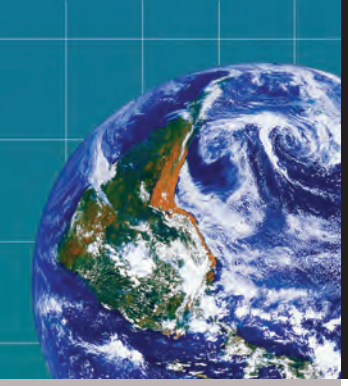

Newsletter

Environment and Energy Law

BURGES SALMON

Summer 2013

Welcome

Welcome to the Summer 2013 issue of **Environment and Energy Law**. If you would like further details on any of the areas covered in this briefing then please contact one of our partners or have a look on our website at **www.burges-salmon.com**

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Energy and Power

Electricity Market Reform - further details announced

On 27 June, following George Osborne's announcement in the Spending Review the day before, Chief Secretary to the Treasury, Danny Alexander, outlined the Government's plans for investing in Britain's infrastructure. The Department for Energy and Climate Change (DECC) also took the opportunity to publish further details on Electricity Market Reform (EMR), including, to the surprise of some, the publication of draft "strike prices" for the new Feed in Tariff Contracts for Difference (FiT CfDs) that will be available for non-fossil fuel generation from 2014.

The position on nuclear is still not clear, but for renewables the draft strike prices are now in the public domain and are being debated. Alongside this, DECC also issued an update on the FID Enabling Scheme process, a process designed to help non-fossil fuel developers overcome the inevitable concern of funders leading up to the implementation of FiT CfDs. Also published were further details of the capacity mechanism under EMR.

The draft strike prices have been published following detailed analysis from National Grid, whose job it is to assess the strike prices required to meet the Government's objectives of tackling climate change, ensuring security of supply and minimising the cost to consumers in promoting non-fossil fuel generation. The Government believes that the strike prices will enable over 30% of Britain's electricity to come from renewable energy sources by 2020.

In deciding on the proposed strike price, a number of elements have been considered. This includes current projections for the wholesale

electricity price, accepting that the level of support for renewables is now going to be for a contracted period of 15 years, rather than 20 years, which was the case under the Renewables Obligation (RO). Indexation has also changed to the Consumer Price Index as opposed to the Retail Price Index under the RO.

The final strike prices will be set in December 2013 and will be subject to state aid and the Royal Assent of the Energy Bill. Between now and then, there will be a number of workshops and stakeholder consultations performed by DECC explaining the background to the setting of the draft strike prices.

We continue to advise clients on the implications of these changes.

For more information please see our detailed update briefing available on our website at

http://www.burges-salmon.com/Sectors/energy_and_utilities/Publications/EMR_Draft_FiT_CfD_strike_prices.pdf

or contact Ross Fairley, Partner on +44 (0) 117 902 6351 or email: ross.fairley@burges-salmon.com

Visit our website at www.burges-salmon.com

RHI: Degression announced alongside early tariff review

The degression mechanism, the long-term financial control mechanism for the Renewable Heat Incentive (RHI) came into force on 30 April 2013 through a set of Amendment Regulations. The mechanism runs until the end of March 2015 (the end date for the Government's current Spending Review). The Amendment Regulations include tables which set out a series of quarterly expenditure limits for the scheme as a whole and for each technology. If these limits are exceeded in any quarter, then one or more tariffs will be reduced.

DECC will conduct quarterly assessments of whether the triggers have been hit. A one month notice period will apply before reduced tariffs take effect, and monthly updates will be published showing progress towards triggers so that stakeholders can evaluate the risk of any reduction occurring.

DECC has also announced the first degression under the mechanism, with the tariff for medium biomass installations being cut by 5% from 1 July 2013.

Separately, on 31 May 2013, a consultation on increasing the tariff levels for heat generated by ground source heat pumps, large biomass (1,000kWth and above) and solar thermal was announced. The consultation closed on 28 June 2013. DECC intends that legislation implementing any new tariffs will take effect from spring 2014, with relevant installations accredited from 21 January 2013 potentially being able to benefit from the higher tariffs going forward.

If you would like further assistance on how these changes may affect you please contact us.

Renewables Obligation: Non-legislative cap for dedicated biomass

The Government announced in December 2012 its decision to introduce a cost control mechanism cap of 400 MW on the total new-build dedicated biomass generating capacity that is guaranteed to receive 1.5 ROCs/MWh (or 1.4 ROCS/MWh after 31 March 2016). A consultation on this issue has recently closed, with the mechanism expected to be introduced shortly.

The cap will not be set in regulation but, once the cap is triggered, the Government will consider removing grandfathering rights from additional dedicated biomass power coming forward. Plants that deploy within the 400MW cap will be unaffected by any review of grandfathering rights. DECC's intention is that a place within the cap should be allocated only to projects that have reached financial close and have either taken a decision to move to the construction phase of the project or have actually started construction and evidence of this will be required as part of the notification.

As long as a plant falls within the 400MW cap and has followed the notification procedure it can progress with certainty. Projects are free to bypass the register, accredit under the RO and still receive ROCs at the dedicated biomass rates - but they risk being affected by any possible future changes to grandfathering.

If you would like further assistance on how these changes may affect you please contact us.

Onshore Wind: Importance of Community Engagement underlined

It is fair to say that onshore wind has come under increasing political pressure of late and a number of recent Government initiatives have reinforced the importance of community engagement, collaboration and compensation.

On 6 June 2013 DECC published its response to the autumn 2012 'Onshore Wind Call for Evidence', recommending an increase in the community benefit package in England to £5,000/MW of installed capacity per year for the lifetime of the wind farm. DECC will also, by early 2014, establish best practice guidance for onshore wind developers to establish the standards of engagement expected and establish a register of community benefits to capture information about community engagement best practices.

Alongside this, the Department of Communities and Local Government (DCLG) has announced its intention to introduce legislation making it compulsory for developers to consult local communities before submitting planning applications for "more significant" onshore wind developments that fall within the scope of the Town and Country Planning Act. Compulsory pre-application engagement is already part of the process for nationally significant infrastructure, including wind farms of over 50MW. In addition DCLG intends to issue updated planning practice guidance on renewable energy (including onshore wind) over the summer.

DECC is also keen to increase community involvement in and ownership of renewable energy developments with £15 million of funding announced targeted at helping rural communities carry out feasibility studies into renewable energy projects and fund the costs associated with obtaining planning permission. A Community Energy Strategy will be published in autumn 2013.

We have experience acting for a variety of community projects including wind and solar. If you would like assistance in this area please contact us.

We continue to advise a variety of clients across the energy sector on the issues affecting them. For further information please contact Ross Fairley, Partner on +44(0)117 902 6351, email: ross.fairley@burges-salmon.com or James Phillips, Partner, on +44(0)117 902 7753, email: james.phillips@burges-salmon.com.

UK opposes EU anti-dumping duties on Chinese solar panels

Against warnings of sparking a trade war, the European Commission has imposed emergency anti-dumping levies on Chinese solar panel imports.

Duties of 11.8% came into force in 6 June and address growing concern that Chinese producers have been undercutting their European rivals by selling panels below cost price. The Commission claims that the fair value of Chinese panels should be 88% higher, and sold at their current price, they have potential to destroy the already withering industry in Europe and threaten over 25,000 jobs.

China has been given until 6 August to reach a negotiated solution with the Commission, before hefty duties of 47.6% hit. If no compromise is reached by December, definitive duties will come into force for five years.

The UK and Germany have fiercely opposed the measures, pushing for a negotiated resolution and warning of higher prices, depressed demand and more lost jobs than those gained in solar production. The broad opposition in the UK spans across the entire photovoltaic value chain. Instead of being in direct competition with China's mass production of current generation technology, the UK has tended to specialise in more advanced technology applications such as combined solar PV and thermal (PVT).

Europe accounts for three quarters of the global photovoltaic market, and unsurprisingly has been heavily targeted by Chinese panel makers, including Trina Solar, Yingli Green Energy and Suntech Power Holdings. Chinese imports of crystalline silicon photovoltaic modules or panels, and associated cells and wafers currently amount to €21 billion (£18 billion), making this the largest anti-dumping case the Commission has tackled.

Earlier this month, there were talks between the Commission and Chinese authorities in Beijing. However, the bottom cost per watt and volume cap proposed for Chinese panel imports have been criticised as being too generous. In the meantime, the Commission is threatening to impose a separate set of duties to counter alleged subsidies granted to Chinese solar panel producers.

Our team has full Chinese language capabilities and we continue to work with our network of preferred Chinese law firms on international issues. For further information please contact Ross Fairley, Partner on +44(0)117 902 6351 or email: ross.fairley@burges-salmon.com.

Carbon, climate change and sustainability

Green Deal and ECO

On 27 June 2013 DECC released the latest statistics on the Green Deal in the domestic sector, on measures installed under the Energy Company Obligation (ECO) up to the end of April and information on ECO Brokerage up to 16 June.

The statistics tell an interesting story, borne out by our experience to date:

- 38,259 Green Deal Assessments were lodged up to 16 June
- 245 Green Deal Plans were in the system for individual properties
- 5,118 cash back vouchers have been issued (mainly for boiler replacements)
- 81,798 measures have been installed under ECO (to end of April)
- £131million worth of contracts had been let through ECO Brokerage (to 16 June).

The Green Deal launched in England and Wales on 28 January 2013. ECO started on 1 January 2013 with the ECO Brokerage platform becoming operational shortly thereafter.

There has been some criticism that only 4 Green Deal Plans have actually been signed and that the figures for insulation installation has gone down under ECO (when compared with its predecessors of CERT and CESP). However, what is clear to us is that there is a developing market in energy efficiency retrofitting of properties. This is critical if the UK is to meet its targets under the Climate Change Act 2008. There are current difficulties in delivering Green Deals but ECO is the real driver in this market.

What has become clear (apparent to those who have been involved in the development of the green deal for a while) is the complexity of the legal arrangements required to operate as a Green Deal Provider. In particular, the interrelationship between the various Green Deal regulations and the interface with the Consumer Credit Act is causing major difficulties. Whilst The Green Deal Finance Company is doing its best to navigate through these issues the reality is that only a handful of Green Deal Providers have completed the on-boarding process necessary to obtain finance from The Green Deal Finance Company. We have managed to assist a number of Green Deal Providers through this not entirely straightforward process.

Management of the supply chain is another key issue. Obligations are placed on Green Deal Providers and energy companies using ECO and it is essential that the various obligations placed on the relevant parties are passed through to counter parties and sub-contractors so that risk of compliance lies in the appropriate place. Again we have considerable experience in drafting contracts to ensure that supply chain management.

Our involvement in the Green Deal dates back to the original Pay as you Save report in 2009 and we are ideally placed to help any party who wants to become involved in this exciting market. If you would like further information or assistance regarding the Green Deal, or ECO, please contact Michael Barlow, Partner, on +44(0)117 902 7708, or email: michael.barlow@burges-salmon.com.

CRC Order 2013 - An effort in simplification

Last year, the Government set out 46 simplifications to the Carbon Reduction Commitment Energy Efficiency Scheme (CRC) after intense criticism. More than 2,000 private and public organisations are impacted by the regime.

The CRC Order 2013 that was passed in May 2013 is estimated by the Government to create a 55% reduction in administrative costs for scheme participants, equating to some £272m up to 2030.

Whether the simplifications actually deliver a sufficient reduction to the costs and burden of the CRC will only become clear as the scheme moves into its second phase over the course of the next two years. There are some very positive simplifications included in the 2013 Order such as:

- The immediate reduction of the fuels that have to be reported from 29 to 2 (electricity and gas used for heating purposes).
- The changes to disaggregation and supply rules which provide more freedom for the participants to dictate the make-up of an organisational group, and contain some of the most important simplifications.
- The removal of the 'Performance League Table' and the requirement to provide "foot printing".

The Government has also provided much needed clarification on the issues of overlap with other schemes like the EU ETS, and also on the banking of credits between compliance years and phases.

However, challenges remain. The staggering of dates for various changes to come into effect as a result of the 2013 Order alone adds additional challenges to stakeholders. In addition the price floor for carbon set as £16 per tonne by the Treasury will result in additional costs to compliance buyers in Phase 2. Further, under the 2013 Order there will now be two sales of allowances - one as a forward sale and the second a buy to comply sale. The staggered sales will most likely result in a higher price for the second buy to comply sale compared to the first.

The effectiveness of the CRC as amended will again be up for review in 2016. For further details please see our briefing available on our website: **http://www.burges-salmon.com/Practices/environment_and_health_and_safety/emissions_trading_and_carbon_law/Publications/CRC_Energy_Efficiency_Scheme_Order_2013.pdf**

Mandatory Emissions Reporting scheduled to arrive in the UK

Under the Companies Act 2006 (Strategic and Directors' Reports) Regulations 2013 (the Regulations) - currently in draft but laid before Parliament on 11 June 2013 - quoted companies will be required to report annual emissions in their directors' reports. Pending approval, the Regulations will come into force on 1 October 2013.

In the Regulations there is a substantial amount of discretion left to companies to implement the requirements. However, there are mandatory Key Performance Indicators (KPIs) that must be met and principles that have to be applied when collecting and reporting on environmental impacts under the proposed regime.

Guidance issued by Defra alongside the draft Regulations does not clearly suggest how a company's 'responsibility' is to be construed, but does consider the setting of organisational boundaries (one of the biggest challenges under most emissions reduction regimes).

The guidance has a substantial amount of information dedicated to voluntary reporting. According to a "robust study" for Defra *"There are direct benefits to your organisation in the measuring and reporting of environmental performance as it will benefit from lower energy and resource costs".*

Beyond the push by the Government for non-regulated companies to start measuring emissions, it is likely that in the future obligations and pressure to report environmental impact and climate change risks could also come from investors, lenders, insurers and consumers. It is likely that starting early prior to mandatory regimes coming into effect could provide a real business advantage.

For further information on how you may be affected by these changes or to receive our separate Carbon Law Updates please contact Michael Barlow, Partner, on +44(0)117 902 7708 or email: michael.barlow@burges-salmon.com or Rachel Blackburn, Associate, on +44(0)117 307 6085 or email: rachel.blackburn@burges-salmon.com

Water

Water Bill published

The much anticipated Water Bill was finally released on 27 June 2013. The Government has announced that the Bill takes forward those areas where legislative change is needed *"by reforming the water industry to improve resilience, drive growth and give businesses more choice and flexibility - whilst protecting the environment".*

The Bill includes proposals on reform of the sector, including increasing choice of supplier for businesses, making it easier for new entrants to enter the market, helping join up the national water supply network, proposals on coping with droughts and improving the merger regime. Changes are also proposed to improve Ofwat's regulation of the industry.

Tackling unsustainable abstraction is also covered in the Bill as is improving the co-ordination between water resource management and drought planning and further streamlining the environmental permitting framework. In addition, the use of Sustainable Drainage Systems (SuDS) is encouraged.

Water UK has indicated that it will be particularly supportive of measures in the Bill to improve resilience and to give businesses, charities and public sector customers a choice of supplier.

The date of the second reading debate on the Bill is not yet know. We will be monitoring developments in this area closely.

If you would like advice on how the proposed changes may affect you or for further information on the Bill or our wider water practice please contact William Wilson, Barrister, on +44(0)117 939 2289, email: william.wilson@burges-salmon.com or Joanne Attwood, Associate, on +44(0)117 902 7257, email: joanne.attwood@burges-salmon.com.

Catchment approach to water quality

In May, Defra published a new policy framework to encourage the wider adoption of an integrated Catchment Based Approach to improving water quality entitled *"Catchment Based Approach: Improving the quality of our water environment".*

This policy framework follows the government's announcement in March 2011, that it would fundamentally review its river basin planning strategy in the context of the European Water Framework Directive (WFD). It was also shaped by pilots (which concluded in March 2013) to give a clearer understanding of how the catchment based approach works in practice, to develop thinking and to identify the elements of good practice needed to support wider adoption of the approach.

Government has announced that the framework document will establish catchment partnerships to work collaboratively with local stakeholders across all of England's 83 catchments with the aim of delivering improved water quality and more ambitious River Basin Management Plans to help meet targets under the WFD.

For further information on these proposals and how they may affect you please contact Joanne Attwood, Associate, on +44(0)117 902 7257, email: joanne.attwood@burges-salmon.com.

Flooding

At the end of June the government issued a consultation paper on securing the future of flood insurance - *"Securing the future availability and affordability of home insurance in areas of flood risk".* This consultation runs until 8 August 2013 and is seeking views on the government's approach to address the future availability and affordability of flood insurance.

On the same day, The Association of British Insurers (ABI) and the government agreed a Memorandum of Understanding (MoU) on how to develop a not-for-profit scheme "Flood Re" with the aim of ensuring that flood insurance remains widely affordable and available.

Key elements of the proposed framework include:

- Flood Re will be run and financed by insurers as a not-for- profit fund, covering the cost of flood claims from high risk homes.
- Insurers will pass the flood risk element from 'high risk' households to the fund.
- Premiums for flood risk will be calculated based on council tax banding (up to a maximum limit).
- Flood Re will charge £180million to member firms annually - which equates to a levy of £10.50 on annual household premiums.
- Flood Re will be designed to fully deal with at least 99.5% of years. For the remaining 0.5% Flood Re will cover losses up to those expected in a 1 in 200 year and government will take primary responsibility (working with the industry and Flood Re) for distributing available resources to Flood Re policyholders for claims exceeding that level.

It is hoped that Flood Re will be operational by summer 2015 (subject to the necessary legislative approval).

We have extensive experience advising on flooding claims and flood risk liabilities. If you would like assistance with responding to the consultation or general advice on flooding claims please contact Michael Barlow, Partner, on +44(0)117 902 7708 or email: michael.barlow@burges-salmon.com.

Nuclear

Developments at Hinkley Point

Planning permission for construction of a new nuclear reactor at Hinkley Point C in Somerset was granted to EDF Energy in March this year, though two judicial review challenges were subsequently launched - one by the National Trust for Ireland and the other by Greenpeace.

Meanwhile, as part of the UK Government's long-term infrastructure strategy, published by the Treasury on 27 June 2013, the Government has decided that a UK investment guarantee will be available to support EDF's investment in this project, as one of a number of prequalified projects worth a total of £13.5billion.

Hinkley Point

Ian Salter elected Vice Chair of International Nuclear Law Association 'INLA' UK Branch

Burges Salmon Head of Nuclear Ian Salter (pictured) has been elected Vice Chair of the UK branch of the INLA. Established in 1970, the INLA is an organisation specialising in the law relating to the peaceful use of nuclear energy, with a worldwide membership of legal, financial and insurance professionals. Ian will work alongside current chair Alvin Shuttleworth, who will step down to be replaced as chair by Ian in October 2014.

For further information please contact Ian Salter, Partner, on +44(0)117 939 2225 or email: ian.salter@burges-salmon.com.

For a full round-up of recent nuclear news please see our dedicated Nuclear Law newsletters available on our website.

Chemicals

REACH and Chemicals Regulation

The second major milestone on the REACH Registration process passed on 31 May 2013, with the deadline for Registration of Substances at or over 100 tonnes per year per manufacturer or importer. Some 3,215 companies submitted 9,084 registration dossiers. The total number of substances registered since REACH came into force in 2008 now stands at 6,598, and as Geert Damcet, Executive Director of ECHA has remarked, Registration is not the end of obligations under REACH, but only the start.

Meanwhile, the Candidate List of Substances of Very High Concern (SVHCs) has now grown to 144 substances, with the addition of 6 more in June 2013.

Data sharing remains one of the busiest active areas for work on REACH, and Burges Salmon is actively involved in advising on this area.

Regulation and Nanotechnology

Investment in nanotechnology is becoming a multi-billion dollar undertaking, while international regulations struggle to catch up with technological developments.

Nanotechnologies are now applied to an ever-increasing list of products, from composites and sports goods through pollution remediation, high tech filters and materials relying on high strength graphene carbon nano-tubes.

The benefits of these technologies are many, and the markets worldwide. Governments are reluctant to stifle an emerging industry with weighty new regulation. At the same time the widespread use in production and manufacturing of particles at the nanoscale brings its own challenges.

Workplace exposures are relatively well addressed through occupational health and safety regulations and procedures, but still need to be taken very seriously. Relatively little work has been done on toxicological effects of nanotechnologies.

The EU prefers to rely on the REACH Chemicals Regulation as the main framework for its controls. However, REACH is based around Registration obligations for substances at 1 tonne or more, or Substances of Very High Concern as 0.1% of articles: this has little bearing on nanoparticles.

It seems likely that REACH will have to be adapted to nanotechnology by an amending instrument or Annex. ECHA has promised guidance in the coming months. The impact of voluntary initiatives and codes of best practice enforced by pressure from NGOs and the public will also be considerable.

Meanwhile the controversial EU definition of nanomaterials will continue to have an impact not only on REACH but also on the Biocidal Products Directive, Food Contact Materials regulations, the Cosmetics Directive, the Medical Devices Directives, general product safety regulation and the application of health and safety legislation.

We are continuing to monitor closely developments in this area.

For further information on any aspect of our work on Chemicals Regulation or to receive our regular briefings in this area, please contact William Wilson, Barrister, on +44(0)117 939 2289 or email: william.wilson@burges-salmon.com.

"The benefits of these technologies are many, and the markets worldwide. Governments are reluctant to stifle an emerging industry with weighty new regulation."

Waste

Proposed amendments to the Transfrontier Shipment of Waste Regulations 2007

On 10 May 2013, Defra concluded its consultation on the draft Transfrontier Shipment of Waste (Amendment) Regulations 2013 (the 2013 Regulations), which will update the Transfrontier Shipment of Waste Regulations 2007 (the 2007 Regulations). The proposed changes in the 2013 Regulations contribute to the government's commitment to improve enforcement and control of the waste exports regime. In summary, the key changes involve:

- Setting up the required legal gateway to allow HM Revenue & Customs to disclose relevant export data to competent authorities in the UK. This will help competent authorities develop better intelligence on illegal waste exports.
- Clarifying the role of the competent authorities for the transit of waste and the marine area. The 2007 Regulations designate the secretary of state as the competent authority for waste transiting the UK en route for disposal or recovery elsewhere, and waste moved to or from the marine area. This arrangement was only ever intended to be a short-term measure. Long-term, the 2013 Regulations envisage a role for Department of Energy & Climate Change (DECC) in undertaking inspections and evidence gathering on behalf of the competent authorities, who will then take appropriate enforcement action.
- Allowing the Border Force to stop and detain suspect containers. Under the 2007 Regulations the Border Force can only stop and detain suspect containers at the request of a UK competent authority. The proposed amendment will allow the Border Force to stop suspect shipments and detain these at the port themselves.
- Changing the fees payable for the import and export of waste into and from Northern Ireland.

The consultation responses are currently being considered with the government is due to publish its response shortly. Defra intends that the 2013 Regulations will come into force this summer.

Waste duty of care

A High Court judgment concerning the extent of the waste duty of care under section 34 of the Environmental Protection Act 1990 (the 1990 Act) was handed down in June. In the in the case of *Mountpace Ltd v London Borough of Haringey* [2012] EWHC 698 (Admin), Mountpace Ltd contracted for a renovation of a London property. Part of the work included the removal and disposal of waste created in the course of the renovation. Mountpace Ltd's contractor transferred the waste to an independent waste contractor, which dealt with the disposal of the waste. The independent waste contractor in fact fly-tipped the waste in contravention of section 33 of the 1990 Act. This resulted in Mountpace Ltd's contractor being convicted of knowingly causing controlled waste to be deposited on land without an environmental permit in contravention of section 34 of the 1990 Act.

Subsequently, Mountpace faced criminal liability under section 34 of the 1990 Act for breaching its duty of care by failing to take all reasonable steps:

- to prevent any contravention by any other person of the duty under section 33 of the 1990 Act;
- to prevent the escape of waste from its control or that of any other person;
- to ensure the transfer was only to an authorised person or to a person for authorised transport purposes; and
- to ensure that when the waste was transferred, a waste transfer note was produced.

The court held that Mountpace as the waste producer retained control of the waste whilst it was being generated. Accordingly, its duty of care could not be contracted out of, and continued upon transfer of the waste to the independent waste contractor. However, the court showed a willingness to consider behaviour before the transfer in considering compliance with the 1990 Act duty of care after transfer.

We have extensive experience in advising on waste issues including advising on the impacts of regulatory changes and compliance, advising on responsibilities for contractors carrying out waste producing activities and representing clients defending alleged breached of waste regulation and enforcement action.

For further information please contact Nick Churchward, Partner, on +44(0)117 307 6998 or email: nick.churchward@burges-salmon.com or Sam Sandilands, Associate, on +44 (0) 117 307 6963 or email: sam.sandilands@burges-salmon.com.

Minerals

Conflict minerals

The 2010 Dodd-Frank Law in the USA covered financial regulation, but also imposed controls on the way in which 6,000 US businesses account for their use of 'conflict minerals', such as gold, tantalum, tin, tungsten, and their derivatives. These are used by warlords in the Democratic Republic of Congo to fund their civil wars. Controls applied by the US Securities and Exchange Commission have been estimated to cost between $3-4 billion, and compliance reporting in 2014 has to be based upon 2013 business usage, so demands for information from the supply chain have rippled outwards.

From March to June 2013 the European Commission held a public consultation considering an equivalent EU initiative for the responsible sourcing of minerals from conflict-affected and high-risk areas. The results will be used by the Commission to help decide whether and how reasonably and effectively to complement and/or continue on-going due-diligence initiatives and support for good governance in mining.

Seabed mining industry developments

Lockhead Martin has chosen to spearhead a project to collect minerals through seabed mining through its British subsidiary, UK Seabed Resources, which has conducted surveys revealing large quantities of nodules (mineral rich rock containing up to 28% metal) on the ocean floor south of Hawaii and west of Mexico. Under the UN's Convention on the Law of the Sea, UK Seabed Resources has obtained a licence from United Nations body, the International Seabed Authority (ISA), to explore an area of 58,000 sq km of the Pacific Ocean seabed. The process involves scooping up the nodules using a seabed harvester. The nodules are then broken up to release the minerals. A leading UN official has described the scale of deposits as 'staggering'.

The proposals have been met with some concern by marine scientists and conservationists, who have warned about the potential adverse impact on seabed ecology. To address these concerns, an expedition is planned to assess the environmental impact this summer. Further, the ISA are keen to ensure that environmental safeguards are introduced to regulate the mining in order to minimise damage to the seabed ecosystem.

The development of regulation of a new technology with potentially major environmental impacts is likely to draw on experience from related fields, such as offshore decommissioning of oil and gas platforms and environmental considerations in siting offshore wind installations, areas in which we have been advising clients for many years.

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

"The proposals have been met with some concern by marine scientists and conservationists, who have warned about the potential adverse impact on seabed ecology."

Case Law update

UK air quality in breach of the government's EU obligations

The Supreme Court has declared that the UK is out of compliance with the EU Air Quality Directive 2008. In the case of *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, an NGO, ClientEarth, brought an application for judicial review against Defra for the government's alleged failure to comply with the limits of nitrogen dioxide in London and several other zones.

Both the Administrative Court and Court of Appeal refused the application and declined to issue a mandatory order forcing Defra to publish new air quality plans to achieve compliance, ruling that this was a matter for the European Commission. The courts also refused to make a declaration that the UK was in breach of its obligations, as Defra had already conceded the breach in court.

ClientEarth then appealed to the Supreme Court. The court granted the declaration that the UK had breached the directive. Notwithstanding the government's concession of the breach, the Court held that the declaration was necessary to make it clear that national or EU enforcement action could be taken immediately. ClientEarth also sought a mandatory order forcing Defra to publish new air quality plans but the Supreme Court decided that this was a matter of interpretation of the directive and made a reference to the Court of Justice of the European Union (ECJ).

Improved development potential around canals, from revision of how flood zones are assessed

The categorisation of canal sluices as formal flood defences may significantly increase the development potential of land surrounding canals.

When assessing flood zones, the Environment Agency's policy is to ignore formal defences (assuming that they will fail) but to take into account de *facto* defences (assuming that they will operate normally). In the past, the EA has regarded the sluices on the canal as formal flood defences; ignoring them in a flood zone assessment often led to potential development land being categorised into Zone 3 (land assessed as having a 1 in 100 or greater annual probability of river flooding).

In the case of *Environment Agency v R (Manchester Ship Canal Company Ltd and another) [2013] EWCA Civ 542*, the court held that sluices formed an integral part of the canal and constitute formal flood defences. This decision will be welcomed by landowners in the vicinity of canals - it will remove large areas of land from Zone 3, increasing development potential and land values.

> *"Both the Administrative Court and Court of Appeal refused the application and declined to issue a mandatory order forcing Defra to publish new air quality plans to achieve compliance..."*

Duty to abate nuisance: not satisfied until a completion certificate is issued

A landowner may still be held liable for a nuisance which they have not caused if they fail to take reasonable steps to abate it once it is known (or ought to have been known).

In the case of *Willis and another v Derwentside District Council* [2013] All ER (D) 70, the council was liable in nuisance for gas escaping from a disused colliery. From the date the emissions were discovered, the council was under a duty to abate the gas escaping - both the emissions of gas originating from the council's land as well as gas merely passing through the land. Whilst the council had carried out remedial work to abate the emissions, it had not committed to its monitoring and maintenance. Importantly, it had also failed to issue a certificate of completion. This rendered the property unmortgageable and thus unmarketable, and formed the largest head of loss claimed.

Constructive knowledge of cause of illness provided limitation defence to asbestos claim

Claims for damages for negligence, including damages for personal injury, are subject to a limitation of three years from the date on which the cause of action accrued or, if later, the date the person became aware of the cause of action. Knowledge can be actual or constructive (a reasonable person would have known).

In the case of *Collins v Secretary of State for Business Innovation and Skills* [2013] EWHC 1117 (QB), the court held that the claimant had constructive knowledge of the cause of illness. Even though the claimant was 78 and had smoked in the past, it would have been reasonable to expect him to make further inquiries as to the possible causes of his lung cancer.

For further information on our specialist environmental litigation practice please contact Michael Barlow, Partner on +44(0)117 902 7708 or email: michael.barlow@burges-salmon.com or Simon Tilling, Senior Associate on +44 (0)117 902 7708 or email: simon.tilling@burges-salmon.com.

Reporting and management

EU Single Market for Green Products Initiative

Burges Salmon is closely following the development of the EU's Single Market for Green Products Initiative and its *"Recommendation for common methods to measure and communicate life cycle performance of products and organisations"*. We expect these voluntary initiatives, with pilot programmes starting in 2013, to develop into sectoral legislation in future, with major impacts on Ecolabelling, Ecodesign and Sustainable Procurement.

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

Sentencing Guidelines changes

The Sentencing Council, an independent body that develops sentencing Guidelines for English courts has just closed a consultation on proposals for new Guidelines for the sentencing of environmental offences. These Guidelines, even if only partially implemented, will materially increase the level of fines for companies, businesses and individuals who breach environmental laws. There is a need for guidelines as magistrates have traditionally tended to struggle when it comes to sentencing environmental offences. The result has been an inconsistent level of fines and a nervousness on the part of many magistrates.

The Guidelines focus on those environmental offences which come before the courts most regularly but in reality, the Guidelines could well be used by the courts for wider environmental offences.

The Guidelines propose a step by step decision making process to follow when sentencing with a clear steer on the actual amount of the fine that should be levied. They also cover the factors which need to be taken into account by the court, particularly the harm caused by the offence and the culpability of the offenders. The Guidelines divide the categories of "culpability" into 4: deliberate, reckless, negligent or no culpability. There are then various tests, mitigating and aggravating factors as well as the financial means of the offender which will need to be taken into account by the court.

Perhaps the most eye-catching part of the Guidelines is the steer to the courts on the tariffs that should be imposed dependent on the turnover of the organisation and the categorisation of the offence. An example of the range of fines and the starting point for the fine levels which the court should consider is set out in the tables below. The move to higher penalties for environmental offences is clear from the table. It makes obtaining proper advice in the event that an environmental offence is alleged or committed more important than ever.

For further information please contact Ross Fairley, Partner on +44(0)117 902 6351 or email: ross.fairley@burges-salmon.com or see our recent In-House Lawyer article *"Paying for environmental incidents"*.

TABLE ONE: Range of fines and starting points **for most serious offences**

Organisation Size	Most serious offence and highest culpability range	Starting point
Large	£270,000 - £2m	£750,000
Medium	£90,000 - £690,000	£250,000
Small	£9,000 - £70,000	£25,000

TABLE TWO: Range of fines and starting points **for less serious offences**

Organisation Size	Range for negligent and medium category offence	Starting point
Large	£20,000 - £150,000	£60,000
Medium	£7,000 - £50,000	£20,000
Small	£700 - £5,000	£2,000

Recent Publications

In-House Lawyer Article (March 2013) by Simon Tilling, Senior Associate *"Knowledge is power: the tension between commercially sensitive material and access to environmental information"*
http://www.burges-salmon.com/Practices/environment_and_health_and_safety/environment/Publications/In_House_Lawyer_article_March_2013.pdf

In-House Lawyer Article (April 2013) by Rachel Blackburn, Associate *"Climate change: the top five trends to watch"*
http://www.burges-salmon.com/Practices/environment_and_health_and_safety/environment/Publications/In_House_Lawyer_article_April_2013.pdf

In-House Lawyer Article (May 2013) by Nick Churchward, Partner and Emma Andrews, Associate *"International shipment of waste: transporters beware"*
http://www.burges-salmon.com/Practices/environment_and_health_and_safety/environment/Publications/In_House_Lawyer_article_May_2013.pdf

In-House Lawyer Article (June 2013) by Ross Fairley, Partner and Sam Sandilands, Associate, *"Industrial heat use and the Heat Strategy"* **http://www.burges-salmon.com/Sectors/energy_and_utilities/Publications/In_House_Lawyer_article_June_2013.pdf**

In-House Lawyer Article (July/August) by Ross Fairley, Partner *"Paying for environmental incidents"*
http://www.burges-salmon.com/Practices/environment_and_health_and_safety/environment/Publications/In_House_Lawyer_article_July_2013.pdf

e-learning podcast available at **www.era.int** of lecture by **Simon Tilling, Senior Associate** to ERA, the Academy of European Law in Trier, Germany, in February 2013 on access to environmental information and the conflict with commercial interests.

Chapter on nuisance and the control of emissions in England and Wales contributed to the North American publication *"Key Issues in Environmental Law"* (Sweet & Maxwell, 2012) by **Michael Barlow, Partner and Simon Tilling, Senior Associate**.

Recent/upcoming events

Joanne Attwood, Associate lectured at the University of Brighton on water pollution issues in May 2013.

Michael Barlow, Partner, and Simon Tilling, Senior Associate have both addressed audiences of surveyors on the topic of environmental liability as part of a series of lectures hosted by the RICS.

William Wilson, Barrister and Simon Tilling, Senior Associate spoke at the launch of Sustainable Aviation's Road Map for Noise in May 2013.

William Wilson, Barrister delivered a webinar on *"Preparing for the Industrial Emissions Directive"* in May 2013 - **http://www.burges-salmon.com/Practices/environment_and_health_and_safety/Publications/Webinar_Industrial_Emissions_Directive_update.pdf**

Rachel Blackburn, Associate delivered an *"International Emissions Schemes Update"* in May 2013 along with Brendan Bateman, a Partner at Australian firm Clayton Utz.

Simon Tilling, Senior Associate addressed the London and South West branches of UKELA on the legal regimes to compel the restoration of environmental harm in May and July 2013.

Ross Fairley, Partner delivered a webinar on *"Environmental issues on a corporate acquisition or disposal"* in June 2013 - **http://www.burges-salmon.com/Practices/environment_and_health_and_safety/Publications/Webinar_Environmental_issues_in_corporate_acquisitions_and_disposals.pdf**

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In the office

Simon Tilling, Senior Associate was recently elected for a 4-year term to the Council of the United Kingdom Environmental Law Association (UKELA) - the body responsible for the management of the association.

The Environment & Energy Law Briefing is collated and edited by Joanne Attwood, Associate. For further information or to receive further details of any of the above events (including conference papers) and publications please contact Joanne on +44(0)117 902 7257, email: joanne.attwood@burges-salmon.com.

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