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Briefing note Winter 2012

# Global Environment Newsletter – Winter 2012

## EU – Water Performance Certificates for buildings?

The European Commission is consulting on possible options for reducing the amount of water wasted in buildings (up to 30% of current water usage). Water scarcity and droughts are making this a priority issue in the EU with lower water tables, rivers drying out and increased salt content in rivers. Reducing water usage would also lower the energy consumption "embedded" in that water usage.

In addition to awareness-raising and education about water use, several specific options have been floated:

- **Water pricing:** This option would seek to ensure that water is priced to reflect its full cost (including from environmental impacts) and aim to persuade customers to reduce water usage. It would also drive an increase in installation of efficient water-using products (see further below).
- **Metering:** Use of water metering with new tariff systems, a concept that can help to support water pricing.
- **Efficient Water-Using Products (WUPs):** Encouraging the uptake of products which use water more efficiently (e.g. toilets and shower systems). This could take the form of voluntary or mandatory labelling of WUPs as to their level of water efficiency (e.g. similar to the green-to-red coded labelling applied to some energy-using products). In addition, minimum efficiency requirements could be applied for particular WUPs (as imposed by the EU Eco-design Directive in relation to energy use).
- **Building-level policies:** These would require water efficiency to feature as one element of a performance standard applied to buildings. To reach the standard, metering or efficient WUPs would probably need to be used. This could either be a voluntary or mandatory scheme. If a mandatory scheme, it could result in a regime of Water Performance Certificates. This would be similar to the Energy Performance Certificate or "EPC" regime which requires owners of buildings to present an EPC to a buyer or tenant of their building and which is intended to make efficient buildings more attractive than inefficient ones. In addition, a minimum water performance standard could be applied to new or refurbished buildings, again similarly to energy performance standards.
- **Certification of water reuse and harvesting systems:** These schemes seek to use greywater (i.e. water used for washing) and rainwater to perform other water-using functions, for example, flushing toilets. This option would focus on reducing the sanitary risks by requiring qualified installation. This option would also seek to increase public acceptance of such schemes.

Click here to see the web page for the consultation. Responses to the consultation must be received by 8 February 2012.

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## Key issues

# Belgium – Flemish Region: higher profile for flood risk assessment

Since 24 November 2003, permit granting and urban planning authorities are obliged to analyse the impact of the development of certain projects on water conditions and in particular on the risk of flooding. This review, generally referred to as "*watertoets*" is required (i) when issuing various types of permits, such as building, plot subdivision and environmental permits, and (ii) when zoning plans are issued. If this review reveals negative effects, then mitigating or compensating measures must be provided. If such measures are not feasible, than the permit will have to be refused or the plan cannot be issued. The outcome of the review must be expressly mentioned in the zoning plan or permit.

After significant flooding occurred at various locations throughout Belgium in 2010, an analysis of the effectiveness of the "*watertoets*" was conducted. As a result, the Flemish Government issued a Decree dated 14 October 2011 which enters into force on 1 March 2012. This Decree makes various changes to the regulatory framework and aims to further limit flood risk, by making the "*watertoets*" a more powerful instrument.

The main changes are as follows:

- The methodology for the assessment of the impact of projects or plans on water conditions and flood risk will be considerably simplified;
- The current map indicating land in the Flemish Region where there is an increased flooding risk (Flood Map) has been updated and gaps in its coverage will be filled in;
- It will be mandatory for the relevant permit granting or planning authority to seek advice from a specialised authority if the permit application or zoning plan concerns land that is located in the vicinity of a waterway or that is shown on the Flood Map as land with an increased flood risk.

More than 20 % of the Flemish Region's territory is shown on the Flood Map as land with an increased flood risk. This figure is so large due to the fact that the Region has been subject to intensive construction and is densely populated. Also, in the past flood risk was insufficiently taken into account when issuing permits for new development. However, these new requirements demonstrate the authorities' increasing awareness of the issue and will hopefully lead to a more controlled development of projects in risk areas.

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# Germany – Uncertainty still surrounds legislation on Carbon Capture and Storage

The German Government was required to transpose the European Directive on carbon storage into German legislation by 25 June 2011. The fate of the resulting German Act on carbon capture and storage (CCS) is still uncertain. After intensive consideration and discussion, the Federal Council of Germany rejected the legislative proposal in September. The legislation went to the national mediation committee on 26 October for ongoing negotiations. However, despite multiple efforts, the committee has not yet been able to reach a compromise between the different positions. Recently, the committee decided to adjourn the debate scheduled for mid December. However, the fact that the talks are still ongoing seems to indicate a general willingness for compromise among the parties involved.

The crucial subject of discussion is the so called "exit-clause". This clause was only included in the draft Act at the insistence of the Federal States of Niedersachsen and Schleswig-Holstein. In these States the local protests against onshore

underground storage of CO2 is especially intense. The "exit-clause" enables individual States to prevent storage of CO2 in certain areas or even for the whole of their territory. If the Federal States of Niedersachsen and Schleswig-Holstein would make use of this clause, the CCS technology could only be implemented in Brandenburg, as other locations do not have suitable ground conditions. The Federal State of Brandenburg has so far been the only site where a CCS-plant for demonstration purposes was in construction. Brandenburg is generally in favour of the CCS law, supported by the States of Sachsen and Hamburg. However, it rejects the "exit clause" as it does not want to be the only site in Germany where the storage of CO2 is possible.

The delays in the adoption of the CCS-legislation have far reaching consequences and are placing pressure on the German government to find a compromise solution:

- Vattenfall, the developer of the proposed CCS demonstration plant, has now cancelled its plans and entered into negotiations with the European Commission which is seeking the recovery of European funds that were granted for this purpose.
- The European Commission has already initiated infringement proceedings against the Federal Republic of Germany for failure to transpose the 2009 Directive. If the German federation and the Federal States fail to enact appropriate provisions on CCS, Germany could face the imposition of penalty payments in the near future.
- Finally the recently published draft of European Commission Guidelines on State aid for the promotion of power plants refer to the readiness for CCS-technology as one prerequisite for full funding. This means that until the CCS Act is passed, only limited state funding for power plants is likely to be allowed under EU law.

A recent statement of the Secretary of State on economic issues, suggested that one possible solution to the problem is a complete prohibition of underground storage of CO2 in Germany.

The ongoing difficulties in finalising the future regulatory framework for CCS in Germany and the uncertainty this is causing are resulting in problems for operators and investors who are unable to take forward their plans for CCS plants. This is also problematic for developers of traditional power plants who have been left unsure of their future obligations in relation to carbon capture.

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# Netherlands - Projects to require cross-border habitats assessment

The Dutch Council of State ("Raad van State"), the highest Dutch administrative law court, has recently ruled that projects close to internal EU borders will require a cross-border assessment of possible impacts where Natura 2000 sites could be affected. Natura 2000 sites are sensitive sites protected under the EU Habitats and Birds Directives which are implemented, in the Netherlands, by the Nature Conservation Act 1998 ('Nbw'). Article 6.3 requires that any project likely to have a significant effect on a Natura 2000 site (in this case a protected habitat) must be subject to an "appropriate assessment" and in general can only be consented if it will not affect the integrity of the site.

Germany-based utility RWE had received a permit to build and operate a coal power plant in the North of the Netherlands, close to the German border. Near the site on the Dutch side is a Natura 2000 site and on the German side of the border are two further such sites. Dutch legislation does not provide for how permits should be issued for projects that may impact Natura 2000 sites in other EU member states. An 'appropriate assessment' had therefore been conducted by RWE on the possible effects of the project on the Dutch Natura 2000 site. The final report briefly added that its content also covered the German sites but did not address the impacts in detail.

Several NGOs challenged the grant of a permit to RWE on grounds that the appropriate assessment undertaken was inadequate. The Council of State ruled that, even though the national legislation did not provide for a cross-border appropriate assessment, the Habitats Directive had "direct effect". It was therefore necessary for any public entity that issues Nbw-permits to include, in its assessment, the impacts the relevant plan or project would have on cross-border Natura 2000 sites. In the absence of adequate assessment, the Council quashed the permit for the plant.

The Council's ruling is helpful in that it provides specific guidance for future permit applications. Any assessment must include an analysis of at least: (i) the type of habitat affected, (ii) the background levels of pollutants at issue, (iii) the conservation status of the type of habitat and (iv) the potential accumulation of (in this case) nitrogen from the project.

As a result of this decision, developers of projects in the Netherlands to be sited near EU internal borders will need to assess the impacts on any Natura 2000 sites, not only within the Netherlands, but also across borders.

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# Spain - New law on responsibility for waste

Law 22/2011 on Waste and Contaminated Soil came into force on 30 July 2011, implementing the revised EU Waste Framework Directive (2008/98/EC). It introduces a number of new responsibilities into the Spanish waste regime as well as clarifying and simplifying certain aspects of the regime's operation.

## Extended Producer Responsibility for manufacturers

Manufacturers of products will have extended duties in relation to waste prevention and waste management involving their products (these duties are similar to those already in place for producers of packaging). A general duty will require manufactures to promote reuse, recycling and other recovery, notably energy recovery of their products upon disposal. Among other things, this will require manufacturers to design their products to have minimum environmental impact, facilitating their reuse, waste separation and disposal.

Manufacturers will have to assume responsibility for their own products when they become waste. This responsibility can be satisfied either by:

- Individual responsibility - whereby the company producing the product undertakes to take measures to deal with re-use, recycling or disposal of the product when it is disposed of.
- Collective responsibility - whereby a number of manufacturers establish an Association under Spanish Law to undertake these duties on behalf of those manufacturers.

The detailed requirements for these obligations will be further determined by a Royal Decree taking into consideration a number of issues including economic and technical feasibility, environmental impact, and impact on the EU internal market.

## Reducing the burden on manufacturers and other waste producers

Previously, companies producing hazardous waste or over 1000 tonnes per year of non-hazardous waste had to include details of their proposed waste management controls for approval as part of their administrative authorisation for the construction or major modification of their facilities. Under Law 22/2011, this prior approval requirement is removed and facilities will now only have to submit details of the proposed controls by way of a "communication" before they begin their waste producing activities. This change does not apply to waste management companies which remain subject to the prior approval requirement.

## Tracking of waste

In order to assist in the enforcement of waste management duties, organisations which are subject to the authorisation or communication procedures mentioned above will have to maintain a file detailing all waste produced and how it is handled, allowing for the tracking of waste from production to final disposal.

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# UK – Costs of environmental legal challenges against development projects to fall

The UK Ministry of Justice (MoJ) is consulting on new rules for protective costs orders in relation to environmental legal challenges (by judicial review). This consultation comes following the finding that the UK was in breach of the access to justice provisions of the Aarhus Convention[1], among other reasons, because the cost for claimants in pursuing legal challenges is excessive. Part of the problem results from the fact that the losing party generally is ordered to pay the winner's costs. Over time, the Courts had developed the concept of discretionary Protective Costs Orders (PCOs) for cases of public interest where a claimant could obtain protection against being ordered to pay the defendant's legal costs. These were, however, found to be insufficient to satisfy the Aarhus requirements.

The MoJ's new proposals are intended to assist in achieving compliance with the Convention and will apply to judicial review cases falling within Convention or the Directive implementing it in the EU[2]. The main "default" rules for PCOs are proposed as follows:

- A claimant's liability to pay the defendant's costs will be limited to £5,000.
- A defendant's liability to pay the claimant's costs will be limited to £30,000.
- No justification evidence (e.g. in relation to the claimant's financial means) is needed to obtain a standard PCO but a PCO would only be granted if the initial "permission" to apply for judicial review is given.

A defendant could apply for the cap to be removed but only where it can be shown (through publicly available information) that the claimant has no real financial need for the PCO. The Government is considering whether it should be possible to seek to have the cap raised in certain cases.

If introduced, it is likely that these changes will increase the number of legal challenges to development projects in the UK (including industrial and energy facilities) on environmental grounds; for example using arguments as to the absence, or inadequacy, of Environmental Impact Assessment.

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[1] UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters signed in 1998.

[2] This would, for example, cover all cases which raise issues under the Environmental Impact Assessment or Industrial Emissions Directives.

# USA - California's Cap-And-Trade Program for Greenhouse Gases faces legal challenges

A successful last-minute legal challenge to California's comprehensive multi-sector cap-and-trade program for greenhouse gas ("**GHG**") emissions has thrown the future of the ground-breaking program into question.

After final approval on October 20, 2011 by the California Air Resources Board ("CARB") the regulations for the cap-and-trade program were set to go into effect on January 1, 2012, with the first phase of the emissions cap planned to begin on January 1, 2013. The cap-and-trade program is a central part of Assembly Bill 32, known as the Global Warming Solutions Act of 2006, which set a goal of reducing emissions of GHG in California to 1990 levels by 2020. The first phase of the emissions cap would apply to approximately 350 of California's largest oil producers, refiners, electric utilities, and other large industrial companies that produce more than 25,000 metric tons of carbon dioxide (or equivalent) emissions annually, and which together generate almost 85% of all carbon dioxide emissions in the California. CARB intends to expand the cap-and-trade program in 2015, to include distributors of transportation fuels, natural gas and other fuels.

Under the program, companies will be required to surrender an allowance for every metric ton of GHG emissions. The total number of available allowances will be set at approximately 2% below forecasted emissions levels for 2012, and will be lowered at a rate of 2% annually until 2015 and 3% annually from 2015 to 2020. CARB will issue 90% of the available allowances to companies, who will then be responsible for purchasing the remaining allowances through offsets from CARB-certified projects across the country (for up to 8% of a facility's compliance obligations), from CARB reserves auctioned off quarterly, or from other companies with excess allowances. Given that companies will be free to save and trade allowances, analysts have predicted an active trading market. Shell Oil already signed a derivatives contract for 100,000 metric tons of 2013 California Carbon Allowances at a price of $17 per metric ton, in line with price predictions of $17 to $22.25 per allowance.

However, the ruling on December 30, 2011, by a U.S. District Court Judge for the Eastern District of California has thrown the viability of the cap-and-trade program into question. At the request of a group of ethanol producers, Judge Lawrence J. O'Neill granted a preliminary injunction blocking enforcement of the regulations, finding that the rules discriminated against crude oil and ethanol imported into California and violated interstate commerce provisions of the U.S. constitution. CARB has stated it will appeal the decision, but critics of the new cap-and-trade program, who have long voiced concerns that the new regulations would raise energy prices and make California less competitive, applauded the decision.

As the case moves through the court system, California's experiment with cap-and-trade, in a state representing the world's eighth largest economy, will be closely watched. A similar federal proposal died on the floor of the U.S. Senate in 2010, and with little chance for any new federal proposal in the foreseeable future, a national cap-and-trade program will likely rest on the success, or failure, of California's program.

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