

ENERGY AND POWER

Infrastructure Planning Commission and National Policy Statements

In a statement to Parliament on 10 November 2009 Secretary of State for Energy and Climate Change Ed Miliband released the first six National Policy Statements on Energy, which are designed to guide the decision making process of the Infrastructure Planning Commission established under the Planning Act 2008

- The **Draft Overarching National Policy Statement for Energy (EN-1)** applies across the board to all the technology-specific National Policy Statements. It contains as much of the policy guidance as DECC felt it could properly generalise, and re-states the Government's Energy and Climate Change Strategy, stating the need for new energy infrastructure and setting out a series of Assessment Principles and Generic Impacts. These range from, for example, the required content of Environmental Statements and Habitats regulations assessments for large infrastructure projects, through general requirements for carbon Capture readiness and Carbon Capture and Storage, grid connections, Biodiversity, Coastal change factors and so on.
- The **Draft National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2)** contains an assessment and technology-specific information, for example with detailed requirements for consideration of water quality resources for cooling water, and provisions on combined heat and power, more detail on Carbon Capture Readiness, and Carbon Capture and Storage for Coal-fired Generating Stations.
- The **Draft National Policy Statement for Renewable Energy Infrastructure (EN-3)** contains the technology-specific guidance for the IPC on Biomass and Waste Combustion, Offshore wind and Onshore Wind. Other forms of renewables such as wave and tidal power are not yet included. For each technology-specific issue there is a description of the issue, a statement of actors to be included in the

Applicant's Assessment, factors to be taken into account for IPC decision making, and a description of mitigation measures proposed or required.

- The **Draft National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)** covers Underground Natural Gas Storage, LNG Import Facilities, Gas reception Facilities and Gas and Oil Pipelines in a similar way.
- The **Draft National Policy Statement for Electricity Networks Infrastructure (EN-5)** briefly covers technology-specific factors such as criteria for "good design" for energy infrastructure and Electric and Magnetic Fields.
- The **Draft National Policy Statement for Nuclear Power Generation (EN-6)** is a much longer treatment of nuclear-specific impacts, (such as flood risk) with a separate list of issues marked 'flag for local consideration' in the planning process, such as emergency planning or demographics. There is then a case by case treatment of ten out of the original eleven sites which are taken from the original Strategic Siting Process, namely Bradwell, Braystones, Hartlepool, Heysham, Hinkley Point, Kirksanton, Oldbury, Sellafield, Sizewell and Wylfa. One further site, Dungeness, has been excluded from the NPS on environmental grounds. Three further sites were considered as alternatives but ruled out on various grounds, namely Kingsnorth, Druridge Bay and Owston Ferry.
- As part of the Nuclear Power NPS, accepting that there could be adverse effects on some protected habitats under the Habitats Directive and Regulations, there is a statement of Imperative Reasons of Overriding Public Interest. Alongside the Nuclear Power NPS, the government has issued draft proposed Justification decisions on two nuclear reactor designs, a further statement of confidence that effective arrangements to manage and dispose of water from new nuclear power stations can be put in place (back a deep geological repository, although on present plans this may not be available for 160 years, requiring a long view of interim storage)

Disclaimer: This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

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- The National Policy Statements are therefore of key importance to the further development of nuclear power, three forms of renewables (biomass and waste, offshore wind and onshore wind) and (with the proposed Energy Bill) the further elaboration of the statements of Carbon Capture Readiness and in support of Carbon Capture and Storage. They also contain important detail on technology-specific aspects of other elements of energy infrastructure. Consultation on the new National Policy Statements will extend to February 2010.

More detailed briefing will be available over the next few weeks as the full implications of these important announcements become clearer. Meanwhile, for further information on the National Planning Statements please contact –

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STOP PRESS - Burges Salmon receives top billing In new Chambers Guide

We are delighted to announce that in the new Chambers Guide to the UK Legal Profession, Burges Salmon's Environment law team is ranked No 1 for London and UK wide and the South West, our Projects Energy – Renewables and Alternative Energy team is at Band 4, and our Planning law team is ranked as Band 1 for the South West.

Together with the award of Infrastructure/Energy Team of the Year in *The Lawyer Awards* for 2009, this is a further strong endorsement of our environmental, energy and planning law capacity, and our determination to deliver the highest quality of service for our clients.

Underground Coal Gasification

- It would be hard to argue that the precise make up of the future energy mix is fixed and certain. We know that many existing conventional power plants are due to close with the combined emission requirements of the Large Combustion Plants Directive, and that significant numbers of nuclear plants are reaching the end of their working life.
- We have seen the present government declare its strong support for nuclear new build as one important component of a low emission future source of power generation. Large subsidies have supported the installation of significant wind power generation, especially offshore, but debates continue over whether the UK's renewables targets will be met any time soon. Major changes have been made to the legislation, policy support and funding for Carbon Capture and Storage, but despite this, the commitment of several major power generators to 'clean coal' generation seems to be faltering, with renewed interest in gas and biomass powered generation.
- Biomass generation involves complex issues of sustainability, which we discuss in a separate article in this briefing. Gas is always subject to concerns about the security of supply, and sure enough and right on cue, as a number of power generators expressed renewed interest in CCGT power stations, Russian Prime Minister Vladimir Putin raised the issue of renewed disputes over gas supplies to Ukraine.
- Underground coal gasification, according to its supporters, offers the scope to continue to draw on 17 billion tons of potentially gasifiable coal onshore in Britain with perhaps double that offshore. The gas produced by this process would be available as an alternative fuel source for any existing or new CCGT power stations and the resulting emissions could be subjected to Carbon Capture and Storage, as will be the case at the Hatfield IGCC plant which will now receive €180 million if European funding. Supporters of the technology, such as Kenneth Fergusson of the UCG Partnership argue that underground coal gasification represents a "clean, competitive, indigenous source of fuel".

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RENEWABLES

Feed-in Tariffs finally on their way

- Using powers in the 2008 Energy Act, the Government is about to introduce a new incentive scheme in April 2010 to encourage the greater deployment of small-scale renewable electricity. The Government has predicted that small-scale renewables will be capable of providing 2% of the UK's total electricity needs by 2020 and therefore will play an important role in helping the UK to meet its binding target of 15% of all UK energy from renewable sources by 2020.
- To help realise the potential of small-scale renewable electricity generation, the new feed-in tariffs (or FITs) regime will be aimed at projects with a capacity of up to 5 megawatts and will offer a more simple alternative incentive mechanism to the Renewables Obligation, which will continue to run in parallel. This more straightforward regime is anticipated to appeal in particular to homeowners and those businesses for whom electricity generation is not a core business, such as retailers, builders, farmers, property owners, communities and the public sector, including housing associations, schools and hospitals.
- The incentives will derive from a fixed generation tariff, which will be paid by electricity suppliers for all of the metered renewable electricity produced. The amount of the generation tariff will depend upon the type of technology used and the size of the installation. Under current proposals, these generation tariffs range from 4.5 pence per kilowatt hour (for larger wind, hydro and biomass projects) to 36.5 pence per kilowatt hour (for the smallest retrofitted solar (PV) systems). Initially, the FITs regime is only intended to apply to electricity produced from anaerobic digestion, biomass, hydro, PV and wind projects.
- In addition to the generation tariff, generators will have the option of either selling any electricity that is not used on-site to third parties, or collecting a further 5 pence per kilowatt hour from their electricity supplier by way of a guaranteed export tariff, for electricity which is fed back into the electricity network. As well as benefitting from these two tariffs, those generating electricity will also benefit from the avoided costs of having to buy less electricity from suppliers to meet their on-site needs.

- The Government has yet to publish its response to the recent consultation carried out in relation to the proposed FITs regime and therefore there are a number of details which may still be subject to change, including the level of the tariffs themselves. However, it is anticipated that the certainty and benefits provided by the new FITs regime will, when implemented, significantly increase the interest in small-scale renewables development and open up development opportunities to a wide range of individuals and businesses who have not previously considered entering the renewable energy market.

For further information on the new FITs regime and to discuss potential opportunities for developing renewable electricity projects, please contact **James Phillips** on +44(0)117 902 7753 james.phillips@burges-salmon.com or **Ross Fairley** on +44(0)117 902 6351 ross.fairley@burges-salmon.com.

Biomass and Sustainability Standards

- The introduction of banding in the Renewables Obligation from April 2009 has created huge interest in the biomass power sector. With dedicated biomass generating stations now attracting 1 ROC for every 2/3 of a megawatt hour of electricity produced (and 1 ROC for every 1/2 MW/h produced where the plant uses CHP) a large number of developers are seeking to develop generating stations powered by biomass.
- There are currently more than ten proposed biomass plants in the course of development with a capacity of over 50MW and the largest of these is proposed at over 300MW. Fuel demand for some of these projects can exceed 2 million tonnes per year and in most cases, the source of fuel will be wood chip. In view of the quantities involved, much of the fuel will need to be sourced outside the UK and therefore developers are needing to tap into foreign markets to ensure that this demand is met.
- The importance of the sustainability of biomass has been underlined at both UK and European level in recent times. The Renewables Obligation Order 2009 provides that a biomass generating station will only attract ROCs if prescribed information in relation to the sustainability of the fuel is provided. Currently, the RO does not actually require that fuel to be from sustainable sources in order to attract ROCs, although when the reporting requirements were introduced, the UK Government promised further

action if the fuel being used by generators was found to be unsustainable.

- The sustainability of biomass has been caught up with concerns about the sustainability of bioliquids and biofuels, in the context of the Renewable Energy Directive, and this has contributed to demands for sustainability criteria to be attached to biomass used for power generation. The European Commission has consulted on a sustainability scheme for biomass and plans to publish a report on the requirements on a sustainability scheme for biomass in December 2009. Early indications at the time of writing are that binding sustainability requirements are unlikely to be introduced at this stage, with Member States instead being 'recommended' to adopt sustainability criteria similar to those for biofuels. This will need to be monitored closely when the report is published.
- Whilst developers have been eagerly awaiting the Commission's proposals in terms of sustainability requirements, there have been recent developments at a UK domestic level which have advanced the sustainability debate. In late September the Environment Agency issued an environmental permit in respect of Prenergy's proposed 350MW Port Talbot plant, containing a condition that all wood must be certified to a standard approved by the government's Central Point of Expertise on Timber Procurement. A similar condition was imposed in the plant's planning consent.
- For generators, building and operating a biomass power station only works from a financial perspective if the plant meets the criteria for obtaining ROCs. A biomass plant (without CHP) would lose almost two-thirds of its income in any month when it failed to qualify for ROCs. Many would argue that this is likely to be a sufficient driver for generators to ensure that fuel is obtained from sustainable sources.
- By introducing requirements into an environmental permit, a generator is also faced with the threat of committing a criminal offence as a result of breaching the conditions of its permit, which could lead to criminal enforcement action against the company and/or directors of the company, and in a worst case scenario, closure of the plant if the permit is withdrawn. Opponents of the double regulation approach point to the fact that fuel sustainability requirements backed up by criminal penalties are not required for other types of fuels, the sourcing of

which can also lead to environmental damage, such as fossil fuels and uranium.

- In reality, most, if not all developers are already seeking to develop supply chains which will secure wood from sustainable sources. However, the robustness of those supply chains and the ability to demonstrate sustainability through certification systems are likely to become increasingly important if an obligation for wood fuel to be from sustainable sources is imposed through the Renewables Obligation and also through the environmental permitting regime. It remains to be seen how imposing sustainability requirements through two separate regimes would work in practice and how the two monitoring regimes would interrelate. For developers of biomass generating stations working hard to put in place supply chains, it is hoped that the picture on sustainability will become clearer sooner rather than later.

Burges Salmon is known for its work in the biomass area and has been working with Prenergy and with Helius Energy on these types of issues. Our work helped us secure the award of **Infrastructure/Energy Team of the Year at The Lawyer Awards 2009**. For further information and to discuss biomass sustainability issues with one of our expert team please contact **Ross Fairley** on +44(0)117 902 6351 ross.fairley@burges-salmon.com or **James Phillips** on +44(0)117 902 7753 james.phillips@burges-salmon.com

CARBON CAPTURE AND STORAGE

- Rapid progress has been achieved in addressing many of the legal obstacles to deployment of Carbon Capture and Storage, but there are still real practical difficulties in the way of this key technology.
- In legal terms, the contracting parties to both the London Convention and Protocol and the OSPAR convention have agreed important revisions that will facilitate the placement of carbon dioxide sub-seabed. London Convention parties are reported to have agreed further progress at their meeting in London in October on the issue of transboundary shipments of CO₂.
- The EU Directive 2009/31/EC on geological storage of CO₂ established an important framework for permitting exploration and storage, the monitoring and control of storage sites and such matters as the post-closure obligations of storage site operators.

- In the UK, the government has enacted in Part I Chapter 3 of the Energy Act 2008 its own partial implementation in national law of the EU Directive, as the basis for UK national regulations. And it has published, on 25 September 2009, draft Storage of Carbon Dioxide (Licensing) Regulations 2010 and a draft Carbon Dioxide Appraisal and Storage Licence.
- In policy terms the government has decided that coal power stations should retrofit CCS to their full capacity "within five years of CCS being independently technically and economically proven", which may result in some potential participants simply preferring to make investments in known technologies such as CCGT gas and biomass, rather than leave an open-ended commitment to make a very large investment when an outside party judges that it is economically viable.
- The government has further declared its intention not to consent any future applications for new combustion stations at or over 300 MWe unless they can be deemed Carbon Capture Ready as defined in the April 2009 consultation document, and here we can see CCR factors becoming relevant to all power station consenting, including for gas and biomass. The government launched one CCS competition in 2007, and promises a further competition for up to three more CCS installations to be demonstrated. At EU level, Powerfuel Power Ltd's Hatfield development has won Euros 180 million of EU funding as a leading demonstration of CCS.

In the Parliamentary statement accompanying publication of the six National Policy Statements on Energy, and accompanying documents on clean coal, Secretary of State Ed Miliband said –

"...I can confirm that under our new framework, there will be no new coal fired power stations without CCS

With immediate effect, to gain development consent all new coal plant will have to show that it will demonstrate CCS from the outset on around 400 MW of total output.

Our plans are based on up to 4 projects between now and 2020 including up to two post-combustion projects and up to two pre-combustion projects

The pre-combustion demonstration projects are expected to have 100% CCS on their coal capacity from day one.

The post-combustion projects will be expected to retrofit CCS to 100% of their capacity, within five years of 2020, enforced by the Environment Agency, with a review to confirm this by 2018.

If we conclude at that time that CCS will not be proven, we believe further regulatory measures will be required to restrict emissions from these plants, such as an emissions performance standard.

But even with the right regulation, if we leave the funding of CCS simply to private companies, it won't happen in time.

To make CCS financially viable, our proposed Energy Bill contains powers to introduce the levy announced in the Budget by the Chancellor to support demonstration and, responding to points made in the consultation, the levy will also be available to support the move to 100% retrofit of CCS."

Very important detail on the further elaboration of these policies is contained in three more documents released by DECC at the same time as the National Policy Statements, namely –

- Draft Supplementary Guidance for section 36 Electricity Act 1989 Consent Applicants for Coal Power Stations – A consultation;
- A framework for the development of clean coal – Consultation response; and
- Carbon Capture Readiness – Government's response to the consultation responses.

Full steam ahead? Not quite. The preferred direction of travel in policy terms has been settled, and the Conservative party statements on CCS seem fully supportive of its deployment, but major uncertainties remain. Questions discussed at the Institute of Mechanical Engineers' CCS seminar in October 2009 included the unresolved issue of who will actually undertake the storage of CO₂, how they will be funded for taking on the complex long term liabilities that it involves, and the extent to which the government will be prepared to step in to support and underpin its imposition of Carbon Capture Readiness, the development of transport networks and storage facilities, and to take responsibility for liabilities over a certain level.

(continued)

We have seen the present government's declared policy, but as we comment elsewhere in this newsletter, there is little time before the election to deliver the Energy Bill and the rest of the mechanisms needed to support wider development of CCS.

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NUCLEAR

NDA and EDF land sales

- At the end of October 2009, the NDA announced that it had successfully sold a 470 acre plot of land to the north of the existing site at Sellafield in Cumbria. The land was brought by a consortium comprising Iderdrola S.A., GdF Suez S.A and Scottish and Southern Energy plc. The sale represents the continuation of the NDA's asset disposal programme, which aims to raise funds that can be put towards the NDA's core mission of decommissioning the UK's existing nuclear power stations.
- Also, earlier this year over 1000 acres of land next to the existing sites at Wylfa, Oldbury and Bradwell was successfully auctioned by the NDA raising nearly £400 million. Wylfa and Oldbury were bought by consortium companies formed by EON UK Plc and RWE Npower Plc whilst EDF Development Company Ltd successfully bid for the land at Bradwell. Burges Salmon LLP advised the NDA on the sales of Sellafield Ltd, Wylfa, Oldbury and Bradwell.
- In Spring 2009 EDF Energy also initiated a sales process relating to its Heysham and Dungeness sites. The process is ongoing.

Sale of UKAEA Ltd

- In September 2009, UKAEA Ltd was sold by the Government to Babcock International Group for £50 million. UKAEA Ltd operate four nuclear sites in the UK at Dounreay, Harwell, Winfrith and Windscale as well as providing nuclear decommissioning, waste management and site remediation services in the UK and overseas. The sale completed on 31st October.

NDA PBO Competition: Dounreay Site Restoration Limited

- On the 21 September the Nuclear Decommissioning Authority (NDA) announced the launch of the competition to secure a new Parent Body Organisation to take ownership of the Dounreay Site Restoration Limited (DSRL) Site Licence Company. The NDA intend to carry out a detailed programme of market engagement throughout the winter and then hold a two-part industry event in Caithness and either Edinburgh or Glasgow in early to mid 2010. The event will inform interested bidders of the overall aim and scope of the contract, and provide further detail on the timetable and processes to be followed. It is expected that the selected bidder will be announced in the Spring of 2011.

Consultation on restructuring UK nuclear regulator closes

- A joint Department of Energy and Climate Change (DECC) and Department for Work and Pensions (DWP) consultation into proposals to restructure the UK's nuclear regulator closed on 22 September 2009 and the responses are currently being assessed. DECC, DWP and the Health and Safety Executive (HSE) intend to lay a Legislative Reform Order before Parliament by the end of 2009. The key proposed change sees the current HSE Nuclear Directorate replaced by a new sector-specific regulator, the Nuclear Statutory Corporation, by Autumn 2010. A government response to the consultation is awaited.

DECC consultation on revised exemption regime for radioactive materials and waste

- A DECC consultation into a proposed revised exemption regime under the Radioactive Substances Act 1993 closed in September. The Radioactive Substances Act 1993 (RSA) places radioactive substances into two distinct categories, radioactive material and radioactive waste. Any person keeping or using radioactive material or accumulating and disposing of radioactive waste must hold a permit. The Act also contains a series of 18 Exemption Orders (EOs) that define which low risk activities are exempted from permitting, such as domestic smoke detectors.
- The revised regime proposes to remove waste and materials from the scope of the RSA and replace the

current suite of EOs with one that provides conditional exemptions only. DECC intend to incorporate the revised regime directly into the Environmental Permitting Regulations 2007 which are due to come into force in 2010.

- Responses to the consultation have raised concerns over the danger of new regulatory burdens being placed on industries dealing with naturally occurring radioactive materials (NORM). Under the revised regime the disposal of NORM may become more difficult and more may have to go to Low Level Waste Repository or specialist waste disposal with resultant cost implications. The Environment Agency have suggested that industries processing NORM, and in particular the steel industry and coal fired power stations, should not require specific permits and should be granted conditional exemptions if they are caught by the regime. The Agency also noted the current lack of transitional provisions, which may impact on operators that were previously exempt but may now require a permit. A government response to the consultation is currently awaited.

For further information on nuclear law and regulation and the new Draft National Policy Statement for Nuclear Power Generation please contact **Ian Salter**, Partner, Head of Nuclear Law on +44(0)117 939 2225, ian.salter@burges-salmon.com

CARBON, CLIMATE CHANGE AND SUSTAINABILITY

Copenhagen 2009 – mission impossible?

- Progress towards a common consensus has been slow, and several fundamental issues remain unresolved as the landmark UN Climate Change Conference in Copenhagen in December approaches. Gordon Brown, acknowledging the importance of ironing out nations' differences and reaching a new global deal, has become the first global leader to pledge personal attendance at the conference. So what are the key issues that still stand as barriers to reaching a radical new international agreement on climate change?

Form of agreement

- It remains undecided as to what form an agreement reached at Copenhagen should take. Developing nations are pressing for an extension of the Kyoto Protocol, the existing international climate change treaty which commits only developed nations to a

reduction in greenhouse gas (GHG) emissions. Developed nations argue that to extend Kyoto would be to continue to exclude emission-heavy developing nations such as China and India from the international climate change regime.

- Obstacles also lie in the fact that the US Climate Bill is not likely to receive Senate approval for some time. With the US effectively unable to pledge any concrete commitments, it is now unlikely that a legally-binding agreement will be reached, and a non-binding political agreement may be the best that can be hoped for. That at any rate was the signal being sent by Presidents Obama and Hu Jintao from the Asia-Pacific summit in November.

Emission reduction targets

- Agreement reached at Copenhagen is likely to commit nations to a percentage reduction in GHG over a defined period. The exact percentages that different nations should commit to is unresolved. Japan's Prime Minister has made the most ambitious pledge so far by promising to cut Japan's emissions by 25% (of 1990 levels) by 2020. Similar pledges from other large emitters have not been so forthcoming, with neither China nor the USA indicating a percentage reduction that they would be prepared to commit to. The EU, however, has promised that, if a deal is reached at Copenhagen, it will pledge a 30% reduction in the EU's total emissions of CO₂ (of 1990 levels) by 2020, and a 85-90% reduction in CO₂ (of 1990 levels) by 2050.
- Much of the complexity of the negotiation in this area stems from developing nations' argument that to require them to cut back on GHG emissions would be to deny them the opportunity to develop their economies in that way that developed nations did a century ago.

Financial assistance

- There is at least some international consensus on the issue that, if developing nations are to be bound by GHG reduction targets, they should be compensated for the associated economic and infrastructure sacrifices that they will inevitably have to make. The EU has expressed the opinion that, by 2020, support equivalent to at least €100 billion a year must be pledged to developing nations. The EU will contribute up to €50 billion a year, depending on other nations' commitments, some of whom have argued that the provision of 'green technology' to

developing nations would be far more beneficial than direct monetary assistance. Alastair Darling has admitted that, in the context of the world's current economic crisis, an agreement as to the level of assistance will be entirely worthless if countries lack the confidence in the means of delivering it.

The UN Climate Change Conference will be held in Copenhagen from 7-18 December 2009. We will be following the progress of the conference closely and will address the outcome of the conference in future editions.

US Climate Legislation

- In the USA, the introduction of climate change legislation is in progress. The American Clean Energy and Security Act (ACESA) gained approval of the House of Representatives in June and would require that at least 15% of US electricity be generated from renewable sources, such as wind or solar power, by 2020. ACESA would also place a price on emissions of greenhouse gases through the establishment of a US emissions trading scheme similar to that in operation in the EU, with the overall objective of reducing US greenhouse gas emissions by 17% (of 2005 levels) by 2020, and by 83% by 2050. In the Senate, ACESA's counterpart, the Clean Energy Jobs and American Power Act (CEJAPA), establishes the same emissions trading scheme, but goes further than ACESA by aiming to cut US emissions by 20% (of 2005 levels) by 2020. CEJAPA must now be debated in the Senate and will require the approval of a two-thirds majority before a final consolidated text can be considered by both Houses of Congress. One big difficulty is that timing for conclusion of Senate legislation will not be until after the Copenhagen climate summit in December 2009, and US negotiators are very reluctant to agree to anything in Copenhagen that the US Senate will not ratify.

Carbon Reduction Commitment consultation

- Early in October the Government released its long awaited response on the now re-titled 'Carbon Reduction Commitment Energy Efficiency Scheme' (CRC EE). The Response has made some significant changes to the scheme, providing clarity on some issues and further confusion on others.
- The change of most immediate significance is that organisations caught by the CRC EE will not need to

purchase allowances for the 2010/2011 year. Organisations will still need to register by September 2010 and fulfil all reporting requirements for the 2010/2011 year. For budgeting purposes this change will mean that the predicted costs to organisations at the April 2011 sale will now have been cut in half, as only one year worth of allowances (for the 2011/2012 year) will be purchased at that sale.

- Another significant change is the ability to disaggregate Significant Group Undertakings (subsidiaries that in their own right meet the 6,000 MWh of half hourly metered electricity use in 2008 threshold). This will allow SGUs to participate in the **CRC EE Scheme** in their own right including being listed as a separate entity in the league table, purchasing allowances, receiving separate recycling payments and being legally responsible for compliance with the **CRC EE Scheme**. For those organisations covered by the **CRC EE Scheme** it will be important to consider whether disaggregation could provide any benefits under the scheme.
- Also key is that the definition of a 'supply' under the CRC EE is to be updated from the previous 'counterparty to the energy supply contract' concept. This definition is to be broadened so that it covers a wider range of supply arrangements and there is greater clarity on the types of supply that will be included in the CRC EE. Organisations will need to analyse their supply arrangements against the updated definition to review which supplies they will be responsible for under the CRC EE.

The Response included a significant amount of changes that we have not been able to mention here. The updated CRC EE Order is to be publicly released in December this year and DECC is aiming for it to proceed through the Parliamentary process and pass into law by March 2010. If you would like any assistance on CRC EE, or would like to receive updates on further changes please contact **Lucie Drummond** on +44(0)117 307 6906 or lucie.drummond@bures-salmon.com

First Report of the Committee on Climate Change

- The UK's Committee on Climate Change, established under the Climate Change Act 2008, has published its first report to Parliament setting out its views on the progress that has been made towards achieving the UK's target of a 34% reduction in CO₂

(of 1990 levels) by 2020. The headline warning made by the report is that the UK must double the rate of its greenhouse gas reduction if it is to meet the ambitious target. The UK is currently 18% below 1990 CO₂ levels and is reducing emissions at a rate of 1.7% a year. Lord Turner, Chairman of the Committee, admits that although the UK is making progress, significant further reductions must also be made in the power, residential and transport sectors, as well as reductions being made in other greenhouse gases such as methane and nitrous oxides. The report also acknowledges that investment in the low-carbon generation sector has been adversely affected by the current economic climate, and urges Government to establish market arrangements that will facilitate investment in the sector in the future. Government is also encouraged to make a very clear policy signal that power generation by coal plants (without CCS technology) will have a very limited role to play in the UK after 2020.

Electricity and Gas (Carbon Emissions Reduction) Amendment Order 2009

- Gas and electricity providers with over 50,000 customers are required by this Order to promote low carbon and energy efficiency measures. This is part of the means to deliver Carbon Emissions reduction Targets or CERTs.

Aviation joins the EU Emissions Trading Scheme

- Regulations bringing aviation at least partially within the scope of the EU Emissions Trading Scheme have now been made. Aircraft operators can apply for free allowances initially, with an emissions plan. Monitoring and reporting obligations for CO₂ emissions are introduced.

STOP PRESS

Near-zero-energy buildings agreement

- EU Member States government and Members of the European Parliament reached political agreement on 17 November on revisions to the 2002 Energy Performance of Buildings Directive that will have the result of forcing all new buildings constructed after 2020 to consume "near-zero-energy". In effect they will need most of their energy to come from on-site or nearby renewable sources. This political compromise was reached in part in return for concessions by

MEPs on demands to subject major building refurbishments to even higher near-zero-energy standards.

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WASTE AND CONTAMINATED LAND

Anaerobic digestion

- The UK Government has finally increased its efforts to achieve a major increase in the use of anaerobic digestion. The Anaerobic Digestion Task Group has been set up as an independent body whose members have been appointed on a personal basis .
- The Task Group submitted its Implementation Plan in July highlighting as priority areas for action economics and infrastructure, regulation, technology and demonstration and communication. As far as better communication is concerned, the National Non-Food Crop Centre has recently released a new online advice portal at <http://www.biogas-info.co.uk/>
- The Task Group aims to make recommendations for anaerobic digestion nationally. Current headline recommendations include how feed-in tariffs should complement the existing incentives under the Renewables Obligation and how to facilitate the use of biomethane via direct injection into the grid.

Funding for AD

- In June Defra awarded grant funding to five AD projects as part of the £10 million Anaerobic Digestion Demonstration Programme. However, Defra's commitment has been exceeded by the Welsh Assembly Government which is providing £20 million of financial support for Welsh local authorities as part of a pan-Wales AD procurement programme. The Programme will deliver a network of AD facilities producing renewable energy and treating at least 132,000 tonnes per annum of source segregated municipal food waste from the 15 local authorities involved.

Car scrappage scheme raised to £400 million

- The Government has pledged an additional £100m to the vehicle scrappage scheme, taking the total

contribution to £400m - sufficient to cover 400,000 vehicle purchases. Approximately 230,000 new vehicles have been acquired under the scheme thus far, with further uptake expected ahead of the February 2010 scheduled expiry date. The qualification age of cars scrapped under the scheme has been reduced by 6 months to ensure all 10 year old vehicles are captured and the van scrappage element has been extended to cover qualifying commercial vehicles over 8 years old, rather than 10 years as was previously the case.

Waste Framework Directive update

- Following revisions to the Waste Framework Directive that were finalised in November 2008, EU Member States have until December 2010 to transpose these revisions into national law. Defra have just closed their consultation on their transposition plans.
- Of key importance are provisions to extend the effect of producer responsibility, mandatory separate waste collections for plastic, metal, paper and glass by 2015, tough recycling targets for household and construction waste (50% and 70% respectively by 2020), as well as revisions to the Hazardous Waste and Waste Oils regimes. A report on the response to the consultation is expected in January 2010, and it will be interesting to gauge industry's reaction to these proposals.

For further information on waste issues, please contact **Nigel Campbell**, Director, Environmental Projects +44(0)117 902 7286 nigel.campbell@burgessalmon.com or **Nick Churchward** +44(0)117 307 6998 nick.churchward@burgessalmon.com

AIR QUALITY AND INDUSTRIAL EMISSIONS

Air Quality in London

- Most air quality standards are expressed in terms of limit values. The limit values for PM10 particulates and NO₂ (nitrogen dioxide) and for many other air pollutants were brought together in a consolidated Directive 2008/50/EC on ambient air quality and cleaner air for Europe.
- The UK is one of the 27 Member States in Europe that has struggled to meet legally binding air quality standards, and it continues to experience 'hotspots' or in air quality legislative language 'exceedances'

especially in areas such as London, which is a case study for the operation of air quality legislation. In April 2009, the UK, seeking to avoid fines for non compliance with air quality legislation applied to the Commission for more time to meet PM10 limit values for eight UK zones or agglomerations. The Commission asked for further information, including an air quality in London.

- In October 2009 the Mayor of London published a draft Air Quality Strategy, which promised a number of steps to address continued breaches in particular of PM10 and NO₂ standards. The problem is that some of the measures proposed are unfunded, and will depend upon central government funding to enter into effect, while others such as the deferred extension of the Low Emissions Zone from 2009 to 2012 (to save costs on small business) run the risk of infraction proceedings being brought against the UK by the European Commission.
- Air Quality legislation demands a particular result, keeping air pollutant levels below specific limit values. The problem that many EU governments are experiencing is that the powers to take action over air quality are complex, and shared with a variety of devolved administrations, including in this case the Mayor of London. It is not an academic debate, as air quality in London is known to result in several thousand premature deaths, even with the improvements since the 1950s.

For further information on air quality issues, please contact **William Wilson** on +44(0)117 939 2289, email william.wilson@burgessalmon.com. William has in depth experience of air quality legislation, having managed Part IV of the Environment Act 1995 and drafted regulations to implement the Air Quality Framework Directive and the First, Second and Third Daughter Directives.

CHEMICALS

REACH and 2010

- Between 1 June and 1 December 2008, 65,000 companies submitted 143,000 pre-registrations under REACH of substances of potential importance to their business. This however is only the start of the process of applying the obligations of the REACH Chemicals Regulation.
- The pre-registrations have been subject to Substance Information Exchange Forum or SIEFs, a

process described by some as chaotic, as the REACH system has struggled to ensure that massive duplication is avoided, that downstream users 'uses' are identified and addressed in exposure scenarios and safety data sheets, and that key information and studies are shared between potential registrants. Many have responded by establishing consortia to try to regulate the process.

- 2010 sees the start of full registration of substances, which will be required where any manufacturer or importer in any one year is dealing with –
 - any substance over 1,000 tonnes
 - over 1 tonne of CMR (carcinogenic, mutagenic or reprotoxic) substances; or 100 tonnes of any substance which is very toxic to aquatic organisms (R50/53).
- At the same time, many companies are unaware of the sharply growing impact of REACH requirements for Authorisation and Substitution. As at October 2009 there were 7 Priority substances, 15 Candidate List substances and proposals for 15 more. But the NGO "substitute it Now!" or SIN list covered 267 Substances of Very High Concern and many industries estimate that at least 3,500 substances meet the definition of SVHC. Therefore, we can expect far more sustained pressure to subject a much wider list of substances to Authorisation, and to seek their substitution by safer alternatives. We also expect this to affect a much wider range of industries.
- In 2010, we well as the start of full Registration of substances under the phase-in timetable, we expect to see enforcement action against those who missed pre-registration but continue to place substances on the market without registration, we also expect to see continued activity on SIEFs and Consortia, more work to alert supply chains, new contractual provisions on REACH, more developments on Authorisation and substitution, developments on defence exemptions and much more use by the public of access to information provisions on Substances of Very High Concern.

For further information on REACH or the related CLP Regulation, to read a new article on REACH and aerospace from UBM's publication Aviation and Environment or to discuss briefing, training or advice for your company, please contact William Wilson, Barrister on +44(0) 117 939 2289, e-mail william.wilson@burgess-salmon.com. William worked on REACH throughout its negotiation, and had advised many multinational companies and trade associations on its implementation.

ENVIRONMENTAL LEGISLATION

Energy Bill

- An Energy Bill was announced in the Queen's Speech on 18 November 2009, which will cover (at least) the proposed funding mechanism for up to four Carbon Capture and Storage demonstration projects and powers to introduce a levy or Carbon Capture Incentive, reportedly for up to £9.5 billion, for that purpose. It will be on a tight schedule to complete its passage through Parliament before the next election (if it has not been enacted before then it will fall). Debates on the Bill, even if it is not eventually enacted, may nevertheless be very relevant in outlining opposition thinking on funding for CCS deployment. We will be reporting on this Bill in future editions of this newsletter.

For further information please contact **Ross Fairley** on +44(0)117 902 6351 ross.fairley@burgess-salmon.com or **William Wilson** on +44(0)117 939 2289 or william.wilson@burgess-salmon.com

Marine and Coastal Access Act 2009

- The Marine and Coastal Access Bill received Royal Assent on 12 November 2009 after 17 sessions in Committee in the House of Lords and consideration of over 1,000 amendments. Prime Minister Gordon Brown declared – "The historic, ground-breaking legislation fulfils the Government's 2005 commitment to introduce a new framework for managing the demands we put on our seas, improve marine conservation, and open up access for the public to the English coast."
- The new Act will see the establishment of a Marine Management Organisation, based in Newcastle, and Marine Conservation Zones. It will see changes to marine planning, marine licensing and consenting, reforms to the management of inshore and

freshwater fisheries and new provisions on coastal access in England.

- On of the first areas where the influence of the new legislation may be felt is in the planning and consenting decisions on coastal power stations.

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Floods & Water Management Bill

- In the last issue we reported that Defra had published a consultation and draft Bill on flood and water management. The draft Bill covered a wide range of water related issues including sustainable drainage systems (SUDS), reservoir safety and corporate rescue and insolvency for undertakers alongside new provisions for flood management. Over the summer various bodies have been issuing their responses. Concerns have been raised over the proposed flood risk management structure, Defra's assumptions on funding, and the construction, operation and maintenance of SUDS. Local authorities will have a 'lead role' in flood risk management and the Local Government Association is particularly concerned over the increased financial burden placed on local authorities as a result of these new responsibilities.
- The draft Bill has also been scrutinised by the Parliamentary Committee for the Environment, Food and Rural Affairs (the EFRA Committee) which produced a critical report in September. The current draft Bill was described as a "confusing mix of measures" that was a far cry from the comprehensive strategy recommended by Sir Michael Pitt in his review of the Summer 2007 floods. The EFRA Committee considered that Defra "has a long way to go" and was doubtful whether the draft Bill could reach the statute book in this Parliament.

The Government has now included a Floods and Water Management Bill in the Queen's Speech of 18 November 2009. For advice on the issues raised during the passage of that Bill please contact **Michael Barlow** on +44(0) 902 7708 michael.barlow@burges-salmon.com or **Simon Tilling** on +44(0)117 902 7794

New Criminal Penalties for Ship-Source Pollution

- The 2009 EU Directive on ship-source pollution has come into force and EU Member States have until 16 November 2010 to fully transpose the Directive into national law. The 2009 Directive amends the existing penalty regime under the 2005 Directive on ship-source pollution by introducing a series of new criminal offences. The introduction of these new criminal offences is designed to demonstrate 'social disapproval of a different nature' from the existing administrative penalties that were established under the 2005 Directive regime.
- Member States are required to pass national laws making it a criminal offence for ships to discharge oil or noxious liquid substances into territorial waters, internal waters, straits used for navigation, the exclusive economic zone, or the high seas. Criminal sanctions will apply where the discharge is committed with intent, recklessness or serious negligence and results in a deterioration of the quality of water. Minor discharges that do not individually result in a deterioration of the quality of water will also be subject to criminal penalties where they are committed repeatedly and with intent, recklessness or serious neglect.
- A company may be held liable for the commission of an offence where an individual associated with the company commits an offence either for the benefit of the company, or as a result of not exercising a sufficient degree of control or supervision. Individuals may also be held personally liable for the commission of an offence, with the Directive stating that Member States are to ensure that penalties are effective, proportionate and dissuasive.

WATER

Water abstraction licensing delays

- Reforms in the Water Act 2003 would remove or limit certain important exemptions from water abstraction regulations, and will introduce revised exemption regulations of particular interest to ports, harbours, navigation authorities, water nuclear management, Internal Drainage Boards and certain underground strata. These changes were due to be implemented from 1 October 2009, but Defra has indicated that they will now be postponed to an undisclosed date.

Time limiting abstraction licences

- The government and Environment Agency would prefer to move to a position where all water abstraction licences are time limited, which allows for flexibility in regulation and the attachment of environmental conditions (in effect restrictions on use) where necessary to protect the environment.
- A further consultation exercise in summer 2009 may yet result in more legislation (if the next government shares the same priorities) to address continued over abstraction and environmental damage.
- The real issues around water abstraction are that pressures on the environment are increasing through climate change and pressures of new house building and development. The stock of existing water abstraction licences is still mainly unconditional, but subjecting them to time limits and environmental conditions may imply funding compensation which government has found to be intractable and difficult. The water industry has won itself an exemption from the compensation scheme which it wishes to defend. At the same time as pursuing environmental protection by limiting over abstraction, the government also wants to promote competition and innovation in water supply markets as advocated in the Cave review. The result appears to be a temporary hiatus in water policy in government.

River Basin Management Plans

- These key elements of Environment Agency Management and control of local water resources were submitted on 22 September 2009 to the Secretary of State for approval, and are presently expected to be published for each River Basin Management District in England and Wales on 22 December 2009. We will be reporting on their future development in later issues of this newsletter but would encourage businesses to become familiar with the contents of their local plan, as it will affect their operations.

New draft Groundwater Regulations

- New regulations are published in draft which will give effect to the revised Groundwater Directive of 2006, itself a Daughter Directive to the Water Framework Directive of 2000. They aim to strengthen the control and prevention of pollution of groundwater from hazardous substances and non-hazardous pollutants. List I and List II will be replaced by lists of

hazardous substances and non-hazardous pollutants to be prepared by Member States. With transitional provisions and exemptions, radioactive substances are to be brought within the groundwater regulation system of control. The whole regime will become part of the Environmental Permitting framework.

Water Regulation Workshops

William Wilson spent nearly 10 years in government advising on water law, was the Legal Manager of the Environment Act 1995 and Water Industry Act 1999 and the publication draft of the Water Act 2003. He participated in negotiations of the Water Framework Directive, drafted water regulations and advised on water supply and regulation, water quality and drinking water issues and litigation, and current work includes advice on water valuation issues.

For further information on water law issues or to discuss in-house training or workshops on current water regulation issues such as the CSO infractions or water abstraction licensing, please contact **William Wilson** at william.wilson@burges-salmon.com or tel +44(0)117 939 2289.

ENVIRONMENTAL LITIGATION

Asbestos Litigation

- Asbestos-related diseases are reported to cause over 3,500 deaths per year in the UK and claims for mesothelioma in particular have increased steadily since the 1970s.
- Asbestosis is a chronic lung condition caused by exposure to asbestos-symptoms include shortness of breath. Although not directly fatal, it does affect quality of life and at its worst considerably shortens life expectancy. It also presents a significant risk of the development of mesothelioma and lung cancer. Treatment can manage asbestosis but will not cure or reverse it. Mesothelioma is a cancer of organ membranes (typically lung) almost invariably caused by asbestos exposure. The prognosis for mesothelioma is even worse than for ordinary lung cancer. The vast majority of mesothelioma sufferers will die within three years of diagnosis.
- As asbestosis is a cumulative exposure disease, liability is treated like other industrial dust diseases. A party is liable if it is proven that they had materially contributed. What is 'material' will be a matter of fact for a court to decide in each case on the balance of

probabilities. Where there are multiple sources of exposures, each defendant materially contributing to exposure can be expected to be apportioned a share of the damages (typically reflecting respective periods of time of exposure).

- For mesothelioma the position is slightly different. Scientifically speaking, the injury could have been potentially caused by single exposure or indeed by a single fibre. However because science cannot say for certain where specifically that fibre came from, so as to avoid the situation where all mesothelioma claims fail, the law developed an exceptional lesser test for liability in the case of *Fairchild v Glenhaven Funeral Service*. The effect is that a party is liable if they have exposed the claimant to a material risk of injury. The situation has been slightly readdressed in favour of defendants as a result of the *Barker v Corus* case in which it was held that a defendant's liability ought to be in proportion to the contribution that he has made to the risk of the harm occurring. The practical effect for claimants is that mesothelioma claims will only succeed against a given defendant to the extent of their exposure. However, following the introduction of the Compensation Act 2006, any party so liable is liable jointly and severally. This means that full damages can be claimed by a claimant against any defendant albeit those liable defendants can then consider contribution claims against other potential defendants. The result is that if you have been responsible for any significant degree of exposure at all then it can be very difficult to avoid a finding of negligence.
- A 'fast track system' including standard court directions exists to deal with these matters expeditiously. In the Queen's Bench Division 'Fast Track' system at the High Court in London, cases are dealt with by dedicated Masters. There is a high threshold for defendants to overcome on liability before a liability trial is allowed.
- With an increase in the number of asbestos claims, we are likely to see an increase in group litigation and litigation financing arrangements, such as conditional fees and after the event insurance. Additionally, it is not only front line claimants who are making claims but since cases such as *Maguire v Harland & Wolff plc* and *Others* the net has been widened to include co-workers and family members of employees exposed to asbestos.

- Companies contemplating the prospect of taking on liabilities of other companies will therefore need to examine whether there is any prospect that the target company has had any interaction, even slight, with asbestos.

For more information on this subject, please contact **Simon Stuttford**, Solicitor-Advocate (civil) on +44 0117-307-6924, or e-mail simon.stuttford@burgess-salmon.com

Ground-breaking climate change case reinstated

- In 2004 8 US States, the City of New York and 3 land trusts brought a civil case against 5 large US power companies in the District Court in Manhattan alleging that they were creating a public nuisance by their emissions. The Plaintiffs sought an injunction from the Court to limit the power companies' emissions of greenhouse gases. The case was dismissed in September 2005 by the District Court judge on the basis that decisions on limits to be placed on emissions was a political matter and should not be dealt with by the courts. On 21 September 2009 the US Court of Appeals overturned that decision and remanded the case back to the District Court Judge for further proceedings.
- The importance of the case to organisations which can be said to contribute significantly to climate change can perhaps be best summarised by a quotation from the lawyer representing the plaintiffs who said "Global Warming polluters everywhere: you are on notice that you are committing a tort and we will sue you".
- We have written various articles and briefings on the subject of Climate Change Litigation and the possibility of it in the UK which are available on request.

EU Commission takes UK to court over sewer overflows

- At the beginning of October the European Commission announced that it was taking the UK to the European Court of Justice (ECJ) on the grounds that current waste water collection and treatment systems in London and Whitburn, Sunderland are inadequate and fail to comply with the 1991 EU Urban Waste Water Treatment Directive.

- Sewage spills from combined sewer overflows (CSOs) are nothing new, however, this time the Commission has taken action after becoming concerned that untreated waste water is spilling into the Thames and North Sea in excessive quantities and more frequently than current EU guidelines permit. The Commission is also concerned that treatment capacity for the waste waters collected in London is in need of improvement.
- The heavy summer rainstorms of 2009 led to repeated spills from CSOs, the worst of which saw over 20,000 tonnes of sewage flowing into the river Thames from Thames Water's Mogden sewage treatment works in Isleworth. In Whitburn the rain overloaded the current system to such an extent that manhole covers were lifted causing untreated sewage to run across the promenade, beach and into the sea. London's ageing Victorian sewers have long been the source of controversy, with discharges occurring after as little as 2mm of rain and as frequently as once a week. The ambitious 'Tideway Tunnels' solution, which sees 2 tunnels dug deep under London at an estimated cost of nearly £2 billion, is an attempt to solve the problem.
- The 1991 Directive was implemented in the UK by the Urban Waste Water Treatment Regulations 1994 (as amended). The Directive required member states to put in place adequate waste water collection systems and treatment facilities for large towns and cities by the end of 2000. Waste water collected is required to undergo treatment before being released. The Directive does authorise the spillage of waste water in certain situations such as unusually high rainfall, but the Commission maintains that the spills in London and Whitburn were excessive and go beyond what is permitted.
- DEFRA has declined to comment on the case but maintains that the UK has invested heavily in improving CSO's since the Directive came into force. Despite this the proceedings are likely to result in increased pressure on water companies to invest in water collection and treatment infrastructure with a corresponding rise in customer bills.

For questions about environmental litigation issues, please contact **Michael Barlow** on +44(0)117 902 7708, or michael.barlow@burges-salmon.com

BIODIVERSITY

IUCN report on species facing extinction

- The International Union for Conservation for Nature (IUCN) recently released the latest update to their Red List of Threatened Species, the world's most comprehensive information source on the global conservation status of plant and animal species with 47,677 species from around the world assessed. 17,291 out of 47,677 species assessed are threatened with extinction. Although the overall percentage of threatened species has reduced to 36% this year (from 38% in 2008), this is down to the fact that more species have been assessed in 2009. Habitat loss due to slash and burn farming, logging, hunting, land development and the effects of climate change have all contributed to placing a number of species at risk. The IUCN warns that "the scientific evidence of a serious extinction crisis is mounting".

LICENSING AND GAMBLING

- The Winter issue of the Licensing & Gambling briefing, 'After Hours' is now available, and contains articles on promotional lotteries, the new minor variation procedure and the reclassification of table-dancing clubs from a planning perspective. If you would like a copy, please contact **Chris Pritchett** on +44(0)117 902 6684 or email chris.pritchett@burges-salmon.com.
- The team are also organising a seminar in co-operation with the Institute of Licensing covering the management of Outdoor Events, from both a legal and practical perspective. This conference will be held over 2 days at Burges Salmon's Bristol office on 21/22 January 2010, and also in London on 18/19 January 2010, and is aimed at landowners, venue managers and promoters who are interested in all aspects of event management, ranging from noise nuisance, crowd safety, contractual arrangements and health & safety requirements. To register your interest, please contact **Joanne McPherson** on +44 (0)117 902 7257 or joanne.mcpherson@burges-salmon.com.

If you would like to know more on any of the areas covered in this briefing, please contact one of the following :



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Disclaimer: This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

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