

Contributed by the Environmental Law Unit, Burges Salmon LLP

Environmental matters and the associated carbon law issues have seen a rapid rise up the agenda of all corporates over the last few years but particularly in 2007/2008 with the added practical focus on the cost of energy.

The EU continues to legislate heavily on environmental issues and the scope is expanding into new areas such as carbon footprinting, carbon law and emissions trading, all of which have as their rationale the protection of the environment. In the EU, major legislative initiatives cover most sectors, notably the Directive on Industrial Emissions, the revised Waste Framework Directive, a new Directive on Ambient Air Quality, political agreement on the Priority Substances Directive (a daughter directive to the Water Framework Directive, along with the revised Groundwater Directive), and the Marine Strategy Directive, which will have major impacts on the targets for ensuring 'good environmental status' of the seas. Over 150 EU Regulations and Directives published in 2007/08 were environment-related and understanding and advising in the area involves getting to grips with a complicated mix of pure traditional 'command and control' regulations and environmental financial instruments. Clear distinctions have also started to emerge on the back of this volume of legislation between environmental law teams that tend to focus on servicing transactions and those focusing on day-to-day compliance and strategy with businesses.

In the UK, 2007/08 will be seen as a radical year from a regulatory perspective. It has seen a new regime of permitting facilities, intended to create a single, more user-friendly system for pollution prevention and control and waste management licensing but in reality it still leaves gaps. This system will be rolled out to other areas in due course.

We have also seen the development of the regulatory sanctions initiative, something that will change the face of enforcement as companies know it. The idea is to allow for, among other things, the imposition of administrative penalties, such as on-the-spot fines, rather than go through the formal court process. In theory it may ease the burden on courts and on companies but it raises the spectre of all types of fines and penalties being applied inappropriately, but for expediency's sake. One thing we have seen, as legal practitioners in the area over the last few years, is the stiffening of enforcement, and the unwanted consequences it leads to – reputational issues, confiscation of perceived profits, tougher sentencing and the risk of losing important public contracts. How a supposedly new, quicker, more efficient fining regime will be applied will be of key interest and we believe companies will need to be extremely careful when accepting such fines/administrative penalties. In reality, it may lead to further cases in terms of appeals before the courts. There has been much talk over the years about the establishment of dedicated environmental courts or tribunals and it is possible that this new system of sanctions will ultimately lead to this.

The last year has seen some key UK national environmental legislation introduced into Parliament or published, notably the Climate Change Bill, the Energy Bill and the Planning Bill, which are all before Parliament now.

The new Marine Bill has been published in draft, and a separate Scottish Marine Bill is expected.

We continue to see a move by the government to use financial instruments as a persuasive method for changing behaviour. The whole emissions trading and producer responsibility for waste and other substances are the obvious examples and 2008 has seen the new EU chemicals regulation, REACH, moving into full force and affect. It is still taking companies by surprise and for an initial period will provide lawyers with considerable work in drafting associated agreements and regulatory advice. REACH demonstrates the wide ambit of environmental law. It is predicted to affect many thousands of businesses, many of which will have to devote significant time and expenditure to it.

The UK is also having to wrestle with the implementation of a new liability regime for cleaning up and controlling pollution through the EU's Environmental Liability Directive. The intent behind the Directive is to make organisations causing or threatening to cause environmental harm responsible for notifying the regulators and financially liable for clean-up. It has also raised the possibility of organisations having to compensate the nation by securing alternative clean sites where full clean-up of the polluted area is impossible. How this will dovetail with existing UK clean-up regimes is still unclear but, in reality, it is likely to complicate matters further.

Aside from criminal proceedings and fines, we would see 2007/08 as the year when environmental civil litigation started to come to the fore. The USA has been ahead of the game when it comes to such cases but the EU and UK are now seeing an unprecedented growth in claims and tortious actions. To advise in this area requires specialist knowledge of litigation and an understanding of White Book Advice married with detailed on-the-ground environmental law experience. This type of litigation is now being taken very seriously by corporates and, as a result, this area of legal advice will come to the fore.

Lastly, mention has to be made of the key role that environmental law is now playing in the whole energy debate, both through emissions but also in developing and establishing new regimes for energy facilities such as nuclear and renewable energy plants.

The government has now expanded its approach to reducing carbon emissions from targeting carbon-related financial instruments and emissions trading on large industrial emitters, to one where large public and private sector companies will now be covered by an emissions trading scheme in the form of the carbon reduction commitment (CRC). This will require a much wider range and number of organisations to become familiar with carbon management, carbon accounting and trading issues.

Add to this the environmental law aspects of the nuclear renaissance and the new international liability regimes being established, and once again firms that can marry a thorough knowledge of the regulatory regime with energy expertise will profit in the medium term.