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DEWEY & LEBOEUF

ENVIRONMENTAL LAW NEWS

From the London Office

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Environmental Liability Directive 2004/35/EC in force in UK from March 2009

Far-reaching new pollution laws come into force in the UK in the next few weeks after much controversy and delay.

The Environmental Damage (Prevention and Remediation) Regulations 2009 (the "Regulations") were laid before Parliament on 2 February 2009, and will enter into force on 1 March 2009. Generally speaking, the Regulations will not apply to pollution or damage occurring before that date (although there are some exceptions to this). The Regulations are designed to fulfill the UK's obligation to implement the EU Environmental Liability Directive of 2004 (the "ELD").

What is the ELD?

The ELD aims, for the first time, to harmonise the disparate approaches across the EU to liability for environmental pollution. It will strongly incentivise prevention of such damage, applying the "polluter pays" principle when damage occurs. Strict liability will apply to environmental damage caused by most types of industrial

activity, with fault-based liability attaching to biodiversity damage (see below) caused by other activities. The liable party is the "operator" of the activity in question – usually the permit holder in relation to activities subject to permitting (such as IPPC installations).

Why should I be concerned?

New liability for "Biodiversity Damage"

Liability will arise not only for traditional damage to land and water, but also now for damage to protected species and natural habitats. This is an entirely new concept in the EU but has proved costly for the US oil industry, particularly since 1990.

Rare "Self-Executing" provisions

In a marked departure from the status quo, operators will have to take preventative action where there is an imminent threat of environmental damage or take mitigatory action where damage has occurred, in both cases without waiting for a regulatory order. A "whistleblowing" duty to *notify* the regulator of such damage will also apply. Breach of either obligation shall incur criminal liability. Additionally, the operator must propose remediation options to the regulator (not the other way round as is more typically the case).

New forms of remediation

The ELD adopts a novel approach to

remediation of "non-land" damage. Sites shall be restored to their pre-damage state ("primary remediation"), but additionally operators shall "compensate" for the temporary loss of the particular environmental resource whilst remediation occurs ("compensatory remediation"). Furthermore, if the site is irreparably damaged, *off-site measures at an alternative location* (so called "complementary remediation") may be required.

Such remediation will be complex, protracted and costly for operators (and their insurers). Our experience with similar provisions in the US shows that a rapid response with appropriate legal and technical experience is essential. Very little guidance is given on what will be required by way of compensatory or complementary remediation.

NGO rights

Third parties who are (or may be) affected by environmental damage will be entitled to require action by the regulator, judicially review regulators' decisions and be consulted before any remedial notice is served. The standing of environmental NGOs, charities and pressure groups is expressly recognised.

I thought the UK already had a contaminated land regime?

The ELD will not diminish, and is "without prejudice" to, existing English laws on liability for environmental damage. If environmental damage (or the imminent threat of it) falls within the ELD's scope, then the Regulations must be applied. If existing law is more stringent than the Regulations, those aspects which go further may be applied in addition to (not instead of) the Regulations. Regulators must exercise judgment to ensure they do not serve duplicate notices requiring the same action under the Regulations and other laws.

The interrelation between the Regulations and, for example, Part IIA of the Environmental Protection Act 1990, is complex. The Regulations are wider than Part IIA in some respects (e.g. land damage may be caused by (micro) organisms as opposed to just substances and damage must result in a *significant risk of adverse effects on human health* (under Part IIA, a similar but higher threshold exists ("*significant possibility of significant harm*")). Elsewhere, the Regulations are narrower than Part IIA (e.g. the event which caused the damage must occur since 30 April 2007 and have a maximum 30-year limitation period, whereas Part IIA is fully retrospective).

A good working knowledge of the scope, exemptions and defences to liability under each scheme is necessary, as well as of the differences in meaning of similar but different terms used in each.

So do we now finally have a harmonised pollution regime across the EU?

Yes and no! The ELD applies to all 27 Member States. However, the flexibility given to EU Member States for transposing the Directive into national law and the different interpretations that resulted from this have led to a patchwork of uneven implementation across the 27 nations. While many countries have opted to go beyond the minimum requirements, for example by extending the scope of the rules to include habitats and species not covered by the EU's Natura 2000 network, on the other hand, to date only 20 states have transposed the ELD into national law. The remaining seven have all been referred to the European court of justice on account of their delay.

UK power companies to pay for home improvements

The UK's Department for Energy and Climate Change (DECC) launched consultations on a reform of the existing Carbon Emission Reduction Target (CERT) and the proposed Community Energy Saving Programme (CESP) on 12 February 2008. Both the changes to CERT and the introduction of CESP will have a significant impact on power companies.

Carbon Emission Reduction Target

The existing CERT

Under the existing CERT, electricity and gas *suppliers* with 50,000 or more customers must deliver measures that will provide overall lifetime CO₂ savings of 154 MtCO₂ by 2011. The target is divided between suppliers according to the number of domestic customers to which they supply electricity and gas.

Measures include the use of technologies such as micro generation, introduction of efficient appliances, insulating homes and the use of low-energy lamps. They are estimated to require suppliers to invest approximately £2.8 billion.

Suppliers are required to focus 40 per cent of their CERT activity on a "Priority Group" of vulnerable and low-income households, including those in receipt of certain income/disability benefits and pensioners over 70. CERT therefore aims to simultaneously increase energy efficiency and help to alleviate fuel poverty.

Changes to CERT

The CERT Consultation proposes increasing the level of the CERT from 154 MtCO₂ to 185 MtCO₂ (a 20 per cent increase), creating an additional burden for suppliers. The changes would also provide new incentives to increase the use of insulation and to encourage suppliers to promote Real Time Display Devices, which give information on the amount of electricity being used.

Community Energy Saving Programme

The proposal

CESP is an entirely new measure, but based broadly on CERT. CESP will apply not just to electricity and gas suppliers, but also to *generators*. It aims to help families to permanently cut their household energy bills by promoting a "whole house" approach and working in partnership with local authorities and other community organisations. The government has suggested that suppliers with fewer than 50,000 domestic customers should be excluded from the regime, as is the case for CERT. Generators that generate less than 10 TWh/yr of electricity are also proposed to be exempt.

CESP Points

The CESP target will be specified as a score and it is proposed that the target will be split equally between suppliers and generators. Companies will achieve their target by delivering carbon abatement measures in homes. Each measure will be worth a different number of points. The actual CO₂ emissions savings are likely to be in the region of 3.9 million tonnes.

The measures eligible for CESP are intended to make significant improvements to the energy efficiency of homes. Fewer measures will therefore be available than under CERT. CESP measures will include wall and loft insulation, switching to gas, using heat pumps and connecting to district heating schemes.

Generators

The government acknowledges that it has been suggested that electricity generators that are not vertically integrated (having no supplier arm) will find it more difficult and expensive to comply with CESP. This is one of the most controversial aspects of the CESP proposal.

Consultation responses

Consultation responses in respect of changes to CERT should be submitted by 14 April 2009. The deadline for responses in respect of CESP is 8 May 2009.

Beyond Kyoto – The EU Commission's "road-map" for Copenhagen

The European Commission has issued a "Communication" (COM (2009) 39) dated 28 January 2009 setting out its vision of what is required to achieve a comprehensive climate change agreement in Copenhagen in December to succeed the UNFCCC's Kyoto Protocol.

Key elements of the Commission's "road-map" include:

- Facilitating the development of an OECD-wide carbon trading market by 2015 and an even broader market by 2020;
- In order to achieve the objective of capping average global temperature increase at less than 2°C compared to pre-industrial levels, developed countries to commit to reduce their GHG emissions by in the range of 25-40 per cent below 1990 levels by 2020 (30 per cent in aggregate) and 80-95 per cent by 2050;

- When setting emission reduction targets for developed countries for the post-2012 period, possible surpluses of emission rights from before 2012 to be taken into account;
- A "significant contribution" to achieving the desired 2°C cap to be made by all developing countries (except least developed countries, or LDCs), by adopting "robust and verifiable low-carbon development strategies" by the end of 2011 setting out a "credible pathway" to limit that country's emissions as a "pre-requisite for access to international support for mitigation action";
- Developing country action should be entered into an international registry which will list the action taken and show the mitigation benefits;
- If by the end of 2010 there is no satisfactory agreement in ICAO (the International Civil Aviation Organisation) and IMO (the International Maritime Organisation), emissions from international aviation and maritime transport should be counted towards national totals under any Copenhagen Agreement to ensure comparable action by all developed countries;
- An EU-US working group to be formed by the Commission and the new Obama administration to work on the design of carbon markets; and
- The CDM (Clean Development Mechanism) to be reformed, crediting only those projects that deliver real additional reductions and go beyond low-cost options. For advanced developing countries and highly competitive economic sectors, the project-based CDM should be phased out in favour of moving to a sectoral carbon market crediting mechanism.

Consultation Watch

- **Environmental Reporting for Major Industrial Sites:** Environment Agency Pollution Inventory Consultation 2009-2011 (ends 1 March 2009)
- **New Regulations for Power Companies:** Government consultation on reform of the existing Carbon Emission Reduction Target (CERT) (ends 14 April 2009) and the proposed Community Energy Saving Programme (CESP) (ends 8 May 2009)
- **Nuclear:** Public comments on proposed power station generic design assessment (ends 30 September 2009)
- **Waste Electrical and Electronic Equipment (WEEE):** Government Consultation on new regulations to take effect from the fourth compliance period (ends 6 April 2009)
- **Planning:** Consultation on list of statutory consultees for National Policy Statements under the Planning Act 2008 (ends 20 April 2009)

For more information please contact:

Nicholas Rock, Partner
T: 020 7459 5212
E: nrock@dl.com

Jose A. Cofre, Associate
T: 020 7459 5116
E: jcofre@dl.com

John Bowman, Partner
T: 020 7459 5209
E: jbowman@dl.com

Tim Baines, Associate
T: 020 7459 5128
E: tbaines@dl.com

This document is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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