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New PRC Anti-Pollution Notice Targets Exporters

December 2007

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The PRC Ministry of Commerce (“MOFCOM”) and the State Environmental Protection Administration of China (“SEPA”) jointly issued a notice on October 8, 2007 on “Strengthening the Environmental Monitoring over Export Enterprises” (the “Notice”).

The stated goals of the Notice are to save energy, reduce emissions, build an environmentally-friendly society, protect state environmental interests and promote the transformation of trade growth.

The Notice reflects a new approach to regulating pollution in China. Existing anti-pollution rules, which generally impose fines on polluters, have been considered largely ineffective because many businesses find it less expensive to pay the fines than to restructure their operations to reduce pollution. The new rules embodied in the Notice target exporters of goods, and require businesses to demonstrate environmental compliance as a condition to obtaining an export license or quota.^[1] It is believed that these rules will be more effective in effecting environmental compliance because they impact a critical aspect of exporters’ businesses.

The Notice represents a collaboration between MOFCOM, which is responsible for regulating exporters, and SEPA; which is responsible for enforcing China’s environmental laws. The general concept is that SEPA and local environmental agencies under its administration will monitor environmental compliance by exporters, and will relay information regarding non-compliant businesses to MOFCOM and local commerce departments so that they can consider such non-compliance in passing upon applications for export licenses and quotas.

Monitoring by Environmental Protection Departments

The Notice provides that environmental protection departments at various levels will intensify their environmental monitoring of pollutant discharging enterprises that export goods (“export enterprises”), through the following measures:

- Conducting special environmental law compliance inspections of export enterprises and imposing penalties on violators.
- Strengthening and increasing daily environmental monitoring to ensure that the discharge of pollutants is within prescribed standards.
- Strengthening the management of environmental cases involving export enterprises by
 - Establishing an environmental law compliance database covering export enterprises to track the varieties and quantities of export products, the principal pollutants produced by exporters, the amounts of pollutants discharged and the sanctions imposed for environmental violations.
 - Conducting a dynamic enforcement program, including the imposition of penalties for environmental violations and requirements for remedial action.

Impact on Export Applications

Local environmental protection departments are directed to impose administrative penalties for environmental violations by export enterprises (“violators”) and to make public announcements of such penalties. The departments are also directed to order the correction of illegal environmental conditions within specific time limits. The departments are to report these conditions and penalties to SEPA. SEPA, in turn, will promptly report the conditions to MOFCOM.

MOFCOM will deliver a list of violators and the corresponding written enforcement decisions to the applicable local commerce departments and authorize them to suspend the acceptance of export business applications filed by violators. Types of applications covered by the new rules include, but are not limited to, applications for export quotas and licenses, applications for the examination and approval of trade contracts or projects, issuance of certificates regarding manufacturing capacity and operation status of companies in processing trade business, and applications to participate in national and regional export commodity fairs and expo booths. Each local commerce department is directed to report the status of export business applications filed by violators to MOFCOM. MOFCOM may, pursuant to Article 34 and 63 of the Foreign Trade Law, prohibit violators from engaging in foreign trade for more than one year but less than three years, and will deliver its written enforcement decisions to the local commerce departments. The local commerce departments must suspend the acceptance of export business applications filed by the violators within the time periods specified in the relevant MOFCOM enforcement decisions.

Enterprise Environmental Supervisors

A pilot system of enterprise environmental supervisors will be implemented first in the metallurgical, chemical, cement, textile and light industries due to their rapid growth, substantial environmental problems and trade surpluses. Each enterprise is required to establish an environmental management body and assign special environmental supervisors to inspect and record the enterprise’s environmental operation indicators, give reports to the local commerce and environmental protection departments, prepare for inspections and regularly publicize its environmental operating conditions to the public.

Cooperation between Departments

The commerce departments and the environmental departments at both the provincial and prefecture levels are directed to establish joint working panels to coordinate their work and establish information sharing mechanisms. When a local commerce department is examining the export business application filed by an export enterprise in an industry that causes a significant environmental impact, it must solicit the views of the related local environmental protection department, and the environmental protection department must reply within two weeks. Each environmental protection department is directed to regularly report on the status of its investigations and its handling of illegal environmental acts to the related commerce department as the basis for the commerce department to examine business applications filed by export enterprises.

The Notice required the commerce departments and the environmental protection departments of all regions are required to cooperate with each other to formulate their joint working panel and implementation plans and report them to MOFCOM and SEPA before the end of October 2007. It is unclear whether the affected departments met this timetable, but the relatively short timeframe for departmental compliance reflects the urgency that MOFCOM and SEPA attribute to this initiative.

The Notice may represent a significant step forward in China’s efforts to control environmental degradation, but it presents an additional cost and bureaucratic hurdle to China’s exporters. It remains to be seen whether this approach will be applied in a manner that results in effective pollution control without creating excessive delays, costs and other burdens on business.

Footnotes:

[1] MOFCOM, directly and through local commerce departments, is responsible for administering export licenses and quotas under the 1994 Foreign Trade Law (as amended in 2004). Over the past several years, the PRC has progressively reduced the number of products requiring export licenses

or quotas in order to conform to WTO rules that generally prohibit export restrictions. Nonetheless, approximately 50 categories of products are still subject to some form of export license, while export quotas are still applicable to around 20 categories of products .