

ENVIRONMENT AND ENERGY LAW

Welcome

Welcome to the December 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.

This edition of our Environment and Energy Law Briefing is slightly later in the year than usual. The cause of this was our recent move to our BREAM Excellent rated new office at One Glass Wharf. We are extremely pleased to have moved in to this fantastic new office and are enjoying all of its benefits.

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Chambers and Partners – Top ranking for second year

Burges Salmon's Environmental Team is delighted to have been given top rankings in Chambers and Partners Directory, being in the top band for Environmental Law both nationally and in the South West for the second year running. The 2011 Edition says;

The Directory also lists all four partners in the Environment Team as 'key individuals' and recognises **Ross Fairley** as "a pre-eminent authority on renewables, waste and contaminated land issues", **Ian Salter** as "one of the Sector's leading experts in advising nuclear sector clients", **Georgie Messent** as "having a growing profile as head of the Firm's emissions trading and carbon law team", and **Michael Barlow** as "a future star" in environmental litigation and sustainable development.



"This Bristol-based firm has one of the strongest specialist environment teams in the country, certainly the best to be found outside of London."

Energy and Power

National Policy Statements

On 18 October 2010, Chris Huhne (Secretary of State for Energy and Climate Change) announced a further consultation on the draft energy National Policy Statements (NPSs). This follows a consultation undertaken by the previous Labour Government, which closed earlier this year. The NPSs set out national policy on six key areas, being nuclear, renewables, fossil fuels, electricity networks, gas supply and gas and oil pipelines.

The consultation, which will close to the public on 24 January 2011, is being undertaken primarily because of changes to sustainability appraisals for non-nuclear energy and it is intended that the finalised NPSs will be laid before Parliament for ratification next spring. The Government is hoping that the revised NPSs provide investors with sufficient certainty to support projects that will accelerate decarbonisation and maintain the UK's security of supply.

Severn tidal power scheme

Following a consultation on the feasibility of the Severn tidal power scheme, the Government has announced that there is **"no strategic case at this time for public funding of a tidal scheme to generate energy in the Severn estuary"**. The Government concluded that the high project costs (in excess of £30 billion) could not be justified when compared to other low-carbon projects and also noted the significant effect that the scheme would have on the natural environment of the estuary and potential uncertainty regarding regulatory compliance. Although the Government does not completely rule out the possibility of the project being developed in the future, it is not intending to review its decision before 2015.

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Energy and Power

Carbon Capture & Storage Update

International legal and regulatory review of carbon capture and storage

In October 2010 the International Energy Agency (IEA) published its first legal and regulatory review of carbon capture and storage (CCS) across a number of jurisdictions.

The aim of the CCS review is to:

- help countries develop their own CCS regulatory frameworks.
- provide a forum for sharing knowledge on CCS legal and regulatory issues.
- Identify the steps taken towards the legal and regulatory goals set out in the IEA's Technology Roadmap: Carbon Capture and Storage, published in 2009.

EU NER300 funding round

The European Union has opened the first tranche of funding for Carbon Capture and Storage and renewables projects. This could help finance up to 8 CCS projects and 24 renewables projects across the EU, with funds drawn from the sale of up to 300 million carbon allowances in the New Entrants Reserve (NER) of the EU Emissions Trading Scheme. This NER 300 funding could amount to Euros 4 billion, and can cover up to 50% of construction and operation costs of projects, with EU Member States expected to provide the rest.

UK CCS competitions

The UK government's commitment to provide up to £1 billion for the first CCS demonstration project competition survived the Comprehensive Spending Review, and with the announcement by E.ON of its withdrawal from that competition, the only remaining contender is the consortium led by Scottish Power, which proposes to retrofit CCS technology to its Longannet power station in Fife, Scotland.

At the same time, DECC has confirmed its commitment to bring forward up to three further CCS competitions, which may include pre- and post-combustion technology and a gas powered project. Participants have been concerned to try to ensure maximum compatibility between EU NER300 funding and access to matching UK funding in the remaining CCS competitions.

DECC's 'market sounding' exercise confirmed a level of interest in participating in future CCS competitions from a range of potential participants, and the area remains under very active development in terms of policy and commercial initiatives.

Burges Salmon continues to be closely involved in these projects. For further information on any aspect of Carbon Capture and Storage, please contact William Wilson on +44(0)117 939 2289 or william.wilson@burges-salmon.com

Nuclear

NDA publishes strategy for managing solid low level radioactive waste

The Nuclear Decommissioning Authority (NDA) published a UK strategy for the management of solid Low Level Radioactive Waste (LLW) on 26 August 2010. The strategy will be of interest to the nuclear sector and parts of the non-nuclear sector that generate LLW, such as hospitals and research establishments. Amongst other provisions, the strategy aims to apply the waste management hierarchy more effectively in order to reduce the amount of LLW that is generated and reduce reliance on disposal. It also aims to make the best use of existing waste facilities and to extend the life of current waste repositories.

NDA Consults on Draft Strategy

On 1 September 2010, the Nuclear Decommissioning Authority (NDA) published a draft strategy for consultation (<http://www.nda.gov.uk/strategy/>). The NDA is required under the Energy Act 2004 to review and publish a strategy at least every five years, and this is the first of the NDA's five-yearly reviews of its strategy.



Along with presenting a review of their first strategy, the draft strategy sets out how the NDA plans to deliver the efficient decommissioning and clean-up of legacy sites while promoting high standards in health, safety, security and environmental performance.

The draft strategy is structured around six core themes under which the NDA groups all of their activities, namely Site Restoration, Spent Fuels Management, Nuclear Materials, Integrated Waste Management, Business Optimisation and Critical Support Services.

The consultation closed on 24 November 2010, with the final version of the strategy expected to be published by March 2011, subject to the approval of both the UK and Scottish governments.

Revised Nuclear National Policy Statement

The nuclear-specific National Policy Statement (EN-6), taken together with the overarching NPS for energy (described earlier), provides the basis for decisions by the Infrastructure Planning Commission (IPC)/Major Infrastructure Planning Unit (MIPU) on applications it receives for nuclear generating stations with over 50MW generating capacity.

Key Changes in the Revised Draft Nuclear NPS include:

- The list of potentially suitable sites in Part 4 has been reduced from 10 to 8 (Braystones and Kirksanton have been removed) and the site assessments have been updated;
- Some of the assessment principles in Part 2 of the revised draft have been streamlined to clarify the policy that the IPC/MIPU should consider when determining applications;
- The section relating to the management and disposal of radioactive waste (Section 2.11 and Annex B) has been amended in order to demonstrate the Government's confidence that geological disposal will be implemented and to clarify the Government's expectations in relation to the likely duration of the onsite storage of higher activity waste and the role of the IPC/MIPU;

- New text has been introduced into Section 2.6 in order to explain the interaction between the NPS and Regulatory Justification; and
- The text scoping the role of the IPC/MIPU and that of the regulators has been revised and condensed.

Nuclear Waste Directive Proposal

On 3 November 2010, the European Commission put forward a legislative proposal for a Council Directive on the management of spent fuel and radioactive waste (http://ec.europa.eu/energy/nuclear/waste_management/waste_management_en.htm). The decision to legislate by the European Commission seeks to introduce a degree of harmonisation between Member States into an area of law that raises important issues relating to safety, security and health. Amongst other things, it would set EU-wide safety standards for the disposal of long term high level waste (HLW).

The scope of the proposed Directive is wide-ranging and will catch most types of civilian spent fuel and radioactive waste, including those arising from nuclear electricity generation, reprocessing and radioisotope applications.

The Directive is potentially significant for a wide variety of organisations and institutions operating in industries where they are responsible for nuclear waste, and should be tracked carefully over the next few years.

For further information on Nuclear Sector matters or if you would like to be added to the circulation list for our nuclear briefing, please contact Ian Salter on +44 (0)117 939 2225 or ian.salter@burges-salmon.com

"Burgess Salmon is home to the largest dedicated nuclear practice in the UK. The team's experience in the sector attracts clients such as the Nuclear Decommissioning Authority and International Nuclear Services, which it advises on the full range of issues relating to the nuclear industry, from project development to waste storage and disposal".

(Chambers 2011)

Renewables

Feed-in Tariff and Renewable Heat Incentive survive the Spending Review

Both the Feed-in Tariff (FIT) regime, introduced in April 2010, and the proposed Renewable Heat Incentive (RHI) came under the scrutiny of the Spending Review, the results of which were published in October 2010. Whilst the announcements in respect of both regimes lacked significant detail, it is clear that both regimes have survived the spending cull, albeit with some notes of caution.

The levels of the Feed-in Tariff for newly accredited installations will continue to be reviewed in 2012 (with any changes to be introduced in 2013 as originally planned) but the Government has warned that this review could take place earlier if higher than expected deployment necessitates this. The Government has also stressed that as part of the review, feed-in tariffs will be "refocused on the most cost-effective technologies" saving £40m in 2014-15. It remains to be seen what level of deployment would lead to an early review, or how the £40m saving is expected to be achieved.

Following on from the previous Government's consultation on the RHI in February 2010, things had gone very quiet. As part of the Spending Review the Government reiterated its support for a Renewable Heat Incentive, stating its intention to introduce the scheme in June 2011, which will receive £850m of central funding up to 2015. It is expected that there will be an announcement on the detailed design of the RHI before the end of the year, which will be aimed at achieving the Government's target of moving from 1% to 12% of all heat generated from a renewable source by 2020.

DECC grandfathers support for biomass

On 27 July 2010, the Department of Energy and Climate Change (DECC) issued its response to the consultation on grandfathering policy of support for Dedicated Biomass, Anaerobic Digestion and Energy from Waste under the Renewables Obligation. It confirmed it will grandfather support for anaerobic digestion and energy from waste, dedicated biomass and advanced conversion technologies but not for bioliquids or energy crop uplift. The Scottish Executive is currently consulting on the same issue.

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Renewables *continued*

Offshore electricity transmission: changes to the enduring regulatory regime

On 26 August 2010, the Department of Energy and Climate Change (DECC) and the Office of Gas and Electricity Markets (Ofgem) published a consultation document on the enduring regulatory regime for offshore electricity transmission, setting out further detail on the arrangements for OFTO built transmission assets and presenting an additional "generator build" option to provide greater flexibility to offshore generators. The consultation also addressed implementation challenges and issues surrounding the development of a co-ordinated transmission system. Subsequently, it has been confirmed that a generator build option will be made available for developers under the enduring regime and some of the further proposed detail has been set out in a three week consultation which commenced on 8 November 2010. DECC is keen to introduce the relevant changes to the industry codes using powers which expire on 18 December 2010.

Proposed changes to the Renewables Obligation

The draft Renewables Obligation Order 2011 (draft ROO 2011) was published on 27 August 2010. The draft ROO 2011 will apply to England and Wales, and will come into force on 1 April 2011. Changes to the RO have been necessary to fulfil obligations under the Renewable Energy Directive. The draft ROO 2011: (i) updates the definition of bioliquids and provides new sustainability criteria; (ii) brings in sustainability requirements for biomass; and (iii) introduces phased support for offshore wind projects. The consultation closed on 19 October 2010.

Ban on sale of renewable electricity by local authorities lifted



Local authorities have been prevented, under section 11(3) of the Local Government (Miscellaneous Provisions) Act 1976 (LGMPA 1976), from selling any electricity that they produce albeit with some limited exceptions. In March 2010, a consultation was undertaken on regulations to allow the sale of electricity generated by renewables. The Government announced it would repeal the sections of the LGMPA 1976 that prevent such sales by local authorities, providing incentives for local authorities to invest in and seek to gain financial benefits from renewables generation. The Sale of Electricity by Local Authorities (England and Wales) Regulations 2010 (SI 2010/1910) and the Sale of Electricity by Local Authorities (Scotland) Regulations 2010 (SI 2010/1908) came into force on August 18th 2010.

For further information on renewable energy issues, please contact Ross Fairley on +44 (0)117 902 6351 or email him at ross.fairley@burgess-salmon.com

Carbon, climate change and sustainability

As with so many aspects of business regulation, the spending review has had a major impact in this area.

CRC

First, the Carbon Reduction Commitment Energy Efficiency Scheme (CRC) will be changed so that revenue raised from the sale of CRC allowances will be used to support the public finances, rather than recycled to participants. This change will have a significant financial impact on those who are participants under the CRC and has led many commentators to query whether the scheme is now more akin to a tax. The CSR announcement also noted that the obligation to purchase allowances will be postponed to the end of the 2011/2012 compliance year, providing more time for participants to attempt to reduce these costs and budget for the potential impact. Not surprisingly, the decision has caused much consternation and it has been

estimated that the loss of revenue recycling payments will add 10% to participants' energy bills and an additional £3.5 billion to the costs of the wider business community over the next 4 years.

Secondly, Government launched a CRC consultation on 17th November, to which responses must be received by 17 December 2010. The key proposals on which the Government is consulting include extension of the introductory phase, postponing phase II and subsequent phases (along with relevant allowance sales) and removing the requirement to make information disclosures. The delays set out in this consultation are intended to allow time for further simplifications to be considered and made to the scheme and to give participants additional experience before moving into Phase II. A further consultation on structural changes to the scheme is still awaited and we will update you once we know when this might be taking place.

Climate Change Levy and Carbon Floor Price

The review of the Climate Change Levy (CCL) also formed part of the spending review. This review will be linked to the proposal to create a floor price on carbon in the UK. The CSR contained little detail on how this will link in with other price mechanisms affecting carbon and energy, such as the EU Emissions Trading Scheme, Renewables Obligation Order, CRC, Feed In Tariffs and the Renewable Heat Incentive, and we await this further detail with interest.

DECC is due to launch a consultation on CCL changes in November/December 2010.

The abolition of recycling payments and changes to CCL mean it is crucial to be fully conversant with potential liabilities, and to assess any means by which these can be mitigated. The Emissions Trading and Carbon Law team have been advising a large number of companies on CCL and CRC issues (including intra-group arrangements).

EU ETS

In Europe the cap for 2013 (the first year of phase III) of the EU Emissions Trading Scheme (EU ETS) was adopted by the European Commission on 22 October 2010. Phase III will have an extended scope as compared to previous phases of the scheme and will involve a larger amount of allowances being auctioned to participants. The cap will reduce by 1.74% each year of the phase through to at least 2020. If the EU moves towards a 30% greenhouse gas

reduction target the cap will need to be revised to ensure that this target is met. Those organisations that will be part of phase III of the EU ETS will be keen to be aware of their allocation of allowances under this cap which is yet to be announced.

New EU Regulation on Registries for Greenhouse Gas Allowances comes into force

On 15 October 2010, EU Regulation 920/2010 for a standardised and secured system of registries pursuant to Directive 2003/87/EC and Decision No. 280/2004/EC (Registries Regulation) came into force. The Registries Regulation amends the system of registries for holding and tracking greenhouse gas (GHG) allowances under the EU Emissions Trading System (EU ETS). The key amendments are that it:

- transfers allowances in the national registries to a new central EU registry from 1 January 2012.
- introduces new measures to combat carousel fraud, money laundering and other types of fraud with immediate effect.
- includes GHG emissions from aviation in the EU ETS from 1 January 2012.

For further information on carbon or emissions trading issues, please contact Georgie Messent on +44 (0)117 902 7732 or email her at georgie.messent@burges-salmon.com

Environmental legislation

The Energy Security and Green Economy Bill

We are expecting the above Bill to be introduced to the House of Commons in the first week in December. It is the Coalition Government's flagship environmental legislation and contains a number of measures.

The most significant of the measures to be contained in the Bill is the framework for the "Green Deal". This is to establish a framework for the financing of energy efficiency measures to be installed in existing properties, both domestic and commercial. The premise is that an upfront loan is granted for the works which is paid back through savings on the energy bill. The scale of the retrofitting required is enormous but, with approximately 44% of the UK's greenhouse gas emissions coming from existing buildings, this work is essential if the UK is to meet its targets in the Climate Change Act 2008.

The Green Deal is likely to have a significant impact on energy suppliers and District Network Operators (who will administer the scheme), landlords and property owners and, potentially micro-renewable companies.

We chaired the legal working group of the UK Green Building Council's task group looking at this scheme (known at the time as Pay As You Save) and have been following developments closely.



If you need any further information on this please contact Michael Barlow on +44 (0)117 902 7708 or email him michael.barlow@burges-salmon.com

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Environmental legislation

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Environment Agency (EA) to start using civil sanctions from 4 January 2011

The EA has recently published new Enforcement documents to replace the current Enforcement and Prosecution Policy and Functional Guidelines. The EA has also published additional specific guidance for using Enforcement Undertakings (EUs) and produced a model Enforcement Undertaking offer form. EUs are one of the novel introductions in the new range of civil sanction powers, giving an opportunity for an offender to offer a written agreement to take action within a specified period to make amends for non-compliance and its effects.

Whilst the new civil sanctions apply to a fairly limited range of offences at present (including Hazardous Waste Regulations, Transfrontier Shipment Regulations, Packaging Waste Regulations and some Water Offences) this is undoubtedly the shape of regulation to come and those affected will need to have a good grasp of the new regime and how it operates.

DEFRA is also consulting on the introduction of Civil Sanctions for offences arising under the Environmental Permitting Regulations 2010.

We have put together a training programme to explain the operation of this new regime and we would be happy to tailor this to your organisation. It can be delivered over the telephone, by webinar or in person. **For more information, please contact Simon Stuttaford on +44 (0)117 307 6924 or email him at simon.stuttford@burgess-salmon.com.**

The Storage of Carbon Dioxide (Licensing etc) Regulations 2010

The Storage of Carbon Dioxide (Licensing etc) Regulations 2010 came into force on 1 October 2010.

This Statutory Instrument forms part of the UK's implementation of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide. It implements the requirements of the Directive relating to the licensing of Co2 storage and to the liabilities of the storage operator both during and after the active operation of the storage.

The instrument can be seen as part of the UK's continuing commitment to making the UK a leading player in carbon capture and storage (CCS) and creating an effective licensing regime to ensure the safe long-term storage of carbon dioxide. The implementing regulations have been made some 8 months before the Directive's transposition date of 25 June 2011 to give a degree of regulatory certainty to companies that are planning to deploy this new technology in the near future. Further instruments will be required in due course on third-party access to Co2 stores and pipelines and on transfer of liability to the State on termination of a Co2 storage licence.

EU adopts stricter rules on Industrial Emissions

New EU legislation adopted on 8 November 2010 aims to reduce industrial emissions from large combustion plants across the EU.

The Directive on industrial emissions updates and merges seven pieces of existing legislation but at the core of the new Directive is the strengthening of the application of Best Available Techniques (BAT). The proposal revises the minimum emission limits that apply to large combustion plants across the EU to bring them into line with BAT. The Directive also requires Member States to actively promote emerging techniques.

The new Directive also includes a number of improved mechanisms for Member States to check and enforce compliance with the new legislation. Provisions related to emission monitoring and reporting and to environmental inspections have been strongly enhanced and improvements have also been made regarding public access to information.

The Directive is due to enter into force 20 days after its publication in the Official Journal which is expected before the end of 2010. Member States will then have 2 years to transpose the Directive into their legislation and to start implementing the new legislation.

For further information on carbon or emissions trading issues, please contact Georgie Messent on +44 (0)117 902 7732 or email her at georgie.messent@burgess-salmon.com

The Energy Performance of Buildings



Council Directive 2010/31/EU on the Energy Performance of Buildings (Recast) (EPB Directive 2010) came into force on 8 July 2010 and replaces Council Directive 2002/91/EC on the Energy Performance of Buildings (EPB Directive 2002) from 1 February 2012.

It aims to increase energy performance requirements and improve the process for the issue and display of energy performance certificates. It also introduces a requirement that new public sector buildings must be "nearly zero-energy" by 31 December 2018. New private sector buildings should be nearly zero-energy by 31 December 2020.

New energy labelling requirements for appliances

The European Commission adopted 4 EU Regulations for energy labelling of televisions, refrigerators, dishwashers and washing machines on 28 September 2010. The Regulations state that televisions must be labelled using an energy ratings scale and extend existing energy rating labelling requirements for other products and appliances. Electrical products make up nearly a third of all domestic electricity use in the EU. The Regulations are expected to come into force sometime between December 2010 and early 2011.

Law Commission Consultation on Criminal Liability in regulatory contexts: environmental aspects

On 25 August 2010, the Law Commission published a wide-ranging consultation paper on issues connected with criminal liability and its regulatory context.

For more information, please contact Simon Stuttaford on +44 (0)117 307 6924 or email him at simon.stuttford@burges-salmon.com.

Members of Burges Salmon's Environmental Litigation Department will be contributing to the consultation under the auspices of UKELA's Environmental Litigation Working Party Group, which is also reviewing DEFRA's Information Strategy.

Biodiversity racing up the agenda

The 10th Conference of Parties 'CoP' of the Convention on Biological Diversity met in Nagoya, Japan between 18 and 29 October 2010, bringing together 18,000 participants from the 193 Parties.

There is no doubt that biodiversity, and the critical levels of species extinction, are racing up the political agenda, and legislation will follow the Nagoya conference.

We are already seeing important impacts of biodiversity protection legislation on companies' operations, as for example in the European Commission's guidance document 'Wind Energy Developments and Natura 2000' (October 2010). There is no doubt that companies and multinational groups with a view to planning for legislation 'just over the horizon' need to be considering now the impacts of their operations on the biodiversity of the countries in which they operate and reviewing their biodiversity policies, where it is often the case that large impacts and significant benefits can be achieved without large amounts of money being spent.

For further information on present and likely future regulations on biodiversity, please contact William Wilson on +44(0)117 939 2289, or e-mail him at william.wilson@burges-salmon.com. We are happy to consider proposals for training in this area, where appropriate in collaboration with scientific institutions with different expertise.

Waste

Waste Project News

Making the headlines at the end of October was the cancellation of Government support for seven Waste PFIs to the tune of £1bn over the lifetime of the projects. The authorities affected were Cheshire, Coventry - Project Transform, Gloucestershire, Leicestershire, Milton Keynes and Northamptonshire, North London WDA and South London Waste Partnership. News of the announcement was met with disbelief, with procurement teams claiming no prior knowledge of the cuts. While a number of the Authorities have already publicised the continuation of their procurements, there is likely to be some redesign to projects, either in risk allocation, facilities or both in order to accommodate the loss in funding and meet affordability limits. The announcement is likely to provide new opportunities for merchant facilities operators and those offering interim solutions.

Just weeks earlier came the "pre-release" of the final version of the WIDP contract to local authorities currently in procurement. A formal release to the wider market is awaited. Although designed for PFI supported residual waste procurements, the contract, which brings together the experience of the public sector from a host of waste PFIs can be adapted for merchant facilities and "service contracting" approaches to waste management. As such it is likely to find continued application in some form even among projects no longer receiving central Government support.

Stage 2 consultation on the implementation of the New (Revised) Waste Framework Directive

On 8 July 2010 DEFRA and the Welsh Assembly Government (WAG) launched stage 2 of a two-stage consultation on the implementation of the new (revised) Waste Framework Directive (2008/98/EC) in England and Wales which must be implemented by 12 December 2010. Stage 1 provided input on policy, stage 2 consults on draft regulations to implement the new WFD. The main new features of the revised WFD are that it requires Member States:

- (i) to apply the "waste hierarchy" as a priority order and waste prevention and management legislation and policy;
- (ii) to set up "separate collections" of waste for at least paper, metal, plastic and glass by 2015 where technically, environmentally and economically practicable. This applies to both household and business waste;
- (iii) to recycle 50% of waste from households by 2020; and
- (iv) to recover 70% of construction and demolition waste by 2020.

The issue at stake now in the UK is the disparity between the individual jurisdictions with their differing views on the Framework's implementation. The Coalition's review

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highlights the concern that England's proposals did not go far enough when compared to Scotland and Wales. What is yet to be seen is whether the devolved governments have unwittingly created an internal market whereby one jurisdiction is viewed more attractive than another to the waste industry or sectors of the industry.

New Consultation on Standard Rules for Environmental Permits

On 6 September 2010 the Environment Agency (EA) launched its Standard Rules Consultation No. 5 on new standard rules for environmental permits. This falls under the Environmental Permitting (EP) Regime. Standard rules are used for regulated facilities posing a "low-risk to the environment". Certain standard rules in the EA consultation follow changes brought by the Environmental Permitting (England and Wales) Regulations 2010. The Consultation closes on 29 November 2010.

Other news

In September 2010, the Environment Agency (EA) published technical guidance, entitled *The surrender of permits for the permanent disposal of waste*.

In July 2010 the Environment Agency (EA) published revised guidance on how the Environmental Permitting (EP) Regime will apply to low risk waste activities.

Low risk activities include:

- Construction and demolition waste and soils, Landspreading of manures and Electrical equipment and components.

For further information on these or any other waste issues, please contact Nigel Campbell on +44 (0) 117 902 7286 or email him at nigel.campbell@burgessalmon.com

Chemicals

REACH

A key milestone in the implementation of the REACH Regulation 1907/2006 is the first Registration deadline on 1 December 2010.

Registration will be required by this date for – substances supplied at or over 1000 tonnes per year per legal entity; R50/53 substances (e.g. hazardous to the aquatic environment); and substances containing Category 1 or 2 Carcinogens, Mutagens or Reprotoxins 'CMRs' supplied at or over 1 tonne per year.

Registration dossiers are now arriving thick and fast at the offices of the European Chemicals Agency 'ECHA' in Helsinki, but it is by no means clear that all or even most of those requiring Registration will meet this first deadline. As at 28 October 2010, 4,742 substances had been proposed for Registration, and 2128 Phase-in substances had actually been registered.

Some industries continue to voice extreme concerns at the possible practical effects of a significant failure to meet Registration deadlines across Europe, with risks to business continuity high on the list of concerns as risks grow that suppliers of some key substances either cannot or will not continue to supply them to EU Downstream Users. Firms potentially affected by this kind of interruption to supplies may wish to track the progress of the Directors' Contact Group on the ECHA website, a high level group of representatives from the European Commission, ECHA and industry trade bodies set up to try and find practical ways to resolve some of the emerging difficulties in applying the REACH Regulation.

A significant failure in the first Registration process would also have widespread implications for contractual arrangements up and down the complex supply chains, where businesses are already hard pressed to obtain all the information that they need from their suppliers in order to deliver compliance with REACH.

SVHCs

A further key development is the continued addition of further Substances of Very High Concern 'SVHCs' to the Candidate List for Authorisation under REACH.



Having substances on the Candidate List for the much more restrictive and expensive Authorisation procedure has both legal and practical effects. In legal terms, it imports immediate legal duties, such as the requirement to notify consumers on request about SVHC substances in articles. Other practical duties such as changes to Safety Data Sheets and further notification requirements to ECHA will also come into play. In commercial terms, the importance of having substances on the Candidate List and liable to be added to the Annex requiring Authorisation to justify their continued use raises the stakes. It will in most cases be difficult, restrictive and expensive to prepare the socio-economic analysis and other evidence necessary to justify the continued use of an SVHC substance. Meanwhile, customers may well conclude that whatever it says in REACH, they would prefer to avoid the substance, and the product containing it, and the problems that go with it, hence the commercial pressure from a different kind of 'substitution'.

CLP regulation

The EU Regulation on Classification, Labelling and Packaging of Substances and Mixtures 1272/2008 came into force on 20 January 2009. It implements the internationally agreed Globally Harmonised System 'GHS' and will replace both the Dangerous Substances Directive (67/548/EEC) and the Dangerous Preparations Directive (1999/45/EC) by 1 June 2015.

The obligation to apply the CLP Regulation to substances runs from 1 December 2010. There may be practical changes required to Safety Data Sheets, health and safety materials and other information within companies that need immediate review if this is not already in hand. Important notification requirements are also due to take effect shortly. The HSE has posted a new website page on the CLP, and firms with CLP issues are recommended to start by checking its application to their operations against that page.

Member State competent authorities and industry can propose harmonisation of classification and labelling under the CLP, and the first such proposals have been received and are the subject of consultation on the ECHA website.

RoHS Regulation recast

RoHS Directive Recast

The restriction of the use of certain hazardous substances in electrical and electronic equipment Directive ('RoHS Directive') has been undergoing a very important revision,

with negotiations between the European Union Council of Ministers and European Parliament resulting in a first reading agreement, which seems likely to be endorsed by the full Parliament, on 16 November 2010.

The RoHS Directive originally applied restrictions on the use of a limited list of six hazardous substances in electrical and electronic equipment, namely lead, mercury, Cadmium, hexavalent Chromium, PBB fire retardant and PBDE fire retardant. Many industries using these substances were nevertheless outside the scope of the RoHS Directive because of wide exemptions.

The informal and unofficial final text of the recast Directive, and reports of the negotiations between Community institutions indicate that a number of significant changes have been made which will have wide implications for industry.

The Directive will now go to an Environment Council and to the full plenary of the European Parliament for final votes.

Fur further information or advice on any aspects of chemical legislation or regulation affecting your business, please contact William Wilson on +44(0)117 939 2289 or email him at william.wilson@burges-salmon.com

Water

Transfer of private sewers to water and sewerage companies in England and Wales - Draft regulations and proposals

The UK Government in England and the Welsh Assembly Government for Wales are proposing to use powers under the Water Industry Act 1991 (as amended by the Water Act 2003) to transfer private sewers and lateral drains connected to the public sewerage system into the ownership of the statutory water and sewerage companies. The transfer of private sewers and lateral drains will bring about the biggest change in responsibility for sewerage services since 1937 and it is estimated that it will affect 184,000 kilometres of private sewers and 36,000 kilometres of private lateral drains that connect to the public system. If the proposals go ahead as planned, regulations to implement the change will enter into force on 1 April 2011, and the vesting of the private sewers and drains would take place on 1 October 2011.

The proposals have wide implications for householders, builders and developers, drainage companies, Crown land, water and sewerage companies and many others, including the condition of the sewers, resource issues for sewerage undertakers, TUPE issues and impacts on contractual arrangements.

The government consultation on the draft regulations has now closed, but we expect to see considerable interest in the final outcome of these proposals because they affect so many different groups.

For further information about these proposals please contact William Wilson, on +44(0)117 939 2289, or email him at william.wilson@burges-salmon.com

Water metering

The suggested roll out of smart energy meters by 2020 to every home in England and Wales could also have important implications for the water industry. Ofgem and DECC published a smart metering implementation programme prospectus on 27 July 2010 and Ofwat (the Water and Sewerage Regulator) responded to this in September 2010. Ofwat recognise that the roll out of smart energy metering will change the landscape for promoting energy efficiency and also has the potential for a significant impact on opportunities for improving water efficiency. Ofwat note that the installation of smart meters provides the opportunity to provide a co-ordinated home efficiency consumer education programme and provides the opportunity to achieve lasting behavioural change by reinforcing the home efficiency message.

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Water *continued*



Flood and Water Management Act 2010 (Commencement No.1 and Transitional Provisions) Order 2010

The Flood and Water Management Act 2010 (Commencement No.1 and Transitional Provisions) Order 2010 (SI 2010/2169) was made on 31 August 2010 and published on 3 September 2010, bringing into force key provisions of the Flood and Water Management Act 2010 (FWMA 2010). The Order gives ministers the power to create new regulations in relation to flood risk management and improved water and sewerage management.

Certain provisions of the Flood and Water Management Act 2010 came into force on 1 October 2010. In particular, new Section 106(b) is inserted into the Water Industry Act 1991.

If you need any further information on this please contact Michael Barlow on +44 (0)117 902 7708 or email him at michael.barlow@burges-salmon.com

Case law update

Court of Appeal ruling provides further guidance on when a landowner can be liable for damage to neighbouring property from a nuisance that it did not create

The Court of Appeal decision in *Lambert v. Barratt Homes* provides further clarity on the circumstances in which a landowner can be liable to its neighbour for damages caused by naturally occurring events. In *Lambert*, residents adjacent to a new development were flooded because rainwater falling on a playing field owned by a local authority was now channelled onto their properties. In the High Court, the developer was held liable because its works had interfered with the existing drainage provisions, and the local authority was also held liable because the rainwater originated from its land and it had not taken sufficient steps to alleviate the problem. The local authority appealed.

It is established authority that a landowner has a measured duty of care to its neighbours to abate a nuisance even though the nuisance is naturally occurring. The question for the Court of Appeal was the extent of the duty in these circumstances. The Court of Appeal considered that the duty of the local authority on this occasion did not extend to paying for the entire relief works but it did have a duty to allow access to its land and co-operate with the other parties in devising and implementing the relief work.

A more detailed briefing on this case is available on our website.

Burges Salmon's specialist environmental litigation team has extensive experience in flood risk and flooding litigation. If you have any questions or would like to discuss these issues in more detail then please do not hesitate to contact Michael Barlow at michael.barlow@burges-salmon.com or Simon Tilling at simon.tilling@burges-salmon.com

When is an offensive odour not a nuisance?



The High Court judgment of *Hirose Electrical UK Limited v. Peak Ingredients Limited* handed down by the Court on 21 October 2010 provides a good example of how an activity which could well be regarded as a "nuisance" in common parlance is not an actionable nuisance at law. The case concerns the emissions of strong and pervasive smells such as curry and garlic from a food additives manufacturer to a neighbouring commercial unit. The judge held that the odours did escape and agreed that many people would find the odours disagreeable, but held that the interference did not amount to a nuisance in law taking into account the nature of the neighbourhood. The Court was persuaded that the area was a light industrial estate rather than a "business park", and, as such, commercial units in the area must tolerate interference to a greater extent than would be the case in a "business park" or residential area. The food additives manufacturer had been reasonable in its operation of its unit. The problem appeared to be exacerbated by a party wall which either party could have remedied and the fact that the Defendant had not done so did not make it liable in nuisance.

The case is a good example of the boundaries between that which may cause discomfort or annoyance but which is not an actionable nuisance and those which cross the line. Burges Salmon has seen an increase in complaints relating to odours from industrial premises and is well-versed in the legal and practical issues arising from industrial odour emissions.

For more details please contact Michael Barlow or Simon Tilling or visit our website.

Access to Confidential Environmental Information

In the March 2010 edition of the In-House Lawyer we wrote an article called "Access All Areas : How Safe Is Your Commercially Sensitive Environmental Information?" in which we looked at the case of *Veolia ES Nottinghamshire Limited v. Nottinghamshire County Council*. We reported that the High Court had concluded that the commercially sensitive financial information in a waste management contract between Veolia and Nottinghamshire County Council could be disclosed to a local resident, Mr Downen, under the Audit Commission Act 1998. The resident was backed by Friends of the Earth.

Veolia appealed and the judgment of the Court of Appeal was handed down in October 2010.

The Court of Appeal held that the Audit Commission Act 1998 should be read down to ensure that it was not inconsistent with the protection of confidential information and to ensure compatibility with the European Convention on Human Rights. As such, the Council was entitled to refuse to disclose confidential information to Mr Downen.

As a result of the Court of Appeal decision, it appears that confidential information held by a local authority now has some degree of protection from interested parties seeking to rely on the Audit Commission Act 1998 to obtain those documents. This will be a relief to the many businesses that contract with local authorities for services, especially (but not limited to) waste PFI projects.

If you need any further information on this please contact Michael Barlow on +44 (0)117 902 7708 or email him at michael.barlow@burges-salmon.com

Reporting and Management

Retail Environmental Sustainability Code



The European Commission announced in the summer of 2010 that a number of European business leaders have agreed to adhere to a new environmental code of conduct, the *Retail Environmental Sustainability Code*. The Code details a number of principles to which signatories commit in an effort to reduce the environmental impacts of their business in areas including sourcing, resource efficiency, transport and distribution, waste management, communication and reporting. The Code also provides practical advice to retailers on how to implement its measures. It is hoped that more retailers will sign up to the Code resulting in a significant improvement in environmental sustainability in the retail sector.

Narrative reporting

In August, the Department for Business Innovation and Skills published a consultation on narrative reporting (information which companies are obliged by statute to include in company reports and accounts in addition to

financial information). The government's aim from an environmental perspective is to improve corporate social responsibility and accountability through including such reporting in its company reports and accounts. The consultation closed on 19 October and the Government's response is awaited.

GRI/CDP

In September the Global Reporting Initiative (GRI) and Carbon Disclosure Project (CDP) released a publication explaining the differences and synergies between their respective reporting regimes. The sheer number and complexity of the various schemes under which obligatory and voluntary emission and environmental impact reporting can/must be made has led to confusion for business as to their reporting requirements. It is hoped that the joint publication will go some way to clarifying the reporting procedures, at least under the GRI and CDP.

The team has extensive experience in advising on the requirements of environmental reporting and management systems, and can provide assistance and training to companies in respect of such obligations.

For further information on carbon or emissions trading issues, please contact Georgie Messent on +44 (0)117 902 7732 or email her at georgie.messent@burges-salmon.com

In the office



Personnel

Georgie Messent has returned from maternity leave, having had a second daughter.

We welcome Esther Kiddle into the team. Esther joins us from another Bristol firm and has extensive experience with waste law and waste projects, and we look forward to working with her in these areas.

Joanne McPherson has now become Mrs Attwood, and is currently on secondment to OFWAT in Birmingham.

Mike Freeman is on secondment to NDA in Cumbria.

Events

Burges Salmon will be hosting a seminar at its offices entitled 'Hot Topics in Environmental Law' on 17 February 2011. The evening will start with refreshments from 4pm, followed by the seminar between 4.30pm and 6pm. This promises to be an interesting look at not only at current hot topics, but also at what exciting developments are expected. Please contact georgie.messent@burges-salmon.com or chris.pritchett@burges-salmon.com to register your interest or to request further details as they become available.

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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