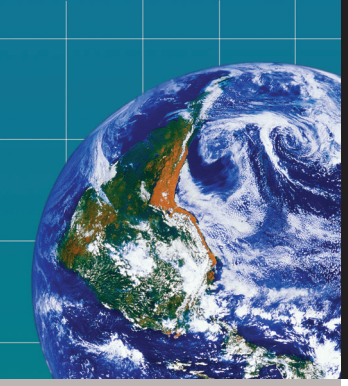

Newsletter

Environment and Energy Law

BURGES SALMON

Spring 2016

Welcome

Welcome to the Spring 2016 issue of **Environment and Energy Law**. If you would like further details on any of the areas covered in this newsletter then please contact one of our partners or have a look on our website at **www.burges-salmon.com**

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Carbon and climate change

Paris Agreement on Climate Change

In a major speech in January 2016, UK Special Representative for Climate Change Sir David King referred to the Paris Agreement on Climate Change, agreed in December 2015, as "a turning point in human history" and the "biggest opportunity of our age". Fair assessment, or 'irrational exuberance'? What is clear is that 195 countries put behind them the failures of earlier summits such as Copenhagen, and many of the sterile arguments between 'developed' and 'developing' countries, and agreed a common aim and a common framework for achieving much more ambitious goals on controlling climate change.

The Paris Agreement at COP 21 (A.2)…*"aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*

- *Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change;*
- *Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;*
- *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate – resilient development."*

The Agreement itself will be legally binding, but each country's "Nationally Determined Contributions" (NDCs) will not. International engagement, transparent reporting and pressure from civil society will be the means for ensuring that countries' commitments are maintained.

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The machinery for five yearly reviews and a periodic "global stocktake" in the full light of public scrutiny, actions before 2020, alignment of reporting and transparency, technology transfer and funding aims of US$100 billion per year for developing countries will be part of the challenge of making the Paris Agreement effective. The 'progressive approach', ratcheting up increasingly ambitious national contributions, will be very important.

It seems inevitable that there will be many setbacks along the way, such as the US Supreme Court's 5-4 vote against early implementation of the administration's emissions control plans. The law and regulation on climate change can be expected to develop from the political lead from Paris. NDCs need to be translated into national programmes. At the regional and EU level in particular, legislation to implement, develop and enforce the political consensus will be required. National legal developments country by country will be crucial, but so will the contributions of some 7,000 cities worldwide engaged with the process, the point at which business is sufficiently persuaded of the direction of travel to scale up investment, and the continued active engagement of civil society.

The Paris Agreement will be open for signature on 22 April 2016, and will come into force when ratified by 55 parties accounting for 55 percent of total global greenhouse emissions.

For further information about the potential impacts of the Paris Agreement for your business, or to discuss in-house training on the Agreement that we could offer, please contact Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com or William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

New Marine Conservation Zones

In January 2016, the Department for Environment, Food and Rural Affairs ("Defra") exercised its power under the Marine and Coastal Access Act 2009 to designate 23 new marine conservation zones ("MCZs") around the English coast. MCZs are protected areas, designated in order to safeguard a range of nationally important, rare or threatened habitats and species. They form a so called "blue belt".

MCZ status does not automatically restrict economic or recreational activities within the designated area. However, Defra has the power to impose certain "management measures" where required because of the sensitivity of the relevant species or habitats. Management can be through use of the existing licensing framework, specific byelaws and orders or an EU Regulation for the site. It is important for those whose activities intersect with MCZs to be aware of any management measures in place. For example, there may be cost and project feasibility implications where current or potential offshore wind farms are co-located with MCZs, as well as where the export cables for those projects pass through coastal MCZs.

This is the second tranche of MCZs to be designated. The first tranche of 27 was designated in 2013, and the government intends to consult on a third and final tranche of designations for England in 2017 (with designation to follow in 2018).

It is not only at home that the UK government is taking marine conservation action. Also in January, the government announced that Ascension Island is to become a marine reserve, furthering the government's 2015 manifesto commitment to create a "blue belt" of protected ocean around the UK's Overseas Territories. The area of the Ascension Island marine reserve is significant – only slightly smaller than the UK – and over half of the protected area will be closed to fishing. Formal designation of the Ascension Island marine reserve will not be until 2017 at the earliest.

For further information, please contact Sarah Raby, Solicitor on +44 (0) 117 902 7181 or email: sarah.raby@burges-salmon.com

Potentially sweeping changes to UK energy efficiency

The Treasury and DECC consultation on the business energy efficiency tax landscape closed on 9 November 2015. The repercussions of the consultation are likely to be relevant to any organisation that is currently required to adhere to any of the Climate Change Levy (CCL), CRC Energy Efficiency Scheme, Energy Saving Opportunity Scheme (ESOS) or mandatory greenhouse gas reporting regimes. In practice this will include a large number of businesses across a diverse range of sectors.

One of the stated aims of the consultation was to reduce administrative burdens by simplifying both the reporting and taxation regimes. The government made three specific proposals in the consultation:

- a single reporting framework for energy use and emissions (taking the existing ESOS regime as a basis);
- a single business energy consumption tax based on the CCL (and, consequentially, abolition of the CRC); and
- the development of new measures to incentivise investment in energy efficiency and carbon reduction that aim for simplicity of comprehension and compliance and maximise impact.

The government is considering a number of options on the form of the new reporting and taxation regime.

What is clear is the government's intention to end the CRC (both its reporting requirements and its status as an environmental tax). Otherwise it remains to be seen whether the new regime will reduce burdens on business simply by removing some existing obligations and retaining others (i.e. abolition of the CRC in favour of CCL (for tax) and ESOS (for reporting)) or whether there will be a real attempt to construct a new regime which consolidates the current disparate range of measures – potentially a challenging project and requiring cooperation between DECC and the Treasury.

The Government has indicated that it will announce the response to this consultation in the course of the 2016 budget on 16 March 2016. Burges Salmon will be watching these developments closely. For further information please contact Stephen Lavington, Solicitor on +44 (0) 117 307 6314 or email: stephen.lavington@burges-salmon.com or Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

New Energy Savings Opportunity Scheme (ESOS) now in operation

The Government's new scheme aimed at promoting energy efficiency measures within specified undertakings – ESOS – is now in full operation, and all those organisations falling within its remit must have regard to the obligations it places on them. The initial deadline for compliance with ESOS has passed, as has an additional longstop date by which late reporting entities could aim to avoid enforcement action.

ESOS is designed to address Article 8 of the EU Energy Efficiency Directive 2012, and requires UK entities of a certain size to measure their energy consumption, undertake an audit of opportunities to bring efficiency savings to such consumption, and report to the Environment Agency to confirm compliance.

Entities (or "undertakings") that employ at least 250 people or that have an annual turnover of over €50 million and an annual balance sheet of over €43 million will generally qualify for ESOS and will be required to prepare an ESOS audit, as will an entity that has such a "large undertaking" within its group.

Qualifying undertakings must report to the Environment Agency, confirming that this audit has taken place. The deadline for this report was 5 December 2015, though the Agency also indicated that enforcement action would, generally, not be taken if notification was provided by 29 January 2016.

This is a significant scheme for companies to be aware of, as fines for non-compliance can be up to £50,000.

For further information please contact Simon Tilling, Senior Associate on +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com

General scaling back of UK carbon ambitions?

Since the May 2015 election there has been a general scaling back of initiatives aimed at reducing carbon emissions. In July 2015 the new Government announced that it would no longer pursue its target for all new homes to be zero carbon homes, despite the ongoing EU goal for all new buildings to achieve nearly zero energy standards by 2020. This was followed in November by the announcement that the capital budget of £1billion previously ring-fenced for a nationwide competition to develop carbon capture and storage (CCS) projects would no longer be available. Meanwhile the recent Government consultation on energy efficiency suggests a considerable streamlining of reporting and regulatory measures. This has all taken place at the same time as domestic energy efficiency programmes such as the Green Deal and ECO have been cut back.

There is a contrast between these national policies and the government's declared international ambitions, for example in the Paris Agreement on Climate Change.

Energy Company Obligation to be refocused after 2017

Government has announced that the Energy Company Obligation (ECO) scheme will be changed after the current obligation phase ends on 31 March 2017.

ECO was introduced by the Coalition Government in 2012 to require UK energy suppliers to fund energy efficiency measures in UK homes as part of the package of energy efficiency measures in the Energy Act 2011. ECO has received significant criticism from energy suppliers on the basis that the cost of compliance has led to higher energy bills. ECO has funded significantly more energy efficiency measures that the voluntary Green Deal scheme introduced at the same time.

The original intention was for ECO to run in a series of phases after 2017 but it was announced in the Autumn Statement that the policy was being reconsidered. Government recently announced that ECO will continue but that from 2018 it will be refocused on improving vulnerable homes instead of reducing carbon emissions through changes to the targets for ECO sub-obligations. 2017 will act as a transition year for the changes. It is not yet clear whether the overall obligations on energy suppliers will be reduced.

Burges Salmon has advised Government, Energy Companies and the energy efficiency industry on ECO. For more information please contact Ella Curnow, Associate on +44 (0) 117 307 6814 or email: ella.curnow@burges-salmon.com.

Green Investment Bank privatisation

Plans to privatise the Green Investment Bank 'GIB' were announced by Business Secretary Sajid Javid in Summer 2015, and attracted critical comment from some Parliamentarians, who were concerned that it may result in an alteration or watering down of the GIB's mandate to invest in exclusively green projects.

In a response to critical comments from the Environmental Audit Committee, published in February 2016, the government argues that the move to the private sector was always envisaged, and would give the GIB wider access to capital. The government argues that the GIB will carry on doing what it does best, but in the private sector. It has canvassed the idea of retaining a special share, with the right to approve any change to the GIB's green purposes.

For further information please contact Simon Tilling, Senior Associate on +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com

Environmental liability and environmental permitting

Environmental Liability – UK Courts consider the meaning of environmental damage for the first time

The Environmental Liability Directive is implemented in the UK by the Environmental Damage (Prevention and Remediation) Regulations 2015 (in England) and 2009 (in Wales). Under both sets of regulations operators of certain activities are obliged to prevent and remediate *environmental damage.*

In the case of *(R (Seiont, Gwyrfai and Llyfni Anglers' Society) v Natural Resources Wales and others*, (a case in which Burges Salmon were involved) an angling Society with fishing rights on a lake in Snowdonia noticed a significant decline in the population of resident Arctic charr since the 1990s and subsequently notified Natural Resources Wales (NRW) that environmental damage was being caused by discharges from sewage treatment works.

In December 2014, NRW decided that no *environmental damage* was being caused from the discharges, a decision which the Society judicially reviewed primarily on the basis that NRW had wrongly applied the concept of *environmental damage* by limiting its assessment to the direct impact of the discharges on the environmental situation and/or the deterioration of a particular aspect of the lake and ignoring the indirect inhibitory impact the discharges were alleged to be having on improving the environmental situation.

In the first ever Court ruling on the meaning of *environmental damage*, the Court found that the concept of *environmental damage* was limited to deterioration of the environmental situation and did not include events or omissions with prevented improvements to an already damaged environmental state or slowed down any rate of improvement.

The significance of this ruling is that the key obligations under the UK regulations to prevent and remediate environmental damage

will not apply unless a particular event or omission can be shown to have caused a direct deterioration in the environmental situation when compared to a baseline taken before the particular event or omission occurred. The regime will not apply if an act or omission merely prevents or inhibits improvement in the environmental situation at a given site.

Revised regulations on Environmental Permitting

Defra and the Welsh Government plan to consolidate the Environmental Permitting (England & Wales) Regulations 2016, replacing the 2010 Regulations and incorporating subsequent amendments. These would also bring flood defence consenting into the EPR regime and strengthen EA and NRW enforcement powers over the waste industry.

For further information on Environmental Liability or Environmental Permitting issues covered in these notes, please contact Ian Truman, Senior Associate on +44 (0) 117 939 2280 or email: ian.truman@burges-salmon.com or Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

STOP PRESS:

***ClientEarth* served letter before action on UK government for ongoing NO2 breaches, Welsh Government, Scottish Government, London Mayor, Department for Transport as Interested Parties – 1 March 2016**

Air quality and emissions

Air quality update

In February 2014, the European Commission began infringement proceedings against the UK government for continuing breaches of NO2 levels set by the EU Ambient Air Quality Directive.

In a judgement in November 2014, the Court of Justice of the European Union on a reference of some questions of interpretation, ruled that the national court should order "any necessary measure" to require national authorities to establish the plan required by the Directive.

In April 2015 in a landmark ruling in the *ClientEarth* case, the Supreme Court responded to "the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide set by European law, under Directive 2008/50/EC", and Lord Carnwath, giving the judgement of the Court, ruled the UK to be in breach and made a mandatory order requiring the Secretary of State to prepare new air quality plans, to be delivered to the European Commission no later than 31 December 2015.

Revised air quality plans were published for consultation by the UK government in September 2015 and made in December 2015, and focus in particular on traffic emissions, selected air pollution 'hotspots' and proposed Clean Air Zones for six cities. *ClientEarth* has already announced its intention to bring a further legal challenge on the basis that the revised plans are inadequate to meet the legal obligation to put the UK back into compliance with the Directive as quickly as possible.

Also in September 2015, news broke of the admissions by Volkswagen to US authorities of having fitted 'defeat devices' to some 11 million cars worldwide, designed to deliver misleading results to emissions tests.

In January 2016 it was announced that some sites in London had breached their annual emissions limits by 8th January. In the same month the US government filed a multi-million dollar civil suit against the Volkswagen group in the US District Court of Michigan.

Despite this background, the UK government and other EU governments with car making facilities led the arguments in favour of relaxing the emission limits applicable to 'Real Driving Emissions' for diesel, giving their car industries longer to meet the tougher standards reflecting real driving required by Euro 6 standards, despite the failure of such standards to reflect real driving levels of emissions for the 23 or so years since they were introduced. On 3 February 2016, by 323 votes to 317 with 61 abstensions, the European Parliament voted to allow this compromise. The outcome was welcomed by some parts of government and the car industry, and denounced by some environmental NGOs as illegal, and doing nothing to address the premature mortality statistics resulting from air pollution across Europe. This issue is likely to remain a political and legal battleground, with some of the attention moving to regulation of air pollution at the level of individual cities, such as London.

Meanwhile, continued steps are being taken to complete implementation of the Industrial Emissions Directive 'IED', where a number of industries are starting to become familiar with the

changes to the Best Available Techniques or 'BAT' test introduced by the IED, and its effects on their operations. The UK's approach to the Transitional National Plan provisions for Large Combustion Plants is being challenged by the European Commission in at least one set of infringement proceedings, and negotiations are continuing on a proposed revised National Emissions Ceiling Directive and a Medium Combustion Plants Directive proposed by the Commission in 2013 (see separate articles below).

At Burges Salmon we continue to follow these issues closely, and we are actively involved in briefing clients on their very wide implications, for example, for transport, diesel users such as diesel generators for Demand Side Storage, buses, trains, and those affected by Low Emission Zones.

For copies of our separate and more detailed briefings on possible criminal offences arising from the Volkswagen case, and on Volkswagen and the new landscape for producer responsibility, or to discuss our Board Level Briefings on air quality law, regulations and policy, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

Industrial Emissions Directive 'IED' – implementation update

The Industrial Emissions Directive 2010/75/EU 'IED' has replaced:

- the Integrated Pollution Prevention and Control 'IPPC' Directive 2008/EC
- the Large Combustion Plants 'LCPD' Directive 2001/80/EC
- the Waste Incineration 'WID' Directive 2007/76/EC
- the Volatile Organic Compounds 'VOCs' Directive 1999/13/EC and
- three Titanium Dioxide 'TiO2' Directives 78/176/EEC; 82/883/EEC and 92/112/EEC.

The Large Combustion Plants Directive 2001/80/EC was the last of these to be repealed, on 1 January 2016, which is the date when the Large Combustion Plants (Transitional National Plan) Regulations 2015 took effect (see separate item).

Many holders of Environmental Permits are now experiencing the significant revisions imported by the IED, which include some stricter controls on specific pollutants and emission limit values, and a significantly different approach to the Best Available Techniques or BAT test in some key areas. Revisions to regulator key guidance on Environmental Permitting are continuing.

"The reason for this is the important linkage that the IED reinforces between BAT conclusions and permit conditions."

Holders of Environmental Permits will be hearing from many quarters – regulators, consultants and lawyers – that it is important that they stay engaged with the process of development of BAT conclusions for their industry sector through the preparation of BREFs and the Seville process. The reason for this is the important linkage that the IED reinforces between BAT conclusions and permit conditions. Once BAT conclusions are in place, permit conditions may need to be brought into line with them within four years, which is not long when planning for the major refits to abatement processes which might be required.

Sites producing or releasing hazardous substances are also required to prepare a baseline report, either before first operation or before the first update of the installation's permit after 7 January 2013, and this is going to be very important to defining obligations and any site closure, decommissioning and clean-up.

As noted in our earlier work on this important Directive, it is quite a bit more than a simple re-cast and consolidation.

For further information, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

Large Combustion Plants: UK Transitional National Plan goes live

On 1 January 2016, the Large Combustion Plants (Transitional National Plan) Regulations 2015 implemented the UK's Transitional National Plan ("TNP") for certain Large Combustion Plants ("LCPs"). LCPs covered by the TNP have an additional four and a half years in which to make the necessary investments in emissions abatement technology to achieve compliance with the stringent emissions limit values and desulphurisation rates set by the Industrial Emissions Directive 2010 (the "IED") for three key pollutants – nitrogen oxides, sulphur dioxide and particulates (dust).

"The idea behind the TNP is to achieve a reduction in emissions of air pollutants without imposing an unreasonable burden on industry."

LCPs are plants with a thermal output of more than 50 MW, such as power stations and boilers in petroleum refineries and steelworks. It is recognised, both at member state and at EU level, that certain LCPs are particularly important in terms of economic productivity and energy security. The idea behind the TNP is to achieve a reduction in emissions of air pollutants without imposing an unreasonable burden on industry. For a "transition period" from 1 January 2016 to 30 June 2020, LCPs covered by the TNP are exempt from the IED emission limits and must instead, as a minimum, maintain the emission level values set out in the permit they held as at 31 December 2015. From 1 July 2020, the TNP will fall away and the IED emission limits will apply to the relevant LCPs.

The TNP Regulations also establish an emissions trading system, which allows participants to trade unused "emissions allowances" with other participating plants.

The government's impact assessment concluded that the TNP will have a net benefit to the UK economy of £5,572.2 million.

The TNP remains one of the most contentious areas of implementation of the IED, with the UK already facing infringement proceedings before the Court of Justice of the European Union for related issues of coal-fired emissions from LCPs. Production of the TNP regulations at the last minute by Defra has led some MPs and Peers on the Joint Committee on Statutory Instruments questioning whether the procedures for laying the statutory instrument have been handled correctly.

For further information please contact Sarah Raby, Solicitor, on +44 (0) 117 902 7181 or email: sarah.raby@burges-salmon.com or Ross Fairley, Partner, on +44 (0) 117 902 6351 or email: ross.fairley@burges-salmon.com

Medium Combustion Plants Directive 'MCPD'

This measure, proposed in the European Commission's Clean Air For Europe programme in 2013, was adopted by the Council of the European Union on 10 November 2015.

The MCPD sets new emission limit values for sulphur dioxide (SO2), nitrogen oxides (NOx) and dust, applying them to new and existing combustion plants of medium size, that is, between 1 and 50 MW. Emissions monitoring is also required for carbon monoxide (CO).

This will impact on domestic heating and cooling, electricity generation and medium combustion plants providing steam for industrial processes.

There are some relevant and particular exceptions from scope of the MCPD, which are likely to be reflected in particular by implementing measures in England. There may be differences in detailed implementation within other UK jurisdictions.

Rules cover the combination of two or more medium combustion plants into one, for example discharging through a common stack. All medium combustion plants covered by the MCPD are required to be permitted or registered, and a register maintained with details.

Different emission limit values will take effect on 1 January 2025 and 1 January 2030, with potential exemptions for plants not operating over 500 hours per year on a five year average.

Operator obligations will include record keeping requirements on different fuels used, and emissions monitoring.

For further information, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

Proposed Revised National Emissions Ceiling Directive

This revision of the existing National Emissions Ceiling Directive 2001/81/EC was also proposed as part of the European Commission's Clean Air Policy Package in 2013.

When agreed it would replace national ceilings after 2020 with stricter limits, and national emission reduction commitments between 2020 and 2030, for SO2, NOx, VOCs, fine particulate matter (PM2.5) and methane.

The European Parliament voted its position on the draft directive in October 2015, and the Council agreed a general approach for concluding negotiations with the Parliament on 16 December 2015.

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Chemicals and product stewardship

REACH 2018 – are you ready?

The third and final deadline for Registration of substances under REACH will take effect in 2018, and will apply to the manufacture or import of substances at or above 1 tonne a year. Inevitably this will apply to many more substances, and to many more Small and Medium Enterprises 'SMEs' for the first time, and the evidence suggests that quite large numbers of these SMEs are not well prepared for the discharge of REACH responsibilities. This has wide implications not only for the SMEs themselves, but also for the larger companies which in some cases depend upon their specialist suppliers further up their supply chains.

Since the REACH Regulation came into force in 2007, two REACH Registration deadlines have already passed (in 2010 and 2013 respectively). These were for higher tonnage thresholds, and the fact that they came and went without too much significant disruption may have persuaded some companies in the supply chain that this will also apply to the 2018 deadline. The final registration deadline of 31 May 2018 applies to all chemical substances manufactured or imported and placed on the EU/EEA market at levels of 1-100 tonnes per annum per company. It is expected that up to 70,000 Registrations will need to be prepared for REACH 2018, so there is a significant amount of work to be done.

Companies that have a Registration obligation should be aware that a failure to register substances by the Registration deadline means that you will no longer be allowed to supply them in the EU/EEA. Non-compliance could result in a regulatory investigation and enforcement action being taken by national Member State authorities. Importantly, larger companies dependent on SME suppliers for continued access to key chemical substances would do well to check that those suppliers are on course to achieve any necessary Registration, or investigate alternative Registration strategies.

The amount of preparation time required to ensure that Registrations are in place should not be underestimated. For example, companies will need to consider the REACH data generation and sharing principles, and may need to join a Substance Information Exchange Forum 'SIEF' for this purpose. Ultimately a Registration dossier will need to be submitted to the European Chemicals Agency, "ECHA". ECHA has introduced reduced Registration fees for SMEs, but costs will still be significant.

To help support SMEs who might be facing registration obligations for the first time, ECHA has produced specifically targeted guidance. Burges Salmon also routinely advises clients on their REACH compliance strategies, and is experienced in working with technical teams to assess product portfolios.

For further information on REACH or product stewardship issues, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email william.wilson@burges-salmon.com or Simon Tilling, Senior Associate on +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com

REACH Reviews

The EU REACH Regulation is notoriously complex, and accordingly provides for a number of important Reviews to be carried out at different intervals. Article 117 of REACH requires a Review by the European Commission of the performance of the Regulation every five years. This was last conducted in 2012, and published in 2013 by the Commission as a "general report". Alongside this, Member States are required to report to the European Commission on the operation of REACH (including enforcement) on a five yearly basis. The second round of these reports were received in June 2015. In addition, Article 117 requires a report from ECHA on the operation of the Regulation, the second of which is due in June 2016.

In its first general report, the European Commission reviewed REACH and concluded it was meeting its objectives, but that there were some areas for adjustment. One such area was to review the impact of REACH on SMEs. The European Commission recognised the need to put in place extra support to assist SMEs to meet the 2018 registration deadline. We have seen steps taken towards this objective.

The European Commission is currently preparing its second general report, due on 1 July 2017. This second report will also be considered an evaluation of REACH under the Commission's Regulatory Fitness and Performance Programme ("REFIT"). The REFIT analytical framework assesses themes of effectiveness, efficiency, coherence, relevance and EU-added value, and seeks to address the perceived regulatory burdens created by EU law. This second report by the European Commission therefore represents a particularly important Review, as it combines the REFIT principles which should assist in identifying areas to facilitate implementation and ease the burden of REACH compliance.

"This will impact on domestic heating and cooling, electricity generation and medium combustion plants providing steam for industrial processes."

REACH: Data Sharing Implementing Regulation Published

On 26 January 2016, the a new Implementing Regulation on joint submission of data and data-sharing in accordance with REACH came into force. The Implementing Regulation is directly effective, and therefore already applies within the UK without need for further UK legislation, although such regulations are often followed by national measures setting out enforcement measures and penalties for breaches.

Under the REACH Regulation, manufacturers and importers are required to share certain data for the purposes of registering REACH substances with ECHA. Despite the REACH regulation containing such provisions, recent experience with data sharing disputes has persuaded the European Commission that further measures are required to give legal force to principles that have hitherto been contained in Guidance.

The Implementing Regulation seeks to address this issue with specific provisions on transparency, the principle of "one substance, one registration" (i.e. joint registration), fairness and non-discrimination and dispute resolution. In particular, the Implementing Regulation sets out specific requirements regarding the itemisation of costs and the inclusion of cost-sharing models within data-sharing agreements, subject to certain rights of waiver for pre-existing agreements.

Relevant manufacturers and importers should consider the new requirements very carefully, not least of which because the Implementing Regulation provides that parties' compliance with its provisions will be taken into account by ECHA when setting data-sharing disputes. Burges Salmon has advised on ECHA data sharing dispute issues, for further information please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

REACH Enforcement

Recent weeks have seen a number of noteworthy announcements from ECHA about compliance with, and enforcement of, obligations under REACH.

December 2015 saw the publication of the final report of REACH-EN-FORCE 3, an enforcement project co-ordinated by ECHA's Enforcement Forum with the intention of investigating levels of compliance with the Registration obligations placed upon manufacturers, importers and Only Representatives. As part of the project, enforcement authorities in 28 countries inspected 1,169 companies and 5,746 substances in two phases in 2013-14. The project uncovered significant levels of non-compliance, with 13% of companies inspected failing to comply with their REACH registration requirements in some respects and 2% of those inspected having failed to register any of their relevant substances. The report recommended that more attention needs to be paid in future to importing companies and that Only Representatives should be considered a group particularly at risk of non-compliance. Companies falling into these categories should expect ECHA and national enforcement authorities to show heightened interest in their compliance.

"The project uncovered significant levels of non-compliance, with 13% of companies inspected failing to comply with their REACH Registration requirements..."

On 13 January 2016, ECHA published a news item drawing attention to the new compliance check strategy which it had started to implement in 2015. ECHA's strategy focuses on checking the dossiers of those substances which are most important in terms of protecting people and the environment. In its announcement, ECHA revealed that it had checked the dossiers of 107 high priority substances and has promised further statistical information relating to the strategy in its annual evaluation report.

Registrants should pay particular attention to shortlisted substances and expect further regulatory activity in relation to them. In this vein, on 27 January 2016, ECHA announced that it had shortlisted almost 300 substances from REACH Registrations and earmarked these for further attention by Member States' enforcement authorities. The substances selected are registered by almost 1,500 companies, and those affected receive letters from ECHA informing them of the potential examination of their Registrations. Companies receiving such letters should carefully consider addressing any weaknesses in their dossiers as soon as possible.

For further information please contact Simon Tilling, Senior Associate on +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com or William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

SVHCs in Articles: Update

Burges Salmon's September 2015 briefing, 'REACH: CJEU judgment on SVHCs in Articles', reported on the Court of Justice of the European Union's ("CJEU") landmark judgment in a case referred to it by the French Conseil d'État, on the obligations relating to Substances of Very High Concern ("SVHCs") in Articles, and on whether REACH notification and information requirements only to the assembled product or also to its component articles.

The CJEU overturned the majority view then held by Member State competent authorities, and held that the relevant duties applied to each component Article as well as in some cases to the product as a whole.

In response to this ruling from the CJEU, ECHA has made short term amendments to its relevant REACH Guidance on Substances in Articles, but has stated that it intends to produce a more comprehensive revision of the Guidance later in 2016, which it is intended will contain new examples that are aligned with the CJEU judgment and also a review of experience gained and questions received by ECHA since the Guidance was first published.

"In response to this ruling from the CJEU, ECHA has made short term amendments to its relevant REACH Guidance on Substances in Articles..."

As our earlier Briefing made clear, the CJEU decision has a number of very important practical implications for relevant importers and suppliers and it is essential that such affected parties familiarise themselves with the revised Guidance as a matter of urgency to ensure that they are fully in compliance with their REACH obligations.

To receive a copy of our more detailed article on the CJEU decision, or for further information, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com, or Simon Tilling, Senior Associate on +44 (0) 117 902 7794 or email: simon.tilling@burges-salmon.com

EU Commission proposes changes to RoHS2 to address unintended effects

The recast Directive on the restriction of certain hazardous substances in electrical and electronic equipment (RoHS2), prohibits the marketing of such equipment within the EU if it contains more than a prescribed level of six hazardous substances. RoHS2 replaced the RoHS Directive 2002 and extended the categories of electrical and electronic equipment subject to the ban (the "open scope" provisions). However, Article 2(2) of RoSH2 provides that equipment that was outside the scope of the 2002 RoHS Directive but becomes legally non-compliant under the 2011 Directive can continue to be made available on the market until July 2019. Other (more imminent) deadlines apply for medical devices and monitoring and control instruments, in vitro diagnostic medical devices, and industrial monitoring and control instruments.

After the adoption of RoHS2, the EU Commission undertook studies – the Inception Impact Assessment – to assess the impact of the Directive's "open scope" provisions and has made detailed proposals covering specific products affected, secondary markets, refurbishment and repair and spare parts.

For further information on RoHS2 please contact William Wilson, Barrister, on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com or Elsa Hadley, Solicitor on +44 (0) 117 307 6312 or email: elsa.hadley@burges-salmon.com

Energy

Update on the Energy Bill

Having been subject to considerable debate in the House of Lords, the Energy Bill (the "Bill") is currently passing through the House of Commons. The Bill implements the key recommendation of the Wood Review on Maximising the Economic Recovery of petroleum from the UK's Continental Shelf (UKCS) by formally establishing the Oil and Gas Authority ("OGA") as an independent regulator. The OGA will have the existing regulatory powers of the Secretary of State for Energy and Climate Change in respect of offshore oil and gas as well as additional powers, including rights to obtain information and impose sanctions.

The Bill also makes changes to allow for comprehensive charging of the offshore oil and gas industry for permits and licences for environmental and decommissioning activity. The intention is to allow government to recover the costs of environmental and decommissioning activity in accordance with the 'polluter pays' principle.

Finally, and perhaps most controversially, the Bill seeks to implement the Conservative Party's manifesto commitment to 'end new subsidy' to onshore wind farms by closing the Renewables Obligation (RO) to onshore wind from 1 April 2016. Closure would be subject to grace periods which would allow wind farms to qualify after 1 April 2016 where they can provide specified evidence to demonstrate:

- significant financial investment as at 18 June 2015, when the intention to close the RO was announced;
- difficulty obtaining financing due to the early closure announcement; and/or
- evidence that the delay in completing the wind farm was due to third party delays in completing grid works or implementing radar mitigation schemes.

"The Bill also makes changes to allow for comprehensive charging of the offshore oil and gas industry for permits and licences for environmental and decommissioning activity."

The early closure of the RO was the subject of heated debate in the House of Lords culminating in the passing of an Opposition amendment which removed the 'early closure provisions' (and grace periods) in their entirety. The government has since re-introduced the provisions in the House of Commons without significant amendment and it remains to be seen what will happen when the amendments are considered again by the House of Lords, not least due to arguments around the application of the Salisbury convention, which traditionally ensures that Government Bills included in an election manifesto will be passed by the House of Lords.

Eligibility for grace periods is an issue of fundamental importance for onshore wind projects and needs to be assessed on a case by case basis. Burges Salmon has provided extensive advice on these issues to funders, developers and purchasers of projects and we continue to follow the passage of the Bill closely. Should you require further information on grace period eligibility or any other issues on the Bill, please contact Daniel Ballard, Solicitor, on +44 (0) 117 307 6931 or email: daniel.ballard@burges-salmon.com or Ross Fairley, Partner, on +44 (0) 117 902 6351or email: ross.fairley@burges-salmon.com

REMIT

The EU Regulation on energy market integrity and transparency is known as REMIT, and creates an EU framework on wholesale energy markets which defines and prohibits market abuse and manipulation, requires effective and timely public disclosure from market participants and obliges firms arranging transactions professionally to report suspicious transactions. Ofgem is the UK's national regulatory authority for the REMIT Regulation.

Since 7 October 2015, companies have had to report all EU wholesale gas and power trades and orders on organised market places to ACER (Agency for the Cooperation of Energy Regulation). By 5 November, some 4,232 companies had registered as "market participants" to report their trades and orders.

ACER is preparing for the final stage of data collection on 7 April 2016, after which transactions not concluded at an organised market place need to be reported to the Agency.

For further information, please contact James Phillips, Partner on +44 (0) 117 902 7753 or email: james.phillips@burges-salmon.com

Battery storage

Significant developments have been taking place in battery storage projects.

The UK's largest battery storage array, the 10 MW scheme at Kilroot, Northern Ireland, came online in January 2016.

Meanwhile BSR, Western Power Distribution and RES announced plans for participation in a £1 million Ofgem funded 640 KW battery system in Somerset.

National Grid is currently running a tender process to procure up to 200MW of enhanced frequency response 'EFR' capacity. Enhanced frequency response achieves 100% active power output within 1 second and will be the fastest response service available to National Grid. This new service is being developed to improve management of the system frequency and maintain system frequency closer to 50Hz under normal operation. It is envisaged that the tender process will be of real interest to battery storage developers as battery storage technology is able to deliver the rapid response times necessary. This could also result in the largest deployment of battery storage technology in the UK. There has been significant interest in this tender process and over 60 potential providers of EFR capacity prequalified for the tender process.

Waste and Energy sector consultants, Eunomia have published a report examining the potential for energy storage deployment in the UK, which provides the first forecast of its likely extent. The report, which focuses on battery technologies, also provides analysis of a range of electricity storage applications as investment propositions, together with figures on the level of deployment to date in the UK.

The report can be downloaded for free at **http://www.eunomia.co.uk/reports-tools/investing-in-uk-electricity-storage/**.

For further information on battery storage issues, please contact Nick Churchward, Partner on +44 (0) 117 307 6998 or email: nick.churchward@burges-salmon.com

Capacity Market and Demand Side Response

The Capacity Market was introduced under the Electricity Capacity Regulations 2014 and Capacity Market Rules 2014, as part of the UK's Electricity Market Reform, to ensure security of electricity supply during times of system stress. Capacity Market auctions were held in 2014 and 2015 in which generators were able to bid for capacity agreements which commit them to supplying electricity during a set period in return for various payments. At the second capacity auction in December 2015, the clearing price was £18/kW/year and the auction secured 46.4GW of generating capacity for 2019/20.

Capacity Market agreements are also available in respect of demand side response (DSR) arrangements, whereby entities that consume significant volumes of electricity, or aggregators, reduce electricity demand or shift their electricity usage out of times of peak demand. On 27 January 2016, National Grid Electricity Transmission plc (NGET) held the first transitional Capacity Market auction aimed at encouraging participation in DSR. The auction, which was for backup response during the winter of 2016/17, saw 28 companies successfully bid on agreements to secure a total of 803MW of capacity at a clearing price of £27.50/kW/year against a target of 900 MW (with a price cap of £40/kW/year).

Organisations can participate in DSR directly or via aggregators and thereby supplement income if they are able to put in place procedures or systems which allow more flexible electricity consumption. NGET anticipates rapid growth of the DSR market over the next few years and we have certainly seen an increase in activity both from major energy users and aggregators seeking to capitalise on the opportunities. The next transitional capacity auction is expected to be held in early 2017.

Burges Salmon have advised aggregators and major energy users on the opportunities presented by DSR and in negotiating the contractual arrangements. For further information, please see our 2014 and 2015 articles on the Capacity Market http://www.burgesSalmon.com/sectors/energy_and_utilities/publications/electricity_market_reform_the_capacity_market_explained.pdf and http://www.burgessalmon.com/sectors/energy_and_utilities/publications/in_house_lawyer_article_july_2015.pdf or contact Nick Churchward, Partner, on +44 (0) 117 307 6998 or email: nick.churchward@burges-salmon.com or Sam Sandilands, Senior Associate, on +44 (0) 117 307 6963 or email: sam.sandilands@burges-salmon.com

"Organisations can participate in DSR directly or via aggregators and thereby supplement income if they are able to put in place procedures or systems which allow more flexible electricity consumption."

ONTOs

Ofgem has plans to introduce competitive tendering for some on-shore electricity transmission equipment and projects. A consultation on Ofgem's plans closed in January 2016.

It is expected that first projects covered by these proposals would be announced in mid-2016, with first tenders in 2017.

For further information on ONTO tendering issues and regulatory incentives for Competitively Appointed Transmission Owners, please contact James Phillips, Partner on +44 (0) 117 902 7753 or email: james.phillips@burges-salmon.com

Energy market: competition investigation

The Competition & Markets Authority (CMA) opened an investigation into the competitiveness of the supply and acquisition of energy on 26 June 2014. This follows the Energy Act 2013 and is the fourth intervention in the retail energy sector in the last eight years. It is also an area of longstanding interest to the European Commission.

The CMA is currently considering replies to its provisional findings and proposed remedies. The issues identified include the allocation of Contracts for Difference (CfDs) outside the competitive process without a clear mechanism, the prevalence of cross-subsidisation leading to transmission losses, and the need to correct technology weightings. Insufficient regulation regarding gas settlement is also identified as an issue. And finally, consumer reluctance to switch to cheaper tariffs, hindered by regulatory restrictions, is stated to effectively give each supplier unilateral pricing power.

The proposed remedies include:

- a licence condition to introduce a cost-reflective charging mechanism;
- consultation and a cost-benefit analysis before awarding CfDs;
- removing the 'simpler choices' rules, enabling suppliers to have greater flexibility in setting tariffs - to be monitored by the CMA to ensure that varied pricing on price comparison websites doesn't reduce competition (an independent price comparison website is also proposed);
- various regulatory measures to increase flexibility and safeguard customers including greater information provision for microbusinesses and maximum price caps for default tariffs (including increasing Ofgem's focus on promoting competition); and
- the introduction of 'Project Nexus' regarding the gas market and inefficient allocation of costs and increased reporting conditions regarding Annual Quantity updates.

A provisional decision on remedies will be published in March 2016 with the final report to be published by 25 June 2016. The CMA has described this as "a once in a generation opportunity to shape the future of this market". Whether or not this is the case will become clear later this year.

For further information, please contact Noel Beale, Director, Competition-Regulation on +44 (0) 117 307 6056 or email: noel.beale@burges-salmon.com

Waste

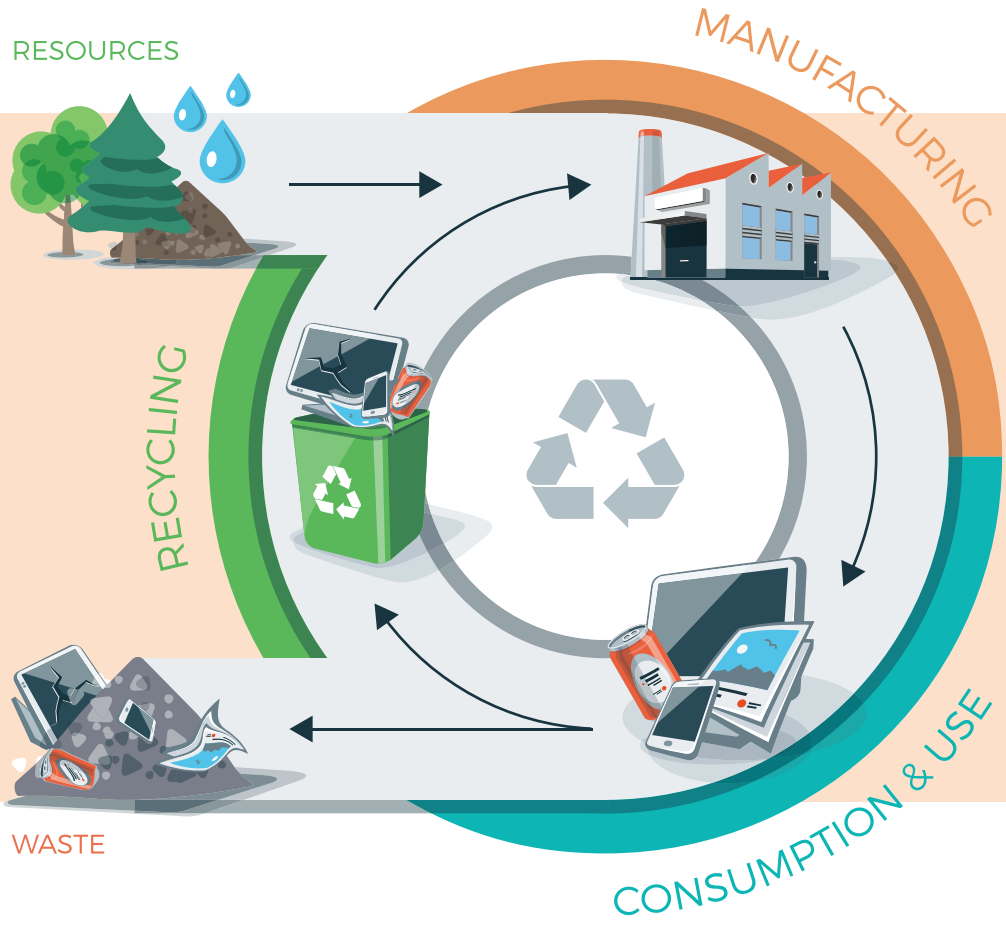
Circular Economy update

The European Commission's plans for promoting a Circular Economy, published in December 2015, will start to have significant impacts in key areas such as waste and recycling.

Highlights include:

- Promoting revisions to the way the Ecodesign Directive is implemented;
- Revisions on best waste management and resource efficiency in a number of Best Available Techniques reference documents (BREFs);
- Revised legislative proposals on waste;
- Clearer rules on by-products;
- Promotion of Green Procurement, and its application in EU procurement;
- Increased recycling targets for packaging materials;
- Minimum conditions on transparency and cost-efficiency for producer responsibility schemes;
- Further measures on the illegal transport of waste, within the EU and to non-EU countries;
- EU-wide quality standards for some secondary raw materials;
- More harmonised rules on when secondary raw materials are no longer waste, and clearer rules on 'end-of-waste';
- Legislation on minimum requirements for re-used water, and actions to promote treated wastewater, for example for irrigation and groundwater recharge;
- A review of the interaction of waste, products and chemicals legislation;
- A revised EU regulation on fertilisers, to facilitate organic and waste-based fertilisers;
- A strategy on plastics in the circular economy (probably published in 2017) and a more ambitious target for recycling plastic packaging;
- Further measures on food waste and the food chain;
- Measures to promote recovery of critical raw materials, for example from electronic waste;
- Measures to ensure recovery of valuable resources from construction and demolition waste;
- Targets for recycling wood packaging and to promote efficient use of bio-based/resources;

For further information please contact William Wilson, Barrister on + 44 (0)117 939 2289 or email: william.wilson@burges-salmon.com or Nick Churchward, Partner on +44 (0) 117 307 6998 or email: nick.churchward@burges-salmon.com



Court of Appeal on the Environment Agency's approach to the waste recovery v disposal test

On receipt of an application for a standard environmental permit for waste recovery, the Environment Agency must decide whether the operation is actually waste disposal which requires a bespoke environmental permit. The legal framework applicable to waste disposal and recovery is set out in the Waste Framework Directive (WFD) and implemented in the UK through the Environmental Permitting regime. The Environment Agency has also issued Regulatory Guidance Paper no.13 (Defining Waste Recovery: Permanent Deposit of Waste on Land) (RGN 13).

In the case of *R (on the application of Tarmac Aggregates Limited (formerly Lafarge Aggregates Limited)) v The Secretary of State for Environment, Food and Rural Affairs*, Tarmac Aggregates Limited (TAL) ran a quarry and was obliged, by a condition attached to its original planning permission, to restore the site in accordance with the plan it had agreed with the local planning authority. This plan involved the use of inert waste to backfill parts of the quarry excavations to provide recreation / amenity benefits to the public. Understanding the proposed restoration works to be a waste recovery operation, TAL applied for a standard permit for waste recovery.

This application was refused by the Environment Agency on the basis that under RGN 13, the operation amounted to a *waste disposal operation*. TAL appealed to the Secretary of State who duly appointed an inspector. Both the inspector and then the High Court dismissed its appeals but TAL went on to appeal to the Court of Appeal.

The Court of Appeal upheld the appeal finding that the restoration plan in question was *a waste recovery operation*. The Court emphasised that TAL was legally obliged to undertake the restoration works agreed with the local planning authority whether waste was used or not and that as a result the use of inert waste clearly avoided the use of virgin material. On this basis the Court held that the restoration works were to be considered *a waste recovery operation* for the purposes of the WFD.

This decision could have significant implications for the aggregates industry in which operators are often obliged to restore their sites after use and have found it increasingly difficult to obtain waste recovery permits from the Environment Agency in relation to the backfilling of quarry voids with inert waste.

Updated standard rules for waste published by the Environment Agency

Under the Environmental Permitting regime the Environment Agency can issue either a standard permit for facilities presenting a low risk to the environment or bespoke permits for a higher risk facility or a lower risk facility in a sensitive area. The application process for standard permits and the permit itself is more straightforward as the permit simply requires the operator to comply with a set of published standard rules for the activity concerned.

On 1 December 2015 the Environment Agency published a number of updated standard rules covering the transfer of waste, biological treatment (including composting), metal recovery and scrap metal and materials recovery and recycling.

Government response to consultation on waste enforcement powers

In October 2015 the government published a response to its February consultation on strengthening regulators' powers the recommendations of which were largely implemented by the *Environmental Permitting (England and Wales)(Amendment)(No.3) Regulations 2015* which came into force on 30 October 2015.

The following changes have been made to the Environmental Permitting (England and Wales) Regulations 2010:

- Regulation 37 now empowers regulators to issue a suspension notice (where there has been a breach of permit condition and a consequent risk of pollution) and require the operator to advertise that certain wastes can no longer be accepted on the site;
- Regulation 42 now allows regulators to apply to the High Court for an injunction to secure compliance regardless of whether it has taken other enforcement action;
- Regulation 57 now allows regulators to restrict access to a site where they are taking steps to remove a risk of serious pollution, whether a permit or exemption is in place or not.

The consultation response also provides that the government will extend the scope of sections 59 and 59ZA of the Environmental Protection Act 1990 to cover waste that has been unlawfully kept on land as well as unlawfully deposited i.e. to address circumstances where waste is initially lawfully deposited but is illegally kept on the site.

Other measures included in the response included:

- A request to regulators to consider how the permitting process can be revised to ensure that landowners are fully informed in relation to the waste operations that will be taking place on their sites;
- A request to the Insolvency Service to crack down on Directors of waste companies that repeatedly offend; and
- Undertakings to consult further on:
  - Amending legislation to include requirements for operator competence and site management plans;
  - The requirement for financial security for waste management operations;
  - Further powers to recharge for pollution works; and
  - Proposals to reform the exemptions regime.

For further information please contact Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com or Ella Curnow, Associate on +44 (0) 117 307 6814 or email: ella.curnow@burges-salmon.com

Water

Winter flooding and Flood Re

Flood Re, the insurance scheme intended to help up to 350,000 flood risk properties receive affordable insurance against flood damage, is due to launch in April 2016.

It will enable insurers to pass on the flood risk element of cover to Food Re, in return for premiums based on properties' council tax band, and a levy of £180 million to cover Flood Re's operating costs. Householders would continue to purchase insurance cover in the ordinary way. The intention is that it be run for 25 years, and, that there should then be a return to risk reflective pricing:

The Flood Re scheme still needs clearance from the Prudential Regulation Authority and the Financial Conduct Authority.

Meanwhile the Chair of the Natural Capital Committee Professor Dieter Helm has called for the Environment Agency to have its flood defence role moved to a separate authority, and for an end to subsidised insurance for house building in flood plains.

For further information please contact Michael Barlow, Partner, on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

Water Framework Directive

December 2015 was the key date by which all controlled waters within the EU were supposed to have achieved "good status", which for surface waters is a combination of good chemical status and good ecological status. It was reported that some 53% of EU surface waters had achieved good ecological status by the due date – which suggest that 47% had not.

It is likely that this will result in a closer focus on key areas which may be preventing waters from achieving good status, particularly (but not exclusively) diffuse pollution from agriculture.

In October 2015 the European Commission announced that it has sent a Reasoned Opinion to the UK challenging some technical aspects of the UK's national implementation of the Water Framework Directive.

In November 2015, WWF-UK, the Angling Trust and Fish Legal won a judicial review against Defra on the issue of whether Water Protection Zones were required to protect against nitrate pollution.

Meanwhile, the CJEU 'Weser' case concerning the interpretation of the 'no deterioration' provisions of the Water Framework Directive continues to have major implications for plans, operations and projects which may impact upon water quality.

For further information, please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

Water Abstraction Reform: major changes in prospect

On 15 January 2015, Defra published the UK government response to consultation on reforming the Water Abstraction Management System. It proposes that:

- from the early 2020s, replacement abstraction permits will be issued with permitted volumes that at least reflect current business use and have a similar reliability to current licences;
- abstractors' past peak water usage over at least 10 years will be considered including dry years;
- unused but licensed abstraction volumes will be removed, subject to appeal, if they pose a risk to the environment;
- hands-off flow and similar conditions will be simplified;
- when flows are high, abstractors will be able to take water to store it;
- all abstractors directly affecting surface water will have permit conditions that enable flow based controls to protect the environment;
- water trading within catchments will be facilitated, with a range of pre-approved trades;
- no permits will be time limited, and permit reviews will be on a risk-based catchment approach;

A similar approach is reflected after close consultation in a separate response for Wales published by the Welsh Government.

This is the most significant reform of water abstraction licensing and regulation for several decades, and has wide implications for all abstraction licence holders, property rights, farms and estates fish farms, hydropower plants and many other users. We expect to be following further developments closely. For further information please contact William Wilson, Barrister on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com or Michael Barlow, Partner, on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

STOP PRESS: Defra, Welsh Government, EA, NRW propose removal in England and Wales of water abstraction exemptions. Affects water transfers, dewatering mines, quarries, construction, trickle and other irrigation, Crown – consultation ends 8 April 2016

Environmental enforcement

Sentencing for environmental offences – record £1m fine

On 4 January 2016, St Albans Crown Court fined Thames Water Utilities Ltd £1 million for unauthorised discharges from a sewage treatment works into a canal in Hertfordshire. This is the largest fine to date handed down to a water company following a prosecution brought by the Environment Agency. This case is also an example of tougher sentencing following the introduction of new sentencing guidelines for environmental offences.

The Court heard that Thames Water had an environmental permit to discharge treated effluent into the Grand Union Canal, however there was evidence of repeated, unfiltered sewage discharges due to ineffective inlet screens. Notwithstanding the following factors – a guilty plea by the company, co-operation with the Environment Agency's investigation, and capital spend of £30,000 to replace the inlet screens, the Crown Court decided that a fine of £1 million was appropriate. Judge Bright QC explained that sentences for environmental offences committed by very large organisations need to be sufficiently severe to have a significant impact on their finances, and that such companies should be aware of the potential consequences of failing to implement the standards which they strive to deliver.

Later in January 2016, in a separate case, Yorkshire Water Services Ltd was fined £600,000 for polluting a lake and canal after an ageing sewage pipe burst. In March 2015, United Utilities was fined £750,000 for an unauthorised discharge into the Duddon Estuary. These cases reflect the new climate in sentencing following the introduction in 2014 of the Definitive Sentencing Guideline. It aims to strike home the importance of environmental compliance through imposing fines that are proportionate to a defendant's size (based on turnover), their level of culpability and the extent of environmental harm caused. This trend is also expected for health and safety breaches following similar guidelines coming into force on 1 February 2016.

For further information on environmental sentencing issues, please contact Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

For information on new health and safety sentencing guidance, please contact Ann Metherall, Partner on +44 (0) 117 902 6629 or email: ann.metherall@burges-salmon.com

Corporate Manslaughter and health and safety: parent company responsibility for subsidiary

When a safety incident happens, the common assumption is that it will just be the legal entity delivering the relevant activity that is likely to be investigated. However, case law confirms that this is too simplistic. In a recent case a parent company was convicted of corporate manslaughter and fined £600,000 for health and safety failings at its subsidiary.

The courts look at the relationship and responsibilities in practice, boundaries created by legal entities are not absolute. Key questions to determine this include: whether what the parent company did amounted to taking on a direct duty of its subsidiary? Could the subsidiary take action without the approval of the parent company? Was the parent company aware of the issues? The degree of control does not have to be absolute to assume a legal duty, but probably goes beyond intra-group coordination or the shared use of resources.

Just as there is no automatic ring-fencing of liability just because a company divides itself into separate legal entities, it is not the case that every parent company is fixed with the failings of its subsidiaries. Each case is very fact dependent and it is not necessarily the case that exactly the same tests would be applied to environmental cases as to safety cases.

There are circumstances when keeping a subsidiary separate in terms of its governance and resourcing are both beneficial commercially and can effectively limit exposure in the event of a competent authority investigation. However, it is clear that turning a blind eye and hiding behind a corporate structure where there is a genuine element of operational control is unlikely to be an effective shield against a prosecution if legislation is breached.

Burges Salmon has prepared a more detailed briefing on this case and its implications. For further information or to receive a copy of the briefing on this recent case, please contact Matt Kyle, Senior Associate on +44 (0) 117 902 7215 or email: matt.kyle@burges-salmon.com or Ann Metherall, Partner on +44 (0) 117 902 6629 or email: ann.metherall@burges-salmon.com

"The courts look at the relationship and responsibilities in practice, boundaries created by legal entities are not absolute."

Devolution and Europe

Wales – devolved Environment & Planning legislation

The Environment (Wales) Bill, a significant new environmental law measure reflecting the widening impact of devolution in the areas of environment, energy and planning, moved to "post stage 4" in the legislative process on 2 February 2016, meaning that it should be expected to receive Royal Assent around St David's Day.

The Bill or Act contains important measures or planning and managing Wales' natural resources. It provides Natural Resources Wales ("NRW") with a new statutory purpose related to the principles of sustainable management of natural resources, and new powers on land management agreements and experimental schemes. Public authorities will have new duties to maintain and enhance biodiversity. There will be a new statutory framework on climate change and greenhouse gas reduction, and tougher rules on waste recycling.

There will be new provisions on shellfish fisheries, fees for marine licences, a new Food and Coastal Erosion Committee and changes to land drainage and NRW bylaws.

We have also seen substantial changes to the planning system proposed through the Planning (Wales) Act 2015. Its measures are being implemented incrementally and a major procedural shift, dealing with planning procedure, fees and appeals, will become effective from 16 March 2016. The thresholds for what constitutes the new category of Developments of National Significance (DNS), where the planning application needs to be made directly to the Welsh Ministers, as opposed to the Local Planning Authority, are also due to come into effect on St David's day through the DNS Regulations. In an energy context, the DNS Regulations will set the threshold for onshore generating stations DNS at between 10MW and 50MW. Interestingly, one measure in the draft Wales Bill (to be laid before the UK Parliament) is the proposal to devolve decision making in respect of onshore generating stations of up to 350MW to the Welsh Ministers. If the Wales Bill is enacted, presumably this increase in threshold will see generating stations between of 10MW and 350MW to fall within the DNS regime, rather than a separate Welsh Development Consent Order process. The draft Wales Bill has not been laid before Parliament yet, having completed its pre-legislative scrutiny by the Welsh Affairs Committee in January and a report on its content and representations is due shortly.

As the Wales Bill moves through the UK Parliament, with debates on how far and how fast further devolution measures should be enacted, and businesses operating in Wales come to terms with the Planning (Wales) Act 2015 and the Well-being of Future Generations (Wales) Act 2015, it is plainly time to become better prepared for the impacts of new devolution legislation on businesses.

For further information on Welsh devolution legislation in the Planning field, please contact Julian Boswall, Partner, on +44 (0) 117 307 6851or email: julian.boswall@burges-salmon.com or Stephen Humphreys, Senior Associate on +44 (0) 117 902 2109 or email: stephen.humphreys@burges-salmon.com

For further information about impacts on Environment and Energy, please contact Michael Barlow, Partner, on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com, Ross Fairley, Partner, on +44 (0) 117 902 6351or email: ross.fairley@burges-salmon.com or William Wilson, Barrister, on +44 (0) 117 939 2289 or email: william.wilson@burges-salmon.com

Environmental Better Regulation Bill – Northern Ireland

This significant new environmental legislation was passed by the Northern Ireland Assembly on 8 February. It will introduce changes to environmental permitting, revise regulators' enforcement powers, make changes to air quality regulation, transfer responsibility for public drinking water quality and make provisions about fuels in smoke control areas. In May 2016 the functions of the DENI will be transferred to other departments.

For further information on these developments, please contact Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

Scotland and London

Future editions of this newsletter will report in more detail on developments in environmental and energy laws in Scotland and in London.

'Brexit', Environment and Agriculture

As the country heads towards a referendum on 23 June 2016 to decide whether the UK should leave the European Union or remain as a member, many issues remain unresolved.

The implications of a UK withdrawal from the EU (or "Brexit") would very much depend on the UK's future legal relationship with the rest of the EU, and associated decisions made on the status of EU laws in the UK.

The UK may seek to retain access to the EU Single Market, for example by joining the European Economic Area (EEA) or it may try to follow other models such as Switzerland's, or to negotiate its own trade deals with the EU. But as well as these fundamentally important aspects of the future relationship between the UK and EU, the UK would need to decide whether and if so how it national laws should change after a Brexit.

A significant proportion of the UK's environmental laws at the present are based upon and derived from EU law. A Brexit (whatever its final terms) would be seen by some as an opportunity to "opt out" of environmental standards that are seen as onerous, and by others as threatening to lower standards of environmental protection that are regarded as necessary.

For example, the Water Framework Directive commits EU Member States to achieve "good status" in controlled waters by 2015. The EU Ambient Air Quality Directive applies mandatory air quality standards. EU law determines habitats protection, procedures for registration of chemicals, rules for waste. In each case decisions would be needed whether to continue to maintain these laws, either because they were justified in themselves or as part of agreements required to maintain access to the single market.

UK law as it affects food and farming reflects many aspects of EU law, from food safety law to many aspects of the Common Agricultural Policy and the Common Fisheries Policy. Again, there would be many decisions to be made and many arguments to be considered for and against continuing to maintain EU law.

In very many cases, and in contrast to, for example, the Scottish independence referendum, detailed consideration of such issues has not been published by either side of the referendum debate ahead of the launch of the referendum, leaving all the detail that to be addressed in the course of the political campaigns.

For further information or to register for more specific briefings on environmental aspects of Brexit, please contact Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com

For further information of Brexit implication for food and farming and for details of the debate on these issues in which she participated at a House of Lords committee, please contact Sian Edmunds, Partner on +44 (0) 117 902 7187 or email: sian.edmunds@burges-salmon.com

Burges Salmon news

Newly Scottish qualified lawyers at Burges Salmon

Energy and Environment partner **James Phillips** is one of three Burges Salmon partners who have recently passed the Law Society of Scotland's transfer test and are now Scots qualified solicitors. Banking and Finance lawyers **Richard Leeming** and **Katie Allen** have also dual qualified.

The firm has for many years advised on Scots law matters but, to date, all that work has been carried out by solicitors who were qualified in Scotland before joining Burges Salmon. This is the first time any of our existing English solicitors have re-qualified for Scots law and now brings the number of Scots qualified solicitors in the firm to 16 (including four partners).

Upcoming events

Hot Topics in Environmental Law – Autumn 2016

To receive further details about this forthcoming event or to register an interest in attending, please contact **Michael Barlow, Partner on +44 (0) 117 902 7708 or email: michael.barlow@burges-salmon.com**

Waste seminars

For further information about Burges Salmon's forthcoming waste seminars, please contact **Nick Churchward, Partner on +44 (0) 117 307 6998 or email: nick.churchward@burges-salmon.com**

Recent publications list

Testing Times: Criminal culpability in the Volkswagen emissions scandal

LexisPSL – Environment analysis: air quality

LexisPSL – Environment end of year review – a look forward to 2016

LexisPSL – Environment end of year review – life in 2015

Contaminated Land – True or False?

Enforcement trends and targets in waste crime

REACH: CJEU judgment on SVHCs in articles

Site closures: managing the environmental issues

Nuclear Law newsletter – Spring 2016

Oil&GasCONNECT – Feb 2016

Procurement law in the nuclear industry

In House Lawyer article – November 2015

How the Courts approach the automatic suspension of procurement procedures when a claim is brought

New and revised standard forms for publishing public procurement notices

Cabinet Office guidance on the use of the Public/Public contract exemption

Food Farming and Land Quarterly newsletter – Winter 2015

Environment, climate, air quality and investment

Volkswagen and a new landscape for product stewardship

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