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By E-mail (ahychui@legco.gov.hk)

10 December 2024

Mr Alvin CHUI
Assistant Legal Adviser 3
Legal Service Division
Legislative Council Secretariat

Dear Mr CHUI,

Air Pollution Control (Amendment) Bill 2024

Thanks for your letter of 3 December 2024 concerning the captioned Bill. Our clarifications on the matters set out in the Appendix of your letter are provided in attached **Appendix A**.

Should you like to further discuss, please feel free to contact the undersigned. Thanks.

Yours sincerely,

(Dr Sunny CHEUNG)

for Director of Environmental Protection

c.c.

Department of Justice

(Attn: Mr Allen LAI, Sr Govt Counsel) (by e-mail: allenlai@doj.gov.hk)

Clerk to Bills Committee

(Attn: Ms Angel SHEK,) (by e-mail: aykshek@legco.gov.hk)

A. Closure Notice

In order to regulate pollution processes that may cause serious air pollution, 31 specified process (SP) are specified in Schedule 1 to the Air Pollution Control Ordinance (Cap. 311). Under Cap. 311, a licence is required for using premises for the conduct of any of those SP so as to ensure that in relation to the emission from the SP, the necessary mitigation measures could be implemented and maintained properly, the relevant air quality objectives could be achieved, and the potential impact on public health would unlikely arise. In this regard, on top of voluminous complaints, an unlicensed SP operation may cause immediate health impact and obnoxious nuisance to a large number of residents nearby. To ensure such health impact and obnoxious nuisance to be promptly suspended, a statutory closure notice issued by the Authority is required to stop the pollution process timely.

Regarding the Authority's power to enter the concerned premises for executing the closure notice, under the proposed new section 30J, the Authority may permit a person to enter the subject premises for the purposes of locking or sealing the subject premises or disconnecting the utility supplies. Furthermore, pursuant to section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1), the Authority is conferred with such powers as are reasonably necessary to enable the Authority to do those acts which the Authority is empowered to do under the proposed new s.30G. Hence, the Authority has the power to enter the subject premises if such power is reasonably necessary to enable the Authority to lock or seal the premises or to disconnect the utility supply to the subject premises.

B. Proposed New Offences under Cap. 311

In relation to the newly introduced closure notice, new offences under the proposed new sections 30H (prohibition on conducting SP on the subject premises), 30I (prohibition on entering or remaining on subject premises), 30K (prohibition on removing or defacing closure notices) and 30L (prohibition on breaking or interfering with lock or seal attached to subject premises) under Cap. 311 are introduced as well.

It is our intent that these new offences are strict liability offence and that the prosecution needs not prove the existence of *mens rea* of committing the offence. In this regard, statutory defences under the proposed sections 30H(3) & (4) and 30M of Cap. 311 have been made available for these offences respectively. In addition, the common law defence of "honest and reasonable

mistaken belief” would also be available for these offences. Similar to the mentioned proposed statutory defences, the defendant bears only an evidential burden for the said common law defence and the prosecution would be required to prove the contrary beyond reasonable doubt. Sufficient protection should have been provided.

C. Liability

When the specified person of the subject premises fails to ensure that no SP described in the closure notice is conducted on the subject premises, it would be an offence under the proposed section 30H of Cap. 311. If the specified person is a body corporate, legal proceeding under the proposed 30H would be initiated against the body corporate. Nonetheless, the existing 47A(1) of Cap. 311 has stipulated the liabilities of the director, manager, secretary or other person concerned in the management of the body corporate if the offence was committed with the consent or connivance of, or was attributable to any neglect or omission on the part of such parties. There is also a general provision in section 101E of the Criminal Procedure Ordinance (Cap. 221) which provides for the liability of the director or other officer concerned in the management of the company if the offence committed by the company was committed with the consent or connivance of him/her.

D. Person having an Interest

The proposed section 30N(1) provides that any person having an interest in the subject premises may apply in writing for cancellation of a closure notice. A person having an interest in the subject premises may include an owner of the subject premises (who is not necessarily a specified person) and the mortgagee of the mortgage of the subject premises. It is our intent not to set excessive limitations. As long as it is demonstrated that the person have an interest in the concerned premises, such person could apply for the cancellation of the closure notice.

E. Appeal against the Authority’s Decision

The execution of the closure notice would not be suspended pending the appeal against the Authority’s decision to issue the closure notice to the Appeal Board in view that continued unlicensed SP operation would very likely bring along impact on health.

However, in the event that leave to apply for judicial review against the decision in relation to (i) the issuance of the closure notice by the Authority and/or (ii) the Appeal Board's upholding of the Authority's decision to issue the closure notice is granted, **and** if the relief sought is an order of prohibition or certiorari, **and** the Court so directs, then the execution of the closure notice will be stayed until the determination of the application for judicial review or until the Court otherwise orders pursuant to Order 53 rule 3(10)(a) of the Rules of the High Court, Cap. 4A ("**RHC**").

Similarly, if leave to apply for judicial review against the Authority's decision to refuse to renew a SP licence and/or the Appeal Board's decision to confirm the Authority's decision to refuse renewal is granted, **and** if the relief sought is an order of prohibition or certiorari, **and** a stay of the Authority's and the Appeal Board's said decisions is so ordered by the Court pursuant to Order 53 rule 3(10)(a) of the RHC, a closure notice would not be issued until the determination of the application for judicial review or until the Court otherwise orders.

F. Defence

The proposed section 48A of Cap. 311 provide for a defence of emergency for certain offences under Cap. 311. In addition to the statutory defence, it is our intent that the common law defence of "honest and reasonable mistaken belief" would also be available for these offences. Similar to the mentioned proposed statutory defences, the defendant bears only an evidential burden for the said common law defence and the prosecution would be required to prove the contrary beyond reasonable doubt. Sufficient protection should have been provided.