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For information

Information Note

The Hong Kong-Zhuhai-Macao Bridge Judicial Review

Purpose

This paper sets out the judgment handed down by the Court of First Instance (CFI) on 18 April 2011 in respect of the Hong Kong-Zhuhai-Macao Bridge Judicial Review (JR) case.

Background

2. In this JR case, the Applicant has applied for judicial review of the decisions of the Environmental Protection Department (EPD) made on 23 October 2009 and 4 November 2009 respectively pursuant to sections 8(3) and 10(3) of the Environmental Impact Assessment Ordinance (EIAO) in granting approval of the EIA reports relating to 2 out of the 3 designated projects of the Hong Kong-Zhuhai-Macao Bridge Project (namely the Hong Kong Boundary Crossing Facilities and the Hong Kong Link Road) and in granting the environmental permits (EPs) for the construction and operation of the said projects.

3. The JR case was heard by Hon. Mr Justice Fok on 22-24 March 2011. On 18 April 2011, the CFI handed down a judgment allowing the JR. The CFI judgment is available on the webpage of the Judiciary. Regarding the 7 main issues raised by the Applicant, the CFI rejected the

Applicant's contentions on 6¹ of the 7 main issues but agreed with the Applicant on one issue, namely, because of the absence of a quantitative "stand-alone" analysis of the projected environmental conditions without the projects in place in the EIA reports, the EIA reports do not comply with the Technical Memorandum (TM) and Study Briefs (SB). EPD's said decisions under challenge were quashed on that ground.

The CFI judgment

4. The only issue on which the CFI has ruled against EPD was the absence of a quantitative "stand-alone" analysis of the projected environmental conditions without the projects in place. The Applicant's case is that the said analysis has to be done so that predicted conditions without the proposed projects in place are presented in the EIA reports, and it would not be sufficient if only the cumulative impacts (i.e. in the case of air quality, the aggregate effect of air pollutants produced by the projects and air pollutants from other sources) were presented in the EIA reports. In this way, the environmental "footprint" of the projects (i.e. the net environmental effect of the projects) can be seen and assessed. EPD's case is that in accordance with the requirements of the SB and the TM, the said analysis is not required.

5. The CFI took note of the purpose of the EIAO as declared in its long title to protect the environment and the definition of "environmental impact" in Schedule 1 to the EIAO and held that one of the means by which EIAO seeks to achieve the purpose of protecting the environment is by assessing the extent to which a project will have an impact on the environment. An adverse impact is the change in the environment from the position that would prevail if the project were not implemented.

6. The CFI also referred to the Applicant's analogy: is the environment to be treated like a bucket into which pollutants may be introduced so long as there is still space within the bucket to

¹ The other 6 main issues are 1. Lack of presentation of input data in the PATH model; 2. Choosing of the assessment year of 2031 as the reasonably worst-case scenario; 3. Failure to assess ozone; 4. Failure to assess sulphur dioxide; 5. Quantitative or qualitative assessment of public health impact; and 6. Failure to assess pollutants outside the air quality objectives such as toxic air pollutants and fine suspended particulates.

accommodate them? Or, is it the case that any pollutant introduced into the bucket must be identified and measured and then, if possible, mitigated? (Paragraph 73 of the CFI judgment).

7. Adopting the “purposive approach” in interpreting the EIAO, the CFI considered that the EIAO is not to be construed as if the only relevant yardstick is whether particular benchmarks are exceeded. If environmental protection is to be meaningful, it must aim to minimise the environmental impact of any project and, in the case of air quality, by minimising the amount of pollutants released into the atmosphere. It would be contrary to the purpose of the EIAO if the statutory scheme in Hong Kong were to be construed as if it treated the environment like a bucket into which waste may be deposited until it is full. That approach does not protect the environment (Paragraph 75 of the CFI judgment). Ascertaining that the increases in a particular air pollutant do not exceed applicable guidelines (say, Air Quality Objectives) cannot be the sole determining factor in a decision whether to grant an EP (Paragraph 80 of the CFI judgment).

8. The CFI held that (a) a prediction of the environmental conditions that would be expected in the absence of the projects is required to be presented in the EIA reports and a comparison be made with the environmental conditions with the projects in place to identify the extent of the change to the environment caused by the projects ; and (b) there should be a 2-stage mitigation approach i.e. identify the net change to the environment that would be brought about by the projects and propose mitigation measures there and then, and then to work out the cumulative effects and see if further mitigation is required (Paragraph 77 of the CFI judgment).

Implications on the EIA Process

9. As the CFI judgment stands, EPD is duty bound to take into account its findings in considering applications and making decisions under the EIAO. This includes those relating to :

- EIA reports (sections 6 and 8)

- Environmental permits (section 10)
- Further environmental permits (section 12)
- Variation of environmental permits (section 13)

10. In making new decisions, EPD will have to consider the need and relevancy of (a) a prediction of the environmental conditions that would be expected in the absence of the projects to be presented in the EIA reports; and (b) identification of the net change to the environment that would be brought about by the projects and mitigation measures. The absence of the relevant information may lead to rejection of the relevant application.

Way Forward

11. The CFI judgment has adopted an interpretation of the EIAO requirements which has profound implications on the EIA process as well as how designated projects should be designed and planned. After having examined in detail the issues concerned and considered the legal advice obtained, EPD has decided to lodge an appeal against the CFI judgment. However, as long as the CFI judgment stands, EPD is duty bound to take into account its findings in considering applications and making decisions under the EIAO. Equally, it is also necessary for project proponents to take into account the CFI judgment and provide sufficient justifications to satisfy EPD that the relevant requirements have been fully met.

Environmental Protection Department
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