

HCAL 100/2013

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 100 OF 2013

BETWEEN

HO LOY

Applicant

and

DIRECTOR OF ENVIRONMENTAL  
PROTECTION

1<sup>st</sup> Respondent

CHIEF EXECUTIVE IN COUNCIL

2<sup>nd</sup> Respondent

and

CIVIL ENGINEERING AND  
DEVELOPMENT DEPARTMENT

Interested Party

Before : Hon Au J in Court

Date of Hearing : 18 February 2014

Date of Judgment : 12 August 2014

J U D G M E N T

A. INTRODUCTION

1. On the application of the Civil Engineering and Development Department ("CEDD"), the Director of Environmental Protection ("the Director") granted the environmental permit ("the EP") on 26 April 2010 under the Environmental Impact Assessment Ordinance (Cap 499) ("EIAO") to enable the CEDD to construct a bathing beach at Lung Mei, Tai Po.

2. The EP was granted after the Director approved in November 2008 the environmental impact assessment report ("the EIA Report") submitted by CEDD to the Director under s 6 of the EIAO.

3. In the ecological impact assessment chapter of the EIA Report, it contained in its conclusion a statement ("the Statement") saying that *"Lung Mei did not appear to serve as critical/unique habitats for species of conservation importance, or support significant populations of such species"*.

4. Under s 14(1) of the EIAO, the Director *may* suspend, vary or cancel the EP if she is satisfied that at the time of the application for the EP, information provided by CEDD in support of that application was misleading, wrong, incomplete or false. Further, under s 14(3) of the EIAO, the Chief Executive in Council ("CEIC") *may* also suspend, vary or cancel the EP if he is satisfied that the continuation of the project would cause more prejudice to, among others, the fauna and ecosystems of Lung Mei than expected at the time when the EP was issued.

5. In late 2012 and early 2013, environmental concern groups and the applicant had written to the Director and the CEIC respectively requesting them to exercise the respective power under these provisions to suspend or cancel the EP. In making the requests, it was the concern groups' position that (a) CEDD gave incomplete, misleading or wrong information in support of its application for EP (and therefore the Director should cancel or suspend the EP), and (b) it would be more prejudicial to Lung Mei's fauna and ecosystems if the project continued (and thus the CEIC should also cancel or suspend the EP). That position was said to be supported by various surveys of Lung Mei's ecological environment conducted by these groups. In particular, the concern groups said they had in these surveys sighted a few spotted seahorses (*Hippocampus Kuda*, which is a recognised rare species) and more diversity of the ecosystems in Lung Mei since 2009.

6. Both the Director and the CEIC however have refused to do so.

7. This is the applicant's application for judicial review to challenge:

(1) The Director's decision ("the Director's Decision") dated 10 May 2013 not to exercise her power under s 14(1) of the EIAO to suspend or cancel the EP.

(2) The CEIC's decision ("the CEIC's Decision") dated 4 June 2013 not to exercise the power under s 14(3) of the EIAO to suspend or cancel the EP.

8. On 30 October 2013, I granted leave (after a contested hearing) to the applicant to apply for judicial review only on the following grounds:

(1) The Director's Decision is irrational or *Wednesbury* unreasonable, given that the failure to carry out an ecological impact assessment of the Study Area (as defined at paragraph 18 below) in relation to spotted seahorses renders the Statement an incomplete, misleading or wrong information for the purpose of s 14(1)(a) of the EIAO.

(2) The CEIC's Decision is illegal and/or irrational.

9. I will elaborate on these judicial review grounds later in this judgment. However, it should also be pointed out at the outset that the challenges in this judicial review are only directed at the Director's and the CEIC's exercise of their statutory power under ss 14(1) and (3) of the EIAO. They are *not* directed at the EIA Report itself. In other words, there are no questions raised in this judicial review that the relevant EIA process and the EIA Report are defective or unlawful under any public law grounds.

10. But before I deal with these grounds, I need to first put the matter in context by setting out the relevant background.

## *B. THE BACKGROUND*

### *B1. The EIAO*

11. The EIAO provides a comprehensive regime regulating the undertaking and construction of certain proposals and projects by

subjecting them to meeting environmental protection criteria through the statutory environmental impact assessment process.

12. In gist, under the EIAO<sup>1</sup>:

(1) A person (the project proponent) who is planning a “designated project” (as listed in Schedules 2 and 3 of the Ordinance) shall apply to the Director for an environmental impact assessment study brief. The Director shall issue such a study brief in 45 days after receiving such an application.

(2) The project proponent shall prepare an environmental impact assessment report in accordance with (a) the requirements of the study brief so issued, and (b) the technical memorandum applicable to the assessment.

(3) After receipt of the environmental impact assessment report, the Director shall decide whether it has met the requirements of the study brief and the technical memorandum. Once she has decided that it has so met the requirements, the Director shall also advise the project proponent (a) when to exhibit the report for public inspection and (b) whether the report shall be submitted to the Advisory Council on the Environment (“the ACE”). The ACE is an advisory body consisting of academics, green group representatives and professionals appointed by the Chief Executive.

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<sup>1</sup> See ss 4-10 of the EIAO, as I have summarised their effect in *Leung Hon Wai v Director of Environmental Protection* (unreported, HCAL 49/2012, 26 July 2013) at paragraphs 9-10.

(4) Within 30 days of the expiry of the public inspection or the receipt of comments from the ACE or the receipt of further information from the applicant as requested by the Director (whichever is later), the Director shall approve, approve with conditions or reject the report.

(5) Based on the approval of the environmental impact assessment report, the project proponent who wishes to construct and operate the designated project is required to apply to the Director for an environmental permit. It is only with the grant of an environmental permit that the project proponent can proceed to construct and operate the designated project.

13. Up to the present, there has only been one technical memorandum ("the TM") that has been issued by the Secretary for the Environment under s 16 of the EIAO.

*B2. The project in Lung Mei and the issue of the EP*

14. In 1998, the Ex-Provisional Regional Council endorsed the implementation of a feasibility study on the project ("the Project") of constructing a bathing beach at Lung Mei. The feasibility study was completed in 2001 which confirmed that it was feasible to carry out the Project.

15. Lung Mei beach is situated within the Plover Cove area in Tai Po. It is also adjacent to Tai Mei Tuk with well-established facilities for holiday-makers and water-based recreation activities. The shoreline of

Plover Cove is over 9km, while the shoreline to be affected by the Project is about 200m (which is about 2.2% of the entire shoreline of Plover Cove).

16. The Project falls within the meaning of a “designated project” under the EIAO. As a result, before the Project could be carried out, the CEDD as the project proponent submitted in November 2005 an application to the Director for an environmental impact assessment study brief together with a project profile. After the Director had issued the subject study brief (“the SB”), the CEDD commissioned Halcrow China Ltd (“Halcrow”) as consultant to prepare an environmental impact assessment report in accordance with the SB and the TM.

17. One of the potential environmental impacts of the Project highlighted in the project profile was the loss of existing intertidal and subtidal habitats and associated living organisms due to the beach development works<sup>2</sup>. The CEDD undertook to investigate the ecological value of the marine habitats that could be threatened by the Project<sup>3</sup>.

18. The Director through the SB<sup>4</sup> also required an ecological impact assessment to be carried out of all areas (“the Study Area”) within 500m from the boundary of the project site, ie, Lung Mei. The said assessment should be done in accordance with Annexes 8 and 16 of the TM.

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<sup>2</sup> See paragraph 5.5 of the project profile.

<sup>3</sup> See paragraph 3.4 of the project profile.

<sup>4</sup> See paragraph 3.4.5 of the SB.

19. Halcrow in compiling the EIA Report carried out such an ecological impact assessment of the Study Area. The assessment was incorporated in the EIA Report as Chapter 8.

20. Insofar as this ecological impact assessment in the EIA Report is concerned, it has set out, among others, the details of all the surveys (including subtidal dive surveys, the intertidal (including mangrove) survey and benthic survey) <sup>5</sup> adopted and conducted in the assessment and all the locations where the surveys were done.<sup>6</sup> It also sets out:

- (1) The findings from the subtidal soft bottom habitat and benthic assemblages within the proposed beach development (including core sampling) that no rare species were recorded (see paragraph 8.7.3, as summarised in Table 8.22);
- (2) The findings from the subtidal hard bottom habitat and dive surveys within the proposed beach development (see paragraph 8.7.3);
- (3) The finding that all marine organisms found within the project site are regarded as common or very common species in Hong Kong (see paragraph 8.7.4); and
- (4) The view that since the project site is located at the seashore within the inner bay of Tolo Harbour and next to the artificial or disturbed shorelines at Tai Mei Tuk, marine habitat fragmentation and isolation are not expected.

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<sup>5</sup> See paragraphs 8.6.1 and 8.6.3.

<sup>6</sup> See Figure 8.3.



21. Moreover, the assessment also recorded that although spotted seahorses were *not* sighted within Lung Mei (ie, the project site), two were sighted at location 5 and one at location 7 of the Study Area in these surveys.<sup>7</sup>

22. As mentioned above, in the conclusion section of the ecological impact assessment section of the EIA Report<sup>8</sup>, it contained the Statement saying that “*Lung Mei did not appear to serve as critical/unique habitats for species of conservation importance, or support significant populations of such species*”.

23. Further, as set out in the EIA Report<sup>9</sup>, wide public consultations had been commenced in the early stages of the assignment and throughout the study to understand and address the public concerns of the preliminary designs related to the Project. The consultation parties included green groups, fisherman societies, Tai Po District Council and the general public<sup>10</sup>.

24. In late 2007, CEDD submitted the EIA Report to the Director and the ACE for consideration. The EIA Report was also made available for public inspection from 23 November to 22 December 2007, and members of the public were invited to make comments on it pursuant to s 7(2)(c) of the EIAO.

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<sup>7</sup> See Table 17 of the EIA Report.

<sup>8</sup> See Chapter 8 of the EIA Report.

<sup>9</sup> See paragraph 1.2 of the EIA Report.

<sup>10</sup> See also the Affirmation of Cheng Kin Man, paragraph 10.

25. The ACE approved the EIA Report subject to certain conditions in early 2008. Those conditions included requiring the CEDD to provide additional information on ecological matters. Taking on the conditions, the Director required the CEDD to provide the additional information.

26. The CEDD submitted the additional information ("the 2008 Additional Information") on ecological matters in October 2008. The 2008 Additional Information was also prepared by Halcrow after conducting an active ecological search at Lung Mei and three other sites in Plover Cove and Inner Tolo Channel that were regarded as having similar ecological characteristics to Lung Mei. The purpose of the active search was to try to compile a comprehensive list of the species present at the relevant sites, without regard to whether the sites were a breeding ground or otherwise important for the species found there so that a comparison could be made between the diversity of the species found at Lung Mei and at the other three sites.

27. The 2008 Additional Information targeted, among others, specifically the conclusion in the EIA Report that the overall ecological value of the Lung Mei beach was a low one, and CEDD focused on actively searching for different types of species for the purpose of establishing a comprehensive species list<sup>11</sup>.

28. Moreover:

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<sup>11</sup> See p5, last paragraph.

- (1) At that time, CEDD was provided with a list of species allegedly identified by the public.
- (2) The active search methodologies adopted in the surveys, which were different from and served a different purpose than the EIA Report, was accepted by the Agriculture, Fisheries and Conservation Department ("AFCD") as appropriate.
- (3) The findings in these active searches were reviewed and supported by an independent reviewer, and were accepted by the AFCD.
- (4) These active searches did *not* reveal any spotted seahorse whether in Lung Mei or the 5 reference sites in the nearby waters. Only 3 fish species of conservation importance (Two-spot Goby, Tropical Sand Goby and Grass Puffer) were identified. Thus, three marine species of high conservation value not mentioned in the EIA report, namely, Tropical Sand Goby, Two-spot Goby and Grass Puffer, were found to be present at Lung Mei.
- (5) However, it was also stated in the 2008 Additional Information that all these three species were said to be very common in the Tolo area. The findings therefore showed that Lung Mei did not appear to serve as critical/ unique habitats for them, which conclusion was also accepted by the AFCD

29. The 2008 Additional Information stated that the assessment found that Lung Mei had the lowest number of epifaunal and infaunal

species among all surveyed sites, and that the diversity of crustaceans was also the lowest. It also found that Lung Mei as having the lowest number of marine faunal species when compared with the other four sites surveyed, and Lung Mei exhibited a low diversity of species.

30. Insofar as the ecological status of Lung Mei is concerned, the 2008 Additional Information therefore reconfirmed the Statement that *“Lung Mei did not appear to serve as a critical/unique habitat for any species of conservation importance, or support significant populations of such species”*.

31. The 2008 Additional Information then went on to conclude that *“[t]he overall habitat quality of Lung Mei is, therefore, considered to be relatively low, thereby confirming that the overall ecological value of Lung Mei was low and drawing the same conclusion as in the EIA report.”*<sup>12</sup>

32. In November 2008, the ACE further considered the 2008 Additional Information and eventually endorsed the EIA Report with the

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<sup>12</sup> In full, it says “An assessment of the beach quality of Lung Mei and other three selected reference sites (ie Ting Kok East, Yung Shue O North and Lai Chi Chong) is provided in Table 3. The assessment showed that the diversity of intertidal and shallow subtidal species was the lowest in Lung Mei among the four sites examined. The three species of conservation importance, ie Two-spot Goby *Psammogobius biocellatus*, Tropical Sand Goby *Favonigobius reichei* and Grass Puffer *Takifugu niphobles*, were also present in the three reference sites. Whilst the habitat of Lung Mei Beach is considered to be re-creatable, habitats at the three reference sites cannot be re-created since established mangrove and/or seagrass habitats are present at the reference sites. The overall habitat quality of Lung Mei is, therefore, considered to be relatively low, thereby confirming that the overall ecological value of Lung Mei was low and drawing the same conclusion as in the EIA report.”

condition that precautionary measures be taken to reduce the size of the Project.

33. On 21 November 2008, the Director approved the EIA Report (together with the 2008 Additional Information) pursuant to s 8 of the EIAO.

34. Then in April 2010, upon CEDD's application, the Director issued the EP.

35. During these times, no parties had made any formal challenges to the approval of the EIA Report or the issue of the EP<sup>13</sup>.

*B3. The Director's Decision and the CEIC's Decision*

36. By the time the EP was granted, some green groups reported having documented some 22 different marine species that were classified in Hong Kong as being either rare or uncommon in Hong Kong. In particular, they reported the sighting of *a breeding pair* of spotted seahorses. It is common ground that spotted seahorses are classified as "vulnerable" in the Red Data Books of the International Union for the Conservation of Nature ("IUCN") and are deemed to be of significant conservation value under Table 3 of Annex 8 of the TM. Habitats that constitute a breeding ground for any species, and especially a species that is rare, are also classified in Table 2 of Annex 8 as having high conservation value because of their importance to the regeneration and long-term survival of the organisms that are found there.

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<sup>13</sup> See Affirmation of Cheung Kin Man, paragraph 9.

37. On 27 October 2012 and 2 November 2012, a member of the Save Lung Mei Alliance (the "Alliance"), Designing Hong Kong Limited ("DHK"), wrote to the Director asking her to exercise her power under s 14(1) of the EIAO to suspend or cancel the EP on the ground that the CEDD gave misleading, wrong, incomplete or false information, in that the EIA Report had failed to consider alternative, less environmentally sensitive sites for the beach in Shatin District. On 4 December 2012, the applicant also wrote two letters to the Chief Executive, asking him to intervene in the above request.

38. At the same time, the Alliance further wrote to the CEIC on 19 October 2012 asking him to suspend or cancel the EP under s 14(3) of the EIA Ordinance. It again wrote on 19 April 2013 urging the CEIC to so exercise his power.

39. The Environmental Protection Department ("EPD") replied in a letter dated 31 December 2012 requesting DHK to specify in what respects of the information provided by CEDD in its application for the EP was misleading, wrong, incomplete or false.

40. On 31 January 2013, the applicant, DHK and one Mr Chan To, writing individually and together as members of the Alliance, replied to the EPD's letter of 31 December 2012. In substantially identical letter sent by the applicant and DHK, it was stated that "*members of the 'Save Lung Mei Alliance' including HKWildlife.net have continuously over many years found seahorses, including live and dead ones in the waters affected by the captioned development. These reports include a family of spotted seahorses (male, female and two juveniles) at the Lung Mei site in 2009*".

41. The applicant and the other persons and organisations also wrote to the EPD and provided additional information to the EPD, seeking to show that the diversity of marine species of conservation value present at Lung Mei was considerably greater than what had been indicated in the EIA Report.

42. In the meantime, given that the above ecological concerns raised by the Alliance and others, the EPD sought professional advice from AFCD.

43. For that purposes, the AFCD in December 2012 and January 2013 had conducted surveys at Lung Mei and the three other sites that had been previously surveyed by Halcrow in 2008.

44. The surveys were to obtain updated ecological information at Lung Mei, Ting Kok East, Yung Shue O North and Lai Chi Chong. Information was specifically collected on the distribution of fish and epifauna with the intertidal and subtidal areas of Lung Mei Beach, with special attention being given to five fish species: dragonet, cowfish, spotted seahorses, flagfin goby and bearded worm goby<sup>14</sup>.

45. The AFCD compiled a report of the surveys ("the AFCD 2013 Surveys") in April 2013. The key findings of the AFCD 2013 Surveys were as follows:

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<sup>14</sup> See paragraph 1 of the AFCD 2013 Surveys.

- (1) For intertidal surveys, the number of faunal species recorded was 101 at Lung Mei, 129 at Ting Kok East, 131 at Yung Shue O North and 140 at Lai Chi Chong;
- (2) For subtidal surveys, the number of faunal species recorded was 48 at Lung Mei, 46 at Ting Kok East, 42 at Yung Shue O North and 47 at Lai Chi Chong;
- (3) The combined total number of species recorded by both the intertidal and subtidal surveys at the four sites was 183;
- (4) Out of the 5 target fish species that green groups reported as having been sighted at Lung Mei but were not recorded in the additional surveys conducted by CEDD in 2008, three (cowfish *Lactoria cornuta*, dragonet *Dactylopus dactylopus* and spotted seahorses) were encountered in the intertidal and subtidal surveys conducted by AFCD; and
- (5) A total of 27 spotted seahorses were found at all four survey sites, of which the highest number was recorded at Yung Shue O North (12), followed by Ting Kok East (8) and Lai Chi Chong (5), with *the lowest number recorded at Lung Mei (2)*.
46. In its analysis and assessment of the above findings, AFCD was of the view that as at April 2013:



(1) The ecosystem of Lung Mei Beach including the number of species and the overall diversity of species assemblages had basically remained the same since the EIA Study in 2008<sup>15</sup>.

(2) Although the presence of cowfish, dragonet and spotted seahorses then sighted in surveys would add to the diversity of fish fauna at Lung Mei, it would not be so significant as to affect Lung Mei's overall ecological status<sup>16</sup>.

47. In relation to the the sightings of spotted seahorses recorded during the surveys, the AFCD 2013 Surveys went on also to say as follows:

*"(6) It should be noted that the spotted seahorse figures recorded in the present study may consist of re-sightings of the same individuals owing to the inherent difficulty in distinguishing individuals of spotted seahorses. Also, a direct comparison of results of various studies was made despite the difference in survey design and methodology although such constraints should not vitiate the data interpretation and analysis, or the conclusions so drawn. Given the 'vulnerable' status of spotted seahorse and the significant ecological findings identified by the present field survey, ie considerable number of spotted seahorses recorded, we consider that a precautionary approach should be adopted.*

*(7) It should be noted that all seahorse species have vital parental care, and many species studied elsewhere to date have high site fidelity, highly structured social behaviour, and relatively sparse distributions. The number of spotted seahorses found in the present survey suggested that the subtidal shores of Plover Cove and Inner Tolo Channel, where the four survey sites are located, could be habitats for the spotted seahorse. Since Ting Kok East and Lung Mei are actually*

<sup>15</sup> This was so as (a) the total number of species and the respective number of species at the surveyed sites recorded in AFCD's surveys were comparable to those recorded in the 2008 Additional Information study, and (b) similar to the results of the 2008 Additional Information, Lung Mei recorded the lowest number of faunal species among the four surveyed sites. See paragraph 3 of the AFCD 2013 Surveys.

<sup>16</sup> See paragraph 4 of the AFCD 2013 Surveys.

*located in the same body of waters within the embayment of Plover Cove, treating the whole Plover Cove as one habitat for the spotted seahorse is considered justified. Ting Kok East, and the waters in its immediate vicinity including Lung Mei, could be a habitat for the spotted seahorse.*

*(8) During the present survey, no pregnant or new born spotted seahorses were found at the four survey sites. In view of high site fidelity of seahorses, however, it is not unreasonable to expect pregnant or new born spotted seahorses be eventually found at all these sites which, as suggested in paragraph 7 above, could be habitats for the spotted seahorse. Findings of Surveys undertaken by AFCD in Lung Mei, Ting Kok East, Yung Shue O North and Lai Chi Chong (April 2013) paragraphs 6-8. [footnote omitted]" (emphasis added)*

48. By a letter dated 10 May 2013, the Director informed the applicant and the other persons and organisations that had written to the EPD that the Director *"is of the view that no case has been made out for the exercise of power under s 14(1) of the EIA Ordinance."* This is the Director's Decision.

49. By a letter (in Chinese) dated 4 June 2013 (the "CEIC Letter"), the Secretary to the Executive Council replied the Alliance that the CEIC decided not to invoke the power under s 14(3) of the EIA Ordinance to suspend, vary or cancel the environmental permit for the Project. This is the CEIC's Decision.

50. On 5 June 2013, the Government announced in a press release that it has awarded the contract for the construction of the artificial beach at Lung Mei.

C. *THIS JUDICIAL REVIEW*

C1. *The challenge of the Director's Decision*

51. The challenge against the Director's Decision is in relation to the exercise of her power under s 14(1)(a) of the EIAO, which provides as follows:

“(1) The Director may, with the consent of the Secretary, suspend, vary or cancel an environmental permit if he is satisfied that-

(a) on the application for the environmental permit the applicant gave-

(i) misleading information;

(ii) wrong information;

(iii) incomplete information; or

(iv) false information; or

(b) ...”

52. In the letter containing the Director's Decision, it is stated that:

“This is to inform you that, having considered the aforesaid information provided by you and having reviewed the matter, [the Director] is of the view that no case has been made out for the exercise of power under s 14(1) of the [EIAO]”

53. In other words, the Director was not satisfied with all the materials before her that the CEDD gave misleading, wrong, incomplete or false information when it applied for the EP<sup>17</sup>.

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<sup>17</sup> See the explanation of the basis of the Director's Decision given at paragraph 45 of the Affirmation of Tang Kin Fai, where it is deposed that “[t]here is nothing to show that, on the information available, CEDD had submitted misleading, wrong, incomplete or false information to the Director. Hence there is no ground for the Director to exercise her power to suspend, vary or cancel the EP under section 14(1) of the [EIAO].”

54. Under the ground where leave is granted, it is the applicant's case that the Director's Decision is *Wednesbury* unreasonable or irrational because the Statement clearly amounts to at least misleading or incomplete information.

55. Mr Cooney SC's arguments made in support of this ground run as follows:

(1) It is common ground that the SB<sup>18</sup> required an ecological impact assessment to be carried out of the Study Area in accordance with Annexes 8 and 16 of the TM.

(2) In the surveys carried out by Halcrow for the EIA Report, although spotted seahorses were *not* sighted within Lung Mei (ie, the project site), they were in fact sighted in the other parts of the Study Area<sup>19</sup>.

(3) At the same time, Annexes 8 and 16 of the TM effectively provide that an ecological assessment would be needed if the proposed development affects habitats supporting animal species that are, among others, listed in the Red Data Books.

(4) Given that spotted seahorse is a rare species listed under the Red Data Books, an ecological impact assessment *in relation to spotted seahorses* was therefore mandatorily required (under the TM) to be carried out also over the Study Area. This is particularly so as (Mr Cooney further submits) even

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<sup>18</sup> See paragraph 3.4.5 of the SB.

<sup>19</sup> See paragraph 21 above.

the AFCD (as set out in the AFCD 2013 Surveys) was of the view that the entire Plover Cove area<sup>20</sup> could be treated as one habitat for spotted seahorses, particularly given their fertility loyalty<sup>21</sup>.

(5) However, it is not disputed that no ecological impact assessment was carried out specifically vis-à-vis spotted seahorses in the Study Area.

(6) In the circumstances, the Statement saying that "*Lung Mei did not appear to serve as a critical/unique habitat for any species of conservation importance, or support significant populations of such species*" must at least be misleading or incomplete, since no ecological impact assessment specifically of spotted seahorse was carried out in the Study Area (as required by the TM and SB) to support that conclusion. This is also so as it is implied (contended Mr Cooney) in the Statement that an ecological impact assessment had been carried out in the Study Area to support it.

(7) As such, the Director's conclusion that there was no case to show that CEDD gave misleading or incomplete information at the time of the EP is irrational or *Wednesbury* unreasonable.

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<sup>20</sup> As mentioned above, the Plover Cove area is larger than the Lung Mei Project site but within the Study Area.

<sup>21</sup> See particularly paragraphs 7 and 8 of the AFCD 2013 Surveys as quoted at paragraph 47 above.

56. With respect to Mr Cooney, I am not persuaded by these arguments. I will explain why.

57. Fundamental to the applicant's arguments is the submission that under Annexes 8 and 16, it was mandatory to carry out an ecological impact assessment in relation to spotted seahorses in the Study Area to assess the area's (including Lung Mei's) conservation value. It is the failure to carry out such assessment which leads to the follow-up argument that the Statement is misleading or incomplete.

58. However, Mr Yu SC for the Director submits that whether an ecological impact assessment *of the seahorses* needed to be carried out in the Study Area is a matter of professional judgment for the Director. In the present case, the Director had in the exercise of her judgment decided that it was not necessary, and it was not unreasonable or irrational for her to so decide.

59. In light of these contentions, the debate between the parties rests on whether it is mandatory to carry out a specific ecological impact assessment of spotted seahorse of the Study Area. This in turn depends on the proper reading and construction of the relevant parts of the TM and SB. This is what I will look at now.

60. Annex 16 set out the guidelines for carrying out of ecological assessment. It "*describes the general approach and methodology for assessment of ecological impact arising from a project or proposal.*"<sup>22</sup>

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<sup>22</sup> See paragraph 1.1.

A			A
B	61.	Paragraph 1.2 of Annex 16 also states as follows:	B
C		“1.2 An ecological assessment is part of an EIA study for a	C
D		designated project which may have an impact on the natural	D
E		environment including existing flora, fauna and wildlife habitats.	E
F		The term ‘ecology’ includes both marine and terrestrial ecology.	F
G		The main objective of ecological assessment is to provide	G
H		sufficient and accurate ecological data to allow to complete and	H
I		objective identification, prediction and evaluation of the	I
J		potential ecological impacts. The methodology used may vary	J
K		from case to case depending on the natural environment to be	K
L		affected and the nature and scale of the project.”	L
M	62.	Paragraph 2.1 then provides that the procedures for	M
N		determining “the need” for ecological assessment are outlined in	N
O		Appendix A, and that the key factors to be considered are described in	O
P		Notes 1 to 3 thereof. In other words, whether it is necessary to carry out a	P
Q		relevant ecological assessment is guided by the factors set out in those	Q
R		Notes.	R
S	63.	Relevant for the present purpose is Note 3, which says:	S
T		“Note 3: Species of Conservation Importance	T
U		An ecological assessment will be needed <u>if the proposed</u>	U
V		development will affect habitats <u>supporting significant</u>	V
		<u>population of wild fauna or flora that are:</u>	
		1. <u>listed in IUCN Red Data Books or those of the South</u>	
		<u>China region;</u>	
		2. listed in international conventions for conservation of	
		wildlife;	
		3. endemic to Hong Kong or South China;	
		4. listed under local legislation:	
		(a) Forestry Regulation (under Forests and Countryside	
		Ordinance Cap 96);	
		(b) Wild Animals Protection Ordinance Cap 170;	

(c) Animals and Plants (Protection of Endangered Species)  
Ordinance Cap 187;

(d) Other relevant Ordinances or Regulations such as  
Marine Parks and Marine Reserves Regulation (under  
Marine Parks Ordinance Cap 476);

(References shall also be made to species protected by  
legislation in China, especially the Guangdong Province.)

5. considered as rare in the territory or having special  
conservation importance by scientific studies other than those  
listed above.” (emphasis added)

64. In other words, under Notes 3, an ecological impact  
assessment would need to be carried out only *if* the project would affect a  
habitat that supports a significant population of animals or plants that are  
listed under paragraphs 1-5 thereof.

65. When these parts of Annex 16 are read together, I accept it is  
objectively and expressly provided that:

(1) Whether there is a need to carry out a or certain ecological  
impact assessment depends on the circumstances of each case  
and is guided by the factors listed out under Notes 1 to 3.

(2) Note 3 prescribes that an ecological impact assessment would  
be so needed if the proposed development (in the present case  
the Project) would affect habitats that support “significant  
population” of wild fauna or flora listed thereof.

66. At the same time:



(1) The TM also acts as a guide for the Director in deciding on matters under ss 5, 6, 8, 10, 12, 13 and 14 of the EIAO (see paragraph 1.2.2 of the TM).

(2) Thus, the Director in deciding (a) under s 6(3) of the EIAO, whether the EIA Report meets the requirements of the SB and TM, and (b) under s 8, whether to approve or reject the EIA Report, she should be guided by the TM.

(3) Further, the Director shall take advice from the Director of Agriculture and Fisheries (“DAF”)<sup>23</sup> in relation to, among others, matters concerning nature conservation and ecological assessment (see paragraph 9.1 of the TM).

67. Bearing these interpretations in mind, I now look at the question of whether, in the circumstances of the present case, it is mandatory to carry out an ecological impact assessment of the Study Area *of spotted seahorses*.

68. As mentioned above, the Director in issuing the SB had required (under paragraphs 3.4.5.1 and 3.4.5.2) the CEDD as the project proponent to carry out an ecological impact assessment in the Study Area in accordance with the guidelines and criteria as stated in Annexes 8 and 16 of the TM. To that extent, it is correct that CEDD must carry out an ecological impact assessment over the Study Area to assess matters that are specifically provided under paragraph 3.4.5.4 of the SB. But that had already been done (see paragraphs 18-21 above).

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<sup>23</sup> Now the Director of Agriculture, Fisheries and Conservation.

69. Further, as I mentioned at paragraph 21 above, at the time of the EIA Report, there was no evidence suggesting that spotted seahorses inhabited the project site, ie, Lung Mei, itself, although a few were found in the nearby waters. It is also common ground that up to this time, none of the information submitted by the green groups or the public, whether through comments submitted during the public inspection of the EIA report under s 6 of the EIAO or data provided by the "Lung Mei Forum", made any reference to spotted seahorses being identified in Lung Mei<sup>24</sup>.

70. Viewed in that context, the real question that arises in this ground of challenge is whether, other than the above general ecological impact assessment, a further *specific* ecological impact assessment *in relation to spotted seahorses* of the Study Area should also be carried out, as a few of them were sighted therein.

71. In relation to this question, Note 3 has specifically provided that such an assessment should be carried out *if* the Study Area as a habitat supports a "significant population" of spotted seahorses. If it does not, then it is not necessary to do so.

72. Whether the Study Area is such a habitat is a question of professional judgment. It is the Director's evidence that when she considered that question in the context of whether the EIA Report complied with the TM and SB, she had (as required under the TM) sought

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<sup>24</sup> Mr Cooney fairly and rightly confirmed at the leave hearing that the applicant would *not* pursue an argument (which appears to be one of the bases stated in the Form 86) that the baseline study of the ecological impact assessment in the EIA Report and the 2008 Additional Information was wrong as it is reasonable to infer that there should also be the presence of spotted seahorse at Lung Mei in 2008 because of the reported sighting of the specie in 2009.

advice from DAF. It is DAF's advice that the report complied with the TM and SB as the Study Area (including Lung Mei) did not constitute a habitat that supported a significant population of spotted seahorses<sup>25</sup>.

73. In forming that view, the DAF had looked at the results of the general ecological impact assessment contained in the EIA Report and other relevant literature, which show that:

(1) Lung Mei is not a site of special scientific interest or an area of conservation importance (Sham 2<sup>nd</sup>, paragraph 10);

(2) Although 3 spotted seahorses were found outside Lung Mei and within the Study Area, a professional judgment must be found, under Note 3 in Appendix A to Annex 16 of the TM, whether they are a sufficiently important species. The AFCD considered that spotted seahorse should be so regarded (Sham 2<sup>nd</sup>, paragraphs 12-15);

(3) The AFCD then reviewed the available literature which indicates that spotted seahorse was moderately abundant in Hong Kong, with wide distribution in Indo-Pacific, and is of medium resilience to habitat disturbance or loss (Sham 2<sup>nd</sup>, paragraphs 16-19);

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<sup>25</sup> See: 1st Affidavit of Sham Chung Hung ("Sham 1st"), paragraph 7; 2nd Affidavit of Sham Chung Hung ("Sham 2nd"), paragraphs 9 and 21 to 30; Affidavit of Yeung Kwok Leung, paragraph 11.

(4) The academic opinion was consistent with the information available to the AFCD through the annual reef check showing significant sightings of spotted seahorse (Sham 2<sup>nd</sup>, paragraph 20);

(5) On the basis of the above, the AFCD concluded that an ecological assessment on spotted seahorse was not necessary, and the Statement that Lung Mei was not a critical or unique habitat for species of conservation importance or support significant populations of such species was correct (Sham 1<sup>st</sup>, paragraph 21; Sham 2<sup>nd</sup>, paragraph 21).

74. In light of all the above materials and information, it is in my view clearly within a reasonable range of expert or professional opinions open to the DAF that the Study Area did not constitute a habitat that supported a significant population of spotted seahorses. Thus, that would not under Note 3 mandate the carrying out of a further specific ecological impact assessment of spotted seahorse. This is further underlined by the following:

(1) Since as early at October 2007 (the time of the EIA report), the nearby waters of Lung Mei (Tai Mei Tuk and Yeung Chau) were already habitats of spotted seahorse. Given the location of and the connection with these nearby habitats, and the fact that spotted seahorses move freely in water, even if spotted seahorses were found in Lung Mei, that of itself does not show that Lung Mei is a unique or critical habitat compared to the other nearby habitats, or that the proposed

development will affect habitats supporting significant population of spotted seahorse.

(2) The undisputed evidence is that marine habitat fragmentation is not expected, since the project site is at the seahorse within the inner bay of Tolo Harbour and next to Tai Mei Tuk, and marine organisms move freely in the sea.

(3) At the same time, the applicant has not adduced any evidence to show that 2, 3 or 4 spotted seahorses would amount to a significant population.

75. The Director relying on the DAF's said professional advice accepted that the EIA Report was compliant with the TM and SB even though no ecological impact assessment specifically of spotted seahorses over the Study Area was carried out. That must also be a decision reasonably open to her.

76. For these reasons, I accept that it is not *Wednesbury* unreasonable for the DAF and the Director to form the view that the Study Area did not constitute a habitat that supported a significant population of spotted seahorses. Thus, under a proper construction of Annexes 8 and 16 of the TM together with Note 3, it was also not mandatory to carry out a specific ecological impact assessment of spotted seahorse in the Study Area.

77. As I said above, the foundation of the applicant's ground of challenge is that it was mandatory to carry out such a specific ecological assessment, and it is the failure to do so that has rendered the Statement

incomplete or misleading. Given that it is not mandatory to carry out an ecological impact assessment vis-à-vis spotted seahorses of the Study Area, it does not therefore follow (as contended by the applicant) that the lack of such a study renders the Statement obviously misleading or wrong.

78. For the same reason, I also do not think that the Statement itself implies that an ecological impact assessment specifically of spotted seahorses had been carried out. All that the Statement is saying is *Lung Mei itself* (a) did not serve as a critical/unique habitat for any species of conservation importance or (b) support significant population of such species. The Statement is general in nature and thus consistent with rather an implication that a general ecological impact assessment had been carried out which supports the conclusion. This had been done.

79. Mr Cooney's reliance on the fact that the AFCD in the AFCD 2013 Surveys itself stated that Plover Cove as a whole could be treated as one habitat and advocated a precautionary approach also do not assist his arguments any further. This is so because:

- (1) The 2013 Surveys were not conducted for the purpose of dealing with the question of whether a specific ecological impact assessment should be carried out in the EIA report. One therefore cannot simply import the view from that surveys to the question of whether it was reasonable to form the view that the Study Area (as a habitat) did not support a significant population of spotted seahorses. In any event, the mere fact that Plover Cove can be treated as a habitat for spotted seahorses does not naturally shows that it is also a

habitat that supports a “significant population” of spotted seahorses.

- (2) The advocating of a precautionary approach by itself cannot show that the AFCD’s advice which was adopted by the Director to form the Director’s Decision was perverse.

80. For all these reasons, I cannot see how it could be said that it was irrational or *Wednesbury* unreasonable for the Director to find (basing on professional judgment) that the Statement was *not* misleading or incomplete even though no ecological impact assessment vis-à-vis spotted seahorses was done over the Study Area. The court has no basis to interfere the same in a judicial review<sup>26</sup>. The challenge of the Director’s Decision therefore fails.

*C2. The challenge of the CEIC’s Decision*

81. The proposed challenge against the CEIC’s Decision relates to the exercise of power under s 14(3) of the EIAO, which provides as follows:

“(3) The Chief Executive in Council may suspend, vary or cancel an environmental permit if he is satisfied that the continuation of the designated project is, or is likely to be more prejudicial to the health and well being of people, flora, fauna or ecosystems than expected at the time of issuing the environmental permit.”

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<sup>26</sup> See: *Puhlhofer v Hillingdon London Borough Council* [1996] 1 AC 484, at 511C, 517E-F, 518B-E *per* Lord Brightman; *R v Director General of Telecommunications, ex parte Cellcom* (transcript, 26 November 1988, Lightman J), at paragraphs 26 and 27; *Popular Signs v Radiation Board* (unreported, HCAL 53/2008, 12 January 2010, A Cheung J) at paragraphs 34-37.

82. Thus, in relation to the Project, in order to engage s 14(3):

(1) The CEIC must first be satisfied with the information or materials before him that the continuation of the Project is or is likely to be more prejudicial to the health and well being of the fauna or ecosystems than expected at the time of the issuing the EP.

(2) Second, even if so satisfied, the CEIC has still to be further satisfied that he should exercise the discretion to cancel or suspend the EP after taking into account all the circumstances of the case.

83. As mentioned above, in the letters to the CEIC asking him to exercise the s 14(3) power, the Alliance was saying that the sighting of spotted seahorses (as a rare species) and an increased biodiversity in Lung Mei shows that the continuation of the Project was or was likely to be more prejudicial to the health and well being of the fauna or ecosystems thereat than expected at the time of the issuing of the EP.

84. In the CEIC's Letter containing the CEIC's Decision, it is stated that, after considering the letters from the Alliance and all the relevant information, the CEIC decided not to exercise his power under s 14(3) because there was no evidence to support such an exercise<sup>27</sup>.

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<sup>27</sup> The letter is in Chinese which states as “行政長官會同行政會議經考慮上述信件、聯盟二零一三年五月廿八日致環境局局長的信件及所有有關資料後，認為不應就有關計劃行使《環評條例》第 14(3) 條賦與的權力，因為沒有證據支持這個決定。”



85. The applicant's present challenge to the CEIC's Decision is premised on the following grounds:

(1) The illegality grounds<sup>28</sup>:

(a) The CEIC failed to assess whether the continuation of the Project is, or is likely to be more prejudicial to the health and well being of cowfish, dragonets and spotted seahorses *at Lung Mei* than expected at the time of issuing the EP;

(b) Alternatively, the CEIC failed to pay sufficient regard or at all to the fact that the continuation of the Project is, or is likely to be more prejudicial to the health and well being of at least three species of the "fauna" (namely cowfish, dragonets and spotted seahorses) *at Lung Mei* than expected at the time of issuing the EP.

(2) The irrationality ground<sup>29</sup>: there was no rational basis for the CEIC to conclude that "no basis could be made out to show that the continuation of the Project is, or is likely to be more prejudicial to the health and well being of the ecosystem or seahorses than expected at the time of issuing the EP", since no specific ecological impact assessment had been carried out in relation to cowfish, dragonets and spotted seahorses at Lung Mei.

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<sup>28</sup> See paragraphs 47A-47F of the Amended Form 86 and paragraphs 71-81 of the applicant's skeleton.

<sup>29</sup> See paragraphs 48-51 of the Amended Form 86 and paragraphs 82-86 of the applicant's skeleton.

86. I now turn to examine these grounds.

*C2.1 The illegality grounds*

87. The applicant's arguments made in support of these grounds (under both limbs) are in summary these:

(1) It is clear that by the time when the CEIC exercised his power under s 14(3) of the EIAO in 2013, the information and evidence provided by the concern groups showed that Lung Mei's fauna had more species of sea animals, including spotted seahorses (see paragraph 36 above), than those identified in the EIA Report. There were also in existence more in number of other species spotted there compared with the same at the time of the EIA Report. These changes in the fauna were also supported by the AFCD 2013 Surveys, which also recorded the sighting in Lung Mei of (a) additional species (ie, spotted seahorse, dragonet and cowfish) that were not identified in the EIA Report and (b) increased quantities of other previously identified species (see paragraph 45 above).

(2) Given that there were more in number and more in terms of species identified in Lung Mei's fauna in 2013 compared with the time when the EP was issued in 2010 (which was premised on the results of the EIA Report), it must follow as a matter of logic that the Project would have a more prejudicial effect on the fauna and ecosystems of Lung Mei in 2013 (as it

would affect more in number and more in species of the animals forming the fauna there) than in 2010.

- (3) In the premises, also as a matter of logic, in concluding that it was not the case, the CEIC must either have failed to assess the same or have failed to pay any regard or at all to these relevant facts in exercising his power. This is unlawful.

88. With respect to Mr Cooney SC, I am unable to accept these contentions for the following reasons.

89. An important underlying basis of Mr Cooney's submissions is that, as a matter of construction, the meaning of the words "more prejudicial" in the provision is satisfied by any increase (even one) in the kinds or quantities of species of the fauna or ecosystem that can be identified.

90. On the other hand, it is Mr Yu's submissions that, on a proper purposive construction for this statutory provision, the requirement of "more prejudicial" is to be satisfied when it is shown that the relevant fauna or ecosystem is to be *seriously or significantly* more adversely affected or harmed at the time when the CEIC is asked to exercise his power under s 14(3). This is so as the intended purpose of this section is to provide for the exceptional circumstances where there are significant or serious changes in the adverse environmental impact on the project site by reason of the continuation of the designated project which are not expected at the time of the issue of the relevant environmental permit.

91. I agree with Mr Yu.

92. This purposive construction is consistent with and supported by the legislative materials explaining this provision when the bill<sup>30</sup> was introduced and discussed in the LegCo<sup>31</sup>. The explanations show that the requirements under s 14(3) are intended to be satisfied in exceptional circumstances where the continuation of a designated project would be extremely hazardous to public health or would cause serious environmental damage not expected at the time of the issue of the environmental permit:

- (1) At the meeting of the Bills Committee on the Environmental Impact Assessment Bill on 27 June 1996, in answering members' concerns about the Governor-in-Council's (the predecessor of CEIC) potential exercise of power under this provision, the Administration's representative stressed and explained that, under this provision, in considering whether to exercise his power under this provision, the Governor-in-Council would have to be satisfied that the continuation of the designated project would be "*extremely hazardous to public health and that damage done could not be remedied*". It was also said that the Governor-in-Council would only cancel an environmental permit under "*very exceptional circumstances*."<sup>32</sup>

<sup>30</sup> As the Environmental Impact Assessment Bill.

<sup>31</sup> Mr Cooney SC does not dispute that it is permissible for the court to look at these legislative materials to ascertain the purpose of s 14(3). See: *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at paragraphs 12-14 *per* Li CJ.

<sup>32</sup> See Minutes of the Bills Committee meeting on 27 June 1996 at 2:30 pm, paragraphs 14-15.

- (2) In the resumed debate on the second reading of the bill, the Administration explained that s 14(3) was a “*reserve power*” and it would be “*exercised very sparingly in the unlikely event that the continuation of a project would cause serious environmental damage not envisaged in the EIA*”<sup>33</sup>.

93. Moreover, this purposive construction is also consistent with the following:

- (1) By way of the passing of the EIAO, the legislature has struck a balance between the public need to carry out a designated project and the need to protect the environment in requiring a project proponent to obtain an environmental permit by satisfying the comprehensive statutory regime of environmental impact assessment process provided under the statute.

- (2) The potential intervention by the CEIC under s 14(3) is positioned at the time *after* the relevant environmental permit has already been issued, where the necessary environmental impact assessment envisaged in the statute has already been completed, and the relevant environmental impact assessment report has been approved without any or any successful challenge as provided for in the statute. In such a context, the objective intention of the legislature must thus be to use this last step to cater for any unexpected significant or dramatic change in environmental impact that has arisen since

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<sup>33</sup> See Proceedings of the Legislative Council on 29 January 1997 at p 80.

the approval of the environmental permit. This is particularly so given that by the time someone asks the CEIC to revoke or suspend the environmental permit under this provision, the relevant project may well have already been commenced or even largely completed. In such a context, in my view, it cannot be the objective intention of the legislature that the element of a “more prejudicial” effect on the fauna or ecosystem of the relevant site is to be satisfied even when there are only minor or insignificant changes in the adverse effect on the ecosystem by reason of the continuation of the project.

(3) The ordinary meaning of the words “*more* prejudicial”, which gives the CEIC room to assess and look at the degree and extent of the “prejudice” to be caused to decide if the condition is met.

(4) The ordinary meaning of the words “fauna”<sup>34</sup> and “ecosystem”, which are collectively terms, entitling the CEIC to look at and focus on the community of animal lives *as a whole* and the *entire* relevant environment. These again require and entitle the CEIC to look at a host of facts and factors, and to exercise a judgment as to degree and extent, to see if the criteria that the relevant fauna and ecosystems are more prejudicially affected are met.

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<sup>34</sup> “Fauna” is a collective term applied to the animal or animal life of any particular region or epoch: *Oxford English Dictionary*, p 770.

94. On the other hand, the applicant's construction that the condition of "more prejudicial" *must be* satisfied simply by *any* increase in terms of species or the number of previously identified species in the relevant site is contrary to and inconsistent with the above legislative materials and context.

95. For these reasons, I am of the view that as a matter of construction, in determining whether the continuation of the Project is or is likely to cause more prejudice to the fauna and ecosystem in Lung Mei under s 14(3) of the EIAO:

- (1) The criteria are only met if the increase in the adverse effects on the fauna and ecosystems by reason of the continuation of the Project are or are likely to be significant and serious; and
- (2) In seeing whether there are such serious or significant adverse impacts, the CEIC is entitled to look at, among others, a host of factors and matters that relate to the fauna and ecosystem *as a whole*.

96. In this respect, the evidence shows that, in deciding whether to exercise his power under s 14(3), the CEIC has taken into consideration matters stated in the Alliance's various letters, the EIA Report (in particular its ecological impact assessment), the 2008 Additional Information, the EP and the conditions attached thereto, the AFCD 2013 Surveys and the advices given therein<sup>35</sup>.

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<sup>35</sup> See generally the 1st and 2nd Affirmations of Choi Man Yee.

97. More specifically, the unchallenged evidence shows that CEIC took into account the following matters<sup>36</sup>:

(1) The AFCD's views in the AFCD 2013 Surveys that<sup>37</sup>:

(a) The ecosystem of Lung Mei Beach including the number of species and the overall diversity of species assemblages had basically remained the same since the EIA Study in 2008.

(b) Although the presence of cowfish, dragonet and spotted seahorses then sighted in surveys would add to the diversity of fish fauna at Lung Mei, it would not be so significant as to affect Lung Mei's overall ecological status.

(2) The AFCD's further explanations in the AFCD 2013 Surveys that (a) these fishes are mobile and not static and can move to neighbouring locations with similar habitats; (b) similar habitats of much larger area exist in the vicinity of Lung Mei; and (c) further protective measures are to be formulated, as part of the conditions of the EP, to protect and relocate them during construction of the beach. Thus, even though a few of their numbers are now found at Lung Mei, there is no basis to infer that continuation of the project would cause more prejudice to them (Sham 2<sup>nd</sup>, paragraph 36).

<sup>36</sup> As helpfully summarised by Mr Yu in his skeleton, which I adopt.

<sup>37</sup> See paragraphs 3 and 4 of the AFCD 2013 Surveys, and paragraphs 45 to 47 above.



(2) The AFCD's conclusion that no case has been made out that the continuation of the project is or is likely to be more prejudicial to the well being of the fauna or ecosystem in Lung Mei given the facts that:

(a) In the case of spotted seahorse:

(i) the findings of the AFCD 2013 Surveys and the annual reef check show that spotted seahorse is still moderately abundant in Hong Kong (Sham 2<sup>nd</sup>, paragraphs 28-29); and

(ii) the subtidal shores of Plover Cove and the Inner Tolo Channel, where Lung Mei is located, could be a habitat for spotted seahorse, and there is nothing unique about Lung Mei as a spotted seahorse habitat (Sham 1<sup>st</sup>, paragraph 22; Sham 2<sup>nd</sup>, paragraph 30).

(b) As for cowfish and dragonet:

(i) they enjoy no threatened or statutory protection status in Hong Kong (Sham 2<sup>nd</sup>, paragraphs 31(3), 35);

(ii) although they are said to be "rare" and "apparently rare", the information available to the AFCD shows that they have been found in other locations in Hong Kong (Sham 2<sup>nd</sup>, paragraphs 31(4), 33-34);

(iii) they are of high to medium resilience, and low to moderate vulnerability, and have the ability to adjust and cope with relocation (Sham 2<sup>nd</sup>, paragraphs 31(1)-(2)); and

(iv) they are relied upon by the applicant in her petition letters as contributing to the overall diversity of species and the ecological status of Lung Mei, and *not* as free-standing species which merit individual assessment and protection.

(3) Further, the shoreline of the proposed beach (200m) is only a small fraction of the shoreline of Plover Cove (9km) (Sham 2<sup>nd</sup>, paragraph 36(2)).

(4) The conditions in the EP and the precautionary measures initiated by the CEDD study to relocate fish of conservation importance found in the project site (which could include spotted seahorses, cowfish and dragonet) would further ensure their protection and conservation (Sham 1<sup>st</sup>, paragraph 23; Sham 2<sup>nd</sup>, paragraph 36(3)). That further studies and measures are to be introduced by way of conditions to the EP is not itself indicative of any defect in the determination process. Moreover, the AFCD already had the information concerning the 3 species summarised in subparagraphs (2)(a) and (b) above to show that they would be able to move to and utilize suitable neighbouring habitats. It was with that knowledge that the precautionary measure proposed, which

would further facilitate that translocation and hence their preservation, were found to be acceptable.

98. AFCD's above professional view that the fauna and ecosystems are not likely to be significantly affected by the continuation of the Project is based on the facts and findings in the AFCD 2013 Surveys and the other matters, including the mitigating measures, summarised above.

99. Given these facts and AFCD's views, notwithstanding the recent presence of 2 spotted seahorses, 1 cowfish and 8 dragonets at Lung Mei (and the previous absence of their identification in the EIA Report), it is reasonably open to the CEIC to conclude that the continuation of the Project would not or is unlikely to result in any serious or significant increase in the adverse effect on (thus it is not or is unlikely to be "more prejudicial" to) the fauna or ecosystem of Lung Mei.

100. I therefore reject the applicant's first contention under the illegality grounds.

101. The applicant's alternative submissions under this ground are in reality a flip side of the submissions under the first contention. What in effect the applicant is saying is that, given the increase in number of the sighting of these species, it follows logically and the CEIC should come to a view that it is more prejudicial to the fauna of Lung Mei if the Project continues. Thus, in failing to exercise his discretion to suspend or cancel the EP despite it is more prejudicial to the fauna of Lung Mei, the CEIC had allegedly failed to pay or pay sufficient regard to this fact.

102. As I said above, by the use of the word “may”, s 14(3) clearly gives the CEIC a discretion as to whether to exercise the power even if it can be shown that the continuation of the project is or is likely to be more prejudicial to the relevant fauna or ecosystem<sup>38</sup>. Thus, even if I was wrong in the above in accepting the purposive construction of s 14(3) and that the applicant was right to say that the condition of “more prejudicial” is satisfied by the mere fact that there was an increase in the kinds of species and the number of other previously identified species sighted in Lung Mei in 2013, it is still a matter of discretion for the CEIC to decide whether to cancel or suspend the EP in the circumstances of the present case.

103. In that respect, the CEIC had clearly paid regard to the relevant facts, including the recent sighting of spotted seahorses, cowfish and dragonets, together with all the other matters I have summarised above before exercising his discretion not to suspend or cancel the EP. This exercise of discretion, as explained above, cannot be said to irrational or *Wednesbury* unreasonable<sup>39</sup>.

104. Mr Cooney however seeks to contend that, reading the CEIC’s Decision as set out in his letter dated 4 June 2013 (see paragraph 84 above), the CEIC’s only basis in coming to the decision was his conclusion that there was no evidence to support that it was more

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<sup>38</sup> Mr Cooney also fairly accepts that even if it can be shown that it is more prejudicial to the fauna and ecosystem in Lung Mei with the continuation of the Project, it is *not* automatic or mandatory that the CEIC must exercise his power under s 14(3).

<sup>39</sup> Cf: *Lister Assets Ltd v Chief Executive in Council* (unreported, CACV 172/2012, 25 April 2013) paragraph 29; *Canadian International Hospital Foundation Ltd v Secretary for Justice* (unreported, HCAL 131/2006, 4 May 2007) at paragraphs 92-93.

prejudicial to the fauna and ecosystem of Lung Mei. Thus, it was not open (says Mr Cooney) to the CEIC to argue that even if the “more prejudicial” requirement was satisfied, it was not unreasonable in light of all the materials for the CEIC in the exercise his discretion to refuse to cancel or suspend the EP.

105. I am not convinced by this submission. Reading the letter objectively, all that the CEIC was saying is that there was no evidence to support the exercise his power under s 14(3). Given that the exercise of power under s 14(3) involves the meeting of (a) *firstly* it is more prejudicial to Lung Mei’s fauna and ecosystem with the continuation of the Project, *and* (b) *secondly* it is necessary in that circumstances to exercise the discretion to cancel or suspend the EP, this reason given by the CEIC is equally consistent with him also saying that he was not satisfied that there was enough to support the exercise of his discretion cancel or suspend the EP.

106. For these reasons, the alternative contention under this ground must also be rejected.

## *C2.2 The irrationality ground*

107. This ground is premised on the argument that, before the CEIC could form a view as to whether the criteria of s 14(3) are met given the recent sighting of 2 spotted seahorses, 1 cowfish and 8 dragonets at Lung Mei, he had to call for ecological impact assessments in relation to these 3 species to be carried out first. Without such assessments, (the arguments say) there is no rational basis for him to come to that view. The decision is therefore irrational.

108. Mr Cooney's arguments seem to be premised on the contention that it is a matter of logic (in particular given the fact that ecological impact assessments are required under the TM and SB) that such assessments have to be carried out to enable the CEIC to form a view as to whether it would be more prejudicial to the fauna or ecosystems of Lung Mei if the Project continues.

109. I do not accept these submissions.

110. S 14(3) does not prescribe that the CEIC must rely on any ecological impact assessments to form a view thereunder. There are thus no legal bases to say that it is mandatory for the CEIC to rely on such assessments before forming a view.

111. Further, given my above conclusion that it is for the CEIC to exercise a *value* judgment to see whether the continuation of the Project *now* would result in significantly and seriously more harm to the fauna and ecosystem as a whole than as expected in the EIA Report, it must be open (and the legislature must have intended it to be so open) to the CEIC to look a host of matters and facts relevant to this Project, the fauna and the ecosystems to decide whether this is the case.

112. It is also relevant to note that the SB and TM do not mandatorily require (as I have also concluded above) a *specific* ecological impact assessment in relation to a specific species to be carried out for the purpose of the EIA Report. As explained above, they leave it to professional judgment as to whether one would be required in the specific circumstances of each case.

113. In the present case, the CEIC had asked for the view of the AFCD. The AFCD had provided his professional view that no significantly more adverse impact would be had on the ecosystem of Lung Mei notwithstanding the recent sighting of a number of spotted seahorses, cowfish and dragonet. The AFCD also did not find it necessary to call for further specific ecological impact assessments. As I have said above, it is not unreasonable for the AFCD to come to these views. Thus, in my view, it also cannot be said that as matter of logic, specific ecological impact assessments of these species have to be carried out before the CEIC could form the view as to whether the criteria for the exercise of s 14(3) are met in the present circumstances.

114. It is therefore not *Wednesbury* unreasonable for the CEIC to make the CEIC Decision after considering all the matters referred to in the above, even without any *specific* ecological impact assessments of those three species of sea animals. In the premises, I would also refuse the irrationality ground.

#### D. CONCLUSION

115. For all the above reasons, the applicant has failed in all her grounds in support of this judicial review. I will dismiss her application.

116. There are no reasons why costs should not follow the event. I further order (on a *nisi* basis) that (a) costs of this application be to the respondents, to be taxed if not agreed, and (b) there be no order as to costs in relation to the interested party's costs, given that most of the arguments made in opposing the application are already made by respondents, and

thus it is only just and fair in all the circumstances that there should only be one set of costs.

117. I further order (also on a *nisi* basis) that:

(1) There be no order as to costs of the contested leave application, as that the applicant was only partly successful in the leave application;

(2) The applicant's own costs be taxed in accordance with legal aid regulations.

118. The costs orders *nisi* shall become absolute 28 days from today unless any of the parties applies to vary it by summons.

119. Lastly, I thank counsel for their helpful assistance.

(Thomas Au)  
Judge of the Court of First Instance  
High Court

Mr Nicholas Cooney SC, leading Mr Hectar Pun, instructed by Bird & Bird, assigned by Director of Legal Aid, for the applicant

Mr Benjamin Yu SC, leading Ms Eva Sit, instructed by the Department of Justice, for the 1<sup>st</sup> & 2<sup>nd</sup> respondents

Mr Jin Pao, instructed by the Department of Justice, for the interested party