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Paper for the House Committee meeting on 5 December 2008

**Subcommittee on Technical Memorandum for
Allocation of Emission Allowances in Respect of Specified Licences**

Purpose

This paper reports on the deliberations of the Subcommittee on Technical Memorandum for Allocation of Emission Allowances in Respect of Specified Licences (the Subcommittee).

Background

2. To improve air quality, the Hong Kong Special Administrative Region Government reached a consensus with the Guangdong Provincial Government in April 2002 to reduce the emissions of sulphur dioxide (SO₂), nitrogen oxides (NO_x), respirable suspended particulates (RSP), and volatile organic compounds by 40%, 20%, 55%, and 55% respectively by 2010 as compared to 1997.

3. Power generation is the largest emission source in Hong Kong, accounting for 89% of SO₂, 44% of NO_x, and 32% of RSP emitted locally in 2006. For Hong Kong to achieve the 2010 emission reduction targets, it is essential for the power companies to substantially reduce their emissions of SO₂, NO_x, and RSP by 2010. Since 2003, the Administration has been engaging the two local power companies regarding the imposition of emission caps in 2010. Emission caps on the power stations have been imposed since 2005 upon renewal of their respective specified process licences. These emission caps are being progressively tightened to ensure that Hong Kong can meet the 2010 emission reduction target.

4. In February 2008, the Air Pollution Control (Amendment) Bill 2008 was introduced to amend the Air Pollution Control Ordinance (Cap. 311) (APCO) to, among others, cap the emissions of specified pollutants, namely, SO₂, NO_x, and RSP of power plants in Hong Kong in 2010 and beyond. The Secretary for the Environment (SEN) is empowered to set the total quantity of emission allowances of the specified pollutants for the power sector in a technical memorandum (TM) and the methodology for allocation of these allowances to individual power plants in relation to each emission year commencing on or after 1 January 2010.

Technical Memorandum

5. This is the first TM issued by SEN pursuant to APCO. It sets out the total quantity of emission allowances for all of the specified licences from 1 January 2010, allocation principles and determination methods of the quantity of emission allowances to be allocated in respect of each specified licence for each emission year, arrangements for adjusting the allocation of emission allowances, and arrangements for new comers.

The Subcommittee

6. At the House Committee meeting held on 14 November 2008, Members agreed to form a Subcommittee to study the TM. Under the chairmanship of Hon Audrey EU Yuet-mee, the Subcommittee has held one meeting. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

7. The Subcommittee generally supports the policy intent of capping the emissions of power plants, with a view to improving air quality in Hong Kong and the Pearl River Delta Region. In the course of deliberation, members have examined issues relating to the extension of the scrutiny period for the TM, emission allowances for 2010, as well as arrangements for adjusting the allocation of emission allowances.

Extension of the scrutiny period for the TM

8. According to section 37B(2) of APCO, where a TM has been laid on the table of the Legislative Council (LegCo), LegCo may, by resolution passed at a sitting of LegCo held before the expiration of a period of 28 days after the sitting at which it was so laid, provide that the TM shall be amended in any manner consistent with the power to issue the TM. Section 37B(4)(a) of APCO provides that before the expiry of the 28-day period, LegCo may by resolution extend that period to the first sitting of LegCo held not earlier than twenty-first day after the day of its expiry. Pursuant to section 37C of APCO, the TM shall commence to have effect upon the expiry of the amendment period (i.e. 10 December 2008) or the period as extended (i.e. 7 January 2009) if LegCo does not pass a resolution to amend it. In the case where LegCo passes a resolution amending the TM, it shall come into effect at the beginning of the day of the publication in the Gazette of such resolution.

9. Given the significance of the TM, members hold the view that deputations should be invited to express their views on the TM. To allow time for the Subcommittee to receive public views and examine the TM, members consider that the scrutiny period for the TM should be extended to 7 January 2009. The Administration's explanation is that it aims at bringing the TM into operation before the end of 2008 to facilitate the coming renewal of licence for the Lamma Power Station (LPS) before year end. The draft TM had been submitted to the Bills

Committee on the Air Pollution Control (Amendment) Bill 2008 and the substances, including the total quantity of emission allowances, the allocation methodology to individual power plants, the arrangement for updating and for new comers, had been fully deliberated during the scrutiny of the Bill. Tabling of the TM was made at the earliest possible meeting of the Legislative Council immediately after further consultation with the Panel on Environmental Affairs at its first meeting of this legislative session. The proposed extension of scrutiny period may have the effect of non-application of the TM to the new licence for LPS which will commence on 1 January 2009 upon renewal.

10. Members are not convinced that the Subcommittee should be forced to accept the TM without consulting the relevant stakeholders due to time constraints. The Subcommittee has examined the feasibility of extending the existing licence for LPS until such time after the TM has come into operation. According to the Administration, section 15(4) of APCO provides that a specified licence shall be valid for a reasonable period of not less than two years, and hence it would be necessary to include also the emission caps of 2010 in this renewal of the licence for LPS. Although under the Air Pollution Control (Specified Processes) Regulation, the existing licence for LPS shall continue in force after its expiry if renewal cannot be made before 1 January 2009, it will be subject to the licence conditions currently in force, which will not include the emission caps of the emissions years of the new licensing period, i.e. 2009 and 2010. The emission allowances as set out in the TM in respect of an emission year cannot be applied to the licence for LPS, since section 2 of APCO provides that "emission year" means a period of 12 months commencing on 1 January in each year without retrospective effect. This would have an impact on the Administration's effort in improving air quality, as well as its ability in achieving the 2010 emission reduction targets.

11. Members express grave concern that the Administration has put the Subcommittee in a difficult position. However, in view of the imminent need to improve air quality, and the fact that deputations had already been invited by the Bills Committee to express their views on the Air Pollution Control (Amendment) Bill, including the TM, the majority of members agree not to pursue the proposal of extending the scrutiny period for the TM, and not to invite deputations on this occasion. Mr KAM Nai-wai has stated that he has no choice but to accept the decision. However, he remains of the view that deputations should be invited to present their views.

Emission allowances for 2010

12. Based on the need to achieve the 2010 emission reduction targets under the 2002 consensus with Guangdong, the best practicable emission reduction technologies and means available, as well as emissions from other sources and sectors, the proposed 2010 emission allowances for the power sector are as follows -

	<u>1997 baseline emissions (tonnes)</u>	<u>2010 emission allowances to be included in the TM (tonnes)</u>	<u>Reduction compared to 1997 (%)</u>
SO ₂	54 400	25 120	54%
NO _x	56 100	42 600	24%
RSP	2 610	1 260	52%

13. Some members consider that the quantities of emission allowances should be further tightened to achieve better air quality. According to the Administration, it has been communicating with the power companies on the requirements to achieve the 2010 emission reduction targets since 2003. Power companies have therefore already built into their operational plans to provide for the installation of the necessary pollution abatement equipment and use of cleaner fuels to achieve the emission reduction targets. Further tightening of the quantities of emission allowances may require the adoption of additional emission control devices and changing the fuel mix for power generation, which cannot be achieved within a short time.

Arrangements for adjusting the allocation of emission allowances

14. To allow sufficient lead time for power companies to adjust their operation, the Administration proposes that an advance notice of no less than four years will be given to the power companies before any changes to the allocation of emission allowances arising from the regular updating to take effect.

15. To ensure that SEN will regularly review the total quantity of the emission allowances of the power sector taking into account factors such as latest technological development, outcome of review of Air Quality Objectives etc, members have examined the feasibility and legality of including an expiry date in the TM. According to the Legal Adviser to the Subcommittee, section 46(d) of the Interpretation and General Clauses Ordinance (Cap.1) (IGCO) provides that where any ordinance confers power upon any person to issue an instrument, such as the TM in the present case, such power shall include the power to declare the period of operation of any such instrument. Hence, the power of LegCo to amend a TM under section 37B of APCO should include a power to add an expiry provision so that in effect an operation period of the TM is declared. While an expiry date may be added to the TM, section 26G(4) of APCO provides that an allocation of emission allowances does not have effect in respect of an emission year unless the relevant TM has commenced to have effect at least four years before the emission year in question. As a result, any expiry date that may be added to the first TM may not be earlier than 31 December 2013. This would allow time for the second TM to be made not less than the four years, which must elapse under the section before the allocation specified in the second TM to take effect immediately after the expiry date of the first TM so as not to leave any vacuum in which no TM will be in force. To ensure that

the inclusion of an expiry date would not leave a vacuum, the second TM may have to be made and published in the Gazette towards the end of 2009.

16. The Administration's explanation is that section 26G of APCO does not contain any provisions which specifically allow or prohibit SEN from including an expiry date for the first TM. However, SEN has a duty to make sure that emission allowances are allocated by TM for each type of specified pollutant in respect of each specified licence in relation to each emission year commencing on or after 1 January 2010 continuously without any interruption. Therefore, if the first TM is subject to an expiry date, SEN must ensure that a valid TM is in place immediately upon the expiry date of the first TM. It is legally unacceptable for there to be any broken period where there is no valid TM in place to govern the allocation of emission allowances, particularly when there is no express or implied deeming provision in the law whereby the expired TM could continue to be regarded as valid. To allay members' concern, SEN has acceded to the Subcommittee's request to provide an undertaking in writing that he will conduct a review of TM within two years after the coming into operation of the first TM.

17. The Subcommittee has also examined other technical aspects of the TM.

Amendments to the TM

18. The Subcommittee will not move any amendment to the TM.

Advice sought

19. Members are requested to note the deliberations of the Subcommittee.

Prepared by
Council Business Division 1
Legislative Council Secretariat
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**Subcommittee on Technical Memorandum for
Allocation of Emission Allowances in Respect of Specified Licences**

Membership list

Chairman Hon Audrey EU Yuet-mee, SC, JP

Members Hon KAM Nai-wai, MH
Hon Cyd HO Sau-lan
Hon CHAN Hak-kan

(Total : 4 Members)

Clerk Miss Becky YU

Legal Adviser Ms Clara TAM

Date 25 November 2008