

**Queries raised by
LegCo Legal Advisor as per his letter of 8 November 2004**

Legal Advisor's comments	Administration's response
<p><i>Waste Disposal (Designated Waste Disposal Facility) (Amendment) Regulation 2004 [L.N. 165 of 2004]</i> <i>(referred to as "DWDF Regulation" hereafter)</i></p>	
<p>(1) <u>Section 4(3) – new section 4(2)(b)(ia)(B)</u></p> <p>The Chinese rendition for the “name” of the registered owner of the vessel is “姓名或名稱”. It is appreciated that the registered owner may be a natural person or corporation. However, the Chinese rendition for the “name” of the registered owner of the vehicle in section 4(2)(b)(i)(B) is “姓名”. Noting that the registered owner of a vehicle may also be a natural person or corporation, would you consider amending the Chinese rendition for “name” of the registered owner of the vehicle to “姓名或名稱” (as that in section 4(2)(b)(ia)(B)) in section 4(2)(b)(i)(B)?</p>	<p>The existing rendition of the “name” of the registered owner of the vehicle in section 4(2)(b)(i)(B) is already the same as the one in new section 4(2)(b)(ia)(B), i.e. “姓名或名稱”.</p>
<p>(2) <u>Section 4(7) – new section 4(4A)</u></p> <p>In light of the opening wording of the new subsection that “[t]he Director or an authorized officer may also exercise the following powers”, may an “authorized officer” exercise the power conferred on the Director in paragraphs (a)-(c)? If not, why?</p>	<p>An "authorized officer" is defined in section 2(1) of the Waste Disposal Ordinance (Cap. 354) ("the Ordinance") to mean a public officer authorized under section 23A. According to section 23A, any public officer may be authorized in writing by the Director to perform or exercise the following functions, duties or</p>

Legal Advisor's comments	Administration's response
	<p>powers -</p> <p>(a) those which are imposed or conferred by the Ordinance (construed under Cap. 1 as including regulations) upon the Director; or</p> <p>(b) those which, by virtue of the Ordinance (construed under Cap. 1 as including regulations), may be exercised by an authorized officer.</p> <p>Any public officer authorized in writing by the Director under section 23A is intended to be able to exercise the powers which, by virtue of the opening wording of new section 4(4A) of the DWDF Regulation, may be exercised by "an authorized officer" (as described in (b) above), namely the powers to –</p> <p>(a) refuse to accept any waste at a designated waste disposal facility in certain circumstances;</p> <p>(b) require any person who delivers any waste to a designated waste disposal facility to state the nature of the waste and give certain information;</p> <p>(c) close a designated waste disposal facility or any part of it for certain period.</p> <p>The circumstances, information</p>

	Legal Advisor's comments	Administration's response
		<p>and period prescribed in the new section 4(4A) are matters intended to be determined by the Director (i.e. those matters are within the powers conferred by the DWDF Regulation upon the Director). The Director may, under section 23A of the Ordinance, delegate all or any of those powers to an authorized officer. Those powers are not intended to be generally exercisable by any authorized officer because the Director may consider that some of the matters in question should be reserved for determination by himself and therefore may choose not to make a delegation regarding certain of those matters.</p>
(3)	<p><u>Section 4(7) – new section 4(4A)(c)</u></p> <p>Section 33(4)(ba)(iv) of the Waste Disposal Ordinance (Cap. 354) confers on the Director the power to close temporarily any designated waste disposal facility for a specified period of time. But under new section 4(4A)(c), the Director's power to close a designated waste disposal facility is not qualified to close it "temporarily" as required in the enabling provision. "For such period as the Director considers necessary" may be an indefinite closure hence not temporary in nature. Would you consider that there is a vires problem?</p>	<p>The expression "for such period as the Director considers necessary" will not empower the Director to close a designated waste disposal facility infinitely because the Director can only exercise the power of closure in a manner consistent with the enabling provision at section 33(4)(ba)(iv) of the Ordinance. We do not consider that there is a vires issue because new section 4(4A)(c) of the DWDF Regulation must be construed according to the scope of power conferred by section 33(4)(ba)(iv) of the Ordinance.</p>

	Legal Advisor's comments	Administration's response
(4)(i)	<p><u>Section 4(7) – new section 4(4B)</u></p> <p>How do you reconcile new section 4(4B) with new section 3A(2)?</p>	<p>New section 3A(2) provides that no waste other than construction waste of a specified type shall be accepted for disposal at a sorting facility or public fill reception facility specified in new Schedule 2. To enforce this legal requirement, the Director may exercise certain statutory powers, including the power under new section 4(4A)(b) to require a person delivering any waste to a designated waste disposal facility to provide certain information about the waste. In view of the difficulty for waste haulers to distinguish the level of inert content in the case of construction waste, new section 4(4B) provides that the Director shall not require a person delivering construction waste to state whether the construction waste falls within any specified type. This restriction on the Director's power to require further information will not affect the enforcement of new section 3A(2) because the information provided by a waste hauler is not the only source of information that the Director will rely on in determining whether or not to accept the waste. The Director may carry out an inspection of the waste load or adopt other methods or procedures on site to determine whether the waste falls within the type specified for the relevant facility.</p>

	Legal Advisor's comments	Administration's response
(4)(ii)	Should an "authorized officer" be empowered to exercise the power of the Director?	As explained in our reply to question (2) above, the Director may, under section 23A of the Ordinance, delegate to an authorized officer any power conferred by the DWDF Regulation upon the Director.
<i>Waste Disposal (Charges for Disposal of Construction Waste) Regulation [L.N. 166 of 2004]</i>		
(5)	<p><u>General observation</u></p> <p>Section 24(3) of the Waste Disposal Ordinance provides that where the decision appealed from was made under a provision mentioned in section 24(1)(e), (f) or (g) the notice thereof shall be suspended until the appeal is disposed of, etc. Would you explain the reason for not providing for similar suspension of decision made under section 6, 8 or 12 (imposition of additional conditions), or section 19 (suspension and revocation of billing account) when the decision is pending appeal?</p>	<p>We do not consider it appropriate to suspend the Director's decision to impose additional conditions under sections 6(6), 8(7) and 12(7). Given the nature and characteristics of construction works, the disposal of large amount of waste by vehicle and by vessel may occur within a very short time frame (like 2 or 3 weeks) and is not reversible. The Director may need to impose additional conditions in relation to the use of a billing account, exemption account or approved vessel in order to ensure the smoother operation of waste disposal facilities and the timely protection of government revenue. The measure of imposing additional conditions will be of little efficacy if the Director's decision is subject to suspension pending appeal (which may take 2 or 3 months).</p> <p>Similarly, we do not consider it appropriate to suspend the Director's decision under section 19 pending appeal as the circumstances leading to the</p>

	Legal Advisor's comments	Administration's response
		suspension or revocation of a billing account is that the account-holder defaults on payment of prescribed charges or surcharges. In such case, he should not be allowed to continue to use the facilities for the sake of protecting government revenue.
(6)	<p><u>Section 2 - Definition of "construction waste"</u></p> <p>Would you give some examples within the definition of "construction waste"?</p>	<p>Construction waste from demolition of building or renovation work may contain, but is not limited to bricks, carpet, concrete, metals, acoustical ceiling tiles, cardboard, drywall, fluorescent lights, electric sockets, lightings, glass, insulation, tile, porcelain, masonry, wood, asphalt, etc.</p> <p>Construction waste from site formation work may contain, but is not limited to rock, soil, rubble, boulder, earth, sand, concrete, asphalt, brick, tile, masonry, used bentonite, etc.</p>
(7)(i)	<p><u>Section 2 - Definition of "construction work"</u></p> <p>Is there any precedent on the definition of "construction work"?</p>	<p>This definition is modeled on the definition of "construction work" in section 2 of the Factories and Industrial Undertakings Ordinance, Cap. 59 with minor modifications.</p>
(7)(ii)	<p>Have you consulted the relevant industries about the</p>	<p>During the previous consultation with the relevant trades (including</p>

	Legal Advisor's comments	Administration's response
	definition of "construction work"?	the latest Tripartite Working Group meeting on 4 Nov 2004) and the discussion at the Bills Committee in June 2004, the trade did not raise any concern over the definition.
(8)	<p><u>Section 3(1)(d)</u></p> <p>Does the term "conditions of use" include the "basic conditions", "conditions of use" and "additional conditions" referred to in section 6(5) and (6), and section 8(6) and (7)?</p>	<p>The "conditions of use" mentioned in section 3(1)(d) corresponds to the "conditions of use" described in sections 6(5)(b) and 8(6)(b), and does not include "basic conditions" in sections 6(5)(a) and 8(6)(a). "Additional conditions" in sections 6(6) and 8(7) can be additional conditions of use or additional basic conditions. Therefore "conditions of use" includes additional conditions of use, if any, imposed by the Director.</p> <p>The "conditions of use" are to be distinguished from the "basic conditions" described in sections 6(5)(a) or 8(6)(a) because non-compliance with the "conditions of use" will not result in the revocation of the relevant billing or exemption account.</p>
(9)	<p><u>Section 3(4)(c)</u></p> <p>Does the term "conditions of use" include the "basic conditions", "conditions of use" and "additional conditions" referred to in section 12(6) and (7)?</p>	<p>The "conditions of use" mentioned in section 3(4)(c) corresponds to the "conditions of use" described in section 12(6)(b), includes "additional conditions" in section 12(7), if additional conditions of use are imposed, but does not include "basic conditions" in section 12(6)(a) or additional basic</p>

	Legal Advisor's comments	Administration's response
		<p>conditions imposed under section 12(7).</p> <p>The “conditions of use” are to be distinguished from the “basic conditions” described in section 12(6)(a) because non-compliance with the “conditions of use” will not result in the revocation of the approval of the relevant vessel.</p>
(10)	<p><u>Section 3(5)(a)</u></p> <p>Would you consider it necessary to extend the same exemption to waste delivered by a vessel owned by the Government?</p>	<p>We do not consider it necessary to extend the same exemption of waste delivered by a vessel owned by the Government as the Government does not own any vessel suitable for such disposal.</p>
(11)	<p><u>Section 3(6)</u></p> <p>Would you illustrate with examples of “circumstances as he [the Director] thinks fit”?</p>	<p>An example that wastes may be rejected would be rejecting waste due to operational constraints, for example, the Director had once rejected the disposal of a Vietnamese boat delivered for disposal at the landfill. The boat had to be broken up before being accepted.</p>
(12)	<p><u>Section 5(5)</u></p> <p>Would you consider enumerating the subsections applicable to the “requirement” (c.f. the drafting of sections 7(7) and 11(6))?</p>	<p>We consider it unnecessary to enumerate the subsections applicable to the "requirement" mentioned in section 5(5) because all the preceding subsections (1) to (4) in section 5 are applicable. It</p>

	Legal Advisor's comments	Administration's response
		<p>is necessary to enumerate the subsections applicable to the "requirement" mentioned in sections 7(7) and 11(6) because sections 7(1) and (2) and 11(1) are inapplicable.</p>
(13)(i)	<p><u>Section 6(2)(c)</u></p> <p>Mr A is applying for a billing account. It is found that the sole shareholder of company Z is Mr A. Company Z has a billing account with outstanding prescribed charge or surcharge. Would the Director reject Mr A's application because Mr A and company Z are treated as the same person? Would the answer be different if Mr A is only one of the shareholders of company Z?</p>	<p>If Company Z is a limited liability company, it is a legal entity distinct from its shareholder(s). It should not be treated as the same person as Mr. A for the purpose of section 6(2)(c) regardless of whether Mr. A is the sole shareholder, or one of the shareholders, of Company Z.</p>
(13)(ii)	<p>Mr A is applying for a billing account. It is found that Mr A and Ms B have a joint billing account with outstanding prescribed charge or surcharge. Would the Director reject Mr A's application due to the deficit in the joint account?</p>	<p>If the joint billing account is established by Mr. A and Ms B in their personal capacities, the Director may reject Mr. A's application for another billing account if a prescribed charge or surcharge is outstanding under that joint account because the condition in section 6(2)(c) is fulfilled. It is irrelevant whether that account is held by Mr. A alone or in conjunction with another person.</p>
	<u>Section 6(5) and (6)</u>	

	Legal Advisor's comments	Administration's response
(14)(i)	Would you confirm whether the imposition of the “basic conditions”, “conditions of use” and “additional conditions” is subject to appeal under section 24(1A) of the Waste Disposal Ordinance (WDO)?	The Director's decision to impose “basic conditions”, “conditions of use” and “additional conditions” under section 6(5) and (6) is subject to appeal under section 24(1A) of WDO.
(14)(ii)	Would you give examples of “basic conditions”?	Examples of “basic conditions” include procedures on payment procedures, arrangement on settlement of invoice, imposition of surcharge on non-payment, suspension / revocation / reinstatement of account, how to inform the Director on change of particulars, revocation of unused account for a prolonged period, etc..
(14)(iii)	Would you give examples of “conditions of use”?	Examples of “conditions of use” include use of chit or other methods on-site to identify the account through which the waste loads are to be paid, procedures on request and issuance of chit, amount of deposit required, procedures for payment and refund of deposit, presentation of chit at the entry of a facility, validation of chit, refusal of damaged or altered chit etc.
(15)	<u>Section 7(1)</u> Would you explain the reason for requiring a written contract (see definition of “contract” in section 2) regardless of the	There is practical difficulty in enforcing the main contractor's duty to apply for a billing account under section 9 and in determining

	Legal Advisor's comments	Administration's response
	value of work? There may be no written contract in small-scale construction work.	applications for the exemption accounts under section 7 without the basis of written documents. If non-written contract (i.e. verbal agreement) is allowed for exemption applications under section 7, the administration will have no practical and effective means to determine whether an application is genuine or not and this will lead to disputes and possible abuses. For main contractor's duty to apply for an account under section 9, the only practical and effective means is to rely on written contract to assess the value of construction work otherwise the enforcement work will not be manageable. We also believe that construction work over \$1,000,000 shall normally be covered under a written contract.
(16)(i)	<p><u>Section 8(6) and (7)</u></p> <p>Would you confirm whether the imposition of the "basic conditions", "conditions of use" and "additional conditions" is subject to appeal under section 24(1A) of the Waste Disposal Ordinance?</p>	The Director's decision to impose "basic conditions", "conditions of use" and "additional conditions" under section 8(6) and (7) is subject to appeal under section 24(1A) of WDO.
(16)(ii)	Would you give examples of "basic conditions"?	Examples of "basic conditions" include the validity period, procedures on revocation of account, revocation of unused account for a prolonged period, how to inform the Director on change of particulars etc.

	Legal Advisor's comments	Administration's response
(16)(iii)	Would you give examples of "conditions of use"?	Examples of "conditions of use" include presentation of chit or other methods on-site to identify the account, validation of chit, refusal of damaged or altered chit etc.
(17)	<p><u>Section 9(5)</u></p> <p>Would you explain the reason for leaving out the application of "reasonable consideration" to an unwritten contract even though there may be evidence showing that the value of the construction work is at or over \$1,000,000?</p>	There is practical difficulty in enforcing the main contractors' duty to apply for a billing account under section 9 without the basis of written documents. The only practical and effective means is to rely on written contract to assess the value of construction work otherwise the enforcement work will not be manageable. We also believe that construction work over \$1,000,000 shall normally be covered under a written contract.
(18)(i)	<p><u>Section 12(6) and (7)</u></p> <p>Would you confirm whether the imposition of the "basic conditions", "conditions of use" and "additional conditions" is subject to appeal under section 24(1A) of the Waste Disposal Ordinance?</p>	The Director's decision to impose "basic conditions", "conditions of use" and "additional conditions" under section 12(6) and (7) is subject to appeal under section 24(1A) of WDO.
(18)(ii)	Would you give examples of "basic conditions"?	Examples of "basic conditions" include revocation of account, how to inform the Director on change of particulars, approval of configuration or dimension of vessel, etc.

Legal Advisor's comments		Administration's response
18(iii)	Would you give examples of "conditions of use"?	Examples of "conditions of use" include procedures on applications and issuance of chit or other method to identify the account, amount of deposit require, procedures for payment and refund of deposit, presentation of chit at the entry of waste facilities, validation of chit, refusal of damaged or altered chit, disposal method, reporting and queuing arrangement etc.
(19)	<p><u>Section 22(b) and (c)</u></p> <p>The Chinese rendition for the term "recklessly" is "罔顧實情" which is different from "罔顧後果" in section 33(2)(a)(ii) of the Waste Disposal Ordinance. Would you consider it necessary to reconcile the difference?</p>	<p>We consider that "罔顧實情" is a more appropriate rendition for "reckless". If Members have no objection to this rendition, we will arrange to alter the existing rendition of "罔顧後果" in section 33(2)(a)(ii) of the Ordinance by way of an order under section 4D of the Official Languages Ordinance (Cap. 5) at the end of the negative vetting period of the Charges Regulation.</p>