

ENVIRONMENTAL HIGHLIGHTS FOR LSH COMPANIES (APRIL 2009)

Carbon Reduction Commitment – CRC

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The CRC, expected to enter into force in 2010, will create a new mandatory emissions trading scheme that will apply to large non-energy intensive businesses. The wide ranging obligations will apply to most organisations and emissions that are not currently within the scope of the EU ETS¹ will be caught (e.g. supermarkets, hotels, offices, Government departments).

A key element of the UK's strategy for controlling carbon dioxide (CO₂) emissions, the CRC will, once it enters into force, require large organisations and Government bodies with a large energy demand to purchase CO₂ allowances to cover anticipated energy demand. Organisations will in turn surrender allowances based upon actual energy use and emissions, purchasing additional allowances in the event that there is a shortfall. The CRC will be a "cap and trade" based scheme with allowances anticipated to be capped in 2013.

Heralded in the 2007 Energy White Paper, the Climate Change Act 2008 paved the way for the Scheme that will apply to a wide range of commercial and public sector organisations with half-hourly metered electricity output of 6,000Mwh or more. Unlike the EU ETS² and Climate Change Agreements, the CRC will apply to persons and organisations - not installations and processes.

Recently, DECC³ and Defra issued the draft CRC 2010 Order⁴ for public consultation, alongside a draft "user guide" aimed at helping organisations that will be subject to the CRC requirements understand what it is that will be required of them, preparing them for the introduction of the scheme and new compliance measures. The consultation closes on the 4 June 2009, after which the Environment Agency⁵, as administrator and regulator, will contact those organisations that may fall within the scope of the CRC in order to gather relevant information for the purposes of registration and taking the scheme forward.

Essentially, the draft CRC Order establishes a new emissions trading scheme in respect of direct and indirect carbon dioxide emissions from non-domestic energy consumption, in addition to imposing obligations on participants such as annual reporting on energy consumption, signature and verification of statements and records kept, and compliance with performance commitments. Organisations and legal persons that do fall within the scope of the CRC must participate in the scheme if they consume 6,000Mwh of electricity or more from half-hourly metered sources during a qualifying year (i.e. "qualifying undertakings"). Government departments on the other hand are obliged to participate regardless of their electricity consumption.

¹ EU Emissions Trading Scheme

² 2003/87/EC

³ Department for Energy and Climate Change, www.decc.gov.uk

⁴ www.defra.gov.uk, March 2009

⁵ SEPA in Scotland

The introductory phase of the scheme will run from 1 April 2010 for a period of three years, with subsequent seven yearly phases thereafter. The qualification period for the introductory phase is 2008, with registration taking place between April and September 2010. During the introductory phase, allowances will be sold at a fixed price of £12 per tonne of CO₂

In terms of practical implementation and action required of "qualifying undertakings", there are a number of initial "up front" obligations set out in draft legislation, further highlighted in the draft government user guide. First, qualifying undertakings will have to register by 30 September 2010, and in addition, they must provide a "footprint report" in line with criteria set out in the draft CRC Order, preparing a residual measurement list if required. The new legislation will, once implemented, bestow a number regulatory functions and powers on the Environment Agency, including the power to require information, audit and verify information, conduct inspections and impose enforcement notices. Failure to comply with the CRC obligations may lead to a civil penalty notice up to £5,000 plus any interest incurred. The better an organisation performs in terms of reducing emissions, the higher it will appear on the annual performance ranked league table to be published by Government. Some organisations will only be required to make information disclosures on a regular basis whilst others, however, will be required to participate fully.

The CRC is a mandatory scheme and will place legal obligations on organisations to disclose information and – for larger energy users – to report on emissions and purchase allowances from Government. A refund on allowance expenditure, however, may be available if there are deemed to have been energy efficiency improvements and the undertaking in question will benefit from a bonus. In contrast, organisations that fail to reduce emissions will be penalised. The size of the bonuses and penalties will increase as the scheme progresses. Any organisation that does not comply with its legal obligations under the scheme will be subject to enforcement action and financial penalties. Organisations likely to be affected should commence the process of compiling relevant information and statistics now. Publicly, reputations may be affected.

In order to simplify reporting and administration requirements, the CRC provides that large and structured organisations should "participate" as a single entity. This will be the case even if the group has large subsidiaries which will qualify for the CRC in their own right. In such organisations, one part of the group must act as primary member under the CRC, generally speaking the highest parent organisation but subsidiary groups can nominate a different primary member if they so wish.

All participants in the scheme will be subject to a registration fee. Furthermore, there will be subsequent annual fees for the administration of an organisation's account.

Environmental Damage Regulations - New UK Regulatory Controls Implement the Environmental Liability Directive⁶

By way of background, the Environmental Liability Directive established a new strict liability regime for "environmental damage" caused by a range of activities, prescribed in the Directive. It introduced a system of fault based liability for damage to protected species and habitats.

On 1 March 2009 the Environmental Damage (Prevention and Remediation) Regulations 2009⁷ came into force. The Regulations, based upon the "polluter pays principle" implement the provisions of European Directive into UK law, and impose new obligations on companies and individuals undertaking commercial operations where there is either an imminent threat of, or actual occurrence of, environmental damage, adding to the existing environmental regime of regulations and controls.

The long awaited Regulations specify three categories of environmental damage as follows:-

⁶ European Directive 2004/35/EC

⁷ The Environmental Damage Regulations

- Land – contamination resulting in significant risk of adverse effects on human life;
- Surface water or groundwater bodies – damage lowering the water classification under the terms of the Water Framework Directive;
- Protected species, natural habitats and Sites of Special Scientific Interest (SSSIs) – damage having either a significant adverse effect on the favourable conservation status of the protected species and natural habitat or an adverse effect on the ecological structure and function of a SSSI.

The Regulations principally apply to damage arising from specified categories of activities, including:

- (i) activities that are subject to environmental permits
- (ii) waste management operations
- (iii) authorised discharges to water
- (iv) water abstraction and empowerment
- (v) the manufacture, use, storage and transport of dangerous substances
- (vi) the use of genetically modified organisms

In the case of environmental damage to protected species, natural habitats and SSSIs, the Environmental Damage Regulations also apply in relation to any other "activity" if the operator first, intended to cause environmental damage, or second, was negligent as to whether environmental damage would be caused.

The Environmental Damage Regulations specify that if an operator of a relevant activity causes either an imminent threat of, or actual, environmental damage then the operator must immediately take all practicable steps to prevent that damage or further damage, as appropriate and, unless any imminent threat has been eliminated, notify all relevant details to the appropriate enforcing authority. The authority in question could be one or more of: The Environment Agency, The Marine and Fisheries Agency, Natural England, or the Local Authority depending upon the activity. Once the duty to report has been discharged, the enforcing authority must then assess what environmental damage has occurred and, after consultation, may serve a Remediation Notice specifying the actions that must be taken. Generally speaking, for environmental damage to land, the remediation must ensure that the land no longer poses any significant risk of adverse effects on human health. Turning to damage to other natural resources, however, the remediation must return the resource to the condition it would have been in if the damage had not occurred. That may not always be possible and so the Remediation Notice can also require complementary remediation, which essentially, makes up for the damage that cannot be undone. In addition, whilst remediation is being undertaken, compensatory remediation must be provided in order to compensation for any interim losses. Breaches of the new regulations are criminal offences and will lead to fines and imprisonment if a guilty verdict is pronounced. The Regulations are not, however, retrospective and will only apply the damage after Regulations enter into force.

REACH Update – End of Pre-Registration and the Establishment of "Substance Information Exchange Forums"

Pre-Registration under the EC Regulation for the **Registration, Evaluation, Authorisation and restriction of CHemical Substances**⁸ was required to take place by 1 December 2008 so that companies could benefit from the staggered approach to "phasing substances" (see ELM issues [ELM to insert details]). A list of pre-registered substances comprising approximately 150,000 substances was published by the European Chemicals Agency in December 2008⁹. Companies that failed to pre-register will now be required to cease trading activities in respect of the substances that should have been registered, until they have submitted a full REACH registration dossier, together with a relevant fee and secured formal registration. Inevitably, there will be cost and resource implications. Those companies that did pre-register prior to the 1 December deadline must now take steps towards forming "Substance Information Exchange Forums" (SIEFs) prior to final registration¹⁰. CEFIC¹¹ guidance on the establishment of such forums is available¹².

Turning to "substances of very high concern" following the European Chemical Agency's candidate list of fifteen substances published for consideration in 2008, the Agency published on 14 January 2009 recommendations for prioritising seven out of the fifteen substances, which are to be the subject of further public consultation. Details of the consultation can be found in the European press release¹³.

In the UK, the REACH Enforcement Regulations¹⁴ came into force on 1 December 2008 and are enforced by a number of authorities including the Health and Safety Executive, the Environment Agency, local authorities and the Secretary of State (BERR). The Regulations provide for an extension to enforcing authorities' existing responsibilities, building upon current UK enforcement regimes and the authorities in question are charged with enforcing the provisions of the REACH Regulations set out in Schedule 1 such as registration and notification requirements.

The HLSE will be responsible for taking enforcement action with regard to non-compliance with the Regulations in respect of registration and the supply chain, whereas the Environment Agency will take action if there has been a breach of environmental controls. Enforcement authorities are required to co-operate and share information as part of their new role. In terms of functions, the main offence in respect of contravening a provision listed in Schedule 1 to the Regulation is punishable on summary conviction in the Magistrates courts to a fine not exceeding £5,000 and/or three months imprisonment, whilst on indictment, to an unlimited fine and/or two years imprisonment. The Regulations transcribe into UK law the enforcement requirement set out in the EC REACH Regulation¹⁵ and will apply to all companies who produce and import chemical substances.

Chemical Labelling - New Proposed Rules on Classifying, Labelling and Packaging Chemicals

The EC adopted a new proposal for a regulation on the classification, labelling and packaging of substances and mixtures¹⁶ in 2008, which will replace provisions in EU Directives 67/548/EEC and 99/45/EEC once adopted. The proposal comprises the classification criteria

⁸ EC Regulation 1907/2006/EC

⁹ ECHA/PR/08/59 – Press Release

¹⁰ The intention of SIEF's and data sharing is for companies to work together and agree on classification and labelling, potentially even showing costs and agreeing working practices.

¹¹ European Chemical Industry Council

¹² www.cefic.be

¹³ ECHA/PR/09/01

¹⁴ SI2008/2852

¹⁵ EC1907/2006

¹⁶ COM (2007) 335

and labelling rules agreed at a UN level¹⁷ and requires companies to label appropriately and package their hazardous chemicals prior to being placed on the open market. The EC formally adopted three legislative reports on classifying, labelling and packaging in 2008, complementing the EU REACH Regulation in respect of chemicals. It is anticipated that the rules for substances will come into force on 1 December 2010 and for mixtures in 2015.

Climate Change Act 2008 – A New Framework to Deal with the Impacts of Climate Change and Emissions Reductions

The Climate Change Bill entered the statute books on 26 November 2008, introducing the world's first long-term legally binding framework in respect of climate change - placing a legal obligation on the UK Government to reduce carbon dioxide emissions in the UK by 80% below 1990 levels by 2050¹⁸. The Act establishes a new Committee on Climate Change (CCC)¹⁹ to act as advisor to Government. Moreover, the Act requires the Secretary of State to set three consecutive carbon budgets capping emissions over a period of five years, the first of which is to run from 2008–2012. The new carbon budgets²⁰ must take into account the UK's targets such as the 80% reduction in greenhouse gas emissions, in addition to European and international obligations and are to be approved by way of parliamentary process. Budgets may, however, be revised by Government if circumstances change. In terms of reporting, the Act provides for a new mechanism to assess the impact of, or adaptation to, climate change, with the establishment of a Government reporting programme that requires annual progress reports to be made to Parliament. There is scope for new national emissions trading schemes to be established by way of regulation, such as the Carbon Reduction Commitment (CRC). Consulted upon in 2007, the CRC is expected to enter into force in 2010 and will apply to large non-energy intensive businesses and public sector organisations. Finally, the Act includes powers to pilot new waste incentive schemes for homeowners and the ability to regulate on charges for the use of plastic bags.

In terms of aviation and shipping, both of these sectors have been brought within the scope of the new Act. Emissions from aviation and shipping will not, however, count as "UK emissions" for the purposes of meeting the 80% target at the outset. Nevertheless, by the end of 2012, the Secretary of State must include such emissions in the target or explain to Parliament why he has not done so. In a recent speech given by the Secretary of State for Environment and Climate Change, Ed Milliband stated that aviation and shipping emissions would be included in the 80% target when difficulties in measuring such emissions have been resolved.

If you have any queries on the issues raised in this environmental briefing, or if you would like a fuller explanation of the topics, please contact **Brian Greenwood** or **Sheryll L'oken** of Taylor Wessing's Environmental Law Group or your usual contact at Taylor Wessing

¹⁷ Globally Harmonised System of Classification and Labelling of Chemicals (GHS)

¹⁸ Further legally binding target to reduce greenhouse gas emissions by 26% by 2020.

¹⁹ The CCC was appointed in March 2008 and became a statutory body in December 2008. The Committee has statutory responsibility to report annually to Parliament on progress in meeting targets.

²⁰ Essentially, carbon budgets place a limit on the quantity of carbon dioxide emissions over a period of time set in advance for the periods 2008-2012, 2013-2017, 2018-2022 by 1 June 2009.