the intention of section 4.5.2 of the TM that either DEP or the Appeal Board should exercise their discretion for major new proposals of the kind under consideration to be accepted with conditions as a substitute for amendment of the report, its re-exhibition for the public and its re-submission to the ACE;
- (d) new proposals of this nature at the appeal stage circumvent the assessment process laid down in the Ordinance and TM. In particular, they circumvent proper public participation and the participation of the ACE; and
- (e) the report, when approved, must be entered in the register and hence acquires a special status. For major new proposals, it is not appropriate to substitute detailed conditions for assessments which must be in the body of the report and available for future reference. It is necessary to set an appropriate standard for EIA reports in the register.

Key Observations/Suggestions Made by the Appeal Board

8. Apart from the decision mentioned above to dismiss the appeals, the Appeal Board made certain suggestions and observations for future reference. These observations would need to be read in the context of the full Determination handed down by the Appeal Board on 30 July 2001. It is important to note that each project is different in terms of the likely environmental issues they may give rise to and the environmental characteristics of the site(s) in question, and should be considered on a case-by-case basis. Key suggestions and observations about the statutory EIA process are summarised in paras. 9-13 below.

Assessment of Alternatives

9. The Board was mindful that in the case of the Spur Line where the dominant issue is about ecology, the issue of consideration of alternatives bears very much upon the guiding principles in sections 3.1(a) and 5.4.1(a) of Annex 16 and section 4.3.1(d) of the TM. It is therefore important not to generalize the observations herewith for other projects which might be of different nature and involve different issues. Section 3.1(a) of Annex 16 of the TM reads:

“areas and/or habitats of ecological importance (e.g. those listed in Note 1 and 2 of the Appendix A) shall be conserved as far as possible. Any project that is likely to result in adverse ecological impacts in areas of ecological importance shall not normally be permitted unless the project is necessary; it has

been proven that no other practical and reasonable alternatives are available and, adequate on-site and/or off-site mitigation measures are to be employed;”

10. The Board was of the view that certainty on the nature of alternatives to be studied at an early stage must be beneficial to the process, and where possible the EIA study brief should be specific about the possible alternatives to be investigated in an EIA study.

11. The Board stressed that what is required is a careful but balanced approach which takes into account all the circumstances. In assessing whether an alternative is practical and reasonable, the Board considered that the matters which must be considered in assessing whether an alternative is “practical and reasonable” include adverse environmental impacts, engineering constraints, extra-time involved, additional cost and even government policy.

12. While the Spur Line case is related to the ecological issues, other projects might result in other adverse environmental effects. When the project is likely to result in adverse environmental effects (e.g. noise impacts, ecological impacts, water quality impacts due to mud disposal, landscape and visual impacts, fisheries impacts etc), there are provisions in the TM and its annexes requiring assessment of alternative alignment, different siting, alternative layout, alternative programme, alternative construction methods, alternative land use, and alternative designs.

13. Based on the observations from the Determination of the Appeal, from the wording in the provisions in the TM, and from the structure of Schedule 2 and 3 of the EIAO where designated projects are grouped into different categories, general guidance can be drawn along the following line after further discussion with parties concerned:

- (a) the need for consideration of alternative arises if the project is likely to result in adverse environmental effects. In other words, if the project is unlikely to result in adverse environmental effects, the need for consideration of alternatives does not arise under the EIAO;
- (b) in the context of the current structure of the Schedule 2 and 3 of the EIAO (in the sense that proponents apply for environmental permits or EIA report approvals by virtue of the project being a certain category (or categories) of Designated Project under Schedule 2 or 3) and the wording in the various provisions of the TM, consideration of alternatives would normally be confined to alternative alignment, different siting, alternative layout, alternative design, alternative land

use arrangement, and alternative construction and programme, rather than completely different means of achieving the purpose of the project; and

- (c) in considering various alternatives, according to the Appeal Board's Determination, the primary consideration is whether applying the precautionary principle the project is shown to be environmentally acceptable.

Approval of EIA Report and Public Participation

14. Section 4.5 of the TM provides DEP and the Appeal Board with a discretion to approve an EIA report with conditions when the report requires amendment but only in circumstances set out in section 4.5.2 of the TM. Section 4.5 of the TM reads as follows:

"Approval of the EIA Report

4.5.1 After the public inspection of the report and, if required, the consultation with the Advisory Council on the Environment, the EIA report shall be approved with or without conditions if

- (a) the requirements in the EIA study brief have been met;*
- (b) the quality of the report meets the requirements as set out in section 4.4 and the results and conclusions are technically sound and reliable;*
- (c) it addresses relevant environmental issues raised by the public and the Advisory Council on the Environment during the public inspection period; and*
- (d) all relevant environmental principles and criteria laid down in this technical memorandum can be met and the residual environmental impacts are within the relevant criteria, unless with sound environmental justifications and without long term serious environmental implications.*

4.5.2 In case the report requires certain amendments but such amendments will not affect the validity of the assessment and the overall results and conclusions of the report, the Director may approve the report with conditions."

15. The discretion provided by section 4.5.2 of the TM is to allow the approval of an EIA report with appropriate conditions in circumstances where the report requires an amendment which will not affect its validity and the overall results and conclusions of the report. The Board considered it as a "safety net" provision.

It allows approval and therefore allows projects to go ahead in a timely way after a relatively minor oversight, omission, change of circumstance and the like without unnecessarily requiring an amendment which may entail the report being re-exhibited and returned to ACE for comments.

16. The Board considered public participation in the EIA process an important step. On the other hand, the discretion under section 4.5.2 is available and should be used to avoid unnecessary return to the public arena. Without it, the process could become legalistic and inefficient. However, having said that, the Board opined that with major new proposals which are not assessed in the EIA report, it is not open to the Board (and thus DEP) to properly exercise its discretion under section 4.5.2 and approve the report with a set of conditions as a substitute for amendment, proper assessment, approval and registration of an amended report.

Setting Conditions

17. The Appeal Board recognized that DEP will often impose conditions on his approval of both the EIA report and the Environmental Permit. The Board also noted that there is a difference in emphasis between conditions to the approval of an EIA report, which usually are to ensure that matters dealt with in the report are completed, and the conditions to a permit, which are to ensure that the report is complied with before, during and after construction, and the measures defined in the report are carried out.

The Importance of an Approved EIA Report

18. During the hearing, it was proposed that it should be open to the Appeal Board, and thus to DEP also, to grant a permit with conditions without approving the EIA report. The Board, however, considered that except in the various circumstances set out in section 5 of the EIAO, there is no power to grant a permit with conditions even if proposals made after the EIA report render the project environmentally acceptable, but without an approved EIA report which will be subsequently registered under section 15 of the EIAO.

19. Moreover, it is mentioned above that an approved EIA report would acquire a special status by entering into the public register and can be relied upon during the period that it remains relevant for other projects. The Board considered that setting an appropriate standard of EIA reports in the register is necessary.

Appeal Board's Suggestions for Improvement of the EIA Process

20. The EIAO gives the EIA process a legal structure. Yet the Board considered it not a process which lies comfortably within a detailed legal framework,

and therefore much of its success depends upon the manner in which it is implemented. The consequence is that all involved are learning how best the various steps required can be implemented.

21. There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. It is necessary in the implementation of the process that both should be kept in mind. In putting its suggestions for improvement, the Board said that:

“...Our suggestions are an attempt to advance the process to increase its certainty and effectiveness. In fact, we believe that the object of putting the EIA process into a legal framework is to provide certainty in the process, the roles and timing. If implemented effectively the EIA Ordinance will improve efficiency in decision making for major projects.” (page 35 of the Determination)

22. The Board put forward the following suggestions with an attempt to advance the EIA process to increase its certainty and effectiveness:

- (a) good communication: The Board considered that the burden of fulfilling the requirements of the EIAO and the TM rests firmly on the proponent but he may require assistance from DEP to clarify his requirements and concerns. To ensure that the process is implemented in a certain, efficient and timely manner, there should be open, ready and frank communication between DEP and the proponent at all stages of the process. The Board considered that cooperation in achieving projects which are environmentally acceptable is the essence of the process.
- (b) the Study Brief: The drafting of a study brief follows the exhibiting of the project profile and the receipt of comments from the public and ACE. The drafting of the study brief then reflects the relevant concerns of the public and ACE. The Board saw the brief as the agenda for the rest of the process and where possible the terms of the study brief should be specific rather than general. Where clarification is required, this should be readily requested and helpfully provided.
- (c) the decision under Section 6 of the EIAO: The Board stressed the importance of DEP’s decision under section 6(3) and opined that DEP must ensure that the report complies with the requirements of the study

brief and the TM. An EIA report cannot be allowed for exhibition unless it meets those requirements.

- (d) further information after public consultation: DEP may seek further information from the proponent under section 8(1) of the EIAO to facilitate decision-making. The proponent's task under section 4.5.1 (c) of the TM is that the EIA report, which has been exhibited under section 7 of the EIA Ordinance, should address relevant environmental issues raised during the public inspection period. The Board considered it helpful if at that stage DEP indicates what relevant information he requires for his decision. The Board was of the view that in requesting information at this stage, DEP is not confined specifically to matters raised by the public or ACE, as the comments by the public or ACE may lead DEP to require some indirectly related information for his decision.

Follow-up

23. The Appeal Board Determination reinforced the importance and integrity of the EIA process in protecting the environment, and the need to ensure effectiveness, efficiency, certainty and reasonableness of the process and its requirements.

24. In light of the suggestions from the Appeal Board, EPD will further enhance communication with project proponents at various stages of the EIA process through the Environmental Study Management Groups or other mechanisms. The Administration is working out a number of measures to improve the EIA process for government projects.

25. EPD will particularize in the future EIA study brief the concerns and matters that require to be studied, and would in future be specific when seeking further information from the proponents. More attention would be given to the scoping of issues at the stage of public consultation on the Project Profile and the preparation of the EIA study brief.

26. In light of the observations and suggestions made by the Appeal Board, members of the ACE EIA Sub-committee may like to consider the following:

- (a) project proponents are encouraged to have informal dialogues with the Sub-committee at the early planning stage to exchange views on preparation of EIA reports, especially about the consideration of possible alternatives, any major environmental concerns that members might have about the project and the EIA study, and the likely

environmental friendly designs; and

- (b) it would be desirable if there could be focused attention at the stage of Project Profile in identifying key issues to be addressed in the EIA study, and if the comments from members of the Sub-committee during the stage of public consultation on the Project Profile could be specific, so that such concerns and matters could be particularised in the Study Brief to be issued to the proponent.

Environmental Protection Department
October 2001

**Report of the 63rd and 64th
Environmental Impact Assessment Subcommittee Meetings**

INTRODUCTION

At its meetings on 8 October and 5 November 2001, the Subcommittee discussed the following items -

- (a) Draft Guidance Notes under the Environmental Impact Assessment (EIA) Ordinance;
- (b) ACE-EIA Paper 14/2001 prepared by Environmental Protection Department (EPD) on *Observations about the Statutory EIA Process arising from the Spur Line Case*; and
- (c) ACE-EIA Paper 15/2001 on *Improvement to Tung Chung Road between Lung Tseng Tau and Cheung Sha*.

ADVICE SOUGHT

- 2. Members are requested to note this report.

VIEWS OF THE SUBCOMMITTEE

Draft Guidance Note on Environmental Impact Assessment Ordinance

- 3. EPD in conjunction with Plan D and AFCD have prepared eight sets of Guidance Note on different topics related to the EIA process. The objective of the Guidance Note is to provide reference for project proponents and to list out good practices on environmental impact assessment. The Guideline Note is subject to revision without prior notice. For legal

compliance with the EIA process, project proponents are advised to observe and follow the requirements in the EIA Ordinance and the Technical Memorandum.

Views and Recommendations of EIA Subcommittee

4. At the Subcommittee meetings, members' discussion focused mainly on the role of contractors in carrying out mitigation measures and the implementation schedule of mitigation measures; visual impact assessment especially that of noise barriers and cut slopes; the definition of "no net loss" principle; and the compilation of an ecological database.

Implementation schedule

5. The Subcommittee noted the important role of the contractors in implementing mitigation measures. Members agreed that the proposed implementation schedule on mitigation measures would facilitate contractors to have better understanding about the purpose of mitigation measures and enable them to identify alternatives if the original measures were not practicable.

Landscape and visual impact assessment

6. The Subcommittee noted the importance of landscape and visual impact assessment and was concerned about the impacts arising from noise barriers and slope works. Representatives of the Planning Department pointed out that a committee set up under the Highways Department was responsible for vetting the aesthetic design of highways structures including noise barriers. Members were also informed that relevant major works departments had their own landscape units to give advice on the quality of landscape works including treatment on slope for projects within their purview.

Definition of the "no net loss" principle

7. Individual members of the Subcommittee commented that paragraph 27 in GN 004/2001 regarding habitat compensation should be revised to give a clearer picture of the general policy for mitigating impacts on important habitats and wildlife as set out in the TM. The proposed wording in paragraph 27 was unsatisfactory in the sense that project proponents would not give priority to the "no net loss" and "like for like" principles. Instead they would focus on the carrying capacity and the ecological functions of the

compensation area which are difficult to define. AFCDD agreed to consider revising the wording of that paragraph.

Ecological database

8. On the subject of ecological database, AFCDD representative pointed out that the database would not remove the need for ecological survey required under the TM. It would provide a starting point for project proponents to conduct the ecological survey. The database would adopt the habitat rather than the species approach and that AFCDD would maintain and update the database for the reference of parties concerned. It was expected that a draft database would be available in end 2002.

The precautionary principle and cumulative impact

9. AFCDD agreed to consider the Subcommittee's suggestion of drawing up a GN on cumulative impact and precautionary principle in ecological impact assessment.

Observations about the statutory EIA process arising from the Spur Line Case

(ACE-EIA Paper 14/2001)

10. Arising from the Judgment of the EIA Appeal Board on the two appeals of the Spur Line project, EPD had prepared a paper for the Subcommittee summarizing the key observations about the statutory EIA process and the possible implications for future operation of the EIA Ordinance.

Views and Recommendations of EIA Subcommittee

11. Members discussed the paper at great length. Their discussion focused mainly on how the Subcommittee could assist in improving the EIA process. Topics discussed included the logistics of meetings; the extension of the consultation period on project profile; informal dialogue between the Subcommittee and project proponents and the quality of EIA reports.

Logistics of meetings

12. The Subcommittee re-affirmed the need to have a quorum for

meetings (i.e. half of the number of Subcommittee members) to ensure that the subject was thoroughly debated and considered before the Subcommittee agreed on a recommendation to the Council.

13. The Subcommittee also noted that the minutes of the meetings were taken seriously by the Appeal Board and confirmed that the current style of the minutes of the subcommittee were about right and that different views of individual members should be clearly recorded.

Project profile

14. On the feasibility of extending the 14-day consultation period for project profile, EPD pointed out that under the EIA Ordinance, DEP was required to respond to the project proponent within 45 days after receiving a project profile. During the 45-day period, EPD had to finish a series of actions, including the exhibition of the project profile, exchange of views with the relevant authorities, and drafting the study brief having regard to comments received on the project profile. Usually the study brief was finalized approaching the end of the 45 days. To extend the consultation period for project profile would cut short the time for drawing up the study brief. On the other hand, extension of the 45-day period might invite criticisms of delaying development projects.

15. The Subcommittee agreed that given the short consultation period, it was not necessary to provide DEP with a collective view of the Subcommittee on project profiles but it would be beneficial if the views of individual members could be circulated to other members for reference. The Subcommittee considered that the Authority should consider reviewing the 14-day consultation period on project profiles when suitable opportunity would arise.

Grounds for accepting or rejecting an EIA report

16. The Subcommittee agreed that the Subcommittee/Council's consideration of approving or rejecting an EIA report should be entirely on environmental grounds with reference to the EIAO and its TM.

Informal dialogue with project proponents

17. The Subcommittee agreed that informal dialogue with project proponents at an early stage would be useful. However, it was stressed that such informal dialogue should be on a voluntary and non-committal basis and that comments given at the meeting should not be taken as the overall indication of the Subcommittee in whatever circumstances. More specifically, there should be understanding that the comments of the Subcommittee should not pre-empt the Subcommittee's endorsement or rejection of the EIA report during the statutory EIA process. The Subcommittee also agreed that such informal dialogue should not be part of the normal Subcommittee meetings and that no record would be kept.

Quality of EIA reports

18. The Subcommittee was concerned about the quality of EIA reports but agreed that detailed examination of the quality of reports submitted was beyond its ability due to resource constraints. EPD pointed out that part of the problem related to the tendering mechanism in which a contract would usually be awarded to the consultant offering the lowest cost. Another problem was that the contract was usually priced on a lump sum basis which discouraged consultants to do additional work even when the need arose in the middle of the study. The Subcommittee considered that the issue should be brought to the attention of parties concerned.

Improvement to Tung Chung Road between Lung Tseng Tau and Cheung Sha

(ACE-EIA Paper 15/2001)

19. In November 2000, DEP confirmed that the EIA report of the proposed Landau North-South Link between Mui Wo and Tai Wan could not meet the requirements of the Technical Memorandum of the EIA Ordinance and the study brief. After reviewing all possible alternative solutions, the project proponent considered that improvement to Tung Chung Road would be the most promising solution. The consultant of the project has completed studying the possible options within a broad corridor along Tung Chung Road and has recommended a preferred alignment option.

Views and Recommendations of EIA Subcommittee

20. At the Subcommittee meetings, Members' discussion focused mainly on the design specifications of the project including vehicular speed; the suggestion to build a bigger road to cater for future economical development of South Lantau vis-a-vis the consideration to preserve the area according to the planned land use; the option of building a one-way tunnel while using the existing alignment as the other way; construction phase runoff and noise and landscape impact of the southern alignments.

Design specifications of the road

21. On the question of vehicular speed, the project proponent pointed out that the radii of curvature at the road bends could meet the design standard of 70 km per hour but the proposed speed limit for the road would be 50 km per hour because the maximum gradient of the road would be 15%. To use smaller radii of curvatures at the road bends would have no environmental advantages because the preferred alignment did not require any loop bends. The design had taken into account traffic assessments conducted by the consultant and that it could meet the traffic demand in 15 years. To meet traffic demand for 15 years was in line with the normal design practice for roads.

22. Individual Member considered that the road should be upgraded to allow a higher speed in view of the development of South Lantau into a tourist centre and the possible establishment of a link with Zhuhai either by land or by sea. It would not be cost-effective to expand the road after it has been built.

23. Other Members outlined the background of the project and stressed that the objective was to improve the safety of Tung Chung Road without creating adverse environmental impact on Tung Chung Stream and nearby areas. Furthermore, according to the South West New Territory Development Study, South Lantau was planned for recreation and conservation purposes. The improvement of Tung Chung Road should be planned in that context.

Alternative tunnel option

24. On the feasibility of building a one-way tunnel, the project proponent explained that the tunnel option would have serious impact on the

ecology of the area during the construction stage be it a one-way tunnel or two-way tunnel. Also, the existing Tung Chung Road even used as a single road would remain a substandard road with steep gradient.

Construction phase runoff

25. On the prevention of construction phase runoff, the project proponent indicated that a drainage pipe would be installed in the construction area to collect and deliver the site runoff away from the Tung Chung Stream during the construction stage. The feature would be maintained to collect the road runoff after completion of the road so as to reduce pollution to the Tung Chung Stream.

Noise and visual impacts of the southern alignments

26. On comparing the southern alignments, i.e. S1 and S3, the project proponent pointed out that S1 had the least visual and noise impacts because the plantation woodland nearby would provide a screen off effect for the road. Also, the residential area in Cheung Sha Sheung Tsuen area was mainly along the South Lantau Road. The noise impact of S1 on those sensitive receivers would be less than that of S3 on Tong Fuk Village.

Conclusion

27. The Subcommittee concluded that whilst giving early comments on the project, the comments given at this stage should not pre-empt the future recommendation of the Subcommittee when the EIA report was submitted during the statutory EIA process.

EIA Subcommittee Secretariat
November 2001

**Confirmed Minutes of the 63rd Meeting of the
Environmental Impact Assessment Subcommittee of
the Advisory Council on the Environment
held on 8 October 2001 at 4:00pm**

Present:

Professor LAM Kin-che (Chairman)
Mr. Otto POON (Deputy Chairman)
Mr. Barrie COOK
Professor Anthony HEDLEY, BBS, JP
Dr. HO Kin-chung
Mr. Peter Y C LEE, SBSSt.J
Mr. LIN Chaan-ming
Dr. NG Cho-nam
Miss Alex YAU
Miss Petula POON (Secretary)

Absent with Apology:

Mrs. Mei NG

In Attendance:

Mr. Elvis AU	Assistant Director (Environmental Assessment & Noise), Environmental Protection Department (EPD) (AD(EN)/EPD)
Mr. Cary HO	Senior Nature Conservation Officer (South), Agriculture, Fisheries and Conservation Department (AFCD) (SNCO(South)/AFCD)
Ms. Cora SO	Executive Officer (C), Environment and Food Bureau

In Attendance for Agenda Item 3:

Mr. Simon HUI	Principal Environmental Protection Officer (Audit & Assessment), EPD (PEPO(AA)/EPD)
Mr. Wang YUEN	Senior Environmental Protection Officer (Territory Assessment), EPD (SEPO(TA)/EPD)
Mr. P K CHAN	Senior Nature Conservation Officer, AFCD (SNCO/AFCD)
Mr. John KWOK	Senior Landscape Architect, Planning Department (Plan D) (SLA/PlanD)
Miss Winnie LAU	Senior Town Planner, Plan D (STP/PlanD)

**Agenda Item 4 : Environmental Impact Assessment Ordinance
Observations About the Statutory EIA Process Arising from the Appeal
Board Determination**

(ACE-EIA Paper 14/2001)

29. AD(EN)/EPD said that the paper set out the key reasons for dismissing the two appeals related to the Lok Ma Chau Spur Line EIA, the key observations and suggestions made by the Appeal Board to improve the EIA process. EPD accepted entirely the suggestions made by the Appeal Board and would put them into practice in future.

30. The Chairman asked Members to highlight major comments on the paper with particular regards to para. 26 and then focused on discussing how the Subcommittee could assist in improving the EIA process.

31. A Member echoed the point made in para. 26(b) that it was important to identify key issues to be addressed in the EIA study at the stage of project profile. He said that he had been writing in his comments and hoped that other Members would do the same.

32. A Member said that the paper was well prepared and the only suggestion he had was to draw up guidelines on the precautionary principle which at present was a vague concept difficult to apply.

33. A Member said that there should be ways to ensure the Director of Environmental Protection (DEP) to make effective decision on whether an EIA report met the requirements of the brief and the TM before allowing the report for exhibition under section 6(3) of the EIA Ordinance.

34. A Member commented that tax-payers would have saved the money involved in the appeals on the Spur Line case had there been better cooperation between the project proponent, the Authority and the Administration.

35. A Member agreed that cooperation between the relevant parties was no doubt important. However, he had reservation on DEP appearing a few weeks ago in a press conference on the tunnel option of the Spur Line together with the project proponent. During the press conference, it was announced that the new tunnel option would work even before the EIA study was completed. As regards the tunnel option, he agreed that it would be a better option as it could avoid the wetland in Long Valley and Kwu Tung and that the project proponent should have considered this option earlier.

36. A Member echoed the previous Member's comments regarding the press conference. He also agreed with another Member's point in para 34 above and disapproved of squandering public money in the EIA as well as the appeal procedures. In response to Members' comments, AD(EN)/EPD clarified that though DEP appeared at the press conference, he did emphasize that an EIA study on the tunnel option was still needed and that the EIA report would go through public consultation process in the same manner as other designated projects.

37. A Member also commended that the paper was well prepared. He, however, felt that the degree of influence of the Subcommittee's comments on DEP's decision was not clear in the legal context under the EIA Ordinance. The Chairman said that the Judgment of the Appeal Board did not refer to the Subcommittee but the ACE in general. Noting that one of the reasons for dismissing the appeals was not to circumvent the participation of the public and the ACE, the Chairman reckoned that the ACE's comments had been given due recognition in the EIA process.

38. SNCO(South)/AFCD welcomed Members' comments, in particular Mr. Poon's suggestion on the precautionary principle. He said that AFCD would consider drawing up the guideline as suggested. The Chairman said that the Subcommittee could further discuss issues related to ecological assessment at a future meeting.

Pre-Submission of EIA Reports - Consultation period on project profile

39. The Chairman said that the importance of voicing comments at the stage of project profile was well noted. However, given the 14-day consultation period, the Subcommittee was unable to provide collective inputs to DEP having regard to its monthly meeting schedule. He asked whether it would be possible to extend the 14-day consultation period on project profile.

40. In response, AD(EN)/EPD explained that the EIA Ordinance required DEP to respond to the project proponent within 45 days after receiving a project profile. EPD would exhibit the project profile on the second day receiving it, have detailed dialogues with the relevant authorities and start drafting the study brief having regard to comments received on the project profile. Usually the study brief was finalized on the 40th or 41st day. To extend the consultation period for project profile would cut short the time for drawing up the study brief. On the other hand, extension of the 45-day period might invite criticisms of delaying development projects.

41. In reply to a Member's question, AD(EN)/EPD said that belated comments on project profile would not be taken formally as comments arising from consultation but if the comments touched upon genuine concerns, EPD would take them into account when drafting the study brief.

42. A Member recalled that the Subcommittee had discussed the subject on project profile before. It was concluded that there was no need to submit a collective view of the Subcommittee but individual Members were encouraged to write to EPD. AD(EN)/EPD said that EPD would prefer having a wide range of views at the project profile stage so as to ensure the comprehensiveness of the scope of the study brief.

43. A Member considered that even if the Subcommittee would not submit a collective view on project profiles, early communication within the Subcommittee about potentially controversial issues would be beneficial. Following this point, another Member asked whether Members' comments on project profiles could be circulated. The Chairman said that if Members would copy their comments to him by e-mail, he could circulate the comments to all Members.

44. The Chairman re-affirmed that there was no need to submit a collective view of the Subcommittee at the stage of project profile but encouraged Members to write in individual comments and send a copy of the comments to him for circulation. He also proposed that EPD should keep an open mind to review the need to extend the consultation period for project profile.

Submission Stage

45. The Chairman noted from the appeal process that the EIA Appeal Board paid due regards to the discussions of the Subcommittee and the council. He therefore reiterated that there must be a quorum at meetings, in particular when decisions were made. The quorum should be half of the number of the Subcommittee Members as agreed earlier on. He also pointed out that the minutes of the meetings were taken seriously by the Appeal Board and confirmed that the current style of the minutes were about right and different views of individual Members should be clearly recorded. Furthermore, he proposed and Members agreed to continue with the current practice of having close-door discussions (in the absence of project proponents) only when there was a need. Finally, he asked why the views of the ESMG had not been included in recent ACE-EIA papers. In response to the last point, AD(EN)/EPD said that the views of ESMG had been taken out to avoid causing confusion to Members.

46. The Chairman emphasized and AD(EN)/EPD confirmed that the Subcommittee/Council's consideration of approving or rejecting an EIA report should be entirely on environmental grounds. Moreover, since the approved reports would be put on the EIA register and serve as reference materials, the Chairman said that the reasons for supporting or not supporting EIA reports should be clearly spelt out.

47. The Chairman pointed out the distinction between conditions for supporting an EIA report and conditions of an environmental permit. He said that conditions should only be imposed on a project when the Subcommittee/Council considered it environmentally acceptable.

Conditions recommended by the Subcommittee

48. The Chairman added that when the Subcommittee recommended conditions for approval of an EIA report, care should be taken to make sure that the conditions were within the ambit of the project proponent. AD(EN)/EPD said that the Subcommittee could suggest improvements which involved parties other than the project proponent.

Discretion under Section 4.5.2

49. On a related point, AD(EN)/EPD said that the Appeal Board reckoned that the Authority could exercise discretion under section 4.5.2 of the TM under which conditions could be imposed if the amendments to an EIA report would not affect the validity of the assessment and the overall results and conclusions of the EIA report. The Appeal Board also asked the Authority to be reasonable and have due regard to the efficiency of the decision making process when exercising this discretion.

Study brief

50. The Chairman noted that the Appeal Board had suggested that study briefs should be written in more focused and specific terms, AD(EN)/EPD confirmed that the Appeal Board suggested the Authority to particularize the concerns arising from public consultations and then lay down terms in the brief as specific as possible.

Informal dialogue

51. The Chairman noted that project proponents were encouraged to have informal dialogues with the Subcommittee at early planning stage. However, he had reservations about receiving briefing or holding discussions with project proponents before the formal submission of EIA report for fear that they might abuse the purpose of those meetings by quoting records in other papers as the Council's green light to their projects. He asked whether there was any overseas experience in conducting such dialogues in good faith and on a non-committal basis.

52. In reply, AD(EN)/EPD said that there were good overseas practices such as setting out the ground rules of the dialogues. Furthermore, all parties involved should agree on the understanding that the discussions held would not be prejudiced during statutory process. He was of the view that informal dialogues could be helpful in the EIA process and should be arranged entirely on a voluntary basis.

53. The Chairman said that EPD could encourage project proponents to have informal dialogues with the Subcommittee when their projects were potentially controversial. The dialogues could take place after the stage of project profile. Project proponents should provide detailed information on the preliminary assessment on different alignments and options so that the Subcommittee could at least comment whether the alignment and option selected was a non-starter or not.

54. SNCO(South)/AFCD said that alternatively informal dialogues could take place before the stage of project profile so that project proponents could have an opportunity to have early focus on the Subcommittee's concerns and adjust the alignment and option, if necessary, before the starting of the 45-day chain of actions by the Authority.

55. A Member supported having early dialogues with project proponents but was concerned over the possibility of their abusing the mechanism. The Chairman said that clear ground rules as mentioned by AD(EN)/EPD earlier on should be set out for the proponents to follow. Another Member agreed with the Chairman and suggested widely disseminating the ground rules when finalized.

56. In reply to the Secretary's enquiry, the Chairman and Members agreed that no minutes should be taken for informal dialogues. The Chairman also said that when approached by a project proponent, either the Chairman himself or the Deputy Chairman would decide whether an informal dialogue should be convened.

Quality of EIA Reports

57. The Chairman said that the Subcommittee had difficulty in assessing an EIA report which was incomprehensive in itself.

58. A Member agreed with the Chairman but said that it was not within the ambit of the Subcommittee to ensure the quality of EIA reports. Nonetheless, Members' concern should be made known to relevant professional bodies and authorities.

59. A Member shared another Member's point and said that it was the reality in Hong Kong that more and more consultants were under financial pressure, thus occasionally compromising the quality of EIA study.

60. AD(EN)/EPD said that the dismissal of the two appeals raised the awareness of potential project proponents and consultants about the quality of EIA, as he had noticed in recent Liaison Group meetings. Moreover, the GNs to be issued shortly would help raise the standards and set the benchmarks for EIA study as well. With reference to a Member's point, AD(EN)/EPD considered that part of the problem related to the tendering mechanism in which a contract would usually be awarded to the consultant offering the lowest cost. Another problem was that the contract was priced on a lump sum basis which discouraged consultants to do additional work even when the need arose in the middle of the study

61. A Member said that there were two means to improve the quality of an EIA. One was to make available a sound site-specific ecological database; the other was to validate in the context of Hong Kong models adopted by overseas countries in EIA study. The Chairman said that the point about ecological database could be discussed at future meeting. On the latter point, AD(EN)/EPD clarified that the models used for air quality and noise assessments had already been validated in Hong Kong. That Member added that the Subcommittee could invite EPD staff to verify technical issues like the effectiveness of the models used in an EIA.

62. A Member asked whether there were clear standards or guidelines on EIA study which consultants could follow. He also asked whether any detailed fisheries survey had been conducted in Hong Kong and if so, whether benchmarking of the data was available for the reference of consultants. He commended that there was a fisheries database in New Zealand in which the number of different species of fish in a specified area was readily available.

63. In response, the Chairman said that the standards and guidelines laid down in TM provided a common basis for compliance by project proponents and consultants and for vetting of EIA by EPD and the ACE. As regards measurable standards for ecological assessment, SNCO(South)/AFCD said that unlike air or noise quality which could be measured readily, ecological assessment involved living organisms. It would be difficult to specify, for example, a minimum number of birds of a certain species must be maintained in a certain area. However, a Member's concern over ecological database in Hong Kong was well noted and he would take it up with his department for further consideration.

Action

64. The Chairman concluded that project proponents should be encouraged to have early dialogues with the Subcommittee at the stage of project profile, in particular with regard to the pros and cons of different alignments and options. The Subcommittee was concerned about the quality of some EIA reports and would like to bring to the attention of various parties. Also, changes in the tendering system as well as the funding mechanism could help ensure the quality of EIA reports. Finally, an ecological database, both terrestrial and aquatic, should be made available as soon as possible.

Agenda Item 5 : Any Other BusinessMonthly Update of Applications under EIAO

65. Members noted the updates.

Tentative Items for Next Meeting

66. Members noted that there was no item scheduled for the next meeting so far.

Agenda Item 6 : Date of Next Meeting

67. The next meeting was scheduled for 5 November 2001 at 4:00pm.

EIA Subcommittee Secretariat
October 2001

**Draft Minutes of the 64th Meeting of the
Environmental Impact Assessment Subcommittee of
the Advisory Council on the Environment
held on 5 November 2001 at 4:00pm**

Present:

Professor LAM Kin-che (Chairman)
Mr. Otto POON (Deputy Chairman)
Professor Anthony HEDLEY, BBS, JP
Mr. Peter Y C LEE, SBSSt.J
Dr. NG Cho-nam
Mrs. Mei NG
Miss Alex YAU
Miss Petula POON (Secretary)

Absent with Apology:

Mr. Barrie COOK
Dr. HO Kin-chung
Mr. LIN Chaan-ming

In Attendance:

Mr. K S CHAN	Acting Assistant Director (Environmental Assessment & Noise), Environmental Protection Department (EPD)
Mr. C C LAY	Assistant Director (Conservation), Fisheries and Conservation Department (AFCD)
Ms. Cora SO	Executive Officer (C), Environment and Food Bureau

In Attendance for Agenda Items 3 & 4:

Mr. Simon HUI	Principal Environmental Protection Officer (Audit & Assessment), EPD
Mr. Cary HO	Senior Nature Conservation Officer (South), AFCD
Mr. Dick CHOI	Senior Marine Conservation Officer (West), AFCD
Mr. Patrick LAI	Nature Conservation Officer (Yuen Long), AFCD

Action

**Agenda Item 4 : Environmental Impact Assessment Ordinance
Observations About the Statutory EIA Process Arising from the Appeal
Board Determination**
(ACE-EIA Paper 14/2001)

29. Given the time constraint, the Chairman asked the Secretary to draft the report based on the discussion at the last meeting and circulate it to Members for consolidation.

Secretary

**Extract of Draft Minutes of the 90th Meeting of
the Advisory Council on the Environment
held on 27 November 2001 at 2:30 p.m.**

Present:

Mr. Peter H. Y. WONG, GBS, JP (Chairman)
Mr. Daniel M. C. CHENG
Prof. Peter HILLS
Mr. Edward S. T. HO, SBS, JP
Mr. KWOK Kwok-chuen, BBS
Prof. LAM Kin-che (EIA Subcommittee Chairman)
Prof. Dennis S. C. LAM
Mr. Edwin C. K. LAU
Mr. Peter Y. C. LEE, SBSSt.J
Mr. LIN Chaan-ming
Dr. NG Cho-nam
Mrs. Mei NG
Mr. PAO Ping-wing, JP
Mr. Otto L. T. POON
Ms Iris TAM
Prof. WONG Yuk-shan, JP
Ms. Jessie WONG (Secretary)

Absent with Apologies:

Mr. Barrie COOK
Prof. Anthony HEDLEY, BBS, JP
Dr. HO Kin-chung
Dr. LEONG Che-hung, GBS, JP
Mr. Michael J. D. RUSHWORTH
Miss Alex YAU
Mr. LOH Ah Tuan

In Attendance:

Mrs. Lily YAM	Secretary for the Environment and Food (SEF)
Mr. Thomas CHOW	Deputy Secretary (C), Environment and Food Bureau (EFB)
Mr. Donald TONG	Deputy Secretary (B), EFB
Mr. Rob LAW, JP	Director of Environmental Protection (DEP)
Mr. LEE Tak-keung	Assistant Director (Technical Services), Planning Department (PlanD)
Mr. C C LAY	Assistant Director (Conservation), Agriculture, Fisheries and Conservation Department (AFCD)

Mrs. Pauline LING	Chief Information Officer, EFB	
Ms. Polly LEUNG	Principal Information Officer,	Environmental
	Protection Department (EPD)	
Miss Petula POON	Chief Executive Officer (C), EFB	
Ms. Cora SO	Executive Officer (C), EFB	

Action

Agenda Item 3 : Report of the 63rd and 64th EIA Subcommittee Meetings
(ACE Paper 44/2001)

4. The EIA Subcommittee Chairman reported the views of the Subcommittee on items discussed at the last two meetings.
5. The Chairman cautioned about the need to keep record of the informal dialogues between the Subcommittee and project proponents, lest the only document that could be referred to in the future if necessary would be the version kept by the other party. He also observed that more and more project proponents were approaching individual members for briefing and discussion. He said that the members concerned should notify the Secretariat of such contacts.
6. DEP said that based on the experience of the Spur Line Appeal Case, the appellant could present any records as evidence. It might be useful if the Council/Subcommittee kept its own records on informal dialogues with project proponents. A Member shared DEP's view and added that requests for project proponents to provide information should also be included in those records for follow-up actions.
7. SEF suggested that there should be records of such informal dialogues but they should not be circulated to the other party to avoid being quoted as part of the formal consultation. As regards briefing and discussions arranged for individual members, SEF said that it should be made clear to the party concerned that individual members expressed views in their personal capacity only. The views of the Council as a whole would be passed to the Administration collectively. On that point, a Member asked whether that should include professional advice sought by the parties. The Chairman replied to the negative.

8. The EIA Subcommittee Chairman explained that the purpose of not keeping a record was to prevent the other party from quoting the views expressed during the informal dialogues in their own interpretation. However, he had no strong views on that suggestion and would revisit the issue with the Subcommittee and submit a recommendation to the Council.

9. A Member asked whether the Subcommittee had deliberated over the guiding principle for assessing alternative options/alignments of an EIA project as there seemed to be a lack of benchmark in that matter at the moment. In response, the EIA Subcommittee Chairman said that there were no specific guidelines to follow. The spirit of the Judgment of the Spur Line Appeal Case was that alternatives should be considered in a reasonable and practicable context. Another Member supplemented that under the precautionary principle mitigation or compensation measures should only be considered when adverse environmental impacts concerned could not be avoided in a practicable way.

10. The Chairman said that it would be useful to draw up a guidance note on that subject. DEP explained that the EIA Ordinance was almost silent about the assessment of alternatives but the Technical Memorandum did touch on that issue. However, there were no hard and fast rules for such assessment because it involved many factors like engineering feasibility, costs and government policies. He considered that the precautionary principle should be the major direction when considering alternatives. There would be no need for alternatives if the chosen option was shown to be environmentally acceptable after applying the precautionary principle.

11. On the quality of EIA reports, a Member urged the Council to request EPD to reflect Members' concern set out in para. 18 of the paper regarding the tendering mechanism as well as the lump sum term contracts. She also enquired about actions taken on poor performers in EIA studies.

12. In response, DEP explained that the issue in question was a complicated one without easy solutions. EPD had no authority over the employment of consultants for private projects. For government projects, greater weightings had always been given to technical and financial considerations. The lump sum term contract remained the most efficient system because sometimes there was no way to verify whether the work claimed by a consultant was really carried out or not. In addition, it would imply professional incompetence if a consultant was blacklisted. It might provoke a series of legal proceedings as the firms usually had strong legal teams to defend them. As environmental consultancies covered many disciplines and usually sub-contractors were involved, it would be difficult to judge a firm on the basis of the performance of their sub-consultancies. DEP concluded that EPD intended to take up the issue with the HKIAIA to encourage the setting up of a mechanism to monitor the performance of the consultants instead of relying on self-discipline.

13. SEF affirmed the point made by the AFCD representative at the Subcommittee meeting that the setting up of the ecological database would not eliminate the need for an ecological survey as part of the EIA process. To ensure the usefulness of the database, AFCD was drawing up a proposal on the detailed arrangements for data collection and compilation. The Department would submit a paper on the proposal to the Council in due course.

14. SEF noted the Subcommittee's concern over the feasibility of extending the 14-day public consultation period for project profiles. She explained that the Administration was already working on a tight schedule for public works programme and there were criticisms over the time taken to complete those projects. At present it would be difficult to extend the consultation period but the possibility would be kept in view. The EIA Subcommittee Chairman said that the Subcommittee raised that point because it would help smoothen the EIA process if views were expressed at an early stage. He hoped that there could be ways to overcome the constraints on the one hand and enable the Subcommittee to play a more proactive role in the EIA process on the other.