

# Global Environment Newsletter - Summer 2011

## EU: Update on REACH implementation

The European Chemicals Agency (ECHA) has produced its second evaluation report on the implementation of the EU REACH chemicals regulation in 2010. Significantly, November 2010 saw the first deadline for full registration of substances (for the production / import of substances in volumes of over 1000 tonnes and certain hazardous substances) which required the submission of detailed dossiers relating to the characteristics and hazards of the substances being registered. As at the end of 2010, more than 21,600 registrations had been made. ECHA is responsible for evaluating 5% of dossiers to see if they comply with REACH requirements. It is also responsible for evaluating proposals for carrying out certain further tests on substances to avoid carrying out unnecessary tests (e.g. on animals).

The report gives an interesting early indication of how the regime is working. Based on 70 compliance checks, ECHA made the following findings: In almost half of cases, improvements in quality of dossiers were needed. Further information needed to be provided in 17% of cases. In all, only 35% of dossiers were found not to need any further action.

The principal area of concern was found to be dossier quality and the main problems identified were:

- Failure to clearly describe the registered substance (i.e. substance identity);
- Failure to submit Annex IX and X tests (e.g. on animals) for approval before carrying them out;
- Failure to share data on animal tests (including resolving any disputes) and to share the costs before dossier submission;
- Failure to set out clear justifications for making changes to the standard testing regime for substances;
- Inadequate detail provided in robust study summaries to allow independent assessment and inconsistencies between summaries and chemical safety reports;
- Lack of conformity of substance classification and labelling (C&L) with identified hazards and with the harmonised C&L regime.

ECHA has set out recommendations on each of these areas in its report. It cautions that the results should be understood in the context that the regime is in its early stages and that the results are not necessarily representative of all dossiers submitted by the November 2010 deadline. However, these findings and recommendations should be helpful to REACH registrants in the coming registration phases. In addition, ECHA notes the legal obligation on registrants to keep their dossiers up-to-date. Those who have already registered substances would be well-advised to consider the report's recommendations and update their dossiers where needed.

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## EU Energy Efficiency Action Plan 2011

The European Commission has launched its new Energy Efficiency Action Plan, in a move to give sharper legislative teeth to its Energy 2020 Strategy for reducing greenhouse gas emissions in the EU by 20% by 2020 compared to 1990 levels. This plan sets out a number of energy-saving initiatives both for the public and private sectors. It is accompanied by a proposed Energy Efficiency Directive which contains various implementing measures and will also consolidate the existing Energy Services and Combined Heat and Power Directives.

The proposed measures include:

- **Business Sector Energy Efficiency Obligations:** These include obligations on service providers to deliver energy savings through efficiency improvements among customers. This would provide a European basis for the type of scheme which currently exists in some member states whereby equalling 1.5% of energy sales volume tradeable "white certificates" are issued to energy service providers for units of energy saved. An example is the Carbon Emissions Reduction Target (CERT) Scheme in the UK, which could be extended as a result.
- **National Targets:** National targets to be set for energy saving by 2020. No targets are currently specified but Member States are to "take into account the Union's target of 20% energy savings". Such targets are to be indicative at first but potentially legally binding from 2020 after a 2013 review to assess whether the EU as a whole is on track to meet the 20% energy savings target.
- **Buildings:** Slashing the energy consumption of buildings through a variety of measures, including:
  - public authorities to double their rate of refurbishment (to 3%) in order to set an example by attaining energy efficiency levels within the top 10% of national building stock and buildings bought after 2019 to be "nearly zero-energy";
  - promoting district heating through urban planning; and
  - legislating to counteract the landlord/tenant "split incentive" problem (both being reluctant to pay for energy saving improvements since the benefits do not accrue in full to either party).
- **Energy Generators:** In order to cut the energy waste associated with the energy industry itself, power plants to have in place a minimum level of best available technology (BAT) as a condition of being granted new capacity, and upgrades for existing installations as part of their permit update. Permits are to be prioritised for power plants able to supply district heating and priority network access for combined heat and power plants.
- **Ecodesign and Labelling:** Obligations will be extended to systems (in addition to individual products), based on analysis of their life-cycle energy impact.
- **Transport:** An increased focus on the transport sector, plans for which will be set out in an upcoming White Paper.
- **Audits and Information:** Regular independent audits for large companies and best practice information sharing for small companies.

Commentators have expressed doubts about whether these measures will achieve the intended target energy reductions, given the failure to meet targets under previous directives and the fact that the proposed national energy saving targets will initially be voluntary.

There are further concerns that reductions in CO<sub>2</sub> through energy-efficiency improvements could upset the EU's emissions trading scheme by causing Carbon prices to fall. However, there are proposals to set aside EU emission allowances to prevent this happening and maintain carbon prices.

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## CCS in the Netherlands

The Dutch Cabinet is in broad agreement that Carbon Capture and Storage (CCS) is an essential tool to achieve the EU target of 20% reduction of carbon dioxide emissions by 2020. However, the actual realisation of CCS initiatives is causing significant political headaches in the Netherlands.

Initially, Dutch CCS policy focussed on onshore projects. The previous Cabinet selected two onshore pilot projects, one in the Rotterdam port area (Barendrecht-project) and one in the north of the country. Since CCS would help the implementation of the Dutch carbon emission reduction programme, the assumption was that these initiatives would meet broad support. However, increasing concerns within the local communities about possible health and safety risks triggered strong protests. This unexpected resistance led to the local governments' re-evaluation of its position and consequently the Dutch cabinet decided to abandon these pilot projects and, at least for the medium term, focus on offshore pilot projects for CCS.

A number of offshore projects have already applied for the required environmental permits and for other forms of government support. The Cabinet has welcomed these applications, but emphasised that government cooperation will only be given if health and safety can be guaranteed.

For this purpose a number of studies are being conducted (including an environmental impact assessment) to identify possible consequences of these projects and CCS in general. A research and development programme has been initiated by a consortium of industries, Universities and NGOs under the supervision of the Dutch Government and the Dutch Technical Research Agency (TNO). Its goals are mainly to further develop CCS technology, its reliability and safety. A risk management study is also being conducted by risk management services company Det Norske Veritas (DNV) to analyse safety and public acceptance of the CO<sub>2</sub> logistics hub in Rotterdam. This logistics hub is part of the broader Rotterdam Climate Initiative which is promoting and supporting numerous projects, including CCS projects. The Climate Initiative's main objective is to reduce CO<sub>2</sub> emissions in the Rotterdam area by 50 % by 2025. In addition to these studies and programmes, industry-driven best practice rules have been implemented. The government is also in the process of revising legislation and implementing European rules regulating the carrying out of CCS projects.

Depending on the outcome of these studies, further decisions will be taken as to the types and locations of projects that will be allowed. So far, the "Road2020-project", a joint-venture by E.ON Benelux and Electrabel to inject carbon in a depleted gas pocket some 20 km offshore from Rotterdam appears to have good chances of success. It fulfils the government's desire to minimise resistance, being an offshore project, and also forms part of the research & development programme, which will maximise its technical potential.

These pilot projects and studies will take time to be completed after which the government hopes to have built a solid basis of knowledge and expertise to refine its policy on CCS and further develop a leading CCS industry.

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## German CCS Act proposed

In April 2011, the German government adopted a draft Act on the demonstration and application of technologies for the capture and storage of carbon dioxide (CCS Act) with the aim of the Act being passed in autumn this year. The draft Act is based on the EU Directive 2009/31/EC, which has to be transposed into national law by 25 June 2011.

Falling short of more ambitious legislation of other European countries (e.g. the UK), the scope of the German CCS Act is limited to testing and research. Carbon dioxide storage will be limited to a total of 8 million tonnes per year, with no more than 3 million tonnes per year stored in each single facility. Following an evaluation period until 2017, the German parliament will decide whether or not CCS will be introduced on a larger scale.

As drafted, the rules of the CCS Act are likely to constitute a profound challenge to CCS facility operators, investors and authorities alike. The CCS Act uniquely combines rules from various legal fields such as mining law, the law of waste landfills, energy law, nuclear law, and emission control law. As a result, each aspect of the CCS chain will require different applications, in many cases to different regulators. Co-ordination of relevant processes and necessary expertise is likely to be a challenge to project developers. In addition, technical guidelines on CCS technology do not yet exist. This will make CCS permitting procedures a first from a legal as well as from a technical perspective.

The CCS Act introduces a new concept on the financial responsibility for CCS sites. During operation, operators need to provide security for their obligations. At any time after the period of 30 years following closure of a storage site, operators can request a transfer of responsibility for the site to the respective federal state. This transfer of responsibility provides operators with a clean exit option. However, this is subject to the payment of additional funds and certain legal and technical requirements. In particular, the requirement that the site is left in a "long-term safe condition" may become a major hurdle. As CCS is a relatively new technology and little technical knowledge exists, the questions of what a "long-term safe condition" amounts to and how to prove this sufficiently to allow transfer of responsibility are currently unresolved.

As CCS technology is a contentious issue in Germany, legal procedures will be monitored closely by NGOs, local communities and other stakeholders, and Court action by these groups against individual projects is likely.

The trial stage of the CCS Act will be crucial for this technology in Germany. Technical and legal issues or problems identified during the trial stage, and whether they can be resolved, will heavily influence decision-making in the political arena and the final form of permanent CCS legislation. Although there will most likely be only a few trial projects, experience from these projects over the next few years will be crucial for shaping the CCS industry in Germany.

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## Italy: The End of the current renewable energy incentive system

The Italian Government has recently approved Legislative Decree 3 March 2011, No. 28 (the Decree), transposing the EU Renewable Energy Directive. The Decree, which thoroughly modifies the incentive framework for renewable energies, has raised significant concerns, prompted heavy debates and triggered the fierce opposition of most of the renewable energy industry, particularly in relation to the new provisions regarding the incentives for solar photovoltaic energy.

The current *Conto Energia* incentive scheme applicable to photovoltaic (PV) plants in Italy is a "feed-in tariff" granted to electricity generators for a period of twenty years, proportional to the quantity of electricity produced.

In light of the extremely rapid growth of the PV sector in Italy, and of decreasing technology and operational costs, the Decree has reduced the period of applicability of the third version of the *Conto Energia* (originally due to extend to the end of 2013), limiting it only to PV Plants commissioned before 31 May 2011. PV Plants commissioned after that date will benefit from a new (and lower) set of tariffs, established in a Ministerial Decree dated 5 May 2011. Besides setting out lower (and gradually decreasing) tariffs, MD 5 May 2011 also provides for maximum cost caps for every six-month period: where such cost caps are reached, no more incentives will be granted for that six-month period. All PV Plants will have to enrol in a special electronic registry, managed by the competent regulatory body, i.e. the *Gestore dei Servizi Energetici* (GSE). The GSE will then form a ranking of all enrolled PV Plants, on the basis of a series of technical and chronological criteria, to determine which of them will be eligible to receive the incentives: the others will be excluded from the incentive scheme, but can apply for the next period.

The Decree also places new limitations on incentives for PV Plants located on agricultural land. In broad terms, they will only be granted for plant under 1MW, with additional conditions relating to the proximity of other plant of the owner and limitations on land surface coverage. These further limitations do not apply to plant authorised before 29 March 2011, or for which authorisation was sought on or before 31 December 2010. In each case, however, the PV Plant must be commissioned within 28 March 2012 to qualify.

The Decree finally provides that, for new plants commissioned from 2013 onwards, only two incentive systems will be applicable for every source of renewable energy (including also the PV plants benefitting from the regime described above):

- for plants with a capacity of up to 5MW, a predefined but variable feed-in tariff, depending on the basis of the power source used and the plant's capacity;
- for plants with a capacity over 5MW, an incentive awarded through descending-price auctions, managed by the GSE.

A number of operators have filed a petition against the Decree before the European Commission, on various grounds, including in relation to their retrospective effect and procedural grounds. It is difficult to predict the potential chances of success of the claims, which are currently pending before the Commission, but they appear reasonably grounded.

Given problems which have arisen from the submission of false documents by owners/developers of PV Plants in order to gain access to the incentives, the Decree establishes a specific penalty for the submission of fraudulent applications which will result in a prohibition on access to any incentive for a period of ten years.

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## UK Proposes Fourth Carbon Budget

Following what is understood to have been a major internal battle between "business" and "green" stakeholders, the UK Government has set an important fourth carbon budget for the five-year period from 2023-2027 promising to reduce emissions to 50% of 1990 levels by 2027. In a disappointing move for the renewable industry, however, it has decided that it will review the targets in 2014.

This budget is part of the group of interim budgets designed to provide a trajectory to bring the UK closer to the 80% target budget cut in emissions by 2050. The first three budgets, which the UK is on target to meet, covered the periods: 2008-2012 (22% reduction target), 2013-17 (28% reduction target) and 2018-2022 (34% reduction target).

Whilst green groups have in general reacted positively to the announcement which accords with advice from the UK Committee on Climate Change (CCC), there is disappointment that some of the other CCC recommendations were not followed. In particular, the Government declined to implement:

- more stringent measures in relation to the second and third budgets amounting to an economy-wide reduction of 37% reduction by 2020; and
- an indicative 60% target reduction by 2030.

Whilst the Government is still continuing to argue for an EU target of 30% (rather than 20%) reduction by 2020 compared with 1990 levels, UK carbon targets will be reviewed at the time of the EU climate negotiations in early 2014. The Government will then revise the carbon budget (and potentially make it less stringent) to match the EU commitments in existence at that time. This does not help investor certainty in the renewable and other green industry sectors but has been offered up to address complaints from industry that tougher UK targets threaten its competitiveness within the EU and beyond.

Another disappointment for environmentalists was confirmation that methods of achieving the budget would not be restricted to actual emissions reductions in the UK, keeping the door open to meeting it through carbon trading.

In a further bid to reassure energy intensive industries, the Government has announced that it will introduce a range of measures by the end of the year designed to reduce their electricity costs and to assist them in their transition to the low-carbon world.

However, some commentators argue that greater policy commitments are required to effect the target reductions including far stricter emissions policies although this could bring about large increases in energy costs. It would also necessitate a shift in the energy mix with a preponderance of nuclear and renewables, the transport sector turning to biofuels and electricity on a national level; and a major increase in mandatory carbon capture and storage.

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