

**LegCo Panel on Planning, Lands and Works
Meeting on 12 December 2001**

**Background brief on
Charging and penalty system for road opening works**

Present permit and penalty system in respect of road excavation works

Disruption to traffic and inconvenience to the public caused by road excavation works has long been a subject of public concern. Road excavation works normally involve two parties, namely the promotor (e.g. a utility undertaker) for whom the works are carried out and the contractor who actually carries out the works.

2. The Government's control of road excavation works is exercised through the excavation permit (EP) system. Under section 8 of the Land (Miscellaneous Provisions) Ordinance (LMPO) (Cap. 28), a promotor is required to obtain an EP for making excavations from the Director of Lands or the Director of Highways. An EP is issued to the applicant free of charge.

3. Breach of EP conditions is an offence under section 8(4) of the LMPO which carries a maximum penalty of \$5,000 and 6 months' imprisonment. Under the current practice, it is the promotor being the permittee, not his contractor, who is to be prosecuted for a breach of the EP conditions.

Audit reviews

4. The Director of Audit in his report in 1991, invited attention to the need to reduce incidence of delays in the completion of utility works on roads and the substantial financial implications for the Government due to the delay in implementing EP fee scheme. In 1995, the Director of Audit reiterated that a penalty should be imposed on utility operators who delayed their works without good reasons and that an EP fee scheme should be implemented as soon as possible.

5. The Public Accounts Committee (PAC) has been closely monitoring the work of the Administration to improve the existing road-opening system since the early 1990s. In the PAC report no. 24 – July 1995, PAC recommended, among others, that penalty should be imposed on utility companies which delayed their works without good reasons and urged that an EP fee scheme should be implemented as soon as possible.

Proposals for a charging and penalty system

6. The Administration introduced its first proposal for a charging and penalty system for road opening works to the Planning, Lands and Works Panel on **19 March 1996**. Having taken into account Panel members' comments and upon consultation with utility undertakers, the proposal was revised and was put to the PLW Panel for consideration on **19 November 1996**. The major revision was to dispense with the proposed two-tier permit system, i.e. instead of requiring the promotor to obtain a licence for occupation of the excavation site and the contractor to separately obtain the relevant EP, under the revised proposal, an EP issued to the promotor would be deemed to be issued also to any independent contractor instructed by the promotor for carrying out the excavation.

7. Thereafter, further revised proposals were presented to the PLW Panel on **13 January 2000 and 6 November 2000**. According to the Administration, the revised proposals presented to the Panel on 13 January 2000 and on 6 November 2000 did not contain major changes to the proposal presented in November 1996 except that the charge rates had been updated based on up-to-date cost information. The revised proposal presented to the Panel on 6 November 2000 was set out in the extract from the relevant information paper (CB(1)115/00-01(05)) attached at **Appendix I**.

8. Except for the initial proposal put to the PLW Panel in March 1996, the Administration had undertaken consultation with utility undertakers in drawing the subsequent revised proposals. All along, utility undertakers maintained their objection to the proposed charging and penalty system. In the relevant information paper for the Panel meeting on 13 January 2000, the Administration set out in a table the comments of utility undertakers and the Administration's responses. The relevant table is attached at **Appendix II**.

Concerns raised by members and the Administration's responses

9. In considering the proposals for a charging and penalty system for road excavation works, members of the PLW Panel had raised concerns on the effectiveness of the proposed system in addressing the problems arising from road excavation works, the yardsticks in determining the related fees and the parties required to pay such fees. Members also requested the Administration to explore other alternatives, such as the construction of a common trench for all underground utilities in new towns.

10. The Administration's responses to the above concerns are summarized below –

- a) The purpose of the charging system was to recover the costs incurred by Government for administering the EP system based on the "user-pays" principle. It was not intended to contain a penalty element.

- b) The existing penalty system had the inherent constraint in that only the promotor could be prosecuted for breach of EP conditions. However, it was normally the contractor who took full control of the site. Under the proposed penalty system, contractors would be deemed to be a permittee and could be held legally responsible for breach of the EP conditions.
- c) The promotor's and the contractor's incentive to comply with EP conditions would come from the proposed penalty scheme, whereby the Administration would be empowered to prosecute the contractor for breach of EP conditions and the maximum fee for breach of EP conditions would be raised from \$5,000 to \$50,000 to increase the deterrent effect.
- d) Since the Administration already incurred administrative costs for issuing EPs and inspecting the excavation sites currently, the additional staff cost for administering the charging system would be minimal.
- e) The Administration had undertaken consultation with utility undertakers. The objections raised by utility undertakers were expected as they would be required to pay EP related fees.
- f) Government contractors would need to obtain an EP but would not be required to pay the related EP fees since the cost would ultimately be borne by the Government. However, the Government portion of the cost had been deducted in deriving the proposed EP fees so that it would not be shouldered by other EP applicants.
- g) Government departments, being the promotor for some road opening works, would closely monitor the performance of their contractors. Prior to commencement of works, the contractor concerned was required to submit the plans for road opening works to the supervising department for scrutiny. The Works Bureau would also carry out regular inspection and would request the relevant department heads for rectification should irregularities be found.
- h) The Administration had examined the feasibility of constructing common trenches for all underground utilities and the conclusion was that this approach was difficult to implement because the size of such a common trench would be larger than a MTR tunnel. Nevertheless, in planning newly developed areas, the Administration would consider housing underground utilities under a purpose-built utility services road if space was available, such as in the case of the North Lantau Highway and the future road to Penny's Bay.

- i) The suggestion of introducing a scale of fines in lieu of prosecution could be put forward to the Department of Justice for consideration.

Legislative Council Secretariat

5 December 2001

**Extract from information paper for
LegCo Panel on Planning, Lands & Works on 6 November 2000**



8. The proposal is now finalized. No major changes have been made except that the proposed charge rates have been updated based on cost information in the financial year 1999-2000 and projected to 2001-02.

Proposed EP System

9. The following system is now proposed :

- (a) A promoter has to obtain an EP for excavation works on unleased land.
- (b) Excavation without a valid EP is permitted in case of emergency, namely, prevention of injury, saving of life, prevention of damage to property and prevention of serious interruption or disruption to any public transport system or utility services.

- (c) With appropriate amendment to the LMPO, an EP issued to the promoter is deemed to be issued to any independent contractor employed by the promoter for carrying out the excavation.
- (d) To ensure that the independent contractor is aware of the terms of the EP, the contractor is required to acknowledge that he has received a copy of the EP together with its conditions.
- (e) If the contractor employs a sub-contractor for carrying out the excavation works, an EP issued to the contractor is also deemed to be issued to his sub-contractor. However, the contractor is required to supervise his sub-contractor and if the sub-contractor fails to comply with the EP conditions, the contractor shall be liable as if he had personally committed the offence.

10. An EP is normally issued for a specific period and for a particular project. It follows that an EP is required for every project under most circumstances and they shall be valid for the period specified therein or as may be extended by the Authority upon application.

11. The current requirement and arrangement for advance notification and coordination of road excavation activities through the Road Opening Coordinating Committees of HyD shall continue.

12. For Government works which are to be carried out by an independent contractor, the contractor (rather than the Government department as the promoter) is required to obtain an EP direct from the Authority for road excavation works.

Proposed Fee Structure

13. The following fees are proposed to recover the full cost incurred in vetting applications for and issuing the EP, and in carrying out inspections to ensure compliance. The fees which are different from that proposed to this Panel in January 2000, were reviewed by the departments concerned and updated to 2001-02 price level:

The EP applicant (i.e. a utility undertaker or a private developer) has to pay :

Excavations in streets maintained by Highways Department		
	<u>Description</u>	<u>Fee</u>
(i)	for issue of an EP	\$1,440
(ii)	for an extension of an EP, if required	\$375
(iii)	a daily charge for the duration of the EP including any extension, if required.	\$31 per day

Excavations on other unleased land (Lands Department is to deal with these applications)		
	<u>Description</u>	<u>Fee</u>
(i)	for issue of an EP	\$3,060
(ii)	for an extension to an EP	\$400

14. The above proposal is based on the projected cost in the financial year 2001/02. The basis of the calculation of the fees is presented in Appendix B.

15. For Government works, Government will have to pay its contractors and ultimately bear the cost of the EP. To save Government's administrative effort, Government contractors are not required to pay the related EP fees. However, in deriving the proposed fees, the cost is assumed to be shared by all EP works. Internal arrangement will be established such that Government will bear its own portion of the cost and will not be subsidized by other EP applicants.

Proposed Penalty System

16. Breach of EP conditions is an offence under section 8(4) of the LMPO which carries a maximum penalty of \$5,000 and 6 months' imprisonment. Under the current practice, it is the promoter being the permittee, not his contractor, who is to be prosecuted should there be a breach of the EP conditions. Such arrangement is not satisfactory as normally it is the contractor who takes the full control of the site and violates the EP conditions. It may be unfair to penalize the promoter instead of the contractor. With the proposal that the contractor shall be deemed to be a permittee, action can be taken to prosecute the contractor if he is found to be in breach of any EP conditions.

17. A prosecution team will be set up in HyD who will inspect EP sites which have received a warning from HyD's inspectorate staff regarding areas of non-compliance identified during their routine inspections. Where appropriate, the prosecution team will collect evidence and institute prosecution action against the permittee i.e. the promoter or the independent contractor as appropriate.

Tightening Control in Respect of Idle/Inactive Sites

18. In order to tighten up control on road excavation works, the following Condition has been included in EPs :

“The Permittee shall carry out the works for the purposes for which excavation is permitted to be made under this Excavation Permit with such despatch as is reasonably practicable. The Permittee shall therefore ensure that the excavation is not left open without being actively worked on during any working day. For the purpose of this Condition a working day shall mean the period between 8:00 a.m. and 6:00 p.m. on any day which is not a Sunday nor a public holiday. If it is necessary on technical grounds for the excavation to be left open and not be worked on during any working day, the Permittee shall, unless obtaining the Authority's prior permission to do otherwise, cover the excavation by steel plate or other suitable means in such a manner so as to allow the area to be reopened for the safe and reasonably nuisance-free passage of vehicular and/or pedestrian traffic.”

19. The Authority will take action to prosecute a permittee for any breach of EP conditions including the situation described in para 18.

Increase Maximum Fine in LMPO

20. It is considered that the prosecution of contractors against the breach of any EP conditions would be a direct and effective way in dealing with isolated default incidents by any contractor engaged in road opening work. However, the maximum fine of \$5,000 in section 8(4) of LMPO as mentioned earlier has remained at the same level since enactment of the Ordinance in 1972. In order to reflect the serious consequences of the offence, it is proposed to amend LMPO to increase this maximum level of fine to Level 5¹ on the basis of a similar purchasing power.

Computerized Utility Management System (UMS)

21. HyD has developed the UMS under the assistance of the Information Technology Services Department. Amongst the various benefits of introducing the UMS, the processing of EP applications has been more properly coordinated.

22. Under the existing practice, an applicant has to complete and submit a standard form to HyD when applying for an EP. Upon scrutinizing the application and finding it satisfactory in all respects the authorized staff will indicate approval by signing and returning the form to the applicant.

23. With the coming into effect of the Electronic Transactions Ordinance and implementation of the UMS, for most applicants (essentially the utility undertakers) it would be technically feasible for EP applications to be forwarded to HyD through electronic media. However, non-UMS users can also submit their applications through other electronic means. The approved EPs can also be returned to the applicants through UMS or other electronic media. It is anticipated that substantial effort in administering paper applications could be saved, not to mention the significant saving in delivery time. We propose to make statutory provisions for processing EP applications and granting EPs through electronic media as well as for legalizing the records of such applications on the Authority's computer system.

1 The maximum penalty under this level is \$50,000 and \$25,000 for level 4.



**Response to comments raised by utility undertakers
during the 2nd round consultation in late 1996**

Abbreviated Organization Names :

HKCG: The Hong Kong and China Gas Co., Ltd.
 CLP: China Light & Power Co., Ltd.
 HKTy: Hongkong Tramways Ltd.
 WCL: Wharf Cable Ltd.
 NT&T: New T&T Hong Kong Ltd.

HCL: Hutchison Telecommunication Ltd.
 NWT: New World Telephone
 HKTC: Hong Kong Telecommunication Ltd.
 HEC: The Hongkong Electric Co., Ltd.
 HyD: Highways Department

No.	Comment	Utility Undertaker raising the Comment	Administration's response
1	There is no incentive for the contractor to complete the work earlier if he is asked to pay for the duration he applied.	CLP, NT&T, HKCG, NWT	The proposal will discourage the applicant from applying for an unnecessarily long duration for an EP. Further, if the Permittee cannot complete the works on time, he will have to pay another sum for applying EP extension. It follows that the proposal does introduce incentive for the Permittee to avoid delay and to plan more carefully before applying. Proper advance planning of road opening will enhance co-ordination with other road opening works.

2	It appears that HyD is building a requirement into their UMS that works in different streets must be under different EPs disregarding the length of trench in each street. This requirement will induce unnecessary increase in number of EPs.	CLP, NT&T, WCL, NWT, HKTy, HKCG	Government has explained to utility undertakers in other occasions that the original proposal of demanding one EP for one street would be relaxed.
3	The commencement date is usually out of the utility undertakers' control due to Police's or TD's additional traffic requirements.	CLP, HKCG, HKTy, NT&T, WCL, NWT, HCL	<p>Although Government departments (e.g. Police, TD etc.) may impose control requirements which would affect the commencement dates, the construction programmes and progres are essentially under control of the Permittee if the works are properly planned taking into account their impact on traffic or the environment. The utility undertakers, when denoting the proposed commencement date in their applications, should take into account the lead time required for seeking traffic advice etc.</p> <p>In case at the commencement date, the site is still being occupied by another permittee, the Authority may grant extension free of charge to compensate for the delay in delivery of the site by the Authority.</p> <p>The daily fee will be calculated starting from the proposed commencement date instead of the EP issue date.</p>

4	Utilities are usually required to temporarily suspend their work due to various uncontrollable reasons. Hence the daily charge should only apply to the actual period of work.	HKCG, HKTy, NT&T, WCL	Site inspection by the Authority is still required even if the utility works are suspended. The daily charges calculated on the basis of the EP period do reflect the costs genuinely incurred by the Authority.
5	Charging the utilities for diversion work done for the Government is extremely unfair since the work is done solely for the Government authorities.	HKCG, NT&T, NWT, HCL	To demand utility undertakers to bear all necessary costs for utility diversions requested by Government is the requirement under the various statutory provisions.
6	The fees remain more or less the same despite that the EP system has been simplified. There must be some cost savings by only issuing half the amount of paperwork.	CLP, HKTy	Eliminating the originally proposed Licence will not reduce the cost since the build up of the originally proposed fees are based on the assumption that the Licence will be issued at the same time with the EP such that no additional administrative effort will be required.
7	The proposed EP condition regarding unattended site may sometimes be unfair to the Permittee. CLP quoted the case that if they had three permits for one section of cable, no work might be carried out in one or two of the permit areas for some time although the overall project was being worked on every day.	CLP, WCL	In order to reduce disruption to the public, the permit areas with no work being carried out should be temporarily covered up with appropriate plating for the passage of the traffic. As such the Permittee could avoid violation of the proposed EP condition if he has taken proper actions.

8	Clearer definition on “unattended site” is required. Will a site under the concrete curing process be regarded as unattended?	CLP, HKTy	For the purpose of the road opening control exercise, “unattended site” shall be defined as “an excavation left open without being actively worked on during any working day and without proper plating over for temporary use by the public”. When a site is under the concrete curing process it should not be regarded as unattended, but a notice board explaining reasons of the apparent unattendance should be displayed on site to avoid misunderstanding.
9	A breakdown of the proposed charges should be provided to utility undertakers	CLP, HKTy, NT&T, WCL, HKCG, HCL	A breakdown is attached.
10	The rates of charges are very much on the high side and should be reviewed and reduced significantly.	HEC	The proposed fees are based on the true costs which are necessarily incurred in administering the EP system.
11	The daily charge should not be applied to the extended period of an EP	HKTy	Inspection on the site is also required for the extended period of an EP, the daily charge is therefore applicable to the extended period of an EP as well.
12	Penalties will also be charged for extensions of EPs	NT&T	The fees are to recover the costs incurred by the Government, bearing no implication of a penalty.

13	It is important for us to understand the constitution of the proposed prosecution team, how it operates and on what base it exercises its authority.	WCL	The proposed prosecution team will consist of both professional and inspectorate staff. When a site covered by an EP is suspected to have involved non-compliance with EP conditions, the team will monitor the site and, if necessary, collect evidence for instituting prosecution in accordance with the Land (Miscellaneous Provisions) Ordinance.
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January 2000

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