

Bills Committee on Air Pollution Control (Amendment) Bill 2008
Summary of views of Mr David Renton, Baker Botts L.L.P.
(as at 15 May 2008)

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<p>Deficiencies of the Pilot Scheme</p> <p>* "Project-based carbon finance acts as a form of subsidy; it reduces the emission from a particular project, but it does not affect the demand for high carbon goods and services across the economy as a whole so the overall level of emissions can remain high or increase. It also creates issues of moral hazard and gaming, where there are incentives to manipulate the system to increase the rewards received (or reduce the costs paid)."</p> <p>The same criticisms can be leveled at the Pilot Scheme.</p> <p>* The principal method of allocating emission allowances to power plants in Guangdong allows their emissions to increase in line with increases in their</p>	<p>* To achieve overall emissions reduction in the PRD region, the Guangdong and HKSAR governments reached a consensus in 2002 to reduce air pollutant emissions in the region, namely sulphur dioxide (SO₂), nitrogen oxides (NO_x), respirable suspended particulates (RSP) and volatile organic compounds (VOC), by 20 to 55%, by the year 2010, using 1997 as base year. These emission reduction targets are being pursued vigorously by the two sides through the implementation of a series pollution abatement measures targeting major sources including power plants, industries and the transport sector. At the most recent Working Meeting of the GD-HK Cooperation Joint Conference held on 8 January 2008, the two governments reaffirmed their determination and commitment to achieve the 2010 emission reduction targets.</p> <p>The project-based approach is adopted for the Pilot Scheme since this would ensure that emission credits generated for trading are derived from the implementation of a specific emission reduction project/plan, which is carried out in addition to other planned emission reduction projects/measures required for meeting the local regulatory requirement. This arrangement would help provide a clear and transparent linkage between the rewards from trading emission credits and the implementation of emission reduction projects/plans by the power plants. It would also ensure that any emissions trading carried out under the Pilot Scheme would not undermine the achievement of the emission reduction targets agreed by the Guangdong and HKSAR governments.</p> <p>* According to the Implementation Framework of the Pilot Scheme announced in January 2007, in examining the application of a PRD power plant submitted under the Pilot Scheme, the respective governments of the trading parties would determine the base emission target of the power plant by considering factors in the following order of priority:</p> <ol style="list-style-type: none"> 1. The annual emission cap allocated by the local government under the principle of total emissions

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<p>generated output.</p>	<p>control.</p> <ol style="list-style-type: none"> 2. The annual emission cap specified in the power plant licence or emission permit. 3. Where the annual emission cap for a power plant in the PRD Economic Zone of the Guangdong Province is estimated by means of the Generation Performance Standard (the "GPS"), the calculation is to multiply the installation capacity of the unit by the actual operating hours and further by the GPS. 4. The annual emission cap or total emission control levels specified in the statutory EIA report. <p>Following the above arrangements, a power plant which participates in the Pilot Scheme would be given clear limits on its total emissions. Any increase in emissions by the concerned power plant, whether as a result of poor control performance or from increased plant output, will be subject to the same emission limits imposed on it.</p>
<p>* The Pilot Scheme could also create a disincentive for the Guangdong authorities to further tighten their legal controls over power plant emissions since that would foreclose a source of subsidy for Guangdong power plants that are in a position to profit by agreeing to make voluntary reductions in their emissions.</p> <p>* The EPD has yet to acknowledge the risk of moral hazard and gaming that arises when trading occurs between two jurisdictions whose policies are poorly co-ordinated, ... The only controls explicitly provided for in</p>	<p>* The Guangdong Provincial Government has given clear commitment to achieve the 2010 emissions reduction targets. They are actively implementing a series of control measures to reduce emissions from power plants, including closing down small power generating units by 2010, requiring large power plants to install desulphurization systems by 2008, etc., under the PRD Regional Air Quality Management Plan (RAQMP). In announcing the mid-term review results of the RAQMP on 8 Jan 2008, the Guangdong Provincial Government reaffirmed their determination and commitment to achieve the 2010 emission reduction targets and has agreed to carry out additional measures, including requiring new coal-fired power plants to install NOx removal equipment, in order to help achieve the emission reduction targets by 2010. There is absolutely no evidence or basis whatsoever to suggest that the introduction of the pilot scheme will undermine the Guangdong authorities' efforts to tighten emissions reduction in the PRD.</p> <p>* The Pilot Scheme was properly coordinated and set up by the two governments in January 2007. The Pilot Scheme includes provisions to manage, transfer and write-off the emission credits, announce the distribution of emission credits, recommend the operational rules of emissions trading as well as provide training to personnel, etc. through the establishment of an Emissions Trading Management Panel. The Panel will also provide technical advice on, amongst others, approaches for allocating emission credits, setting of emission targets, emission monitoring systems, total emission calculation method as well as approval and implementation of emission reduction plans. Appendices 5 and 6 to</p>

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<p>the Bill are audits under s.26M to verify that sellers of emission credits have reduced their own emissions sufficiently to obtain the credits they have contracted to sell.</p>	<p>the Implementation Framework of the Pilot Scheme provide details of the Panel's function and operation of the pilot scheme. The above arrangement would help to provide a robust arrangement for emissions trading to be conducted under the pilot scheme.</p>
<p>The Bill Seriously weakens the EPD's Legal Duties</p> <p>* People in Hong Kong will want to be reassured that there are legal safeguards in place to prevent trading under the Pilot Scheme from worsening air quality where they live and work. The Bill offers them no such assurance.</p> <p>* The Director's responsibility for limiting emissions would be transferred to the Secretary for the Environment. In allocating emission allowances, the Secretary would be subject to duties similar to those imposed on the Director in s.15(3), but with significant difference that the</p>	<p>* The Bill will not weaken the EPD's legal duties as all the existing power and responsibilities conferred to the Authority will remain intact. In granting the licence, the Authority shall continue to be required under section 15 to:</p> <ul style="list-style-type: none"> (a) have regard to the capability of the applicant to provide and maintain the best practicable means for the prevention of the emission from his premises of any air pollutant; (b) have as his purpose the attainment and maintenance of any relevant air quality objective; and (c) have regard to whether the emission of noxious or offensive emissions would be, or be likely to be, prejudicial to health. <p>Under the proposed section 26M, any emissions trading under the Pilot Scheme will be required to be made in accordance with the terms and conditions of the specified licence. In granting the application, the Authority will impose the necessary terms and conditions in the licence to ensure the local air quality will not be adversely affected.</p> <p>* In controlling the emission from the power stations, the Authority is also required to observe the additional obligation arising from the Secretary's allocation of emission caps to the power sector. As mentioned above, the current control regime on the Electricity Works will remain in place and will not be weakened.</p> <p>The emission caps to be imposed on the power companies in 2010 will ensure the achievement of the 2010 emission reduction targets agreed with the Guangdong Provincial Government in 2002 for improving the air quality in Hong Kong and PRD region. As emissions trading between Hong Kong and PRD region will not lead to any increase in the emissions, it will not result in any adverse effect on</p>

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<p>Secretary's allocation of allowances under s.26G would only be provisional. The final allocation of the allowances would be determined in light of any trading in emission allowances and emission credits. By applying these duties only to the initial allocation of allowances, the Bill would effectively deprive them of any legal force.</p>	<p>achieving these emission reduction targets for air quality improvement.</p> <p>The proposed amendment will result in more stringent requirement as the Secretary, in making the allocation of the emission allowances under s.26G, shall have regard to the best practicable means of all the Electricity Works instead of individual licensed premises.</p>
<p>* In responding to a concern that the Scheme might result in the importing of pollutants from Guangdong, he [David Wong of EPD] suggested that the EPD might impose two emissions caps on power plants; an "absolute cap" which power plants would never be allowed to exceed, regardless of how many emission credits they might buy, and a lower cap that power companies could achieve either by taking in-house measures or by purchasing emissions credits.</p> <p>* How the EPD exercises its new statutory powers under the Bill may also be influenced by its</p>	<p>* Mr David Wong of EPD highlighted in the briefing to ACE on 12 March 2007 that no matter whether the local power plants would participate in the Scheme or not, they had to comply with the emission caps. The power companies could choose to comply with the caps by in-house measures or by buying emission credits under the Scheme. Even if they would buy emission credits from power plants in the Guangdong Province, the absolute caps would remain unchanged. It was important to note that emissions from local power plants as well as those in Guangdong would contribute to the overall pollutant emissions and affect regional air quality as the region shared the same air shed.</p> <p>* The Scheme of Control Agreement is a bilaterale agreement between the Government and the power companies. The enforcement of the APCO will not be affected by the Agreement. In fact, the new Agreement encourages further emission reduction by providing an incentive of increasing the rate of</p>

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<p>non-statutory role as the Hong Kong power companies' economic regulator under the Scheme of Control Agreements. ... the Government could leave the power companies with no option but to buy emission credits under the Pilot Scheme simply withholding or even delaying approval of the necessary expenditures for them to use in-house measures to meet their emission reduction targets.</p>	<p>return if the power companies can reduce the emissions further to below the caps by in-house control measures. On the other hand, there will be a penalty of reducing the rate of return for exceedance of any of the emission caps by 10% or above.</p> <p>The proposed emissions trading provides only an alternative means for the power companies to achieve the very stringent emission caps. Participation in the Pilot Scheme is entirely a commercial decision for the power companies. Any speculation on the Government forcing the power companies to buy emission credits under the Pilot Scheme is entirely groundless. The Government will continue to ensure safe, reliable and efficient electricity supply at reasonable prices and to minimize the environmental impact of power generation through the Scheme of Control Agreements.</p>
<p>Limits on the Public's Right to Object</p> <p>* The Bill, however, does not offer the public any right to object to, or even be made aware of, proposals for allocating emission allowances to power plants in Hong Kong or applications to purchase emission credits, even though air quality may be adversely affected in the vicinity of the power plant that is acquiring additional credits.</p>	<p>* The proposed amendments require the Secretary to allocate emission allowances in an open and transparent manner. Under the proposed section 26G, the Secretary will allocate the emission allowances by means of a Technical Memorandum which is required to be placed before the Legislative Council through the process of negative vetting.</p> <p>Before tabling the technical memorandum to the Legislative Council, the EPD will ensure the appropriateness and adequacy of the Technical Memorandum and full compliance with the requirements stipulated under the proposed section 26G(2) of the Air Pollution Control (Amendment) Bill, viz.</p> <ul style="list-style-type: none"> (a) the use of best practicable means for the prevention of emissions; (b) the need to attain and maintain the relevant air quality objectives; and (c) whether the emissions would be, or be likely to be, prejudicial to health. <p>by taking account of the requirements of other advanced countries and economies, technological development and consulting the relevant stakeholders, in particular, the power companies, the Advisory Council on the Environment and the Panel on Environmental Affairs of the Legislative Council.</p>

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	<p>Under sections 37A & 37B, the Technical Memorandum has to be made known to the public for inspection.</p> <p>Under the proposed section 26M(4)(a), the specified licence holder is required to make prior application for the use of emission credit. In granting the application, the Authority will impose the necessary terms and conditions in the licence to ensure the local air quality will not be adversely affected. As required by section 39, the Authority shall keep a register containing details of the licences open for inspection by the public.</p>
<p>* Whenever a Hong Kong power company proposes to enter into a contract to buy emission credits from a power plant in Guangdong, it should be required to give public notice of the application and provide basic particulars of its terms and its likely impact on the achievement and attainment of any relevant air quality objective. The EPD should make available its air quality model to allow applicants to predict the effect of shifting emissions from one power plant to another. The financial terms of the proposed trade should be disclosed.</p> <p>* The proposed trade should require prior approval of the Director of Environmental Protection, who should be subject</p>	<p>* Under the Pilot Scheme, the licence holder has to apply for approval of the proposed emission reduction project. The Emission Trading Management Panel of the Pilot Scheme consisting of officials from both sides of the governments will scrutinize the application. One of the criteria to be considered is that the concerned power plant has to implement an appropriate monitoring and measurement system to oversee and report the performance of the emission reduction project. The latest information will be made available by both governments.</p> <p>The particulars of the air quality model for assessing air quality impacts are available at EPD's website.</p> <p>* As mentioned above, under the proposed section 26M(4)(a), the specified licence holder is required to make prior application for the use of emission credit. In granting the application, the Authority will impose the necessary terms and conditions in the licence to ensure the local air quality will not be adversely affected.</p>

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<p>to the same duties as the Bill would impose on the Secretary under s. 26G(2). Before approving a trading contract, the Director should be required to take account of any objections to the trade made by members of the public.</p>	<p>Experience in other advanced countries has proven that emissions trading can provide a cost-effective option for achievement of the emission caps. We consider that any intervention in addition to the prior approval of the Authority is not warranted.</p>
<p>* Buying emission credits should not be a substitute for requiring power companies to use the best practicable means of preventing the emission</p>	<p>* The use of emissions trading is an alternative option for the power company to achieve the emission caps. It is not the substitute for using the best practicable means for preventing the emissions.</p>
<p>* The applicant, but no one else, should have the right to appeal an adverse decision by the Director to the Appeal Board, but the public should be allowed (as it is at present) to challenge a decision of the Director by way of judicial review</p>	<p>* The right of appeal to the applicant has already been provided under the proposed section 31(1)(nb) and 31(1)(nc).</p> <p>The proposed amendments will not affect the right of the public to make any judicial review.</p>