

Environmental Protection Department’s enforcement actions against two concrete batching plants operating without a valid licence Investigation Report

On 9 December 2022, this Office received a complaint against the Environmental Protection Department (“EPD”).

The Complaint

2. Allegedly, the complainant found two concrete batching plants (“the Plants”) still in operation despite EPD’s revocation of their licences. The complainant queried why EPD did not intervene and shut down these plants.

Our Findings

3. After examining the response and information provided by EPD, we completed the investigation. Our findings are as follows.

Prevailing Mechanism and Legislation

4. The Air Pollution Control Ordinance (“APCO”) is the principal legislation to control air pollution in Hong Kong. It provides for a licensing system to pre-empt, control and monitor potential air pollution from specific industrial processes categorised as “Specified Process” under Schedule 1 of the APCO. Under the Ordinance, a licence is required for the conduct of any Specified Process. “Cement Works”¹ is classified as a Specified Process under Schedule 1 and thus the operation of a concrete batching plant is subject to the control of the terms and conditions of a valid Specified Process Licence (“SPL”).

5. Conducting any Specified Process, including cement works, without a valid licence is in contravention of section 13 of the APCO and may result in prosecution. Offenders would be liable for a fine and imprisonment.

¹ It refers to works in which the total silo capacity exceeds 50 tonnes and in which cement is handled.

6. According to sections 14A and 15 of the APCO, in deciding the granting or renewal of an SPL, the Control Authority (i.e. the Director of Environmental Protection) will consider the capability of the applicant to provide and maintain the best practicable means for the prevention of the emission from his premises of any air pollutant, and whether the relevant air quality objective could be attained and maintained. The Control Authority will also have regard to the air pollution control plan submitted by the applicant when exercising discretion to grant or refuse to grant SPL.

7. Pursuant to section 31 of the APCO, if the applicant of the SPL is aggrieved by the decision of the Control Authority, he has the right to appeal to the Air Pollution Control Appeal Board (“Appeal Board”). Under section 9 of the Air Pollution Control (Specified Process) Regulations, the SPL shall continue to be in force where the applicant has filed an appeal against the refusal, until the appeal is disposed of, withdrawn or abandoned.

8. Where a concrete batching plant operates without a valid SPL, if the Control Authority is satisfied that the emission of air pollutants from a polluting process is causing or contributing to air pollution which exists or which is imminent, it may give an air pollution abatement notice (“Abatement Notice”) pursuant to section 10 of the APCO to the owner of the concrete batching plant requiring him to cease the polluting process or take steps to abate the emission of air pollutants.

The Plants in question

9. The two Plants in question, namely Plant A and Plant B, are operated by the same operator (“the Operator”).

10. Plant A was first granted an SPL by EPD in 2001 and subsequently had its licence renewed three times in 2006, 2011 and 2017 respectively. In April 2021, EPD refused the Operator’s application for further renewal of SPL, as the Operator had failed to demonstrate in its submissions its ability to implement effective air pollution control measures to prevent pollutant emissions and nuisance to nearby residents.

11. Plant B was first granted an SPL in 2004 and subsequently had its licence renewed twice in 2010 and 2015 respectively. Similarly, EPD refused the Operator’s SPL renewal in April 2022 as the Operator had failed to take effective measures to

prevent dust emission incidents from its operation and failed to demonstrate its ability to implement adequate and practicable mitigation measures to prevent air pollution.

Sequence of Major Events

12. In April 2021, EPD refused the Operator's application for SPL renewal for Plant A. Subsequently, the Operator filed an appeal with the Appeal Board against EPD's decision in May 2021.

13. The Appeal Board conducted a hearing for the appeal in October 2021. On 27 January 2022, the Board dismissed the appeal, upholding EPD's decision to refuse the licence renewal for Plant A.

14. In April 2022, EPD refused the Operator's application for SPL renewal for Plant B. In the same month, the Operator lodged an appeal with the Appeal Board against EPD's decision.

15. On 13 April 2022, EPD, with the assistance of the Department of Justice ("DoJ"), applied for and obtained an interim injunction order regarding Plant A from the High Court. Under the Order, Plant A was required to cease relevant operations, including the concrete batching process, until 22 April 2022 for further hearing.

16. In the hearing on 22 April 2022, the Court decided not to extend the interim injunction order regarding Plant A on the undertaking by the Operator that its operation would not lead to air pollution and cause public nuisance, and further adjourned the injunction hearing. The date of next hearing has yet to be fixed.

17. Between September 2022 and February 2023, the Appeal Board conducted hearings regarding the SPL renewal of Plant B. The decision of the Appeal Board is pending.

Response from EPD

18. After Plant A and B lodged their appeal applications, EPD promptly sought assistance from and closely collaborated with DoJ in handling these appeal cases. EPD is duty-bound to follow and comply with the Appeal Board's decisions throughout the appeal process.

19. EPD emphasised that it has been all along very concerned about the operations of the Plant A and Plant B. The EPD has all along been processing the SPL renewal applications of Plant A and Plant B in accordance with the relevant provisions under the APCO. Since the dismissal of Plant A's appeal application on 27 January 2022, which meant its SPL was no longer in force, EPD has closely monitored the plant. The Department has provided details of its enforcement and follow-up actions on the case as follows.

Abatement Notice

20. Based on the observations and information gathered, EPD was satisfied that the emission of air pollutants from the polluting process at Plant A had caused imminent air pollution. Consequently, on 17 February 2022, EPD issued a statutory Abatement Notice to the Operator pursuant to section 10 of the APCO, requiring the Operator to cease the emission of air pollutants and the polluting process along with its associated activities.

Prosecutions

21. EPD has also taken enforcement actions under the relevant provisions of the APCO and initiated multiple prosecutions. It has conducted frequent inspections at the Plants with a view to collecting evidence. Since the expiry of Plant A's SPL on 27 January 2022, as of the end of March 2023, EPD has initiated 20 prosecutions against the Operator for violating the APCO by operating without a valid SPL and failing to comply with the requirements stipulated in the Abatement Notice. All these prosecutions are currently being handled by the Court. EPD's enforcement actions are on-going and will continue.

Civil Proceedings

22. While there is no provision under the APCO that empowers EPD to shut down a concrete batching plant operating without a licence, the Department has made an application for an injunction with a view to ceasing the operation of Plant A. An interim injunction was granted by the High Court on 13 April 2022 until the hearing on 22 April 2022. The Court, however, decided not to extend the interim injunction order after that. The next injunction hearing was further adjourned by the Court and the date has yet to be fixed. EPD has been following up with DoJ to schedule the injunction hearing as soon as possible.

23. EPD added that apart from the legal proceedings mentioned above, the Department had also acted promptly in response to the judicial review and civil claim actions initiated by the Operator.

Our Comments

24. While we acknowledge the complainant's concern regarding the air pollution that might have been caused by the Plants in question and his view on their immediate closure, the focus of our investigation is whether EPD has properly fulfilled its duties in this saga from an administrative perspective.

25. Paragraphs 4 to 8 above have set out the current regulatory regime in Hong Kong concerning cement batching process. Since the SPL of Plant A ceased to be in force in January 2022, EPD has indeed taken various follow-up actions, including conducting frequent inspections, issuing an Abatement Notice, initiating multiple prosecutions under relevant ordinances, and applying to the Court for an injunction order. It is worth noting that the APCO does not empower EPD to forcibly shut down any concrete batching plant operating without a licence. Based on the information available to this Office, we consider EPD to have performed its role in handling the SPL renewal applications of the Plants, closely monitored the situation and taken necessary and appropriate steps to address the unlicensed operation of Plant A within its realm and the existing regulatory regime. EPD has also refused the SPL renewal of Plant B in April 2022. Therefore, we consider there to be no evidence suggesting inaction or maladministration on the part of EPD in handling the matter. As mentioned by EPD, the prosecutions and legal proceedings are still on-going for Plant A, while the decision of the Appeal Board concerning Plant B is pending. Notwithstanding this, we still urge EPD to continue to closely follow up on the case and take enforcement actions when necessary.

26. With the above, The Ombudsman finds this complaint against EPD **unsubstantiated**.

Office of The Ombudsman
May 2023

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