

100 YEARS

DEWEY & LEBOEUF

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Environmental Law News From the London Office

There have been a number of newsworthy developments in relation to climate change law and policy in recent weeks. In particular, there have been various developments towards the implementation of the EU's package of legislation on climate change and renewable energy adopted in late 2008 (known as the 20-20-20 package), as follows:

Key Features of EU 20-20-20 Package Become Law

In June 2009, the key EU legislation implementing the EU "20-20-20" package was officially published and thereby came into force. The package includes:

- The Renewable Energy Directive (2009/28/EC);
- The ETS Amendment Directive (2009/29/EC);
- The Fuel Quality Directive (2009/30/EC); and
- The CCS Directive (2009/31/EC).

Commission Decision on National Renewable Energy Action Plans (NREAPs)

On 30 June 2009 the EU Commission adopted a decision establishing a template for National Renewable Energy Action Plans (NREAPs) as required by the Renewable Energy Directive.

The Directive sets mandatory national targets for each Member State with the aim of achieving a 20 percent share of renewable energy in Europe's final energy consumption by 2020. Member

States therefore need to design long-term renewable energy measures and policies and develop detailed estimations of the contribution of renewable energy in final energy consumption.

Each Member State must submit a NREAP to the Commission by 30 June 2010 at the latest. The template will guide Member States in preparing their Renewable Energy Action Plan and detailing their strategies for reaching their 2020 renewable energy targets.

A NREAP must establish and set out Member States' paths to compliance with national targets for the share of energy from renewable sources consumed in transport, electricity, heating and cooling in 2020. It must also detail national policies on biomass resources and on the implementation of biofuel sustainability schemes while taking into account effects of other policy measures related to energy efficiency.

Commission Consults on EU ETS Auctioning Rules

From 2013, it is estimated that at least half of the Allowances available under the EU ETS will be auctioned instead of being allocated free of charge, a fundamental change from the current system in which free allocation is the norm.

On 4 June 2009, the EU Commission launched a public consultation on future EU ETS allowance auctioning rules.

The EU ETS Directive (2009/29/EC), which came into force on 24 June 2009, requires the Commission to adopt an auctioning Regulation by 30 June 2010. It must ensure that auctioning of EU Allowances in Phase III of the EU ETS (2013-2020) and later trading periods of the EU ETS is conducted in an open, transparent, harmonised and non-discriminatory manner.

The detailed technical consultation document runs to 106 pages and covers all aspects of auctioning that

may be relevant for the future Regulation. In particular, it seeks views on the timing, size and frequency of auctions, auction design and regulatory aspects relating to issues such as pre-registration of participants, collateral, payment and delivery, information disclosure and monitoring. It also addresses the question of the number of auction processes that could be used and the appropriate degree of coordination between Member States.

The online consultation closes on 3 August 2009.

UK Government Consults on Initial Implementation of Phase III of the EU ETS

Following the official publication of Directive 2009/29/EC regulating Phase III of the EU ETS from 2013 onwards, on 24 June 2009, the UK Department of Energy and Climate Change (DECC) published a consultation to seek views on a draft UK Statutory Instrument

to transpose the first stage of the Directive.

The Directive states that Member States must transpose it into national law, in its entirety, by 31 December 2012. However, Member States must transpose Articles 9(a)(2) and 11 by 31 December 2009.

The UK government intends, therefore, to undertake a staged transposition process, beginning with these first two Articles, which are the subject of the draft Regulations linked to the consultation (*the draft Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009*).

Article 9(a)(2) of the Directive enables the Commission to require Member States to submit GHG emissions data for new installations that will be introduced into the EU ETS in Phase III (from 2013). This is to allow the Commission to recalculate the EU-wide cap to take account of these new installations. The consultation seeks views on a draft list of installations new to the EU

ETS in Phase III. These include further metallurgical, mineral and chemical processes, as well as the international aviation sector. A draft list of all installations, with company names, likely to be included in Phase III of the EU ETS is set out in Annex B of the consultation.

Any operators whose installations will be included in Phase III will be required to submit GHG emissions data for the period from 1 January 2005 to 31 December 2008 to the Environment Agency by 30 April 2010.

Article 11 of the Directive obliges Member States to publish and submit National Implementation Measures (NIMs) to the Commission by 30 September 2011. NIMs will replace the National Allocation Plans (NAPs) of Phases I and II and will contain a list of installations covered by the revised Directive in the Member State's territory, together with any proposed free allocation to each installation. The Commission has the ability

to reject proposed free allocations.

The draft Regulations would require that operators of installations eligible for free allocation of allowances in Phase III submit to the regulator independently verified activity data by 31 March 2010.

The consultation closes on 16 September 2009.

Guidance Published on EU ETS Compliance for Aviation Sector

On 17 June 2009, the UK Environment Agency (EA) published guidance for the aviation industry on complying with the EU ETS. The sector joins the EU ETS from 1 January 2012 and it is necessary for aviation operators to take a number of important formal steps in advance of this deadline.

Two sets of UK regulations implementing the EU ETS relating to aviation are expected to be published in early August 2009. Aviation

operators must submit annual emissions and benchmark monitoring plans by no later than 31 August 2009 and these will be approved/rejected by the EA by the end of this year. The first annual emissions monitoring period for the aviation sector starts on 1 January 2010.

Carbon Capture & Storage (CCS) on the UK and International Agenda

On 17 June 2009 DECC issued its consultation paper "*A framework for the development of clean coal*" (the "Consultation") and on 29 June 2009 a new UK Energy Bill was proposed for the forthcoming session of Parliament to introduce the financial mechanisms proposed in the Consultation.

DECC sees the UK as leading the international efforts to develop CCS, particularly in assisting to push through the December 2008 European agreement to fund up to 12 demonstration projects by 2015 through the sale of free EU

ETS allowances from the New Entrant Reserve.

The responses to the DECC consultation will influence, among other matters, the development of primary legislation to allow for a new financial mechanism to support and incentivise the development of CCS demonstration projects in the UK and the decision as to how new coal-fired power plants may be required to demonstrate CCS capacity.

The UK's most recent proposals follow the European Commission's draft proposal of 29 May 2009 to approve amendments to the OSPAR Convention to enable CCS operations to take place in the OSPAR maritime area.

Outline of the UK Proposals *Finance and Funding*

In 2007, the UK government launched a competition to contract with a developer to construct a commercial-scale CCS demonstration. The government proposes to continue with this competition

subject to receiving suitable bids and being able to reach appropriate terms. In addition, the funding of up to four further demonstration projects is now planned as part of the proposals.

The funding proposals comprise either:

- An obligation to supply CCS electricity which would operate in a similar fashion to the Renewables Obligation requiring electricity suppliers to purchase certificates issued to the generators of “CCS electricity”;
- or
- A levy on electricity suppliers of a specified sum per unit of electricity supplied, the proceeds of which would contribute towards supporting CCS demonstration projects.

Coal-fired New Build and CCS

Since April 2009, applicants for consent to construct and operate all new combustion installations in England and Wales with an electrical output at or over 300 MW (whether gas, coal, biomass, etc) have had to demonstrate that their power station will be, and will

be maintained as, “carbon capture ready” (CCR). All existing and proposed coal power stations are well above the 300 MW threshold.

The government proposes that alongside the current requirement to build and maintain CCR power stations, a new coal power station would only gain development consent if it could show that it was designed and intended to capture, transport and store at least 20 million tonnes of the carbon dioxide emitted from at least 300 MW net of its capacity.

New power stations are unlikely to be built with less than 300 MW of net capacity. However, to avoid the unintended consequence of driving investment in smaller coal power stations (so as to side-step the proposed new condition), new coal fired power stations with a capacity of less than 300 MW would be required to capture carbon dioxide from its full capacity.

Retrofitting and CCS

The government also proposes that new coal-fired power stations should be required to retrofit CCS to their full capacity within five years of CCS having been independently judged economically and technically proven.

The question of how to determine when CCS is “proven” is to be determined taking into consideration existing evidence-based concepts and methodologies such as the Best Available Techniques (“BAT”) concept defined under EU IPPC legislation. An assessment of whether CCS was technically proven would need to look across the CCS chain, including capture, transport and storage along with other factors such as reliability and security of electricity generation and carbon dioxide storage sites. Proposals for decision making bodies include the Environment Agency, the Committee on Climate Change or the creation of a new dedicated CCS body.

Contingencies

The government expects the case for CCS will be proven by 2020, but is also considering other measures to manage emissions from new coal power stations in the event CCS is not proven as quickly as expected. These proposed measures include imposing:

- Caps on carbon dioxide emissions from individual power stations;
- A running hours limit in the operation of coal fired power stations; and/or
- An Emissions Performance Standard (“EPS”), which would limit the amount of carbon dioxide that could be emitted per unit of electricity generated.

Existing coal-fired power stations are expected to close over the coming decade and well before 2020. However, the government has sought views on the possible options in the unlikely event that an existing coal-fired power station continues to operate beyond the 2020s. A requirement to retrofit is seen as likely to force closure of an existing

power station unless operators have invested in upgrading to “supercritical technology” to increase efficiency over the years.

UK CCS Demonstration Projects

The proposals include the creation of a “management agency,” which will oversee and supervise all selected CCS demonstration projects. This will include measuring if the projects deliver against the funding agreement. At this stage, the government’s preference is for Ofgem to take on this role.

consultation is between £8.7 - £10.3 billion and further detail is set out in the accompanying Impact Assessment.

DECC are inviting responses to the Consultation until 9 September 2009.

Round 3 Offshore Wind Development Given Go Ahead

Finally, on 24 June 2009, the UK government announced the outcome of the strategic environmental assessment on offshore energy.

further 25 gigawatts of offshore wind, together with oil and gas licensing, and gas storage reservoirs.

The Crown Estate is the leasing authority for offshore wind in the UK, and can now proceed with its Round 3 offshore wind leasing competitions, which it began in June 2008.

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The estimated overall costs of implementing up to four CCS demonstration projects and rolling out the proposals in the

It has concluded that there are no overriding environmental considerations to impede its draft plan of leasing for a

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