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Legislative Council

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**Report of the Bills Committee on
Waste Disposal (Amendment) Bill 2013**

Purpose

This paper reports on the deliberations of the Bills Committee on Waste Disposal (Amendment) Bill 2013 ("the Bills Committee").

Background

Fly-tipping of construction waste on private land

2. Construction and demolition ("C&D") materials mean any substance, matter or thing which is generated as a result of C&D works. It is a mixture of materials arising from site clearance, excavation, construction, refurbishment, renovation, demolition and road works. Over 80% of C&D materials are inert and known as public fill, which includes debris, rubble, earth and concrete which is suitable for land reclamation and site formation. When properly sorted, such inert materials can be recycled for use in construction works.

3. The Construction Waste Disposal Charging Scheme has commenced since January 2006. Construction waste producers, such as construction contractors, renovation contractors or premises owners, prior to using the designated waste disposal facilities, need to open a billing account with the Environmental Protection Department ("EPD") and pay for the construction waste disposal charge. Depending on the inert content of the construction waste, the current charge is (i) \$27 per tonne at public fill reception facilities for the disposal of construction waste consisting entirely of inert construction waste; (ii) \$100 per tonne at the sorting facilities for the disposal of construction waste containing more than 50% by weight of inert construction waste; (iii) \$125 per tonne at the

landfills for construction waste containing not more than 50% by weight of inert construction waste; and (iv) \$125 per tonne at the Outlying Islands Transfer Facilities for any percentage of inert construction waste.

Current regulatory control

4. It is the objective of the Government to effectively deter fly-tipping of C&D materials so that the adverse environmental impacts, or any land use, slope safety, hygiene, drainage problems caused by these activities can be minimized. Various existing legislation, administered by different Government departments, may be applied to achieve this purpose from planning, environmental, drainage, public health or country park perspective¹.

5. Under the Waste Disposal Ordinance (Cap. 354) ("WDO"), it is illegal to deposit waste in any place without the permission of the landowners or lawful occupiers concerned. However, there is no statutory requirement on how the permission should be obtained. In the situation where an offence under WDO has been committed, the Director of Environmental Protection ("DEP") may undertake prosecution action against the offender. If the waste illegally deposited gives rise to an imminent risk of adverse environmental impact, and action needs to be taken immediately to reduce or eliminate that risk, DEP as the Authority of WDO may enter the place to remove the waste and recover the cost from the responsible person.

¹ Some key examples are: (i) Air Pollution Control Ordinance (Cap. 311), Water Pollution Control Ordinance (Cap. 358) and Noise Control Ordinance (Cap. 400), enforced by EPD, for the control of dust emission, noise and wastewater discharges arising from land filling activities; (ii) Town Planning Ordinance (Cap. 131), enforced by Planning Department, for the control against unauthorized development including illegal land filling falling within the Development Permission Areas in the rural area when provisions of statutory plans are not complied with; (iii) Public Health and Municipal Services Ordinance (Cap. 132), enforced by Food and Environmental Hygiene Department ("FEHD"), for the control against land filling or depositing of construction waste on a private lot that have given rise to sanitary nuisances; and against deposition that leads to an accumulation of water resulting in breeding of mosquitoes; (iv) Public Cleansing and Prevention of Nuisances Regulation (Cap. 132BK), enforced by FEHD, for the control against the depositing of litter or waste from any specified vehicles stipulated under the Regulation; (v) Buildings Ordinance (Cap. 123), enforced by Buildings Department for the control of building works including those associated with land filling on a private lot; (vi) Country Parks Ordinance (Cap. 208), enforced by Agriculture, Fisheries and Conservation Department, for the control against illegal dumping on a private lot that is located within country park; and (vii) Land Drainage Ordinance (Cap. 446), enforced by Drainage Services Department, for the control against any filling in any designated main watercourse that would impede its flow.

The Bill

6. The Waste Disposal (Amendment) Bill 2013 ("the Bill") seeks to amend WDO to enhance the regulatory regime for the depositing of waste by requiring that the depositing of *construction waste on private land* can only be carried out with the permission from the sole owner or all of the owners of the land and that such permission must be given in a specified form affixed with an acknowledgement by DEP.

The Bills Committee

7. At the House Committee meeting on 28 June 2013, Members agreed to form a Bills Committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

8. Under the chairmanship of Hon Cyd HO Sau-lan, the Bills Committee has held four meetings with the Administration and received views from deputations at one of the meetings. A list of individuals or organizations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

9. The Bills Committee in general accepts that there is a genuine need to strengthen the legislation so that EPD could effectively regulate unlawful depositing of construction waste. In the course of deliberation, it has examined the scope and effectiveness of the proposed enhanced regulatory framework and the relevant enforcement procedures to control fly-tipping activities.

Need of and justifications for the proposed enhanced regulatory regime

10. The Bills Committee notes that notwithstanding the regulatory control currently under WDO, enforcement against fly-tipping on *private land* is not effective as it is sometimes difficult to prove the lack of permission of a landowner or lawful occupier. According to the Administration, it is not unusual to receive incomplete or conflicting information from the depositor and the landowner or lawful occupier as to whether proper permission has indeed been given. Some cases involve uncertainty in ownership due to outdated records, for example, when a landowner on record has deceased. In some other cases, the

Administration is not able to collect sufficient evidence in a suspected fly-tipping case within the statutory time limit of 6 months for initiating prosecution. This has undermined the deterrent effect of the control mechanism.

11. According to the Administration, fly-tipping of construction waste on private land has aggravated in the New Territories in the past few years. In a notable case, an agricultural land of over 1 000 square metres ("m²") at Ho Sheung Heung in Sheung Shui was dumped with construction waste in 2009. Having reviewed WDO and conducted a public consultation in 2010, the Administration considers it necessary to enhance the regulation of the depositing of construction waste on private land under WDO in addition to the existing regulation under section 16A of WDO, with the aims of preventing the carrying out of unauthorized depositing activities on private land; safeguarding the interest of private landowners and through a new proposed notification mechanism, enabling the Government Departments to be notified in advance of possible depositing of abandoned C&D materials on private land.

New provisions prohibiting fly-tipping on private land without permission and criteria for exclusions

12. Currently section 16A of WDO provides that a person commits an offence if the person deposits, or causes or permits to be deposited, waste (which includes construction waste) in any place except with lawful authority or excuse, or with the permission of any owner or lawful occupier of the place. The Bills Committee notes that clause 4 of the Bill proposes to add new sections 16B and 16C to WDO to provide for an enhanced regulatory regime for the depositing of construction waste on a private lot. Under these new provisions:

- (a) subject to certain exclusions, the depositing of construction waste on a *private lot* must be carried out with the valid permission of the sole owner or all of the owners of the lot (new section 16B(3));
- (b) in order to be valid, the permission must be given in a form specified by DEP and the form giving the permission must be affixed with an acknowledgement by DEP (new section 16B(4)); and
- (c) the form in which permission is given and acknowledged by

DEP ("acknowledged form") must be displayed (the required part of it) in a conspicuous place on the lot at all times during the depositing activity (new section 16C(4) and (5)(a)).

The Administration has explained that DEP's acknowledgement on the specified form does not imply any authorization of the depositing activity concerned under the relevant legislation administered by other government departments because authorization on factors other than environmental grounds (such as land use and slope safety) will go beyond DEP's authority under environmental legislation.

13. In connection with the proposed new section 16B(3) which provides that it is an offence if a person deposits, or causes to be deposited, construction waste on a *private lot* without the valid permission, the Bills Committee has raised questions on the definition of *private lot*. The Administration clarifies that subject to relevant exclusions, the enhanced regulatory control proposed by the Bill will apply to the depositing of construction waste on a private lot, which is defined as "a piece or parcel of ground held under a *Government lease* **and** identified by a *lot number* as defined by regulation 2 of the Land Registration Regulations (Cap. 128 sub. leg. A)". The Administration further elaborates that:

- (i) with reference to its definition under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), the term "*Government lease*" includes short term tenancy ("STT") granted by the Government which may not bear a lot number. The Administration stresses that these STT cases do not suffer from the same enforcement problem that the Bill aims to tackle and hence have not been covered under the Bill. Otherwise, according to the Land Registry's record, lands held under a Government lease have a lot number;
- (ii) there is no case of land that is identified by a lot number but not held under a Government lease; and
- (iii) there are lands not held under a Government lease and do not have a lot number. Examples include (a) government land and (b) "land vested in a person by an Ordinance", such as land vested in the Kowloon-Canton Railway Corporation under the Kowloon-Canton Railway Corporation Ordinance

(Cap. 372) as well as Saint John's Cathedral Church in Central which was vested in the trustees of the Church of England by the Church of England Trust Ordinance (Cap. 1014). According to the Administration, these cases do not suffer from the same enforcement problem that the Bill aims to tackle and hence have not been covered under the Bill.

Exclusions (new section 16B(1))

14. The Bills Committee notes that the proposed enhanced regulatory regime does not apply to the depositing of construction waste on a private lot under **either** of the following circumstances:

- (i) if the total area on which construction waste has been deposited within the lot, regardless of who deposited the waste, does not exceed 20 m²; or
- (ii) the depositing forms part of any building works carried out on the lot and commenced in accordance with the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121) or the Buildings Ordinance (Cap. 123).

The Bills Committee has examined whether or not the proposed exclusions would undermine the effectiveness of the proposed enhanced regulatory regime. The Administration has explained that for circumstances mentioned above, the exclusions are proposed under the principle of reasonableness to cater for small-scale or other depositing activities that have not been regarded as fly-tipping problems. It is further clarified that there is no restriction on the height or depth of the construction waste deposited on or below the permitted area of 20 m², which is set after consultation with the public and taking into consideration the difficulties anticipated in enforcement and the pattern of fly-tipping activities. In calculating the total area for the purpose of the new section 16B(1)(a), the Administration explains that the boundary of the private lot on which construction waste has been deposited can be determined by standing surveying methods.

15. The Administration stresses that the Bill aims to regulate the depositing of construction waste on the ground without any house, building or structure of a private lot. If construction waste is to be deposited *inside* a building, house or structure that is built on a private lot, the construction waste will not be regarded as having been deposited on a piece or parcel of ground and thus such depositing activity will not be

subject to the proposed new section 16B. In calculating the total area on which construction waste has been deposited within the lot under the new section 16B(1)(a), the Administration will *not* count construction waste that has been deposited *inside* any structure built on the lot. Nevertheless, section 16A (covering sanctions against unlawful depositing in any place) will still be applicable and the intended depositor has to seek permission from any owner or legal occupier of the place.

16. Some members of the Bills Committee have expressed concern over fly-tipping in urban areas. They note from the Administration that if construction waste is to be deposited on a private lot in urban areas, the proposed new section 16B will also apply subject to relevant exclusions and the person will need to obtain permission from all owners of the lot in writing vide a specified form following the requirements under the proposed new section 16B. They also note that the Bill is not intended to regulate depositing activities inside a building but such activities will still be subject to the existing control under section 16A.

17. The Bills Committee notes that under the new section 16B(5), the sole owner of a private lot is not required to declare self-permission in an acknowledged form. However, in case of multiple owners, the Administration has clarified that an intended depositor and the person who causes the construction waste to be deposited on a private lot have to obtain permission from all owners of the lot in writing vide a specified form following the requirements under the proposed new section 16B.

18. The Bills Committee has also sought explanation of the elements that the prosecution would consider when deciding to charge a person who has done a single act possibly in breach of WDO with the existing section 16A(1) or the proposed new section 16B(3). The Administration clarifies that the offences under section 16A(1) and the proposed new section 16B(3) comprise different ingredients. Under section 16A(1), the depositing of *any kind of waste in any place* without the permission of *any owner or lawful occupier* of the place (or without lawful authority or excuse) is prohibited. There is no statutory requirement on how the permission should be obtained or presented. Whereas under the proposed new section 16B(3), only the depositing of *construction waste* on a *private lot* without the permission of *all owners* of the lot is prohibited. There will be statutory requirements on how to obtain a valid permission. In the event that a person is found to have deposited construction waste on a private lot, the enforcement authority will investigate and determine whether or not to initiate prosecution taking into account the collected evidence of the case. Where prosecution is initiated for a single act of

contravention, the depositor will only be prosecuted for having committed an offence under section 16A(1) or the proposed new section 16B(3) but *not* both. The Bills Committee also takes note that under section 18(1), the penalty for an offence under the proposed new section 16B(3) is the same as that for section 16A(1).

Display of the acknowledged form in a conspicuous place

19. The Bills Committee notes that the required part of the acknowledged form must be displayed in a conspicuous place on the lot at all times during the depositing activity. Under the proposed new section 16C(7), if a person fails to comply with such requirement, the person commits an offence. The Bills Committee has thus examined the words *conspicuous place* under the new section 16C(4) and sought clarification from the Administration on its meaning.

20. The Administration states that it is not uncommon under the existing legislation to provide for the display of certain documents in a *conspicuous place*. For example, under the Employees' Compensation Ordinance (Cap. 282), display of notice of insurance in a conspicuous place on each of the employer's premises is required. Section 18 of the Education Ordinance (Cap. 279) requires the management authority of a school to cause the certificate of the registration or a certificate of provisional registration in the specified form to be exhibited at all times in a conspicuous place in each of the premises specified in the certificate unless exception applies. As there is no existing legislative provision which seeks to define the words *conspicuous place*, the Administration considers that there is not any specific circumstantial consideration in the context of the Bill that may require *conspicuous place* to be defined. In actual practice, the Administration does not see major problems for a depositor to comply as the copy of the acknowledgment form being displayed will normally be quite visible in a depositing site.

21. The Bills Committee also notes that it is an offence under the proposed new section 16C(6) if a person submits to DEP a specified form or any information or document specified in it which the person knows to be incorrect or inaccurate in a material particular or does not believe to be correct and accurate in a material particular.

Strict liability offences under section 16A and the new sections 16B and 16C(7)

22. The Bills Committee notes that section 31 of WDO provides that

in any proceedings for an offence under, amongst others, section 16A, it shall not be necessary for the prosecution to prove that the acts or omissions in question were accompanied by any intention, knowledge or negligence on the part of the defendant as to any element of the offence. Clause 8 of the Bill seeks to amend section 31 of WDO to add appropriate reference to the new section 16B. To put it beyond doubt, the Administration proposes to move Committee Stage amendments to include the offence under the new section 16C(7) in respect of the display of acknowledged form in the existing section 31.

Enforcement issues and penalties

23. Knowing that the Bill aims to enhance enforcement against fly-tipping activities, the Bills Committee has examined the enforcement procedures in real situation as well as the deterrent effect of the penalties to be imposed. It is suggested that a minimum fine can be prescribed under section 18 of the Bill to discourage such fly-tipping activities.

Enforcement procedures

24. The Administration has explained that the proposed enhanced regulated framework under WDO will be enforced by EPD. Where a person is found to be depositing construction waste, it requires the presence of a public officer who has been authorized as an "authorized officer" under section 23A of WDO² to take the necessary enforcement action.

25. The Administration clarifies that as far as enforcement under section 16A of WDO is concerned, in a typical case, authorized officers will attend the scene and conduct investigation to check whether any illegal depositing activities occur. If illegal activities are suspected, the officers would record the particulars of the suspects (such as drivers or contractors) and warn them on their legal liabilities and possible penalties. If there is sufficient evidence, EPD may initiate prosecution actions against them under WDO. In general, under WDO, such an authorized officer has been empowered to enter relevant places or premises to undertake enforcement work. He may also take samples and collect relevant pieces of evidence. Sections 23C and 23D of WDO provide the

² Under section 23A of WDO, any public officer may be authorized in writing by – (a) DEP; or (b) the collection authority; or (c) the waste disposal authority, to perform or exercise all or any of the functions, duties or powers which are imposed or conferred by WDO upon DEP, the collection authority or the waste disposal authority, as the case may be, by which the public officer is so authorized, or which by virtue of WDO may be exercised by an authorized officer.

authority to do so. In the situation where an offence under WDO has been committed in a place, DEP may undertake prosecution action against the offender.

Role of EPD officers and Police

26. The Bills Committee notes that wilful obstruction to authorized officers in exercising their powers is an offence under section 23F of WDO³. In exercising their powers, authorized officers may, as the cases so require, seek assistance from the Police. In general, under section 10 of the Police Force Ordinance (Cap. 232), police officers have duties to take lawful measures for preventing and detecting crimes and offences, including those under WDO. The Bills Committee also notes that while EPD does not receive complaints round the clock, it may as necessary arrange ad hoc enforcement activities to combat fly-tipping activities that take place in the evening or early morning.

27. The Administration envisages that the proposed enhanced control regime under the Bill will improve the situation because the prior notification mechanism will help identify the depositing activities that have indeed been properly authorized and thus single out those that have not. The introduction of the notification procedure to EPD will be able to alert the planning, lands and other authorities of such depositing activities.

Reinstatement of land affected by depositing activities

28. The Bills Committee has studied if there is any responsibility on the part of the landowner to reinstate the lot used as the depositing area. The Administration advises that WDO provides for reinstatement of land lot used as depositing area if the deposited waste contains *chemical waste*. More specifically, DEP may, by notice in writing under section 31 of the Waste Disposal (Chemical Waste) (General) Regulation (Cap. 354 sub. leg. C), require the owner or occupier of the premises in which the waste is stored to remove the chemical waste to a particular facility and to establish to his satisfaction that such requirement is complied with. The

³ Under section 23F of WDO, a person who –

- (a) wilfully obstructs – (i) a collection authority; or (ii) a waste disposal authority; or (iii) any authorized officer, in the exercise of the authority's or the officer's powers or duties under this Part; or
- (b) fails without reasonable excuse to comply with any requirement duly made under this Part by – (i) a collection authority; (ii) a waste disposal authority; or (iii) any authorized officer; or
- (c) in purported compliance with any such requirement produces any drawing, document or record which he knows to be incorrect or inaccurate in a material particular or does not believe to be correct and accurate,

commits an offence and is liable to a fine of \$100,000.

Bills Committee also notes that other control regime may also be relevant. Under Town Planning Ordinance, for instance, depending on the provisions of the relevant statutory plans, filling of land resulting in an elevation of ground level in some zones is an unauthorized development ("UD") unless with the permission from the Town Planning Board. In accordance with section 23(1) of Town Planning Ordinance, the Planning Authority may serve Enforcement Notice on one or more of a landowner, an occupier or a person who is responsible for the UD requiring the UD to be discontinued.

Penalty

29. The Bills Committee notes that clause 5 of the Bill seeks to amend section 18 of WDO to provide for the penalties for these new offences. The offence under new section 16B(3) carries the same maximum penalties as applicable to the offence under section 16A of WDO. Such offence carries maximum penalties of a fine of \$200,000 and imprisonment for 6 months for the first offence, and a fine of \$500,000 and imprisonment for 6 months for a second or subsequent offence. In the case of a continuing offence, such person is further liable to a maximum daily fine of \$10,000. As to the 2 offences under the proposed new section 16C(6) and (7), the maximum penalty is a fine at level 6 (i.e. \$100,000).

Suggestion of minimum penalty

30. The Bills Committee has sought information on the maximum penalties imposed by the court for unauthorized dumping vis-à-vis the maximum penalties specified in WDO in the past and enquired if it is possible to provide for a minimum penalty in the Bill to enhance its deterrent effect.

31. The Administration states that in the past 3 and a half years, the prosecution statistics for section 16A of WDO are as follows:

	2010	2011	2012	2013 (up to June 2013)
No. of prosecutions by summonses	55	36	47	27
Convicted summonses	51	35	45	27
Average Fine (HK\$)	2,631	3,086	5,107	8,611
Maximum Fine (HK\$)	6,000	5,000	20,000	20,000
Minimum Fine (HK\$)	500	1,000	1,500	1,500

32. The Bills Committee notes that among the convicted cases in the first 6 months of 2013, the maximum fine handed down by the court is \$20,000 while the minimum fine is \$1,500 and the average fine being \$8,611. Hon LEE Cheuk-yan strongly urges the Administration to prescribe a minimum fine in WDO to enhance its deterrent effect. The Administration has explained that no minimum penalty level is set out under section 18(1) of WDO and that in general, the court will take into account various factors, such as the nature or seriousness of the offence, environmental impacts and mitigation, before sentencing in each case. According to the *Prosecution Code* published by the Department of Justice, the Secretary for Justice may also apply to the court in exceptional cases for the review of a sentence on the basis that it has proceeded on an error of law or of principle or that it is manifestly inadequate or excessive. The Bills Committee notes that the average fine showed an increasing trend over the past few years.

Prosecution against persons other than the drivers

33. The Bills Committee has also examined if there was any prosecution cases against persons who caused or permitted to be deposited construction waste without lawful authority on a piece of land apart from the drivers. It is given to understand that in general, 3 categories of persons may be prosecuted in an illegal depositing activity under section 16A:

- (i) the person who directly performs the depositing activity;
- (ii) the driver of the vehicle from which waste is deposited (if applicable); and

- (iii) any person who employs the driver to drive the vehicle at that time.

The Administration explains that an individual may fit into more than one of the preceding descriptions such that he has different roles in the illegal depositing activity, and prosecution against which individual or company has to be considered on a case-by-case basis in light of available evidence. Accordingly, the Administration indicates that there is no breakdown figures on the convicted cases which involve "persons who cause or permit to be deposited construction waste without lawful authority on a piece of land". The Administration nevertheless confirms that there have been cases where an employer of the driver or a person giving instructions to the driver for the waste deposition was successfully prosecuted.

Committee Stage amendments

34. With the agreement of the Bills Committee, the Administration has proposed to move Committee Stage amendments in order to explicitly declare that the offence under the new section 16C(7) is an offence of strict liability as discussed in paragraph 22 above which is set out in **Appendix III**. The Bills Committee has not proposed any Committee Stage amendment.

Resumption of Second Reading debate

35. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 18 December 2013.

Consultation with the House Committee

36. At its meeting on 6 December 2013, the House Committee noted the deliberations of the Bills Committee.

Bills Committee on Waste Disposal (Amendment) Bill 2013

Membership list

Chairman Hon Cyd HO Sau-lan

Members Hon LEE Cheuk-yan
Hon CHAN Hak-kan, JP
Hon WU Chi-wai, MH
Hon Charles Peter MOK
Hon CHAN Han-pan
Dr Hon Kenneth CHAN Ka-lok
Hon KWOK Wai-keung
Hon CHUNG Kwok-pan

(Total : 9 Members)

Clerk Ms Sophie LAU

Legal Adviser Ms Wendy KAN

Bills Committee on Waste Disposal (Amendment) Bill 2013

**List of organizations/individuals that have made oral representations
to the Bills Committee**

1. 南昌北居民聯會
2. Motor Transport Workers General Union
3. Hong Kong Waste Disposal Industry Association
4. Heung Yee Kuk New Territories
5. Hong Kong Dumper Truck Drivers Association (with submission)
6. Mr LI Ka-leung, Sai Kung District Councillor (with submission)

Waste Disposal (Amendment) Bill 2013

Committee Stage

Amendments to be moved by the Secretary for the Environment

<u>Clause</u>	<u>Amendment Proposed</u>
8	(a) By renumbering the clause as clause 8(1).
	(b) By adding—
	“(2) Section 31, before “17”—
	Add
	“16C(7),”.’”.