CLIFFORD
CHANCE

Newsletter Spring 2015

Global Environment Newsletter

Welcome to the Spring edition of our Global Environment Newsletter. This issue covers the following topics:

We hope that you find this issue of our Global Environment Newsletter of interest. If you have any topics that you would like to see covered in future editions or if you have any comments on previous issues please let us know.

International

Climate Change Agreement negotiations continue: mixed success so far on further state commitments for emissions reductions

Progress on negotiating a new international climate agreement has been made at the UNFCCC Lima Climate Conference in December 2014. However, negotiations continue slowly in the run-up to the Paris Climate Conference in December 2015 which is charged with finalising a full agreement to take over from the Kyoto Protocol in 2020.

Pre-conference optimism had been boosted by the November 2014 U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation which announced commitments by:

- The USA to reduce net greenhouse gas emissions to 26-28% percent below 2005 levels by 2025.
- China for CO2 emissions to peak around 2030.

One of the principal milestones reached at Lima and set out in the "Lima Call for Action" (LCA) comprised agreement on the elements necessary to agree a negotiating text. It will cover: mitigation actions (i.e. emissions cuts), adaptation to climate change, finance, technology development, transfer and capacity building, and transparency of action. The LCA agreed a methodology for negotiating States to submit their intended contributions to mitigation efforts (called "Intended Nationally Determined Contributions" or "INDC"). Negotiating states were required to submit their INDCs by March 2015 if possible.

The UNFCCC announced in Bonn on 31 March 2015 that approximately two-thirds of industrialised states, covering 65% of greenhouse gas emissions from the developed part of the world, have submitted their INDC commitments in support of the

new agreement which is due to come into operation in 2020. Further contributions from industrialised states, as well as from developing countries are expected as the Paris convention draws nearer. Among other countries, Japan, Australia, Canada and China failed to submit their INDCs in time.

World-wide efforts are also already underway to assist developing nations in preparing their INDCs. Governments ranging from Australia, Germany, France, the UK and the USA as well as UN agencies and inter-governmental organisations continue to provide financial, technical and other assistance to around 100 developing countries around the world.

There is still deep disagreement between developed and developing nations as to levels of responsibility for emission cuts and the extent to which they will be legally binding on developing nations. The LCA recognises that States should be based on "common but differentiated responsibilities" in light of "different national circumstances". As a result, there are a significant number of options built into the LCA reflecting the divergent positions of groups of negotiating states. The LCA does, at least, agree on the need for action to ensure that global warming does not exceed 1.5 or 2˚C above pre-industrial levels, and requires each party's actions to go beyond its "current undertaking". Further major disagreements remain on the extent to which emissions reductions need to be reported, monitored and verified; and on when, and how often, climate commitments should be reviewed.

Separately, at Lima, pledges to the Green Climate Fund exceeded its preliminary target of $10bn. This fund will be used to support developing nations with mitigation and adaptation action.

An interim meeting in Geneva in February 2015 agreed a formal negotiating text for the international agreement but without narrowing the gap on the negotiating positions. In February, the EU released its Energy Union Package which seeks to strengthen energy security, and create an integrated market in the context of an energy efficient and decarbonised economy. The Package contained a Communication setting out the EU's vision on the international climate agreement. It seeks a new Protocol which the EU would like China and US to join. In particular, the Protocol should provide for:

- A long term goal for global emissions to be reduced by 60% below 2010 levels by 2050, with legal commitments for mitigation reductions;
- A global review of mitigation commitments every 5 years; and
- Detailed rules and procedures for reporting and verification of emissions.

It is clear that there is a considerable amount of work to be done before the Paris Conference in December 2015.

Michael Coxall
Tel: +44 207006 4315
Email: Michael.coxall@cliffordchance.com
Clifford Chance, London

EU

1 June 2015 deadline for new classification, labelling and packaging rules

As from 1 June 2015 it will become mandatory for manufacturers, importers, distributors and retailers of products (technically "mixtures" of substances) to classify, label and package their products in accordance with the EU's 2008 Classification, Labelling and Packaging Regulation (2008/1272/EC - "CLP").

CLP implements the UN's Globally Harmonised System of Classification and Labelling of chemicals in Europe. Until 1 June 2015, manufacturers and those in the supply chain have been able to choose whether to work under CLP or under the EU's pre-existing Dangerous Preparations Directive ("DPD") legislation covering classification, labelling and packaging of products. As from 1 June 2015, a switch must be made to the CLP. In particular, CLP brings new processes for classifying whether substances are hazardous and determining how mixtures containing those substances need to be assessed. It also introduces new ways of showing hazards on labelling (e.g. using pictograms and hazard statements).

Key points on CLP include:

- New Products: Only new goods produced on and after 1 June 2015 are subject to the CLP. Products already in circulation do not need to be withdrawn, reclassified, relabelled or repackaged.
- No minimum tonnage threshold: Unlike the current system, there is no minimum tonnage threshold for operation of CLP. Except for products of 125 ml or less (which are exempt), all products are caught.
- Labelling and Packaging: The CLP prescribes new hazard and warning labels along with precautionary advice. Requirements to include additional product information must also be observed. Product containers must be designed to ensure that any hazardous contents cannot escape or damage the container.
- Exemptions: A number of exemptions apply. In particular, products regulated by other regimes are exempt, e.g. finished food and cosmetic products.

It is possible that many products will need to be classified, labelled and packaged differently under CLP from previous practice under the DPD. Product stakeholders could therefore have a great deal of work to reclassify, label and package their products based on the new system that will be required from 1 June 2015 onwards.

Michael Coxall
Tel: +44 207006 4315
Email: Michael.coxall@cliffordchance.com
Clifford Chance, London

Australia

Is ethical investment back on the agenda?

The Australian government's implementation of its "Direct Action" program to reduce the country's carbon dioxide emissions has sharpened the focus on Australia's fossil fuel sector but has also appeared to reignite the debate on ethical or socially responsible investment principles in this country.

The repeal of Australia's emissions trading scheme and the passage of legislation to implement the conservative government's widely criticised Direct Action Plan and Emissions Reduction Fund was eventually achieved in 2014, but only after substantial negotiations with, and concessions to, the minor parties in the Senate. The first reverse auction of carbon emissions abatement under the Emissions Reductions Fund was held in mid-April 2015. 47 million tonnes of abatement was purchased by the government, putting an effective price on carbon of A$14 per tonne. Notwithstanding the perceived success of this auction, many doubt the capacity of the Fund to deliver the amount of emissions reductions required for Australia to meet its global targets.

The fact that no one political party holds a majority in the federal Senate has also complicated the ability of the government to finalise a new policy position on Australia's Renewable Energy Target, introduced in 2000 to encourage the development of energy generation from renewable sources. As a result of the political stalemate, investment in the renewables sector in Australia has fallen drastically and many current and planned projects are under review.

The developments at the national political level can be set against two key developments at the sub-national level in the context of the energy sector:

- The establishment of a Royal Commission of Inquiry by the South Australian government into the development of a nuclear industry in that State.
- The significant curtailment of any further development of the coal seam gas industry in Queensland and New South Wales and moratoriums on CSG development in Victoria and Tasmania, largely driven by public concerns associated with the impact of hydraulic fracturing on water resources.

Perhaps as a response to the political failure to deliver policy certainty, there has been a renewed discussion in Australia about the ethics of investing in energy and resources companies, particularly those involved in fossil fuels sector. This has best been demonstrated by the recent decision of the Australian National University to sell investments worth A$16 million in seven Australian mining and energy companies on the grounds that those companies were the lowest ranked against the University's social responsibility policy. A number of these companies had projects in the fossil fuels sector. The University's decision provoked a strong response, not only from the companies whose shares were sold, even though many other public institutions around the world have adopted similar approaches to investment (an example being the Church of England's recent decision to sell off all thermal coal and tar sands investments).

While the intense debate over that decision has now subsided, the discussion around ethical responsible investment continues, although it is likely to remain focused in the short term on fossil fuels and our response to climate change pressures in the lead up to the next major climate change conference in Paris in December this year.

It will be interesting to see whether public discussion will broaden to encompass wider notions of sustainability and social responsibility as the United Nations attempts to finalise new Sustainable Development Goals and the post-2015 international development agenda in September this year.

Robyn Glindemann
Tel: +61 892625 558
Email: Robyn.Glindemann@CliffordChance.com
Clifford Chance, Perth

Belgium

Urban planning and environmental permits integrated into one single permit in Belgium's Flemish Region

In Belgium's Flemish Region, a new statute will bring major reform of the permitting regime for projects. The Flemish Statute regarding the single permit (the "**Statute**") will introduce one single permit (*omgevingsvergunning*) to cover both the development and operational phases of a project.

At present, in the Flemish Region the development of a project will often require both:

- an urban planning permit (*stedenbouwkundige vergunning*), covering construction works, zoning and planning law aspects of the project; and
- an environmental permit (*milieuvergunning*), covering the environmental aspects of the operation of the technical equipment and activities in the premises following construction.

The development of a project may only start after both permits have been obtained.

One single permit, issued by one single permit granting authority

Currently, most urban planning permits are issued by the municipalities, whereas permits for important projects are often issued by the Provincial authorities. As a result, in order to develop a project, two separate permit applications before two different authorities are often required. This creates a significant administrative burden for project developers and a risk of diverging or incompatible decisions by the permit granting authorities.

The Statute provides that only one authority will issue the single permit:

- Regionally Important Projects: The **Flemish Government** will issue the permit for major projects of regional importance, such as the construction of highways, railways, nuclear power stations, airports, waste incinerators, and major electricity production installations;

- Provincially Important Projects: The **Provincial Authority** will issue the permit for mid-size projects such as for example, important retail projects, and wind farms with a maximum of four turbines;
- Other projects**:** **Municipalities** will deal with permit applications for all remaining projects, which will mainly be smaller projects of local importance.

A Decree by the Flemish Government dated 13 February 2015 lists the projects that will qualify as projects of Regional or Provincial for this purpose.

A permit that is unlimited in time

Currently, environmental permits are normally granted for a period of 20 years and must be renewed thereafter.

The Statute changes this regime and provides that the validity of the *omgevingsvergunning* will normally be unlimited in time. The permit-granting authority has the right to limit the duration of a permit but this requires a specific provision in the permit and should only apply in limited and specific situations (for example, for groundwater abstraction, extractive activities and temporary constructions).

Consequently, most operators of permit-requiring facilities will no longer be required to renew their permits on a periodical basis.

Entry into force of the Statute

This reform has been long awaited and it is expected that it will significantly simplify and reduce the time and cost of permit application procedures. It should enter into force during 2016, after the Flemish Government has issued various enacting decrees.

Pieter de Bock
Tel: +32 2533 5919
Email: Pieter.DeBock@CliffordChance.com
Clifford Chance, Brussels

Spain

Amendments to guarantee requirements under the environmental liability regime in Spain: more flexibility is given to operators and site owners

Changes to legislation implementing the Environmental Liability Directive in Spain came into force on April 27, 2015 and are likely to impact the operators of potentially polluting businesses caught by the legislation.

Two significant changes seek to reduce the burden of obtaining guarantees against liability under the legislation. Under the amended regime, the amount of the guarantee required to be put in place by an industrial operator will no longer be set prescriptively by the environmental authorities. Operators will have to put in place a guarantee based on their reasonable assessment of possible liability, following criteria set in regulations. The criteria provide for a formula ("Environmental Damage Index") which takes into consideration the myriad circumstances that make up for the potential threat for the environment, such as: the characteristics of the polluting agents (viscosity, toxicity, etc.) and of the underlying environment surrounding the facility (e.g., soil porosity, temperature, wind speed, slope), as well as the potentially endangered species affected. The environmental authorities will, however, be able to review, and seek to raise, the amounts of guarantees put in place if they believe them to be too low. In addition, the requirement to obtain a guarantee has been removed from operators of certain activities which are deemed to pose no, or minimal, risk to the environment. Such activities will be listed in a further regulation but will, in any event, not include activities involving substances classified as dangerous by relevant legislation.

The changes also seek to make financial guarantees a more effective tool in ensuring the remediation of environmentally damaged sites. Site owners have a subsidiary liability for environmental damage (the site operator is primarily liable). Currently, there is uncertainty as to whether owners can be added to the guarantee that the operator is required to put in place. The amended regime clarifies that the owner and operator can both be covered by the same guarantee. This will reduce the guarantee costs to both owner and operator of the site. It will also facilitate enforcement by the authorities.

It is hoped that these changes will increase the effectiveness of the environmental liability regime and provide greater protection to the environment whilst reducing the burden on industry as a whole.

The primary changes were made by Law 11/2014, dated 3 July 2014, amending Law 26/2007, dated 23 October, on Environmental Liability which contains the main framework for the Spanish environmental liability regime. Implementing legislation containing further detail was brought forward in Royal Decree 183/2015, dated 3 March 2015, amending the Executive Regulation on Environmental Liability approved through Royal Decree 2090/2008, dated 22 December 2008.

Octavio Canseco
Tel: +34 91590 9416
Email: Octavio.Canseco@CliffordChance.com
Clifford Chance, Madrid

The Netherlands

Soil remediation in the Netherlands: enhanced possibilities to coordinate remediation of sites polluted by more than one source

The Dutch authorities are beginning to put in place new programmes for remediation of sites contaminated by multiple sources of pollution, as a result of changes to the Soil Protection Act ("*Wet bodembescherming*").

As in any country, soil remediation in the Netherlands can be time consuming and expensive. The soil conditions in the Netherlands, a flat and wet country, create an additional complexity. Often remediation is complicated by the presence of numerous aquifers at varying levels. Those aquifers can allow soil contamination to migrate, often far beyond a site's boundary.

Historically, Dutch legislation on soil contamination largely ignored this phenomenon. The Soil Protection Act was previously based on the assessment of an individual urgent and serious soil contamination "Case" ("*geval van ernstige bodemverontreiniging*"); A Case is made up of imminent and connected contamination (from source to receptor) that in its entirety forms a distinct and coherent instance of soil contamination. Each Case can impose liability only on the basis of one sole cause of contamination and an identifiable responsible entity or person.

This approach works well in those cases where the contamination has not mixed with other contamination. However, where mobile contamination has merged into one big "contamination soup", the concept creates significant obstacles to determining liability and responsibility for remediation.

For this reason, the Soil Protection Act was amended in 2012, introducing the possibility of competent public authorities ("*bevoegd gezag"*) designating a specified contaminated area for "integral remediation" ("*gebiedsgerichte aanpak"*), rather than simply dealing separately with individual "cases" of contamination in such area. Such designation can be made if the contamination of the deeper groundwater is spreading, if it obstructs spatial development of the area or in certain other circumstances based on the discretion of the authorities.

When an area is designated, the relevant authority determines an integral remediation plan including, among other things: the remediation goals, a description of the contamination, required investigations, details of implementation of the remediation, and allocation of costs. Once determined, the authority will then carry it out.

Putting in place an integrated remediation "package" is voluntary and depends on the agreement of all owners of the relevant land within the specified area. However, if the owners are unwilling to participate in the integrated remediation, the relevant authority can still use its powers to order investigations and remediation that are available to them for urgent and serious soil contamination Cases. The benefit for such land owners in adopting the integrated approach can be that they will be relieved from their individual responsibility and liability for remediation. However, the parties will have to agree with the authorities on their financial contribution to the integrated approach. There can be residual risk remaining for them if the parties only agree a package in relation to part of the site, or for example, the source of the contamination is not included (because the owner believes the source is already being suitably managed).

Initially, the Dutch authorities were slow to implement this new remediation option. The consequences, such as taking over responsibility, were quite significant compared to the traditional approach and it has taken time for the authorities to determine new policies for its use.

However, recently the authorities are showing increased activity, especially in those areas where existing remediation creates an impediment to further development of the relevant area, for example, in Almelo where there is extensive historical contamination. Authorities are increasingly approaching owners of contaminated land with proposals for integrated remediation.

This is a new area for authorities and site owners alike, meaning that there is no standard form of remediation "package" as yet. As a result, packages are being negotiated on a bespoke basis and these negotiations are not proving easy. However, we anticipate that a more general remediation policy for such packages will emerge and this will be beneficial for all parties involved.

Jaap Koster
Tel: +31 20711 9282
Email: Jaap.Koster@CliffordChance.com
Clifford Chance, Amsterdam

Jesje Schuiringa
Tel: +31 20711 9164
Email: Jesje.Schuiringa@CliffordChance.com
Clifford Chance, Amsterdam

UK

A change in environmental impact assessment thresholds: fewer residential, urban and industrial estate developments will be subject to EIA but more legal challenges may arise

The Department for Communities and Local Government (**DCLG**) has introduced new regulations[1] to raise the screening thresholds for determining whether a new development requires an environmental impact assessment (**EIA**). The regulations came into force on 6 April 2015.

Some types of major development require an EIA due to their potential for harming the environment (e.g. major pipelines and mining projects). Other projects (including, for example, infrastructure) are only subject to EIA if they are likely to have a significant effect on the environment due to factors such as their nature, size or location. In broad terms, if such projects exceed the "screening" thresholds, the local planning authority will "screen" (review) the development to determine whether significant effects are likely and, if so, the development will be subject to EIA.

1 The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2015

The new thresholds of development, above which screening is required, have been raised from 0.5 hectares as follows:

- ***Residential development***: (The lower of) 5 hectares, or up to 150 units;
- ***Urban development*** 1 hectare; and
- ***Industrial estate development*** 5 hectares.

Developers will welcome the rise in thresholds which will reduce the number of developments subject to screening where adverse environmental effects are unlikely. It should consequently lower the related administrative and financial burden on LPAs for developments, as well as shortening the planning process in many cases.

However, as a result of the rise in thresholds, proposed developments which now fall outside of the regime might possibly be subject to more challenges by third parties on environmental grounds and/or requests for the Secretary of State to order an EIA.

The increased risk of challenge will be particularly pertinent for controversial residential developments and densely populated areas, both areas of concern raised during the consultation on the proposed regulations. DCLG has sought to address these concerns, to some extent, by introducing a threshold where residential developments of more than 150 units will require screening irrespective of the area of development involved.

Additionally, a cautious approach is advised where small development sites are located in the vicinity of much larger existing or approved sites. Whilst a small site, on its own, may lie below the new thresholds, when considered cumulatively with nearby sites, the development of that small site may still give rise to significant environmental effects. It should be remembered that the fundamental principle of the EIA Directive remains, namely that all developments with the potential for significant environmental effects should undergo EIA.

The European Commission is tightening up the guidelines for conducting an EIA in an attempt to ensure both (i) that EIA is being applied consistently to projects across the EU and (ii) that an EIA is concentrated on only those projects with the most significant impacts. As Member States transpose the new EIA Directive, it remains to be seen whether those that apply thresholds like the UK in turn will raise them to reduce administrative burdens.

The rise in EIA screening thresholds is just one of a number of changes that will need to be introduced as the UK Government looks to implement the new EIA Directive. Other changes under the EIA Directive include expanding the scope of an EIA to include new issues (such as climate change, biodiversity and risk prevention), implementation of mitigation and offsets with post-development monitoring, and a requirement for the local planning authority to provide a greater level of reasoning in their decisions (which could also result in an increased risk of decisions being challenged).

Sarah Chapman
Tel: +44 207006 2501
Email: Sarah.Chapman@CliffordChance.com
Clifford Chance, London

Editors

Nigel Howorth
Partner, Head of Global Environment Group

E: nigel.howorth@cliffordchance.com

Michael Coxall
Senior Professional Support Lawyer

E: michael.coxall@cliffordchance.com