

# ENVIRONMENTAL LAW

## Welcome

Welcome to the April issue of **Environmental Law**. If you want further details on any of these areas then please contact one of the Environmental Team or have a look on our website [www.burges-salmon.com](http://www.burges-salmon.com) or complete the fax back at the end of this newsletter.

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**Nick Churchward joins Burges Salmon's Environmental Projects team**

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## Energy and Power



### White Paper on Nuclear Power

The government produced its long awaited White Paper on Nuclear Power in January 2008, expressing a strong policy signal that it supported the availability of nuclear power as part of the energy mix, and making the formal policy statement clearing the way for energy generators to apply for consents to build and operate new nuclear power stations.

Burges Salmon has been following these issues very closely, and has produced a separate briefing on the

Planning and Building of New Nuclear Power Stations and Radioactive Contaminated Land, which is available on request. It reviews the interlocking legislative and policy initiatives in the Energy Bill, Planning Bill and other consultations and developments of policy.

**For further information or a copy of this nuclear briefing, please contact Ian Salter, Partner at [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com) tel 0117 939 2225.**

### EU Environment and Energy Package

In January 2008 the European Commission launched a major new package of legislative and policy proposals on environment and energy. This contained proposals to implement the decisions agreed by EU Heads of State and Government, including a 20% reduction in EU greenhouse gas emissions by 2020, increasing to 30% if there is international agreement; a figure of 20% of total EU energy consumption to come from renewable sources; and measures to support carbon capture and storage 'CCS' with twelve demonstration projects.

The package includes a Draft Renewable Energy

Directive, a New Emissions Trading Directive for the period 2013-2020, a communication on carbon capture and storage and environmental state aid guidelines. The UK will be given important new targets for greenhouse gas emission reductions, targets for energy from renewable sources, and targets for the percentage of road transport fuels to come from renewable sources. The UK government has welcomed the Commission's ambitious proposals.

**For further information, please contact Ross Fairley, Partner, at [ross.fairley@burges-salmon.com](mailto:ross.fairley@burges-salmon.com), tel. 0117 902 6351.**

Visit our website at [www.burges-salmon.com/our\\_work/content/Environment/Index.htm](http://www.burges-salmon.com/our_work/content/Environment/Index.htm)

## Biofuels: Sustainability Arguments

The sustainability aspects of production and targets for the use of biofuels has recently become the subject of intense scrutiny and debate. The displacement of food production to make way for biofuels led the United Nations Special Rapporteur on the right to food to call in October 2007 for a 5 year moratorium on biofuel production.

In the EU, of course, they have tended to promote biofuels by a mixture of subsidies and quotas. Both have been attacked. The Royal Society report on Sustainable Biofuels in January 2008 commented that the European Directive on Biofuels (5% of transport supply from biofuels by 2010, 10% by 2020) and subsidies “focus only on supply targets”, adding that ...“biofuels have only a limited ability to replace fossil fuels and should not be regarded as a ‘silver bullet’ to deal with transport emissions.”

The House of Commons Environmental Audit Committee raised blunter questions, saying that –

*“Biofuels can reduce greenhouse gas emissions from road transport – but most first generation biofuels have a detrimental effect on the environment overall...the Government and EU’s neglect of biomass and other more effective policies to reduce emissions in favour of biofuels is misguided.”*



This prompted an angry reaction from EU Energy Commissioner Andris Piebalgs –

*“The Commission strongly disagrees with the conclusion of the Environmental Audit Committee of the British House of Commons report, where it says that the overall effect of existing biofuel policy is negative. On the contrary, it is delivering significant greenhouse gas reductions, compared with the alternative, oil.”*

Arguments about the sustainability or otherwise of biofuels are now being stepped up in lobbying of the European Parliament, with proponents claiming the benefits of biofuels, and opponents claiming that there might be more sustainable uses of land than clear felling rainforests to make palm oil to ship round the world to meet transport fuel substitution targets.

## Energy – Saving Items (Income Tax) Regulations 2007

These Regulations will be important for residential landlords, who may deduct expenditure (incurred after 6 April 2007 on acquiring and installing in dwelling houses certain specified energy saving devices), from income tax when calculating the profits of a business.

## Electricity and Gas (Carbon Emissions Reduction) Order 2008

For England, Wales and Scotland this Order, coming into force on 31 January 2008 places carbon emissions reductions obligations on electricity and gas suppliers who have 50,000 or more domestic customers, in order to achieve an overall carbon emission reduction target of 150 million lifetime tonnes of carbon dioxide between 1 April 2008 and 31 March 2011.

*“...there might be more sustainable uses of land than clear felling rainforests to make palm oil to ship round the world to meet transport fuel substitution targets.”*

# Climate Change and Sustainability

## Bali Roadmap

The 2007 Conference of Parties and Meeting of Parties to the UN Framework Convention on Climate Change was held in Bali, Indonesia between 3 and 14 December 2007. Two weeks of intensive negotiations resulted in an agreement, known as the Bali Roadmap, which committed both developed and developing countries to a timetable for negotiations on a climate change treaty to apply beyond 2012, when the Kyoto Protocol comes to an end. The Roadmap sets the agenda for negotiations ending in 2009 and links in to the work of the Intergovernmental Panel on Climate Change. The Bali Roadmap itself does not include a formal commitment for developed countries to cut their emissions as advocated by the EU. The United States, Canada, Japan and Russia opposed such clear commitments, and at one point it looked as though the Bali talks would founder on the same refusal by developing countries to accept firm commitments to reduce emissions and a corresponding refusal by the USA and others to accept their own commitments to reduce emissions without corresponding developing country progress.

As China is moving to become the world's largest emitter, this issue has continued to grow in importance. However, the final Bali text includes a

mandate to negotiate new binding objectives for developed countries (perhaps looking to a post-Bush administration), and calls for "measurable, reportable and verifiable nationally appropriate mitigation actions" from developing countries. At a late stage in the process, Russia, China and Japan signed up to this wording, and in the end the US delegation did so too. Meanwhile the Kyoto Protocol signatories, now including the new Australian administration of Kevin Rudd, agreed to aim for 25% to 40% cuts by developed countries and a global cut in emissions to below half of 2000 levels by 2050. The talks also resulted in agreements on deforestation, adaptation, technology, finance and the carbon markets. These will form part of a roadmap to a future agreement. The roadmap will be a very important pointer to future climate change negotiations for the next two years.

**A fuller assessment of what was decided at Bali is available from Burges Salmon on request: please contact William Wilson, Barrister on tel. 0117 939 2289 or at [william.wilson@burges-salmon.com](mailto:william.wilson@burges-salmon.com).**

## Government announces Offsetting Code

In February 2008 the Government announced a Government Code of Best Practice for consumer offsetting products. This is aimed to give consumers consistent and correct information and transparent prices for products claiming to offset their emissions, with a quality mark available. To begin with, the Code will only cover products using Kyoto-compliant credits: high quality and sustainable voluntary offset products will be challenged to achieve similar standards.

**For further information, please contact Robert Triggs, Solicitor, at [robert.triggs@burges-salmon.com](mailto:robert.triggs@burges-salmon.com) tel 0117 902 7767.**

## Aviation to be included in EU Emissions Trading Scheme

Environment Secretary Hilary Benn welcomed the inclusion of aviation in the European Union's Emissions Trading Scheme announced in December 2007. Under the new agreement, emissions from aviation will be capped at 2004 to 2006 levels so that any further growth in aviation emissions would need to be cancelled out by emissions reductions in other sectors. Airlines will be able to trade their emissions and be subject to a "polluter pays" policy. The proposal will now be sent to the European Parliament, with the aim of reaching agreement on it in 2008.

The present intention is that aviation will be incorporated into the scheme from 2012, which will then apply to all flights between EU countries and flights taking off from or landing in an EU country. It will also apply to all intercontinental flights, and not simply the part of the journey in European airspace. That aspect the proposals will continue to be controversial, particularly with the US airlines, who may challenge the decision.



**UN Climate Change  
Conference 2007  
Bali - Indonesia**



### Consultation on Proposed UK Auction Design for Use in the EU Emissions Trading Scheme Phase II

Defra recently consulted on draft Regulations on the Government's proposed type, form and process for the auction or sale of EU allowances (EUAs) during Phase II of the EU Emissions Trading Scheme. The Government has taken particular account of the overriding aim of the Emissions Trading Directive to achieve the reduction of emissions. The objective for the auction or sale of the allowances is to allocate allowances in a simple and transparent way to those who value them most highly whilst maximising revenue to Government and avoiding damage to confidence in the EU ETS.

### Greenhouse Gas Emissions Trading Scheme (Amendment No. 2) Regulations 2007

These regulations made in December 2007 amend the main Trading Scheme Regulations and make changes following the final UK national allocation plan for participation in Phase II of the European Union Emissions Trading Scheme.

### EU Decision on Guidelines for monitoring and reporting of Greenhouse Gas Emissions

New guidelines were introduced from 1 January 2008 for the accurate monitoring and reporting of greenhouse gas emissions resulting from activities within the scope of the EU Emissions Trading Scheme.

### Climate Change Levy

Minor amendments were made by Schedule 2 to the Finance Act 2007 to the Climate Change Levy concerning reduced rates supplies, and these came into force on 1 November 2007.

The Environmental Audit Committee published its report on the role of the Climate Change Levy and Agreements in March 2008.

### Kyoto Protocol First Commitment Period

The first commitment period of the Kyoto Protocol to the United Nations Framework Convention on Climate Change began on 1 January 2008. This comes against the background of very important new commitments made by parties to the UNFCCC and the Kyoto Protocol in Bali in December 2007 to spend the next two years in intensive negotiations for a successor instrument to the Kyoto Protocol to apply after 2012.

### Carbon Reduction Commitment

Consultation on the Carbon Reduction Commitment (CRC), the government's new cap-and-trade scheme for non-energy intensive organisations in the public and private sectors (which is due to apply from January 2010), continues apace. DEFRA recently let a consultancy project to advise it on how best to define an 'organisation' for the purposes of the CRC. In conjunction with Ecofys, a firm of environmental consultants, Burges Salmon was recently chosen by DEFRA to advise it on how best to define an "organisation" for the purposes of the CRC. The Burges Salmon/Ecofys report is now available through the DEFRA website. DEFRA has also recently published the government's official response to the public consultation on implementation proposals for the CRC, which was open from June to October 2007.

# Waste and Contaminated Land

## Waste Framework Directive Revision

Political work on the revision of the Waste Framework Directive continues. The Environment Council of Ministers reached a Common Position on the revision on 20 December 2007, following the First Reading of the European Parliament. The Directive has now been passed to the European Parliament for Second Reading consideration, expected to last until June 2008.

## WEEE

Scheme operators are required under the Waste Electrical and Electronic Equipment Regulations 2006 to provide information concerning WEEE for which they are responsible during the third quarter of a compliance period by 1 November.

## Transfrontier Shipment of Waste

Major changes were made to the annexes on Regulation 1013/2006 which set out standard documents for notification and movement of transboundary shipments of hazardous waste by Member States of the European Union. Technical changes were made to the annexes of the main Regulation which will be of importance to all those engaged in practical arrangements for shipments of waste, and for the fairly frequent ongoing discussions of what constitutes waste and whether or not it is caught by the Basle Convention.

## Radioactive Contaminated Land Regulations

Separate Regulations made for England, Scotland, Wales, and Northern Ireland came into force on 10 December 2007 extending the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990 to cover contamination arising from the escape of radioactivity through nuclear occurrences governed by the Nuclear Installations Act 1965. These very important Regulations are the subject of separate briefing issued to Burges Salmon's nuclear clients, and which is also available on request.

## Waste Incineration Directive

The EU Waste Incineration Directive of 2000 contained a number of exemptions which came to an end with effect from 1 January 2008. These include exemptions for dust from certain existing incineration plants exemptions for NOX and dust emissions from cement kilns, for NOX and SO2 from certain existing co-incineration plants burning solid fuels and for NOX emissions from certain existing co-incineration plants burning biomass. Also brought to an end were exemptions for NOX from some existing incineration plants with a nominal capacity of 6 tons per hour, and for total suspended solids from certain existing incineration plants.

## Producer Responsibility Obligations (Packaging Waste)(Amendment) Regulations 2008

These regulations increase recovery and recycling targets for 2008, 2009 and 2010 for packaging waste caught by the producer responsibility system.

## OSPAR Convention

On 1 January 2008 the UK's formal exemption for dumping low and intermediate level radioactive substances at sea expired.

## Waste and Air Pollution (Miscellaneous Amendments) Regulations 2007

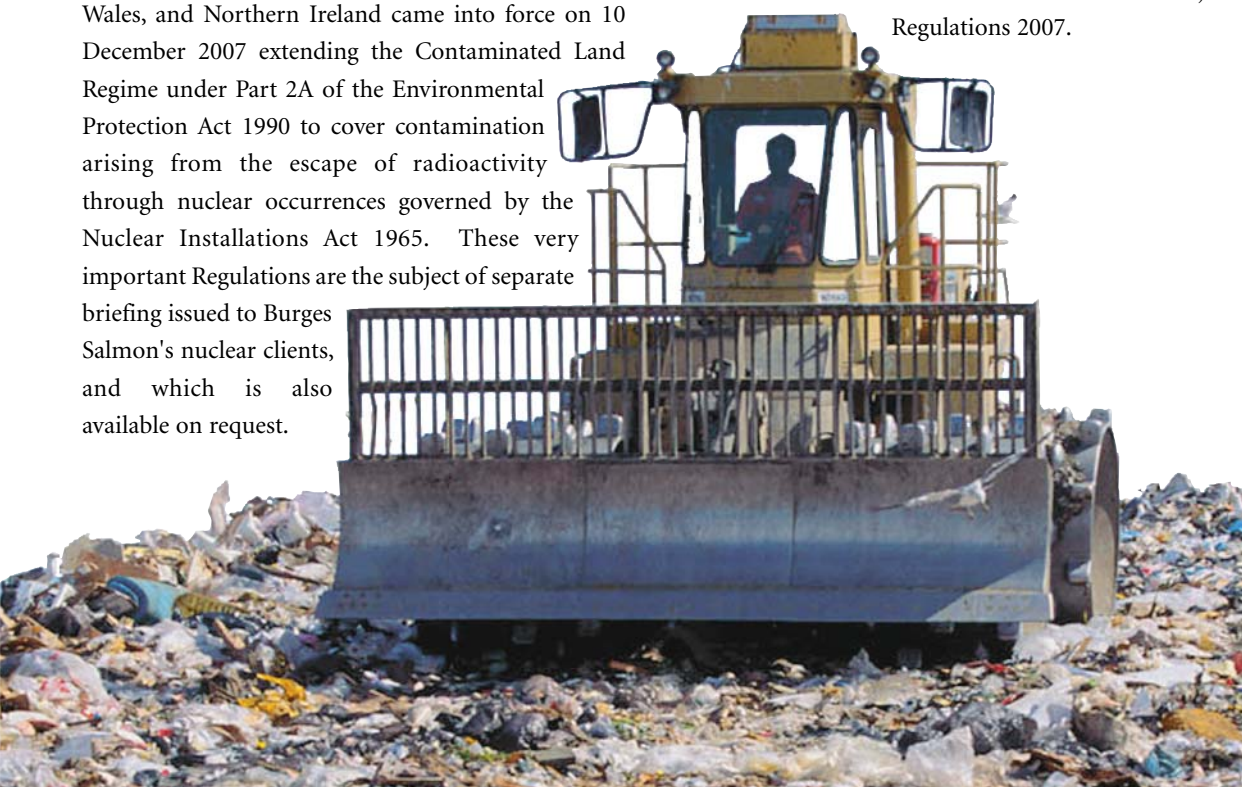
These Regulations make minor corrections to the Hazardous Waste (England and Wales) Regulations 2005 and to the Large Combustion Plants (National Emission Reduction Plan) Regulations 2007.

## Site Waste Management Plans

New regulations in force 6 April 2008 require Site Waste Management Plans for construction site projects worth £300,000 or more.

## Batteries Directive

Defra and DBERR Consultation on implementation (required by September 2008) closed 13 March 2008. Will affect both automotive and household batteries.



# Chemicals

## Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008 (2008/37)

These new Regulations coming into force for England, Wales, Scotland and Northern Ireland on 1 February 2008 implement the RoHS Directive 2002/95/EC which restricts the use of hazardous substances, including lead, cadmium and others in new electrical and electronic equipment within categories set out in the schedule, including electric light bulbs and luminaires for use in households that are put on the market on or after 1 July 2006. These Regulations will be of widespread importance and the subject of a separate briefing issued by Burges Salmon available on request.

### UN GHS

An HSE consultation closed on 2 November 2007 on proposals for an EU Regulation changing the EU classification and labelling system for chemicals to replace it with the United Nations Globally Harmonised System of Classification and Labelling of Chemicals, 'GHS' which it is intended will be introduced to parallel with the EU's REACH Chemicals Regulation 1907/2006.

### REACH

**The deadline for pre-registration of substances, between 1 June 2008 and 30 November 2008, is rapidly approaching, and there is plenty of evidence that many businesses have yet to address their obligations under the EU's REACH Chemicals Regulation 1907/2006 as Manufacturers, Importers or Downstream Users. Businesses are however finding that the larger businesses to whom they act as suppliers are beginning to exert significant pressure to deliver compliance through the supply chain. It is worth reminding reluctant managers of the 'no data, no market rule' whereby substances which require REACH Registration may not be placed upon the EU market unless they have been so registered.**

Meanwhile, the European Chemicals Agency has produced in January and February 2008 revised Guidance on Registration, for Intermediates, on Process and Product Oriented Research and Development 'PPORD' and for Downstream Users.

The HSE as UK REACH Competent Authority has

produced new Guidance on the Basics of REACH, the REACH Timeline, Pre-Registration and Exemptions from REACH.

**For further information on REACH or the UN GHS please contact William Wilson, Barrister at [william.wilson@burges-salmon.com](mailto:william.wilson@burges-salmon.com), tel. 0117 939 2289.**

### 'Marketing and Use' Directive Amended

The Directive governing the marketing and use of certain dangerous substances and preparations was amended for the thirtieth time to introduce new restrictions on perfluorooctane sulphonates.

### Pesticides Residues

New regulations made in December 2007 applied new and varied pesticide residue definitions and introduced schedules of maximum pesticide levels for crops, food and feedstuffs. Separate regulations were made for England and Wales, Northern Ireland and Scotland. A new Directive introduced important changes in this area.

### EU Regulation on the Prohibition of Organotin Compounds on Ships

In January 2008 the EU made a Regulation requiring the elimination of organotin compounds on ships. Tributyl tin 'TBT' is mainly used for biocides (marine antifouling paints – the same properties that make it effective are highly toxic to marine organisms in tiny amounts), PVC stabilisers, catalysts, agrochemicals and glass coatings. From 1 January 2008 ships entering EU harbours will either have to be free of TBT based paints or have a coating preventing such paints from leaching.



# Environmental legislation

## Energy Bill

This Bill, introduced into the House of Commons in January 2008, aims to improve the regulatory framework for offshore gas infrastructure. It introduces a regulatory framework for Carbon Capture and Storage. It amends the Renewables Obligation, and makes new provision about decommissioning offshore renewables and oil and gas installations, and about licensing of offshore oil and gas. It contains reforms of offshore electricity transmission licensing provisions.

The Bill contains important new provisions on nuclear waste and decommissioning financing, and establishes a Nuclear Liabilities Funding Advisory Board. These are covered in a more detailed briefing prepared by Burges Salmon on the Planning and Building of New Nuclear Power Stations, which is available on request.

**For further information, please contact Ian Salter, Partner at [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com) tel 0117 939 2225 or Ross Fairley, Partner, at [ross.fairley@burges-salmon.com](mailto:ross.fairley@burges-salmon.com), tel. 0117 902 6351.**

## Marine Bill

In July 2007, the much-heralded Marine Bill was only reported to be amongst those 'being considered for publication in draft'. Defra now claims that such publication "could be expected" in early 2008, which represents some progress, however slow. Defra's work on impact assessment and related studies in preparation for the Bill continues.

## Climate Change Bill

This Bill is now making its way through Parliament. It sets clear statutory targets for reducing carbon dioxide emissions, including making the UK's targets for a 60% reduction by 2050 and a 26-32% reduction by 2020, legally binding.

There will be a new system of 5 year "carbon budgets" for the UK, and a new statutory body, the Committee on Climate Change, to provide independent expert advice and guidance to government on achieving its targets and staying within carbon budgets.

Government amendments tabled in February 2008 will tighten up provisions on the review of targets and introduce further measures to improve transparency. The Bill will provide enabling powers to enact further emissions trading schemes, including the Carbon Reduction Commitment, and any new provisions

required to address emissions from aviation and shipping, after international negotiations.

**For further information on the Climate Change Bill please contact William Wilson, Barrister at [william.wilson@burges-salmon.com](mailto:william.wilson@burges-salmon.com), tel. 0117 939 2289.**

## Planning Bill

This Bill, introduced into Parliament in November 2007, introduces a new system for approving major infrastructure considered to be of national importance, such as harbours, waste facilities and nuclear power stations.

Decisions would be taken by a new Infrastructure Planning Commission, and based upon new national policy statements of 'national need'. The hearing and decisions of the Commission would be timetabled. There would be a new Community Infrastructure Levy on developers to finance infrastructure. Planning appeals for minor developments would be heard by a panel of local councillors rather than a planning inspector. The intention is that planning inquiries for major developments would concentrate upon locally specific issues.

**For further information, please contact Ian Salter, Partner at [ian.salter@burges-salmon.com](mailto:ian.salter@burges-salmon.com) tel 0117 939 2225 or Ross Fairley, Partner, at [ross.fairley@burges-salmon.com](mailto:ross.fairley@burges-salmon.com), tel. 0117 902 6351.**

## Directive on Environmental Noise

One of the latest requirements of a Directive of 2002 on environmental noise is that by 18 July 2008 Competent Authorities in EU Member States should have produced maps and action plans for management of environmental. This will affect a number of major operations such as airports and people affected by them.

*"There will be a new system of 5 year "carbon budgets" for the UK, and a new statutory body, the Committee on Climate Change..."*

# Water

## Government publishes 'Future Water' Strategy

In February 2008 the Government published its Future Water Strategy document, accompanied by draft statutory Social and Environmental Guidance to OFWAT. Environment Secretary Hilary Benn pointed out that the average person in Britain uses about 1 tonne of water per week. The Strategy addresses the trends of future policy on water demand, water supply, water quality in the natural environment, surface water drainage, river and coastal flooding, Greenhouse Gas emissions, water charging and the regulatory framework.



## River Basin Management Plans

The Environment Agency carried out a consultation on River Basin Management Plans Strategic Environmental Assessment Scoping Report for English river basin management areas, which closed formally on 16 November 2007. This is part of the implementation of the Water Framework Directive under the supervision of the Environment Agency, which is likely to become increasingly detailed and burdensome between now and the final date of 2015 by when Community waters are supposed to have achieved "good status" under the Water Framework Directive.

## Water Framework Directive – Daughter Directives on Groundwater and Priority Substances

A consultation on proposals for implementation of the revised Groundwater Directive 2006 is expected from Defra in Spring 2008.

Negotiations continue on the very important Priority Substances Directive, introducing further controls on about 33 Priority Substances. A Common Position was reached at the Environment Council of Ministers on 20 December 2007, following First Reading in the European Parliament, and the Common Position text has now been passed to the European Parliament for Second Reading debates expected to last until June 2008. The Directive is likely either to be agreed between Council and Parliament or sent for Conciliation in the course of 2008.

## EU Directive on Assessment and Management of Flood Risks

In the EU Directive of 2007 sets out provisions whereby Member States are required to limit and prevent floods and their adverse effects on human health, the environment, infrastructure and property.

## Environment Agency Consultation on Water Resources Abstraction Charges

The Environment Agency concluded a consultation in December 2007 on proposals to recover compensation costs incurred when making changes to licenses associated with damaging abstractions. One of the more controversial features of the Water Act 2003 was the new powers taken to allow the Environment Agency, in some case without compensation, to take steps to remove water abstraction licences which were causing environmental damage. This consultation concerns proposals on regional and national options to fund compensation for this limited but important category of licence changes from charges on other abstractors.

## EU Bathing Waters Directive

Defra and the Welsh Assembly have issued a consultation which closed on 4 February 2008 on implementation of the revised Bathing Water Directive. The Revised Directive was due to be implemented by 24 March 2008, but implementation will probably be late. It will introduce revised standards for inland and coastal bathing sites, for microbiological and other water quality classifications.

# Reporting and Management

## Environmental Permitting Regulations

These very important Regulations which came into force on 6 April 2008 will introduce a new unified and streamlined permitting regime for activities currently regulated under the pollution prevention and control and waste regimes, with important read-across effects to many other Directives.

The new regime will replace the existing waste management licensing (WML) and Pollution Prevention and Control (PPC) permitting regime with a single Environmental Permitting Programme. The Regulations will automatically convert all WMLs and PPC permits into Environmental Permits, and any outstanding WML and PPC permit applications will become Environmental Permits if the application is granted. A key change will be the ability to apply for a standard permit for certain activities and the possibility of consolidating different permits and licences which apply to the same sites.

**A separate briefing on these Regulations is available from Burges Salmon on request. For further information, please contact James Phillips at [james.phillips@burges-salmon.com](mailto:james.phillips@burges-salmon.com), tel. 0117 902 7753.**

## Environmental Liability Directive: Environmental Damage (Prevention and Remediation) Regulations 2008

These regulations, published in draft for consultation, will implement the Environmental Liability Directive 2004/35/EC. They will apply to damage to protected species, natural habitats, sites of scientific interest, water and land. For certain economic activities, where there is an imminent risk of environmental damage, responsible operators will be under a duty to prevent it. Enforcing authorities will be able to assess the damage that has occurred and to identify remedial measures, backed up by remediation notices served on operators, and enforcement powers.

## Green Leases

As Corporate Social Responsibility, pressure from consumers and concern about climate change move up the corporate agenda, the development of wholly new forms of 'green leases' is under way. These are leases including a binding Environmental Management Strategy, and may include, for example, shared targets on environmental issues and performance, incentives for tenants and cost sharing arrangements between landlord and tenant.

**Burges Salmon has produced a separate briefing on developments in this area. For further information on green leases or to obtain a copy of the briefing, please contact Michael Barlow at [michael.barlow@burges-salmon.com](mailto:michael.barlow@burges-salmon.com), tel 0117 902 7708.**

## Energy Performance Certificates

Energy Performance Certificate (EPCs) have had a rather shaky introduction. Although the timetable has been amended they are currently required on the sale

of all residential buildings. However, with limited exceptions, by 6 October 2008 they will be required on the construction, sale or rent of all buildings in England and Wales. Therefore, every owner of a building will have to become familiar with EPCs.

An EPC assesses the capability of a building to be energy efficient and will give each building an asset rating from A to G (similar to the ratings that have been used on white goods for a number of years). The EPC will also be accompanied by a recommendation report for cost effective actions to improve the rating (although there will be no obligation to implement any of the recommendations).

Although the principle of the EPC regime is relatively straightforward, the practical application of it is not. Further, the requirement to obtain an EPC could result in significant cost for owners/landlords (it has been estimated that for some commercial buildings, the cost could be as much as £10,000).

For organisations with large portfolios of property, there will be a benefit in making an early assessment of the requirements of the regulations for the organisation and the cost and practical implication for its property portfolio at an early stage. This can then inform the strategy for managing the portfolio on the short and longer term and could result in costs savings.

**For further information on EPCs please contact Michael Barlow at [michael.barlow@burges-salmon.com](mailto:michael.barlow@burges-salmon.com), tel 0117 902 7708.**

## Draft Code of Good Agricultural Practice

Defra consulted in November 2007 on draft revisions to the Code of Good Agricultural Practice on air, soil and water and proposals to consolidate individual codes for those media into one single code.

## Conservation (Natural Habitats etc.) (Amendment) Regulations 2007

New regulations made in November 2007 make extensive amendments to the regulations applying and implementing that Habitats Directive. Breaches of licence will become an offence. The regulations overhaul and update the 1994 regulations implementing the Habitats Directive, and make new provisions for "European offshore marine sites".

## Home Information Packs

An Order made in December 2007 extended the requirement for people marketing residential property to provide a Home Information Pack unless exempted for all residential properties. This will include information on the property's energy profile.

## Greater London Authority Act 2007

Certain provision of the Greater London Authority Act 2007 came into force on 21 January 2008. These cover a number of environmental issues, including

provisions on transport, the London Development Agency, health, the London Fire and Emergency Planning Authority, planning, the duties of waste collection authorities, information on waste contracts, climate change and energy.

## BERR Consultation on the Code of Practice on Good Guidance on Regulation

This consultation invites views on a Code of Practice on Good Guidance on Regulation, a public statement of what regulated organisations can expect from Government and regulators in guidance interpreting and applying regulatory requirements. It will be relevant ammunition for those disputing the application of particular regulations.

## Regulators Statement on Fundamentals of the Management of Radioactive Waste

In December 2007, HSE, Environment Agency and SEPA issued a joint introduction to the management of higher level radioactive waste on nuclear licensed sites headed "Fundamentals of the Management of Radioactive Waste".

*The regulations overhaul and update the 1994 regulations implementing the Habitats Directive, and make new provisions for "European offshore marine sites"*



# Environmental Case Law Round-up

## Environmental Warranties and Representations in Transactions

***In Lambson Fine Chemicals Ltd v. Merlion Capital Housing Ltd*** the Defendant purchased an industrial site from the Claimant. The Defendant obtained a survey by environmental consultants but also requested comfort from one of the directors of the seller that he did not have any knowledge of any further contamination other than the contamination specifically identified by the consultants.

After the purchase of the site, the buyer discovered that the contamination was far greater than anticipated. The Claimant brought an action for the balance of the purchase price, the Defendant counterclaimed against the seller (for a breach of warranty) and the director (alleging that the director had made a fraudulent statement as to the extent of contamination at the property).

The counterclaim failed but the case serves as an important reminder to consider carefully any representations or warranties given in relation to environmental matters during transactions.

## Pollution Prevention and Control

We reported the Court of Appeal decision in the case of ***United Utilities Water plc v. Environment Agency*** in our July 2006 newsletter. In summary, the Court of Appeal held that sewage sludge was 'waste' and therefore a water treatment plant that treats sludge for disposal is an "installation" which requires a permit under the Pollution, Prevention and Control Regulations 2000 (PPC Regulations). The Claimant appealed.

The House of Lords upheld the decision of the Court of Appeal. It held that the purpose of the PPC Regulations is to prevent or reduce environmental harm from industrial processes. Therefore even though the product of the processing was transferred to another site for further processing prior to disposal it remained an installation.

## Modification of S59 Notices

### ***Neal Soil Suppliers Ltd v. Environment Agency***

Following a successful conviction for unauthorised deposit of waste, the Environment Agency served a notice under Section 59 of the Environmental Protection Act 1990 requiring the waste to be removed from the land. The Defendant Company appealed to the Crown Court to request that the conditions of the

notice should be modified to allow the Claimant to treat the waste at its current location. The Crown Court held that it could not make such a modification because to do so would be to permit a criminal offence under Section 33 of the Act, or was contrary to the purpose of the legislation and underlying European Directive, and therefore this was not within its jurisdiction. However, it referred this issue to the Divisional Court.

The Divisional Court took a more purposive view. The purpose of section 59 of the Act was to remedy any damage caused by non-compliance with the licensing regime and, if remediation could take place on the Claimant's land, then it was open for the Crown Court to modify the section 59 order accordingly. The matter was remitted to the Crown Court for consideration.

## REACH case referred to European Court of Justice

### ***R (on the application of SPCMA SA and Others) v. Secretary of State for Environment, Food and Rural Affairs***

Several companies that manufacture, distribute, import and supply chemicals including polymer chemical products applied for permission to bring judicial review proceedings relating to a number of ambiguities and conflicts with the REACH Regulation. Allegations of unlawfulness and discrimination in Articles 5 and 6.1 were not accepted by the judge and permission was refused. However, the judge did accept that there was a serious issue regarding the validity of Article 6.3 because Article 6.3 resulted in inconsistencies between the treatment of polymers and monomers for which there was no scientific basis. Permission was granted for judicial review on this issue and the matter has been referred to the European Court of Justice for clarification. We will report on the outcome in due course.

## Proceeds of Crime Act 2002 and Environment Offences

The Proceeds of Crime Act 2002 allows prosecuting authorities to recover criminal assets which have been accumulated as a result of criminal activity in order to disrupt organised criminal enterprises. In *R v John Craxford Plant Hire Ltd* the Environment Agency used these provisions to confiscate almost £1.2 million from a landfill site operator for illegally depositing prohibited materials in a landfill. The Defendant

Company was fined £60,000 and ordered to pay £18,855 in costs in the Exeter Crown Court but, although these sums are significant, they are clearly much lower than the amount that was confiscated under the Proceeds of Crime Act 2002.

## Environmental Insurance

There are two recent insurance cases worthy of mention.

The first is *Bartoline Ltd v. Royal and Sun Alliance Insurance plc and Heath Lambert Ltd*. As we have previously reported, the trial judge handed down judgment in this matter at the end of 2006. The case result from an accidental fire at the Claimant's premises which resulted in pollutants from the fire fight entering a watercourse and the Environment Agency engaging time and resources in providing an emergency response to mitigate damage to the environment. The Claimant claimed under its public liability insurance for all of its losses resulting from the fire, including the Environment Agency's clean-up costs.

The court at first instance held that the costs owed to the Environment Agency and any costs that the Claimant had in relation to clean-up works that it carried out itself could not be recovered under its public liability policy.

The case was due to go to appeal in the Autumn of 2007 but settled out of court shortly before the appeal was heard. Therefore, the first instance decision stands. Owners and occupiers of land will need to consider their public liability policies to ensure that they are not exposed for clean-up costs following pollution incidents, and if they are, to consider additional insurance products to fill the gaps.

The second case of note is *WASA International Insurance Co. Ltd v. Lexington Insurance Company*. In this case an insurance and reinsurance policy each had the same or equivalent wording relating to property damage. A claim was brought under the policy for the costs of clean-up and restoration of heavily contaminated sites and decided under the law of Pennsylvania. Full recovery for the costs of clean-up was allowed. The insurer sought to recover under its contract of reinsurance in the UK courts as the contract of reinsurance was subject to English Law. At first instance, the court held that no payment was required under the policy because the loss or damage had occurred outside of the policy period. On appeal, the Court of Appeal overturned the first instance decision and held that the insurance and reinsurance

provided cover for the same period and therefore the wording should be given the same construction. It was clear to the reinsurer that the insurance policy was to be construed in a US court and therefore the reinsurer was taking the risk that the law would be interpreted differently in the US.

## Landfill Tax

In *Waste Recycling Group Ltd v. Revenue and Customs Commissioners*, the Claimant waste management company sought to recover over £2 million from Revenue and Customs which it claimed it had overpaid in landfill tax since October 1996. The Claimant operated waste transfer stations and civic amenity sites as well as a number of landfill sites. The landfill sites required a regular supply of inert material for site engineering works and daily cover for the landfill. It obtained this inert material in a variety of ways. When supply was plentiful, the Claimant could charge the person disposing of the inert waste, or collect it through the civic amenity site or transfer station deposits. When supplies were limited, the Claimant would accept inert material at reduced rates, sometimes for free, and sometimes it would need to seek out inert material for purchase.

The Commissioners, and subsequently the Tribunal, considered that the economic circumstances under which the material was obtained were irrelevant considerations when considering whether it was the intention of those handing over the inert material to 'dispose' of that material. As a result, the claim for recovery of tax failed.

On appeal, the judge considered that the tribunal was wrong in law to hold that the economic circumstances of disposal could not be taken into consideration. All of the circumstances surrounding the disposal had to be taken into consideration including the intention of the disposer as evidenced by the financial agreement reached between the disposer and the landfill operator.

It is clear from this case that all landfill operators should reconsider their record keeping to ensure that they keep detailed records of both the use to which material is put at the landfill site (such as daily cover and site engineering) and also the circumstances in which that material was acquired.

**For further information on any of these cases or environmental litigation, please contact Michael Barlow at [michael.barlow@burges-salmon.com](mailto:michael.barlow@burges-salmon.com), tel 0117 902 7708.**

# IN THE OFFICE

## Nick Churchward

The Burges Salmon Environmental Projects Team welcomed the arrival of associate Nick Churchward at the end of 2007.

Nick is a waste projects specialist, and his arrival further strengthens Burges Salmon's existing expertise in PFI and PPP waste projects. As with Nigel Campbell, Nick joined Burges Salmon from Bevan Brittan and is another highly experienced lawyer. Nick has previously advised local authorities, funders, contractors and technology providers on waste schemes and renewable energy schemes.

Burges Salmon has now acted on over 25 waste management projects and, amongst other things, Nick is assisting the team acting on the Greater Manchester Waste Project, Europe's largest.



Burges Salmon is taking part in a series of international webinars with law firms Thompson Hine LLP from the US and Gowling Lafleur Henderson LLP from Canada.

For further information, click on

[www.burges-salmon.com/news/content/carbon\\_emissions\\_webinar](http://www.burges-salmon.com/news/content/carbon_emissions_webinar)

**BURGES SALMON** **GOWLINGS** **THOMPSON HINE**

### Climate Change Litigation Webinar – Thursday, April 3, 2008

The spectre of litigation claims in relation to carbon emissions has risen in courts around the world, putting at risk the profits of major corporations, the way they do business, and their market value. Conventional energy-intensive industrial methods, particularly in the energy and manufacturing sectors, and products linked to carbon emissions are at risk of being challenged in the courts.

This webinar brings together leading environmental lawyers from the U.K., the U.S. and Canada to discuss the challenges presented by such claims, the reality of the risk to major carbon emitters and their stakeholders, and how those risks may be managed.

This transatlantic webinar will address:

- the foundations of climate change litigation claims
- who is at risk for such actions
- the hurdles plaintiffs face to achieve success
- the strategies available to the defence
- proactively managing the risk for the carbon emitters and their stakeholders

This webinar will be of interest to fossil fuel producers, large carbon emitters, utilities, and manufacturers with carbon sensitive processes or products. The program will also be of interest to stakeholders in these sectors, such as lenders, insurers and shareholders, as well as governments and non-governmental organizations.

**Moderator:** Andrew L. Kolesar – Thompson Hine LLP

**Panel Speakers:**

U.S.	Canada	U.K.
Michael Hardy Thompson Hine LLP	David Estrin Gowling Lafleur Henderson LLP	Michael Barlow Burges Salmon, LLP
Heidi Goldstein Thompson Hine LLP	Mark Madras Gowling Lafleur Henderson LLP	Ian Salter Burges Salmon, LLP

**Webinar Details:**  
**Thursday, April 3, 2008**  
Time: 11:00 a.m. to 12:30 p.m. Eastern Time  
4:00 p.m. to 5:30 p.m. British Summer Time (BST)  
Cost: Complimentary

The conference incorporates both audio and web. A link to receive log-in information will be included in the registration confirmation.

**Future Webinars in this series:**  
April 30 - Commercializing Environmental Technologies  
May 21 - Carbon Markets and Carbon Finance

**For more information, please contact:**  
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Don't forget to visit our website at [www.burges-salmon.com](http://www.burges-salmon.com)

# Environmental Law Team



**Ian Salter**  
Partner

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Ian has a wide ranging practice in all aspects of environmental law with particular expertise in the waste, energy, transport and nuclear sectors. He is a top ranked leading individual in the environmental section of Chambers Guide to the UK Legal Profession and is a member of the International Nuclear Law Association, Institute of Wastes Management and Chairman of the UK Environmental Law Association (SW Region).



**Ross Fairley**  
Partner

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Ross is regarded as “one of the leading lawyers of his generation” (Chambers Guide to the UK Legal Profession). For over ten years Ross has been advising businesses and companies on all aspects of environmental law both in relation to day-to-day operations and all types of corporate, banking and property transactions. He has been particularly active advising companies on issues associated with the energy and renewables sectors.



**Georgie Messent**  
Partner

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Georgie is one of several Solicitor Advocates at the firm with rights of audience in the Higher Courts. Her current practice includes advising on a wide range of environmental and health and safety regulatory matters, including running and closure liabilities for manufacturing sites and contaminated land issues, drafting and negotiating contractual protection for commercial and property transactions, and defending substantial criminal prosecutions.



**Bob Smyth**  
Partner

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Bob established the Environmental Law Unit at Burges Salmon. He advises public and quasi-governmental bodies, corporate clients and financial institutions on property-related issues including contaminated land, telecoms and renewable energy development.



**William Wilson**  
Barrister

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William joined the unit from the Solicitor’s Office at the DoE/DETR/Defra where he had worked since 1992. William has been legal manager of much of the recent environmental legislation, including negotiations on the Water Framework Directive and legal management of the Environment Act 1995 which set up the Environment Agency, the Water Industry Act 1999 and the publication draft of the Water Act 2003, as well as drafting implementing regulations for several key environmental EU Directives.



**Michael Barlow**  
Associate

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Michael is an experienced litigator who now specialises in environmental disputes. He has recently worked on cases of statutory nuisance and private nuisance, claims under the statutory environmental torts, professional negligence claims against environmental consultants, claims under environmental warranties and flooding claims. He has taken cases through all of the civil courts as far as the House of Lords.



**Nigel Campbell**  
Director

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Nigel has joined Burges Salmon’s Environmental Projects Team as projects director, after 8 years as a partner with Bevan Brittan. He has unrivalled expertise in waste projects, including PFI, PPP and other projects, advising contractors, technology providers, funders and local authorities.

## Environmental Law Team *continued*



**Chris Pritchett**  
Associate

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Chris works on a wide range of regulatory issues, including large scale due-diligence and contractual protection in transactional work, defending environmental prosecutions and dealing with compliance matters across a broad spectrum of environmental topics. He is currently advising clients on issues surrounding various Producer Responsibility Directives. Chris is also responsible for much of our work on Licensing, Leisure and Gambling, and issues a separate briefing, *After Hours*, on developments in this area.



**James Phillips**  
Associate

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James advises on a range of transactional and contentious environmental matters. He has recently been on secondment working in-house for Ofgem, the regulator for Britain's gas and electricity industries, advising on various environmental issues.



**Nick Churchward**  
Associate

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Nick is a waste projects specialist who has joined Burges Salmon from Bevan Brittan and has advised local authorities, funders, contractors and technology providers.



**Simon Tilling**  
Solicitor

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Simon is a graduate of Bristol University, and has a BSC in chemistry and law. He is working on a number of current major environmental litigation cases and inquiries.



**Cheryl Parkhouse**  
Solicitor

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Cheryl has a PhD in environmental integration into the CAP, an LLM in environmental law and land management and completed a Stage in DG Environment at the European Commission. She has been on secondment to the Nuclear Decommissioning Authority in Cumbria.



**Robert Triggs**  
Solicitor

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Robert Triggs joined the Environmental Unit in January 2007. For six years Robert was a finance lawyer at a City law firm before deciding to re-train in environmental law. He has an LLM in environmental law and, prior to joining us, spent several months working at the Centre for Law and the Environment at University College London. We wish him every success with the move to Bristol and Burges Salmon.



**George Fellowes**  
Solicitor

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George graduated from Bristol University with a BSc in biological sciences. His work includes major environmental litigation cases and commercial matters and agricultural land disputes.

## Fax back for further information

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- White Paper on Nuclear Power and Nuclear Briefing
- EU Environment and Energy Package
- Carbon Reduction Commitment
- Bali Roadmap and climate change negotiations
- Environmental Permitting Regulations
- Environmental Damage (Prevention and Remediation) Regulations 2008
- Green Leases
- Energy Bill
- Climate Change Bill
- Planning Bill
- Waste Framework Directive Revision
- EU REACH Chemicals Regulation and UN GHS
- Other (*please specify*)

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A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.

Don't forget to visit our website at [www.burges-salmon.com](http://www.burges-salmon.com)