



Compliance with Environmental Laws: Road Towards Achieving a Healthy and Sustainable Triple Bottom Line

Almost every other day on various platforms, we receive feeds and articles on the importance of putting in place Environmental, Social and Governance ("ESG") policies that contribute towards ethical and responsible way of carrying on business, with the golden mantra on being 'sustainable'. Recently reported events also demonstrated an increasing shift in investors' investment criteria and objectives, that place significant emphasis on ESG policy disclosures and compliance with the law in assessing how well the investment will fair in the market. We see companies faced with compliance issues being adversely affected financially, resulting in the loss of goodwill from the negative media coverage given the growing investor sentiment wary of ESG risks. In the most extreme cases, this has come at the risk of losing access to an entire market. From regulatory actions taken by US authorities on Top Glove shipments over concerns of alleged human rights concerns, to the unprecedented ousting of directors at Exxon Mobil by activist investor group Engine No. 1, and ongoing bilateral discussions taking place relating to EU imports of Malaysian palm oil – these incidents demonstrate that both the investors and businesses may have underestimated the ESG imperative at their peril.

In this Update, we take a closer look at some of the environmental law compliance issues frequently encountered in Malaysia.

Major Reported Pollution Activities in Malaysia

Most reported pollution cases and environmental law breaches have often resulted from industrial activities. In 2020, a majority of reported pollution cases were caused by illegal industrial waste disposal and dumping. Below are some examples of the reported cases and their effects to the environment and the lives of the communities within the vicinity.

Dumping of Toxic Waste

- The airborne pollution at Sungai Kim Kim is one of the most severe pollution cases reported in recent years, whereby dozens of students in the Pasir Gudang district suffered breathing difficulties and vomiting from inhaling toxic fumes from the river caused by illegal dumping of chemical substances from a used tyre processing factory.
- Two parcels of land raided by the Selangor Department of Environment led to the unearthing of more than 1,000 drums and 'jumbo bags' containing oil and rubber sludge. Together with other toxic waste illegally dumped at the site, this has led to toxic waste land pollution amounting close to one hectare in size along Jalan Sijangkang Utama, Johan Setia.
- Illegal discarding of drums containing hazardous chemicals in Kampung Tambak Jawa became a health and safety hazard when the drums caught fire and exploded. The rise of illegal dumping activity raised concerns on the long-term health and safety of the residents in the area where 250 drums of glycerine were also earlier found to be dumped on the banks of the river.

Pollution of Water Treatment Plants

- Sungai Semenyih Water Treatment Plant had to be shut down due to pollution caused by illegal dumping of waste into the sewage system, leading to a series of unscheduled water disruptions/shortages in the Klang Valley to allow for remediation measures to be carried out. This type of waste could not be treated by the sewage system, therefore resulting in water and odour pollution when it was discharged into the rivers which are the main source of raw water for the Sungai Semenyih Water Treatment Plant.
- Closure of the Sungai Selangor Phase 1, 2 and 3 Water Treatment Plants and the Rantau Panjang Water Treatment Plant due to the inability to cope with the disposal of solid wastes (e.g. furniture) and illegal industrial effluents into the nearby river basin. This led to a series of unscheduled water disruptions/shortages in the Klang Valley to allow for remediation measures to be carried out.

Dumping of Industrial Waste

- In Ipoh, the Perak Environmental Department had started investigations on an unknown soil-like substance with green and grey tints and a strong odour which had been found to be illegally dumped and buried in a piece of land in Chepor, with sources claiming that industrial waste had been illegally dumped on the land. Workers who had come into contact with the unknown substance claimed to have developed rashes, with additional claims that the nearby river has been polluted by the same substance, making it unsafe for the community who live around the area.
- As a cheaper option of getting rid of industrial and solid wastes, illegal dumping is rampant in many secluded locations, some organised by illegal dumping syndicates. Illegal dumping of shredded plastic waste, broken plastic fittings and renovation debris on a vacant piece of land in Klang has

resulted in a mounting slope of waste beside a palm oil plantation. The accumulated waste was disposed of irresponsibly by open burning, resulting in strong acrid smells and air pollution in the surrounding area.

- Such illegal method of disposal was copied at Taman Bukit Kempas. It took the firefighters three weeks to put out the fire and clear the smoke and chemical residues emitted from layers of inflammable waste, including recycled wastes which were repeatedly discarded at the illegal dumpsite. It was reported that the culprits of the illegal disposal include construction companies, waste disposal contractors and even a recycling company.

Legal and Regulatory Framework in Malaysia

The legal and regulatory framework for the protection, conservation and preservation of the environment in Malaysia consists of various pieces of legislation and supplemented by orders, rules and regulations issued by the relevant Ministers who are conferred with such powers to do so by the legislation.

In respect of protection against environmental pollution, the main framework is based on the provisions of the Environmental Quality Act 1974 ("**EQA**") and orders, rules and regulations issued thereunder by the Minister of Environment and Water. The administration of the EQA is carried out by the Department of Environment ("**DOE**") under the supervision and instruction of the Director General of Environmental Quality ("**Director General**"), who is empowered to carry out and delegate enforcement actions under the EQA.

In addition, DOE has also issued the Contaminated Land Management and Control Guidelines ("**Guidelines**") that provide guidance on the management and handling of waste and pollution to land and water. We set out below a brief summary of some of the key elements of the EQA and the Guidelines.

Environmental Quality Act 1974

In general, the EQA prohibits any person from emitting or discharging, or causing the admission or discharge of any environmentally hazardous substances, pollutants or wastes into the atmosphere unless a licence (which specifies the conditions and permissible limits) is obtained from DOE. With respect to pollutions to land and inland waters/groundwater, Section 24 (*Restrictions on Pollution of the Soil*) and Section 25 (*Restrictions on Pollution of Inland Waters*) of the EQA set out the restrictions and actions that would cause a person to be deemed to have polluted the land or inland waters. Specifically, on the handling of scheduled wastes, Section 34B provides that no person shall place, deposit or dispose of scheduled wastes on land or into Malaysian waters (amongst others) without the prior written approval of the Director General. These provisions are typically referred to when addressing the pollution activities frequently reported and occurring in Malaysia.

Additionally, the EQA is supplemented with a number of subsidiary legislations which regulates specific activities and pollution, such as:

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- Environmental Quality (Industrial Effluent) Regulations 2009, which regulate the discharge and release of industrial effluent or mixed effluent onto or into any soil, inland waters or Malaysian waters;
 - Environmental Quality (Sewage) Regulations 2009, which regulate premises which discharge sewage onto or into soil, inland waters or Malaysian waters;
 - Environmental Quality (Scheduled Wastes) Regulations 2005, which regulate the handling of scheduled wastes; and
 - Environmental Quality (Control of Pollution from Solid Waste Transfer Station and Landfill) Regulations 2009, which regulate solid waste transfer stations and landfills which discharge or release leachate.

The regulations above set out, amongst others: (i) permissible levels or acceptable conditions for certain compounds to be released to the environment; (ii) standards for handling and monitoring the release of wastes; and (iii) the obligation to notify the Director General of any spill, accidental discharge or leakage of wastes into the environment.

If an offence is committed under the EQA or its subsidiary legislation, in addition to fines and imprisonment, DOE may also still issue a notice to the owner or occupier of the premises to require it to, amongst others, adopt any measure to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution, regardless of whether the owner or occupier is the polluter or otherwise. DOE may further issue a prohibition order against the owner or occupier to require it to suspend its operation until the requirements to remedy a breach as directed by the Director General have been complied with.

Contaminated Land Management and Control Guidelines

As guidance on assessing and managing contaminated sites in Malaysia, DOE has issued the Contaminated Land Management and Control Guidelines ("**Guidelines**"). Compliance with the Guidelines is voluntary as the Guidelines currently do not have the force of law. Nevertheless, in the event of an investigation under the EQA, evidence of compliance with the Guidelines would provide an indication that appropriate steps have been taken by an entity to prevent, manage and control any contamination. This could then be taken as a mitigating factor in respect of any non-compliance of the EQA.

The Guidelines are issued in three parts and cover the aspects of:

1. recommended site screening levels for contaminated land;
2. assessing and reporting contaminated sites; and
3. remediation of contaminated sites.

The Guidelines generally apply a "Polluter Pay Principle" and "Risk-Based Approach" in developing the principles and standards under the Guidelines:

- The "Polluter Pay Principle" defines the responsibility for performing and paying for site assessments and remediation. The Guidelines recognise that the "polluter" can be the landowner, occupier, the underground storage facilities owner and/or chemical/waste owner.
- The "Risk-Based Approach" is applied to site assessment, remediation and planning/managing contaminated land which requires the highlighting of future risks associated with the presence of contaminants in the land in order to take corrective actions to mitigate and/or control incremental risk to the level acceptable from human health and ecological perspectives.

Under the Guidelines, the landowner has the responsibility to determine if there is any presence of subsurface contamination in the land and if so, to identify if there are any unacceptable human health risk and ecological risk. If the risks are assessed to be unacceptable, it is the responsibility of the landowner to propose and implement a remediation action plan to address these risks. If the landowner is able to ascertain that the subsurface contamination is not caused by its current or historical onsite operations, the landowner should identify the polluter who is responsible for the remediation actions.

In the event of any subsurface contamination to a piece of land, the landowner must notify DOE of such a contamination via a prescribed form under the Guidelines. DOE will then decide on the necessary actions that must be taken to address the risks posed by the subsurface contamination.

Recommended Site Screening Levels

In conducting the assessment, the Guidelines provide criteria for contaminated land assessment known as "Site Screening Levels" ("**SSLs**"). As a guidance for industrial soils, the SSLs take into consideration exposures to: (i) soil ingestion; (ii) dermal contact; and (iii) direct vapour and particulates inhalation.

With regard to metal concentration levels, the Guidelines acknowledge that metal concentrations can be a result of natural occurring phenomenon and thus, metal concentration must be assessed carefully to determine if the detected concentrations are naturally occurring or from anthropogenic sources. Even if natural occurring metals concentration becomes higher than the SSLs, the responsible parties are required to justify the basis of such claims and to notify DOE of this. Without DOE's endorsement that the metal concentrations are attributed to natural occurring phenomenon, the responsible party needs to manage the risk posed by the subsurface contamination on the land.

Assessing and reporting contaminated sites

An initial assessment must first be conducted to identify if there is any potential presence of subsurface environmental impact based on a defined assessment protocol/procedure. The initial assessment typically involves a desk top study, interview, and a site visit.

Thereafter, a detailed assessment should be conducted if the findings of the initial assessment suggest that the land is potentially impacted by onsite or offsite activities. A detailed assessment involves a soil and groundwater investigation with the aim of determining whether the subsurface environmental media is impacted. This typically includes activities such as soil boring, groundwater well installation, and soil and groundwater sampling. A copy of the detailed assessment report should be submitted to DOE. If it is found that the subsurface contamination will pose unacceptable human health risk and/or ecological risk, the landowner is required to propose and implement a remediation action plan.

Remediation of contaminated sites

Under the Guidelines, there are four stages for remediation of contaminated sites. These are summarised below.

1. *Remediation Action Plan* – involves a review of the site information and setting out the objectives of the proposed remediation activities, together with the details of the proposed remediation activities.
2. *Remedial Investigation, Feasibility Study and Remedial Design* – aims to identify the most appropriate remediation strategy and/or technologies to remedy the contamination.
3. *Remediation Implementation* – execution of the final remediation strategy and implementation of the appropriate technology onsite.
4. *Post Remediation Evaluation* – evaluation of the effectiveness of the remediation activities; performed by confirming that the site complies with the remediation goals determined in the Remediation Action Plan.

Plans for Review

With the unimproved pollution activities in Malaysia, coupled with the industry players' apathy of the potential environmental impact arising from their actions, there is a growing need to review our environmental laws in order to steer Malaysia's national environmental policy to better address these concerns.

Although the EQA was reviewed by DOE in 2019 by a government-assigned group of officials, scientists, civil society members and legal experts, and past announcements made by the Minister of Natural Resources and Environment regarding the amendments to be made to the EQA or the possibility of even enacting a new act to replace the EQA in its entirety, such reviews and announcements have only led to sporadic amendments of the EQA and little movement towards the complete overhaul of the EQA.

However, in February 2021, in pursuit of a cleaner and healthier environment in Malaysia, Prime Minister Tan Sri Muhyiddin has pledged that a review is underway to ensure that stern actions can be taken against offenders of the EQA. Allocations have also been set aside in the 2021 Budget under the fourth

strategy of Ensuring Resource Stability to ensure that Malaysia is in alignment with its commitment to the United Nations' Sustainable Development Goals. Aside from the plans to review the EQA, other "Green" initiatives include: (i) the first Sustainability Bond for environmental and social initiatives to be issued in 2021 as a foundation for Malaysia to transition to a low carbon economy; (ii) the extension of income tax exemptions for Sustainable and Responsible Investment ("**SRI**") green Sukuk grants to encourage the issuance of SRI products and bonds; as well as (iii) the Green Technology Financing Scheme 3.0 with a fund allocation of RM2 billion until 2022.

Amidst the long-term challenges in tackling environmental pollution and implementing a harsher and more effectively enforced EQA, the uncertainty of the pandemic and stricter movement control restrictions has made it harder to estimate when a revised EQA will be introduced in Parliament.

Is it enough?

As Malaysia looks forward to maintaining its competitiveness, local businesses and regulators must understand the changing dynamics in the international investor sentiment. Increasingly, international investors are required to not only disclose ESG metrics to their stakeholders and financial backers, but also to set minimum benchmarks of qualifying investments with reference to ESG factors. To satisfy the international investors' demand in this regard, at the most basic level, it is imperative that Malaysia put in place the appropriate and effective legal and regulatory framework to ensure that compliance with environmental laws is monitored effectively and strictly enforced.

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