CLIFFORD
CHANCE

Newsletter Summer 2014

Global Environment Newsletter

Welcome to the Summer 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.

Europe

A new accelerated consenting process for energy network infrastructure

The EU has identified that around EUR 200 billion of investment is needed in the run up to 2020 to modernise and expand Europe's primary energy network infrastructure. The timely realisation of the necessary upgrade projects is seen as vital to enable the EU's energy and climate policy objectives to be achieved. Nevertheless half of these projects are expected to be delayed, or not delivered at all, due to obstacles related to the permit granting process, regulatory issues and financing.

On 17 April 2013, the EU adopted Regulation No. 347/2013 (the "Regulation") on guidelines for trans-European energy infrastructure aimed at promoting and accelerating achievement of key infrastructure projects. The Regulation applies to a "Union list" of "projects of common interest" (PCIs) that are to be given priority under the Regulation. The first Union list identifies 248 PCIs and entered into force on 10 January 2014 including a mixture of interconnector, internal power

transmission networks, electricity and gas storage, pipelines and associated projects across the EU. The projects are a mixture of cross-border and purely national upgrades. Additional projects for the 2015 Union List will be added following finalisation of the Ten-Year Network Development Plan expected in December 2014.

Project Permitting

Among other regulatory and financing assistance, the Regulation requires Member States to establish a new structure for quicker and more efficient permitting procedures for PCIs. Provisions to streamline and speed up the permitting process include:

- Establishing time limits for the permitting process (structured in two phases: two years for pre-application procedures, and one year and six months for permit granting procedures); and
- Designation of a "one-stop-shop" authority to coordinate the permitting process as well as requirements for public participation and consultation.

Environmental Impact Assessment (EIA)

The Regulation also contains provisions aimed at improving and better coordinating EIA procedures for PCIs (but without relaxing existing EU environmental standards). Member States will have to make changes to their EIA processes, and a non-binding EU guidance document issued in July 2013 gives suggestions for the types of measures that could be included, e.g.:

- Early planning and effective "tiering" of environmental assessments (ensuring that there is consistency between upper level strategic environmental assessments and project-level assessments, and there is less duplication between them);
- Providing for the "one-stop-shop" authority to co-ordinate relevant assessments; and
- Establishing flexible time limits for assessment procedures.

Member States had to put non-legislative measures in place by April 2014 and will need to make necessary legislative changes by July 2015.

Impact

It seems likely that the new permitting process provisions put in place by the Regulation will help improve the process for infrastructure projects (in particular cross-border projects), in many cases speeding them up. For example in Germany, some energy infrastructure projects have taken 10 years to go through the permitting process in the past. Work is ongoing in Germany to understand how current permitting processes will need to be updated to comply with the Regulation and it is not yet clear what the impact will be.

The Regulation should also help to drive improvements and efficiencies in undertaking EIA in some Member States, particularly where EIA practice is still developing. In Germany, by contrast, EIA is a mature process and the changes to procedures are unlikely to be very significant.

Mathias Elspass
Tel: +49 2114355 5260
Email: Mathias.Elspass@CliffordChance.com
Clifford Chance Düsseldorf

Jutta Mues
Tel: +49 2114355 5341
Email: Jutta.Mues@CliffordChance.com
Clifford Chance Düsseldorf

Australia

Repeal of the Carbon "Tax" – what's next?

The Australian Government achieved a major election promise in July with the repeal of Australia's "carbon tax". A package of eight bills repealing the Clean Energy Act 2011 and related legislation that created Australia's carbon pricing mechanism under the previous Labor Government received Royal Assent and effected the repeal on 17 July 2014.

Importantly, the Australian Competition and Consumer Commission (ACCC) has been given new powers to obtain information about, and monitor, price impacts as a result of the repeal of the carbon tax. There are also new offences that will apply where entities fail to pass on price reductions as a result of the repeal of the carbon tax to their customers.

In August 2014, the ACCC issued 250 formal requests to electricity and gas retailers and bulk importers of synthetic greenhouse gases requiring those entities to provide a written explanation as to how the carbon tax repeal has affected input costs and how the reduction has been passed on to consumers. Responses to the requests were required by 8 September.

Those same entities are also required to provide a "carbon tax removal substantiation statement" to the ACCC which sets out the entity's assessment, on an average annual percentage price or dollar price basis, of the entity's cost savings that have been or will be attributable to the repeal of the carbon tax and that will be passed onto customers during the 2014/2015 financial year. Carbon tax removal substantiation statements are to be placed on the entity's website and be easily available to the public until 30 June 2015.

While the new provisions in the Competition and Consumer Act focus on energy retailers, the ACCC's existing price monitoring powers and provisions in the Act dealing with misleading and deceptive conduct will also be used to monitor the behaviour of other businesses in relation to the repeal of the carbon tax. The ACCC has been proactively seeking information on price impacts from other business sectors, including aviation and building products manufacturers, in the lead up to the repeal of the carbon tax.

With the repeal of the carbon tax, the focus of Australia's climate change policy will turn to the implementation of the Government's "Direct Action Plan" which is built around a new Emissions Reduction Fund. The fund will be used to purchase emissions reductions from Australian business through a reverse auction process. The fund will be established through amendments to the existing Carbon Farming Initiative (CFI) Act. The CFI will itself be expanded to encompass all forms of carbon emissions reduction or sequestration activities – not just the land-based activities that are currently captured.

The proposed amendments have been introduced into the Federal Parliament and are currently in the Senate. It is unlikely that the amendments will be considered again until late September. In anticipation of the amendments being passed, the Government has released draft rules for emissions reduction projects in connection with coal mining, landfill gas and alternative waste treatment activities. The draft rules are open for public comment until 1 October 2014.

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

Belgium

New controls on the operation of office building car parks in Brussels

The new Brussels Code on Air, Climate and Energy Management (the "**Code**") provides for various measures to improve air quality, to increase the energy efficiency of buildings and to protect the climate.

In order to encourage the use of alternative means of transport, the Code imposes limits upon the maximum authorised capacity of office building car parks. Significantly, the limits will not only apply to new buildings but also, in certain circumstances, to existing buildings.

Capacity Limits

Firstly, the strictest limits are imposed on those office buildings which are considered easily accessible by public transport (Category One areas). This includes office buildings located in Brussels' European district, in the city centre or in the vicinity of the Brussels North or South railway stations. For these buildings, the Code provides that the number of spaces in the buildings' car park must be limited to:

- Two parking spaces for the first 250m² of office space; and
- One parking space for each additional 200m² of office space.

Secondly, for office buildings that are located in areas where the accessibility by means of public transport is considered to be average (Category Two areas), the Code allows one parking space per 100m² of office space.

Finally, in the least accessible areas (Category Three areas), the limit is one parking space per 60m² of office space.

These thresholds apply to the construction of new office buildings. In addition, they also apply to existing office properties when the environmental permit covering operation of their car parks is renewed. Since environmental permits must be renewed every 15 years, all existing office buildings will at some point in time have to comply with the thresholds.

Consequences of exceeding the limits

The Code provides that parking spaces (including those inside the buildings) that exceed its maximum capacity thresholds must be removed and may no longer be used unless (i) the relevant parking spaces are converted into public parking spaces or (ii) the operator of the property agrees to pay an annual environmental levy per parking space in excess of the thresholds.

The annual levy amounts per space for the first year in which the environmental permit covering the operation of the car park is granted or renewed are:

- For Category One areas: EUR 450;
- For Category Two areas: EUR 350; and
- For Category Three areas: EUR 250.

In each subsequent year, the levy is indexed and, in addition, increased by 10% during the entire term for which the permit was granted (i.e. 15 years in principle).

Exemptions

The above restrictions do not apply to car parks which are accessible to the general public (whether free or for payment). Also, an environmental permit may allow the thresholds to be exceeded in certain specified circumstances, i.e. where:

- A greater number of parking spaces is needed for clients, visitors or service vehicles;
- The specific social and economic needs of the concerned activity justify it; or
- The accessibility of the area to public transport is particularly low.

Entry into force

The permit granting authority must take the new capacity thresholds into account when dealing with all applications (i) for new environmental permits or (ii) for the renewal of existing environmental permits that were filed after 5 February 2014.

Most of the existing car parks for office buildings in the Brussels Region significantly exceed the Code's maximum authorised capacity. Consequently, unless an exemption from the thresholds can be obtained, office building owners will have to decide whether to (i) abolish the parking spaces that exceed the thresholds, (ii) change these parking spaces into

public parking spaces or (iii) continue to reserve the parking spaces for the users of the property and pay the environmental levy. Their choice will be influenced by the characteristics of the building and the rental value of the parking spaces.

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

Mehdy Abbas Khayli
Tel: +32 2533 5089
Email: Mehdy.AbbasKhayli@CliffordChance.com
Clifford Chance Brussels

The Netherlands

Next stage in Environmental Permitting Consolidation

The Minister of Infrastructure and Environment submitted the draft Bill on the Environmental Act (*Omgevingswet*) to the Dutch parliament on 17 June 2014. With this Bill, the Dutch Government intends to incorporate several environmental and spatial planning-related Acts into one overarching Act. This is a next step in streamlining the environmental and spatial planning regulations in The Netherlands. The General Environmental Management Act (*Wet algemene bepalingen omgevingsrecht*, or "Wabo"), implemented in 2010, was enacted to create a single point of liaison within the government for environmental-related permit applications (a "one-stop-shop" approach). At that time, however, the substantive rules and regulations governing the various areas of environmental and spatial planning law did not change. This Bill goes a step further on two levels:

- The one-stop approach from the Wabo is broadened in scope and as such applies to more laws (e.g. the Water Act); and
- The rules and regulations governing the granting and content of permits on environment and spatial planning have been amended in this Act with the aim of simplifying the regimes and making them more consistent with one another.

At least fifteen Acts will be consolidated into the Act covering the following areas, among others: soil contamination, construction, infrastructure consenting, mining, monument-preservation, environmental protection permitting, nature conservation and water management.

Each environmental area covered by the Act will now be governed by the following 5-part framework:

1. An overall vision statement (*omgevingsvisie*) setting out the strategic values or goals for the environmental area concerned;
2. A plan or programme, consisting of a bundle of policy intentions and measures ensuring that the values or goals set are achieved and can be maintained;
3. Local legislation by the provinces, municipalities and the water boards, which outlines the general rules and permit requirements for the relevant environmental area;
4. A framework permit (*omgevingsvergunning*), which enables an applicant to complete one application and to obtain approval for all of the applicant's activities; and
5. A standardised methodology for the decision-making process relating to construction or operating permits for projects deemed to have a special public interest (e.g. electricity generation projects including wind farms, or highways). This aims to provide for quicker and more efficient permitting for such important projects.

The Bill is widely welcomed as it is likely to provide for significant simplification of Dutch environmental & spatial planning legislation and in particular, the permitting of industrial activities.

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

Willem-Jan Wieland
Tel: +31 20711 9368
Email: Willem-Jan.Wieland@CliffordChance.com
Clifford Chance Amsterdam

Spain

Constitutional Court removes regional legislative barriers to fracking In Spain

As studies show the northern regions of Spain are likely to be home to large shale deposits, the pros and cons of shale gas extraction have become a hot topic of debate in Spain. Prospective developers will be heartened by a recent judgement of the Spanish Constitutional Court which has significantly smoothed the regulatory barriers to hydraulic fracturing.

In 2013, due to environmental concerns, the regional Parliament of the Autonomous Region of Cantabria passed an Act (1/2013) aimed exclusively at prohibiting the use of hydraulic fracturing for the investigation, exploration or exploitation of shale gas within Cantabria.

This was immediately challenged by the Spanish Government, and on June 24, 2014, the Spanish Constitutional Court issued a decision annulling the regional Act on the grounds that it deals with matters (energy, mining, oil & gas) which are strictly reserved to nation-wide legislation.

The Constitutional Court took this position despite the fact that the regions have competence in many areas of environmental protection which are relevant to shale gas extraction through fracking (e.g. environmental permitting, pollution control, water pollution, waste management).

The decision is important since it effectively removes one of the most significant obstacles to the use of fracking in Spain, in declaring that only the central Parliament and the central Government can legislate on the principle of approving or prohibiting mining (including fracking for shale gas).

Nation-wide legislation is, in principle, open to the use of fracking. In particular, Act 17/2013 (amending the Hydrocarbons Act 1998), expressly states that the application of techniques that are common in the gas industry, "such as hydraulic fracturing", is fully permitted (provided it meets the applicable environmental permitting requirements).

It is expected that, in the next few weeks, the Spanish Constitutional Court will also annul other two regional acts solely aimed at banning fracking (affecting the Autonomous Regions Navarra and La Rioja) on the same grounds.

The future for shale gas projects in Spain looks more secure now, since regional control over projects will be strictly limited to environmental permits and controls. However, it is still to be seen if the regional authorities will try to circumvent this recent judicial setback by applying excessive environmental permitting requirements with a view to maintaining an effective ban on fracking, whether or not such action would ultimately prove to be lawful.

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

UK

New Water Act passed – The Act focuses on encouraging long term water supply resilience and allowing water abstraction to be brought into the "one-stop shop" environmental permitting regime

The Water Act 2014 has been passed making a number of changes to legislation governing the use and protection of water resources. Much of the Act relates to freeing up the water supply markets and allowing water customers greater freedom of choice. The Act also contains a number of provisions relevant to environmental protection as follows:

- Management of water resources: Water regulator, Ofwat, now has a duty to pursue a "resilience objective" which seeks to ensure that sufficient water supplies remain despite environmental pressures and population growth. Ofwat will have to promote appropriate long-term planning and management by water undertakers, who must manage water in sustainable ways including reducing demand and increasing efficiency. The Secretary of State can now also make directions to water undertakers to include resilience and security of supply objectives in their water resources management plans.
- Water abstraction: The UK Government aims to ensure that water abstraction rules are reformed to allow sustainable management of water and reflect the value of water to customers and its scarcity. It separately consulted on detailed proposals in December 2013 with two principal options for reform: (i) a revised licensing regime with abstraction limits, where allowable abstractions more closely follow available water supplies; and (ii) a more radical mechanism whereby abstractors are given shares of availability (rather than absolute limits), similar to the system applicable in the Australian Murray-Darling basin. In each case, water trading between abstractors would be facilitated.
- The Government aims to introduce separate legislation for the reformed regime "early in the next Parliament" (i.e. from 2015 onwards) and to implement the reforms in the early 2020s. Concern over the likely slow passage towards implementation is reflected by the inclusion in the Act of a requirement for the Secretary of State to report on progress on abstraction reform by July 2019.
- Environmental permitting: The Act contains powers to allow water abstraction (among other activities) to be brought into the environmental permitting regime. This would, for example, allow industrial operators who abstract water supplies to be covered by a single environmental permit for various activities such as discharges to water, emissions to air and waste management. This in turn would result in simplified applications and regulatory control. This change is likely to be brought into force before the more fundamental reforms of the water abstraction regime mentioned above.

Nigel Howorth
Tel: +44 207006 4076
Email: Nigel.Howorth@CliffordChance.com
Clifford Chance London

Michael Coxall
Tel: +44 207006 4315
Email: Michael.Coxall@Cliffordchance.com
Clifford Chance London

USA

Divided Supreme Court strikes down part of Environmental Protection Agency's Greenhouse Gas Regulations for stationary sources

The U.S. Supreme Court (the "Court") ruling earlier this summer in *Utility Air Regulatory Group (UARG) v. Environmental Protection Agency*, No. 12-1146 largely upheld the U.S. Environmental Protection Agency's (EPA) greenhouse gas emission regulations, but left much to be desired in terms of regulatory clarity. The Court ruled 5-4 that the EPA cannot require power plants and other facilities to seek building or operating permits solely because they emit greenhouse gases, rejecting the EPA's position that it may regulate all stationary (non-vehicular) sources of greenhouse gas emissions under the Clean Air Act (the "Act"). However, the Court ruled 7-2 that the EPA may regulate the greenhouse gas emissions of facilities already covered by the Act's "best available control technology" (BACT) requirements due to the facilities' emissions of other, more conventional, pollutants such as carbon monoxide and lead.

The EPA's attempts to regulate greenhouse gas emissions began in the wake of the Court's decision in *Massachusetts v. EPA (549 U.S. 497 (2007))*. Prior to that ruling, the EPA's position was that regulation of greenhouse gas emissions does not fall within the purview of the Act. The Court's judgment that greenhouse gas emissions fit within the Act's definition of "air pollutant" gave the EPA authority to regulate the greenhouse gas emissions of vehicles. However, it was unclear until now whether this authority extended to stationary sources of greenhouse gas emissions, such as power generating plants, mining sites, petroleum facilities, and chemical plants.

The Court's ruling validates the bulk of the EPA's greenhouse gas emission regulating regime while also limiting the agency's regulatory authority. Stationary sources of greenhouse gas emissions already regulated under the Act account for roughly 83% of all stationary emissions. However, the Court's ruling does mitigate the power of the EPA to promulgate expansive regulation by invalidating the Tailoring Rule, a doctrine under which the EPA claimed the authority to increase the emissions thresholds promulgated by Congress under the Act in order to adopt a reasonable construction of the law with regards to greenhouse gases. The invalidation of the Tailoring Rule casts a shadow on future EPA regulation under the Act. In addition, any other EPA regulations that utilise the Tailoring Rule will be susceptible to scrutiny.

The Court's decision leaves two key open issues. First, the bounds of the EPA's power to regulate the greenhouse gas emissions of stationary sources of emissions under the Act remains unclear. Second, the Court did not fully resolve the meaning of the phrase "any air pollutant" under the Act, despite the fact that the majority and both dissenting opinions addressed the meaning of this key phrase. This is important because the EPA's newly proposed Clean Power Plant Rule, which seeks to limit carbon emissions from existing power plants, relies on states to establish performance standards for existing sources of "any air pollutant". Ultimately, greater clarification will be required in the form of more EPA regulation and guidance from the Court before a clear framework for the regulation of greenhouse gas emissions under the Act may emerge.

Victoria Manthas
Tel: +1 212878 8208
Email: Victoria.Manthas@CliffordChance.com
Clifford Chance New York

Darius Niknamfard
Tel: +1 212878 8336
Email: Darius.Niknamfard@CliffordChance.com
Clifford Chance New York

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2014

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

69697-5-1624