# Part 2 Study on Dispute Resolution Process in Specific Cases V. Dispute Resolution Process in Environmental Problems

# V. Dispute Resolution Process in Environmental Problems

## A. Environmental Law Framework and System in Malaysia

The framework laws are the Federal Constitution and the principal statute for environmental matters namely the *Environmental Quality Act 1974* (EQA). Article 4 (1) of the Constitution provides that it is the supreme law of the Federation and any law passed after Independence Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. There is no specific mention of the environment or of any rights or duties owing to or flowing from the environment. The EQA together with several other statutes provide that the dispute resolution technique is through the medium of the Courts (ie, the civil courts).

The EQA has been amended several times to increase the scope of activities covered by the Act. See for instance, the Environmental quality (Amendment) Act 1985 (Act A636) sections 2 and 3 with effect from 10 January 1986. Section 2 of the *Environmental Quality (Amendment) Act 1996* (Act A953) enlarged the scope of the Act by introducing terms and definitions such as:

> 'aircraft', 'Committee', 'computer', 'document', 'environmental audit', 'environmental management system', 'environmental risk', 'environmentally hazardous substances', 'Fund', 'goods', 'inland waters', 'prescribed conveyance' 'prescribed product', 'scheduled wastes' and 'transit'; 'occupier', 'owner', 'pollutants', 'premises' and 'waste'.

Others include Amendment to the Environment Quality Act 1974 (Act 127) (Amendment 2000) and Delegation of Powers for Open Burning Investigations pursuant to Environmental Quality (Prescribed Activities) (Open Burning) Order 2000.

Act A1030, *Environmental Quality (Amendment) Act 1998* was published in the Gazette on 1 July 1998. It amends Section 29 of the EQA, by inserting after section 29 the following sections:

29A. (1) Notwithstanding anything to the contrary contained in this Act, no person shall allow or cause open burning on any premises.

(1) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(2) For the purposes of subsection (1) –

"Open burning" means any fire, combustion or smouldering that occurs in the open air and which is not directed there through a chimney or stack, but does not include any fire, combustion or smouldering that occurs for such activities as may be prescribed by the Minister by order published in the Gazette;

"premises' includes any land.

29B. If open burning occurs on any premises-

(a) the owner; or

(b) the occupier,

of the premises who has control over such premises shall be deemed to have contravened subsection 29A(1) unless the contrary is proved.

(a) that the open burning occurred out side his control or without his knowledge or connivance or consent; or

(b) that he-

(i) took all reasonable precautions;

or

(ii) exercised all due diligence,

to prevent the commission of the offence as he ought to have taken and exercised having regard to the nature of his responsibility in that capacity and to all the circumstances.".

2. Section 33 was amended by substituting for section 33 the following section:

44. No prosecution shall be instituted for an offence under this Act or the regulations made thereunder without the consent in writing of the Public prosecutor".

A very recent amendment to the EQA was made ie, the *Environmental Quality* (*Amendment*) *Act 2001,* Act A1102, which came into operation on 28 June 2001. This Act amends section 2 of the EQA 1974 by inserting after the definition of "inland waters" a definition on "local authority" which reads as follows:

"local authority" includes any person or body of persons appointed under any written law to exercise and perform the powers and duties which are conferred or imposed on a local authority under any written law.

Section 21 of the EQA is amended by substituting for the words "may specify" the words "may by regulation specify". The definition of "open burning" in subsection 29A(3) of the EQA is amended by substituting for the comma appearing after the word "stack" a semicolon and deleting all words appearing after the new semicolon. Further, section 29A of the EQA is followed by a new section 29AA which provides for 'exclusion from open burning'.

Section 29AA

(1) The Minister may by order published in the Gazette declare that any fire, combustion or smouldering for the purpose of any activity specified in that order is not open burning as defined in and for the purpose of section 29A so long as such activity is carried out n accordance with or under such conditions as may be specified in the order and not in the place or area specified in the order.

(2) Notwithstanding that any fire, combustion or smouldering is excluded from the definition of open burning under subsection (1) or that it is for the purpose of any activity specified in an order made under subsection (1), no person shall allow or cause such fire, combustion or smouldering to occur in any area if the Director General notifies, by such means and in such manner as he thinks expedient, -

(a) that the air quality in the are has reached an unhealthy level; and

(b) that the fire, combustion or smouldering for the purpose of any activity other than those specified in the notification would be hazardous to the environment.

(3) In addition to the circumstances referred to in subsection (2), the Minister may by order published in the Gazette specify the circumstances in which no person shall cause any fire, combustion or smouldering for the purpose of any activity specified in the order to occur notwithstanding that it is excluded from the definition of open burning under subsection (1) or that it is for the purpose of any activity specified in an order made under subsection (1).

Finally Act A1102 provides for the validity of all subsidiary legislation made under section 51 of the EQA 1974 in the context of acceptable pollution conditions in section 21 of the EQA 1974 before section 21 is amended by Act A 1102.

**1. Uncertainty Over Definition of Environment**

In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* (the *Kajing Tubek Case*) and other appeals, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23, the Court of Appeal held that the expression 'environment' was a "multi-dimensional concept that is incapable of having any independent existence. It is a concept that must attach or relate itself to some physical geographic feature, such as land, water or air, or to a combination of one or more of these, or all of them. Any impact upon the 'environment' must, in the present context, relate to or be in respect of some activity that is connected with and having an adverse effect upon either land, or water, or the atmosphere or a combination of them. Justice Mokhtar Sidin added that he agreed with the opinion of Senior Federal Counsel that environment per se was an 'abstract thing' – "it is multi-dimensional so that it can be associated with anything surrounding human beings. Section 2 of the EQA sets out the

meaning of 'environment' as "physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics".

In the instant case, the judge's understanding of the word 'environment' was that it only existed when it affected something of a physical nature, biological or social factors. The environment came into play when something was affected. In the opinion of the Court, the EQA definition was vague. The power to legislate on environmental matters would depend on the specific activity to which the environmental matters related.

## 2. Issues in Environment Litigation

### 2.1 Federal Laws vs State Laws

In Malaysia, the Federal Constitution is the supreme law of the land. Under the Federal System, both the Federal Parliament and the State Legislatures have powers to legislate laws. For that purpose, the Federal Constitution provides the distribution of legislative powers. Under the Federal system, the state has powers to legislate upon certain matters, and this is provided under the State List of the Ninth Schedule. However, an examination of the Ninth Schedule shows that the term 'environment' is not found in any of the Lists.

Under the Malaysia Act, the States of Sarawak and Sabah can legislate upon more matters than the other states. On 11 August 1994, the Sarawak Government gazetted the *Natural Resources and Environmental (Prescribed Activities) Order* 1994 (the Sarawak State Order).

The distribution of legislative powers between the Federation and the states is, *inter alia*, found in Articles 73-77 which provide as follows:

(73) Extent of Federal and State Laws:

In exercising the legislative powers conferred on it by this Constitution –

(a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; and

(b) The Legislature of a State may make laws for the whole or any part of that State.

(74) Subject matter of Federal and State Laws:

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List. (emphasis added).

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule, the generality of the former shall not be taken to be limited by the latter.

(75) Inconsistencies between Federal and State laws:

If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of inconsistency, be void.

(76) Power of Parliament to Legislate for States in certain cases:

(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

(2) No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matter of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.

(3) Subject to Clause (4), a law made in pursuance of paragraph (b) or paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a Federal law, and may accordingly be amended or repealed by a law made by that Legislature. (emphasis added).

(4) Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1) (b) and (3) shall not apply to any law relating to any such matter.

(76)A Power of Parliament to extend legislative powers of States:

(1) It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorize the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter.

(2) Notwithstanding Article 75, a State law made under authority conferred by Act of Parliament as mentioned in Clause (1) may, if and to the extent that the Act so provides, amend or repeal (as regards the State in question) any federal law passed before that Act.

(3) Any matter with respect to which the Legislature of a State is for the time being authorized by Act of Parliament to make laws shall for purpose of Articles 79, 80 and 82 be treated as regards the State in question as if it were a matter enumerated in the Concurrent List.

(77) Residual power of legislation:

The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

The above articles demonstrate that the State Legislature may make laws with respect to matters enumerated in the State List or the Concurrent List as set out in the Ninth Schedule or where the matter is not enumerated in any of the lists in the Ninth Schedule. In addition to these, the States of Sabah and Sarawak are given additional lists as contained in List III which is supplement to the Concurrent List for States of Sabah and Sarawak. The relevant provision giving this power is Art 95B(1) where it provides:

(1) In the case of the States of Sabah and Sarawak –

(a) the supplement to List II set out in the Ninth Schedule shall be deemed to form part of the State List, and the matters enumerated therein shall

be deemed not to be included in the Federal List or Concurrent List; and

(b) the supplement to List III set out in the Ninth Schedule shall, subject to the State List, be deemed to form part of the Concurrent List, and the matters enumerated therein shall be deemed not to be included in the Federal List (but not so as to affect the construction of the State List, where it refers to the Federal List).

**2.2 Federal EIA vs State EIA (Environmental Impact Assessment)**

It appears that both the Federal Parliament and the State Legislature are competent to make laws in order to control the environmental impact on any activity of which the activity is identifiable with the lists given to them. Industries and regulation of industrial undertakings is a Federal matter which is under List I para 8(1), and therefore Parliament can make environmental laws in respect ofindustries. Thus, the EQA came into being. On the other hand, when the environmental impact is on rivers, land and forest which are items contained in the State List, the State Legislature is competent to make laws in order to control all works on state land in respect of these items. Thus, state legislatures can pass laws, for example, to control all works on state land including the clearing of forest and building dams across any river.

As can be seen from the above, both the Parliament and the State Legislature are competent to make laws on environmental impact. While there might seem to be a conflict of laws here, none should arise for in each case, one has to look into the activity to which the environmental impact is aimed at. If the impugned activity complained is in the State List, then the State Ordinance shall apply and if the activity complained of is in the Federal List, then the EQA shall apply.

**2.3 Section 11A of Sarawak State Order**

The Order provides for a Report to be submitted in cases where certain activities may have an impact on environment and natural resources. Those activities listed in section 11A (1) include:

(a) development of agricultural estates or plantation of an area exceeding the dimension specified in the said Order;

(b) clearing of forest areas for the establishment of agricultural estates or plantation;

(c) carrying out of logging operations in forest areas which have previously been logged or in respect whereof coupes have previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance;

(d) development of commercial, industrial and housing estates of an area exceeding the dimension specified in the said order;

(e) extraction and removal of rock materials;

(f) activities which may cause pollution of inland waters of the state or endanger marine or aquatic life, organism or plants in inland waters, or pollution of the air, or erosion of the banks of any rivers, watercourses or the foreshores and fisheries; or

(g) any other activities which may injure, damage or have any adverse impact on the quality of the environment or the natural resources of the State;

(2) Upon consideration of such report, and having regard to the standards and recommendations of the Council, and after making all necessary enquiries and seeking any further opinion as the Board may deem desirable or necessary, the Board may make such Order or directions as the Board is empowered to do under section 10 or any other provisions of this Ordinance or to undertake such works as may be deemed necessary under section 11.

(3) Nothing in this section shall authorize or deem to have authorized the Board or the Yang di-Pertua Negeri, in the exercise of the powers conferred under section 18, to make any Order, direction, guidelines, rules or regulations in regard to the environment affecting matters over which the State, by virtue of the provisions of the Federal Constitution, has no legislative authority.

As can be seen from the above, there are provisions under the EQA and the State ordinance for a report to be submitted before any activity which has an impact on the

environment can be carried out. The report under the EQA must be approved by the Director General, and under the State Ordinance, by the Board. As can be seen from the provisions of both these sections, there is no requirement for the report to be made public. There is no right for an aggrieved party,

(1) to be supplied with copies of the EIA report for the project prior to the approval of the EIA; and
(2) to make comments on the project which will be taken into consideration by the review panel prior to the approval of the EIA.

These sections and the citizen's right to sue seeking a declaration against the federal or state government or a developer on the basis of an EIA report or in the absence of such a report are discussed in greater detail in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors* and other appeals, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23 (under ***case law*** below).

### 2.4 Handbook on Guidelines vs Victims

The Handbook which contains guidelines prescribed by the Director General does not have the force of law. If a federal EIA report is not supplied to natives of a state project where the undertaking is a federal development project, this failure will neither nullify the report nor will non-compliance of it subject the offender to a penalty. The interpretation of Section 34A, in particular sub-s (8), makes it an offence for a person not submitting a report or not complying with the conditions imposed by the Director General or for carrying on the activity without the report being approved. There is no provision under s 34A that the report must be supplied to the public and that failure to do so will nullify the whole activity. Subsection (8) makes it clear that if an activity is not carried out in accordance with the provisions of the other subsection, then the person carrying on that activity is subjected to a daily penalty until he complies with the provisions.

Section 34A of the EQA empowers the Minister to make orders `whereby he could prescribe any activity which may have significant environmental impact, as prescribed activity'. By virtue of this, the Minister made the 1987 Order. Subsequent to that, the

Ordinance was amended to include s 11A to give the State of Sarawak similar powers and jurisdiction as in s 34A of the EQA.

The Court in the *Kajing Tubek Case* was of the opinion that even if the EQA, in particular s 34A applied to a particular case, there was no requirement under s 34A for the victims to be supplied with copies of the EIA for the project prior to the approval of the EIA and for them to make comments.

It could be argued that the right to be given the EIA is found in cl 3.4.7 of the Handbook where the relevant passages are as follows:

> (3) 4.7 the publication of detailed assessment reports
> In the normal course of events, detailed assessment reports should be in the form that can be made available to the public and it is the responsibility of the project initiator to provide and distribute sufficient copies to meet the combined requirements of the Review Panel, the approving authority, concerned environment related agencies and the interested public. The number of copies of the report to be made available for each purpose would have been specified in the terms of reference for the detailed assessment. Maximum use should be made of economical duplicating processes to provide the required number of copies. A charge to cover duplicating and postage costs can be made for copies of the report requested by the public.
>
> On submitting a detailed assessment report for review, the project initiator must notify the Review Panel where the public may obtain copies of the report and the cost of each copy. The project initiator at the same time distributes copies of the detailed assessment report to the approving authority and to the appropriate environment related agencies for their consideration. As soon as it receives the report, the Secretariat to the Review Panel puts up public notices as it considers appropriate. The notices state:
>
> (1) that a detailed assessment report has been received for review;
> (2) the nature and the location of the project;

(3) where copies of the report can be obtained, the cost of each copy; and

(4) that any representation or comments by the public or concerned environment related agencies, on the report should be made in writing and forwarded to the Review Panel not more than forty-five (45) days of the notice.

What in effect these provisions mean according to the Honourable Court in the *Kajing Tubek Case* is that an interested member of the public is entitled to the report if he applies for the report to be supplied to him on payment of a certain sum of money as he will not be given the report if he does not ask for it. There is no accrued right that the report must be distributed to the public without the public asking for it.

As mentioned earlier, the Handbook does not have the force of law and failure to comply with the guidelines may render the report to be rejected by the Director General. On the other hand, the second paragraph of cl 3.4.7 clearly provides for a report not to be made public. Thus, non-compliance with the Handbook would not nullify the project which will attract the order of a declaration.

S 34A does not accord any right to the victims of a development project to be supplied with the report. The right will only operate as soon as a request has been made for them.

**B. The Environmental Quality Act, 1974 (EQA)**

The Ministry responsible for the environment is the Ministry of Science, Technology and the Environmental, headed by its Minister. The Department of Environment is one of the organisations under the supervision of the Ministry, headed by the Director General of Environmental Quality (DG) (see Organisation Chart). The EQA is an Act that relates to the prevention, abatement, control of pollution and enhancement of the environment, and for purposes connected therewith. Central to this act is a definition of the term "pollution" which means any direct or indirect alteration of the physical, thermal, chemical, or biological properties of any part of the environment by discharging, emitting, or depositing environmentally hazardous substances, pollutants or wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety, or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause a

contravention of any condition, limitation, or restriction to which a licence under this Act is subject. "Pollutants" in turn are defined as any natural or artificial substances, whether in a solid, semi-solid or liquid form, or in the form of gas or vapor, or in mixture of at least two of these substances, or any objectionable odour or noise or heat emitted, discharged or deposited or is likely to be emitted, discharged or deposited or is likely to be emitted, discharged or deposited from any source which can directly or indirectly cause pollution and includes any environmentally hazardous substances.

While the duty of care is entrenched in the laws of tort and negligence, the EQA speaks of practicable measures that may be employed for the efficient maintenance and proper use of a surrounding. Section 2 offers a definition of what is "practicable" and "practicable means":

"practicable" means reasonably practicable having regard, among other things, to local conditions and circumstances and to the current state of technical knowledge and the term "practicable means" includes the provision and the efficient maintenance of plant and the proper use thereof and the supervision by or on behalf of the occupier of any process or operation".

Under the EQA "waste" includes any matter prescribed to be scheduled waste, or any matter whether in a solid, semi-solid or liquid form, or in the form of gas or vapour which is emitted, discharged or deposited in the environment in such volume, composition or manner as to cause pollution. "Segment" in relation to the environment means any portion or portions of the environment expressed in terms of volume, space, area, quantity, quality, or time or in any combination.

**Grievance under the EQA**

The EQA does not offer a definition of a 'grievance' that can be suffered by a person. Therefore, it becomes necessary to understand the various spheres of activity covered by the EQA to assess in which sphere a potential grievance could arise which could include a grievance in the atmosphere and on land, inland waters, and territorial waters.

## C. Organisations/institutions for dispute resolution

### 1. Director General and Other Officers

Section 3(1) of the EQA provides for the appointment of a Director General of Environmental Quality (DG) who shall be appointed by the Minister from amongst members of the public service. The DG heads the Department of Environment and is the licensing authority. The powers, duties and functions of the DG shall be-

(a) to administer the EQA and all regulations and orders made under it;

(b) to be responsible for and to co-ordinate all activities relating to the discharge of wastes into the environment and for preventing or controlling pollution and protecting and enhancing the quality of the environment;

(c) to recommend to the Minister the environment protection policy and classifications for the protection of any portion of the environment or any segment of the environment with respect to the uses and values, whether tangible or intangible, to be protected, the quality to be maintained, the extent to which the discharge of wastes may be permitted without detriment to the quality of the environment, long range development uses and planning and any other factors relating to the protection and enhancement of the environment;

(d) to control by the issue of licences the volume, types, constituents and effects of wastes, discharges, emissions, deposits or other sources of emission and substances which are of danger or a potential danger to the quality of the environment or any segment of the environment;

(e) to undertake surveys and investigations as to the causes, nature, extent of pollution and as to the methods of prevention of pollution and to assist and co-operate with other persons or bodies carrying out similar surveys or investigations;

(f) to conduct, promote and co-ordinate research in relation to any aspect of pollution or the prevention thereof and to develop criteria for the protection and enhancement of the environment;

(g) to recommend to the Minister standards and criteria for the protection of beneficial uses and the maintenance of the quality of the environment having regard to the ability of the environment to absorb waste without detriment to its quality and other characteristics;

(h) to co-opt any persons or bodies to form panels of experts whom he considers capable of assisting him in relation to special problems;

(i) to publish an annual report on environmental quality not later than 30th September of the following year and such other reports and information with respect to any aspect of environmental protection;

(j) to specify methods to be adopted in taking samples and making tests for the purposes of the EQA;

(k) to undertake investigations and inspections to ensure compliance with the EQA or the regulations and to investigate complaints relating to such breaches;

(l) to provide information and education to the public regarding the protection and enhancement of the environment;

(ll) to administer the Fund;

(m) to establish and maintain liaison and co-operation with each of the State Authorities in Malaysia and with other countries with respect to environment protection, pollution control and waste management;

(n) to report to the Minister upon matters concerning the protection and enhancement of the environment and upon any amendments he thinks desirable to any law affecting pollution and environment and upon any matters referred to him by the Minister; and

(o) to promote, encourage, co-ordinate and carry out planning in environmental management, waste management and pollution control.

**2. The Environmental Quality Council**

Section 4 of the EQA establishes the Environmental Quality Council (EQC) which is an advisory body to the Minister of Science, Technology and the Environment on all matters pertaining to the environment, including issues of law, policy and strategy arising under the EQA and other matters raised by the Minister. This ensures a holistic approach to the environment. The EQC does not have any executive functions under the Act.

The EQC consists of the following members-

(a) a Chairman who shall be appointed by the Minister;

(b) the Secretary General, Ministry of Science, Technology and the Environment or his authorized representative;

(c) the Secretary General, Ministry of International Trade and Industry or his authorized representative;

(cc) the Secretary General, Ministry of Domestic Trade and Consumer Affairs or his authorized representative;

(ccc) the Secretary General, Ministry of Agriculture or his authorized representative;

(d) the Secretary General, Ministry of Human Resources or his authorized representative;

(dd) the Secretary General, Ministry of Transport or his authorized representative;

(e) the Director General of Health or his authorized representative;

(f) one member each from Sabah and Sarawak who shall be appointed by the Minister after consultation with the Governments of the States of Sabah and Sarawak;

(g) one member who shall be appointed by the Minister from among persons engaged in the petroleum industry;

(gg) one member who shall be appointed by the Minister from nominations by the oil palm industry;

(h) one member who shall be appointed by the Minister from nominations by the Federation of Malaysian Manufacturers or if such Federation no longer exists from among persons engaged in manufacture;

(hh) one member who shall be appointed by the Minister from nominations by the rubber industry;

(i) one member who shall be appointed by the Minister from among the academic staff of the Universities or Colleges in Malaysia;

(j) two members who shall be appointed by the Minister from among registered societies knowledgeable and having interests in matters pertaining to the environment.

(1) The Minister may in respect of each member appointed under paragraphs (f), (g), (gg), (h), (hh), (i) and (j) of subsection (2) appoint one person to be an alternate member to attend

in place of the member at meetings of the Council if the member is for any reason unable to attend.

(2) When attending meetings of the Council an alternate member shall for all purposes be deemed to be a member of the Council.

(3) An alternate member shall, unless he sooner resigns or his appointment is sooner revoked, cease to be an alternate member when the member in respect of whom he is an alternate member ceases to be a member of the Council.

**3. Environmental Impact Assessment Report (EIA)**

Section 34A of EQA reads as follows:

(1) The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.

(2) The person intending to carry out any of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. *The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity* will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment (emphasis added).

(3) If the Director General on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report satisfies the requirements of sub-s (2) and that the measures to be undertaken to prevent**,** reduce or control the adverse impact on the environment are adequate, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

(4) If the Director General, on examining the report and after making such inquiries as he considers necessary, is of the opinion that the report does not satisfy the requirements of subsection (2) or that the measures to be undertaken to prevent, reduce or control the adverse impact on the environment are inadequate, he shall not approve the report and shall give his

reasons therefore and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly: Provided that where such report is not approved it shall not preclude such person from revising and resubmitting the revised report to the Director General for his approval.

(5) The Director General may if he considers it necessary require more than one report to be submitted to him for his approval.

(6) Any person intending to carry out a prescribed activity shall not carry out such activity until the report required under this section to be submitted to the Director General has been submitted and approved.

(7) If the Director General approves the report, the person carrying out the prescribed activity, in the course of carrying out such activity, shall provide sufficient proof that the conditions attached to the report (if any) are being complied with and that the proposed measures to be taken to prevent, reduce or control the adverse impact on the environment are being incorporated into the design, construction and operation of the prescribed activity.

(8) Any person who contravenes this section shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him.

The main activities for the year 2000 were focused on reviewing EIA reports, providing environmental input to development planning, pre-siting evaluation and processing of written permissions for pollution control and fuel burning equipment.

On 23 November 2000, the Department of Environment has enforced a certified standardised procedure for reviewing EIA reports, with the implementation of the ISO 9002 Procedure for Reviewing Detailed EIA Reports and Post-EIA Enforcement. The certification, presented by the Rt Honourable Deputy Prime Minister Dato' Seri Abdullah bin HJ Ahmad

Badawi, recognized and further challenges the Department to continue providing better quality service to their clients.

**EIA reports processed**

The statistics on the processed EIA Reports show that in the year 2000, the Department of Environment received for review a total of 153 EIA reports and one Risk Assessment. Out of the total of 153 reports, 139 were subjected to the preliminary procedure and 14 were subject to detailed assessment. The detailed reports were for activities relating to construction of dam for hydroelectricity, centralized tankage facility, mixed development involving coastal land reclamation, construction of on-site toxic and hazardous waste incinerator, municipal solid waste incinerator, lead batteries recycling plant, coal-fired power plant, construction of dam for water supply, silicone manufacturing facility, coastal land reclamation, and brown paper mill. The total number of approved projects was a mere eight, one was rejected and another withdrawn. Due to incomplete information four were pending.

**Preliminary reports**

The year 2000 also saw 32 Preliminary Reports for infrastructure development such as new townships, industrial estates and highways followed by 28 reports relating to the recovery of toxic and hazardous wastes and 21 reports for the development of quarries.

**Detailed reports**

Eleven activities required detailed EIA reports in the year 2000, similar to those discussed above. These were, construction of dam for hydroelectricity, centralized tankage facility, mixed development involving coastal land reclamation, construction of on-site toxic and hazardous waste incinerator, municipal solid waste incinerator, lead batteries recycling plant, coal-fired power plant, construction of dam for water supply, silicone manufacturing facility, coastal land reclamation and brown paper mill. The Department of Environment did not approve all these activities, for it rejected one and eight were approved. One application was withdrawn while the other four were still pending as the information was incomplete.

The EIA division of the Department of Environment also received seven Terms of Reference for prescribed activities that followed the detailed procedure. These were for solid

waste incineration facility, mixed development involving coastal land reclamation, clinical waste incinerator, coal-fired power plant and brown paper mill.

**Enforcement Inspection of EIA Projects**

In the year 2000, 586 enforcement inspections were conducted to determine the development and compliance status of EIA projects and consequently, 236 notices and 16 compounds were issued and five cases were taken to court for non-compliance with EIA conditions.

**Environmental Management Plan**

The Environmental Management Plan focused on following up on post EIA activities particularly those relating to resource development for past experience showed that it was difficult to specify and predict exact requirements for nature conservation. This Plan ensures that all mitigation measures and monitoring requirements in EIA approvals were carried out. Such a Plan would include the final design incorporating mitigation measures, detailed environmental monitoring programme and budget and personnel to implement the Plan. Such Plans are to be submitted at least three months before the project is implemented.

**Registration of EIA Consultants**

In the year 2000, 28 applications were received from individuals and five from firms for registration, but only 16 individuals and 2 firms were approved. At the close of the year, a total of 265 EIA consultants and 72 EIA consultancy firms were registered.

**Environmental Auditing**

According to the Handbook of Environmental Auditing Guidelines, the Department of Environment hopes to implement environmental auditing by placing emphasis upon compliance audit for EIA reports and licenses for prescribed activities such as palm oil and rubber factories and toxic and hazardous wastes.

**Environmental input to development planning**

The Department of Environment provided a total of 99 inputs in the year 2000 for development plans, policies and studies initiated by other agencies and other Divisions of the

Department. The breakdown shows that 61 applications were for registration of sewerage systems and equipment with the Sewerage Services Department. The balance was for plans and policies such as the National Spatial Plan Study, the National Coastal Zone Policy, Local Plans and other studies for flood mitigation, ground water, island monitoring and highland development activities.

**Geographical Information System**

Geographical information systems have been put in place with thematic maps prepared for EIA projects in the state of Perak, Malaysia. In particular, assistance was given to the Cabinet Committee for the Co-ordination of Development on Highlands and Islands, chaired by the Honourable Minister of Science, Technology and Environment, YB Datuk Law Hieng Ding, by preparing thematic maps for development projects and agriculture activities in the area of Cameron Highlands. The objective of this Cabinet Committee is to monitor and coordinate the development on highlands and islands with the assistance of a Task Force and the Department of Environment as the Secretariat. The Task Force has to recommend strategies and direction for (1) the development of highlands – physical development projects and agricultural activities, (2) establish a suitable mechanism for monitoring activities on highlands, (3) assess the effectiveness of monitoring and enforcement, (4) recommend practical measures to prevent the deterioration of environmental quality, and (5) provide regular reports on monitoring and enforcement activities.

Two officials conducted aerial surveillance and ground investigations on 31 locations. Sustainable development of the Highlands will be carried out once the geo-hazard and terrain mapping is undertaken by the Department of Minerals and Geo Science.

Digital maps were also produced to support the activities of the other Divisions of the Department of Environment.

The Department of Environment has set up an Advisory Services Centre at the Malaysian Industrial Development Authority office which received a total of 67 enquiries

from local and foreign investors on environmental requirements for setting up industrial projects.

**Project Pre-Siting Evaluation**

The Local Authorities and Land Offices submitted a total of 6, 469 applications for pre-siting evaluation to ascertain the suitability of the site for the development projects that were not subjected to the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987*. They were advised to incorporate environmental considerations during decision-making.

**Written permission and approval**

The Annual Report for the Year 2000 states that the Department of Environment received 7, 243 applications for the constitution of wastewater treatment plants and 810 applications for the installation of air pollution control equipment as required under the *Environmental Quality (Sewage and Industrial Effluent) Regulations 1979* and the *Environmental Quality (Clean Air) Regulations 1978.* The Report further states that other than pollution control equipment, the Department also received 1640 applications for written approvals for the installation of fuel burning equipment, mainly boilers and generator sets.

With regard to non-prescribed premises, 2,924 out of 3460 premises visited, that is 84.5 %, complied with the *Environmental Quality* (*Sewage and Industrial Effluents*) Regulations 1979. The remaining 536 premises failed to comply with other provisions such as Regulation 4 on factory expansion and creating new sources of effluent discharges and Regulation 16 on effluent discharges not at approved point of discharges. Industries such as food and beverage, metal finishing, electroplating and textile had a compliance record of 59%, 61 % and 66% respectively. The reason for non-compliance was the inability to meet with parameters such as the Biochemical Oxygen Demand, Chemical Oxygen Demand, Suspended Solids, Oil and grease and heavy metals like nickel, cyanide, copper and lead due to inefficient effluent treatment systems and absence of effluent treatment systems for small and medium industries. Currently, the *Environmental Quality* (*Sewage and Industrial Effluents*) *Regulations 1979* is under review for purposes of improvement and strengthening the provisions to accommodate developments in technological and socio-economic fields. This

may involve the publication of quarterly reports, institution of compoundable offences, setting specific standards for specific industrial sectors, new control mechanisms and additional parameter standards.

**Prosecution of Offences Under the EQA**

In the year 2000, 158 premises and companies were brought before the Court and fined a total of RM 3, 506, 800.00. This figure represented an increase 29 % in fines. However, compared to 1999, there was a 49 % decrease in the number of cases. The majority of cases concerned the infringement of Section 25 (1) of the EQA 1974 for pollution of the inland waters. Various premises and companies were issued a total of 1, 645 compounds notices for a variety of offences amounting to RM 2, 560,000.00. Air pollution offences attracted 65 % while the remaining 35 % were offences involving handling of scheduled wastes. In the year 2000, six prohibition orders were issued, as a last resort measure, under section 31A of the EQA 1974. Of the six, two were for inland water pollution from metal-based and rubber-based industries and four for air pollution offences involving wood-based and metal-based industries. Further operations depended upon remedial measures being taken. With respect to public complaints, the Department of Environment received 2,284 complaints, most of which were on open burning at illegal waste disposal sites and dust pollution, which is a decrease of 167 complaints (6.8 %) compared to 1999. State officials of the Department of Environment handled 1,916 complaints while the remaining 368 were outside their jurisdiction and therefore referred to other relevant agencies. On a state by state count, the State of Perak received the highest number of complaints at 329 (14.4 % of the total) followed by Kuala Lumpur at 304 (13.3 %) and Johor at 271 (11.9 %) with the lowest being the State of Perlis at 29 complaints (0.01 %). Of the total number of complaints received, 1690 were air pollution complaints (74 %), 191.6 water pollution complaints (10%) and the rest 5 % being noise pollution complaints. Open burning at waste disposal sites stood at 30% of the 1690 complaints received.

## 4. Nature of Offences and Dispute Resolution Under the EQA

### (a) Prohibition and Control of Pollution

Section 18 provides that prescribed premises are to be licensed. The Minister after consultation with the Council has the power to prescribe premises and a person can occupy or use such premises if he is the holder of a licence issued in respect of those premises. Use or occupation without such a license is punishable under the law. Similarly, the Minister, after consultation with the Council, may by order prescribe the vehicle or ship used for the movement, transfer, placement or deposit of waste and these may be used only by a person who is a holder of a licence issued in respect of the prescribed conveyance. Any person found guilty of this offence shall be liable to a fine not exceeding fifty thousand ringgit or imprisonment for a period not exceeding two years or to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified has been served upon him. Before the 1996 Amendment, the penalty figure stood at ten thousand ringgit.

However, these provisions do not apply to three categories of persons until their application has been finally determined: firstly, where a person who, on the date of the coming into operation of this Act, was the occupier of such prescribed premises, and within the prescribed period after that date makes application for a licence in respect of those prescribed premises; second, persons who, where by virtue of any order made by the Minister from time to time amending any previous order made under this section, premises not previously prescribed premises become prescribed premises, is, consequent upon the order, the occupier of any prescribed premises, and who within the prescribed period after the publication of the order in the *Gazette* makes application for a licence in respect of those prescribed premises; finally, those who have made an application for the transfer to them of a licence in respect of any prescribed premises and made the application within the prescribed period after they became the occupiers of those prescribed premises, until their applications have been finally determined.

The Annual Report for the Year 2000 of the Department of Environment states that raw natural rubber factories and crude palm oil mills fall within the term of agro-based premises under Section 18 of EQA 1974 that require a license for use or occupation.

Compared to 1999 where the figure stood at 134, the number of raw natural rubber factories that were licensed in the year 2000 under the *Environmental Quality* (*Prescribed Premises*) (*Raw Natural Rubber*) *Regulations 1978* stood at 128, a fall by six. These premises were permitted to discharge treated effluent into watercourses (107), onto land (7), into combined watercourse and land (2) and to effluent recycling (12). In the context of crude palm oil, 343 crude palm oil mills were licensed under the *Environmental Quality* (*Prescribed Premises*) (*Crude Palm Oil*) *Regulations 1977* compared to 1999 when 337 were licensed, an increase of six mills. The licenses were given for discharge into watercourses after treatment (195), onto land (105) and for both watercourses and land disposal (43). The enforcement officers of the Department visited 627 crude palm oil mills and action was taken against 213 mills including court cases for various air and water pollution offences. The overall compliance stood at 38%. For purposes of cooperation with the industry, the Department established a Consultative Committee for the Rubber and Palm Oil Industry for purposes of discussing compliance status and research findings.

The *Environmental Quality (Prescribed Premises) (Scheduled Wastes and Disposal Facilities) Regulations* 1989 (PU (A) 141/89) provides that the 'prescribed period' for scheduled waste treatment and disposal facilities is the period ending 31 May 1989. The *Environmental Quality (Prescribed Premises) (Scheduled Wastes and Disposal Facilities) Regulations* 1989 (PU (A) 141/89 provides that the `prescribed period' for scheduled waste treatment and disposal facilities is 14 days.

The procedural requirement and approval of plans is provided for in Section 20. It basically involves two steps, of which the first step is that every application to carry out any work, building, erection or alteration specified in section 19 shall be submitted to the Director General and shall be accompanied by the plans and specifications of the proposed work, building, erection or alteration together with details of the control equipment if any to be installed. This is followed by a lay-out plan indicating the site of the proposed work, building, erection or alteration which will take place in relation to the surrounding areas and the details of the trade, industry or process proposed to be carried on in such premises. Descriptions of waste constituents and characteristics and any other information which the Director General may require. The applicant shall pay the prescribed fee. Before the Director General can

grant an application, the applicant should have obtained planning approval from the competent planning authority. Once this has been done, the Director General may grant such application either subject to conditions or unconditionally and may require the licensee to provide and bear the cost of the control equipment and of a satisfactory monitoring programme.

Section 21 deals with the Ministerial power to specify conditions of emission and discharge. The Minister, after consultation with the Council, may specify the acceptable conditions for the emission, discharge or deposit of [environmentally hazardous substances, pollutants or] wastes of the emission of noise into any area, segment or element of the environment and may set aside any area, segment or element of the environment within which the emission, discharge or deposit is prohibited or restricted.

**(b) Contravention of Licenses**

**Section 22(1) – Atmospheric Pollution and Section 25(1) – Pollution of Inland Waters**

Section 22(1) imposes certain restrictions on atmospheric pollution which mean that no person shall, unless licenced, emit or discharge any environmentally hazardous substances, pollutants or wastes into the atmosphere in contravention of the acceptable conditions specified under section 21. Section 22 (2) provides that without limiting the generality of subsection (1), a person shall be deemed to emit or discharge wastes into the atmosphere if-

(a) he places any matter in a place where it may be released into the atmosphere;

(b) he causes or permits the discharge of odours which by virtue of their nature, concentration, volume or extent are obnoxious or offensive;

(c) he burns any wastes of the trade, process or industry; or

(d) he uses any fuel burning equipment not equipped with any device or control equipment required to be fitted to such equipment.

The penalty for contravention of subsection (1) is a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been

served upon him. Previously, they read 'ten thousand dollars', 'two' and 'one thousand dollars', respectively.

The *Environmental Quality (Clean Air) Regulations 1978* (PU (A) 280/78 reg 49(2) stipulates that an application for a licence for contravention of acceptable conditions of discharge or emission of any waste into the atmosphere shall be made in accordance with the procedures specified in the *Environmental Quality (Licensing) Regulations 1977* (PU (A) 198/77. The *Environmental Quality (Clean Air) Regulations* 1978 (PU (A) 280/78 reg 49 (3) provides for the circumstances where the Director General may grant the application for such a licence.

The Annual Report for the Year 2000 of the Department of Environment states that for air quality monitoring, there were 50 Continuous Air Quality Monitoring Stations in the country. Besides this, Quality Assurance Audit was also carried out nation-wide on all the automatic air monitoring stations. Continuous action is being taken to ensure that air quality meets set standards. The haze episode of 1999 triggered a Haze Study for Malaysia in December 1998 with assistance from the Australian Government through the Commonwealth Scientific and Industrial Research Organisation. This organization also assists in analysis and data interpretation. The Malaysian Meteorological Services also assisted the Department of Environment in monitoring air quality stations in two towns, namely Gombak and Petaling Jaya. The last sampling was taken on 16 December 2000 and the report should have come in by June 2001.

The Annual Report for the Year 2000 of the Department of Environment also points out that 67 % of the 2454 air pollution sources visited complied with the *Environmental Quality* (*Clean Air*) *Regulations 1978* with the following breakdown: edible and petroleum refineries achieved 100% compliance; paper and textiles sector at 88% and food and beverages industry at 83%. Inefficient or ineffective air pollution control equipment gave rise to dust pollution which in turn made compliance amongst the non-metallic sector difficult, hence their compliance rate was low. As far as other premises such as small and medium sized industries were concerned, some committed offences involving (1) the

installation of fuel-burning equipment or chimney without a prior written approval (2) open burning of industrial wastes, and (3) emission of black smoke from chimneys exceeding the allowable limit. The Department of Environment also instructed large scale industries such as cement plants, iron and steel mills, petroleum refineries, and power plants to install continuous emission monitoring systems and to submit monthly monitoring results to the Department. Such installations were already in place for the cement, petrochemical and chemical industries, crude oil terminals, liquefied natural gas plants and power plants.

Section 25 (1) states that unless a licence has been obtained, no person shall emit, discharge or deposit any environmentally hazardous substance, pollutant or waste into any inland waters in contravention of acceptable conditions under section 21.

The Annual Report of the Department of Environment for the Year 2000 states that in accordance with the provisions of Section 22(1) and 25 (1) of the EQA 1974, the number of applications for licenses increased to 101 (38.4 %) from 73 in 1999; 94 applications (93.1%) in respect of Section 25(1) and 7 applications (6.9 %) for Section 22 (1). Of these applications, 78 were approved (77.2 %) while the remaining 23 (22.8 %) were rejected.

Applications for contravention licenses under Section 25(1) were also received from Indah Water Konsortium Sdn Bhd. which is responsible for managing sewerage treatment plants under a privatization agreement. In the year 2000, the number of applications increased to 3140 from 2475 in 1999; 2777 (88.4%) licenses were for renewal purposes, while 363 (11.6 %) were new applications.

On motor vehicle emission, the Annual Report for the year 2000 of the Department of Environment, states that according to emission load calculations, atmospheric pollutants from the 10.6 million vehicles would consist of 2.04 million metric tonnes of carbon monoxide; 190,293 metric tonnes of oxides of nitrogen and 15, 954 metric tonnes of particulate matter.

The control of gaseous emissions from motor vehicles such as carbon monoxide, hydrocarbon, oxides of nitrogen and particulates are controlled under the *Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996* and the *Environmental*

*Quality (Control of Emission from Petrol Engines) Regulations 1996.* These regulations provide that all new models of motor vehicles introduced on or after 1 January 1997 would have to comply with the requirements of 91/441/EEC for motorcars, 93/59/EEC for light commercial vehicles, and ECE R 49-02 (EURO 1) for heavy vehicles. From 1 January 2000 onwards, all new models of vehicles would be required to comply with 94/.12/EC emission standard. On the control of black smoke emissions from diesel vehicles, in the year 2000, a total of 946 Area Watch and Sanction Inspection enforcement operations were carried out throughout the country. Approximately 108,017 diesel vehicles were inspected of which 3,542 were summoned for failing to comply with the 50 Hartridge Limit and 960 were issued prohibition orders. They were considered roadworthy again only after rectification and retesting by DOE. Fifty-five drivers and vehicle owners were prosecuted in court for failure to settle compound fines. On the control of carbon monoxide and hydrocarbon gas emissions from petrol vehicles, in 2000, a total of 1, 089 petrol vehicles were tested for these emissions and only 845 vehicles (77.6 %) complied with the limits. There is a plan to establish government controlled testing centers for the year 2001, to enable vehicle owners to test and repair their vehicles. On unleaded petrol, the government directive to use unleaded petrol was implemented by petrol companies with the result that there was a 100 % sale in unleaded petrol in the year 1999 and all petrol stations in the country were selling unleaded petrol.

**(c) Section 23 – Restrictions on Noise Pollution**

The restrictions on noise pollution are set out in section 23 which state that no person shall, unless licenced, emit or cause or permit to be emitted any noise greater in volume, intensity or quality in contravention of the acceptable conditions specified under section 21. Those found guilty of an offence shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding five hundred ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.

According to the Annual Report for the Year 2000 of the Department of Environment, the control of noise from motor vehicles was enforced under the *Environmental Quality (Motor Vehicle Noise) Regulations 1987.* Curbside enforcement campaigns tested a total of

3,522 motorcycles of which 565 were compounded for exceeding the noise limits. Compliance was at 84% which is considered to be an improvement of 6.2 % over 1999. In the year 2000, 2,847 new motorcycles of different models were randomly tested and the compliance was found to be at 100%. Further, schools and hospitals were chosen as sensitive areas where noise monitoring was carried out. The results showed that the noise level at schools and hospitals in the capital city exceeded the recommended limit set by the World Health Organization.

**(d) Section 25 – Restrictions on Pollution of Inland Waters**

Similar restrictions are placed on pollution of inland waters. No one is allowed, unless licensed, to emit, discharge or deposit any environmentally hazardous substance, pollutant or waste into any inland waters in contravention of the acceptable conditions specified under section 21. A person shall be deemed to emit, discharge or deposit wastes into inland waters if-

(a) he places any wastes in or on any waters or in a place where it may gain access to any waters;

(b) he places any waste in a position where it falls, descends, drains, evaporates, is washed, is blown or percolates or is likely to fall, descend, drain, evaporate or be washed, be blown or percolated into any waters, or knowingly or through his negligence, whether directly or indirectly, causes or permits any wastes to be placed in such a position; or

(c) he causes the temperature of the receiving waters to be raised or lowered by more than the prescribed limits.

The penalty for this offence is a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for each day that the offence is continued after a notice by the Director General requiring the offender to cease the act specified therein has been served upon such person.

Rivers fall within the definition of internal waters. The Annual Report for the Year 2000 of the Department of Environment states that the Department implemented the River

Water Quality Monitoring Programme in 1978. There are 901 stations located within 120 river basins. Besides these, there ten automatic continuous monitoring stations at Sungei (River) Perai, Sungei Perak, Sungei Selangor, Sungei Klang, Sungei Linggi, Sungei Melaka, Sungei Skudai, Sungei Kuantan, Sungei Terengganu and Sungei Sarawak. Water samples were collected and the parameters used for deriving the water quality index are as follows:

- Biochemical Oxygen Demand
- Chemical Oxygen Demand
- Ammoniacal Nitrogen
- PH
- Dissolved Oxygen
- Suspended Solids

The current Project on Biological and Bioindicator Monitoring, started in 1999 at six rivers was completed in 2000. These rivers were Sungei Sarawak, Sungei Linggi, Sungei Liwagu, Sungei Sedili Besar, Sungei Pahang and sungei Kedah. It is now hoped that the Project will be extended to other rivers as well. The Project uses aquatic organisms such as bacteria, fish, macroinvertebrates as indicators to assess the quality of the water.

The Programme on River Monitoring in Areas Affected by the Japanese Encephalitis (JE) Outbreak which was started in April 1999 made use of 10 stations to detect changes in water quality that arise from the disposal of pig carcasses at the affected areas, namely, Negeri Sembilan, Malacca and Perak. There were 4 stations in Negeri Sembilan, 4 in Malacca and 2 in Perak.

**(e) Section 27 – Prohibition of Discharge of Oil into Malaysian Waters**

Oil pollution of the territorial sea is also covered under the EQA.

Section 2 offers a definition of “oil” to include-

(a) crude oil, diesel oil, fuel oil and lubricating oil, and

(b) any other description of oil which may be prescribed by the Minister;

"mixture containing oil" means a mixture with such oil contents as may be specified by the Minister or, if such oil content is not specified, a mixture with an oil content of one hundred parts or more in one million parts of the mixture;

"ship" includes every description of vessel or craft or floating structure;

"transit" means the continuous passage from one border to another border through Malaysian territory and waters without storage.

Section 27, like the previous sections, permits pollution under certain conditions. No person is permitted, unless licensed, to discharge or spill any oil or mixture containing oil into Malaysian waters in contravention of the acceptable conditions specified under section 21. The fine for this offence exceeds five hundred thousand ringgit or to imprisonment not exceeding five years or to both.

The Annual Report for the Year 2000 of the Department of Environment states that the Marine Water Quality Monitoring Programme was started for Peninsula Malaysia in 1978 and for Sabah and Sarawak in 1985. This was done to achieve three objectives, namely, (1) to establish an island marine water quality baseline database, (2) to monitor marine water quality changes around the islands and (3) to utilize the baseline database for the protection of the island marine environment such as providing guidelines for development.

The monitoring mechanism involved establishing 213 monitoring stations at estuaries and coastal areas given the beneficial uses of these areas for recreation, fishing and designation as marine parks. A total of 993 samples were collected.

The Island Marine Water Quality Monitoring Programme which began in July 1998 was set up after the island monitoring network in Malaysia, with 85 stations at 71 selected islands categorized into Marine Parks(38), Resorts (25), Protected Islands (5) and Development Islands (3). Samples were taken six times a year for Development Islands, while only four samples were collected for the others. Thus, a total of 728 samples were collected altogether. Such monitoring includes measurement of *in-situ* parameters, for

example, temperature, pH conductivity, salinity, dissolved oxygen, and turbidity. The parameters for laboratory analysis were, total suspended solids, *Escherichia* coli, nitrate, total organic carbon, oil and grease, and heavy metals like mercury, cadmium, chromium, copper, lead, and arsenic. Tarball samplings on beaches were conducted too.

**(f) Section 28 – Special Defences**

There are five special defences available to a person charged under the EQA 1974 as follows:

It shall be a defence to prove that such discharge or spillage was –

(a) for the purpose of securing the safety of the vessel;

(b) for the purpose of saving human life;

(c) the result of damage to the vessel and that all reasonable steps were taken to prevent, to stop or to reduce the spillage;

(d) the result of a leakage, which was not due to want of care, and that all reasonable steps have been taken to stop or reduce the leakage; or

(e) the result of an effluent produced by operation for the refining of oil, and that all reasonable steps had been taken to eliminate oil from the effluent and that it was not reasonably practicable to dispose to the effluent otherwise than by discharging or spilling it into the Malaysian waters.

**(g) Section 29 – Prohibition of Discharge of Wastes Into Malaysian Waters, Section 29A – Prohibition Against Open Burning Activities and Section 30A – Power to Prohibit Use of Any Material or Equipment**

Only licensed persons can discharge environmentally hazardous substances, pollutants or wastes into the Malaysian waters in contravention of the acceptable conditions specified under section 21. A contravention of this section attracts a fine not exceeding five hundred thousand ringgit or to imprisonment not exceeding five years or to both.

The Minister after consultation with the Council may by order published in the Gazette-

(a) prohibit the use of any materials for any process, trade or industry;

(b) prohibit whether by description or by brand name the use of any equipment or industrial plant,

within the areas specified in the order.

With regard to open burning activities in section 29A, the Annual Report for the Year 2000 of the Department of Environment states that the Department stepped up enforcement action against these as daily ground surveillance of fire prone areas and aerial surveillance were carried out with the cooperation of the Police Air Wing. Besides these, the Department held constant dialogue with the concerned organisations, government agencies, plantation owners and operators. This was possible as the *Environmental Quality* (*Delegation of Powers*) (*Investigation of Open Burning*) *Order 2000* came into force on 21 August 2000 whereby powers for investigation of open burning offences under section 29A of the EQA were delegated to several agencies namely, the Fire and Rescue Services Department, the Royal Malaysian Police, the Health Ministry and the local authorities including Kuala Lumpur City Hall and the Labuan Municipality. Besides delegation of powers, the Department of Environment also instituted Standard Operating Procedures (SOPs) as a guide for investigating officers and personnel. Further, there were several courses of short duration, conducted for the benefit of the relevant agencies under the "training the trainers" concept. These were then extended to and conducted in the States. The entry into force of the *Environmental Quality* (*Prescribed Activities*) (*Open Burning*) *Order 2000* on 21 August 2000 enabled the exemption of 15 prescribed activities which could only be carried out under specific conditions found in the Order. There was a total prohibition on open burning in peat soil.

Statistics indicate that in the year 2000, 1801 cases of open burning were detected and investigated *via* satellites. There were 582 cases of open burning detected in plantations, 387 in bushes, and due to hot and dry weather conditions, 514 generally in the month of July, 276 in August and 185 in March. Since, the nationwide launch, on 8 April 1998, of the operation to prevent open burning till 31 December 2000, 1098 cases had been compounded which

amounted to RM1, 628, 600. 00 and 105 cases prosecuted in court and fined a total of RM931,700.00.

**(h) Sections 30A, 30B and 31 – Certain Powers of Control, Specification and Requirement**

The power to control use of substance and product and to state environmental labelling is provided in Section 30A. According to this section, the Minister, after consultation with the EQCl, may by order published in the Gazette-

(a) prescribe any substance as an environmentally hazardous substance which requires the substance to be reduced, recycled, recovered or regulated in the manner as specified in the order; and

(b) prescribe any product as a prescribed product for sale and that the product shall contain a minimum percentage of recycled substances and to carry an appropriate declaration on its recycled constituents, method of manufacture and disposal.

Such an order may specify rules on the use, design and application of the label in connection with the sale of the substance or product which claims to be environmentally friendly. Failure or refusal to comply with the order will attract a fine not exceeding fifty thousand ringgit or imprisonment for a period not exceeding five years or both.

Section 30B lays down the power to specify rules on deposit and rebate schemes. The Minister, after consultation with the EQC, may specify the guide-line and procedures on deposit and rebate schemes in connection with the disposal of products that are considered environmentally unfriendly; or causing adverse constraint on the environment. This is to enable collecting the product efficiently in order to ensure that the recycling or disposal of the products is done in an environmentally sound manner.

The terms of Section 31 state that where any environmentally hazardous substance, pollutant or waste is being or is likely to be emitted, discharged or deposited from any vehicle, ship or premise irrespective of whether the vehicle, ship or premise is prescribed under

section 18 or otherwise, or from any aircraft, the Director General under Section 31 may by notice in writing require the owner or occupier of the vehicle, ship or premise, or aircraft, to –

(a) install and operate any control equipment or additional control equipment;
(b) repair, alter or replace any equipment or control equipment;
(c) erect or increase the height of any chimney;
(d) measure, take a sample of, analyse, record and report any environmentally hazardous substances, pollutants, wastes, effluents or emissions containing pollutants;
(e) conduct a study on any environmental risk;
(f) install, maintain and operate monitoring programme at the expense of the owner or occupier; or
(g) adopt any measure to reduce, mitigate, disperse, remove, eliminate destroy or dispose of pollution.

within such time and in such manner as may be specified in the notice.

The Director General is also empowered to direct the owner or occupier of any vehicle, ship, or premise, or aircraft to emit discharge or deposit environmentally hazardous substances, pollutants or wastes during such periods of day as he may specify and may generally direct the manner in which the owner or occupier shall carry out his trade, industry or process or operate any equipment, industrial plant or control equipment.

The punishment for a violation of this section is a fine not exceeding twenty-five thousand ringgit or imprisonment for a period not exceeding two years or both and a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after notice has been served upon him to stop.

**(i) Section 31A – Prohibition Order and Section 32 – Owner or Occupier to Maintain and Operate Equipment**

Section 31A (1) provides that the Minister, after consultation with the EQC, may by order published in the Gazette specify the circumstances whereby the Director General may issue a prohibition order to the owner or occupier of any industrial plant or process to prevent

its continued operation and release of environmentally hazardous substances, pollutants or wastes either absolutely or conditionally, or for such period as he may direct, or until requirements to make remedy as directed by him have been complied with. Under sub-section 2 of this section the Minister, in circumstances where he considers that the environment, public health or safety is under or likely to be under serious threat, may direct the Director General –

(a) to issue an order requiring a person to cease all acts that have resulted in the release of environmentally hazardous substances, pollutants or wastes; and

(b) to effect and render any machinery, equipment, plant or process of the person inoperable.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a period not exceeding two years or to both.

Section 32 provides that the owner or occupier of any vehicle, ship or premises irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, or aircraft shall maintain any equipment or control equipment installed on the vehicle, ship or premises, or aircraft in good condition and shall operate the equipment or control equipment in a proper and efficient manner.

**(j) Section 33 – Power to Prohibit or Control Licensed Persons From Discharging, etc of Wastes in Certain Circumstances**

According to this section, where several persons are licensed under this Act to emit, discharge or deposit environmentally hazardous substances, pollutants or wastes into the same segment or element of environment and appears to the Director General that each of such persons is complying with the conditions of the licence but nevertheless the collective effect of the aggregate of such wastes is likely to cause a worsening of condition in that segment or element of the environment such as to affect the health, welfare or safety of human beings, or to threaten the existence of any animals, birds, wildlife, fish or other aquatic life, the Director General may, by notice serve on each of the licensees, requiring each of them to abate such emission, discharge or deposit in the manner and within the period

specified in the notice. A contravention of this section attracts a fine not exceeding fifty thousand ringgit or to imprisonment not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after service on him of the notice specified in subsection (1).

**(k) Section 33A – Environmental Audit**

The provision on environmental audit empower the Director General to require the owner or occupier of any vehicle, ship or premises, irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, to carry out an environmental audit and to submit an audit report in the manner as may be prescribed by the Minister by regulations made under this Act.

To carry out an environmental audit and to submit a report thereof, the owner or occupier must appoint qualified personnel who are registered under subsection (3). To this end, the Director General is required to maintain a list of qualified personnel who may carry out any environmental audit and submit a report thereof.

**(l) Section 34B – Prohibition Against Placing, Deposit etc of Scheduled Wastes**

Part IV A which contains a single provision namely, section 34B – Prohibition against placing, deposit, etc of scheduled wastes was introduced pursuant to Malaysia's accession, on 8 October 1993, of the *1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, to provide for the control of transboundary movement of scheduled/hazardous wastes. It came into force on 6 January 1994.

Section 34B provides that no one is allowed to place, deposit, or dispose any scheduled wastes on land or into Malaysian waters except on prescribed premises. Scheduled wastes can only be received, sent, or transited in or out of Malaysia with the prior written approval, conditionally or unconditionally, of the Director General. Any one who receives, or sends, or transits any scheduled wastes through an approval obtained through falsification, misrepresentation or fraud or which does not conform in a material way with the relevant documents commits an offence. The punishment for contravention of this section is a fine

not exceeding five hundred thousand ringgit or imprisonment for a period not exceeding five years or both.

The Annual Report of the Department of Environment for the Year 2000 states that a total of 14 Written Permissions were given by the Director General for purposes of constructing prescribed premises to treat and dispose scheduled wastes of which 3 were issued to metal-based off-site recovery plants, 4 to chemical off-site recovery plants, 5 to scheduled waste incinerators, 1 to secured land-fill and 1 to off-site storage. With regard to licensed scheduled waste transporters, there was an increase from 96 in the year 1999 to 101 in the year 2000 of which 22 transported wastes to off-site treatment and disposal facilities, 63 transported wastes that were either exported or imported for recovery purposes and 16 transported wastes for reutilisation at approved facilities. Besides these, 203 licenses were issued to both existing and new facilities for off-site recovery, off-site storage, incinerators, land treatment, off-site treatment, secured landfills and others. With regard to import and export of scheduled wastes, the Annual Report states that a total of 4, 878.02 tonnes of scheduled wastes were exported in 2000 which comprised principally of spent industrial catalysts and metal hydroxide sludges from 25 waste generators. The sludges were to be recovered in foreign countries. Seven approvals were granted to import 125,875 tonnes of wastes to be used as raw materials in various processes.

**(m) Sections 35 and 36 – Dispute Resolution.**

The provisions on dispute resolution are found in Part V entitled Appeal and Appeal Board. Part V consists of two sections, sections 35 and 36, of which section 35 on Appeal provides that where a person is aggrieved on any of the following six grounds, an appeal may be lodged with the Appeal Board set up under section 36. Before the *Environmental Quality (Amendment) Act 1985* (Act A636), there were only four grounds (1) to (4), with grounds (5) and (6) being inserted by the latter amendment which came into force on 10 January 1986. The terms of Section 35 stipulate that an aggrieved person is someone affected either by a licence issue or by a decision of the Director General.

These six grounds of grievance are:

1. a refusal to grant a license or transfer of a licence
2. the imposition of any condition, limitation or restriction on his licence

3. the revocation, suspension or variation of his licence
4. the amount which he would be required to pay under section 47
5. any decision of the Director-General under subsection (3) or (4) of section 34A and
6. any decision of the Director General or any officer under subsection (2) or (5) of section 48A.

However, the EQA *per se* does not offer a definition of an 'aggrieved person', which is an essential feature of dispute resolution. The closest definition is found in Section 35(1).

The aggrieved person is allowed to appeal to the Appeal Board within such time and in such manner as may be prescribed. Under section 35(2), upon hearing the Director General and the appellants, the Appeal Board may make such order as it deems fit. Such a Board has not been constituted yet. This does not mean that no other mechanism for dispute resolution is open to an aggrieved person. Whoever suffers from a decision of the Director-General or the Minister under this Act can also apply to the High Court under Order 53 of the Rules of the High Court for an application of any of the following writs, namely, mandamus, prohibition, certiorari or habeas corpus.

The composition of the Appeal board is provided for in Section 36 and is set out below:

(1) For the purpose of this Act there shall be appointed an Appeal Board Consisting of three members, one of whom shall be the Chairman (hereafter in this section referred to as the Chairman).

(2) There shall also be a Deputy Chairman of the Appeal Board (hereafter in this section referred to as a Deputy Chairman) who shall only serve in the Appeal Board if the Chairman is unable to exercise his functions owing to illness, absence from the Federation or for any other cause whatsoever; and when the Deputy Chairman is to serve in the Appeal Board under the aforesaid circumstances he shall exercise the functions of the Chairman.

(3) The Chairman and the Deputy Chairman shall be persons nominated by the Chief Justice from amongst persons who for the seven years preceding the nomination have been Advocates and Solicitors of the High Courts in Malaysia or have been members of the judicial and legal service of the Federation and who shall be appointed by a notification in the Gazette by the Minister for a period not exceeding three years; and any person so appointed shall be eligible for reappointment.

(4) (a) The Chairman may call upon to serve on the Appeal Board any two members from a panel of persons appointed by notification in the Gazette by the Minister.

(5) A member shall be entitled to such remuneration or allowances as may be determined by the Minister.

**(n) Sections 37 to 51 – Dispute Resolution Miscellaneous Matters**

Part VI on Miscellaneous matters covers 23 very significant provisions of the law with regard to dispute resolution, from sections 37 to 51, an overview of which is given below:

Section 37 deals with the duty of an owner or occupier to furnish information, section 38 covers the power to stop, board, search, etc, section 38A describes the power to examine persons acquainted with case, and section 39 deals with the service of notices.

Section 40 is on Evidence, section 41 on Penalty for offences not otherwise provided for, section 42 on Attempts and abetments, section 43 on Offences by bodies of persons and by servants and agents, section 44 on Who may prosecute, section 45 on Compounding of offences, section 46A on Power to seize vehicle or ship, section 46B on Power of forfeiture and disposal, section 46C on Seizure and forfeiture of vehicle or ship, section 46 D on No costs or damages arising from seizure unless seizure made without reasonable cause, section 46E on compensation for loss or damage to property, section 47 on Power of recovery of costs and expenses, section 48 on Power to detain and sell vehicle or ship, section 48A on

Power to test and prohibit use of vehicle, section 48B on Assistance, and section 49 on Delegation.

Sections 50 and 51 deal with Secrecy and Regulations respectively.

Section 37(1) gives a discretionary power to the Director General to require by notice, the owner or occupier of any vehicle, ship, premises or aircraft to furnish to him within the period as may be specified in the notice information in relation to –

(a) the ownership of the vehicle, ship, premises or aircraft;
(b) the use of raw materials, environmentally hazardous substances or any process, equipment, control equipment or industrial plant found on the vehicle, ship, premises or aircraft;
(c) any environmentally hazardous substances, pollutants or wastes discharged or likely to be discharged; or
(d) any environmental risk that is likely to result from the use of the raw materials, environmentally hazardous substances or process.

Section 37(2) states that any person who, when required by the Director General to answer any question or to furnish any information, fails to answer such question or to furnish such information as is required or gives any answer or information that is false or misleading in any material respect shall be guilty of an offence and shall be liable to a fine not exceeding two thousand ringgit or to imprisonment not exceeding six months or to both.

Section 38 in effect sets out additional powers or civil and criminal jurisdiction of the office of the Director General. The term ‘etc’ shows that additional powers may follow in addition to the present terms set out as follows:

(1) Where the Director General or any officer duly authorized in writing by him is satisfied, or has reason to believe that any person has committed an offence under this Act, he may, if in his opinion it is necessary to do so for the purpose of investigating the offence, without a warrant, stop, board and search any vehicle, ship or aircraft, or

enter any premises, irrespective of whether the vehicle, ship or premises are prescribed under section 18 or otherwise, and may-

(a) inspect, examine, seize or detain any equipment, computer, or industrial plant;

(b) inspect, examine, seize or detain any book, record, licence, permit, certificate or document relating to –

(i) the performance or use of the equipment or industrial plant;

(ii) environmentally hazardous substances, pollutants or wastes; or

(iii) any matter required to be carried on board a vehicle, ship or aircraft under this Act or under any other written law;

(c) inspect, examine, seize or detain any scheduled wastes or environmentally hazardous substances and any vehicle or ship used in the conveyance of the scheduled wastes or environmentally hazardous substances;

(d) make such enquiries and physical inspection of the ship, equipment, gear, stores and cargo as may be necessary;

(e) make copies of, or take extracts from, any book, record or documents so seized and detained;

(f) inspect, examine or take a sample of any substances, material or matter used, or which is likely to be used or usually used in any trade, industry or process carried on in or on the vehicle, ship, premises, or aircraft; or

(g) take a sample of any environmentally hazardous substances, pollutants or wastes that are emitted, discharged or deposited, or are likely to be emitted, discharged or deposited, or are likely to be emitted, discharged or deposited from the vehicle, ship, premises, or aircraft.

The Director General or any officer authorized by him has the power to examine orally any person who is acquainted with the facts and circumstances of the case and pursuant to this they are required to reduce into writing any statement so made. The person so questioned is bound to answer all questions relating to the case put to him by the Director General or such officer. The only ground on which such a person may refuse to answer any question is when it will have a tendency to expose such person to a criminal charge, and/or penalty of forfeiture. Such person is also legally bound to state the truth, whether or not the statement is made wholly or partly in answer to questions. These sections of the law, which are tantamount to rights of the interrogated, shall be communicated to the person mentioned above by the Director General.

The section finally states that a statement made by a person under this section shall, be reduced into writing and signed by the person making it or affixed with his thumb-print after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections. Where the person examined refuses to sign or affix his thumb-print on the statement, the Director General or any duly authorized officer shall endorse this fact of refusal and the reason for it, if any.

All notices, orders, summonses or documents that fall within the scope of the EQA 1974 may be served on the person concerned in any one of the following three ways:

(c) by delivering the same to such person or by delivering the same to some adult member or servant of his family;

(d) by leaving the same at the usual or last known place of abode or business of such person in a cover addressed to such person; or

(e) by forwarding the same by registered post in a prepaid cover addressed to such person at his usual or last known place of abode or business.

A notice, order, summons or document is deemed to be properly addressed if addressed by the description of the “owner” or “occupier” of such premises without further name or description.

Finally, the section provides that a notice, order, summons or document required or authorized by the EQA or regulations be served on the owner or occupier of any premises by delivering the same or a true copy to some adult person on the premises or, if there is no such person on the premises to whom the same can with reasonable diligence be delivered, then by affixing the notice, order, summons, or document to some conspicuous part of the premises.

The general law is that the contents of any document prepared, issued or served for the purposes of the EQA shall until the contrary is proved be presumed to be correct and the production of any book purporting to show the licenses issued under the EQA shall be *prima facie* proof of the issue, lack of issue or date of expiry of such licenses. A certificate, for the purpose of establishing a person as the occupier of any premises or prescribed premises, signed by the Collector of Land Revenue shall unless the contrary is proved be evidence of any facts stated therein. The section concludes by stating that in any proceeding for offences against the EQA or the regulations where it is necessary to prove, *inter alia*, that any person was or was not licenced on a certain date or for a certain period shall be prima facie evidence of the facts stated therein and the Director General shall not be cross-examined on the contents of such certificate unless he has been served with ten days' notice stating the intention to do so and further stating the particulars which are intended to be challenged.

Section 43 covers persons not defined under the EQA, for it refers to directors, managers or other similar officers, but described under section 4(1)(1) of the Companies Act 1965 (Act 125). However, it is uncertain whether the Court will use the Companies Act to interpret these terms. "Due diligence" is an essential feature of this section which in turn is a question of fact. Section 43 is given below:

> (1) Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the

offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or that he had exercised all such diligence as to prevent the same and to ensure the observance of such provisions:

Provided that nothing in this section shall be deemed to exempt such clerk, servant or agent from liability in respect of any penalty provided by this Act or regulations made thereunder for any contravention proved to have been committed by him.

The earlier law on section 44 states that prosecutions in respect of offences committed under the EQA 1974 or the regulations may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which such power has been delegated. This has now been amended to provide that a prosecution by the Director General or his duly authorized officer, whether under the EQA 1974 or regulations, can only be instituted if the written consent of the Public Prosecutor has been obtained. The amended section is within the mandate of Article 145(3) of the Federal Constitution. The principle of law that the conduct of prosecutions by a person other than the Federal Public Prosecutor is unconstitutional and a nullity was stated in *Repco Holdings Bhd* v *Public Prosecutor* [1997] 4 CLJ 740 and was recently endorsed in the case of *PP* v *Lee Ming & Anor* [1999] 1 CLJ 379. The case of *Quek Gin Hong* v *Public Prosecutor*, [1998] 4 MLJ 161, was decided before the Minister could gazette the effective (date for entry into force) of the amendment to section 44. In this case, the accused was acquitted of the offence of allowing open burning of certain vegetable wastes without a license for two principal reasons: (1) there was no requirement of a written authorization from the Public Prosecutor and (2) the law in section 44 was *ultra-vires* Article 145(3) of the Federal Constitution and to the extent of that inconsistency, it was void.

Section 45, like many of its earlier counterparts, is self explanatory and reads as follows:

> (1) The Director General or any Deputy Director General, or any other public officer or any local authority to whom the Director or General has delegated such power in writing, may compound any offence under this Act or the regulations made thereunder which is prescribed by the Minister to be a compoundable offence by accepting from the person reasonably suspected of having committed the offence a sum of money not exceeding two thousand ringgit.
>
> (2) The Minister may make rules to prescribe the method and procedure for compounding such offences.

For compounding such offences as already prescribed by the Minister, see:

(i) the *Environmental Quality (Control of Lead Concentration in (ii) Motor Gasoline) Regulations 1985* reg13;
(ii) the *Environmental Quality (Motor Vehicle Noise) Regulations 1987* reg 9;
(iii) the *Environmental Quality (Scheduled Wastes) Regulations 1989* reg 13;
(iv) the *Environmental Quality (Prescribed Premises) (Scheduled Wastes Treatment and Disposal Facilities) Regulations 1989* reg 9;
(v) the *Environmental Quality (Control of Emissions from Diesel Engines) Regulations 1996* reg 21;
(vi) the *Environmental Quality (Control of Emissions from Petrol Engines) Regulations 1996* reg 20; and
(vii) the *Environmental Quality (Clean Air) Regulations 1978* reg 58.

Section 46 provides that notwithstanding any written law to the contrary, a Sessions Court in West Malaysia or a Court of a Magistrate of the First Class in East Malaysia shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.

## 5. Case Law

***Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals***, (1997) MLJ LEXIS 291; [1997] 3 MLJ 23, was a case that, among others, addressed the issue of an EIA report that went in appeal from the High Court at Kuala Lumpur [1996] 2 MLJ 388, to the Court of Appeal. The appeal was heard by Gopal Sri Ram JCA, Ahmad Fairuz JCA and Mokhtar Siddin JJCA JCA.

Appellants

There were five appellants namely, the Director General of Environmental Quality, the Natural Resources and Environment Board of Sarawak, the Government of Malaysia, the Government of Sarawak and a public listed company – Ekran Berhad entrusted with the construction of the Bakun Hydroelectric Project (the Bakun Dam Project).

The impugned project

The Bakun Dam Project was to be carried out upon native customary land occupied by approximately 10, 000 natives under customary rights, near Belaga in the Kapit Division of the State of Sarawak. The respondents were three independent natives. They did not institute a class action on behalf of the other 10,000 natives.

High Court: *Kajing Tubek v Ekran Bhd* [1996] 2 MLJ 388

In *Kajing Tubek v Ekran Bhd* [1996] 2 MLJ 388 natives from three longhouses in Belaga, Uma Daro and Batu Kalo sought a declaration that the Bakun Dam Project was approved without adhering to the procedures set down in environmental legislation and guidelines. They sought a declaration from the Court that the Bakun Dam Project was governed by the provisions of federal law and not state law and that there was a violation of the provisions of the federal law and for compliance with certain procedural rules of fairness.

In the High Court, the plaintiffs alleged that the EIA Report of the developmental project made under section 34A of the EQA 1974 was not communicated to them. The State of Sarawak had a legislation known as the `*Natural Resources Ordinance 1949* (Cap 84)', which is different from the section in the Guidelines made pursuant to this section. The rule

in the Guidelines entitles the public to a copy of the Environmental Impact Assessment and the subsequent public comments to the review panel before an approval can be granted by the Director General. The *Sarawak Natural Resources Ordinance 1949* (Cap 84) does not contain such provisions. This in turn propelled the defendants to call into question the applicability of the EQA 1974 to the Bakun Dam Project. According to the defendants, if the EQA 1974 was declared inapplicable to the Bakun Dam Project, no question of the publicity of the EIA report on it would arise. The High Court granted the declaration ruling that the plaintiffs had *locus standi* to sue for a declaration as being natives to the land affected by the said project, they would suffer much more loss than any other member of the public on the basis that the EQA 1974 was applicable to the Bakun Dam Project. So the defendants appealed.

*Court of Appeal*

There were three appeals and the appellants were the Director General of Environmental Quality, in the second appeal were the Natural Resouces and Environment Board of Sarawak and the Government of the State of Sarawak. The third appellant was 'Ekran Berhad' ('Ekran').

The respondents were the three individual natives who appeared in the High Court and who were not representing the rest by class action.

*Procedural start of the appellate dispute resolution mechanism:*

Three appeals arose from a single judgment of the High Court. The subject matter was the same, the appellants were different and the respondents were common in all the three appeals. For this reason, the procedure adopted for the hearing decided to seek consent of counsel to hear the appellant in each appeal and then the counsel for the respondents was heard. The appeals were not heard in the manner in which they were filed but according to a perceived logical sequence of the arguments as they were raised and argued in the court below. Senior Federal Counsel, Gani Patail, who appeared for the appellants in the first appeal made the first appearance, followed by the Attorney General for the State of Sarawak and En Muhammad Shafee Abdullah who appeared for the second and third appeals respectively. After the Court had heard the counsel for the appellants, the Court then invited

Mr. Gurdial Singh Nijar, counsel for the respondents in all three appeals, to respond to each of the arguments advanced by the appellants.

The appeals were heard on 17 February 1997. They were allowed.

*Issue in the Court of Appeal*

In the Court of Appeal, the basic issue was concerned with the applicability of the following federal legislation namely, the EQA 1974, ss1(1) and 2, 34A, *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* Schedule 13 (b), *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995*, and the *Federal Constitution* articles 4(4), 5(1), 8 (1), 128, 73-77, 95B(1), Ninth Schedule. The state ordinances pressed into issue by the defendants were the *Sarawak Land Code* (Cap 81), the *Natural Resources Ordinance 1949* (Sarawak Cap 84), s 11A, and the *Natural Resources and Environmental (prescribed Activities) Order 1994*.

These legislation cut across several issues of constitutional law, administrative law and principles of statutory interpretation.

Since the High Court had dealt thoroughly with the facts, chronology of events and the history of the of the relevant legislation, the Court of Appeal did not repeat the same but merely confined itself to the salient features of the case as essential to the appeal.

The construction of the Bakun Dam Project involved the inundation of a very large tract of land, the creation of a reservoir and a water catchment area. The ownership of the entire land vested in the State of Sarawak and there was no dispute regarding this fact. Approximately 10,000 natives occupied the said land area under customary rights. The three respondents have from time immemorial lived upon and cultivated the said land. Two facts were common ground

(i) that the ancestral and customary native rights of livelihood and their way of life would be extinguished under the existing Sarawak Land Code (Cap 81) ; and

(ii) that the government of the State of Sarawak would resettle those affected.

*Respondents arguments*

The respondents rested their case upon the argument that they were not given a chance to give their 'input' on the Bakun Dam Project that fell within the terms of the EQA 1974 read with the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment ) Order 1987* made under the EQA 1974 and which took effect from 1 April 1988.Their main contention was that they were not given a copy of the EIA report on the said project and had been deprived of procedural fairness as they were not given an opportunity to make representations on the impact that the project would have upon the environment before the decision to implement the project was made. The respondents conceded that Sarawak had its own environmental legislation but argued that the appellants were under an obligation to follow the stricter requirements of the EQA 1974. The respondents therefore claimed both threshold and substantive *locus standi* in the case. Further, on 20 April 1995, the day on which the summons was filed, the Director General of Environment and the Government of Malaysia published in the Gazette the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1995*(the Amendment Order) retrospectively, excluding the operation of the 1987 Order to Sarawak. They argued that this order was invalid as section 34A did not authorize the making of retrospective orders and that they had a vested right under the EQA 1974 to receive procedural fairness so that the Amendment Order could not operate retrospectively to terminate that right.

*Appellants arguments*

Mr. Gani Patail, who appeared for the appellants in the first appeal, but not before the High Court, raised the argument that though section 2 of the EQA 1974 applied throughout Malaysia, it did not extend to the impugned activity, as the land in question belonged to the State of Sarawak with respect to which Parliament had no legislative authority. The enumerated powers doctrine found in article 74 of the Federal Constitution read with the Ninth Schedule places land as a legislative subject in the State List. The subject of 'environment' is not mentioned in any of the three Lists, the Federal, the State and the Concurrent. As the impugned activity which concerned a piece of land and a river, both

which were situated in the State of Sarawak, it was the Ordinance and not the EQA 1974 that applied. The presumption that operated in favour of the Parliament was that it did not intend to encroach upon the legislative powers of the State of Sarawak when the EQA 1974 was drafted or upon the Executive when the 1987 Order was made. On the contrary, it was to make clear that the 1987 Order was published. The applicability of the Act or the Ordinance to a particular activity within the State of Sarawak depended upon the facts of each case. The first argument rested upon the ground that the EQA 1974 did not apply to the impugned project, and that the respondents had no right to procedural fairness. Consequently, there was no deprivation of any such right under the Amendment Order.

Datuk Fong argued that the respondents lacked the requisite *locus standi* and that this was not a representative class action. Further, the respondents lacked substantive *locus standi* for they suffered no injury in law. In respect of the fundamental rights of the natives, they were being compensated in accordance with the law. Issues regarding the fairness of compensation had to be dealt with elsewhere. The High Court judge had erred when the Court did not decide the issue that lay at the heart of the case, namely whether the EQA 1974 applied to the impugned activity. Further, the Court also erred when it ruled that the Amendment Order formed the core of the case and the Court should not have granted the relief claimed.

Mr. Shafee drew attention to the fact that the respondents sought to enforce a penal law against Ekran. The litigation, counsel claimed, was a private law action to enforce a penal law against it which meant that the respondents lacked the requisite *locus standi*.

*Summary of issues*

The Court of Appeal found it convenient to consider the submissions in relation to the two main issues that they raised which are as follows:

1. Whether the EQA1974 applied to the impugned project?
2. Whether the respondents had *locus standi* in point of relief?

*Judgment*

Applicability of the EQA 1974 to the impugned project:

It was assumed by all that the EQA 1974 applied to the impugned project for there were no arguments raised before the High Court judge on that point. Relying on the doctrine of separation of powers and the provisions of the EQA 1974, sections 1 and 34A and particularly on para 13(b) of the 1987 Order, the Court of Appeal ruled that EQA 1974 did not apply to the present case. The Court of Appeal held:

> "Dams, hydroelectric power schemes, reservoirs, and the like must exist on land, which of course, is part of the environment, as is the very air that we breathe. Admittedly, the land and river on which the project is to be carried out lie wholly within the State of Sarawak and are its domains".

Based on this understanding, the Court ruled that the 'environment' referred to by the respondents wholly belonged to the State of Sarawak, subject to those customary or other rights recognized by its laws. The Court endorsed Gani Patail's' definition of the term 'environment' as a multi-faceted and multi-dimensional concept. The EQA 1974 only applied to limited environment in the State of Sarawak, that is, the environment within the State of Sarawak which may fall outside its legitimate and constitutional control and within that of the Federal Government.

In the present case, the environment referred to is the water and land area within the State of Sarawak upon which the project would have an impact and this environment by reason of Item 2(a) of list II and Item 13 of List IIIA of the Federal Constitution fell wholly within the legislative and constitutional province of the State of Sarawak, and by that fact that state has exclusive authority to regulate, by legislation, the use of it in such manner as it deemed fit. It was said that in the appeal, the activities complained of were related to matters in the State List, thus the Ordinance applied.

The Court of Appeal used settled principles of construction in this dispute to advance its judgment when it ruled that the EQA 1974 was in harmony with the Ordinance and

Parliament could not have intended the EQA 1974 to regulate so much of the environment that fell within the State of Sarawak.

The Court of Appeal ruled in favour of the appellants for the following reasons:

1. The relevant statute that regulated the use of the environment in relation to the project was the Ordinance and not the EQA 1974.
2. Since the EQA 1974 did not apply, the respondents did not acquire any vested rights under it. The validity of the Amendment Order was therefore wholly irrelevant to the case and the first declaration ought not to have been granted.
3. In any event, the respondents lacked substantive *locus standi*, and the relief sought should have been denied because:

    (i) the respondents were, in substance, attempting to enforce a penal sanction. This was a matter entirely reserved by the Federal Constitution to the Attorney General of Malaysia in whom resided the unquestionable discretion whether or not to institute criminal proceedings;

    (ii) the complaints advanced by the respondents amounted to deprivation of their life under art 5(1) of the Federal Constitution. Since such deprivation was in accordance with the law, the respondents had on the totality of the evidence, suffered no injury. There was therefore, no necessity for a remedy;

    (iii) there were persons, apart from the respondents, who were adversely affected by the project. There was no special injury suffered by the respondents over and above the injury common to all others. The action commenced by the respondents was not representative in character and the other affected persons were not before the Court; and

    (iv) the judge did not take into account relevant considerations when deciding whether to grant or to refuse declaratory relief. In particular, he did not have sufficient regard to public interest. Additionally, he did not consider the interests of justice from the point of view of both the appellants and the respondents. (see pages 18 and 19 of judgment).

In a separate judgment, Judge Mokhtar Sidin in this case, pointed out that there were two sets of laws that applied to the environment, namely the EQA 1974 that applied to the Malaysia as a whole and in general and for the State of Sarawak the *Natural Resources Ordinance of Sarawak of 1949*. The *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* was made under s34A of the EQA 1974 and came into force on 1 April 1988. Under section 34A, the Director General was empowered to draw up Guidelines in respect of a report made to the Director General. Under the terms of section 34A, and by the Guidelines drawn up by the Director General, where the EQA 1974 applied to a project, and where a person requested for that report, it must be made known to the affected persons under that project. It was a genuine complaint if the public had requested for a copy of the report in such circumstances and none were given before the project was approved. This could amount to a violation of the 1987 Order for failure to follow the Guidelines of the Director General purportedly made under the 1987 Order. On 27 March 1995, an amendment order was made to amend the 1987 Order and this was to take effect on 1 September 1994. The state order came into force on the same day. (See page 20 of judgment). The effect of the Amendment Order was that effective, from 1 September 1994, the Order was not applicable to Sarawak and consequently the Guidelines issued by the Director General were inoperable in Sarawak. The 1987 Order encroached upon activities reserved for the State and the Minister made the Amendment to clarify that the Order did not apply to these activities because Sarawak had its own laws in respect of those activities. The State List, List II, covers land, forest and water and State List, List IIIA, covers the production, distribution and supply of water power and of electricity generated by water power.

All of them knew that according to the Handbook, before the project could commence, a detailed assessment report must be given and approved by the appropriate authority. Thus, when the project was commenced, the respondents should have known that the reports had been submitted to the appropriate authority but they did not request for the report to be supplied to them with the stipulated conditions that they were willing to pay the costs of providing the report. The right in this case, it appears to me, is only a conditional right which must be exercised by the person concerned: see *Kong Chung Siew & Ors v Ngui Kwong Yaw & Ors* [1992] 4 CLJ 2013. It appeared that there was certainly no provision for the public to be supplied with the reports when there was no request for the reports. The provisions of the

Handbook as a whole show that it is not really a right but a privilege to have a copy of the report if the person so requests: see *Director of Public Works v Ho Po Sang & Ors* [1961] 2 All ER 721.

Under the EQA 1974, an "environmental audit" refers to a periodic, systematic, documented and objective evaluation to determine –

(a) the compliance status to environmental regulatory requirements;
(b) the environmental management system; and
(c) the overall environmental risk of the premises;

while an "environmental management system" comprises an organizational structure with its responsibilities, practices, procedures, processes and resources for implementing and maintaining the system relating to the management of the environment.

Environmental risk is defined as any risk, hazard or chance of bad consequences that may be brought upon the environment. Environmentally hazardous substances refer to both natural or artificial substances. This would include raw material, whether in a solid, semi-solid or liquid form, or in the form of gas or vapor, or in a mixture of at least two of these substances, or any living organism intended for any environmental protection, conservation and control activity, which can cause pollution.

*Result of Appeal*

The result of the appeal was that the three appeals were allowed and the judgment of the High Court was set aside and the respondents originating summons was dismissed. On the order for costs, the Court of Appeal accepted the contention of counsel for the respondents that they only instituted their action in the first place because all parties had believed that the EQA 1974 applied to the facts and, therefore, no order for costs should be made against the respondents. The Court of Appeal accepted the merit of this argument and ruled that no order for costs be made either in the Court of Appeal or in the High Court below. Counsel for the appellants were also agreeable to this suggestion and did not press for costs. The Court also ordered that the deposit paid into court by *Ekran* be refunded to it.