

Environment and Climate Change

Newsletter

Global

BAKER & MCKENZIE

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In order to keep our clients informed regarding relevant environmental issues of international concern, Baker & McKenzie's Global Environmental Practice Group is continuing its Global Environmental Newsletter. Members of our global team have contributed to this newsletter, focusing on recent environmental legislative and regulatory changes implemented in their respective regions.

We encourage you to review the articles below and let us know if you have any questions.

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Asia Pacific

Australia

Carbon Pollution Reduction Scheme White Paper

On 15 December 2008, the Australian Government released a White Paper setting out the final design of the Carbon Pollution Reduction Scheme (an emissions trading scheme), including Australia's medium term target range for national emissions.

The Scheme will commence on 1 July 2010. The goal is to reduce Australia's emissions by 2020 to between 85% and 95% of 2000 levels (a 5-15% reduction). Along the way, Australia will meet its Kyoto Protocol target. Australia's long-term emission reduction goal remains unchanged: a 60% reduction from 2000 levels.

While many of the basic features of the proposed emissions trading scheme are unchanged from the Green Paper released in July this year, the White Paper provides more details on several key issues. The coverage of the Scheme is extensive and the majority of permits will be auctioned. However, there will be increased assistance provided to emissions-intensive trade-exposed industries and the electricity sector, as well as households.

It is also important to recognise that the White Paper will be supplemented by other measures such as the mandatory renewable energy measure.

Scheme Coverage

The following sectors will be covered from Scheme commencement:

- stationary energy;
- transport;
- fugitive emissions;
- industrial processes;
- synthetic greenhouse gases; and
- waste.

Reforestation is to be included in the Scheme on a voluntary opt-in basis from Scheme commencement. Only domestic emissions sources and sinks that are recognised in Australia's Kyoto Protocol accounts will be eligible for inclusion in the Scheme.

The following emissions sources will not be included in the Scheme at commencement:

- deforestation;
- agriculture (to be reconsidered in 2013 with possible inclusion from 2015);
- emissions from landfill waste sites that closed prior to 30 June 2008, and (until 2018) emissions from waste deposited prior to 1 January 2009;

- combustion of biofuels; and
- combustion of biomass.

The Government leaves open the possibility that avoided deforestation may provide a source of offsets for the Scheme, although there appears to be more focus in the White Paper on the introduction of alternative incentive-based mechanisms to reduce emissions from this activity. If avoided deforestation projects are not ultimately eligible to generate offsets, there may still be potential for such projects to earn emission reduction credits in the voluntary market.

The selected coverage, combined with the proposed Scheme liability threshold of 25ktCO₂-e, means that of Australia's 7.6 million registered businesses, approximately 1,000 companies will have mandatory obligations under the Scheme. It is expected that a number of additional businesses (in the forestry sector) are likely to opt-in to participate in the Scheme.

Targets and Trajectories

The target range for Australia-wide emissions reductions to be achieved by 2020 is between 5% and 15% below 2000 levels. The 5% boundary represents Australia's minimum commitment to emissions reductions irrespective of the actions of other countries. The 15% boundary represents the extent to which Australia will accept tighter targets in the context of "a global agreement under which all major economies commit to substantially restrain emissions and advanced economies take on reductions comparable to Australia". The Government has commented in briefings on the White Paper that a 15% target does not require developing countries to take on binding targets. However, developing countries would need to reduce their growth rate in emissions as against business as usual.

A five year indicative trajectory for Australia-wide emissions reductions will be set commencing at the beginning of the Scheme and will be extended by one year, every year, from 2010, so that the trajectory for the current year and four future years are always known.

The first indicative national emissions trajectory will be:

- In 2010-11, 109% of 2000 levels
- In 2011-12, 108% of 2000 levels
- In 2012-13, 107% of 2000 levels

The Government has stated that the trajectory will start "soft" and will become steeper in later years.

The Government has maintained its long term target to reduce total greenhouse emissions by 60% below 2000 levels by 2050.

If a comprehensive global agreement emerges over time involving "emission commitments by both developed and developing countries that are consistent with long-term stabilisation of atmospheric concentrations of greenhouse gases at 450ppm CO₂ or lower" then Australia would establish post-2020 targets to ensure that it makes its full contribution to a more ambitious global agreement.

Assistance to Emissions-Intensive Trade-Exposed Industries (EITE)

EITE assistance is provided with the dual purpose of reducing carbon leakage and providing a measure of transitional assistance. The Government has decided to provide the same assistance to both new and existing entities that conduct a given activity on the same basis. Providing assistance on the same basis means that less efficient producers will not be rewarded relative to more efficient producers of the same product.

Assistance will be provided to EITE industries with up front (ex-ante) free allocation of permits at the beginning of each compliance period contingent on continuing production.

The proposed allocation is based on each entity's level of production in the previous year (a per unit of production basis) to take into account expansion and contraction of EITE activities. This prevents windfall gains flowing to an entity that reduces production in a given year.

Assistance will be reduced by 1.3% per year so that the EITE sector shares the task of meeting the national commitment to reduce emissions. The EITE assistance program will be reviewed at the five year Scheme review or at an earlier date at the request of the Minister. Five years' notice will be provided of changes to the program unless required for compliance with Australia's international trade obligations.

Eligibility for EITE assistance will be determined using industry average estimates of emissions intensity. The Government has decided that for the purposes of determining eligibility, there will be two metrics used, a revenue-based or value add method as a measure of carbon intensity. The activity must also be demonstrated to be trade-exposed, i.e., having a trade share greater than 10% in past years or a demonstrated lack of capacity to pass through costs due to the potential for international competition.

There are two assistance rates — 90% and 60% — with the most emissions-intensive activities, over 2000t CO₂/\$m revenue (likely to include aluminium smelters, cement clinker production, silicon production and integrated iron and steel manufacturing), receiving 90% of their required permits for free and those with an emissions intensity above 1000t CO₂/\$m revenue (likely to include alumina refining; petroleum refining; and LNG production) receiving 60%.

Assistance to Strongly Affected Industry

Assistance to coal-fired electricity generators, who will be strongly affected by the Scheme but will not be eligible for EITE assistance, will be provided in the form of free permits through an Electricity Sector Adjustment Scheme (ESAS).

Under the ESAS, the Government will allocate \$3.9 billion of permits over five years based on a \$25/t carbon price. This may equate to approximately 10% of permits.

The provision of direct assistance will be conditional on the recipient remaining registered with the relevant market operator, with the same actual or planned capacity as at 3 June 2007, unless the relevant market operator assesses that there are likely to be adequate energy reserves in the system to allow the reduction in capacity without breaching the power system reliability standards.

Assistance to workers and regions will be delivered through a \$2.15 billion Climate Change Action Fund. Assistance for the development and deployment of carbon capture and storage technologies will be delivered through existing programs.

Price Cap

The Scheme will have a transitional price cap for the first five years commencing at \$40/t and rising in real terms by 5% per year. The use of a price cap is likely to prevent Australia from linking to other Kyoto Schemes. However, despite this the Government considers it prudent to have some form of price cap in order to avoid extreme prices, at least initially while uncertainty is highest in the Scheme.

The price cap will be in the form of an unlimited store of additional permits at the fixed price. If the price cap is reached the Australian Government will purchase permits to ensure that its Kyoto obligations are met. Significantly this exposes the Government to purchasing AAUs, CERs, or ERUs on the international market and to potential price volatility.

Further Information

If you would like a copy of our more detailed client alert on the Carbon Pollution Reduction Scheme, please contact Marisa Chiarella at marisa.chiarella@bakernet.com. For any other questions, please contact:

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Auctioning

The Government reiterated its desire to move towards 100% auctioning as the scheme matures. At commencement between 65% and 70% of permits will be auctioned, with the rest being delivered via EITE or ESAS assistance. The auctions are to be held monthly using an ascending clock method. The White Paper introduces the possibility of deferred payment for permits purchased at auctions in order to better suit the cash flow arrangements of companies.

International Credits and Linking with Other Schemes

One of the major surprises in the White Paper was the removal of any restriction on the number of eligible international credits that can be used for compliance purposes in the scheme. Liable entities can use Certified Emission Reductions (CERs), Emission Reduction Units (ERUs) and Removal Units (RMUs) for compliance subject to certain qualitative restrictions.

No other international non-Kyoto units will be accepted on commencement. This position will be reviewed in 2012-2013.

In the initial years of the Scheme, export of carbon pollution permits will not be allowed. A minimum of five years notice will be given on a decision to allow the sale and transfer of carbon pollution permits, except where an independent review finds that establishing a bilateral link (most likely with New Zealand) will not have a significant impact on the permit price in the Scheme, and the responsible minister decides to waive or shorten the notice period.

As discussed above, the imposition of a price cap is likely to prevent Australia from linking with other Kyoto-based schemes for the first five years.

Changes to Law on Contaminated Land in New South Wales

There have been recent important changes to laws on contaminated land in New South Wales, Australia. The *Contaminated Land Management Amendment Act 2008* (NSW) (the **Amending Act**) received assent on 10 December 2008. The Amending Act makes significant amendments to the *Contaminated Land Management Act 1997* (NSW) (**CLM Act**) and will result in changes to the management of environmental

risk for owners and occupiers of, and holders of security over, contaminated land in NSW.

Principal changes

These are:

- a new (and perhaps easier) test to satisfy before the Environment Protection Authority of NSW (EPA) can require investigation and remediation of land;
- greater power for the EPA to require further investigation or remediation of potentially contaminated sites;
- extending the duty to report contamination to contamination of which “the person ought reasonably to have been aware”;
- removing one of the defences to the criminal charge that a director or manager of a company that breaches the CLM Act has also breached the CLM Act; and
- clarifying that more than one person may be responsible for contamination, and that liability under the CLM Act cannot be passed from one party to another under a contract.

Orders to undertake preliminary investigations

Under the Amending Act the EPA can require a range of people to carry out a preliminary investigation of any specified land – to investigate whether the land is contaminated by specified substances, and the nature and extent of any such contamination (s10). The EPA can give a preliminary investigation order to any one or more of: the person suspected of being responsible for the contamination, the owner of the land, the notional owner of the land (which may include an occupier), a person who previously carried on activities on the land that generated or consumed the same substance as the contaminating substance, and a public authority.

Previously the EPA could only order investigations if it had “reasonable grounds to believe that the land is contaminated with a substance in such a way as to present a significant risk of harm” (old s15). The new provision gives the EPA much greater power to order preliminary investigations.

When can land be declared contaminated?

Under the CLM Act, the EPA was only able to make orders on remediation of contaminated land if the land was found to be contaminated so as to present a “significant risk of harm” to human health or the environment (old s21).

The test set out in the Amending Act appears to be easier to satisfy (and arguably gives the EPA greater discretion). Under new s11(1), the EPA may declare land to be “significantly contaminated land” if the EPA has reason to believe that the land is contaminated and that the contamination is significant enough to warrant regulation under the new Division 2 of the CLM Act. However, before making a contamination declaration the EPA must take into account some of the same factors that it was previously required to consider when assessing whether land was contaminated so as to present a significant risk of harm.

Regulation of contaminated land

Once the EPA has declared land to be “significantly contaminated land”, it can issue a “management order” to one or more “appropriate persons” (replacing the CLM Act concept of “remediation orders”). The management order may require the person to take any of a wide range of actions, including investigating, monitoring, reporting and remediating contamination, erecting barriers, treating, storing or removing any materials, or vacating the land (s16). This list of actions is broader than the actions which the EPA could previously require under a remediation order.

As in the CLM Act, an “appropriate person” can be, in order of priority:

- the person responsible for contamination;
- an owner of the land (whether or not responsible for the contamination); or
- a notional owner of the land (whether or not responsible for the contamination) (s13).

The Amending Act specifies ways in which a person may be responsible for contamination, including that the person is the owner or occupier of the land and the person ought reasonably to have known that contamination of the land would occur and the person failed to take reasonable steps to prevent it (s6).

Constructive knowledge of contamination

The Amending Act extends reporting requirements under the CLM Act to include people who have constructive knowledge of contamination. A person who contaminates land, or who owns land which has been contaminated (even if the contamination occurred before they bought the land) is required to notify the EPA as soon as practicable after the person becomes aware of the contamination (s60(4)). A person is taken to be aware of the contamination if the person “ought reasonably to have been aware” of the contamination (s60(5)). In determining this, these factors are to be taken into account (s60(9)):

- the person’s abilities, including his or her experience, qualifications and training;
- whether the person could reasonably have sought advice that would have made the person aware of the contamination; and
- the circumstances of the contamination.

This new requirement means that large landowners with expert advisors will be expected to be aware of, and report, any contamination of their land. There are increased penalties for failing to report contamination – for companies, \$165,000 initially plus \$77,000 each day the offence continues, or for individuals, \$77,000 initially plus \$33,000 per day.

Breaches by directors or managers

If a company contravenes the CLM Act, each company director and each person concerned in the management of the company is taken to have contravened the same provision, unless that person:

- was not in a position to influence the conduct of the company in relation to the contravention; or

- was in such a position, but used all due diligence to prevent the contravention by the company (s98).

The Amending Act removes a third defence – that the company contravened the CLM Act without the actual or imputed knowledge of the person. This change brings the provision into line with the equivalent provision of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) – and increases the risk that directors or managers will be found liable for their company’s breaches of the CLM Act.

Other changes

The Amending Act also clarifies, under s6, that a person who is responsible under statute for contamination continues to be responsible regardless of the provisions of any contract or other arrangement that purports to pass liability to someone else.

Other important amendments in the Amending Act include:

- creating an offence of providing false or misleading information in compliance or purported compliance with the CLM Act (s103);
- new regulation-making powers for pollution “offset” programs;
- clarifying that the EPA can approve a voluntary proposal for managing contaminated land, subject to conditions;
- ensuring the EPA can issue notices under the POEO Act in connection with the regulation of a contaminated site under the CLM Act; and
- enabling the EPA or a local authority to disclose information with regard to statutory site audits.

Next steps

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Some provisions of the Amending Act are already in force, and some will come into force on a day to be proclaimed (presumably in 2009).

The amendments increase the ability of the EPA to require investigation and remediation of potentially contaminated land, increase the level of knowledge land owners are assumed to have about their land, and increase the risk of officers being held personally responsible for their company’s breaches.

So if your company has an interest in land in NSW, it may be timely to consider whether you have the required level of knowledge about the potential for contamination on your company’s land, whether you need to notify the EPA of any contamination, or whether you need to take further steps to prevent contamination occurring.

Article by Lily Mitchell and Megan Flynn from the Sydney Office.

China

China's Circular Economy Promotion Law

Overview

Issued on August 29, 2008, *The Circular Economy Promotion Law* (循环经济促进法) (the “**Circular Economy Law**”), became effective as of January 1, 2009. This is China's first national law that sets forth a comprehensive legal framework for a national sustainable development strategy (otherwise referred to as “recycling economy”) with a strong focus on resource conservation based on- Recycling, Reduction, Reuse, Reformulation, and Remanufacturing. The *Circular Economy Law* also governs quality and labeling of refurbished/remanufactured products.

Specific and unique local conditions as well as those technologies that are technically feasible and economically practical are considered in formulating China's “recycling economy”. In the future, a “National Recycling Economy Development Plan” will be drafted in addition to a “*Compulsory Recycling Product and Packaging Catalogue*” and a “*Catalogue of Encouraged, Restricted and Eliminated Techniques, Equipment, Materials and Products*”.

The “*Circular Economy Law*” itself recycles and reuses various clauses from China's existing Laws including: *Prevention and Control of Water Pollution Law, Solid Waste Law, Mining Law, Energy Conservation Law, Electronic Information Product Pollution Prevention and Control Regulation* (referred to as China RoHS) (电子信息产品污染控制管理办法), *Cleaner Production Promotion Law and Environmental Impact Assessment Law*.

Implementation and Oversight

The implementation and oversight of the *Circular Economy Law* is delegated to the “Comprehensive Department of Circulation Economy Development” (under the State Council). Several other government bodies are involved including: Ministry of Environmental Protection, Ministry of Land and Resources, the State Administration of Quality Supervision Inspection and Quarantine (the “**SAQSIQ**”), the Ministry of Water Resources and others. Government bodies on the central, provincial, and local levels are required to:

- Develop local industrial, social, economic, environmental policies, standards, statistics and targets for recycling, energy-savings, and waste-reutilization;
- Establish energy efficiency labeling of electronic products;
- Establish rational industrial zoning and clustering of synergy industries;
- Establish centralized recycling outlets and support industrial waste exchange programs; and
- Provide preference for purchasing recycled, energy efficient, and environmentally friendly products.

Compliance

The new law applies to the government, private entities, and individuals. Individuals and trade associations are encouraged to report to the government those entities and institutions that waste resources and/or damage the environment.

In general, companies must use advanced water-saving technologies, processes, and equipment in the development and implementation of water-saving programs to enhance water management, including methods for compiling accurate water consumption statistics. Alterations, expansion and new construction projects are required to use water-saving measures and if feasible to utilize solar, wind, geothermal or other alternative energies. Industrial enterprises are to use heat recovery technologies when feasible and to sell excess recovered heat to the local power grids.

Manufactures of products including packaging, covered by the *Compulsory Recycling Product and Packaging Catalogue*, will be responsible for recycling of their discarded products or packaging. If recycling is not feasible, discarded products need to be converted into a material that does not affect the environment. Additional requirements under the *Circular Economy Law* apply to several specific industries listed below. For example, electronic manufactures are required to design products so recycling, dismantling or disposal of the products does not cause environmental pollution.

Overall, compliance under the *Circular Economy Law* is through economic incentives (i.e., preferential tax and investment policies) rather than using penalties or other administrative measures for non-compliance. Still, non-compliance penalties can be up to 1 million RMB, in addition to administrative actions.

Industry/Sectors Covered

As with other new environmental regulations in China, the *Circular Economy Law* also places more focus and scrutiny on the “dirty seven” industries- iron/steel and non-ferrous metal production facilities, power generation, petroleum processing, paper making, chemical, construction, printing and dyeing industries and other industries with high-energy consumption and pollution discharges.

Other sectors include:

- Electronic Manufactures
- Automotive
- Mining Operations
- Construction/Architectural Design Companies
- Agricultural
- Service Industries
- Fast Moving Consumer Goods (FMCG)

Future Implications

It is likely that various other regulations will be drafted in 2009 to further implement and supplement the Circular Economy Law, including “*Regulation on Prevention and Control of Environmental Pollution Caused by Electronic Waste*” (China’s version of WEEE) and the “*Regulation on the Limitation of Excessive Packaging*”.

Some implementing regulations were released before the final version of the *Circular Economy Law* was passed, including the State Council’s ban on free thin film plastic

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bags, effective as of June 1, 2008. The ban was implemented for environmental and energy conservation reasons. Other regulations may follow including those addressing the recycling and remanufacturing of automobile components including tires. Manufacturing operations and other industries that are regulated under the *Circular Economy Law* will need to pay close attention to forth-coming implementing regulations and standards.

Article by Dayton Carpenter from the Shanghai Office.

Revised Noise Standard for Industrial Enterprises

The Ministry of Environmental Protection (“MEP”) and the State Administration of Quality Supervision Inspection and Quarantine (“SAQSIQ”) jointly issued a new *Noise Standard for Industrial Enterprises (GB 12348-2008)* (the “*Industrial Noise Standard*”) on August 19, 2008, effective as of October 1, 2008. The new *Industrial Noise Standard* combines and replaces two former industrial noise standards “*Measurements Methods for Noise Pollution for Industrial Enterprises Boundaries*”, (GB-12349-90) and “*Noise Pollution Standard for Industrial Enterprises’ Boundary*”, (GB 12348-90). The *Industrial Noise Standards* are used in the implementation of China’s *Law on the Prevention and Control of Pollution from Environmental Noise* (the “*Noise Law*”), issued by the National People’s Congress on October, 29 1996 and effective March 1, 1997.

New Noise Standards vs. Old Noise Standards

For the most part, under the new *GB 12348-2008* standard, the actual noise limits have remained unchanged for sound zones with the exception of the addition of a new sound zone category zero (0), that governs those areas where rehabilitation and convalescent centers are located. Under the *GB 12348-2008*, standard industrial facilities are not permitted to exceed the noise limits of specific sound zone where the facility is located. (see table below) China’s permissible noise limits generally mirror those in the US and other advanced jurisdictions with an important distinction, under China’s standards noise levels are measured at the source’s property boundary, rather than on the property where the noise complaint originated.

Noise Boundary Noise Emission Limits in dB (A).

Sound Zone Classification		Day time Limit	Night time Limit
Class 0:	Rehabilitation, convalescent, and other quiet areas with special needs	50	40
Class 1:	Residential, medical and health, education, scientific research, office areas	55	45
Class 2:	Business districts, mixed areas of residential, commercial, and industrial operations	60	50
Class 3:	Industrial and logistics operation areas	65	55
Class 4 a/b:	Areas adjacent to roadways and rail lines	70	55
4a:	Highways and secondary roads, urban rail transit, inland waterways	70	55
4b:	Rail lines on both sides of the region	70	60

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Indoor noise limits have also been incorporated into the new standard to protect sensitive buildings (i.e., residential) within close proximity to industrial facilities. Previously no standards existed for indoor noise limits. Some of the technical standards relating to the measurement of noise levels have been clarified or modified, including adjustments for background noises. Night-time¹ noise limit exceedences for both frequent² and sporadic³ noise discharges have been established providing some clarity to industrial facilities with intermittent noise discharges with adjacent residential units nearby. The *Noise Law* and subsequent noise standards in the past failed to define sporadic noises.

Non-Compliance

Under China's *Noise Law* an entity that exceeds noise limits **and** "impairs the living environment" of the surrounding area is deemed to be in non-compliance. In general, the local Environmental Protection Bureaus ("EPBs") and the MEPs interpret "impairs the living environment" as a noise complaint being lodged by an adjacent property. Local EPBs can impose noise discharge fees on violators and can require mitigative measures to be implemented to bring noise discharges into compliance. Facilities failing to take corrective actions can be ordered shut down until compliance measures are taken, although under current practices this is unlikely.

¹ Night-time is defined as 10pm-6am

² Frequent noise under GB 12348-2008 sec. 3.7, defined as a regularly occurring of relatively short duration such as releasing emission/pressured gases, loading operations.

³ Sporadic noise under GB 12348-2008 sec. 3.8 defined an infrequently noise of short duration such as a warning alarm/horns.

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Summary

Roughly seventy percent of China's environmental complaints are related to noise exceedences. Facilities located nearby residential or other sensitive receptors nearby should consider conducting preliminary in-house noise measurements (using the *GB 12348-2008* standard for reference) on property boundaries to determine areas of potential non-compliance and any associated legal risks. Companies with operations with potential noise pollution issues may want to consider inquiry with their EPB to determine local interpretations and enforcement practices.

Article by Dayton Carpenter from the Shanghai Office.

Tax Incentives for Environmental Protection Projects

When the *Foreign Enterprise Income Tax Law* and *Foreign Enterprise Income Tax Implementing Rules* were abolished on January 1, 2008, tax incentives applicable to foreign investment enterprises ("FIEs") were replaced by the *PRC Enterprise Income Tax Law* and the *Enterprise Income Tax Implementing Rules*, effective as of January 1, 2008. The new tax regime provides a "3+3 tax holiday" policy for enterprises engaging in environmental protection projects and tax credits for enterprises that purchase and put to use specialized environmental equipment.

"3+3 Tax Holiday"

An enterprise engaging in projects that relate to environmental protection, energy efficiency, or water conservation as prescribed in the "*PRC Enterprise Income Tax Law*" and the "*Enterprise Income Tax Implementing Rules*" are eligible for a three-year tax exemption followed by an additional tax reduction at 50% rate ("3+3 tax holiday"). The tax exemption starts from the first year that income is generating. If an enterprise eligible for the 3+3 tax holiday transfers the project during the tax holiday, the transferee may continue to use the remaining period of tax holiday. For those projects transferred after the expiry of tax holiday, the transferee will not receive a tax reduction or exemption. Enterprises with more than one project are required to separate incomes and allocate reasonable expenses for those environmental projects that qualify for the tax holiday.

Tax Credit for Use of Specialized Environmental Equipment (Circular Cai Shui [2008] No. 48)

Enterprises that purchase and use specialized equipment listed in the "*Catalogue of Energy and Water Conservation Equipment* (2008 Edition) ("**2008 EWCE Catalogue**") and the *Catalogue of Environmental Protection Equipment* (2008 Edition) ("**2008 EPE Catalogue**") issued by the Ministry of Finance and the State Administration of Taxation, the National Development and Reform Commission" (*Circular Cai Shui [2008] No. 115*), qualify for 10% tax credit based on total and actual costs of the environmental equipment. Equipment purchases can be made through bank loans but the leasing of equipment will not qualify for the tax credit. The tax credit can be carried over for five years.

Article by Dayton Carpenter from the Shanghai Office.

Administrative Detention for Water Pollution Violations

China's National Peoples Congress ("NPC") Law Committee issued an opinion on May 23, 2008 on the applicability of administrative detention for entities illegally discharging to waterbodies. The Law Committee's opinion is based on China's

Public Security Administration Punishment Law and the *Water Pollution Prevention Control Law*. In the NPC's opinion, executives directly in charge, or other responsible management of those facilities that illegally discharge radioactive, toxic, or hazardous substances into a water body, can be held in administrative detention for a maximum of 15 days.

The opinion clarifies the use of administrative detention as immediate form of punishment for those causing water pollution. Although the opinion fails to clearly state the magnitude of the water pollution caused which triggers administrative detention, since the NPC's opinion was issued, several owners of facilities responsible for major water pollution discharges have been placed under administrative detention, including the owner of a facility discharging cadmium waste into a nearby surface water.

Article by Dayton Carpenter from the Shanghai Office.

China's Buildings Going Green

With over two billion square meters of floor space being built in China annually, the Chinese government has been intensifying efforts to adopt policies and proactive measures to promote energy efficient buildings in China. In this article, we will briefly introduce three main aspects of China's current green building regime: 1) energy saving requirements for a range of residential and commercial buildings, 2) green building rating system, and 3) environmental impact assessment requirements.

Energy Saving Requirements for Buildings

Over the past two decades, China has been developing regulations and introducing new technical standards to promote energy saving buildings. A seminal legal development in this regulatory process is the promulgation of the *Regulations on Energy Conservation for Civilian Buildings* ("Conservation Regulations"), which came into force on October 1, 2008. Below are highlights of some of the regulatory approaches adopted by the Conservation Regulations to enforce energy saving requirements for a broad range of residential and commercial buildings:

- Construction permits are only issued to buildings in compliance with statutory energy conservation standards. If the planning layout of a building fails to comply with the building energy efficiency standards, the planning authority will not issue the Construction Project Planning Permit, and the construction authority will not issue the Construction Commencement Permit. No construction work may be commenced without obtaining these two permits.
- All parties involved in a construction, that is, the project owner, the designer, the contractor and the construction supervisor are required to comply with the mandatory energy conservation standards, otherwise, they could be subject to sanctions such as fines, suspension of business, or degradation or revocation of their professional qualification(s). They could also be sued for losses caused to home buyers, and others. The law prohibits project owners from instructing a contractor or designer to deviate from the mandatory energy saving standards, or using construction materials that do not meet the mandatory standards. A project owner may be liable for a fine of 2% - 4% of the total construction contract price if the project owner accepts a building that fails to comply with the mandatory energy saving standards.
- The energy saving requirements also extend to the sale and maintenance of the buildings. For example, a developer must provide home buyers with information

relating to the energy consumption levels of the properties which they have sold. If the developer fails to provide such information to the home buyer or if the information provided is incorrect, the developer may be subject to an administrative penalty of up to 2% of the sale price of the property. The home buyer may also make claims for compensation for any loss suffered as a result of the developer's non-compliance. In regards to the maintenance, the contractor shall be responsible for the maintenance of thermal insulation work, and shall be responsible for rectifying any defects during the warranty period of normally five years.

To strictly implement the energy saving standards imposed by the Conservation Regulations, the Ministry of Housing and Urban and Rural Development ("Ministry of Housing"), together with three other governmental authorities, circulated a notice on December 4, 2008 requiring local governments to pass appropriate regulations to implement the Conservation Regulations locally. This notice also stipulates that the local housing authorities must not grant construction or planning permits to any project which does not comply with such energy saving standards.

Green Building Rating System

The Chinese government introduced a green building rating system in October 2007. The green building rating system is a voluntary national rating system implemented to recognize developers who go beyond the statutory minimum energy saving standards to develop sustainable buildings.

The green building rating system issues two types of certificates. Construction projects in the design or construction phase may be issued a "Green Building Design Rating Certificate", which is valid for two years. Subject to meeting relevant requirements, a completed building may be issued a "Green Building Rating Certificate" after its first year of use. Such a certificate is valid for three years.

Both types of certificates have three grades with the highest grade being the Grade Three level. Grade Three Certificates are issued by the Ministry of Housing, while Grade One and Grade Two Certificates are issued by local construction bureaus. In July 2008, the Ministry of Housing announced six green buildings that have been honored under this rating system.

Before the green building rating system was established, some developers marketed and labeled their properties as a "green building" with reference to certain international standards. Now that the Ministry of Housing's rating system has come into effect, no building may be marketed or labeled as a "green building" unless it has been issued an official green building certificate.

Environmental Impact Assessment in China

Environmental impact assessment ("EIA") is a process used to identify, predict and assess a proposed project's impact on the environment, and an EIA suggests methods to control or prevent pollution. The EIA regime is a part of the China *Environmental Impact Assessment Law* ("EIA Law"), and applies to new construction projects, renovations and expansions of existing facilities, and government development plans.

The EIA Law classifies construction projects into three categories, namely, "major environmental impact", "moderate environmental impact", or "minor environmental impact", and each category has different EIA reporting requirements. Standards for classifying the potential environmental impact of a particular construction project are contained in a catalogue called the "Classification of Construction Projects for

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Environmental Protection Purpose”. This catalogue was recently updated and the revisions came into effect on October 1, 2008.

China is fully aware of the importance and urgency of addressing climate change issues, and is proactively adopting policies and proactive measures to promote its green building legal regime. This is a rapidly evolving regime that investors and users of Chinese buildings should keep a close eye on.

Article by Rico Chan, Vivian Ho and Serena Zheng from the Hong Kong Office.

Japan

RoHS & WEEE Update

Japan has not enacted European-style RoHS or WEEE laws, but manufacturers are confronted with a number of laws, regulations and standards for manufacturing, import, delivery and recycling of electric and electronic products.

In this client alert, we are introducing a few major laws and standards, namely the PSE Law (the law regulating manufacturing/import/delivery of electric appliances), Law for the Promotion of Effective Utilization of Resources (the law setting forth general framework for the 3 “Rs” – Reduce, Reuse, Recycle), the Home Appliance Recycling Law (the law setting forth recycling requirements for home appliances), JIS C 0950 (marking requirements for certain substances) and the JGPSSI standard (guidelines established by a voluntary chamber of private companies in the electrical/electronic device industry). The scope of covered products and responsible parties varies from law to law, depending on its purpose, and many details have not yet been clarified for all practical purposes.

In general, the Japanese importer is primarily responsible for compliance with these types of Japanese laws, but the importer will typically need information and other assistance (e.g., inspections, labeling) from the manufacturers in order to be able to comply. Of course, U.S.-based manufacturers that distribute through wholly-owned buy-sell subsidiaries have to ensure compliance by their Japanese subsidiaries.

Regulations on Manufacturing, Import and Delivery of Electric Products Under the PSE Law:

The purpose of the Electrical Appliance and Material Safety Law - *Denki Yohin Anzenho*, generally known as “PSE Law,” is to prevent hazards and disturbances resulting from electrical appliances. To accomplish this purpose, the PSE Law regulates the manufacture, import and sale of Electrical Appliances and Materials - *Denki Yohin* (“Electrical Appliance”).

What is the scope of Electrical Appliances that are regulated under the PSE Law?



In general, the PSE Law regulates Electrical Appliances which operate on alternate current (AC). The Electrical Appliances are classified into 2 categories: Specified Electrical Appliances (Category A – for a list, see www.meti.go.jp/english/policy/denan/procedure/02.htm), for which an additional product conformity inspection requirement applies, and other Electrical Appliances (Category B – see, www.meti.go.jp/english/policy/denan/procedure/03.htm), which are not subject to the inspection requirement.

Who owes obligations under the PSE Law?

The obligations under the PSE Law are imposed on companies engaged in manufacturing or importing electrical appliances in Japan. As for imported electrical appliances, Japanese importers are the ones who have the direct obligations. If a U.S.-based manufacturer distributes its products through Japanese importers, the manufacturer should coordinate with the importer(s) to make sure the products are sold in compliance with the PSE Law to avoid potential disruption to the supply chain by government action against the Japanese importers. Many non-Japanese manufacturers resist requests from their Japanese distributors to prepare the required filings, labels, etc., for Category B products, especially when they deal with multiple distributors, because the compliance work is perceived to be too onerous and the distributors are primarily obligated to comply. But, at least with respect to the conformity inspection that is required for Category A products, in practice, only the exporting manufacturer has the information and means to take on the inspection and prepare the necessary documents. Although the filing must be made in the name of the Japanese importer(s), the division of roles between the exporting manufacturer and the Japanese importer varies in practice. For example, it is not unusual for manufacturers to prepare some or all of the required documentation for Category A products and provide the drafts to the importers, which then just forward the documents in the distributor’s own name to the authorities. But, some larger Japanese distributors take a more active role and request only specific information from the manufacturers, to enable the distributors to make the required filings and apply the necessary labels. In any case, an importer and an exporter have to cooperate with each other to comply with the regulations.

What are the obligations under the PSE Law?

Japan-based manufacturers and importers of Electrical Appliances must submit “notifications of business” (*Jigyo Todokede*) to the Ministry of the Environment (METI). They must make sure that the products are in conformity with the standard (*Kijun Tekigo Kakunin*). For specified Electrical Appliances (Category A), the manufacturers or importers must further take a conformity inspection (*Tekigosei Kensa*) conducted by a third party registered inspection institution (*Touroku Kensa Kikan*) before distributing products in Japan. The manufacturers or importers must continue routine inspections (*Jishu Kensa*) and retain records for three years. The manufacturers or importers must attach PSE Marks, which are required for all Electrical Appliances sold in Japan, after completing the filings and inspections.

Specified Electrical Appliances (Category A)	Other Electrical Appliances (Category B)
	

For more information, see METI’s website concerning the PSE Law (www.meti.go.jp/english/policy/denan/procedure/index.htm) and JETRO’s website, which provides translations of relevant laws and ordinances (www.jetro.go.jp/en/reports/regulations.htm).

Law for the Promotion of Effective Utilization of Resources

The purpose of Law for the Promotion of Effective Utilization of Resources – *Shigen Yuko Riyo Sokushin Ho* (“Law for PEUR”) is to promote 3Rs (reduce, reuse, recycle) for the formation of a sustainable society.

What is the scope of products that are regulated under the Law for PEUR?

Cabinet orders currently designate 10 industries and 69 product categories including home appliances, personal computers to date where it is required to undertake 3R initiatives, and ministerial ordinances stipulate the details of self-organized/initiated actions that they should take. Manufacturers and importers in Japan must take the initiative and establish their own recycling systems, but they have a certain amount of leeway in terms of how the system is set up. The government will supervise and give instructions to companies on an ex-post basis.

Who owes obligations under the Law for PEUR and what are the obligations?

A Japan-based manufacturer or distributor is generally responsible for rationalizing the use of raw materials using recyclable resources and reusable parts, and for promoting the use of used products and by-products. Consumers are expected to use products in an environmentally friendly way and cooperate with the collection of recyclable products. National and local governments are responsible for financial measures and promotion. Further, as for Specified Resource Recycled Product (*Shitei Saishiganka Seihin*) which includes personal computers, Japan-based manufacturers/distributors have specific obligations to offer voluntary collection and recycling of used products. For more information, see METI’s website concerning 3Rs and the Law for the Promotion of Effective Utilization of Resources (<http://www.meti.go.jp/policy/recycle/main/english/index.html>; www.meti.go.jp/policy/recycle/main/english/law/promotion.html) and PC3R Promotion Center’s website (www.pc3r.jp/e/home/index.html).

Regulations on Recycling of Home Appliances:

The purpose of the Home Appliance Recycling Law (“HARL”) is to take measures to appropriately and smoothly implement the collection and recycling of home appliances by retailers, manufacturers and importers; to secure the appropriate disposal of waste and utilization of natural resources; and to contribute to the preservation of life environments and sound development of the national economy.

What is the scope of products that are regulated under the HARL?

The products regulated under the HARL are air conditioners, televisions (with Braun tube), refrigerators, freezers, and washing machines which are primarily used for household purposes.

Who owes obligations under the HARL and what are the obligations?

Manufacturers and importers, retailers, consumers and municipal offices in Japan have obligations under the HARL. Japan-based manufacturers and importers have an obligation to collect used home appliances which they have manufactured/imported and to appropriately arrange collection sites to ensure efficient recycling. Manufacturers/importers must recycle such collected used home appliances. Retailers must collect used home appliances upon request in certain cases. Consumers must cooperate in the recycling and pay necessary fees for transfer and

recycling. Municipal offices may collect used home appliances, and transfer them to manufacturers or independent bodies for recycling or recycle them on their own.

For more information, see METI's websites concerning Home Appliance Recycling:

(www.meti.go.jp/policy/recycle/main/english/law/home.html) and
(www.meti.go.jp/policy/recycle/main/data/pamphlet/pdf/handbook2008_eng.pdf).

Other Regulations and Standards:

JIS C 0950:

JIS C 0950 ("The marking for presence of specific chemical substances for electrical and electronic equipment") was enforced by Amendment Ordinance to Law for the Promotion of Effective Utilization of Resources in July 1, 2006. The products regulated under JIS C 0950 are personal computers, air conditioners, televisions, refrigerators, washing machines, microwave ovens, clothes driers. JIS C 0950 provides that manufacturers must attach specific labels if their regulated electrical and electronic products contain lead or lead compounds, mercury or mercury compounds, hexavalent chromium compounds, cadmium or cadmium compounds, polybromo-biphenyls, or polybromo-dephenyl ether.

This regulation is sometimes referred to as "Japanese RoHS," but this nickname is somewhat misleading. Unlike the European RoHS Directive, the Japanese ordinance does not restrict the use of substances per se. Rather it only requires representation of use of prescribed substances, and thereby tries to make the dissemination of such substances more transparent. And, unlike "China RoHS," the Japanese ordinance does not come with a formal plan to introduce substance bans as phase 2 after the ingredients of products have been determined and publicized. In a deliberation of a budget committee in the House of Representatives in 2004, a representative of the Ministry of the Environment (METI) commented that METI pays attention to regulations and movements in Europe, and based on the observation, it is engaged in discussions as to what is necessary for the preservation of environment in Japan; since then, however, the government does not seem to have publicized any further announcements indicating that substance bans are forthcoming.

Japan Green Procurement Survey Standardization Initiative (JGPSSI):

JGPSSI is a voluntary association of companies in the electric and electronic industry which establishes and develops Joint Industry Guidelines ("JIG") to standardize green procurement and promotes their application. A large number of major Japanese manufacturers of electrical and electronic devices (including, for example, Canon, Kyocera, Kenwood, Sharp, Sony, Toshiba, Nikon, IBM Japan, Victor, Hitachi, and Fujitsu) are members of JGPSSI. These major manufacturers require vendors and suppliers to follow JIG and this will likely cause JIG to become an established industry standard. For more information, see an English translation of the full text booklet of JIS C 0950 at www.webstore.jsa.or.jp/webstore/Com/FlowControl.jsp?lang=en&bunsoId=JIS+C+0950%3A2008&dantaiCd=JIS&status=1&pageNo=0 and also see JGPSSI's website at http://210.254.215.73/jeita_eps/green/greenTOP-eg.html.

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Emissions Trading - New Trade Initiatives

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Despite strong indications that Japan may miss its target for greenhouse gas (GHG) emissions reductions under the Kyoto Protocol, the Japanese government appears to be taking a soft and gradual approach to the regulation of emissions reductions and is still hesitating to implement compulsory measures to reduce emissions in the domestic market. Analysts have predicted that Japan will need to purchase approximately 587 million credits in order to meet its target for the 2008 to 2012 period. However, with the Japanese economy still in a fragile state, industry groups are opposed to any measures that may sacrifice or stunt economic growth. The Japan Business Federation (Keidanren) has opposed the introduction of a European Union-style cap and trade emissions trading system and has questioned both the fairness of allocation of emissions credits and the effectiveness or need for such a scheme.

The Japanese Ministry of Environment runs a voluntary emissions trading scheme (JVETS) that has been in place since 2005. At the time it was thought that the voluntary scheme would serve as a small-scale experiment that could be used to investigate the feasibility of a national emissions trading scheme. However, as participation is purely voluntary the scheme has attracted very few participants and it is questionable whether any significant results have been achieved. Keidanren has also introduced their own voluntary environmental action plan under which participating industry sectors have formulated plans for the reduction of CO₂ emissions, but these action plans merely set out voluntary goals for each sector and do not provide specific goals for individual entities. The Keidanren action plan makes no commitment to the government that targets will be met, but it has been incorporated into the Japanese government's formal action plan to achieve the target under the Kyoto Protocol and it is believed that Keidanren will observe its action plan.

It is a common practice of the Japanese government to implement new rules on a voluntary or small-scale basis in order to gain social exposure and understanding before making the rules compulsory. A related practice is to pass new laws that lack any sanctions, with sanctions being introduced after an appropriate introductory period. Observers are therefore keenly watching the voluntary emissions trading scheme and other government initiatives to discern whether a national emissions trading scheme or other compulsory measures may be introduced in the future. The recent launch of a trial emissions trading scheme (which will operate on a wider basis than JVETS) and other climate change initiatives certainly follow these trends, as further discussed below.

Trial emissions trading scheme

Coinciding with the G8 summit held in Japan in July 2008, the Japanese Cabinet adopted an Action Plan for Creating a Low-Carbon Society on July 29 2008. The Action Plan states that trial emissions trading should begin in the integrated domestic market from October 2008. An outline of the emissions trading system has also been published and applications from participants are now being solicited.

Under the new Action Plan, the government plans to introduce:

- a trial emissions trading scheme; and

- a domestic credit market.

Emissions credits produced under the Kyoto Protocol (Kyoto Credits) will be able to be used in the domestic market.

However, participation in the integrated domestic market is completely voluntary and for the time being there will be no penalties for any participant that fails to achieve its target reduction in GHG emissions. The only GHG regulated under the scheme so far is CO₂ of energetic origin.

With regard to the trial emissions trading scheme, there will be:

- target-holding participants, which will have a specific target to reduce GHG emissions (including companies covered by the Keidanren Voluntary Action Plan); and
- trading participants (trading houses, financial institutions and carbon brokers, among others) that intend only to trade emissions and that will not have their own emissions reduction target.

Target-holding participants can be an individual facility, a company or a group of companies. They can set their target for one or more years during the period from 2008 to 2012 and can select either a target for the total amount of emissions or a target for emissions per product unit. Each target year starts from April 1 and ends on March 31 of the following year. Target-holding participants can purchase or sell emission credits during the adjustment period starting from April 1 of the year following a relevant target year and ending on the retirement due date of mid-December of the same year.

Target-holding participants that have selected a target for total emissions may receive emissions allowances during the target year or after the end of the target year, at their option. Target-holding participants that opt to receive emission allowances during a target year can sell their emission allowances before the end of a relevant target year, but they must maintain at least 90% (commitment reserve) of the total emission allowances that have been allocated to them. If a target-holding participant elects to receive emission allowances after a relevant target year, they can receive emission allowances equivalent to the difference between their target amount and the amount of their actual emissions.

Target-holding participants that have opted for a target of emissions per product unit can receive emission allowances only after a relevant target year has ended. Under this scheme, banking and borrowing will be allowed for participants with multiple target years. In order to achieve the target, target-holding participants can use: (i) allowances purchased from other participants; (ii) domestic credits (as further explained below); and (iii) Kyoto Credits.

In the domestic credit scheme, which mirrors to some extent the Clean Development Mechanism (CDM) established under the Kyoto Protocol, large corporations will provide technology, funds or other assistance to medium or small companies for their emission reduction projects and large corporations will obtain domestic credits corresponding to the amount of emission reductions generated from such projects. Projects must be validated by accredited independent entities and registered by the Domestic Credit Accreditation Committee. The amount of emission reductions generated by registered projects must be verified by accredited independent entities and then the corresponding amount of domestic credits will be issued by the Domestic Credit Accreditation Committee. The processes of validation and

registration of projects and verification of emission reductions are relatively simple and similar to those for small-scale CDM projects.

The integrated domestic market for emissions trading is intended as a trial scheme and would be quite different from cap-and-trade emissions trading schemes such as the EU-ETS, whereby the government allocates emission allowances to facilities emitting large amounts of GHGs. This scheme is scheduled to be reviewed periodically and further development (including expansion of the kinds of GHGs that are regulated and the introduction of penalties for non-compliance) will be explored. Applications from participants that wanted to set a target for 2008 had to be submitted by mid-December 2008. At the time of writing, it is still unknown how many companies will participate in this scheme and how big the trading volume of emission reductions will be.

Other recent developments

Emissions trading by banks

Since the implementation of the Financial Instruments Exchange Law (FIEL) in September 2007, securities companies have gained the ability to directly trade, and to act as intermediaries in the trading of, emissions reductions and emissions reductions derivatives in Japan. Subsidiaries of banks also became permitted to engage in the emissions reduction trading business. In addition, under revisions of the FIEL and other relevant laws and regulations which came into effect in December 2008, banks themselves are now permitted to trade emissions reductions on their proprietary accounts. Due to these changes, we expect to see further development and expansion of emissions trading and related businesses by securities companies, banks and Tokyo offices of foreign financial institutions in the near future.

Carbon offsets

Foreign and Japanese carbon offset providers have started to provide their services in Japan, and many companies have started to engage in various kinds of carbon offset activities as part of their corporate social responsibility (CSR) programmes. In order to support these activities, the Japanese government has prepared Guidelines for Providing Information on Carbon Offsets and Standards for Accreditation of Carbon Offsets by Independent Accredited Entities, as a system for verifying and issuing carbon offsets that are generated in Japan. At present, the main source of carbon offsets is Kyoto Credits. As Japanese companies and consumers become more mindful of the environment, more entities are expected to start engaging in carbon offset activities.

Emissions trading at exchanges

The Tokyo Stock Exchange has started to explore the possibility of listing emissions trading by establishing a study group for that purpose. The Japan Electric Power Exchange started trial trading of Kyoto Credits from November 2008.

Emissions trading in Tokyo Prefecture

Though participation in the emissions trading scheme to be implemented by the Japanese government will be voluntary, the Tokyo Prefectural Government has enacted legislation introducing a cap and trade-type emissions trading scheme that will come into force from April 2010 within Tokyo Prefecture. Under the Tokyo scheme, facilities that emit large amounts of CO₂ will have legal obligations to reduce the amount of CO₂ emissions, either by achieving actual reductions or by

purchasing emissions allowances from other participants. Facilities that fail to achieve their targets will be ordered by the governor of Tokyo to reduce the amount of the shortfall, multiplied by 1.3. If the facilities fail to comply with this order, the governor may obtain emission allowances from the market on their behalf and claim the cost from the non-complying entity.

Acquisition of AAUs by Japanese government and Japanese companies

The International Transaction Log has been connected to the national registries of Eastern European countries and Russia, which have a large amount of excess assigned amount units (AAUs). The Japanese government has executed agreements on AAU trading and Joint Implementation with the governments of Hungary, Ukraine, Poland and the Czech Republic. The Japanese government and Japanese companies are expected to obtain a large amount of AAUs from Eastern European countries and Russia as a result of these agreements.

In the face of a fragile domestic economy and vocal opposition from local industry groups, the Japanese government is following a soft approach with regard to regulating GHG emissions. This does not mean that Japan will not adopt a domestic emissions trading scheme in the future, but it seems unlikely that any sudden changes will happen within a short period. If the government follows its usual pattern for rolling out potentially controversial new rules, there will likely be an adjustment period during which the trial emissions trading scheme will be studied and expanded, and other non-compulsory measures will be used to encourage emissions reductions in a gradual, cooperative manner. Thereafter, we may start to see some stronger measures being taken, particularly if the soft approach fails to yield sufficient reductions and Japan is faced with a big shortfall in its emissions reduction target under the Kyoto Protocol.

In contrast to the national government's approach, the start of the Tokyo Prefecture emissions trading scheme is an exciting new development that bucks the Japanese trend for a non-compulsory legislative approach. The approach is similar to initiatives by local governments in the US (by the state of California) and Australia before its ratification of the Kyoto Protocol. The Tokyo scheme will likely be the subject of scrutiny by the national government and industry bodies in order to examine both the practical outcome in terms of emissions reductions and the overall economic effect on participants.

Article by Hideo Ohta, Tsutomu Hiraishi and Elizabeth Ticehurst from the Tokyo Office.

Philippines

The Philippines' New Renewable Energy Law

After more than 19 years and five Congresses, the Renewable Energy Act of 2008 (the "Act") was finally signed into law on December 16, 2008, by Philippine President Gloria Macapagal-Arroyo. The new law is said to boost the administration's program to make the Philippines 60 percent energy self-sufficient by 2010 as well as to mitigate the global problem of climate change. In her speech following the signing of the law, President Arroyo recognized that renewable energy reaped a milestone \$71 billion in investments last year and the Act would enable the Philippines to capture a part of this investment flow through tax holidays, tax credits, and other incentives.

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The Act was passed to establish the framework for the accelerated development and advancement of renewable energy resources, and the development of a strategic program to increase its utilization. Renewable energy is energy generated from natural resources that are naturally replenished. It is defined as energy resources that do not have an upper limit on the total quantity to be used. Such resources are renewable on a regular basis, and their renewal is relatively rapid to consider them available over an indefinite period of time. These include, among others, biomass, solar, wind, geothermal, ocean energy, and hydropower conforming to internationally accepted norms and standards on dams, and other emerging renewable energy technologies.

There is some debate as to whether geothermal energy is considered renewable so the Act specifically provides that in the context of the Act, geothermal energy will be considered renewable if geothermal energy, as a mineral resource, is produced through natural or enhanced recharge. Natural recharge is where the water is replenished by rainfall and the heat is continuously produced inside the earth. Enhanced recharge is where hot water used in the geothermal process is re-injected into the ground to produce more steam as well as to provide additional recharge to the convection system.

This article will discuss some of the main features of the Act.

Renewable Energy Development

Renewable Energy Market

The Act mandates all stakeholders in the electric power industry to contribute to the growth of the renewable energy industry of the country. Towards this end, the National Renewable Energy Board (“NREB”) was created and among its functions is to set the minimum percentage of generation from eligible renewable energy resources on a per grid basis within one year from the effective date of the Act. Electricity suppliers will be required to source an agreed portion of their energy supply from eligible renewable energy resources according to Renewable Portfolio Standards (“RPS”). This would give birth to the Renewable Energy Market (“REM”) where trading of renewable energy certificates (“RE Certificates”) equivalent to an amount of power generated from renewable energy resources will be made.

To facilitate this, the Department of Energy (“DOE”), as the lead agency mandated to implement the provisions of the Act, will establish the REM and direct the Philippines Electricity Market Corporation to implement changes in the Wholesale Electricity Spot Market (“WESM”) rules in order to incorporate the rules specific to the operation of REM under the WESM.

A Renewable Energy Registrar will also be established to issue, keep and verify RE Certificates corresponding to energy generated from eligible renewable energy facilities. Such certificates will be used for compliance with the RPS.

Feed-In Tariff System

To accelerate the development of emerging renewable energy resources, a feed-in tariff system is established for electricity produced from wind, solar, ocean, run-of-river hydropower and biomass. This system gives renewable energy systems developers an advantage as opposed to having to negotiate power purchase agreements on their own or participating in the free market through WESM.

Feed-in tariff system rules must be promulgated within a year from the effective date of the Act and these rules will include:

- priority connections to the grid for electricity generated from emerging renewable energy resources such as wind, solar, ocean, run-of-river hydropower and biomass power plants within the Philippines;
- priority purchase and transmission of, and payment for such electricity by the grid system operators;
- fixed tariff to be paid to electricity producers from each type of emerging renewable energy and the mandated number of years for the application of these rates, which shall not be less than 12 years.

Green Energy Option

The DOE is also mandated to establish a Green Energy Option program, which provides end-users the option to choose renewable energy resources as their sources of energy. Upon the determination of the DOE of its technical viability and consistency with the requirements of the green energy option program, end-users may directly contract from renewable energy facilities their energy requirements distributed through their respective distribution utilities.

Hence, the National Transmission Corporation (“TRANSCO”) or its successors-in-interest, distribution utilities, and all relevant parties are mandated to provide the mechanisms for the physical connection and commercial arrangements necessary to ensure the success of the Green Energy Option. The end-user who will enroll under the energy option program should be informed, by way of its monthly electric bill, how much of its monthly energy consumption and generation charge is provided by renewable energy facilities.

Net-Metering for Renewable Energy

Subject to technical considerations and without discrimination and upon request by distribution end-users, the distribution utilities will enter into net-metering agreements with qualified end-users who will be installing renewable energy systems.

The distribution utility shall be entitled to any RE Certificate resulting from net-metering arrangement with the qualified end-user who is using a renewable energy resource to provide energy, and the distribution utility will be able to use this RE Certificate in compliance with its obligations under RPS.

Off-Grid Renewable Energy Development

The law also provides for off-grid renewable energy development through the “Small Power Utilities Group” (“SPUG”). The SPUG, which is mandated to provide missionary electrification in off-grid areas, will, within one year from the effective date of the Act, source a minimum percentage of its total annual generation from available renewable energy resources in the area concerned upon recommendation of the NREB. Eligible renewable energy generation in off-grid and missionary areas will also be eligible for the provision of RE Certificates.

Government Share

The Act also provides that the government share on existing and new renewable energy development projects will be equal to 1 percent of the gross income of

renewable energy resource developers resulting from the sale of renewable energy produced, and any other income incidental to and arising from the renewable energy generation, transmission, and sale of electric power, except for indigenous geothermal energy, which will be at 1.5 percent of said gross income.

To further promote the development of renewable energy projects, the government waives its share from the proceeds of micro-scale projects for communal purposes and non-commercial operations, which are not greater than 100 kilowatts.

Incentives for Renewable Energy Projects and Activities

General Incentives

The Act provides for a generous incentive package for Renewable Energy Developers. Renewable Energy Developers refer to individuals or a group of individuals formed in accordance with existing Philippine Laws engaged in the exploration, development and utilization of renewable energy resources and actual operation of renewable energy systems/facilities. These incentives include the following:

- **Income Tax Holiday** - For the first seven years of its commercial operations, the duly registered renewable energy developer will be exempt from income taxes levied by the national government. Additional investments in the project will be entitled to additional income tax exemption on the income attributable to the investment.
- **Duty Free Importation of Machinery, Equipment and Materials** - Within the first ten years upon the issuance of a certification of a renewable energy developer, the importation of machinery and equipment, and materials and parts thereof, including control and communications equipment will not be subject to tariff duties.
- **Special Realty Tax Rates on Equipment and Machinery** - Realty and other taxes on civil works, equipment, machinery and other improvements of a registered renewable energy developer actually and exclusively used for renewable energy facilities will not exceed 1.5 percent of their original cost less accumulated normal depreciation or net book value.
- **Net Operating Loss Carry-Over (“NOLCO”)** - The NOLCO of the renewable energy developer during the first three years from the start of commercial operation which had not been previously offset as deduction from gross income will be carried over as a deduction from gross income for the next seven consecutive taxable years immediately following the year of such loss.
- **Corporate Tax Rate** - After the seven years of income tax holiday, all renewable energy developers will pay a corporate tax of only 10 percent on its net taxable income provided that they will pass on the savings to end-users in the form of lower power rates;
- **Accelerated Depreciation** - If a renewable energy project fails to receive an income tax holiday before full operation, it may apply for accelerated depreciation in its tax books and be taxed based on such.
- **Zero Percent Value-Added Tax Rate** - The sale of fuel or power generated from renewable sources of energy will be subject to zero percent value-added tax.

- **Cash Incentive of Renewable Energy Developers for Missionary Electrification** - A renewable energy developer, established after the effective date of the Renewable Energy Act will be entitled to a cash generation incentive per kilowatt hour rate generated, equivalent to 50 percent of the universal charge for power needed to service missionary areas where it operates.
- **Tax Exemption of Carbon Credits** - All proceeds from the sale of carbon emission credits as a result of the renewable energy systems will be exempt from any and all taxes.
- **Tax Credit on Domestic Capital Equipment and Services** - A tax credit equivalent to 100 percent of the value of the value-added tax and customs duties that would have been paid on the machinery, equipment, materials and parts, had these been imported, will be given to a renewable energy contract holder who purchases them from a domestic manufacturer.
- **Exemption from Universal Charge** - Power generated from renewable energy sources for the generator's own consumption and/or free distribution in the off-grid areas will be exempt from the payment of the universal charge provided for under Section 34 of Republic Act No 9136.
- **Payment of Transmission Charges** - A registered renewable energy developer producing power from an intermittent resource may opt to pay the transmission and wheeling charges on a per kilowatt-hour basis at a cost equivalent to the average per kilowatt-hour rate of all other electricity transmitted through the grid.
- **Priority Dispatch** - Qualified and registered renewable energy generating units with intermittent resources will be considered "must dispatch" based on available energy and will enjoy the benefit of priority dispatch.

These tax exemptions and general incentives shall also be available to registered renewable energy developers of hybrid and cogeneration systems utilizing both renewable and conventional energy but only to the extent of the equipment, machinery and devices utilizing renewable resources.

Incentives for Renewable Energy Commercialization

All manufacturers, fabricators and suppliers of locally-produced renewable energy equipment and components will also be entitled to incentives for renewable energy commercialization like:

- **Tax and Duty Free Importation of Components, Parts and Materials** - All shipments necessary for the manufacture and fabrication of renewable energy equipment and components will be exempt from importation tariff and duties, and value-added tax.
- **Tax Credit on Domestic Capital Equipment and Services** - A tax credit equivalent to 100 percent of the value of the value-added tax and customs duties that would have been paid on the machinery, equipment, materials and parts, had these been imported, shall be given to a renewable energy equipment manufacturer, fabricator, and supplier who purchases them from a domestic manufacturer if such parts are directly needed, and to be used exclusively for the manufacture and sale of renewable energy equipment;
- **Income Tax Holiday and Exemption** - For seven years starting from the date of recognition or accreditation, a renewable energy manufacturer, fabricator and

supplier or equipment will be fully exempt from income taxes levied by the National Government on net income derived from the sale of renewable equipment, machinery and parts;

- Zero-rated Value-Added Tax Transactions - Their transactions with local suppliers of goods, properties and services will be subject to zero-rated value-added tax.

To encourage the adoption of renewable energy technologies, the Department of Finance will provide rebates for all or part of the tax paid for the purchase of renewable energy equipment for residential, industrial, or community use.

Incentives for Farmers Engaged in Plantation of Biomass Resources

For a period of ten years after the effective date of the Act, all individuals engaged in the plantation of crops and trees used as biomass resources will be entitled to duty free importation and exempted from value-added tax on all types of agricultural inputs, equipment and machinery such as fertilizer, insecticide, pesticide, tractors, trailers, and spare parts of all agricultural equipment.

Financial Assistance Program

Government financial institutions will also provide preferential financial packages for the development, utilization and commercialization of renewable energy projects as duly recommended and endorsed by the DOE.

Incentives for Renewable Energy Host Communities

Eighty percent of the share from the royalty and/or government share of renewable energy host communities or local government units will be used directly to subsidize the electricity consumption of end-users in the host community whose monthly consumption does not exceed 100 kwh. The subsidy may be in the form of rebates, refunds or any other form as may be determined by the proper government agency.

Implementing Rules

Within six months from the effective date of the Act, the DOE must, in consultation with the Senate and House Committees on Energy, relevant government agencies and renewable energy stakeholders, promulgate the implementing rules and regulations of the Act.

Article by Jocelyn J. Gregorio-Reyes and April B. Raimundo from the Manila Office.

Europe & Middle East

European Union

REACH - Compliance: Duty to Communicate Information on Substances of Very High Concern Contained in Products

The REACH Regulation 1907/2006 not only contains provisions regarding the registration and pre-registration of substances (see our earlier Client Alerts), but it also contains information requirements which apply to all suppliers of products (in REACH speak a product is called an “article”).

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Currently, the most discussed obligation is the information obligation under Art. 33 REACH Regulation 1907/2006. Art. 33 requires any “supplier” of an “article” containing a substance listed on a so-called “Candidate List” in a quantity of more than 0.1 % weight by weight, to provide the “recipient” not only with the name of such substance, but also with sufficient information “to allow safe use of the article”.

For a number of reasons, the consequences of this provision are widely viewed as relatively unclear. One main reason is an unclear understanding of the “Candidate List”. Other ambiguities relate to the calculation of the threshold, the duty to obtain information from suppliers and the information to be provided.

What is the REACH Candidate List?

The REACH Candidate List is a list of “Substances of Very High Concern” or SVHCs. It includes substances which eventually may end up on a list of substances for the use of which authorization is required (see: “What is the REACH Authorization List?” below). In addition, suppliers of articles must provide their business partners and, upon request, end customers with information on the Candidate List-substances contained in their products/articles.

On 28 October 2008, the European Chemicals Agency (ECHA) published the first Candidate List on its webpage (http://echa.europa.eu/chem_data/candidate_list_table_en.asp). It contains the following 15 substances:

Substance Name	CAS Number	EC Number	Basis for Identification as a SVHC
Anthracene	120-12-7	204-371-1	Persistent, bioaccumulative and toxic
4,4'- Diaminodiphenylmethane	101-77-9	202-974-4	Carcinogen, cat. 2
Dibutyl phthalate	84-74-2	201-557-4	Toxic for reproduction, cat. 2
Cobalt dichloride	7646-79-9	231-589-4	Carcinogen, cat. 2
Diarsenic pentaoxide	1303-28-2	215-116-9	Carcinogen, cat. 1
Diarsenic trioxide	1327-53-3	215-481-4	Carcinogen, cat. 1
Sodium dichromate	7789-12-0 10588-01-9	234-190-3	Carcinogen, cat. 2; Mutagen, cat. 2; Toxic for reproduction, cat. 2
5-tert-butyl-2,4,6-trinitro-m-xylene (musk xylene)	81-15-2	201-329-4	Very persistent and very bioaccumulative
Bis (2-ethyl(hexyl)phthalate) (DEHP)	117-81-7	204-211-0	Toxic for reproduction, cat. 2
Hexabromocyclododecane (HBCDD) and all major	25637-99-4 and 3194-55-	247-148-4 and 221-	Persistent, bioaccumulative

Substance Name	CAS Number	EC Number	Basis for Identification as a SVHC
diastereoisomers identified (α - HBCDD, β -HBCDD, γ -HBCDD)	6 (134237-51-7, 134237-50-6, 134237-52-8)	695-9	and toxic
Alkanes, C10-13, chloro (Short Chain Chlorinated Paraffins)	85535-84-8	287-476-5	Persistent, bioaccumulative and toxic Very persistent and very bioaccumulative
Bis(tributyltin)oxide	56-35-9	200-268-0	Persistent, bioaccumulative and toxic
Lead hydrogen arsenate	7784-40-9	232-064-2	Carcinogen, cat. 1; Toxic for reproduction cat. 1
Benzyl butyl phthalate	85-68-7	201-622-7	Toxic for reproduction, cat.2
Triethyl arsenate	15606-95-8	427-700-2	Carcinogen, cat. 1

What is the practical consequence?

Now that the Candidate List is officially published, all companies placing products/articles on the EU market must comply with Art. 33 REACH Regulation 1907/2006. As a consequence, they must inform their business partners unsolicitedly with regard to the substances on the Candidate List contained in their products/articles in amounts exceeding 0.1 % by weight and, upon request, they must also inform their end customers.

When assessing whether a product/article contains 0.1 % by weight of a substance on the Candidate List, the article sold by the company is to be considered – at least in the opinion of ECHA. Accordingly, if the “article” is a suit, then the weight of the suit must be compared to the weight of the substance, while, if the “article” is a button and sold to the suit manufacturer, the weight of the button must be considered. Accordingly, it may happen that the producer of the buttons is subject to Art. 33 information requirements, while the suit manufacturer is not. Not all Member States agree with this interpretation. According to the dissenting Member States, the limit value of 0.1 % weight by weight should “normally relate to individual articles, parts or materials that a complex article consists of”. Accordingly, the suit manufacturer would also have to inform about the fact that the button contains a Candidate List-substance in excess of 0.1 % weight by weight.

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What if I do not know if my article contains substances on the Candidate List?

The obligation to provide information is limited to information that is “available to the supplier”. As of today, a supplier of articles does not necessarily have comprehensive information available on the substances contained in his products/articles. This does not mean, however, that such supplier may argue – vis-à-vis the authorities, his business partners and end customers – that he has no such information available. As long as he has information rights vis-à-vis his own suppliers, such information will be considered “available”, even though it has not been obtained so far. As regards, e.g., substances or preparations, information can be derived from safety data sheets or in accordance with Art. 32 REACH Regulation 1907/2006. No such information rights exist with regard to articles sourced from suppliers outside of the EU. ECHA expects, however, that all suppliers undertake serious efforts in order to obtain required information through “supply chain communication”.

What information do I have to provide?

Suppliers of articles must provide, as a minimum, the names of substances contained in their articles. In addition, they shall provide their downstream business partners and end customers “with sufficient information, available to the supplier, to allow safe use of the article”. In its guidance document, ECHA provides some examples for appropriate safety warnings. Considering that comprehensive legislation exists in order to ensure worker and consumer safety, oftentimes such warnings will already be in place anyway.

What is the REACH Authorization List?

The Candidate List must be viewed in connection with the Authorization List, because the substances included on the Candidate List are potential candidates for inclusion on the Authorization List. “Authorization List” is the more catchy and self-explaining denomination of Annex XIV of the REACH Regulation 1907/2006.

The (currently empty) Annex XIV will list all substances which, because of their adverse effects on human health and the environment, may only be used in articles if the EU Commission has granted an authorization for a specific use of such substance. The Commission will, however, grant such authorization only if, with regard to the use applied for, the risks posed by such substance can be controlled or if the socioeconomic benefits of such use outweigh the risks, and no suitable alternatives are available to using such substance.

While for suppliers of products/articles the practical consequence of the inclusion of a substance on the Candidate List is merely the requirement to identify such substance when supplying a product containing such substance, the consequence of inclusion in Annex XIV of the REACH Regulation will be much more severe and may lead, eventually, to the substitution of a substance or, if no substitutes exist, to the discontinuation of a product line.

ECHA has announced that by 1 June 2009 it will file an initial list of substances that in ECHA’s view should be placed on the Authorization List. The final decision on the inclusion of a substance on this list will be made by the European Commission.

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Baker & McKenzie has a team of environmental lawyers specializing in REACH-related issues and experienced in providing practical advice to their non-EU-based clients. Please contact one of our attorneys at the jurisdiction of your concern.

Article by Ulrich Ellinghaus from the Frankfurt Office.

Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment through Criminal Law

Directive 2008/99/EC, dated 19 November, 2008, on the protection of the environment through criminal law is a key improvement in the regulatory regime concerning waste and the environment.

It settles the rules to be respected by Member States in the field of environmental criminal law.

The goal is to accomplish the effective defence of the environment through more dissuasive penalties for environmentally detrimental activities, which cause or are likely to cause substantial damage to water, soil, plants or animals, and air, including the stratosphere. Criminal penalties express a public condemnation of a qualitatively different intensity compared to administrative penalties or a compensation mechanism under civil law.

The Directive requires Member States, by 26 December 2010, to apply significant criminal sanctions to violations of any of a large number of EU Directives and Regulations where the Directive or Regulation requires Member States, when implementing that legislation, to provide for prohibitive measures. The names of the 72 relevant Directives and Regulations are specified in Directive 2008/99/EC.

• **The offences**

In its main provision, the Directive binds every Member State to ensure that each of a variety of illegal activities constitutes a criminal offence, when committed deliberately or with at least serious negligence.

• **Principle of liability**

Although penalties will be set by each Member State within its own legal system, they will have to be effective, proportionate and dissuasive.

The Directive broadens the scope of prohibited behaviours as it deems not only active illegal “conducts” to be criminalised, but also recognises that inaction can be an offence. Moreover, the Directive requires that liability extend to inciting, aiding or abetting any criminal behaviour within the terms of the Directive.

Further, a company should be liable for the relevant offences committed by its senior officers.

This new Directive is significant in at least three key aspects:

- The variety of violations that are criminalised will be extended;
- The criminal penalties for violations that are currently criminalised will be aggravated;

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- The recent legal developments in criminalising violations of the law on waste and the environment may speed up the improvement of the current environmental enforcement and regulatory regime.

Article by Marie-Laetitia de La Ville-Baugé and Arnaud Cabanes from the Paris Office.

Adoption of European Union Energy and Climate Change Package

EU leaders reached an agreement in December 2008 over an energy and climate change package to achieve the objectives of boosting renewable energies and decreasing greenhouse-gas emissions.

The EU will intend a 30% reduction if other industrialised countries take on equivalent commitments in a new international climate change agreement to be signed at UN-level in Copenhagen.

Focusing on both external and internal aspects of EU energy policy, the agreement maintains the architecture of the proposal put forward by the Commission on 23 January 2008.

In spite of continued disagreements from some Members regarding certain elements of the laws that constitute the EU energy and climate change package, the European Parliament gave overpowering support to reach a consensus with governments on:

- Revising rules for the EU emission trading scheme (ETS) 2013 to 2020: from 2013 an emissions cap will be set at EU-level and cut each year to reach a 21% cut in 2020.
- Boosting the share of renewable energies to ensure renewable energy makes up at least 20% of the EU's total energy consumption by 2020: the Directive sets legally binding targets for each Member State, in order to reach a 20% share of renewable energy in 2020.
- Setting national binding greenhouse gas reduction targets for non-ETS sectors in each Member State, to be met by 2020 from a 2005 baseline: the goal is to reduce greenhouse gas emissions by at least 20 % by this date.
- Revising current fuel sustainability criteria and setting an obligatory goal for greenhouse gas emissions cuts from road fuels by 2020: obligation for each Member State to have 10% biofuels in their transport fuel mix by 2020.
- Promoting safe carbon capture and storage (CCS) a directive on geological storage of CO₂ provides a legal framework to manage possible environmental risks and liability issues.
- Introducing binding greenhouse gas emissions caps for new passenger cars: the new legislation will set binding emissions targets to ensure that emissions of the new car fleet are reduced to an average of 120g CO₂/km².

Article by Marie-Laetitia de La Ville-Baugé and Arnaud Cabanes from the Paris Office.

Germany

New European Batteries Legislation: Germany's Draft Implementation Act

On September 26, 2006, the new Waste Batteries Directive of the European Union (Directive 2006/66/EC) entered into force. The Directive raises the bar with regard to, *inter alia*, battery performance, collection and recycling, thus reducing adverse impacts of battery use on the environment. Member States had to implement the Directive by September 26, 2008. Currently, only 18 Member States of the European Union have implemented the Directive. These are: Bulgaria, Denmark, Estonia, Ireland, Spain, Italy, Latvia, Lithuania, Hungary, Malta, the Netherlands, Austria, Poland, Romania, Slovenia, Finland, Sweden and the UK. In December 2008, the Directive had not yet been implemented in Belgium, the Czech Republic, Germany, Greece, France, Cyprus, Luxemburg, Portugal and Slovakia.

In Germany, on May 8, 2008, the Federal Ministry for the Environment has published a draft on its website. This bill, which can be accessed at http://www.bmu.de/files/pdfs/allgemein/application/pdf/battg_entwurf.pdf, was supposed to be passed to the other German Ministries for intra-government discussion and adjustment by the end of September.

In the following, we provide a brief description of the main duties of manufacturers of batteries and of equipment containing batteries under the current German bill.

Who must comply with the obligations under the German draft legislation?

The bill imposes its obligations mainly to “producers”. The term “producer”, however, comprises not only manufacturers of batteries, but rather any person who for commercial purposes places batteries on the German market. This includes, for example, companies which complement their battery-powered appliances with a “first set” of batteries. Since batteries built into other products and batteries supplied together with other products are included in this definition, any manufacturer or importer of electric appliances is considered a “producer” and must thus comply with the obligations under the draft legislation. In addition, retailers are considered “producers” for the purposes of the bill, if they place batteries on the market for which no producer has registered.

What are the major obligations of producers?

Some of the new obligations imposed upon producers under the European Waste Batteries Directive have already been part of German legislation before. In Germany, a common collection and disposal scheme for waste batteries was established in 1998. Other obligations, such as the obligation for all producers of batteries to register with a “Joint Commission” and the requirement that end-users must be able to remove waste batteries “problem-free”, have been newly introduced into the German bill.

1. Registration and indication of registration number

Before a producer may place any batteries on the German market, it must register with the Joint Commission (*Gemeinsame Stelle*). This registration obligation can be compared with the already existing registration obligations under the WEEE legislation. Although the bill does not state it, it can be expected that the entity managing the existing German disposal and collection scheme for waste batteries, the

foundation GRS Batterien (*Stiftung Gemeinsames Rücknahmesystem Batterien*), will become the Joint Commission.

Each registered producer will be assigned a registration number by the Joint Commission. A registered producer must indicate the registration number in its written and electronic business papers at all times. Thus, business papers and e-mail signatures will have to be updated so that they contain the registration number. The data which must be provided by producers to the Joint Commission will be defined in an Ordinance to be adopted at a later stage.

2. *Participation in Common Collection Schemes for waste batteries*

Under the bill, producers of appliance batteries, i.e., batteries which are encapsulated and can be hand-carried (“portable battery or accumulator” in the wording of the Battery Directive) as well as manufacturers of equipment containing or providing appliance batteries, must either establish their own collection system for waste batteries or participate in a common non-profit scheme for the collection and disposal of waste batteries. In the latter case, producers must contribute to the costs of such Common Collection Scheme (*Gemeinsames Rücknahmesystem*) in an amount that equals their respective annual market share. As indicated, the requirement to set up an individual or to participate in a common collection and disposal scheme already exists under the current German Batteries Ordinance. The existing scheme is operated by the foundation GRS Batterien.

Producers of appliance batteries which do not comply with the obligation to participate in the Common Collection Scheme may nevertheless be charged with the costs for collection, sorting, recovery and disposal of “their share” of waste batteries as well as common costs of the Common Collection Scheme.

Producers of waste vehicle and industrial batteries are not covered by the scope of the above requirement to participate in a collection scheme but must take back and treat waste batteries themselves.

3. *Information campaigns*

Producers must inform end-users that batteries may be returned free of charge, that batteries may not be discharged along with common household waste and that end-users are required by law to return waste batteries. Producers are also required to provide information to end-users on the symbols to be attached to batteries. Alternatively, such campaigns can be implemented by the Common Collection Scheme on behalf of the producers, in which case producers of appliance batteries that do not participate in the Common Collection Scheme may be required to contribute towards the costs of such campaigns.

4. *Problem-free” removal of waste batteries from appliances*

Under the German bill as well as under the Waste Batteries Directive, producers must ensure that waste batteries may be removed without any problems.

In deviation from the Directive, the German bill provides that removal without any problems does not have to be ensured if the advantages of a design or a manufacturing procedure outweigh the benefit of unproblematic removal. Neither does the current German draft require producers to instruct consumers on how to remove batteries, instead, such information must only be provided to waste treatment facilities.

5. *Prohibition on the use of certain substances*

As is already the case in current German legislation, batteries which contain more than 0.0005 % by weight of mercury, and appliance batteries which contain more than 0.002 % by weight of cadmium may not be placed on the market. Certain exceptions apply to these general prohibitions.

6. *Labelling*

Batteries must be marked with the symbol as shown in Annex II of the Waste Batteries Directive, the crossed-out wheellie-bin. If batteries contain more than a certain minimum percentage of mercury, cadmium or lead, such batteries must be marked with the chemical symbol for the metal in question. In addition, as of September 26, 2009, the capacity of the battery must be indicated on the battery in a “visible, legible and indelible form”. This requirement is in line with the requirements set forth in the Waste Batteries Directive.

What are the major obligations of retailers?

Anybody who places batteries on the market in Germany must take back batteries from the end-user free of charge at the place of sale. Retailers must provide the Common Collection Scheme with such returned batteries free of charge.

When will the new German legislation enter into force?

At present, it is unclear when the new German legislation will enter into force. So far, the bill, which has the status of an internal Ministry Draft (*Referentenentwurf*), has not been tabled in the First Chamber of the German Parliament (*Deutscher Bundestag*). We do not expect the bill to be introduced in Parliament before 2009. As of today, it cannot be predicted when the new German batteries legislation will enter into force.

Article by Julia Pfeil from the Frankfurt Office.

The New German Packaging Ordinance

On January 1, 2009, major changes to the German Packaging Ordinance (Verpackungsverordnung - VerpackV) have entered into force. Since this date, every business which produces packaging or puts packaged product on the market in Germany must conclude an agreement with a collection and disposal system licensed in Germany to ensure the take-back of all packaging. Businesses which put large amounts of packaging on the German market must, in addition, submit annual declarations detailing the amounts of packaging placed on the German market.

Duty of producers and distributors to “participate” in a collection and disposal system for packaging

To ensure, as of January 1, 2009, the take-back of all packaging, any producer of packaging and any distributor of packaging - this includes any person who sells packaged products - must “participate” in a collection and disposal system for packaging. It is no longer possible for producers and distributors to independently organize the take-back of their packaging. The new obligation applies to any producer or distributor which places packaging or a packaged product on the market in Germany, i.e.:

- businesses which produce and sell goods in Germany, and

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- importers of goods into Germany;

regardless whether they on-sell their products to retailers or consumers. It is to be noted that producers and distributors which place packaging on the German market must fulfill all obligations under the VerpackV and conclude necessary agreements with the collection and disposal systems themselves; they may not transfer - not even by agreement - their obligations under the VerpackV to their respective customers.

The VerpackV does not define what is to be considered “participation in a collection and disposal system”. Thus, the law grants a certain amount of flexibility on how operators of collection and disposal systems and producers/distributors of packaging may implement such “participation”. We expect that operators of collection and disposal systems will offer producers/distributors of packaging to conclude agreements, whereby the operator is required to organize collection of packaging from private consumers, as well as sorting, recycling and disposal of packaging for a charge by the producer/distributor. At present, two such collection and disposal systems operate in Germany (the system best known is DSD GmbH, which operates the system that uses the “Grüner Punkt” - Green Dot - trade mark); several additional operators have already applied for licenses. The Government expects that, in the short term, between four and five different enterprises will be operating in several of the 16 German Laender.

To ensure that every producer/distributor of packaging contributes to the financing of collection and disposal of packaging, collection and disposal systems may also charge businesses which have put packaging on the market but - in circumvention of the law - do not “participate” in any collection and disposal system.

Use of the “Green Dot” on Packaging after January 1, 2009

Since all packaging will be collected through the above-mentioned systems from private end-consumers, a marking of the packaging showing that it is subject to a particular system - such as “Green Dot” (“Grüner Punkt”) - is no longer required. Rather, operators of collection and disposal systems must collect and dispose of all packaging waste, including packaging and packaging waste from their competitor’s customers. A Joint Commission (“Gemeinsame Stelle”) of collection and disposal systems shall decide upon the adequate distribution of costs and charges for packaging.

DSD GmbH, which owns the Green Dot trademark, has announced that, as of January 1, 2009, it will offer new licensing agreements regarding the use of the Green Dot trademark. Under these new agreements, an entity which uses the Green Dot on its packaging in Germany but does not wish to use DSD GmbH as service provider for take-back and collection, must pay a basic licensing fee for the use of the Green Dot in Germany.

Duty of producers/distributors to submit annual declarations on packaging placed on the market

In order to facilitate enforcement of the Packaging Ordinance, if a producer/distributor of packaging puts a high amount of packaged products on the German market (see threshold levels in box below), such producer/distributor must submit an annual declaration (“Vollständigkeitserklärung” - “Declaration on Completeness”) detailing for the preceding year:

- materials and amounts of packaging placed on the market, and

Threshold levels of Packaging Material

(placed on the market annually):

Glass: >80,000 kg

Paper, paperboard, cardboard: > 50,000 kg

Other types of material: > 30,000 kg

- its participation in a collection and disposal system.

The Government estimated that about 4,500 enterprises will have to submit annual declarations; about 93 % of all packaging in Germany is put on the market by these enterprises.

The declaration must be audited by a Certified Public Accountant, a Tax Accountant or a certified expert. It must then be submitted via Internet to the local Chamber of Industry and Commerce; the competent authorities will be granted access to the declarations. Declarations must be submitted by May 1 of each year. The first such declaration must be submitted by May 1, 2009, detailing the amounts of packaging placed on the market between April 5, 2008 and December 31, 2008.

If the amount of packaging put on the market annually by a certain enterprise stays below the applicable threshold levels, the competent authorities may nevertheless request the business concerned to submit such declaration.

Scope of the obligations to mandatorily participate in a take-back system and submit annual declarations

The duties of producers/distributors outlined above only apply to sales packaging (i.e., packaging conceived so as to constitute a sales unit to the final user or consumer at the point of purchase), which is disposed of by private end-consumers. The duties described above do not apply to the following:

- *Sales packaging which is not disposed of by a private consumer*
Such packaging must be collected at the point of delivery by the final distributor, i.e., the entity that sold the packaged product to the commercial end-user.
- *Packaging made of biodegradable plastic*
In order to promote the introduction of ecologically friendly packaging materials as well as further research into this area, plastic packaging which has been manufactured from biodegradable materials and all components of which are compostable is exempt from the obligations described above. Compostability must be shown by a certificate issued by an independent expert. The exemption is limited until December 31, 2012.
- *Transport packaging* (i.e., packaging used to secure a product during transport or to facilitate transport and that is typically disposed of by the distributor) Such packaging must be collected by the distributor or producer at the point of delivery.
Outer packaging
Distributors must remove outer packaging or provide take-back facilities free of charge to consumers at the point of sale.
- *Sales packaging for goods containing hazardous substances*
Producers/distributors must ensure that emptied packaging may be returned by the final customer in an appropriate distance from the final customer.
- *Take-back systems established by certain industry sectors*
Several industry sectors, e.g., car repair shops and services, have established their own take-back systems which ensure that all packaging is returned. Such systems do not need to be abolished.
- *Disposable packaging for drinks for which a deposit/refund duty exists*
Distributors that sell certain types of drinks, mainly soft drinks and alcoholic

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drinks, must charge customers a deposit for each disposable package and refund the deposit upon return of the package.

- *Returnable* *packaging*
This type of packaging is re-used; typically a deposit is charged to customers, which will be refunded upon return of the packaging.

Article by Julia Pfeil from the Frankfurt Office.

Italy

Decree DPCM of December 2, 2008 Introduces the New Waste Declaration Model for Year 2009

The Environmental Consolidated Act sets forth the most recent legislation and requirements on hazardous waste reporting and record-keeping in order to prevent and identify possible risks of soil pollution.

According to the Act, industrial facilities producing hazardous and non-hazardous wastes must maintain a register, which records the quantity and quality of the wastes generated, re-used and disposed.

The register must be updated regularly, within one week from the generation and disposal of the waste (Section 190 of the Code). The registers, together with the forms relative to waste transport, are kept for five years from the date of the last registration. Facilities producing less than five tons of non-hazardous waste yearly, and one ton of hazardous waste yearly, can commission a separate organization to maintain their registers.

During transport, wastes must be accompanied by an identification register, containing information such as the name and the address of the producer of wastes, the source, the type and quantity of waste, the receiving facility, the route to be taken and the name and address of the receiver.

The register must be prepared in four copies, compiled, dated and signed by the waste producer, and countersigned by the transporter. A copy must remain with the producer, while the other three are signed and dated by the receiving facility. One copy is kept by the facility, one is sent back to the waste producer, and a third is held by the waste transporter. The copies must be kept for five years.

Year-end reporting of hazardous waste generation, transport and/or disposal is undertaken through the new Unified Declaration Form (*Modulo Universale di Dichiarazione* (MUD)), issued by the President of the Council of Ministers in a Decree on March 31, 1999. Declaration through the use of the form is obligatory for producers and collectors of waste.

Ministerial Decree DPCM of December 2, 2008 introduces the new waste declaration model for year 2009. It was published in the Official Gazette on December 17, 2008.

Governmental bodies and private companies that produce hazardous waste, the operators of plants that fall under the IPPC Directive, waste recycling consortia and other similar entities are required to file the new MUD by April 30, 2009.

The new decree widens the number of entities subject to filing and introduces new waste types to be notified.

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Poland

Packaging and Packaging Waste Management Bill

The Polish Parliament will soon discuss the draft Bill that will implement into the Polish legal system the provisions of European Parliament and Council Directive 94/62/EC on packaging and packaging waste. The Bill should also systematize other provisions on packaging waste now dispersed in other acts. The Bill is expected to become law on January 1, 2010.

The draft Bill significantly modifies the currently binding provisions on the product fee and marketing of packaged products, and includes a proposal to establish a register listing businesses and other entities (including both natural and legal persons) that place packaged products on the market, and that deal with recycling and other recovery processes, exporters, and businesses whose activity is related to the importation of waste for recycling or recovery as well as recovery organizations. The register will be kept by the General Inspector of Environmental Protection, while the data will be gathered and recorded by local *voivods* (heads of province).

The Bill sets out the requirements to be met by businesses placing packaging on the market in order to minimize the packaging's impact on the environment, e.g., reuse of packaging. According to the Bill, packaging manufacturers, importers, businesses whose activity is related to packaging importation, and packaging exporters are obliged to inform district governors on the amount of the manufactured, imported or exported packaging. The reporting obligation also covers businesses placing packaged products on the market.

Businesses that do not fulfill their obligations arising under the future Act will be subject to a product fee which is calculated from the difference between the value of the required and achieved level of recycling and recovery of packaging waste. The failure to comply with the provisions of the Bill will also result in pecuniary penalties.

The Bill is yet to be discussed in the Parliament and can be modified in the legislation process.

Article by Slawomir Chmielewski and Jacek Korzeniewski from the Warsaw Office.

Spain

Challenges to the National Allocation Plan of Greenhouse Gas Emission Allowances and their Trading System in Spain

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC was implemented in Spain by Royal Decree-Law 5/2004 of 27 August 2004.

Consistent with article 15 of Royal Decree-Law 5/2004, Royal Decree 1866/2004 of 6 September 2004 passed the National Allocation Plan of Greenhouse Gas Emission Allowances for the period 2005-2007 (hereinafter, the "Allocation Plan 2005-2007"). The Allocation Plan 2005-2007 contained the basic principles of the plan, determined the total amount of emission allowances to be assigned for the referred period, and allocated by sector the total amount of allowances settled.

The European Commission passed the Allocation Plan 2005-2007 with an objection to the definition of "combustion plant". It requested the inclusion of all combustion

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plants with a rated thermal input higher than 20 MW. Following said request, Royal Decree 60/2005 of 21 January 2005, modified Royal Decree 1866/2004 and reassigned the quotas corresponding to the various sectors. Subsequently, Law 1/2005 of 9 March 2005 substituted Royal Decree-Law 5/2004 as the implementation regulation.

The individual allocation of greenhouse gas emission allowances for the facilities falling under the scope of application of Royal Decree-Law 5/2004 was passed by the Resolution of the Council of Ministers dated 21 January 2005, which was published in the National Official Gazette on 28 January 2005 (hereinafter, the “individual allocation 2005-2007”).

The individual allocation 2005-2007 was challenged in Spain by seven companies (Endesa Generación, S.A., UBE Chemical Europe, S.A., Herederos Márquez Villar S.L., Cerámica la Purísima Siles, S.A., Cerámica Belianes, S.L., Becosa Fuente de Piedra S.A.U. and Foraneto, S.L.).

Between 23 September and 6 October 2008, the Supreme Court decided all seven challenges and ruled in all cases accepting the appeals, setting aside and declaring void the individual allocation 2005-2007.

The appeals were founded upon the following grounds: (i) failure to state reasons, due to the lack of justification on the methodology used for the allocation of emission allowances, (ii) failure to comply with the public information procedure, (iii) violation of the principle of technological neutrality, (iv) misinterpretation of Royal Decree 1866/2004, whereby the National Allocation Plan was approved, which led to allocate a non-adequate number of allowances, (v) excess of discretionary power by the Council of Ministers, (vi) right of freedom to conduct business being violated by the lack of justification, and (vii) the procedure followed in order to calculate the allowances did not correspond with the one to be followed.

The Supreme Court’s main argument for the abrogation of individual allocation 2005-2007 was the lack of justification. The judgement stated that while there is an obligation of justifying acts of administrative importance, the authorities had not specified the method used for calculating the supply and demand of electricity. The Court expressed no doubt about the possibility that the calculated amount is correct, but stated that it was not based upon any justification.

The Supreme Court held that the need for justification increases in cases such as the one at issue, arguing that the complexity of the application of the criteria followed for the allocation of the allowances shall not provide an excuse for a failure to justify the decision. The complexity of the calculation method is also no excuse for lacking reasons. On the contrary, it must encourage the search for ways to set out the reasons on which the decision is based. Specific formulas must be sought to justify the decision, especially with regard to the receiver of the administrative resolution. Description, justification and motivation regarding the application of the allocation criteria and the calculation method cannot be deemed sufficient if they only appear in the individual allocation as something general and common to all the applicant companies. Description, justification and motivation need to be specific for each applicant company, especially for those having different market positions, in order not to leave such companies defenceless.

Based on the above, the Court ruled that the Authorities should detail in the Allocation Plan the concrete application of the criteria followed for the allocation of the specific amount of allowances to each company that applied for allowances.

Independent of this judgement, the allowances allocated for the period 2005-2007 are not valid anymore, as four months after the end of a period allowances expire automatically. The Allocation Plan 2005-2007 has been substituted by Royal Decree 1370/2006 of 24 November 2006 (as modified by Royal Decree 1402/2007 of 29 October 2007), which passed the National Allocation Plan for the period 2008-2012 (hereinafter, the "Allocation Plan 2008-2012").

Besides the judicial contest, the application of Law 1/2005 at the end of the period 2005-2007 – the moment when the registration of the emissions information regarding 2007 is closed - shows that the Allocation Plan 2005-2007 resulted in a deficient allocation by 4.1%. Said deficit basically appeared in the sector of generation, by 15%. By contrast, the industrial and the combustion sectors showed emissions of -6.1% and -22.5%, respectively. The electricity generation sector registered an increase of 6.2% in 2007 in comparison to the previous year. The extremely low use of nuclear generation, substituted by fossil fuels justifies said increase.

Regarding the transfer of rights, during the 2005-2007 period there was a total amount of 2,070 transfers (which means an average of 96,000,000 allowances), in equal proportion at a national and international level. Concerning the half that took place at the international level, it has to be taken into account that slightly more than half of the transfers imply receipts and slightly less than half of them are international outgoings.

The Allocation Plan for the period 2008-2012 is the second plan developed within the European trading system, but the first to be applied in accordance with the commitment period (2008-2012) established by the Kyoto Protocol.

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In contrast with the Allocation Plan 2005-2007, the Allocation Plan 2008-2012 contains a concise description of the method followed for the individual allocation that consists of a reference to the methodology established in the Allocation Plan 2008-2012. The individual allocation 2008-2012, however, still does not yet include any details on individual calculations. This is likely due to the fact that the individual allocation was passed before the above judgement was published.

No official reaction has been made public yet in connection with the nullity of the individual allocation 2005-2007 and the situation of the individual allocation 2008-2012. In any event, it is obvious that both the transactions for the purchase and sale of emission rights that took place under the individual allocation 2005-2007 and those that may be taking place under the individual allocation 2008-2012 are affected by the lack of legal security, and that this issue shall be taken into account when drafting purchase and sale documents or facing any potential environmental violation.

Article by Patricia Bauzá and Laia Colomé from the Barcelona Office.

Environmental Liability News

The increasing concern about the prevention and avoidance of damages to the environment, and the remediation in case such damages do occur, is giving rise to a large number of ever more demanding regulations in terms of liability.

Law 26/2007 of October 23, 2007 on Environmental Liability, which entered into force the same year, established a new regime of objective liability for carrying out certain activities, which is extended not only to the remediation of the damage but also to the prevention and avoidance of it.

This Law envisaged the necessary development, before December 31, 2008, of the financial guarantees in order to face the environmental liability that might derive from the activities carried out.

Regulations that partially develop the referred Law have been passed recently, through Royal Decree 2090/2008, of December 22, 2008, which will come into force on April 23, 2009. The Royal Decree establishes the method to fix the minimum amount of the obligatory financial guarantee, which will become effective from a date pending to be determined through a ministry order, not before the second quarter of 2010.

As for the remediation of damages, as a preliminary step, the method requires the identification of scenarios of potential environmental accidents and the probability of each one. Subsequently, the cost of primary remediation has to be assessed for each scenario. The risk for each scenario can then be determined as the product of probability and assessment. The lowest-cost accident scenarios, accounting for 95% of the total risk, must then be grouped together. Finally, the proposed amount of the guarantee will be the amount of the greatest environmental damage among the selected scenarios. Additionally, the costs of prevention and avoidance of damages will have to be taken into account, for a minimum amount of 10% of the guarantee determined in relation to the damage.

The analysis of the environmental risks of the activity must follow the scheme established by the UNE Regulation 150008 or other equivalent rule. In addition, the analysis of risks and the guarantee must be kept updated according to the rules established in the regulations, and the guarantee must be kept in force during the entire time the activity is ongoing.

Business operations that intend to be exempt from the obligation to have a financial guarantee in place pertaining to the costs of remediation of possible environmental damages associated with their activity are entitled to use any of the instruments of risk analysis and the calculation of the amount of the guarantee foreseen in the Regulation in order to determine that they are exempt.

Moreover, the Regulation sets forth that, in specific cases, the mentioned analyses of risk for the calculation of the amount of the guarantee can be disregarded, and instead, affected entities may go to the tables of standards contained in the ministry orders expected to be passed as of April 30, 2010.

The guarantee must be constituted through any of the three modalities allowed and developed by the law (certificate of insurance, guarantee or technical reserve), which also establishes the requirements for the constitution of said guarantee and other specifics.

It is important for companies to bear in mind the need to provide this guarantee. Liability is unlimited under the law and may be shared by more than one party - either because it is extended or transferred to others or is joint, joint and several, or vicarious in nature. Liability may even reach parent or controlling companies, *de facto* and *de iure* managers and administrators, members of insolvency administrations, and liquidators of legal entities.

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Latin America

Argentina

Environmental Insurance

Section 22 of National Law No. 25.675 (“*Ley General del Ambiente*”), enacted on November 6, 2002, requires a mandatory insurance that has to cover any damage to the environment (collective damage) and that also has to provide for a remediation process in order to restore the environment to its condition before the damage had taken place.

It was not until 2007 that the National Environmental Secretariat (“*Secretaría de Ambiente y Desarrollo Sustentable de la Nación*”) enacted several regulations aimed to implement said mandatory environmental insurance. The last of these regulations (Resolution 1398/2008) provided that, to fall within the legal duty to have this type of mandatory insurance (“*seguro de daño ambiental de incidencia colectiva*”), an industrial premise or the like would have to be previously ranked with a Level of Environmental Complexity. The Level of Environmental Complexity depends on the type of raw materials handled, used or stored for industrial processes, and the quantity and quality of effluents and emissions to the environment as a consequence of the processes performed by the specific industry. This mandatory insurance also applies to mining projects.

In August 2008, the National Insurance Superintendence (*Superintendencia de Seguros de la Nación* “SSN”) authorized *Prudencia Compañía Argentina de Seguros Generales S.A.* to issue this type of environmental insurance. The insurance policy was approved in the form of a contingency insurance up to AR\$ 1,200,000.00, approximately US\$ 350,000 at current exchange rates. Other insurance companies are in the process of obtaining approval from the SSN to issue this type of environmental insurance.

Article by Juan Pablo Tassara from the Buenos Aires Office.

Extended Producer Liability - Rechargeable Batteries Take-Back

On October 27, 2008, the government of the City of Buenos Aires published Resolution 262-APRA/08 (the “Resolution”) on the disposal of rechargeable batteries. The Resolution provides for the implementation of plans for the collection and proper final disposal of exhausted rechargeable batteries. According to Section 2 of the Resolution, any producer, importer, distributor or intermediary (“Interested Parties”) responsible for the introduction of rechargeable batteries into the City of Buenos Aires market, has 30 workdays, beginning October 27, 2008, to file with the local authority (“*Agencia de Protección Ambiental*”, hereinafter the “Agency”) a plan for battery take-back (the “Plan”). The deadline for filing a Plan expired on December 9, 2008, and the Interested Parties had to put the Plans in place beginning February 1, 2009.

Interested Parties can choose to file a Plan for the Agency’s consideration and approval on an individual basis or jointly, together with other Interested Parties. The proposed Plan must comply with certain minimum requirements set forth in the Annex to the Resolution.

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The Plan must comply with, *inter alia*, the following minimum requirements:

- Allow the recovery and receipt (free of charge to the consumers and end users of batteries), transportation, treatment and final disposal of exhausted rechargeable batteries.
- Provide clear information to the consumers or end users about the Plan.
- Provide for a minimum of 10 places for the collection of exhausted batteries within the City of Buenos Aires.
- Describe the method to be applied from the collection to the final disposal of exhausted batteries.
- The Party proposing the Plan has to, in principle, register with the competent authorities as generator of hazardous waste.

In case of non-compliance with the Resolution, the Agency may put into operation a specific Plan, and demand a monetary support from the Interested Parties to cover the costs the Agency would have to incur to properly handle and dispose of the exhausted rechargeable batteries.

Article by Juan Pablo Tassara from the Buenos Aires Office.

Ban on Plastic Bags in Largest Argentine Province

On September 11, 2008, the Congress of the Province of Buenos Aires passed law 13,868, which bans the use and offer for use of polyethylene and plastic bags by supermarkets, stores and businesses in the territory of the Province of Buenos Aires. The Province of Buenos Aires is the most important province in Argentina economically.

According to this law, plastic bags must be gradually replaced by degradable and biodegradable bags and containers. Supermarkets and minimarkets are required to replace the bags they use and provide to their customers 12 months following the effective date of the law; all other businesses and stores have 24 months to comply with the law.

The ban provides for an exclusion if, for hygienic reasons, polyethylene and plastic bags must be used to contain pre-processed food or raw materials and their replacement is not feasible.

The Provincial Agency for Sustainable Development is tasked with determining the technologies and materials to be allowed in the manufacturing of degradable and biodegradable bags provided to customers and sold to businesses in the Province of Buenos Aires. This agency will also create a Registry of wholesale Manufacturers, Distributors and Importers of bags. To be issued business operation permits, these companies will have to apply with the Registry and secure an annual certification that their products are degradable or biodegradable. The abovementioned agency will also determine the applicable design and labels that manufacturers, distributors and importers of bags will have to place on their products.

Failure to comply with this law may trigger warnings, the application of fines, seizure of bags, or a temporary or definitive closure of business. The implementing regulations will determine the criteria by which to apply these sanctions, depending

on the magnitude of the violation, the economic importance of the company involved and prior violations.

Article by Marcelo Slonimsky from the Buenos Aires Office.

Brazil

Brazilian Government Launched the National Plan on Climate Change

On December 1, 2008, the Brazilian Government launched the “National Plan on Climate Change” (NPCC) (“*Plano Nacional sobre Mudança do Clima*” - PNMC).⁴ This Plan is based on the work of the Interministerial Committee on Climate Change and its Executive Group, as established by Federal Decree No. 6,263, on November 21, 2007,⁵ in collaboration with other institutions such as the Brazilian Forum on Climate Change, the Interministerial Commission on Global Climate Change, the III. National Conference on the Environment and the State Fora on Climate Change, and civil society organizations.

The Plan defines actions and measures that aim at the mitigation of and adaptation to climate change, and has the following specific objectives:

- Stimulate efficiency increase in a constant search for better practices in the economic sectors. The implementation of a National Energy Efficiency Policy will result in a reduction in electricity consumption at around 10% in 2030, which can avoid emissions of 30 million tons of CO₂ the same year, according to a conservative estimate.
- Keep the high share of renewable energy in the electricity matrix, which at present is 89.0%. In addition to hydro-electricity, Brazil intends to expand its electricity supply, free from CO₂ emissions, such as co-generation with sugarcane bagasse and other forms of biomass, wind, solar and wastes.
- Encourage the sustainable increase in the share of biofuels in the national transport matrix and also work towards the structuring of an international market of sustainable biofuels. The encouragement of the increasing replacement of fossil sources in the Brazilian transport sector may allow an annual average increase in the use of ethanol by 11% in the coming years. In the case of biodiesel, the government has announced its intention to anticipate from 2013 to 2010 the obligation to add 5% of this biofuel to diesel.
- Seek for sustained reduction of deforestation rates, in all Brazilian biomes⁶, in order to reach a zero illegal deforestation. This objective is to reduce by 40% the average deforestation rate by the 2006-2009 period in relation to the average rate of the ten years reference period used in the Amazon Fund (1996-2005), and by a further 30% in each of the following periods of four years in relation to the previous four years period. The Federal government is endeavouring to expand the Action Plan for the Prevention and Control of Deforestation in the Legal Amazon Region (“*Prevenção e Controle do Desmatamento na Amazônia Legal*”

⁴ The English version of the Brazilian National Plan on Climate Change - Executive Summary is available at http://www.mma.gov.br/estruturas/imprensa/arquivos/96_11122008040728.pdf

⁵ See http://www.planalto.gov.br/ccivil_03/ Ato2007-2010/2007/Decreto/D6263.htm

⁶ Besides the Amazon biome, the Brazilian territory has the Caatinga, Cerrado, Mata Atlântica, Pampa and Pantanal biomes.

– PPCDAM)⁷ to other Brazilian biomes. This will involve the implementation of the Brazilian biomes satellite monitoring programs, aimed at quantifying deforestation and providing the basis for combating illegal deforestation and for prevention actions in these biomes.

- Reforesting and forestation activities will be encouraged under the auspices of the Clean Development Mechanism (CDM) (“*Mecanismo de Desenvolvimento Limpo*” - MDL). The purpose is to eliminate the net loss of forest coverage in Brazil by 2015, and doubling the area of forest plantation from 5.5 million hectare (ha) to 11 million ha by 2020, of which two million ha must be planted with native species.
- Strengthen inter-sector actions concerned with the reduction of the vulnerability of populations, through strengthening environmental sanitation measures, communication and environmental education measures, stimulation and expansion of the technical capacity of professionals in the Public Health System.
- Identification of environmental impacts resulting from climate change and stimulation of scientific research that can outline a strategy in order to minimize the socio-economic costs of the country’s adaptation.

The first phase of the Plan was designed to be operational for organizing ongoing actions, to reinforce existing measures, and to identify and create new opportunities in order to allow an exchange of experiences and integration of actions. Additional actions and instruments will also be presented, including agreements between Brazilian states in order to guarantee that the objectives stipulated in the Plan can be fully met.

Energy Efficiency

The main actions foreseen in the National Plan reinforce the legislation and the already implemented targets to achieve satisfactory levels of energy efficiency, and consist of:

- Implementation of the *National Policy for Energy Efficiency* which aims to achieve an energy saving up to 106 TWh/year by 2030, avoiding emissions of around 30 million tons of CO₂ in that year.
- Replacement of one million old refrigerators per year, for ten years, resulting in the collection of three million tCO₂ eq/year of CFCs (chlorofluorocarbon).
- Replacement of refrigerant gases, during 2008-2040, in order to avoid emissions of 1,078 billion tCO₂eq of HCFCs (hydrofluorcarbon).
- Reduction of non-technical losses in the electricity distribution at a rate of 1,000 GWh per year over the next ten years, which currently are around 22,000 GWh per year. This will represent a reduction in energy wastage of 400 GWh per year. On average, around 25% (100 GWh per year) of this energy will no longer be produced by thermo power plants.

⁷ The central thematic areas in the Action Plan for the Prevention and Control of Deforestation in the Legal Amazon Region (PPCDAM) are land and territorial organization, monitoring and control, and incentives for sustainable productive activities in order to reduce the rate of deforestation, involving partnerships between federal bodies, state governments, municipal governments, civil society organizations and the private sector.

- Institution of national level programs to promote energy efficiency, for instance, the Incentive Program to Use Solar Energy for Water Heating (“*Programa de Incentivo ao Uso de Energia Solar*”); Program of Vehicle Labeling (“*Programa de Etiquetagem Veicular*”); Program for Voluntary Labeling of Energy Efficiency Level on Commercial, Services and Public Buildings (“*Etiquetagem Voluntária do Nível de Eficiência Energética de Edifícios Comerciais, de Serviços e Públicos*”).
- Stimulating environmental consciousness, especially through the presentation of national level programs⁸ at elementary schools and universities.

Renewable Energy

The main actions foreseen in the National Plan intend to sustain the composition of the energy matrix by promoting energy generation through renewable sources, which currently represent 45.8% of the national mix. The actions include:

- Increasing the Brazilian total electricity supply from cogeneration to reach 11.4%, especially from sugarcane bagasse, by 2030, corresponding with 136 TWh.
- Increasing hydroelectricity generation to reach 34,460 MW as per established in Ten Year Energy Plan (2007-2016).
- Increasing the share of wind and sugar cane bagasse sources in the electric matrix through specific auctions of renewable energy. The National Plan indicates that more than 7,000 MW of renewable sources will be implemented by 2010, in accordance with the Program of Incentives for Alternative Sources of Electric Energy – PROINFA, and the auctions will already have been carried out.
- Anticipation of the targets established in the National Biodiesel Production and Use Program (“*Programa Nacional de Produção e Uso do Biodiesel*” - PNPB) in order to add 3% of biodiesel to Brazil’s total diesel use.
- Expansion of photovoltaic solar energy use in both isolated and grid-connected systems.

Financing under CDM

The National Plan on Global Climate Change reinforces existing financing and credit lines designed to foster Clean Development Mechanism projects in Brazil, as follows:

- Support Program to Projects under the Clean Development Mechanism (Pro-CDM) (“*Programa de Apoio a Projetos do Mecanismo de Desenvolvimento Limpo*” - Pró-MDL), offered by the Studies and Projects Financing Agency (“*Financiadora de Estudos e Projetos*” - FINEP), which finances pre-investment

⁸ (*Programa Nacional de Conservação de Energia Elétrica*; PROCEL) and the National Program for the Conservation of Oil and Natural Gas Products (*Programa Nacional de Racionalização do Uso dos Derivados do Petróleo e do Gás Natural*; CONPET).

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activities as well as scientific and technological development of CDM project activities by means of reimbursable and non-reimbursable financing lines;⁹

- National Bank for Economic and Social Development (“*Banco Nacional de Desenvolvimento Social*” - BNDES) Clean Development Program, which provides the creation of investment funds to support projects that can generate Certified Emission Reductions (CERs) (“*Reduções Certificadas de Emissão*” - RCEs) under the CDM;¹⁰ and
- BNDES Environmental Line, which is a credit line for studies on viability, costs of project and Project Design Document (PDD) (“*Documento de Concepção do Projeto*” - DCP) preparation and other costs related to the validation and registration process.¹¹

Article by Viviane O. Kwon, Laura Lima and Fernanda Veloso from the Buenos Aires Office.

New CONAMA Resolution Regarding Batteries

The National Environmental Council (“CONAMA”) published Resolution No. 401 (the “Resolution”) in the Official Gazette of the Union on November 5, 2008. The Resolution establishes limits of mercury, cadmium and lead for batteries commercialized in Brazil as well as the criteria and standards for the adequate environmental management of such batteries.

The Resolution revokes Resolution No. 257/99 of CONAMA, and applies to portable batteries, acid-lead batteries, industrial and automotive batteries as well as electrochemical nickel-cadmium and oxide-mercury batteries listed in chapters 85.06 and 85.07 of the Common Nomenclature of the MERCOSUL - NCM, and commercialized on national territory. The utilization of this Common Nomenclature is an innovation, and it gives more unity to the South America Market, helping its development in the sector.

Article 3 of the Resolution establishes that the national manufacturers and importers of batteries, including importers of products manufactured outside the country containing batteries, must submit to the Brazilian Environmental and Renewable Natural Resources Institute (“IBAMA”) an annual physio-chemical report, issued by a laboratory accredited by the National Metrology, Normatization and Industrial Quality Institute (“INMETRO”). It also requires that a management plan of batteries is presented to the competent environmental agency within 12 months after the publication of the Resolution, which provides details on the adequate environmental disposal of batteries as determined in the Resolution.

Article 4 establishes that all traders and authorized technical assistants must make available “collection points” (Article 19) to local consumers within 24 months, with the obligation to return the batteries to their manufacturers and importers. For batteries not covered by the Resolution, joint programs of selective collection must

⁹ Further information on Pro-CDM is available in English on the FINEP website at: http://www.finep.gov.br/programas/pro_md1_ingles.asp.

¹⁰ Further information is available in English on the BNDES website at: http://www.bndes.gov.br/english/news/not126_07.asp.

¹¹ Further information is available in English on the BNDES website at: http://www.bndes.gov.br/english/environmental_line.asp.

be implemented by the respective manufacturers, importers, distributors, traders and by public authorities (Article 5).

Articles 7 and 8 set the maximum levels of mercury, cadmium and lead as well as the time limits for compliance with these maximum levels. The Resolution uses the same standards as European Directive 2006/66/EC of September 6, 2006 on batteries and accumulators and waste batteries and accumulators. Compared to the revoked Resolution, the levels now adopted are considerably lower than they used to be. There is no provision about the possible reduction in the performance of the batteries because of the lower level of substances, but Article 26 establishes the obligation for producers and importers to promote research and encourage improvements in the overall environmental performance. The new levels will enter into force on July 1, 2009.

The Resolution also requires that advertising materials and packages of batteries manufactured in or imported to Brazil contain symbols related to their proper disposal, warnings about the risks to human health and the environment as well as the need that used batteries be delivered to the retailers or authorized technical assistance network (Article 14).

Article 15 determines that the manufacturers and importers of products that incorporate batteries must inform consumers about how to proceed regarding the removal of these batteries after their use, so that they are disposed separately from the rest of the product. IBAMA may request sampling of batches of batteries produced or imported for marketing in the country in order to verify compliance with the requirements of the Resolution. The verification of non-compliance with the requirements will lead to the obligation for the manufacturer or importer to recall all the batches in conflict with the Resolution.

Another innovation is the requirement to include specific information on products that contain acid-lead, nickel-cadmium and mercury-oxide batteries (Article 14). The symbol for “separate collection” is also used in the European market, which enhances unity in the sector and gives more security to the consumers.

The “Proper Environmental Destination” foreseen in the Resolution (Article 6) aims to establish means to control the receipt and final destination of batteries. The corresponding procedure will be established by the IBAMA through a Normative Instruction that has not yet been enacted. Recycling is also envisaged by the Resolution, but it does not go further, to establish targets for its implementation.

The Resolution entered into force on the day of its publication, however, it establishes a 24 months target counted from its publication (which would be November 2010) to manufacturers and importers of batteries to give a “Proper Environmental Destination” to the totality of batteries (100%). It may be argued that it is a very short term, due to the reality of the Brazilian market. The European Directive 2006/66/EC was more flexible, establishing a 25% target by 2012 and a 45% target by 2016.

Compared to the revoked Resolution, the 2008 Resolution enhances the Extended Producer Liability, which has its foundation in strict liability. Allied with other Environmental Principles present in the Resolution such as Right to Information, Transparency and Environmental Education, it confirms the commitment of the Brazilian Agencies to better regulate and protect the environment and public health.

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The Resolution holds the manufacturers and importers of batteries responsible for the environmental damage that the disposal of batteries can cause and encumbers them with the obligation of promoting the proper disposal of these products.

Non-compliance may result in the application of the penalties of Law No. 9,605/98 (criminal and administrative sanctions) and Law No. 6,938/81 (civil liability), depending on the circumstances of the violation as well as the damage caused to the environment or to human health.

Article by Ana Beatriz Kesselring from the Sao Paulo Office.

Mexico

How Does the New Renewable Energy Law Impact Projects in Mexico?

As part of the Energy Reform Package prepared by President Calderon’s Administration, a new law was enacted that is aimed at the promotion of renewable energy projects and the financing of an “Energy Transition”: the Law for the Use of Renewable Energy and Finance of the Energy Transition (The “Law”). The goals set forth by the Administration, although commendable, are not immediately reflected in the actual instruments contained in the Law. It sets out a policy aimed at the promotion of renewable energy projects and it grants additional powers to the Ministry of Energy (“SENER”) and the Regulatory Energy Commission (“CRE”) for the future enactment of additional regulatory instruments that may accomplish those objectives. The Law does not substitute the provisions established in the Law of Public Electricity Service. Therefore, it will be possible to continue the operation of self supply projects, develop co-generation projects or to operate as small power projects. The main focus of the Law is the attraction of private investors for the development of renewable energy projects (“Producers”) and not the state-owned companies (“Suppliers”).

New requirements are set up for Producers of renewable energy projects with a capacity in excess of 2.5 MW. These will be required: (i) to secure local participation in a public consultation process; (ii) if leases are entered to pay during the agreed-upon term (at least twice a year) for the use of properties; and (iii) to promote the social development of the community in accordance with the best international practices and the applicable environmental, rural development and agrarian laws.

The Law considers that the use of renewable energy and clean technology will provide a greater benefit to the public and it should be promoted as part of a national strategy for the energy transition into a more efficient and sustainable policy, that will eventually reduce Mexico’s dependency on hydrocarbons as the country’s primary energy source. It also considers that renewable energy is a source derived from natural occurrences and that it may be used by humanity. These sources of renewable energy considered by the Law include wind, solar radiation (in all its forms), movement of waters in their natural and artificial basins, maritime movement, heat from geothermal sites, biofuels as provided by the law for the Promotion and Development of Biofuels and others included by SENER. The Law expressly excludes from its preferential treatment and regulation: radioactive materials for nuclear energy; large hydraulic projects (more than 30 MW); industrial or solid waste when incinerated or when receiving another thermal treatment, and energy derived from landfills that does not comply with environmental regulations.

SENER will be required to develop a program for the use of renewable energy. In order to fulfill this goal, SENER should follow the provisions set forth in the National Strategy on Climate Change and the international treaties signed by Mexico on climate change and the use of renewable energy. SENER is required to establish specific goals and the minimal percentage of installed capacity and energy supply for the use of renewable energy. SENER will coordinate the construction of the electric infrastructure needed to interconnect the renewable energy projects to the national grid. SENER is authorized to coordinate with the State and Municipal governments those measures required to simplify the access to those areas where the renewable resources are available in optimal conditions. The objective of this coordination between the three levels of government is to promote an adequate zone planning and to reduce the “red tape” for renewable energy projects.

CRE will be responsible for issuing norms, directives and methodologies that regulate and provide incentives for the generation of electricity from renewable energy sources and the instruments for the payments by and between Producers and Suppliers. CRE will promulgate the regulations that provide preferential access, interconnection and wheeling of the electric load generated by the Producers. CRE will have greater autonomy to issue the procedures for the exchange and compensation of energy by the Suppliers of renewable energy projects. Furthermore, CRE could establish a differentiated treatment of renewable energy projects and provide additional incentives dependant on the technology used and geographic location of the renewable energy projects. Furthermore, it will develop the contracts to be entered between Suppliers and Producers and it will establish the guidelines for the delivery of Producer surpluses to the national grid. In sum, the legislative branch has placed over CRE’s shoulders the development of a regulatory framework to meet the objectives set out by the Law.

SENER, with the support of the Treasury Ministry, The Ministry of Environment and Natural Resources (“SEMARNAT”) and the Ministry of Health will develop a methodology for the calculation of the externalities associated with the generation of electricity using as a baseline for said calculation the impact caused by renewable energy. Once this methodology is enacted, SEMARNAT will design a regulatory mechanism for the use of renewable energy.

The Federal Executive will design and implement policies to simplify the flow of resources derived from international mechanisms for the mitigation of climate change. It would be possible for Suppliers and competent authorities to act as intermediaries between those projects of renewable energy and the buyers of carbon credits. The Executive branch should bundle the resources applicable to this strategy; this amount will be updated every three years. A Fund for the Energetic Transition and Sustainable Use of Energy has been created (“The Fund”). This Fund will include loans for credit guarantees and other types of financial instruments to meet the objectives of the Strategy. For the fiscal year of 2009, a minimum amount of three thousand million pesos¹² will be allocated in the Fund.

The development of the regulatory framework will not be completed with the enactment of the Law, as this framework, to be complete, will require the issuance of its regulations, a National Program and the Strategy for Energy Transition and Sustainable Use of Energy, the specific mechanism to simplify the flow of revenue from carbon credits, the mechanism for the quantification of the externalities, contract models, methodologies and additional instruments to accomplish the goals of the Law. Furthermore, new requirements have been set up for the implementation of renewable energy projects. As such, this is the first step into a very ambitious goal

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¹² Approximately two hundred fifty million USD.

to rely less on hydrocarbon as the primary source of energy in Mexico. It is a goal that is worth pursuing, however, a lot of steps need to be implemented prior to assessing the impact of this Law in the energy sector in Mexico.

Article by Raul Felix-Saul from the Juarez Office.

New Voluntary Programs and Mandatory Provisions in Mexico Regarding Energy Efficiency

On November 28, 2008, the Law for the Sustainable Use of Energy (LASE in Spanish) was published in the Federal Official Gazette. The LASE is relevant because it is the first specific law in Mexico that mandates energy efficiency (EE), through new voluntary programs and mandatory provisions aimed at increasing national energy efficiency.

The main purpose of the LASE is to increase EE in Mexico. In order to achieve this general objective, the LASE establishes the National Subsystem of Information Regarding Energy Use, and creates the legal framework for voluntary programs and mandatory provisions regarding the generation, transformation, distribution and use of energy.

In Mexico, EE mandatory provisions that were already in force prior to the enactment of the LASE are focused on appliances, lighting and buildings, mainly public buildings of the Federal Government. Another existing EE program in Mexico is the Daylight Savings Time program. Almost all these provisions are established in the Mexican Official Standards (NOMs), which are mandatory standards according to the Federal Law on Metrology and Standards.

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One purpose of the LASE is to establish the characteristics and design the structure of the mandatory National Program for the Sustainable Use of Energy (National Program). This National Program, according to the LASE, will include a Program for the Standardization of EE (EE Program) as well as strategies to promote and increase the number of NOMs related to EE.

Additionally, the LASE creates the National Commission for the Efficient Use of Energy (CNUEE, in Spanish), which is empowered to impose fines ranging from \$5,259 pesos (around \$400 USD) to \$52,590 pesos (around \$4,000 USD) in case provisions of the LASE are breached. Moreover, the Consumers Federal Bureau may impose up to \$1,051,800 pesos (\$79,000 USD) as penalty when the LASE is breached.

For any questions, comments or further information regarding the mandatory provisions and voluntary programs referred to in the LASE, you may contact Raul Felix-Saul or Federico Ruanova-Guinea.

Article by Raul Felix-Saul and Denisse Varela-Olivas from the Juarez Office.

New Occupational Health & Safety Standards

In November 2008, the Ministry of Labor and Social Welfare issued four occupational health and safety standards that are relevant to industrial activities. The most important of the four due to its applicability to different buildings, was published on November 24, 2008 in the Official Federal Gazette, and it is NOM-001-STPS-2008 (“NOM-001”), entitled “Safety conditions for workplace buildings, locales and installations”. The other three standards are:

- NOM-022-STPS-2008. - Safety conditions regarding static electricity in workplaces, published on November 4, 2008;
- NOM-027-STPS-2008. - Safety and health conditions applicable to cutting and welding activities, published on November 4, 2008; and
- NOM-026-STPS-2008. - Colors and safety and health signs; identification of risks caused by fluids conducted through pipelines, published on November 25, 2008.

All of these standards became effective 60 calendar days as of the date of their respective publication.

NOM-001 requires employers to keep workplace installations in safe conditions in order for risks to be avoided. Employers are also required to:

1. Carry out visual inspections every twelve months to identify unsafe areas and make the necessary repairs. Results of such inspections must be documented in logs, through electronic means or in inspection reports prepared by the health & safety commissions;
2. Carry out visual inspections after any accident in the workplace and carry out all necessary actions to guarantee the safety of its occupants;
3. Have in place clean and safe restroom facilities for employees and if need be, reserved spaces for food consumption;
4. Should there be a need to de-contaminate employees as a result of their specific activities, have showers and lockers in place;
5. Provide information to all employees regarding the use and conservation of areas where they carry out their activities within the workplace.

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NOM-001 also contains guidelines and requirements that different areas and installations must meet, such as ceilings, stairways, floors, ventilation systems, areas for vehicle transit, and a checklist that enables employers to verify compliance with all of the requirements set forth in NOM-001.

Should you require any information or advice regarding how to comply with the requirements set forth in any of the health & safety standards that have been published, please let us know.

Article by Federico Ruanova-Guinea from the Tijuana Office.

Venezuela

Clean-Up of the Guaire River

As reported by the BBC in 2002, amidst the claims of contamination of waters in Central Europe, the impact of polluted rivers has proven to be highly dangerous and brings devastating consequences to the community. Consequently, the cleaning up of these rivers has been targeted as a main objective in many countries, including Venezuela. In fact, the Venezuelan government has promoted different projects to improve the conditions of many rivers and lakes, such as the Guaire River, the Maracaibo Lake and the Delta Amacuro Basin.

Specifically, the project of cleaning up the Guaire River, which is located in the city of Caracas, has been remarkable. This plan, which is conducted by the Ministry of the Environment, began in 2005 and is set to be completed in 2014. It involves not only the cleaning up of the river, but also, the construction of engineering works that will improve the re-collection of waste and waste waters, and the creation of educational programs involving the community for the decontamination process of the Guaire River.

This project has been essential because of the high levels of pollution of the Guaire River. Indeed, as has been recognized by the Ministry of the Environment and by organizations such as the Foundation of Organizations and Environmentalists Boards of Venezuela over the last 20 years, the Guaire River has been contaminated by different factors. These factors are, among others, residues produced by different factories which are directly discharged into the river, waste which is deposited directly by the population of Caracas, and waste waters which are not properly treated before they end up in the river.

Currently, as planned by the Ministry of the Environment, the project is in its second stage, which started in 2007, and will focus on the cleaning up of 95% of the waters in the catchments areas of the river. Additionally, they will also continue to promote the participation of the community in this project, not only through cooperation to stop the pollution of the river, but also by acting as comptrollers of the activities conducted by the Ministry of the Environment.

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As a consequence of the above, in the years to come, Caracas will enjoy a river that is clean and that will improve the environment of the city. However, this project will benefit the community in many other ways. The educational campaign that has come along with the cleaning up of the Guaire River has been noteworthy.

Indeed, as noted by the United Nations Development Program, the role of education in the environmental field is pivotal. Without education, a country may enact laws in order to preserve the environment, but if the people are not conscious about the environment and the role they play in it, no law or program shall ever be successful.

Consequently, the cleaning up of the Guaire River will not only contribute directly to the improvement of the environment of the city of Caracas, but will also have an indirect effect by raising the awareness of the population about the importance of preserving and protecting the environment.

Article by Maria Eugenia Reyes and Maria Victoria Romero from the Caracas Office.

North America

Canada

Introduction - Winds of Change

As a variety of governments and markets appear willing to implement new carbon management regimes, it is increasingly apparent that companies will be held accountable for environmental impacts of their business like never before. Recognizing this phenomenon, securities and accounting regulators and industry are putting pressure on issuers to adequately warn investors about environmental risks contained in their disclosure documents. It is also recommended that issuers ensure consistency in both their voluntary disclosures and mandatory regulatory filings.

Ontario Securities Commission (“OSC”) *Staff Notice 51-716 - Environmental Reporting (“the Staff Notice”)*, issued February 29, 2008, reminds reporting issuers of their environmental reporting obligations through continuous disclosure (“CD”). The OSC maintains that an adequate framework for environmental reporting currently exists within the management discussion and analysis (“MD&A”) and annual information form (“AIF”) document formats. Instead of overhauling environmental disclosure requirements, the OSC highlights where environmental reporting should be evident in existing CD documents, and points out, in view of a sample of issuers, where many issuers fall short. The Staff Notice reinvigorates current CD obligations, which should satisfy investors pushing for heightened environmental disclosure, and push reporting issuers to ensure that their environmental disclosure is meaningful and thorough enough to meet expectations. To a lesser extent, the Alberta Securities Commission has raised similar concerns.

The Chartered Accountants of Canada are also offering guidance to help companies better disclose the business impacts of climate change to investors. The Canadian Institute of Chartered Accountants (“the CICA”) has recently published two new documents in response to a growing demand for guidance relating to MD&A disclosures. The first, *Building a Better MD&A - Climate Change Disclosures*, helps companies provide useful and relevant information to investors. The second, *Executive Briefing – Climate Change and Related Disclosures*, points out that, at the company level, climate change is a business and shareholder value issue involving strategy, risk management and financial performance.

Finally, more closely akin to peer pressure than enforcement fear, several voluntary compliance organizations have found traction in the environmental and climate change disclosure arenas.

Securities Regulatory Guidance

Ontario Review

The OSC Staff Notice included a review of CD documents, including MD&A and AIF disclosure, for 35 reporting issuers (22 Toronto Stock Exchange listed companies and 13 TSX Venture Exchange listed companies) for whom the OSC is the principal regulator.

The review also contrasted available CD documents with the disclosure on each company’s website. While the issuers examined operate in environmental services, industrial products, mining, oil and gas, steel, transportation services, or utilities related industries, the OSC emphasized that its commentary would be relevant to any industry.

OSC Staff Notice Environmental Disclosure Requirements

In CD documents, such as the MD&A and AIF forms, “materiality” is the determining factor for inclusion¹³. Information relating to environmental matters is likely material if a reasonable investor’s decision whether or not to buy, sell or hold securities of the issuer would likely be influenced or changed if the information was omitted or misstated.¹⁴ According to the OSC, both qualitative and quantitative factors should be considered in determining materiality for disclosure relating to environmental matters.

¹³ 1MD&A Form 51-102F1 Part 1(f) and AIF Form 51-102F2 Part 1(e).

¹⁴ This concept of materiality is consistent with the financial reporting notion of materiality included in the Canadian Institute of Chartered Accountants Handbook.

The OSC notes that certain environmental matters are likely to be material and require disclosure. These include:

- environmental liabilities
- asset retirement obligation
- financial and operational effects of environmental protection requirements
- environmental policies fundamental to operations
- environmental risks

In order to fulfill CD obligations, issuers will need to include meaningful disclosure on the above matters, including analysis that goes beyond boiler plate discussions. To help clarify the extent of the disclosure expected of issuers, the OSC includes examples of best practices for each type of disclosure.

1. Environmental Liabilities

Estimating environmental liabilities can involve uncertainty, which is why Canadian generally accepted accounting principles (“GAAP”) allow the minimum estimate to be accrued where no estimate is more likely than any other. However, if an environmental liability involves an estimate, management of reporting issuers are required to discuss estimates and include an analysis in their MD&A.¹⁵ In its analysis, management should:

- identify and describe each estimate, including methodology and assumptions, while reflecting on any current trends and explain why the estimate may change in the future
- explain the significance of the estimate, in particular by identifying financial statement line items affected by it
- discuss changes to the estimate during the past two financial years
- identify and discuss the segment of the business that the estimate will effect

The OSC views the inclusion of a discussion of materially contingent environmental liabilities in an issuer’s MD&A and/or AIF as necessary, whether or not the liability has been accrued in the financial statements or mentioned in the notes to the financial statements.

OSC Best Practice Example: *One issuer in the study, in discussing reclamation costs, stated that its operations are subject to environmental laws in the various countries where it has closed mines and open mines. The issuer then stated that technical issues made the reclamation of closed mines uncertain, which, together with any future changes in environmental laws, made estimating reclamation costs difficult. Nevertheless, the issuer provided a breakdown of its estimated reclamation costs for its closed mines and its open mines, and provided the basis and methodology for making these estimates. The issuer concluded its analysis by noting that it recognized changes in its estimated reclamation costs immediately for closed mines and amortized any changes in its estimated reclamation costs over the life of its open mines.*

¹⁵ Required by 1.12 of Form 51-102F1.

2. Asset Retirement Obligations (“AROs”)

ARO’s can impose significant environmental and economic burdens on an issuer. As soon as a reasonable estimate can be made, the OSC notes that AROs should be included in an issuer’s financial statements. Further analysis of an issuer’s financial condition, results of operations and cash flows, which includes a discussion of commitments, events or uncertainties that are reasonably likely to have an effect on the issuer’s business, should be part of an issuer’s MD&A.

OSC Best Practice Example: *One issuer in the study accrued environmental remediation costs relating to certain mines in its annual financial statements in accordance with GAAP. The issuer also included a comprehensive discussion of these costs in its MD&A and AIF, separating the costs into categories such as the costs of compliance with environmental legislation and the costs associated with the disposal of hazardous materials, and also divided the costs among open mines, closed mines and development projects. The issuer then identified the current and future impact of the costs on financial results and noted that it would record a loss accrual if a contingent loss arose due to the improper use of an asset and the loss was probable and could be reasonably estimated.*

3. Financial and Operational Effects of Environmental Protection Requirements

Changing environmental protection requirements can create significant compliance costs for companies. The OSC reminds companies that they must disclose in their AIF how environmental protection requirements will affect the companies’ capital expenditures, earnings and competitive position.¹⁶ This type of analysis, when it includes assigned value estimates, can be valuable to investors trying to select companies which are planning to adapt to future requirements.

OSC Best Practice Example: *One issuer in the study did include a detailed discussion of the financial and operational effects of environmental protection requirements on their capital expenditures, earnings and competitive position in the current financial year and the expected effect in future years. For example, it stated that it designs and operates in compliance with all applicable environmental requirements relating to the protection of the environment. The issuer also stated that it cannot predict the changes that could be made to environmental requirements in the future. The issuer concluded its discussion by stating that its capital and operating costs for environmental controls would likely increase in the future, but these increases were not expected to have a material effect on the earnings or competitive position of the issuer.*

4. Environmental Policies Fundamental to Operations

Environmental policies fundamental to operations must be described in an issuer’s AIF.¹⁷ Thoughtful analysis on how internal policies affect financial performance can demonstrate an issuer’s commitment to voluntary controls and may predict its ability to balance new protection requirements or take advantage of voluntary market credits. The OSC stresses the need to disclose, whenever possible, the costs associated with the policies and their effects on operations.

OSC Best Practice Example: *One issuer discussed its various programs to prevent and control spills and protect water quality, reuse and conserve water, and mitigate the dust produced by its operations for each of its properties. The issuer also*

¹⁶ Form 51-102F2 (item 5.1(1)(k)).

¹⁷ Form 51-102F2 (item 5.4).

addressed how harmful materials generated by its operations are removed and destroyed, and described its policy of performing regular environmental audits on all of its properties.

5. Environmental Risks

Issuers are required to disclose and discuss, in their AIF and/or MD&A, risk factors, including environmental risks, associated with their business. The OSC is of the view that risks relating to the cost of compliance with applicable national and international laws should be discussed and analyzed by issuers. As greater market and reputational consequences flow from an issuer's compliance, an issuer's own assessment of the environmental risks is an important factor for investors to consider.

OSC Best Practice Example: *One issuer provided a detailed discussion of the foreign environmental laws and regulations that apply to it and quantified the costs of compliance with these laws and regulations in both the short- and long-term. The issuer also discussed how significant changes to these laws or regulations could materially impact its expenditures, which in turn could affect its business, financial results and financial condition.*

6. Certification and the Role of Audit Committees

In addition to clarifying existing environmental reporting requirements, the OSC also restated the role of certifying officers and audit committees in ensuring that CD documents such as the MD&A and AIF fairly represent, in all material respects, the financial condition of the issuer. This is a not so subtle reminder to certifying officers and directors that they have a role in ensuring that issuer CD documents meet environmental disclosure expectations.

Alberta Review

On February 16, 2007, the Alberta Securities Commission ("the ASC") published its report entitled "Disclosure Review Program" which focused on the 2006 review of financial statements; MD&A and other continuous disclosure material. Among other things, ASC Staff found boilerplate risk language disclosure found in AIF and MD&A disclosure, including the description of a reporting issuer's environmental policies, environmental protection requirements, and exposure to environmental risk and critical accounting estimates in respect of environmental liabilities. ASC Staff encouraged reporting issuers to improve their environmental disclosure by increasing specificity of any environmental risks likely to affect the reporting issuer.

Accounting Regulatory Guidance

The CICA's recent guidance updates its previous guidance on the topic of environmental disclosure. The materiality standard for disclosure for these purposes is consistent with that contained in the CICA Handbook. In a 2005 discussion brief, *MD&A Disclosure about the Financial Impact of Climate Change and Other Environmental Issues*, the CICA stated, "Climate change and other environmental issues should be disclosed and discussed if they either have, or are reasonably likely to have, a current or future effect, direct or indirect, on the entity's financial condition, changes in financial condition, results of operations, liquidity, capital expenditures or capital resources that is material to investors."

Building a Better MD&A, Climate Change Disclosures updates that 2005 CICA discussion brief and is quite direct in its description of the potential impact of climate change on Canadian companies. It states:

“Climate change issues will impact some industries and companies more than others. But sooner or later climate change will affect, either directly or indirectly, the business operations and financial performance of many Canadian companies, large and small, in most sectors.”

As a result, there is a need for companies that are potentially affected by climate change to provide timely and appropriate environmental related disclosure. The CICA notes that the challenge facing most companies lies in determining what information to disclose and under what circumstances to disclose. The CICA’s guidance echoes many of the same concerns of securities regulators set out above.

For example, securities regulators look to disclosure set out in a company’s MD&A and/or its AIF. However, a company may have also disclosed environmental information in its sustainability report, corporate website or in its responses to surveys such as the annual survey conducted by the Carbon Disclosure Project (discussed below). If disclosure is not made in a company’s MD&A or its AIF, investors may actually interpret that to mean that the information is not material. The challenge lies in balancing the availability of reliable climate change information with the informational needs or demands of investors, bearing in mind that different methods of disclosure are subject to different levels of oversight.

The CICA’s information is largely based upon input from institutional investors and market analysts. It found that these persons increasingly want information that will enable them to assess the impact of climate change to a company, as was evidenced by a 2007 petition to the U.S. Securities Exchange Commission (“SEC”) by a broad coalition of investors encouraging the SEC to compel publicly traded companies to improve their climate change disclosure. The CICA focused on and attempted to answer several key questions:

- What topics do investors want information on?
 - business strategy
 - risks
 - actual greenhouse gas emissions
 - financial impacts
 - governance processes
- What information should a company disclose and how should it be presented?
 - information regarding short-term and long-term impacts
 - consistency with prior disclosures
 - information regarding the variability of possible outcomes
- What questions can a company ask itself regarding climate change disclosure?
 - How has the company determined which climate change issues are material and disclosed in MD&A?
 - Has materiality been assessed in both quantitative and qualitative terms?

- Has the company addressed the potential impact of climate change issues on both its short-term and long-term financial condition and performance?
- From period to period, is there comparability and consistency in MD&A disclosures about climate change?
- Has the company ensured consistency of MD&A climate change disclosures with those in other public reports it has issued?
- Has the company implemented appropriate systems, procedures and controls to enable timely, complete and reliable reporting of climate change information in MD&A?

Other Climate Change Disclosure Initiatives

Investor activists have taken specific additional initiatives to increase climate change disclosure by issuers. In October 2006, the Global Framework for Climate Risk Disclosure was established by a group of leading institutional investors. It set out principles and information that investors often consider when analyzing an investment's climate risks, including the investment's current and historical greenhouse gas emissions, its climate change policy and any corporate and operational steps it has taken to reduce identified risks. This voluntary framework encourages companies to engage in the disclosure of this information through mandatory financial reporting (described above) and voluntary reporting mechanisms, such as the *Carbon Disclosure Project*¹⁸ ("CDP") and *Global Reporting Initiative*¹⁹ ("GRI").

The CDP now represents investors with over US\$57 trillion in assets under management, including major Canadian financial institutions and pension plans. Some of the world's largest companies have answered Developments in Climate Change Disclosure Requirements annual questionnaire, including 202 of Canada's largest companies based on market capitalization, for its fifth report, CDP5 in 2007, and similarly 190 companies in its sixth report, CDP6 in 2008. Also earlier in 2008, three large U.S. banks, Citi, JP Morgan Chase and Morgan Stanley, announced *The Carbon Principles*²⁰ to provide guidance to energy companies in managing carbon risks. These principles result from a nine-month consultation with seven of the largest power companies in the U.S. The principles include greater emphasis on energy efficiency and renewable/low-carbon energy technologies, as well as better risk analysis for conventional forms of energy generation. This effort sets the stage for the development of a consistent approach among major lenders and advisers in evaluating climate change risks and opportunities in the U.S. electric power industry, and could ultimately be emulated across other sectors in the near future.

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Voluntary initiatives like the ones discussed above typically propose that issuers deal with the following aspects of their business:

- measure their "carbon footprint"
- analyze the risks, challenges and opportunities presented by climate change
- manage these risks and opportunities.

¹⁸ For further information, see: <http://www.cdproject.net/aboutus.asp>

¹⁹ For further information, see: <http://www.globalreporting.org/Home>

²⁰ For further information, see: <http://carbonprinciples.org/>

Conclusion

In focusing on environmental disclosure, regulators, accountants and industry are preparing reporting issuers for an era where environmental matters, such as greenhouse gas emissions, directly affect performance and share price. Regulators are clear that website disclosure on environmental policies and risks is not sufficient. Environmental matters must be considered alongside other material matters in an issuer's CD documents. There is no indication that regulators plan any extra enforcement over environmental reporting. However, there is recognition that there will be market consequences for issuers who fail to stay current with environmental compliance and risks. It is becoming harder to resist the position that investors have a right to full disclosure on environmental matters so they can make their own informed investment decisions.

Turning Back the Clock: the Rise of Net Metering in Canada

After years of reviews and feasibility studies, net metering has finally arrived in Canada. The provinces of British Columbia and Ontario have finally approved programs to allow for small power generators to connect to provincial power grids.

How Net Metering Works

While there are some variations in the programs in each of the provinces, they are structured similarly. Producers of relatively small quantities of energy from alternative sources may apply for approval to connect their energy feed into the provincial power system and the production is credited against the energy consumption of the generator.

During periods when generation exceeds consumption, a net reduction in the energy use attributable to the generator occurs, resulting in energy savings. When there is a net export to the energy system for an assessment or billing period, that net contribution may be carried forward to offset energy consumption in future billing periods.

Only "Green" Power Eligible

Both of the provincial programs share a common commitment to allow only low or zero-emission generating energy to qualify for net metering. The categories of energy sources are open to expansion, but at present, the following energy sources generally qualify: small/micro hydro, wind, solar, photovoltaic, geothermal, tidal, wave and biomass energy, as well as cogeneration of heat and power, energy from landfill gas and municipal solid waste, and fuel cells.

Net Metering's Glass Ceiling

While the governments of both British Columbia and Ontario have pointed to net metering as part of their new vision for energy efficiency and green technologies, it is notable that neither program encourages significant alternative energy production. British Columbia will only pay out the net export of energy, determined annually, at a rate of 5.4 cents/kW, a rate that is significantly lower than the feed-in tariff paid for green energy elsewhere.

Ontario's program arguably encourages energy consumption and not conservation or generation during the later stages of each net metering year as the net export of energy is neither carried forward nor paid out at the end of that year.

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Other Provinces to Follow

Although net metering remains in its nascent stage in Canada, many of the other provinces are presently reviewing the performance of the Ontario and British Columbia programs for the purposes of implementing similar schemes. The true watershed for net metering, however, will only come when small generators are given the ability to reasonably profit from their net export of green energy.

Article by Jonathan Cocker from the Toronto Office.

USA

Significant New U.S. Hazardous Waste Rule Excludes Recycled Materials from Regulation

On October 30, 2008, the Environmental Protection Agency ("EPA") issued a final rule that is the most important change in U.S. regulation of hazardous waste in decades. The new rule, which modifies the definition of solid waste under Resource Conservation and Recovery Act ("RCRA") regulations, is intended to encourage recycling of hazardous materials by excluding materials that are legitimately recycled from regulation under RCRA. The rule provides two self-implementing exclusions as well as a case-by-case petition process. In addition, the rule codifies the factors used to distinguish legitimate recycling from "sham" recycling.

The new rule has numerous implications for generators of hazardous waste. Most significantly, because material meeting the exclusion is not considered hazardous waste, generators may have the opportunity to reduce the total volume of hazardous waste generated and thereby extricate themselves from the detailed requirements applicable to large-quantity generators of hazardous waste. Generators interested in using this new regulatory exclusion will need to proceed with care. While recycling may allow a generator to avoid the traditional RCRA hazardous waste requirements, there are other requirements that must be met, including notification to EPA, due diligence of reclamation facilities, and proper management of materials to be recycled.

The first self-implementing exclusion applies to hazardous secondary materials that remain "under the control of the generator" when legitimately recycled. This includes legitimate recycling that occurs: (1) on site, either by the generator or a contracting company; (2) off site, either by the generator or by an entity that owns both the generator and reclaimer; or (3) pursuant to a tolling agreement whereby the tolling contractor reclaims the materials.

The second self-implementing exclusion, the "transfer-based exclusion," applies to hazardous secondary materials that are transferred off-site for legitimate recycling either to intermediate facilities that store materials for more than 10 days before transfer to the reclaimer or to a reclamation facility. If an off-site facility that will receive a generator's hazardous secondary materials does not maintain a RCRA permit, then the generator must conduct due diligence to ensure that the off-site facility is capable of handling the material and must certify reasonable diligence efforts were made for each off-site facility. This certification and the due diligence must be completed prior to operating under this exclusion and every three years thereafter. If the generator satisfies this due diligence condition, then any RCRA

liability attaches to the off-site facility, not the generator. The off-site intermediate and reclamation facilities must also comply with recordkeeping and documentation requirements and maintain financial assurance.

Under either exclusion, hazardous secondary materials cannot be speculatively accumulated and must be managed the same as any valuable raw material, intermediate or final product. Further, a generator risks losing the benefit of these new exclusions if a release of hazardous secondary materials occurs. Released material will be considered discarded and subject to RCRA regulation if not immediately recovered. Additionally, routine small releases likely will be deemed hazardous waste management and the stored material will no longer be excluded from RCRA. In the event of a significant release to the environment that is not immediately recovered, both the released material and material remaining in the storage unit likely will be considered discarded and will not meet the terms of this RCRA exclusion.

In addition to the two self-implementing exclusions, the new rule enables EPA to make case-by-case non-waste determinations. The petitioner must demonstrate that the hazardous secondary material is not a solid waste because it is either legitimately recycled in a continuous industrial process or indistinguishable from a product or intermediate. These non-waste determinations are intended to address recycling practices that do not involve the discard of materials and, in essence, can be considered normal manufacturing processes rather than waste management operations. These non-waste determinations will take time and likely will be limited in scope and number.

The new rule also addresses the need for codification of the distinction between legitimate and “sham” recycling. Such factors had been provided previously in EPA guidance but, until the issuance of this rule, had not been incorporated into the RCRA regulations. Legitimate recycling is met if the hazardous secondary materials being reclaimed provide a useful contribution to the recycling process or to a product or intermediate of the recycling process. The recycling process also must produce a valuable intermediate or final product. In making this legitimacy determination, facilities should consider whether the hazardous secondary material is being managed as a valuable commodity and whether the product of the recycling process contains significantly greater concentrations of toxic constituents.

The exclusions cannot be used for spent lead acid batteries, materials subject to special management conditions such as those related to cathode ray tubes, and K171 or K172 listed waste. Generators, intermediate facilities, and reclaimers must notify EPA prior to engaging in recycling activities and provide follow-up notification by March 1 of every even-numbered year.

The provisions of this new rule took effect December 29, 2008.

Article by Sasha M. Reyes and Jessica Mitchell Wicha from the Chicago Office.

Air Permits and Greenhouse Gas Controls under the Obama Administration

After only one week on the job, the Obama administration has already announced several significant actions to reduce greenhouse gas emissions from mobile sources. President Obama will also face the challenge of addressing greenhouse gas emissions from power plants and other stationary sources. Similar to many matters the new administration inherited, the climate change issue is a complicated and highly politicized one. Multiple lawsuits and administrative challenges involving the

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control of greenhouse gases under myriad existing environmental laws are outstanding, and Congress is poised to consider new climate change legislation in 2009. As such, there is significant uncertainty regarding future controls on greenhouse gases. While Congress and the Environmental Protection Agency (EPA) are expected to address climate change policy in the next year or so, in the meantime, the practical effect of such regulatory ambiguity is that carbon-intensive facilities will face significant difficulty in obtaining necessary governmental approvals. This article describes the current context of greenhouse gas controls in air permitting for major sources.

Air Permits under the Clean Air Act

Administrative challenges to new or modified air permits are a common strategy to compel the regulation of greenhouse gases under the Clean Air Act because there are well defined avenues for public participation in the issuance of air permits and facilities must hold valid air permits to operate or face significant penalties. These challenges have become more frequent following the U.S. Supreme Court's landmark ruling in *Massachusetts v. U.S.*, in which the court ruled that carbon dioxide and other greenhouse gases are "air pollutants" under the federal Clean Air Act.²¹

Several direct challenges to coal-fired power plants seeking Prevention of Significant Deterioration (PSD) air permits were recently considered by the administrative judges who compose the Environmental Appeals Board (EAB).²² The EAB is the final EPA decisionmaker on administrative appeals under all major environmental statutes that EPA administers.²³ The challenges in front of the EAB were based primarily on the grounds that the EPA did not include limits for carbon dioxide in air permits or otherwise address climate change implications in issuing permits.

EAB Ruling

On November 13, 2008, the EAB issued an order in *In re Deseret Power Elec. Coop.*, impacting all such challenges.²⁴ The *Deseret* case involved a PSD permit issued on August 30, 2007 by EPA Region 8 for a new waste-coal-fired electric generating unit at Deseret Power Electric Cooperative's existing Bonanza Power Plant, located near Bonanza, Utah within the Uintah and Ourah Indian Reservation. Sierra Club and other petitioners challenged the issuance of the permit on several grounds, including the failure of the EPA to require a best available control technology (BACT) emissions limit for control of carbon dioxide (CO₂) emissions. The EAB granted review of the CO₂ BACT issue on November 21, 2007.

The *Deseret* case involved the interpretation of a short clause in the Clean Air Act that requires the imposition of PSD limits for all air pollutants "subject to regulation under the Act".²⁵ This language is also found in EPA's New Source Review

²¹ The categorization of a substance as an "air pollutant" is a threshold matter in the EPA's ability to regulate emissions under many provisions of the Clean Air Act.

²² Petition for Review, *In re Christian County Generation, LLC.*, PSD Appeal No. 07-01 (Envtl. Appeals Bd., filed July 7, 2007); Petition for Review, *In re ConocoPhillips Company*, PSD Appeal No. 07-02, (Envtl. Appeals Bd., filed August 21, 2007); Petition for Review, *In re Deseret Power Elec. Cooperative*, PSD Appeal No. 07-03 (Envtl. Appeals Bd., filed October 1, 2007).

²³ 40 C.F.R. Section 1.25(e). The EAB is an administrative appeals court within the federal EPA and is independent of all EPA offices except for the Office of the Administrator to which the EAB reports.

²⁴ *In re: Deseret Power Elec. Cooperative*, PSD Appeal No. 07-03 (Envtl. Appeals Bd. November 13, 2008).

²⁵ Clean Air Act, Section 165(a)(4).

regulations under the definition of “regulated NSR pollutant.”²⁶ Petitioners argued that this phrase required EPA to impose BACT for carbon dioxide because carbon dioxide emissions are “air pollutants” according to *Massachusetts v. EPA* and are “subject to regulation” because they are required to be monitored under the Clean Air Act. The EPA argued that the agency’s historical interpretation of the phrase “subject to regulation” required the imposition of BACT limits only for air pollutants that are presently subject to actual control of emissions of that pollutant and not merely subject to monitoring requirements.

EAB rejected the petitioners’ argument that the phrase “subject to regulation” has a plain meaning and compels EPA to impose a carbon dioxide BACT. It also held, however, that EPA was not bound by its historical interpretation of “subject to regulation”—that emissions must be actually controlled—and that EPA had not substantiated such an interpretation in the record. The EAB remanded the permit to Region 8 to reconsider whether or not to impose a CO₂ BACT limit and to develop an adequate record for its decision. In its decision, the EAB stated that it recognized the issue of whether CO₂ is “subject to regulation under [the] Act” is an issue of national scope and significance and that all parties would be “better served by addressing it in the context of an action of nationwide scope rather than in the context of a specific permit proceeding.”²⁷

EPA’s Interpretative Memo

In response to the EAB ruling and before Region 8 had a chance to reconsider the PSD permit for Deseret, then-EPA Administrator Stephen Johnson issued an interpretive memorandum attempting to provide additional clarification to the issue of which air pollutants are subject to PSD provisions. A notice of the issuance of the memo was published in the Federal Register on December 31, 2008.²⁸ The memo stated that the EPA’s interpretation of the definition of “regulated NSR pollutant” excludes pollutants for which EPA regulations require only monitoring or reporting, as opposed to actual control of emissions.²⁹ Based on the memo, carbon dioxide, for which only monitoring provisions are required, would not trigger PSD provisions. The memo stated that it was intended to provide an “initial interpretation” of EPA’s regulation at issue in the *Deseret* case. As an interpretive memo, no public comment or other review was required prior to issuance unlike when an agency undergoes formal rulemaking.

The memo states that it was not intended to supersede the EAB’s decision in *Deseret*, which was issued in accordance with the authority delegated to the EAB by Administrator Johnson.³⁰ Instead, the memo refers to the EAB’s statement that the EPA should consider undergoing an “action of nationwide scope” to resolve the interpretation of the phrase “subject to regulation under this Act” and states that it is attempting to accomplish that purpose. However, many parties believed that overruling the EAB’s decision was precisely the intent of the memo and that a quickly issued interpretative rule was not what the EAB meant when it referred to the need for an “action of nationwide scope” to resolve the interpretation issue.

²⁶ 40 C.F.R. 52.21(b)(50).

²⁷ EAB at 10.

²⁸ 73 Fed. Reg. 80300 (Dec. 31, 2008).

²⁹ Stephen Johnston, *EPA’s Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program* (December 18, 2008), http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf.

³⁰ 40 C.F.R. 124.2; 40 C.F.R. 124.19; 57 Fed. Reg. 5320 (Feb. 13, 1992).

Nearly immediately upon the issuance of the interpretative memo, environmental groups, including those who initially challenged the PSD permit in front of the EAB, filed a petition for review of Administrator Johnson's memo and a request that the agency stay the action pending resolution of the petition. On January 15, 2009, the groups filed a lawsuit in the U.S. Court of Appeals for the D.C. Circuit requesting review of the EPA's action. The groups allege that the Administrator is unlawfully attempting to overturn a ruling by the EAB.

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As a practical matter, the EAB ruling combined with the interpretative memo have left significant uncertainty in their wake. Approximately 275 major source industrial facilities apply for PSD permits each year, including a number of coal-fired power plants. Johnson's memo, while attempting to provide guidance to EPA regions considering pending air permits, may not be determinative, and EPA regions issuing permits relying on the memo will likely be challenged.

While legal actions continue, the focus now turns to the Obama administration and Congress to definitively address greenhouse gases in a comprehensive fashion. The Obama administration has indicated that it will consider measures to address greenhouse gas regulation under the Clean Air Act but has not revealed specific details yet. Indications are that Congress will also consider a climate change bill but no legislation has been introduced at this point. As such, the fate of the interpretative memo, the implications of the EAB ruling and how the EPA proceeds on regulating greenhouse gases in general remain to be seen. As a practical matter, until these issues are resolved, businesses making long-term investment decisions with greenhouse gas implications or those seeking permits for new or modified carbon-intensive facilities face significant uncertainties and likely legal challenges resulting in substantial delays.

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