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INTERNATIONAL

Update on latest round of UN climate change talks

The latest round of talks under the banner of the United Nations Framework Convention on Climate Change (UNFCCC) saw negotiators struggle to agree an agenda for discussions ahead of the next major conference in Cancun, Mexico, in November.

The three-day meeting held in mid-April in Bonn was intended to agree a negotiating agenda up to Cancun. However, discussions were complicated by divisions between developed and developing countries over the role of the Copenhagen Accord and specifically on whether it should be the basis for negotiations towards a new treaty.

The meeting eventually saw an agreement that new negotiating texts should be prepared for the next United Nations (UN) meeting in June, also in Bonn, and that two additional negotiating sessions of at least one week should be added to the current meeting schedule.

Meanwhile, a group of multilateral development banks meeting recently in Luxembourg, including the European Investment Bank and the International Monetary Fund, has re-affirmed its readiness to provide support to the UN process. The participants particularly welcomed the commitment made in the Copenhagen Accord by developed countries to provide fast-track financing for developing countries, and the pledge to provide \$100bn of funding by 2020 to help developing countries adapt to the impacts of climate change and achieve the deep emissions cuts required.

EU

Commission highlights carbon pricing as a means to tackle budget deficits

The European Commission recently published a staff working document examining non-traditional ways of raising public finance in response to a request by the European Council, given the huge budget deficits most EU governments face because of the global economic and financial crisis.

While the main focus of the paper is on pricing risk taking in the financial sector, *Innovative financing at a global level* also examines the potential for the use of such instruments to tackle the issue of climate change. The issues of achieving financial stability and tackling climate change both attract a common problem, namely how to unlock the financial resources required to meet their challenges given the significant budgetary implications pursuing policies connected with them entails.

On the climate change side, the paper examines a range of options to price carbon emissions, but notably many of them are already in place within the EU. These include auctioning emissions allowances from cap and trade schemes such as the EU emission trading scheme (ETS), introducing carbon taxes, pricing emissions from maritime and aviation transport and the use of the Kyoto flexible mechanisms. The analysis concludes that for instruments like carbon pricing a 'double dividend' of both raising revenues and improving market efficiency results, as a consequence of least-cost opportunities of emission abatement being pursued and by ensuring that

emissions reductions are distributed efficiently across the market.

The paper indicates that in the absence of a single global carbon price, there may be scope for improving the coherence of carbon pricing within the EU through improvements in both the EU ETS and carbon taxation. As we reported in the March edition of *Environment planning and regulatory news*, new tax commissioner, Algirdas Šemeta, is set to table a proposal for an EU-wide carbon tax on energy use shortly (as part of the revision of the EU Energy Taxation Directive).

GERMANY

Second attempt to pass carbon capture and storage (CCS) law on the cards?

The State Secretary for the Federal Ministry for the Environment, Katharina Reiche, has recently announced new plans by the Federal government to seek to pass a law governing the approval of carbon dioxide capture and geological storage (CCS) projects. The State Secretary indicated that the government hopes the draft law will be passed by the end of this year.

CCS technology enables carbon dioxide from large-point sources such as fossil fuel power plants to be captured and stored, primarily in geological formations, avoiding its emission to the atmosphere and reducing carbon dioxide emissions. The technology has yet to be developed on a commercial basis although there are several small-scale pilot projects in operation within the EU. The EU has already adopted a directive on the geological storage of carbon dioxide (directive 2009/31/EC), giving member states until 25 June 2011 to implement national laws dealing with such matters as storage site selection, the grant of storage permits and operational, closure and post-closure matters. The cabinet had sought to introduce a bill before the 2009 general election (see June 2009 edition of *Environment planning and regulatory news*) but subsequently withdrew it due to public and political protests.

Since then, demand from would-be developers of CCS projects has been growing for the German government to put in place a secure legal framework enabling, in particular, the delivery of larger-scale pilot projects. The timing of the approval of the legislation could well be critical if German developers are to secure EU

funding for their proposals – following a recent decision of a committee of member states on how to distribute surplus EU emission trading scheme allowances to fund up to eight CCS projects, the first set of decisions covering two-thirds of the allowances could be made by the end of next year. It could therefore happen that the Federal government introduces a ‘light’ version of the bill previously presented, seeking only to regulate the conditions for the approval of CCS pilot projects in order to guarantee the bill’s success.

UK

Environmental permitting regime further extended

The environmental permitting regime came into force in England and Wales on 6 April 2008, and brought in a single, streamlined regime for environmental permits for regulated industrial facilities. The first phase saw the amalgamation of the waste management licensing and the pollution prevention and control regimes. In 2009, the regime was extended to encompass the permitting and compliance requirements of the mining waste and batteries directives. The Department for Environment, Food and Rural Affairs (DEFRA) also consulted on the inclusion of three other permitting regimes in phase two of the regime, namely water discharge consents, ground water authorisations and radioactive substances authorisations.

The Environmental Permitting (England and Wales) Regulations 2010 (the 2010 Regulations) extend the regime to these three areas with effect from 6 April 2010 and in the process repeal and consolidate the existing regulations made to implement the first phase and the two EU directives. The Regulations, together with the Environmental Permitting (England and Wales) (Amendment) Regulations 2009 (the 2009 Regulations), also introduce significant changes to the waste exemption system by introducing a number of new waste exemptions and providing for a number of previously exempt but high-risk activities to be subject to permitting.

New exempt waste activities will become immediately subject to the new system with existing ones being subject to a transitional period to move to the new system. Exemptions will continue to be free, but must be registered with the Environment Agency every three years.

Various transitional arrangements also apply to holders of existing water discharge consents, ground water authorisations and radioactive substances authorisations. These have automatically become environmental permits for the purposes of the Regulations from 6 April but some previously permitted activities have become exempt from the environmental permitting regime altogether while others will be subject to a review in the next 18 to 24 months or to the need to apply for new permits within a specified time limit.

Both DEFRA and the Environment Agency have published revised guidance on the environmental permitting regime as a result of the changes.

High Court rules on Heathrow extension...

The High Court recently handed down its judgment on a judicial review challenge brought by a group of local authorities and organisations against the Secretary of State's decision in January 2009 to confirm policy support for a third runway and new passenger facilities at Heathrow airport. The case examines how the passing of the Climate Change Act and the Planning Act, which introduce a new planning consent system for nationally significant development like airport extensions, may overtake government decisions based on information and consultations pre-dating their coming into force.

R (on the application of the London Borough of Hillingdon) v Secretary of State for Transport [2010] EWHC 626 (Admin) examines the status and effect of the government's decision in 2009 in light of a 2003 white paper on the strategy for the future of air transport that indicated support for the project subject to the meeting of three conditions concerning local air quality, noise and public transport access. The conditions were the subject of a further consultation in 2007 resulting in the 2009 decision to confirm policy support on the basis that the conditions could be met and the runway was critical to further economic development. However, in the meantime, the Planning Act had come into force, confirming a commitment to develop an airports national policy statement and the Climate Change Act. In the case of the latter, the Climate Change Committee had issued a report on the 2050 cap on aviation emissions that raised issues about the overall aviation growth assumptions adopted in the 2003 white paper.

In essence, the Court held that the challenge was premature in that it was clear that the government's decision must and would be subject to further review in the context of the development of the national policy statement in due course. This would also correct the defect in relation to climate change policy, as this would be an issue relevant to the development of the policy and one identified in relation to satisfaction of the condition relating to public transport access. The Court therefore declined to grant the order sought on the basis that the decision had no substantive legal effect but instead invited the Secretary of State to give an undertaking that he would not use the power under the Planning Act to import pre-commencement policy into the national policy statement.

... And on second contaminated land appeal

The High Court has recently upheld the Secretary of State's decision on what is only the second decision on an appeal against the service of a remediation notice under the contaminated land regime set out in Part 2A of the Environmental Protection Act 1990. The case is significant in illustrating what amounts to causing pollutants to be present in, on or under land; the application of the exclusion tests, particularly the 'sold with information' test; and apportioning liability.

R (on the application of Crest Nicholson Residential Ltd) v Secretary of State for Environment, Food & Rural Affairs [2010] EWHC 561 (Admin) involved the service of a remediation notice on both Redland Minerals (Redland) and Crest Nicholson Residential (Crest), who were both found to be Class A appropriate persons and liable to remediate contaminated land at a former chemical works at Sandridge, Hertfordshire under a remediation notice. They both appealed the remediation notice. An inquiry was held, following which the inspector appointed to hold the inquiry produced his report of his findings and conclusions on liability. The Secretary of State's decision was based on the inspector's report.

Both the inspector and the Secretary of State took a robust and purposive approach to the interpretation of the statutory guidance provided in the DEFRA circular on the contaminated land regime. Redland and Crest were found to have caused the contamination to be on, in and under the site; Redland had taken on the liabilities of the

previous owner, a chemicals company, when it originally purchased the site and while Crest had not brought the chemicals onto the site, it was found as a result of its action and inaction in the way it dealt with the site during its ownership to have caused the contamination. The Secretary of State particularly pointed to the fact that Crest had demolished hardstandings, leaving contaminated soil exposed to rainfall leaching for some two years before the houses were built, despite it being aware of the presence of contamination on the site. This had caused contaminants that would otherwise have been removed to remain and to leach deeper and faster into the ground.

Liability was apportioned between Redland and Crest on the basis of 85:15 for one contaminant and 45:55 for another. In the case of the second contaminant, Redland has argued that the 'sold with information' test should apply but the Secretary of State found that while Redland had provided a limited amount of information on its presence, it was not sufficient to enable Crest to have been aware of the presence of it in the aquifer. Liability on the basis of the 'sold with information' test was therefore only partly reduced.

The remediation notice was therefore confirmed (albeit in a modified form) in a decision in July 2009.

Crest then applied to the High Court for permission to bring judicial review proceedings to quash the decision. An oral hearing was held.

In a brief judgment, the High Court approved of the inspector's report and its conclusions on liability, rejecting Crest's arguments that both the inspector and the Secretary of State had erred by assuming that there was sufficient evidence at the inquiry to say that Crest's actions were connected to the pollution as identified when the remediation notice was served by the Environment Agency. Crest's application for permission was therefore refused.

On the issue of what amounts to 'causing' contaminants to be present, the Court also confirmed that:

- the correct test was whether Crest caused the contaminants to be present in, on or under the land, not whether Crest caused those contaminants to actually be brought onto the site; and
- Crest 'caused' contaminants to be present because of the groundworks that it undertook, which included

removal of the concrete hardstanding of the former chemical works, opening up the underlying soil to leaching by rainwater for two and a half years.

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