

ENVIRONMENT AND ENERGY LAW

Budget 2011 Environmental highlights



The Budget as a whole has been received with mixed responses against the Coalition's bid to be the "greenest government ever". The Green Investment Bank has been unveiled and will come into operation in 2012-13. However, as with many of the other Budget announcements, many feel that the measures do not go far enough to promote a low-carbon UK economy.

The Green Investment Bank (GIB)

The GIB will be used to invest in renewable energy sources and will have an initial capitalisation of £3 billion. £1 billion of this funding has been allocated by the Government in the Spending Review (in October 2010). The Government also hopes to attract a further investment of £15 billion from the private sector.

Carbon Floor Price

The carbon floor price is planned to be introduced for electricity generation from 1 April 2013. This follows a consultation which took place in December 2010. The floor price is to start at £16 per tonne of carbon dioxide (Co2)

and is set to gradually increase to £30 per tonne during 2020. The Budget also contains detailed proposals concerning the anticipated roll-out of the measures.

In order to provide some protection to carbon capture and storage (CCS) and combined heat and power (CHP) schemes, the Government intends to provide some form of relief and remove an existing exemption in the climate change levy (CCL) for electricity supplied direct to the consumer by CHP plants.

Zero Carbon Homes

The Government has also received criticism as a result of an announced "watering down" of its proposals to meet its target for all new homes to be zero carbon from 2016, as a result of the fact that Co2 emissions from household appliances will not be included. Instead, the definition of "zero carbon" will be that applied in the Building Regulations 2010 (which covers energy used in heating, hot water, fixed lighting and building services).

Initially the Government intended that all homes would have a net zero impact on the carbon footprint for UK housing stock. In order to achieve this housebuilders were to fund renewable energy projects to offset emissions from household appliances. However, this measure has been scrapped in the Budget and as a result it is anticipated that only two thirds of carbon emissions from the typical homes will be mitigated per annum.

There were no announcements in the Budget regarding the Carbon Reduction Commitment.

For further information on these issues please contact michael.barlow@burges-salmon.com

Energy and Power

Electricity Market Reform

Billed as the most comprehensive and radical reform of the electricity markets since privatisation over 20 years ago, the UK government recently published proposals for electricity market reform ("EMR"). The Government has 3 key objectives for the EMR:

- security of supply,
- decarbonisation; and
- affordability

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Welcome

Welcome to the April issue of **Environmental and Energy Law**. If you would like further details on any of the areas covered in this briefing then please contact one of our partners or have a look on our website at www.burges-salmon.com.

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The devolved administrations are fully co-operating with the proposals, but it is likely that Scotland will produce provisions containing some significant differences.

The UK is seeking to reform the electricity market owing to the need to replace a great deal of its generating capacity by 2020. Much of the UK's current capacity is too environmentally inefficient (especially in light of the new Industrial Emissions Directive) and many power stations are nearing the end of their operational lives. Furthermore, the binding commitments that have been made to renewable energy production and the reduction of greenhouse gases mean that changes are needed. In the EMR consultation, it is said that the electricity sector needs to be *"largely decarbonised during the 2030s"*.

"Clean" electricity is becoming, and will become, more and more in demand. Ofgem has estimated that to meet the estimated demand, up to £200 billion of investment in power generation might be needed over the next 10 years.

The EMR will seek to achieve its aims in 4 main ways.

Emissions Performance Standard

An Emissions Performance Standard is proposed for new power stations. Essentially, the standard will be the permitted amount of CO₂ emissions that will be tolerated whilst leaving some flexibility as to how the power station achieves this. The level of cap will essentially make it impossible to commission new coal fired power stations without Carbon Capture and Storage (CCS) capability.

Capacity Payments

Provisions for capacity payments to generators who provide surplus power generating capacity are included in the EMR, with the hope of ensuring security of supply. This applies even where the extra capacity is standing idle for some of the time.

These reforms will have a wide and substantial impact on all businesses in the energy sector, and Burges Salmon's team have extensive experience across the full spectrum of energy generation activities. For further information, please contact ross.fairley@burges-salmon.com

Nuclear

This section was drafted before the tragic events in Japan. We feel it is too early to comment on those events but we will continue to monitor developments there and consider at a later stage what implications there may be for international nuclear law.

Changes to the Nuclear Third Party Liability Regime

DECC has recently published its consultation paper on the implementation of amendments to the Paris and Brussels Conventions on Nuclear Third Party Liability.

The Consultation seeks views on the UK's proposed implementation of amendments to the Conventions. The aim of the proposals is to revise the Nuclear Installations Act 1965 in order to incorporate changes to the Conventions agreed in 2004.

Some of the changes include:

- Widening the scope of the damage for which compensation can be claimed so as to include the following new heads of liability: economic loss arising from damage to property or personal injury; cost of measures to reinstate damage to the environment; loss of income deriving from a direct economic interest in any use or enjoyment of the environment; and the cost of preventative measures.
- Widening the geographical scope of the Paris Convention so that compensation must be paid to certain countries

(e.g. Ireland) which are not signatories to the Paris Convention. These changes do not affect the geographical scope of the Brussels Supplementary Convention.

- Increasing the amount of compensation from approximately €300 million to €1,500 million. In the UK, the liability cap of nuclear operators is to be increased from approximately £140 million to €1,200 million per incident. The Government proposes to phase in this increase over a period of five years starting with a cap at €700 million.

One of the key concerns that has been expressed as a result of the proposed reform is that the insurance market may be unwilling to provide sufficient coverage to match the widening scope of the liability regime and that consequently there may be gaps in coverage. In its consultation, DECC has suggested that operators consider filling these gaps, especially for smaller claims, with alternative financial security arrangements (e.g. parent company security, external fund and/or industry risk pooling). DECC does concede, however, that there may still be gaps in coverage, especially for long tail liabilities for personal injury, where the government may be forced to step in as a last resort in return for a charge levied against operators which reflects the risk profile of the installation.

The Consultation is accompanied by a draft Affirmative Order, an Impact Assessment and a copy of the unofficial



consolidated text of the amended conventions. The Consultation closes on 28 April 2011.

Launch of Office for Nuclear Regulation

On 8 February 2011, the Government announced that the Office for Nuclear Regulation (ONR) will be established on 1 April 2011. The ONR will regulate the nuclear power industry and will take over a number of relevant regulatory functions currently performed by the Health and Safety Executive and the Department for Transport and will bring civil nuclear and radioactive transport regulation under one roof. It is not intended to change substantively the existing regulatory requirements or standards.

New Regulations on Funded Decommissioning Programmes

Part 3 of the Energy Act 2008 imposes a requirement on new build operators to have an approved funded decommissioning programme (FDP). An FDP is an amalgam of technical and financial details that will be used as a mechanism to ensure that new build is not directly subsidised by the taxpayer. Under an approved FDP, new-build operators will be required to make financial contributions over the lifetime of their installations which are intended to capture the realistic cost of waste and decommissioning liabilities.

On 27 January 2011, DECC laid the Nuclear Decommissioning and Waste Handling (Finance and Fees) Regulations 2011 before Parliament. These Regulations set out the detailed requirements for submitting an FDP for the approval of the Secretary of State. The Regulations will come into force on 6 April 2011.

Consultation on the Management of Plutonium Stocks

On 7 February 2011, DECC published a consultation document entitled "Management of the UK's Plutonium Stocks: a consultation on the long-term management of UK owned separated civil plutonium".

The consultation sets out the Government's initial view on the long-term management of plutonium and considers the following three options:

- **Re-use as fuel:** Separated plutonium will be used in fuel stocks and ultimately disposed of as spent fuel. However, this option would require the construction of a new MOX fabrication plant (because of the difficulties experienced at the MOX plant at Sellafield) which would cost billions of pounds.
- **Continued long-term storage:** This option will leave a legacy of radioactive waste for future generations and it also has potential security risks. If this option is taken forward, it will require new stores to be built and further research to be conducted into the processes of ageing and radioactive decay.
- **Immobilisation and direct disposal of waste:** This option raises technical concerns and could also require that additional storage capacity is built in the geological disposal facility that the Government is currently planning for high level nuclear waste.

The Government will work in tandem with the Nuclear Decommissioning Authority to explore the viability of these options with a view to reaching a final decision. The Government has, however, expressed a preliminary preference for re-use. A policy document will be published in the summer of 2011, in which the Government will respond to the consultation and set out its updated position.

Ian Salter chairs the Nuclear Industry Association's Legal Affairs Working Group which will be assisting the NIA to respond to the consultation. If you have any questions on the consultation and its implications, or for further information on Nuclear Sector matters, please contact Ian at ian.salter@burgess-salmon.com

Renewables



Review of the Feed in Tariff Scheme

On 7 February 2011, the Department for Energy and Climate Change (DECC) announced the first review of the Feed in Tariff Scheme (FiT Scheme), on the back of apparent concern on DECC's part about the tariff levels that were set when the FiT Scheme came into operation in 1 April 2010. The review will cover all aspects of the FiT Scheme but of key importance to operators and funders of renewables projects below 5MW will be the outcomes in relation to eligible technologies and the levels of the tariffs themselves.

DECC has given assurances that tariff levels will remain unchanged until April 2012 (unless the review reveals a need for earlier changes). However, in parallel with the wider review, a fast track review process is also underway, looking at the tariff levels for solar and anaerobic digestion projects. On 18 March 2011, DECC published its proposed fast track changes to these tariff levels, which (subject to consultation) it intends to make before the Parliamentary summer recess, so that changes can take effect from 1 August 2011. Significantly, DECC has proposed a dramatic reduction in support levels for solar projects over 50kW. The fast track review also included a study into the uptake of the FiT Scheme for farm based anaerobic digestion (AD) plants. Very few AD plants have become accredited under the FiT Scheme since April 2010 and as such DECC has proposed modest increases in tariff levels for AD plants up to 500kW, to promote further investment in this technology.

The wider review is due to be completed by the end of 2011 when there will be a formal consultation on the proposals. The outcome of the review will be watched closely by operators and investors who are becoming increasingly nervous about the levels of subsidy available for renewables projects.

We have significant experience in advising on the FiT Scheme and the key issues for FiT-eligible projects from working with operators and land owners across all the technologies covered (wind, solar, hydro and anaerobic digestion).

The Renewable Heat Incentive

The Renewable Heat Incentive Scheme (RHI) was announced by the Department for Energy and Climate Change (DECC) on 10 March 2011. This long-awaited announcement details further incentives for renewable energy production in an effort by the Government to reach its legally binding target of generating 15% of energy from renewable sources by 2020. The RHI will be funded from central Government spending rather than a RHI levy as previously proposed and will be administered by the Gas and Electricity Market Authority (Ofgem).

The RHI will be implemented in phases with the first phase being introduced in July 2011 and the second phase following in 2012. The first phase will introduce long-term tariff support for the non-domestic sector with incentive payments made quarterly over a 20 year period. The non-domestic sector covers the industrial commercial sector, the public sector, not-for-profit organisations and communities. The first phase will also introduce new Renewable Heat Premium Payments (from a ringfenced £15 million of Government money) for the domestic sector – these are payments (rather than long-term tariff support) to households that install renewable heating. The Premium Payments will not be available for multiple residential dwellings served by a district heating system.

The second phase will provide for long-term tariff support for the domestic sector to coincide with the introduction of the Green Deal. The Government has indicated that it intends to keep the RHI scheme open to new installations until at least 2020.

We have a more detailed briefing available on the Renewable Heat Incentive. For a copy please contact Michael Barlow at michael.barlow@burgessalmon.com or Ross Fairley at ross.fairley@burgessalmon.com

Promotion of Renewable Energy

The Promotion of the Use of Energy from Renewable Sources Regulations 2011 came into force on 14 March 2011. The Regulations implement elements of the Renewable Energy Directive (2009/28/EC) which contains a number of obligations on Member States and their public authorities to achieve certain renewable energy targets. The headline obligation is on the Secretary of State for Energy and Climate Change to ensure that at least 15% of UK energy is from renewable sources by 2020, which represents the UK's contribution towards the Europe-wide 20% target. This equates to an eight-fold increase in nine years from the UK's current renewable energy consumption levels.

Clearly, enormous investment is needed, along with a willingness to support these developments in planning and permitting terms. One cannot help but feel, however, that these targets look optimistic, particularly given the uncertainty in the renewables market due to the FiT Scheme review.

“The headline obligation is on the Secretary of State for Energy and Climate Change to ensure that at least 15% of UK energy is from renewable sources by 2020.”

Hydropower Permitting Changes

In an effort to promote an increase in community-based and other small hydropower projects, the Environment Agency has announced that it is simplifying the process by which hydropower plant operators apply for environmental permits. In addition to this simplification the EA is offering advice to small hydropower developers on the detail and design of proposed schemes.

Under the current regime hydropower developers need to apply for up to four permits in addition to obtaining planning consent. The simplified process will mean a single application is required where at all possible. Hydropower schemes were made more popular in 2010 by the incentives offered by the FIT Scheme which currently provides for a generation tariff of between 4.5p and 19.9p per KW depending on the size of the scheme. It is hoped that the simplification of the permitting process will result in a significant increase in the number of hydropower projects being developed from the 65 schemes that were licensed in 2010.



Environmental Legislation

Civil sanctions likely to be extended to offences under the Environmental Permitting Regulations 2010

From 4 January 2011 the Environment Agency (EA) stated that they would start to use civil sanctions. We understand that they are currently actively considering the use of the first Variable Monetary Penalty and are also considering a number of Enforcement Undertakings. Last year DEFRA consulted on proposals to extend the use of civil sanctions to offences under the Environmental Permitting (England and Wales) (Amendment) Regulations 2011 (the EP Regulations). The proposals would allow the Environment Agency to use fixed and variable monetary penalties and enforcement undertakings for offences listed in Regulation 38 of the EP Regulations as alternatives to prosecution in appropriate circumstances. Those offences include failing to hold a permit, breaching a permit condition and water pollution offences.

Initially it was intended that the EA would start using its civil sanctioning powers in relation to the EP Regulations from April 2011. However, this has been pushed back to 1 October this year. This is part of a general review on the use of civil sanctions by the Government across all departments.

For more information on the use of civil sanctions in general, please contact Michael Barlow at michael.barlow@burges-salmon.com or Simon Stuttaford at simon.stuttaford@burges-salmon.com

New regulations to improve energy efficiency of products

On 27 October 2010 the Ecodesign for Energy-Related Products Regulations 2010 were made which came into force on 20 November 2010. The Regulations introduce civil sanctions for non-compliance (to be enforced by the National Measurement Office (NMO)); a new cost-sharing regime that places the financial burden of product testing for enforcement activities on non-compliant businesses, and increases to the range of household and office products covered under the existing regime.

The new Regulations apply to manufacturers, importers, distributors and retailers and represent a significant enhancement of eco-design regulation.



Waste

The Waste Policy Review (WPR) is expected to be published in May/June of this year and it is expected that the LATs regime will be scrapped as part of this review.

On a similar timescale, the Anaerobic Digestion (AD) strategy is expected to be published and fed into the WPR. Some will be watching to see how the "Zero Waste Economy" of England is defined, as compared with Wales and Scotland. Also of interest will be whether an internal cross-jurisdiction market is set to develop.

The End of Waste protocol (PAS100:2011) has now been published and the first AD plant to achieve PAS110 has been announced. The Environment Agency and South East England Development Agency has announced the development of Quality Protocols for biogas and biomethane for heat and power generation for injection into the grid and use as a transport fuel.

National Indicators have been abolished this month, but waste reporting will continue in order that the UK meets its EU waste statistics reporting requirements.

Welsh Waste Order

The Proposed Waste (Wales) Measure 2010 (the "Measure") received royal assent on 15 December 2010. The Measure introduces binding recycling targets and reporting



obligations for local authorities to ensure that municipal waste is reused, recycled or composted and is one of the most significant pieces of legislation since the devolution of key environmental law responsibilities to the Welsh authorities in February 2010. The Measure's secondary legislation is being consulted on and currently imposes positive reporting requirements on local authorities regarding the tonnages of waste recycled, reused and composted. The Measure has wide implications for both Welsh public bodies and private contractors working in Wales. We are currently advising on a number of projects in Wales and as such can provide comprehensive advice in relation to the Measure and its application to the waste sector there.

For further information on developments in the Waste Sector or for advice on waste projects, please contact nigel.campbell@burges-salmon.com or nick.churchward@burges-salmon.com

Carbon, climate change and sustainability

CRC: Removal of Revenue Recycling and Judicial Review

As reported in the December 2010 briefing, the Coalition government announced that the first sale of CRC allowances would take place in 2012 (rather than 2011) and that the revenue raised from allowance sales would not be recycled to participants and instead would support public finance. Some commentators have expressed serious concern about the legality of removing revenue recycling without consultation and have argued that the government has, in effect, introduced a carbon tax through the back door. Judicial review proceedings have in part been initiated against the Secretary of State by Oxford and Cambridge universities. There is, therefore, still a chance that the government could be forced to reconsider.

CRC Amendment Order 2011

The final version of the CRC Energy Efficiency Scheme (Amendment) Order 2011 was published and laid before Parliament on 16 February 2011 and will come into force on 1 April 2011. The Amendment Order will:

- extend the introductory phase of the scheme by a year so that it runs until the end of March 2014;

- postpone the start of each of the second and subsequent phases by two years;
- remove the requirement to provide "information disclosures" for organisations which are not required to register as participants under the CRC; and
- slightly amend the division of responsibility between the Environment Agency and the devolved administrators.

The changes have primarily been made in order to grant the government some time to decide on the future shape of the CRC. The CRC is currently in a state of flux and the government is considering further and more substantial reform later in the year as part of a recent push towards CRC simplification (see below).

Discussion Papers on CRC Simplification

For some time, there has been a debate whether the CRC is unnecessarily complicated and that measures to simplify it should be considered. On 25 January 2011, DECC published five discussion papers which indicate the priority areas for simplification and set out a number of different options for reform. The five areas of the scheme covered by the discussion papers are:

- private sector organisation rules;
- supply rules;
- qualification criteria;
- reducing overlap between the schemes; and
- the timing and frequency of allowances sales from 2012 onwards.

DECC intends to publish responses on its CRC website, and any proposed changes that the government decides to make will be subject to a formal public consultation later in this year.

Low Carbon Roadmap

On 8 March 2011, the European Commission adopted a Low Carbon Roadmap, which provides guidance on how the transition to a low carbon economy can be achieved by 2050 in a cost-effective way. Some of the key aspects of the Low Carbon Roadmap include:

- a recommendation to reduce GHG emissions by 80% from 1990 levels by 2050 through domestic action only, which will require a consequential uplift to existing emission reduction targets to 25% by 2020 (from 20%); and
- a recommendation that additional allowances should be set aside in order to push up the price of carbon allowances and provide an incentive for low-carbon investment.

The achievement of higher emissions reductions will make EU ETS compliance more expensive. Businesses with qualifying installations should, therefore, be in a more informed position to evaluate their carbon strategies once the national allocation plans for Phase 3 are published later this year.

Draft Carbon Plan

On 8 March 2011 the Government also published its draft Carbon Plan. This key document sets out a number of measures under which the Government hopes to establish a low carbon economy for the UK.

The draft Carbon Plan focuses on three areas of concern within which changes are required to the UK economy, namely: (1) electricity generation; (2) heating of buildings; and (3) travel. The draft Carbon Plan also contains information regarding the proposed roll out of a number of important initiatives, including: (1) the proposed Green Investment Bank (GIB), which will begin operation in 2012-13; (2) mandatory company carbon reporting, which will be confirmed by the end of March 2011; (3) carbon capture and storage, the first demonstration contract for which will be awarded by December 2011; (4) a carbon floor price, which is to be introduced under the Finance Bill 2011 by April 2011 (in order to come into force during 2013); (5) exploring new technologies for energy from waste; (6) review of Feed-in Tariffs (FITs); and (7) a strategy for the construction of recharging infrastructure for electric cars by June 2011.

Cyber attacks to EU ETS registries

On 19 January 2011, the European Commission took the decision to suspend transactions (other than the allocation and surrender of allowances) at all national EU ETS registries following cases of allowance theft at a number of registries.

In the wake of the cyber attacks and the damage that they have done to investor and stakeholder confidence, the European Commission outlined, on 23 February 2011, a series of short-term measures in order to help prevent a reoccurrence. The European Commission has also resolved to intensify its work to make the European carbon market subject to appropriate financial markets legislation. On 24 January 2011 an agreement was reached between the EU Commission and Member States on the minimum security levels that should be in place before the registries could reopen. On 4 January the UK registry reopened at 7am, along with France, Germany, the Netherlands and Slovakia.

EU ETS Baseline Emissions Level for Aviation

Despite strong resistance from the aviation sector, the European Commission took the decision in 2008 to include aviation GHG emissions in the EU ETS from 1 January 2012 (although this decision is unsurprisingly the subject of a legal challenge by American airline carriers in the European Court of Justice). Under the European legislation, the total quantity of allowances to be allocated to aircraft operators is defined by reference to average historical aviation emissions from the calendar years 2004-06.

On 7 March 2011, the European Commission published a draft decision which will be used as the baseline level from which the percentage emissions reductions will be calculated.

EU ETS Offset Credit Bans

Amid concerns that Clean Development Mechanism offset credits are being abused, the EU is attempting to phase out their availability from advanced developing countries and to replace them with new mechanisms that would have a greater potential for emissions reductions.

To this end, the EU Climate Change Committee decided on 21 January 2011 to endorse a European Commission proposal to ban the credits from certain offset projects which destroy trifluoromethane and nitrous oxide. There are currently 23 such projects, which together account for approximately two-thirds of all the credits generated through the Clean Development Mechanism. The European Parliament and the Council have until 21 April 2011 to oppose the ban and prevent it from being adopted. If it is adopted, the ban will become effective from 1 May 2013.

A majority of respondents in a recent survey of carbon professionals believe that the EU will adopt further bans in the coming years.

For further information on these issues please contact georgie.messent@burges-salmon.com or jay.jagasia@burges-salmon.com

Chemicals



Regulation of Nanomaterials

The regulation of nanomaterials poses new challenges to international regulators. These regulators will have to consider their risks and their properties as new materials and products. The EU Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) has produced two opinions in relation to the risk assessment of nanomaterials in 2006 and 2007. This led to a Communication from the European Commission to the European Parliament, Council and European Economic Social Committee on the Regulatory Aspects of nanomaterials in 2008. This foresaw the inclusion of nanomaterials within the REACH Chemicals legislation as “substances” but also that these new materials would have impacts on the application of Worker Protection and Product legislation. Environmental aspects of nanomaterials would require adaptation and regulation under the IPPC Directive (now to be repealed and re-enacted in the Industrial Emissions Directive) the Seveso II Directive, the Water Framework Directive and a number of waste directives.

The European Commission went on to develop its application of regulation in two papers on *Nanomaterials in REACH* (December 2008) and *Classification, Labelling and Packaging of Nanomaterials in REACH and CLP* (December 2009).

It has become clear, however, that regulatory authorities internationally are not even using exactly the same working definitions of nanomaterials.

It now appears that in the course of 2011 the European Commission intends to publish a Communication on the review of regulatory aspects of nanomaterials, which will aim to bring together work going on in European Commission working groups, the European Parliament, Member States and international discussions. One very important aspect of this work is that the Commission intends to put forward a working definition of the term “nanomaterial” to try to ensure that a consistent approach is adopted in future regulatory measures and legislation.

Nanomaterials are already present in some consumer products, for example, those containing nanosilver and others, and developments in this area in 2011 are likely to be extremely important to the emerging businesses manufacturing nanomaterials and the much wider range of businesses using their products.

Burges Salmon has already had experience of advising nanomaterial producers, and as noted elsewhere in this briefing has detailed and in depth experience of advising on the REACH Chemicals Regulation. For further information please contact William Wilson at william.wilson@burges-salmon.com

REACH and CLP Regulations

The first deadline for Registration of substances under the REACH Chemicals Regulation passed on 30 November 2010, by which point 24,675 dossiers had been submitted for 4,300 substances, including nearly 3,400 phase-in substances. The first Registration deadline under REACH applied to substances imported in high volumes, over 1,000 tonnes per year per legal entity and to “CMRs” or substances that are carcinogenic, mutagenic, reprotoxic, endocrine-disrupting or having equivalent characteristics.

The first deadline for notification of substances under the EU Classification and Labelling and Packaging (CLP) Regulation passed on 3 January 2011, by which point the European Chemicals Agency ECHA had received 3,140,835 notifications of 107,067 substances for the Classification and Labelling Inventory.

Significant milestones have therefore been achieved in the implementation of this highly complex legislation. All manufacturers, importers and downstream users, (in particular those dealing with substances and mixtures) should now be fully aware of their obligations under REACH and CLP regulations.

Priorities for action now include Evaluation of REACH Registration dossiers by ECHA, coordinated action by national enforcement authorities over the key provisions of REACH and the CLP regulation, work on the Classification and Labelling Inventory, further intensive work to ensure and improve communication up and down the supply chain and preparatory work towards the next Registration deadlines of 2013 and 2018. Also of high significance is the growing number of chemical substances on REACH Candidate List for Authorisation, which at the time of writing had some 46 substances of which 7 were under consideration for Authorisation itself.

We have been advising a number of multi-national firms and trade associations on the implementation and application of REACH and CLP regulation, and running workshops on REACH and the Supply Chain. For further information please contact William Wilson at william.wilson@burges-salmon.com

Water law



Change to Regulator's Information requirements

Ofwat, the water and sewerage regulator, recently released an information notice providing further guidance to companies on reporting expectations for 2010 - 11 for this year's "June return". This is set to be followed by the final reporting requirements which will be published in March.

The June return contains information on each company's performance during the previous financial year and is one of the ways companies demonstrate that they are complying with their obligations and meeting customer expectations. Ofwat have confirmed that, this year, companies will only be expected to provide specific tables of data on their performance and a board overview, in which companies will be asked to draw attention to material issues.

The changes in these data requirements are part of Ofwat's drive to streamline and move to a risk-based approach to regulation and it will be interesting to see whether some companies' concerns that this approach could significantly increase the number of queries (the detailed questions Ofwat ask following the June return) will materialise.

Sustainable Sludge!

The OFT, closely supported by Ofwat are currently working on a market study (expected to conclude in July) into the treatment of Organic waste. The study will help Ofwat consider how sewerage companies in England and Wales could interact with a wider market for treating, recycling and disposal of organic waste and feeds into Ofwat's sustainable sludge project.

Since privatisation in 1989, sewerage companies have invested (which has ultimately been paid for by consumers) in this area. Ofwat have identified that a number of drivers such as increased amounts of sludge, rising costs of

treatment, recycling and disposal and the increased need for renewable energy (amongst others) mean that it is now time to re-think how Ofwat regulates sludge activities.

Ofwat's aim is to develop a sludge framework that ensures sewerage customers receive safe, reliable, efficient and affordable sludge services; promotes positive social, economic and environmental impacts; and provides incentives for innovation to deliver more efficient outcomes for customers and the environment. This market study signals potential important change to regulation in this area which will become clearer when Ofwat publishes its response to the OFT's recommendations in autumn 2011.

Flood and Water Management Act 2011

On 1 April 2011 a number of provisions relating to the Flood and Water Management Act 2011, will come into force.

Significant provisions include those relating to the powers granted to the Environment Agency (EA) to issue levies to lead local flood authorities (LLFAs), so as to enable it to perform its flood and coastal erosion risk management duties; and those relating to obligations imposed upon the EA to divide England and Wales into regions and establish Regional Flood and Coastal Committees.

On 6 April 2011 the EA, LLFAs and Welsh Ministers will also have the power to request information from persons in connection their duties under the Act. The EA, LLFAs, councils and internal drainage boards will also have the power to designate certain features that cannot be removed, altered or replaced so as to protect against the risk of flood and coastal erosion.

For further information please contact Michael Barlow at michael.barlow@burgess-salmon.com or William Wilson at william.wilson@burgess-salmon.com

"Ofwat's aim is to develop a sludge framework that ensures sewerage customers receive safe, reliable, efficient and affordable sludge services..."

Case law update

Electricity market and ROCs

R (on the application of Tate & Lyle Industries Ltd) v. The Secretary of State for Energy and Climate Change [2010] EWHC 2752

Market based mechanisms that interfere with the market will, perhaps inevitably, create winners and losers. Perhaps it is also inevitable that, where the sums at stake are large, those losers may look to the Courts to seek legal redress.

In the case of *R (on the application of Tate & Lyle Industries Ltd) v. The Secretary of State for Energy and Climate Change*, Tate & Lyle stood to lose £1.5 million per year as a result of what it considered to be an “unfair and discriminatory” banding of Renewable Obligations Certificates (ROCs) for its co-fired combined heat and power (CoCHP) generators which it had recently installed at a cost of £81.1 million.

In 2006 the Government held a review into the banding of ROCs and the subsequent Renewables Obligation Order 2009 awarded only CoCHP 1.0 ROC/MWh.

Tate & Lyle believed the maths justified 1.5 ROC/MWh and commenced a judicial review. The Government accepted that it had made some errors in its calculations and therefore proceeded to an “early review” of the banding for CoCHP.

In the period between the Government’s original review for all technologies and the “early review” for CoCHP the wholesale electricity price had increased. The Government applied the current (higher) wholesale electricity prices to the calculation and in doing so it arrived 1.0 ROC/MWh.

Tate & Lyle then argued that, although the calculation was now correct, the fact that CoCHP had been banded using higher wholesale electricity prices than had been used for the original banding was unfair and discriminatory against CoCHP technology.

The Court considered the issue and dismissed the application for judicial review. The Court concluded that to ignore the price increase would result in an over subsidy of CoCHP which would ultimately be extracted from suppliers and thus consumers and was contrary to EU prohibitions on State Aid. Moses LJ stated that “avoiding State Aid which leads to distortion in the market is as much a cardinal principle as consistency of treatment”.

This case is of interest to all those in the electricity markets or energy intensive industries. However, it is also of wider interest to those in the field of environmental and energy regulation because it demonstrates yet again that, despite the current vogue for market based mechanisms over “command and control”, the complexity of such regimes will generate winners and losers and in such circumstances litigation may well follow.

For more information on this case please contact Michael Barlow at michael.barlow@burges-salmon.com or Simon Tilling at simon.tilling@burges-salmon.com

Court of Appeal ruling on “EL Trigger” Litigation

Durham v Bai (Runoff) Limited and Others - “EL Trigger” Litigation [2010] EWCA Civ1096; 2010 [WLR] D256

This long running litigation ended in a Court of Appeal Judgment on 8 October 2010. The Court of Appeal held that in any year in which an employee underwent substantial exposure to asbestos and subsequently developed mesothelioma, that the mesothelioma was “caused” by the exposure during that year. As a result, an insurance policy which was worded to indemnify the employer against disease “caused” during employment responded to the mesothelioma. However, employers’ liability policies framed in terms of the employee “suffering or sustaining an injury” did not have the same effect. Employees did not suffer or sustain an injury within the meaning of the policies when they were exposed to asbestos. Injury in that case was not suffered until the onset of malignancy or development of the mesothelioma, said to be five years prior to diagnosis, and policies with that type of wording did not indemnify the employer.

Notices of appeal however, have already been lodged and the Court of Appeal is likely to recommend that the appeal process before the Supreme Court is expedited. The result of this case is that policy wording will have to be looked at individually and scrutinised before it can be said whether the specific policy will respond. Where asbestos exposure was during a period where the policy includes a “sustain” wording, many policyholders will have to fund these asbestos claims from their own pockets. Until we see a final resolution to the recent EL Trigger Litigation, the insurance market and insureds alike are faced with continued uncertainty over coverage issues.

For further information please contact Michael Barlow at michael.barlow@burges-salmon.com or Simon Stuttaford at simon.stuttford@burges-salmon.com

We have developed a training programme in conjunction with consultants on managing asbestos and dealing with asbestos related diseases. This programme can be delivered by webinar or in person. **For further information please contact Michael Barlow at michael.barlow@burges-salmon.com or Simon Stuttaford at simon.stuttford@burges-salmon.com**

The Aarhus Convention and the Costs of Environmental Litigation in the UK

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, popularly known as the Aarhus Convention, provides that procedures for challenging the legality of environmental decisions shall “be fair, equitable, timely and not prohibitively expensive”. This Convention, agreed in 1998 and ratified by the UK in 2005, has been cited by activists and claimant lawyers as being



“The Court granted an injunction against the operators limiting the noise that could be emitted from the racing venues and awarded damages for the historic impact.”

incompatible with the UK’s current rules on costs recovery in civil and administrative law cases, because of the considerable financial burden on the losing party.

The Court of Appeal was provided with an opportunity to reconsider the Corner House principles on protective costs orders (PCOs) in the context of environmental cases in *Garner v Elmbridge Borough Council* [2010] EWCA Civ. 1006. The case concerned the application of the Environmental Impact Assessment (EIA) Directive which enshrined the principles of the Aarhus Convention by restating that access to the Court should be *“not prohibitively expensive”*. Lord Justice Sullivan held that the judge-made rules on PCOs in Corner House *“must be interpreted and applied in such a way as to secure conformity with the Directive”* and held that a PCO could be granted even though the claimant did have a private interest in the outcome.

Sullivan LJ also considered the issue of whether the fact that the costs should not be prohibitively expensive should be assessed on a subjective basis (looking at the finances of that particular claimant) or an objective basis (looking at the finance of the ordinary member of the public). Sullivan LJ considered that it was an objective test.

In *R (in the application of Edwards) v. Environment Agency*, the Supreme Court was asked to consider whether Sullivan LJ’s objective test was correct. In that case, the claimant had sought a PCO in 2008 but had been turned down, in part based on the subjective test, which was now in doubt. The claimant had subsequently lost the challenge and was facing a bill of nearly £90,000. The case came back before the Supreme Court at the end of 2010 to consider whether, retrospectively, the Court should address its obligations under the EU Directives relating to Aarhus even at the end of the relevant proceedings. Lord Hope held that there was *“no clear and simple answer”* to whether the requirements of Aarhus required an objective or subjective test when assessing whether there is a financial barrier to justice, and has referred the question to the European Court of Justice.

The backlog at the ECJ means that it will be at least a

couple of years before the ECJ gives its preliminary ruling.

For more information on this case please contact Michael Barlow at michael.barlow@burbges-salmon.com or Simon Tilling at simon.tilling@burbges-salmon.com

Noise Nuisance from Motor Sports

***Lawrence and Shields v. Fen Tigers Ltd and Others* [2011] EWHC 360 (QB)**

In March 2011 the High Court found in favour of two Suffolk residents claiming that the operators of a stadium and track used for speedway racing and banger racing created a noise nuisance. The Court granted an injunction against the operators limiting the noise that could be emitted from the racing venues and awarded damages for the historic impact. The case is of particular interest for three reasons.

First, the Court held that the landlord of the racing track was not liable for acts of the tenant where premises are let for a purpose which can be achieved without a nuisance, but where the tenant nevertheless creates a nuisance. The claim against the landlord was therefore dismissed.

Secondly, the Court dismissed an argument that 20 years of continuous use had resulted in an easement by prescription, holding that the law does not recognise an easement of noise.

Thirdly, a claim for aggravated and exemplary damages was dismissed, demonstrating the high hurdle that needs to be overcome to succeed in a claim for aggravated and exemplary damages in nuisance actions.

A more detailed briefing is available from the website.

Michael Barlow and Simon Tilling have considerable experience acting in noise disputes and Simon has recently lectured on the legal regime for the control of noise to the Institute of Licensing and the Environmental Law Foundation. For more information on our capabilities please contact Michael Barlow at michael.barlow@burbges-salmon.com or Simon Tilling at simon.tilling@burbges-salmon.com

Reporting and Management

On 2 February 2011, DEFRA published further guidance for organisations that make “green” claims regarding their products. The guidance is provided to businesses as best practice and is followed on a voluntary basis. The guidance looks to further assist businesses, chiefly in the retail sector, on how to more accurately reflect the environmental credentials of the products that they sell. This includes advice on labelling products more clearly, preventing inaccurate information being provided to consumers and promoting the development of more environmentally friendly products. The guidance is intended to result in greater consumer confidence in businesses that adhere to DEFRA’s Green Claims Code (of which the guidance forms part).



In the office

Personnel

Congratulations from all in the Environmental Team to Cheryl Parkhouse, who recently started her family when she became a mother for the first time.

Environmental team partners

The team are also pleased to have been asked to edit Environmental Law Review, which is one of the most respected periodicals in the Environment sphere.



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