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Environmental Law News From the London Office

DECC consultation on proposed CCS licensing regime

Background to the consultation

On 25 September 2009, the Department of Energy and Climate Change (“DECC”) issued a consultation paper on the Government’s proposed carbon dioxide licensing regime for offshore carbon capture and storage (“CCS”) based on powers under the Energy Act 2008. CCS is the process of capturing carbon dioxide

(before or after combustion) in coal and gas-fired power stations and then storing it in onshore or offshore underground geological sites.

The regime aims to encourage investment in CCS developments and it is intended to come into force in April 2010. The consultation process ends on 30 December 2009. The regime is set out in the draft Storage of Carbon Dioxide (Licensing) Regulations 2010 and is part of the UK

implementation of EU Directive 2009/31/EC.

The regime will extend throughout the territorial sea and the Gas Importation and Storage Zone (GISZ) (an offshore area designated on 6 April 2009 by Statutory Instrument 2009/223). The territorial sea extends to 12 nautical miles from its baselines and the GISZ can extend from the edge of the territorial sea for a further distance of up to 188 nautical miles.

The regime will regulate storage in depleted or partially depleted undersea hydrocarbon fields and in non hydrocarbon geological features.

All carbon storage projects will need to undergo environmental impact assessment under the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (“EIA Regulations”).

Proposed licensing regime

There are four stages of activity in a carbon storage development, as follows:

Stage 1

Initial non-intrusive exploration – where exploration is required by developers prior to proceeding with a storage project. A licence is required for such exploration where connected with carbon storage. This applies in all UK waters below the low water mark under the Petroleum Act 1998. The licence currently costs £500, is valid for three years and can be renewed on request. At this point, neither a lease nor a carbon storage licence is required.

Stage 2

Intrusive exploration and test injection – this can be undertaken during the agreed appraisal phase of a carbon storage licence. This licence allows deep drilling and test injection of carbon dioxide, in addition to the activities permitted under Stage 1. The licence will specify a work programme to be agreed with the developer and once sufficient appraisal of the proposed storage site has occurred, the licensee will have an exclusive right to apply to DECC for consent for storage operations.

Stage 3

Carbon storage – the application for consent must include a proposed monitoring plan, proposed corrective measures plan, proposed provisional post-closure plan and details of the financial security arrangements, amongst other things. Consent is subject to consideration of provisions of the EIA Regulations and the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (both pieces of legislation are

being amended to be applied to CCS projects). The issue of the storage permit will allow the storage facilities to be constructed so the injection of carbon dioxide can go ahead.

Stage 4

The post closure phase – this phase of the licence is reached when storage activities cease. The monitoring obligations and agreed financial security arrangements continue. Responsibility for the site remains with the operator during this phase until DECC is satisfied that the carbon dioxide has stabilised and that there is permanent containment. Then responsibility will transfer to the State.

Obligations on developers/operators

- A company interested in developing an offshore gas storage facility will need to apply to the Crown Estate. The company will be given either a lease (within the territorial sea) or an authorisation (within the GISZ). The lease or authorisation will define the geographical boundaries of the site.

- A condition of the lease will be that the developer will need to apply to DECC for a licence for storage.
- A lease will not be granted without terms having been agreed for the licence and vice versa, and it will therefore be necessary for developers to discuss proposals with both DECC and the Crown Estate.
- The operator will need the approval (technical and environmental) of DECC before activities can be commenced.
- There will be a licence application fee, currently set at £2,100, which will not be refunded if DECC refuses the application.
- Operators will not be permitted to undertake activities in a way that would interfere with other uses of the sea or sea bed.
- Corrective measures must be carried out should any irregularity or carbon dioxide leak occur.

While a CCS licence will be similar to an existing petroleum production licence, there are many obligations that will be placed on developers, both during the term of the licence and following closure when the facility is being prepared for decommissioning. Regular communication between operators, DECC and the Crown Estate will be required at all stages of the licensing process.

UK Government responds to CRC Consultation

In our April 2009 issue of the London Environmental Law Newsletter, we reported on the proposals to introduce in the UK the Carbon Reduction Commitment, a new mandatory carbon trading scheme aimed at reducing carbon emissions covering many public and private sector organisations in any industrial sector in the UK with an energy spend of approximately £500,000 per year or more.

On 7 October 2009, the Government, together with the devolved administrations published its response to

the 12 week consultation on the regime held earlier in the year. The Carbon Reduction Commitment will now be known as the CRC Energy Efficiency Scheme ("CRC"). The new words are stated to have been added to better reflect the primary objective of the scheme, which is the achievement of carbon emission reductions through increased energy efficiency.

The most important changes to the CRC policy as a result of the consultation include:

- **Cash flow:** The first sale of allowances in April 2011 will now only require participants to purchase allowances for the year ahead and no longer for the previous year as well. This came after stakeholder concern regarding the impact of a double sale on their cash flow. As a result, the first year of the introductory phase will become a monitoring period only.
- **Principal Subsidiaries:** Large subsidiaries that would qualify in their own right can now choose whether



to disaggregate themselves from their organisational group and participate independently.

- **Early Action Metric:** Organisations that have demonstrated commitment to reducing their emissions either by achieving the Carbon Trust Standard or by obtaining accreditation from an equivalent scheme can use this to be counted towards the Early Action metric.
- **Renewables treatment:** The CRC will treat electricity that receives a Feed-in Tariff in the same way as electricity issued with a Renewable Obligation Certificate, and has simplified the approach to reporting and accounting for electricity generated from renewable sources. As an energy efficiency mechanism, CRC will not provide additional incentives for renewable generation.

Qualification and registration guidance for potential CRC participants (“Qualification Packs”) will be published at the end of October and distributed thereafter.

Copenhagen Update – The Bangkok Climate Talks

International climate change negotiations continue ahead of the United Nations Climate Change Conference of the Parties (“COP 15”) in Copenhagen on 7 to 18 December 2009, where it is hoped a successor agreement to the Kyoto Protocol will be determined. This should in turn ensure certainty for the international carbon markets after Kyoto expires at the end of 2012.

The latest round of negotiations took place in Bangkok and comprised the ninth session of the Ad Hoc Working Group on Further Commitments for Annex I Parties¹ under the Kyoto Protocol (“AWG-KP”) and the seventh session of the Ad Hoc Working Group on Long-term Cooperative Action (“AWG-LCA”) between 28 September and 9 October 2009.

Reports from industry groups and other observers were that the AWG-KP negotiations had

1. Annex 1 parties to the Kyoto Protocol are those developed countries that have agreed to binding emissions reduction targets.

been slow with parties failing to put their cards on the table pending outcomes in the AWG-LCA. As discussed below, the negotiations of the AWG-LCA were considered to have been more productive. However, much time was reportedly wasted debating whether or not existing market mechanisms (such as the Clean Development Mechanism, or CDM) should be discussed in that forum at all, which delayed progress.

The focus in Bangkok was on finance and in particular the design of a proposed global climate fund to finance emissions reductions and adaptation to climate change in the developed world. Talks centred on proposals by the US and other developed nations introducing commitments of developing countries to nationally appropriate mitigation actions (“NAMAs”) and to reforms to the CDM, such as improving the current system (largely the remit of the AWG-KP) or creating new alternatives by way of introducing sector-based initiatives (considered by the AWG-LCA).

Climate financing

It emerged from the talks that developing countries were dissatisfied with current climate funding from financial institutions, such as the World Bank and the Global Environment Facility, and also with bilateral aid, which developing countries said focused too much on the institutional needs of the lender as opposed to the needs of the countries taking up the finance.

In addition, developing countries were concerned that the overuse of carbon markets to encourage investment in emissions reduction technology could limit the finance available for mitigation and adaptation in less developed countries. In any event, there appears to be consensus that finance needs to be scaled up. Some of the proposals for introducing a climate fund include:

- An EU proposal for an “assessed contributions” fund whereby all countries bar the poorest contribute to a fund through existing fund

structures such as the Global Environment Facility.

- A Mexican proposal for the creation of a “Green Fund” based on all countries paying amounts into that fund according to an agreed formula.
- A US proposal for a “Global Climate Fund” based on voluntary pledges from those countries who have the capacity to pay into it.
- A G77 proposal for a “mother fund” based on 1 percent GDP from developed countries.

There is still little agreement between countries on the governance structure any finance deal would take. The US advocated a governance structure that includes balanced representation between donors and those receiving funding (similar to the World Bank’s Climate Investment Funds). The EU’s position on finance is set to become clearer once it holds planned meetings between finance and environment



ministers. However, it is clear that the EU will seek to encourage an expanded international carbon market to generate financial support for developing countries and promote cost-effective emissions reductions and the provision of international public finance to developing countries to supplement financial flows from the carbon market.

NAMAs

Some industrialised nations, including the US, indicated they wanted developing countries to agree to commit to NAMAs before they would entertain the question of financing.

NAMAs have been proposed as broad actions which developing countries could take to mitigate and adapt to climate change including introducing Feed-in Tariffs to promote renewable energy, implementing waste and recycling regulations, develop projects designed to reduce or remove carbon emissions, or implementing sectoral crediting programs or local cap-and-trade schemes.

Developing countries resisted the concept of NAMAs to the extent that they create any binding mitigation obligations on them. If accepted, NAMAs should only be voluntary in nature. In addition, developing countries wanted to ensure that there were clear systems in place to appropriately recognise, through crediting or otherwise, that activities under any particular NAMA had been carried out by a developing country.

CDM? Sectoral crediting mechanisms?

In order to put pressure on developed nations to maintain the framework of the Kyoto Protocol going forward, reports suggest that developing countries were reluctant to discuss the CDM in non-Kyoto meetings in Bangkok. Developed countries wanted to ensure the continuation of the CDM post-Kyoto, in order to continue making use of CDM credits known as certified emissions reductions (“CERs”) whilst also being open to new sectoral mechanisms. Sectoral mechanisms, unlike the CDM, are proposed to allow for

emissions reductions programs and activities that span clearly identified industrial sectors as opposed to the CDM, which is a project-based mechanism under the Kyoto Protocol to develop emissions reduction projects. Sectoral crediting of emissions reduction projects would need to be managed under a framework that clearly specifies crediting baselines within each sector, monitoring, reporting and verification (“MRV”) systems and which is compatible with existing project-based CDM activities.

The US sought to propose new text to build a bridge between the flexible mechanisms of the Kyoto Protocol and new alternative mechanisms under a fresh Copenhagen agreement. Developing countries made clear that references to the existing flexible mechanisms to achieve emissions reductions (which include CDM, JI and emissions trading) should have no place in a discussion of new offset mechanisms given that this would implicitly mean an agreement to the “death” of the Kyoto Protocol.

Japan and other developed countries argued that the relationship between existing flexible mechanisms and new mechanisms would be important to discuss meaningfully new mechanisms.

The link between sectoral crediting and trading and its integration into NAMA proposals was acknowledged to be the subject of further negotiations in the lead-up to Copenhagen.

Survival or replacement of the Kyoto Protocol

Reports suggest the AWG-KP has made little progress towards reaching conclusions on post 2012 targets. This is largely due to a perceived conflict between the goals of the AWG-KP and AWG-LCA. Most developed countries consider that a simple continuation of the Kyoto Protocol will not be an acceptable final outcome in Copenhagen and that instead a comprehensive new agreement, that includes the US and key developing countries in committed

mitigation efforts will be required. Developing countries, on the other hand, have strongly opposed attempts to merge the AWG-KP and AWG-LCA negotiating tracks mainly to preserve the distinction which the Kyoto Protocol now makes between developed and developing countries.

The EU has pushed for a completely new agreement which should not “kill” the Kyoto Protocol but build on and strengthen it. For now however, developing countries have insisted on maintaining the two negotiating tracks at least going into the next set of talks in Barcelona in November, ahead of the final negotiations in Copenhagen in December.

Consultation Watch

Improving Grid Access

DECC has opened a consultation on improving grid access ahead of the UK seeking to meet its climate change targets and ensure security of supply given large amounts of renewable and other low carbon generation



necessary for us to connect to our electricity networks. The consultation seeks views on the options for grid access reform that the Secretary of State may wish to see implemented. The consultation closes on 17 November 2009.

Environmental Permitting Regulations

The Environment Agency is consulting on new standard rules applicable to the current Environmental Permitting regime covering water discharge consenting, groundwater authorisations

and radioactive substances regulation. The consultation closes on 27 November 2009.

Offshore Transmission Licensing

The Department for Environment, Food and Rural Affairs (“Defra”) is consulting on filling a current regulatory gap such that new submarine cables connected to offshore wind turbines will now require a licence under Part II of the Food and Environment Protection Act 1985, whereas until now this activity has been exempt. The closing date for responses is 26 October 2009.

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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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