

International Environmental Law Committee Newsletter

Vol. 10, No. 1

October 2007

MESSAGE FROM THE CHAIR

Jane Luxton

**General Counsel, National Oceanic and
Atmospheric Administration,
U.S. Department of Commerce**

At the March 2007 Keystone Conference, IELC colleagues from around the world took us on an exhilarating ride “Around the World in 80 Minutes (+10).” This program featured practitioners from Australia, Argentina, Canada, China, Mexico, South Africa, and the United Kingdom who each shared their perspectives on key environmental issues, including climate change, chemicals regulation, extended producer responsibility and product regulation, environmental disclosure, and clean-up liability. It was an extremely informative and well received tour. In fact, it was so useful, we have asked our authors to take us on a journey once more, but one that can be enjoyed from your laptop or easy chair. Thus, the October 2007 IELC Newsletter will focus on brief summaries and perspectives on environmental regulation around the world. Robert Jamieson and Meredith Gibbs will first take us to Australia to cover developments at the federal and provincial level. Guillermo Malm Green and Angeles Murgier will next transport us to Argentina to review recent chemicals-related legislation. We will then head up north, stopping in Mexico where Daniel Basurto-Gonzales will provide perspectives on current issues in federal environmental law, and continue on to Canada with Gray Taylor and Hilary Stedwill to explore important environmental

developments in Canada. Crossing the Atlantic, Nigel Howorth will provide an update for the European Union, before we head south to the tip of Africa, where Adam Gunn will analyze the environmental regulatory framework in South Africa. Finally, we will travel to the Far East as Charles McElwee, II offers insights on China’s environmental law regime. We hope you will find these contributions interesting and informative. So strap on your seatbelts, hang on, and enjoy the ride.

RECENT AUSTRALIAN ENVIRONMENTAL LAW AND POLICY

Robert Jamieson

Meredith Gibbs

**Blake Dawson Waldron, Lawyers
Melbourne, Australia**

Introduction and Overview

This paper provides a brief overview of recent Australian developments in environmental law and policy in six areas of environmental law: climate change, chemicals (dangerous goods), extended producer responsibility and product regulation, environmental disclosure, clean up liability, and officer/director liability.

As in the case in many jurisdictions, environmental regulation in Australia is complex. The Australian

**International Environmental Law
Committee Newsletter
Vol. 10, No. 1, October 2007
James W. Rubin, Editor
Lori S. Gardner, Issues Editor**

In this issue:

Message from the Chair
Jane C. Luxton 1

Recent Australian Environmental Law
and Policy
Robert Jamieson and Meredith Gibbs 1

Chemicals-Related Legislation in Argentina
*Guillermo Malm Green and
Angeles Murgier* 10

Mexico's Contribution to Face the New
Challenges on Environmental Issues
Daniel Basurto-Gonzalez 15

Update on Canadian Environmental Law
Gray Taylor and Hilary Stedwill 18

Developments in Europe
Nigel Howorth 24

Review of Current Developments in
South African Environmental Legislation
Adam Gunn 33

China: An Introduction to Current
Environmental Trends
Charles R. McElwee, II 35

Copyright © 2007. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



Constitution, which assigns specific areas of competence to the Federal Government (the Parliament of Australia) with the remainder being exercised by the States and Territories, does not mention the environment. As a result, traditionally the States and Territories have had legislative competence for environmental protection with the Federal Government exercising a very limited role. Because each State and Territorial Parliament makes its own laws, environmental laws vary from State to State (and Territory).

In 1999, using other heads of power (including the foreign affairs and corporations powers, amongst others) the Federal Government passed the Environment Protection and Biodiversity Conservation Act 1999 bringing certain matters of national environmental significance under its control. These matters of “national environmental significance” include: migratory species, threatened species, world heritage properties, RAMSAR wetlands, Commonwealth property and marine areas, and the nuclear industry (including uranium mining). Areas of predominantly State and Territory-based regulation continue to include development and planning regulation, pollution and waste disposal, impact on threatened species, and European and Aboriginal heritage.

Climate Change

Australia's Response to Climate Change

The Australian Government has been slow to recognize the issue of climate change. It is only since mid-2006 that the prime minister, John Howard, has accepted that climate change is real and an issue that Australia must face. The federal response to climate change reflects Australia's status as a coal-rich nation and its heavy reliance on coal-powered electricity generation. To date, policy responses have focussed on delivering clean-coal technology, including geosequestration, together with encouraging other energy sources, including renewables and more recently nuclear energy, in ways that will least jeopardise the existing coal-industry.

Official Federal Government policy states:

“Australia will not impose significant new economy-wide costs, such as emissions trading, in its greenhouse response at this stage. Such action is premature, in the absence of effective longer-term global action on climate change, and given that Australia is on track to meet its Kyoto 108% target. Pursuing this path in advance of an effective global response would harm Australia’s competitiveness and growth with no certain climate change benefits.” *Securing Australia’s Energy Future*, June 2004.

Like the United States, Australia has refused to ratify the Kyoto Protocol. Again like the United States, Australia is a member of the Asia-Pacific Partnership on Clean Development and Change 6 (AP6). Australia leads the AP6 taskforces on cleaner fossil energy and aluminium, and co-chairs the renewable energy and distributed energy taskforce.

Greenhouse Gas Emissions Trading Schemes

In contrast to the Federal Government’s refusal to establish a national emissions trading scheme, the Australian States and Territories have been more active in this space. The New South Wales Government has established a Greenhouse Gas Abatement Scheme, which sets greenhouse gas (GHG) “benchmarks” out to 2020 for reduction of GHG emissions (Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002 (NSW)). Schemes also exist currently in the Australian Capital Territory and Queensland.

In the absence of federal action, last year the States and Territories established a National Emissions Trading Taskforce which released a discussion paper on the establishment of a multi-jurisdictional emissions trading scheme for GHGs covered in Annex A of the Kyoto Protocol. The proposed scheme would be implemented by the Australian States and Territories by concurrent legislation by 2010. The proposal has received much support both inside and outside industry, but has been criticized for its limited scope (only applying to the stationary energy sector) although

the scheme is expected to be expanded to cover other participants and sectors of the economy over time. It seems likely that special treatment will be afforded to trade-exposed energy-intensive Australian industries, such as aluminum producers.

Indicating a softening of its opposition to a national emissions trading scheme, in late 2006 the Federal Government established a joint federal-business taskforce to advise on the nature and design of a workable global emissions trading system in which Australia could participate. Despite calls for a trading scheme by key business and industry players, including the Australian Business Council, the Federal Government recently announced that it would not compromise Australia’s economy for climate change mitigation measures. Some commentators are predicting some kind of carbon scheme later this year based on the May 2007 task force report and before the next federal election later in 2007. The Opposition Party has indicated that it will sign the Kyoto Protocol if it gains office.

GHG Reporting

Australia has a draft of GHG and energy data reporting requirements at different levels of government. Australia is under increasing pressure to implement a nationally-consistent GHG reporting framework particularly given the emergence of new international standards for measuring and reporting GHG emissions. During 2006, there was movement towards using Australia’s existing National Pollutant Inventory to establish a mandatory GHG reporting scheme. This was move was stymied by the Council of Australian Governments in favour of national purpose-built legislation.

Clean-coal Technologies

Reflecting Australia’s policy position of protecting its international trading position, the Federal Government sees the development of low emissions technology, including carbon capture and storage (CCS), as an important part of its climate change strategy and is investing significantly in research in this area. CCS demonstration projects are now underway in the Otway Basin in Victoria, and the Gorgon gas project

on the North-West Shelf, which may involve one of the largest CCS projects in the world, is currently undergoing assessment. A set of regulatory guidelines for CCS in Australia has been implemented. However, many legal issues remain outstanding as no comprehensive laws exist to regulate the process. The Federal Government is currently drafting amendments to offshore petroleum legislation to enable geosequestration in Commonwealth waters, and State and Territory Governments will also need to enact corresponding legislation to cover geosequestration in State waters.

Renewable Energy

The Federal Government has taken somewhat limited steps to encourage the take up of renewables. Its Mandatory Renewable Energy Target (MRET) requires Australian electricity retailers to purchase 2 percent of their annual energy needs from renewable sources by 2010 (a total of 9500 gigawatt hours) (Renewable Energy (Electricity) Act 2000 (Cth)). The Federal Government has recently attracted strong criticism for not extending the scheme beyond 2010, increasing the targets or indexing the shortfall charge to inflation. Given that the number of projects needed to meet the 2010 target is almost subscribed, it seems clear that the decision not to increase the target will lead to a considerable drop in investment in the renewable energy sector. In response, Victoria, South Australia, and New South Wales have established renewable energy targets. For example, the Victorian scheme requires 10 percent of Victoria's energy to be derived from renewable sources by 2016. The Victorian scheme will run parallel to the federal scheme but has been designed to allow for transition to a multi-state or an expanded federal scheme.

While Australia's investment in wind farms, in particular, has increased dramatically over the last few years, project developers now face strong challenges based on issues such as the appropriate balance between local environmental protection and national GHG abatement, species protection and climate change mitigation, and the cumulative impact of an increased number of wind farms. The Australian courts have begun to develop jurisprudence in this area of balancing national and global public interest against

specific local concerns (*Taralga Landscape Guardians Inc v. Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59).

GHG Emissions and Environmental Impact Assessment Requirements

The Australian courts have also begun to grapple with the extent to which the indirect production of GHG emissions from proposed developments, and the impacts of this on climate change, should be taken into consideration as part of environmental impact assessment (EIA) processes. At present, this developing case law is difficult to reconcile.

Some decisions have held that there is a sufficient nexus between the development of a particular project with a GHG footprint (e.g., a new open-cut coal mine) and harm caused by climate change to require assessment of the indirect and facilitated impacts of the GHG emissions of the project at the proposal stage (*Gray v. The Minister for Planning and Ors* [2006] NSWLEC 720). Other decisions have gone the other way, deciding that there is no clear scientific evidence connecting the GHG emissions of a particular project and climate change (*Wildlife Preservation Society of Queensland Proserpine Whitsunday Branch Inc v. Minister for the Environment & Heritage & Ors* [2006] FCA 736; and *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33).

In an attempt to clarify these issues, 2006 amendments to the federal Environment Protection and Biodiversity Act 1999 introduced a broad definition of "impact" with the result that indirect impacts substantially caused by a proposed development and certain impacts of third party actions facilitated by a proposed development must be considered in the approval process under that act.

Chemicals and Dangerous Goods

Overview and Context

There is a well established scheme for the management and handling of chemicals and dangerous goods in Australia. Federal legislation prohibits the introduction of new industrial chemicals into Australia without an

assessment certificate being in force and enables the collection of information and statistics about industrial chemicals (Industrial Chemicals (Notification and Assessment) Act 1989 (Cth)). There is a raft of specific and detailed legislation and regulations at the State and Territory level governing the storage, management, and handling of chemicals and dangerous goods. Significant penalties apply for failure to comply.

Heavy Regulation

This is a stable part of the Australian law with heavy regulation being the emphasis. For example, under the Dangerous Goods Act (Vic) 1985, a range of detailed regulations exist including specific regulations covering explosives and “high consequence dangerous goods” (Dangerous Goods (HCDG) Regulations 2005 and Dangerous Goods (Explosives) Regulations 2000). The various State and Territory authorities with responsibility for chemicals and dangerous goods spend a good deal of time educating users and the public in relation to the safe handling and storage of chemicals and dangerous goods.

Inter-linkage

The regulation of chemicals and dangerous goods, the environment, and occupational health and safety are well inter-linked in Australia. The regulation of chemicals and dangerous goods falls somewhere between the regulation of the environment and safety in the workplace. A complete review of all of the national standards and codes relating to workplace chemicals regulation, including labelling and classifying chemicals in the workplace, is currently being undertaken and the review of this suite of national material is being undertaken consistent with the Globally Harmonised System for Classifying and Labelling Chemicals.

Future Trends

It is likely that the current focus on continuing education and compliance with sensible and practical management and handling regimes to ensure that chemicals and dangerous goods are managed in such a way as not to adversely impact upon people, the environment, and business will continue in the foreseeable future.

Extended Producer Responsibility and Product Regulation

Overview and Context

For some years Australia has promoted and encouraged a number of extended producer responsibility (EPR) and product stewardship schemes which are largely voluntary. These include the National Packaging Covenant, Refrigerant Reclaim Australia, Waste Oil Product Stewardship, Drum Muster, South Australian Container Deposit Legislation, Cansmart, National Working Group on Plastic Shopping Bags and Recycle IT! Some of the schemes have been the subject of regulation, usually where the voluntary schemes have not met their initial targets.

New South Wales Initiatives

The New South Wales Government has provided for the introduction of EPR schemes. Under the *Waste, Avoidance, and Resource Recovery Act 2001* (NSW) manufacturer and supplier responsibility for products is extended to the post-consumer stage. The act encourages industry to take voluntary action to reduce the environmental impacts of their products, but mandatory EPR schemes will only be introduced where voluntary reduction schemes have proved ineffective.

Under this legislation, in March 2006 the Extended Producer Responsibility Priority Statement 2005-06 (Priority Statement) was released, setting out a number of products or wastes of concern which might be suited to management by EPR schemes. The Priority Statement identified seventeen wastes of concern targeted for specific industry action: agriculture and veterinary chemicals and their containers, batteries, cigarette butts, computers, end of life vehicle residuals, mobile phones and their batteries, office paper, other electrical products, packaging, paint, plastic bags, polyvinyl chloride, televisions, treated timber, tires, and used oil and lubricants. It also listed specific actions required by the sectors responsible for each of the seventeen products.

Submissions on the 2005-06 Priority Statement have included criticisms that the New South Wales scheme does not make clear whether the primary aim of the

scheme is to reduce the volume of waste disposed of through recycling and greater use of recycled content, or also includes upstream intervention to reduce resource use and encourage design for the environment.

Future Trends

The Federal Government's Environment Protection and Heritage Council has initiated the development of a National Environment Protection Measure (NEPM) on product stewardship. The NEPM will establish a generic framework for determining the merits of co-regulatory approaches, and the development of product stewardship agreements, for particular sectors. Sector-specific products under consideration for initial inclusion in the NEPM include televisions and tires.

The Environment Protection and Heritage Council is also working towards consistent regulation of chemical use between Australian jurisdictions and across industry sectors, for example, between agricultural and industrial uses—the National Framework for Chemicals Environmental Management.

Despite some success with the number of voluntary programs in Australia, the Australian Productivity Commission released a report on waste management and resource efficiency which indicated a far less enthusiastic view of EPR, both in its ability to influence product design and its overall net benefit to the community. The report indicated, amongst other things, that in relation to the implementation of EPR and product stewardship programs “there is rarely a thoroughly researched and clearly justified case for Government intervention” and that the commission's preferred approach is to “give closer consideration to other approaches, including doing nothing.” While a number of non-government organizations have heavily criticized the commission's approach to EPR, it remains to be seen how the report will be reflected in future government policy of Australia.

Environmental Disclosure

Background and Context

Current interest in Corporate Social Responsibility (CSR) in Australia has focussed attention on environmental reporting. CSR requires environmental, social, and economic impacts to be taken into account in assessing the performance of corporations, and for those matters to be publicly reported. In general, full CSR reporting is not currently mandatory in Australia, but is strongly encouraged. More limited reporting is required under the Corporations Act 2001 (Cth).

The First Step

Since 1998, the Corporations Act has required most large companies in Australia to include specific information about their environmental performance in their annual directors' reports (section 299(1)(f)). Where a company's operations are subject to any particular and significant environmental regulation under any federal, state, or territory law, a directors' report must report on the entity's performance in relation to that environmental regulation. This appears to warrant disclosure by a company of:

- (a) details of relevant environmental laws, licences, approvals and permits particular to the company's operations and which have the potential to significantly affect the company's operations;
- (b) where (a) applies:
 - (i) details of the company's compliance with identified environmental regulations including:
 - (A) details of any pollution incidents or other breaches of environmental laws;
 - (B) details of any non-compliance with environmental regulations, and if any non-compliance has occurred, details of what steps the company has taken to remedy the problem and ensure future compliance;
 - (C) details of any enforcement action taken by any environmental regulatory authority, including warnings, infringement notices, pollution abatement notices, clean up notices, prosecution actions taken against the company; and

- details of any convictions for environmental offences; and
- (ii) details of the company's system for monitoring compliance with those laws, licences, approvals, and permits.

Disclosure of Significant Social and Environmental Issues

In 2004, further reporting requirements were introduced into the Corporations Act. From 1st July 2004, section 299A requires:

- the directors' report for a financial year for a company ... that is a listed public company must also contain information that members of the company would reasonably require to make an informed assessment of:
- (a) the operations of the entity reported on; and the
 - (b) financial position of the entity; and the
 - (c) entity's business strategies and its prospects for future financial years.

Recent reviews of CSR in the Australian context have concluded that these annual reporting requirements provide a sufficient framework for disclosure of all significant social and environmental issues relevant to a company's business and which might impact on the company's future financial prospects. The practical implications of these existing requirements in relation to climate change issues are now being considered by entities with major greenhouse footprints. It has been suggested that these reporting requirements be extended to all listed entities which, if implemented, would include listed managed investment funds.

Other Obligations to Disclose and Report

There are other laws in Australia both at a State, Territory, and Commonwealth level which require compulsory disclosure of a company's impact on the environment including:

- obligations under legislation in some State and Territories to notify the relevant regulatory authorities if a company becomes aware that its activities have lead to contamination or that the company owns or occupies land which has been contaminated;

- conditions imposed on environmental licences and approvals which require disclosure and information and reports to environmental regulatory authorities; and
- reporting requirements under the National Pollutant Inventory in relation to the discharge of certain pollutants.

Further, obligations to report on environmental performance may arise from contracts between companies and other organizations. For example, reporting obligations may arise if a company enters into an agreement with a government authority, such as a sustainability covenant with the Victorian Environment Protection Authority, or under the greenhouse challenge plus program with the Australian Greenhouse Office. The extent of a company's reporting obligations in these circumstances will depend on the terms of the agreement.

Future Trends

This is an area to be watched, particularly given the push world-wide for CSR. In particular, the Australian Stock Exchange is currently considering introducing enhanced social and environmental reporting requirements.

Clean Up Liability

Overview and Context

Contaminated land issues remain a significant topic in Australia given their relevance to urban renewal projects of former industrial, commercial and defense sites, mining rehabilitation, agricultural (dipping) sites, and areas with groundwater or groundwater usage. Legislation in all States and Territories of Australia regulate the use of contaminated land. The relevant environment protection authority usually has power to issue investigation or remediation orders in relation to contaminated land. Typically, the authority can serve orders on the original polluter or on the owner or occupier of the contaminated land.

In certain circumstances, receivers or other financial administrators or intermediaries with an interest in land may be liable to carry out investigations or remediation.

The costs of complying with such orders may in some cases be recovered from the original polluter, if they can be located and they have the financial capacity to pay.

Remedial Standards

Although remedial standards vary across the various jurisdictions in Australia, generally there is an acceptance of risk-based assessments to determine an appropriate level of remediation. The National Environment Protection Measure (NEPM) for the Assessment of Contaminated Sites, issued by the National Environment Protection Council of Australasia, contains a “technical tool kit” for the assessment of contaminated land and is supported by ten guidelines on various technical and administrative aspects of site assessment. This NEPM only deals with the *assessment* of site contamination. In contrast, the *management* and *remediation* of contaminated sites is covered under the Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites published in 1992. These guidelines have been criticized for being out of date and are likely to be reviewed in the near future.

Increase in Litigation

Litigation involving contaminated land is increasing in Australia both at the state and federal levels. The usual scenario is where land has been contaminated, there have been successive owners of the land, and now the land is to be redeveloped. Apportioning liability amongst the various landowners, occupiers, and users of the land is usually the key issue in this type of action. Consultants, such as environmental assessors and auditors, town planners, and the like are also becoming involved in litigation where it is alleged that their advice has been negligent and the clean up has been unsuccessful or incomplete.

As a result, in commercial transactions, risk and liability containment issues have become important and necessitate careful drafting of contracts for the purchase and sale of contaminated land.

Parent Company Liability

Recently, there have been legislative moves in several Australian states to make parent companies liable for the pollution and contaminating activities of their subsidiaries. These changes to the law have been made to avoid corporations structuring their affairs in ways which leave polluting activities and contaminated assets in single-purpose wholly-owned subsidiaries which would subsequently be liquidated.

In Tasmania and South Australia, if a company contravenes the relevant environmental legislation, a “related body corporate” (defined to include a holding company, a subsidiary, or a subsidiary of a holding company) is jointly and severally liable to pay any amount owing by the contravening company under that legislation. This means that a holding company may be liable to pay criminal fines, remediation costs, and civil penalties incurred by a subsidiary or commits an environmental offense. Queensland introduced similar provisions in its environmental legislation from the beginning of 2006. In Victoria, a slightly different approach has been taken. In August 2006, the Victorian Government amended the Environment Protection Act 1970 (Vic) to allow the Environment Protection Authority to issue a notice to a (parent) company to undertake clean up or on-going management measures in relation to the liability of a subsidiary, associated entity or related entity where:

- the parent company had control of the subsidiary, associated entity or related entity at the time the relevant conduct occurred; and
- the parent company (or one or more of its directors) was aware, or should reasonably have been aware, of that conduct; and
- the Environment Protection Authority considers the parent company (or one or more of its directors) failed to take all reasonable steps to prevent that conduct.

In other Australian jurisdictions, the environmental legislation does not specifically impose liability on related companies. However, there is some scope for parent companies to be held liable in negligence, for example, for environmental harm caused by a subsidiary.

The inclusion of related company liability provisions in environmental legislation around Australia means that holding companies can no longer assume that they will be insulated from the environmental liabilities of their subsidiaries.

Officer/Director Liability

Personal Liability

The personal liability of company officers and directors remains a much considered topic in Australia.

Over the past five years, all significant environmental statutes at commonwealth, state and territory levels have been amended to include derivative liability for officers and directors. Under this concept, a director or a person concerned in the management of a corporation may be held liable for environmental offences separately and distinctly from the liability of the corporation. Usually, the relevant federal or state environmental protection authority will have a discretion to whether to bring charges against the corporation, the director or person concerned in the management of the corporation, or both where there has been a breach of the law.

Defenses

Where persons directly involved in the operations of a corporation may be held liable for environmental offenses, the legislation generally provides specific defenses which a person can rely upon in the event of prosecution. These defenses are along the lines of:

- the person was not in a position to influence the conduct of the corporation in relation to the contravention;
- the person, being in such a position, used all due diligence to prevent the contravention by the corporation;
- the corporation will not have been found guilty of the offence by reason of its being able to establish the defence available to it under the legislation.

Due Diligence

Much corporate reflection has occurred recently on the “due diligence” defense. Sophisticated Australian companies and multi-national organisations operating in Australia are now developing well targeted and managed environmental management systems which adequately assess the risks that their business pose to the environment and put in place appropriate measures to mitigate those risks. A good deal of education and training is being undertaken with a marked increase in knowledge of environmental matters through all tiers of Australian organizations.

The Australian Courts have not developed a well articulated definition of what constitutes due diligence under the various Australian environmental protection statutes. Significant guidance has been taken from the Canadian due diligence case of *R v. Bata Industries Limited and Ors*.

Litigation

There are many instances in Australian case law where directors and officers concerned in the management of a corporation have been prosecuted. These situations have usually required some direct or proximate act of the director or officer which has resulted in the environmental harm. To date, a major prosecution has not been successfully undertaken relying purely upon derivative liability. Given the trends elsewhere, this situation is unlikely to remain for long.

LIKE TO WRITE?

The International Environmental Law Committee welcomes the participation of members interested in preparing this newsletter. If you would like to lend a hand by writing, editing, or identifying authors or issues, please contact the editor, James W. Rubin, at jrubin@hunton.com.

CHEMICALS-RELATED LEGISLATION IN ARGENTINA

Guillermo Malm Green
Angeles Murgier
Brons & Salas

In the last several years, significant new laws have been enacted or proposed in Argentina relating to chemical regulation and chemical weapons designed to implement international conventions or modeled on European directives. This article will focus on the newly enacted law on chemical weapons as well as recently introduced legislation on electric and electronic equipment waste and the restriction of hazardous substances.

A. Chemical Weapons

Law No. 26,247 on the *“Implementation within the Argentine legal system of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction”* (hereinafter, the “Law”) was published on May 22, 2007 in the Argentine Official Bulletin. This article makes brief reference to rules related to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) which were in place prior to the enactment of the Law and to the main issues regulated by the Law, particularly those related to the inclusion of a penalty and criminal system regarding chemical weapons in Argentina.

1. Rules

In 1995, Argentina approved through Law No. 24,534 the CWC. In 1997, the Argentine Executive Branch created through Decree No. 920/97 the Inter-Ministerial Committee for the Prohibition of Chemical Weapons (“the Committee”) in the ambit of the international trade office of the Ministry of Foreign Affairs, comprising a Board of Directors and an Executive Secretariat.

Through Resolution No. 904/98 (“the Resolution”), the Secretariat of Industry, Commerce and Mining of the

then called Ministry of Economy and Public Works and Services in 1998 created the Registry of Chemical Weapons in the ambit of the Undersecretariat of Industry (“the Registry”). This Resolution established forms for declarations to be filed with the Registry by all natural and artificial persons that produce, market, export, and import the products listed in Schedules 1, 2, and 3 to the CWC and defined organic chemicals not listed in said Schedules when the quantities, in weight units, of operations exceed the limits established by the CWC.

2. Highlights of the Law

The Law reproduces some of the prohibited as well as permitted activities under the CWC and establishes the filings that should be made to report permitted activities. The law further contains new elements as it includes in the Argentine body of rules a penalty system and a criminal system related to the CWC.

Generalities

Filings with the Committee. The Law designates the Committee as relevant enforcement authority and provides that *“any natural or artificial person covered by the provisions hereof shall file with the Committee, in the terms and on the forms established by it, an initial declaration as well as annual declarations as required by the CWC.”*

Transfer of Register. Registration. The Law establishes that the Committee shall *“keep an updated registry of the natural or artificial persons that carry out activities included in the CWC”* and transfers the Registry created by the Resolution to its jurisdiction. The Law also includes the duty of registration with the Registry (the Resolution only provides for the filings with the Registry), the issuance of a registration certificate and the obligation to renew the registration.

Exception established in Part VIII A 5 of the CWC. The Law fixes at 30 percent the *“lower concentration”* for mixtures of Schedule 3 chemicals as established in item 5, Part VIII A of the CWC, and sets forth that in these cases the Committee may dispense with the filing of the declarations.

Exports and Imports. The Law establishes that “*Schedule 1, 2 and 3 chemicals may only be exported and imported with the relevant authorization issued by the competent authorities.*” Even though this requirement has been met in practice with regards to exports of chemicals listed in the three Schedules (through the Argentine Committee for the Control of Sensitive Exports and Munitions) and imports of Schedule 1 and 2 chemicals (pursuant to the resolutions of the Customs and the Federal Administration of Public Revenue on the import and export of weapons, ammunition, gunpowder, explosives, and the like), it will be necessary to analyze whether the rules regulating the Law establish new guidelines to carry out these activities.

Inspections. The Law establishes that the owner, administrator, or legal representative of an industry or industrial complex manufacturing Schedule 1, 2, and 3 chemicals or defined organic chemicals not listed in these Schedules, pursuant to the provisions of the CWC and facility agreements, shall allow the Committee’s and international inspectors the following: (a) to have unrestricted access, (b) to inspect documents and registers, (c) to take samples, (d) to operate monitoring on-site instruments, (e) to interview any employee or executive of the facility, and (f) to take pictures and make videotapes of parts of the facility as necessary.

Confidentiality. The Law prohibits the disclosure of confidential information obtained from the declarations established in Article III of the CWC or as a consequence of the inspections carried out on the national territory, as well as of any other information delivered by a State Party or the Organization, except in the following cases: (a) when the disclosure of the information is necessary for the purpose of the CWC, ensuring that such disclosure shall be made in strict conformity with the procedures approved by the Conference of States Parties of the Organization; and (b) when the Committee determines that national security is compromised. In both cases, the Committee shall inform the persons filing the declarations or operators of the facility of any disclosure of information.

Penalty System. The Law establishes that breach of the provisions of the Law, the CWC and any supplementary rules issued in that connection shall be punished by (a) warning, (b) fine ranging from AR\$ 5,000 to AR\$ 1,000,000 (the current exchange rate is USD 1 = AR\$ 3.10), (c) 30-day to 1-year suspension from the Registry, and (d) deregistration.

In case of breaches committed by corporations, the Law establishes that those in charge of their direction, management or administration shall be personally, jointly and severally liable for the penalties and provides that the actions intended to impose penalties become statute-barred five years following the breach. Finally, the Law establishes that any person becoming aware of the existence of chemical weapons produced before 1925 that fails to inform so to the Committee within ninety days stating the place where such weapons are kept shall be punished by a fine from AR\$ 750 to AR\$ 12,500.

Criminal System. The Law establishes penalties of fine and imprisonment for the following six offenses related to the CWC:

Purposes forbidden by the CWC—the development, production, purchase, stockpiling, maintenance, transfer, use, import or export of chemical weapons or Schedule 1, 2, and 3 chemicals for purposes forbidden by the Law or the CWC is punishable by imprisonment from five to fifteen years.

Military Preparations—the commencement of military preparations to use chemical weapons or the use of riot control agents as war methods is punishable by imprisonment from two to six years.

Preventing or hindering inspection—actions intended to damage verification or inspection instruments or equipment to prevent or hinder the work of national or international inspectors is punishable by imprisonment from three months to four years.

Failure to submit the declarations—failure to submit the declarations established in the Law is

punishable by fine ranging from AR\$ 5,000 to AR\$ 1,000,000.

Falsification—the submission of false declarations and the falsification of documents, books, records, or reports to be filed with or supervised by the National Authority or international inspectors is punishable by imprisonment from three to eight years.

Breach of Confidentiality Duty—the unlawful copying, communication, or disclosure of confidential information or documents when such information or documents were delivered to a national inspector or an inspector of the Organization or the Commission, either directly or through a foreign state, is punishable by imprisonment from one to four years.

Finally, the Law provides that “*when any of the parties involved in an offense described in this chapter acted in the name, on behalf or for the benefit of an artificial person, the latter may be punished by a fine ranging from AR\$ 5,000 to AR\$ 1,000,000 and by the cancellation of its registration as artificial person, in addition to the penalties to be imposed on the perpetrators and partners in crime.*”

Final Comments

As already mentioned, the most original aspect of the Law is the inclusion of a penalty system and a criminal system on chemical weapons.

As regards the filing of the declarations established by the CWC, the fact that a new law imposes fines for the failure to file such declarations shall increase the degree of compliance with a system theretofore unknown to many people in Argentina. This, we believe, will translate into the better fulfillment by Argentina of its reporting duties to the Organization for the Prohibition of Chemical Weapons.

Finally, as the rules mentioned above have not been repealed by the Law and the Law expressly establishes the filing of initial and annual declarations with the

Committee as well as the registration duty with the Registry, it will be important to analyze any regulatory and supplementary rules issued in the future as well as the criteria to be adopted by the Committee, for the purpose of evaluating the obligations of the persons falling within the scope of the CWC.

B. Proposed Legislation on Chemicals Regulation

Argentina has not yet enacted regulations on waste electric and electronic equipment (WEEE) and restrictions on hazardous substances (RoHS), which are both the subject of European Union (EU) directives. However, in the last several years two bills have been introduced in the Argentine Congress regarding WEEE and RoHS. The first bill is intended to create a National Plan for the Sustainable Management of WEEE and the second bill is based on Spanish Royal Decree 208/2005 (implementing WEEE and RoHS in Spain). Since the first bill has lost parliamentary status in March 2007, this article will provide a summary of the second bill—*Bill S-207/06 on Disposal of Obsolete Electric and Electronic Equipment and Waste Management (Proyecto de ley sobre la disposición de aparatos eléctricos y electrónicos en desuso y gestión de sus residuos)* (“the Bill”), and compare it to the EU’s WEEE Directive and the RoHS Directive.

1. WEEE Aspects

Definition of EEE. The definition of electric and electronic equipment (EEE) is consistent with the WEEE Directive. It incorporates annex IA and annex IB of the WEEE Directive. The EEE categories and examples provided are identical to those in the WEEE Directive (save for some slight changes in the exemptions).

Definition of WEEE. The definition of WEEE is generally consistent with the WEEE Directive, except that the Bill does not explicitly refer to the EU Directive 75/442/EEC on waste as the WEEE Directive does. The definition of private household WEEE in the Bill is generally consistent with that in the WEEE Directive.

Exemptions. The Bill excludes “*equipment used exclusively for military purposes, that are necessary for national security.*” The Bill contains no reference to EEE that are part of another type of equipment. It does include the exemption of Large-Scale Stationary Industrial Tool (annex IA, category 6 of the WEEE Directive) though with a slight difference since it excepts “*permanently fixed industrial tools of significant size and installed by experts.*” The Implanted and Infected Medical Device exemption is consistent with the one provided in annex IA, category 8 of the WEEE Directive. Regarding Health and Safety legislation, the Bill refers to the “*Law on Labor Risk Prevention*” which establishes the rules governing workers’ health and safety protection against risks related to chemical agents at work and protection to workers against exposure to carcinogenic agents.

Producer Definition. The Bill reproduces the definition included in the Spanish Royal Decree 208/2005 and, consequently, the definition of “producer” under the Bill slightly differs from that in the WEEE Directive. According to the Bill, the term “producer” includes any individual or legal person who, irrespective of the selling technique used, including distant or electronic sale: manufactures and sells electric or electronic equipment under its own brand, puts on the market under its own brand equipment manufactured by a third party, or imports or exports such equipment from/ into a third country. The Bill further provides that an individual or legal person who exclusively finances operations of putting equipment on the market shall not be considered a producer, unless it acts as a producer according to any of the above mentioned cases.

“Put on the Market” Definition. Even though the Bill uses the expression “Put on the Market” it does not provide a definition.

Marking Requirement. The Bill contains a requirement to include the identification of the producer. This requirement, according to the Bill, applies to “equipment” (it does not specifically refer to EEE nor exclude components). The Bill includes the requirement for marking of EEE with the crossed-out dustbin symbol, but it is applicable only for private household EEE.

Registration Requirements. The Bill provides that the producers/importers shall declare before local authorities (municipal/county level) if they have chosen to participate in a collective scheme or to implement a private management system. Both collective schemes and individual management systems need to be approved by the local authority. The Bill includes a detail of the information that needs to be provided in connection with the approval of an individual management system and of a collective scheme (annex VI and article 8 (3)).

The Bill provides that local authorities must provide the Secretariat of Environment and Sustainable Development (National environmental authority) with an annual report of the weight of WEEE that has been collected and reutilization, recycling and recovery percentages achieved in such jurisdiction.

Financial Guarantee Requirements. The Bill establishes that producers opting for an individual management system must provide financial guarantees (either insurance or a blocked bank account). Producers who join a collective scheme do not need to provide additional financial guarantees. However, the collective schemes, when applying for the correspondent administrative authorization, shall refer their financing mechanisms and guarantees.

Information Requirements. The Bill requires differing obligations with regard to producer information depending on the type of end-user or customer.

Information to users. The Bill provides that producers shall inform users about: the criteria for the proper environmental management of private household WEEE; that free selective collection is provided for private household WEEE; the meaning of the crossed-out dustbin symbol, to be provided in the user instructions, guarantee, or documents accompanying the EEE; and the potentially detrimental effects on the environment and human health as a result of the presence of hazardous substances in EEE.

Information to treatment facilities. With regard to treatment facilities, the Bill stipulates that, within

one year after a new piece of EEE is put on the market, producers must give treatment centers the relevant information regarding: the manner of disassembly to allow identification of the different components and materials capable of being reused or recycled; the location of the dangerous substances; and the ways to reach, in each piece of equipment, the goals related to reuse, recycling, and recovery.

Reporting Requirements. The Bill provides for periodic reporting obligations. Producers or importers not involved in a collective management scheme shall annually provide the municipality in the jurisdiction where the registered office is located with certain information, certified by an external auditor, including: EEE, by type of equipment put on the market in the national jurisdiction in the preceding year; WEEE collected from distributors or local authorities; WEEE directly managed or delivered to authorized waste managers for treatment purposes; and evidence of compliance with targets.

In turn, collective management schemes, within the first three months of each year, must send to the municipality that has issued the relevant authorization a report certified by an external auditor regarding their activities in the previous year. The report must specify the quantities of each type of EEE put on the market in the national jurisdiction and the final quantities of managed WEEE, by category of products and materials, in each municipality.

Financing Regime and Collection, Treatment, Recovery, and Disposal Requirements for Private Household WEEE. The Bill provides that users may return private household WEEE free of charge. According to the Bill, distributors or sellers (any person that supplies EEE to another person or entity as final users in commercial conditions) have to take back private household WEEE when selling a new piece of equipment of an equivalent type or with the same function.

The Bill provides that municipalities with more than 5,000 inhabitants shall assure the selective collection of private household WEEE. Producers must collect

WEEE from the municipalities and distributors' facilities and transport it to authorized treatment facilities. They may do so individually or through a collective scheme, and are in charge of the costs of such transportation. In municipalities with fewer than 5,000 inhabitants, the Bill establishes that the collection will be made according to the rules determined by the corresponding authority.

Penalty System. The Bill does not provide for fines, penalties, or other sanctions and establishes that the penalty system shall be laid down through regulations.

2. RoHS Aspects

The Bill contains restrictions and limits on hazardous substances content in EEE, but regulates this issue slightly differently than the RoHS Directive. Section 3 (a) of the Bill states:

“The producers of EEE, its materials and components shall design all equipments and electric light bulbs and luminaries in households so that they do not contain lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls or polybrominated diphenyl ethers, save for the exceptions and as established in annex II. This measure shall not apply to devices falling under categories 8 and 9 of annex I.

Likewise, and with the exceptions established in the referred annex II, no spare parts or components manufactured with the substances mentioned in the preceding paragraph may be used for the repair or reuse of electric and electronic equipment.”

Annex II to the Bill reproduces almost exactly the content of the Annex to the RoHS Directive; consequently, the applications of lead, mercury, cadmium, and hexavalent chromium that are exempted are the same in both. The differences are that (a) for lead, mercury, and hexavalent chromium, Annex II to the Bill leaves an open door for further exemptions by including the following sentence *“other applications not exceeding the maximum concentration standards that may be established,”* and (b) regarding cadmium, Annex II to the Bill states that

they are exempted those that “do not exceed the maximum concentration standards that may be established.” Categories 8 and 9 of Annex I to the Bill are coincident with categories 8 and 9 of Annex IA to the WEEE Directive.

Guillermo Malm Green is a partner in Brons & Salas and chairs its Environmental Law Practice Group. **Angeles Murgier** is an associate in Brons & Salas with practice focused on environmental law.

MEXICO’S CONTRIBUTION TO FACE THE NEW CHALLENGES ON ENVIRONMENTAL ISSUES

Daniel Basurto-Gonzalez

I. Introduction

Mexico has begun a new era with the government of President Felipe Calderon, who has focused his environmental policy in what is known as sustainable development. Mexico has recognized the importance of this concept; unfortunately, the Fox administration did not make the sustainable development and protection of the environment a priority, and the relations with the Mexican Congress were not as good as was expected, resulting in more than 150 environmental bills proposed. Many of these bills were not effective and did not follow the basic premise of any law—the common good.

Moreover, one cannot forget that public safety, employment generation, and the fight against poverty depend on sustainable development, which must be enforced with a very strong and serious environmental policy. Is the new focus on sustainable development too good to be true? Only time will answer this question. This article will focus on several promising areas related to the contribution and efforts of Mexico as it faces new environmental challenges.

II. Climate Change

The international community has assumed commitments in order to address climate change. These

commitments derive essentially from the United Nations Framework Convention on Climate Change, its Kyoto Protocol and the European Parliament Directive 2003/87/CE. These international instruments establish economic mechanisms to address climate change, one of which is the Clean Development Mechanism (CDM) through which investment opportunities in developing countries are created.

The CDM is a tool included in the Kyoto Protocol (Protocol) through which a country listed in Annex 1 of such Protocol (generally, developed countries) can make investments in activities that will reduce the generation of greenhouse gases (GHG) in those countries not listed in Annex 1 (generally, developing countries). The investor in a CDM project would receive a “GHG reduction certificate” that could be commercialized in a market created worldwide for that purpose.

As a non-Annex 1 country, Mexico has been quite active in efforts to develop CDM projects in the country. There are some groups in our country such as the Center of Studies of the Private Sector for Sustainable Development (CESPEDES) that are very active in this area. However, to date, success has been limited. Currently, approximately 173 CDM projects are seeking approval, including those projects related to farms. Source: www.semarnat.gob.mx.

Nevertheless, there appear to be strong business opportunities for the implementation in Mexico of CDM projects in the improvement in energy efficiency and fuel quality, electric generation and transmission, renewable energy sources, oil, and gas.

III. Mexico and Its Active Participation in International Treaties

Mexico has signed and is an active member of many international treaties, such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the Stockholm Agreement Concerning the Elimination, Production and Use of Persistent Organic Pollutants (POP’s Convention).

The POP's Convention establishes a framework designed to guarantee the safe elimination and reduction in the use of these harmful substances to protect human health and the environment. POP's are chemical products that have certain toxic properties which are extremely harmful to human health and the environment, since they are persistent and resistant to degradation. POP's travel by air and water and through migratory species and accumulate in terrestrial and aquatic ecosystems. Mexico is in process of implementing the activities related to this agreement.

The Montreal Protocol is an international agreement designed to protect the stratospheric ozone layer. The treaty was originally signed in 1987 and amended in 1990 and 1992. The Montreal Protocol stipulates that the production and consumption of compounds that deplete ozone in the stratosphere, including chlorofluorocarbons (CFCs), carbon tetrachloride, methyl chloroform, and other ozone depleting substances—are to be phased out over time (CFCs were phased out in 2000, methyl chloroform in 2005). According to the Mexican Secretariat of Environment and Natural Resources (SEMARNAT—www.semarnat.gob.mx/dgca/upo/) some of the most important efforts of Mexico include:

- The reduction of more than 87 percent in the consumption of CFCs has occurred, taking into consideration the implementation of more than 100 projects for the replacement of these substances in refrigerators, air conditioners, polyurethane foams, solvents, and aerosols, during the last fifteen years.
- The implementation of a financial mechanism for the replacement of centrifugal coolers. This mechanism has been recognized inside the spheres of the Montreal Protocol as the most successful project in this topic.
- The elimination of the use of CFCs (2005) in the production of polyurethane foams.
- In 2005, the closing of the company called “Quimobasicos” located at the city of Monterrey, in the State of Nuevo Leon, which used CFC's in its productive processes.

The PIC Convention provides that countries are only allowed to export certain hazardous chemicals

following the importing country's prior consent. Since Mexico recently ratified this convention (May 4, 2005), it will facilitate the exchange of information of prohibited or restricted substances that are subject to international trade.

IV. The Extended Producer Responsibility and the Concept of “Shared Responsibility” Established in the Mexican Legislation

Mexico belongs to the Organization for Economic Cooperation and Development (OECD), which has several publications regarding the principle of Extended Producer Responsibility. This principle establishes obligations on producers for the management of their products through the products' life cycles. Although this concept is not regulated in the Mexico's General Law for the Prevention and Integral Management of Wastes (“The Waste Law”), the Waste Law does state as one of its basic principles the concept of “shared responsibility.”

The Waste Law was published in Mexico's Federal Official Gazette on Oct. 8, 2003 and went into effect on Jan. 6, 2004. This Law establishes three basic principles: Valorization/Assessment, Integral Management, and Shared Responsibility. The concept of shared responsibility, mentioned above, is defined as *“the principle through which it is recognized that urban solid wastes, and wastes requiring special management after the performance of activities that satisfy necessities of society, through value chains of production, process, packaging, distribution, consumption of product types, and that in consequence, their integral management is a joint social responsibility and requires the joint, coordinated and differentiated participation of producers, distributors, consumers, users of byproducts, and of the three branches of government.”*

This principle of “shared responsibility” of the producers, importers, exporters, distributors, consumers, and services companies for waste management is essential for achieving environmental efficiency in waste management.

Finally, Mexico is now searching mechanisms for developing and implementing the three principles mentioned above.

V. Environmental Disclosure and the Mexico's Federal Law of Transparency and Access to Public Information

The topic of environmental disclosure is turning into a very important issue for many corporations that operate in the country. Mexico has worked hard in the process of implementing the concept of governmental and regulatory transparency. For example, during the Fox administration, the Federal Law of Transparency and Access to Public Information was published in the Federal Official Gazette. Moreover, Mexico has created consultation counsels in order to bring access to information to all sectors (social, academic, economic, business, etc.).

In general, all information is public, since one of the main instruments of environmental policy consists of the examination of the status of a company and its environmental performance. Nevertheless, efforts have been made to codify this concept to create legal certainty. For example, the concept of an "environmental audit" is included in the Mexican legislation as an instrument through which private individuals are able to carry out voluntary procedures of self regulation in order to improve their environmental performance. The objective of a voluntary program is to generate a situation different from the administrative procedure. In other words, the voluntary program gives the authority full access to personal information, as opposed to mandatory programs where information is provided only when the authority requires it.

On the other hand, the Mexican law on transparency classifies the information as confidential and reserved. This is very important to companies that provide information to the authorities about their facilities and environmental compliance.

As we mentioned above, all information should be public, however according to the Law mentioned above, "confidential" information is: (article 18).

- The information with such characteristic, which is given by the individuals to the obliged subjects. In case these individuals provide information, they must indicate the documents containing confidential or reserved information, when they have the right to reserve information.
- Personal data that requires the consent of the individuals for the diffusion, distribution, or commercialization.

We conclude that the data provided to the authorities through an environmental audit are considered "confidential," as long as the company brings information of this type, or ask the authority to classify the information as "confidential."

On the other hand, recent laws provide some environmental disclosure: on June 3, 2004, the "Decree issuing the Regulation to the General Law of Ecological Equilibrium and Environmental Protection for Pollutant Release and Transfer Register (*Registro de Emisiones y Transferencia de Contaminantes—RETC*) and adding and amending the Regulations to the General Law of Ecological Equilibrium and Environmental Protection for Air Pollution Prevention and Control" was published in the Mexico's Federal Official Gazette. The RETC information will refer to the quantities and types of contaminant emissions and transferences on environmental aspects, *i.e.*, air, soil, water, hazardous waste, and materials. The information shall be integrated with the data and documents contained in the authorizations, certificates, reports, licenses, permits, and concessions that, in environmental issues, is processed before the Secretariat or the competent authority of the government of the Federal District, states, or municipalities. For this reason, the authority is not allowed to require any further information than the documents above mentioned.

VI. Clean-up Liability: A Big Concern for Companies in Mexico

Regarding clean-up liability, both foreign and domestic corporations are aware of the importance of complying with the environmental legislation; these entities

recognize the importance of avoiding the possible sanctions derived from the non-compliance. For this purpose, the SEMARNAT has published a “Technical guide for orienting the elaboration of studies regarding environmental risk evaluation of pollutant sites.” Even though this document does not have a legal standing, it will help to unify criteria in order to bring certainty. Moreover, this topic has become a significant concern to those who own or hold real estate in Mexico, especially since there are large gaps in legislation and a general lack of knowledge about the law. However, it is true that everybody in Mexico is learning the rights and responsibilities for environmental clean-up.

VII. Officer/Director Liability for Environmental Damage

Regarding environmental damages, the legislation in Mexico establishes three types of liabilities: administrative, civil, and criminal.

In relation to administrative liability, the environmental protection regime in Mexico establishes sanctions for any person who violates the General Law of Ecological Equilibrium and Environmental Protection. It is important to mention that these sanctions are applicable to both individuals and legal entities (companies). The sanctions established by this law include fines, closures, and the confiscation of instruments or products.

The General Law of Ecological Equilibrium and Environmental Protection also establishes criminal liability and requires the SEMARNAT to report known acts or omissions that may be criminal to the competent criminal enforcement authorities. In this case, the competent criminal authorities are the public prosecutors who depends on the Executive branch. Their main function consists of prosecuting crimes and executing criminal actions. Article 182 of the General Law of Ecological Equilibrium and Environmental Protection.

Finally, regarding civil liability, the General Law of Ecological Equilibrium and Environmental Protection in article 203 states that all of those who contaminate or cause any damage to the environment will be financially and legally responsible to repair that damage.

Daniel Basurto-Gonzalez is the founding partner and shareholder of *Lexcorp Abogados (Basurto y Arguijo S.C.)*. He has been practicing environmental law for the last twenty years.

UPDATE ON CANADIAN ENVIRONMENTAL LAW

**Gray Taylor
Hilary Stedwill
Bennett Jones LLP
Toronto, Canada**

The Single Most Important Issue in 2007

On Nov. 6, 2006, pollster Ipsos-Reid announced, “For the first time since July of 1990, the environment (26%) tops the list of issues Canadians feel should receive the greatest attention from Canada’s leaders.” It seems hard to believe that this polling result did not influence the Liberal Party of Canada’s convention decision to elect a new leader following former Prime Minister Paul Martin’s retirement, especially when many expect a federal election is imminent given the Conservative Party of Canada’s present minority government status in the House of Commons. Liberal delegates chose former Minister of the Environment Stéphane Dion over academic and international relations-focused Michael Ignatieff, as their new leader on Dec. 2, 2006. Prime Minister of Canada and Conservative Party of Canada leader Stephen Harper seems to have responded by replacing Rona Ambrose, who was frequently criticized during her tenure as Minister of the Environment, with John Baird, a popular Conservative politician from what many view as the Liberal’s home turf in Ontario.

In the title of his Jan. 27, 2007 editorial, the editor-in-chief of *The Globe and Mail* (a newspaper with Canada-wide distribution) announced “It’s Crystal Clear: The Environment will be the Single Most Important Issue of 2007.” Certainly after the first quarter of 2007, the Canadian political landscape seems aligned with this prediction as the federal government, provincial administrations and municipal councils are, perhaps, racing to be the “greenest.” The

federal government's priority for environmental issues is climate change, and in particular, greenhouse gas and other air pollution emissions. Minister of the Environment John Baird introduced: "Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution" to Canadians on April 26, 2007, which proposes to do by regulation what they tried unsuccessfully for the six preceding months to pass through the House of Commons, that is, Bill C-30, "Canada's Clean Air Act." Perhaps the opposition parties expected this result all along when they supported Bill C-288, the "Kyoto Protocol Implementation Act," which is a private opposition member's bill compelling the federal government to respect its commitments under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. On Dec. 8, 2006, the federal government also initiated a "Chemicals Management Plan" in the midst of the environment's renewed popularity to, perhaps, more fanfare than government chemists are accustomed to, although this work may have significant effects on some foreign suppliers of chemicals to Canada.

Climate change is also leading some provincial agendas. Provincial governments, including Ontario, Quebec, and Alberta are working on climate change plans, although not necessarily in the same direction or legal effect. Many also expect the environment will be an important issue in Ontario's next provincial election in October 2007. Perhaps in anticipation of this, Ontario continues to issue new legislation and regulations for water use in Ontario. Municipalities, including Toronto, Canada's largest city, are also preparing climate change plans. They may also be more active with respect to environmental issues generally following several successful court victories with respect to the authority of municipalities to make by-laws restricting cosmetic pesticide applications despite federal and provincial regulatory regimes already regulating their use (*see: 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241).

Despite all of these news releases, column-inches, opinion polls, and television spots announcing new environmental rules and policies in Canada each

month, one overriding theme is that we may not have a clear picture about Canada's environmental legal landscape until after a few more elections.

Climate Change in Canada

Uncertainty About Federal Climate Change Law and Policy

On April 26, 2007, Minister of the Environment John Baird announced the federal government issued "Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution." This plan proposes to, among other things, regulate greenhouse gas and other air emissions by regulation. The plan explains, "The government is committed to reducing Canada's total emissions of greenhouse gases relative to 2006 levels, by 2020 and by 60% to 70% by 2050." The plan expects this will be achieved by imposing emission intensity reduction targets beginning in 2010. Some critics hold the view that this plan will cause Canada to abandon its obligations under the Kyoto Protocol.

This announcement was preceded two days earlier by journalists' reports that the Minister of the Environment told environmentalists that Bill C-30 (legislation proposed to accomplish similar objectives as the Action Plan described above) "is dead." The Minister explained that amendments made by opposition party members of a House of Commons Committee assigned to consider and revise the bill before third reading in the House of Commons were unacceptable. Consequently, the following overview of federal government initiatives about climate change may only be of historical interest.

The federal parliament and the Government of Canada have tended to be much less active than their provincial counterparts with respect to setting and enforcing environmental legal standards, preferring, instead, to provide research and data collection functions and issuing national guidelines for adoption by provincial authorities. There have been constitutional arguments that have likely restricted federal intervention to environmental issues on its own lands and international matters like migratory birds. However, lack of political

will on this issue may be equally to blame. The federal government has support from the Supreme Court of Canada, which has issued (albeit narrowly divided) decisions ruling that the federal government's powers to make criminal laws and laws to deal with "national concerns" support laws prohibiting the release of polychlorinated biphenyls (*see: Canada (A.G.) v. Hydro Quebec*, [1997] 3 S.C.R. 213) and dumping waste into provincial marine waters (*see: R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401).

This seems to be changing, at least with respect to air pollution, especially greenhouse gas, nitrogen oxides, and sulfur dioxide emissions. Russia caught many signatories to the Kyoto Protocol (Protocol) off-guard by ratifying the agreement and perhaps surprised the Canadian government most of all. Since then, political debate about the Protocol focuses on whether the country can meet these international obligations. The Liberal administration, in power at the time and responsible for Canada's participation in the Protocol, insisted the country could meet these obligations when it issued "Project Green: Moving Forward on Climate Change," an action plan (without legal effect) issued in April 2005. Project Green included a "Climate Fund": 5 billion dollars to, among other things, purchase domestic and foreign carbon emission reduction credits. The plan also included an intensity-based "cap" on greenhouse gas emissions from large industries and a trading system, an offset credit system, and a technology investment fund alternative to the use of carbon emission reduction credits. However, to obtain support for the plan from Canadian industry, a \$15/ton of CO₂e price limit was included in the plan's terms.

A federal election followed shortly thereafter and Prime Minister Stephen Harper's Conservative Party was elected to power in January 2006, but only with a minority of seats in the House of Commons. Prime Minister Harper was a vocal opponent of Canada's participation in the Kyoto Protocol, and environmental issues were hardly discussed in the Conservative platform, except for a commitment to gently resile the country from its commitments under the Kyoto Protocol.

Project Green was shelved. Perhaps in resistance to this policy direction, Pablo Rodriguez, a Liberal member of Parliament, proposed a private member's bill on May 17, 2006. Bill C-288, "An Act to ensure Canada meets its global climate change obligations under the Kyoto Protocol." Unlike in the United States, statutes proposed by individual members of parliament rarely succeed, especially when the governing party has a majority of seats in the House of Commons. However, in this minority situation, all of the opposition parties voted together and, on Feb. 17, 2007, passed Bill C-288 out of the House of Commons for consideration by the Senate. This bill includes provisions that, if passed, would compel the Minister of the Environment to prepare plans and report on Canada's progress to meet the targets under the Kyoto Protocol and compel the Governor in Council (*i.e.* the Cabinet) to make, amend or repeal regulations necessary for Canada to meet its obligations under the Kyoto Protocol. The Senate must also pass Bill C-288 successfully before it becomes law in Canada.

Unlike the House of Commons, however, the Senate features a significant majority of Liberal Party members and senators are appointed, not elected in Canada, so popular opinion is believed to affect Senate decisions less than in the House of Commons. Debate continues with the Minister of the Environment explaining to Senators that Bill C-288 could decimate the Canadian economy and cause job losses. Journalists report that Liberal members of the Senate and critics accuse the Minister of "fear mongering."

Despite Bill C-288, the Conservatives hardly addressed environmental issues for their first eight months in power. However, just a little more than two weeks before the Ipsos-Reid poll described earlier was issued, the Conservatives tabled Bill C-30, "An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act." As mentioned above, the House of Commons Committee considering Bill C-30 gutted it to resemble Bill C-288, including a "national carbon budget" that equals Canada's commitment under the Kyoto Protocol, and would ultimately restrict greenhouse gas emissions

to 6 percent below 1990 levels. These amendments, apparently, were not acceptable to the Minister of the Environment, and consequently Bill C-30, it seems, will be allowed to “die” on the Order Paper, that is, it seems unlikely that it will be put to its third vote.

Despite the Minister’s announcement that the bill is “dead,” Bill C-30 features provisions that, if passed, would enable the Minister of the Environment to issue “ambient air quality standards.” These standards would be, at first, regional limits and, later, possibly limits on emissions from facilities for substances such as nitrogen oxides, sulfur dioxide, particulate matter less than or equal to 10 microns, ozone, ammonia, and mercury, with the option to add more substances by regulation. Provincial laws have typically regulated these kinds of emissions in the interest of “local air quality,” which is within their constitutional powers. If passed, this effort to regulate matters that have largely been treated as a provincial responsibility may reopen constitutional litigation about the distribution of powers to legislate environmental issues. Federal environmental legislation has a tendency to be difficult to pass even when the governing party has a majority of seats in the House of Commons (*see*, for example, the numerous attempts to pass federal endangered species legislation). Consequently, most should not be surprised that Canada’s proposed rules and policies for climate change and air pollution emissions in our present political situation continue to be highly uncertain and liable to change from month to month. Add to this that all parties may be more interested in keeping these and other environmental issues alive for campaigning purposes instead of making reasoned and thoughtful laws and it may be some time before federal environmental law-making settles down.

Provincial and Municipal Activities on Climate Change

The federal government is not the only source of activity with respect to climate change and greenhouse gas emissions. In 2003, the province of Alberta passed the Climate Change Emissions Management Act. This act includes an Alberta target of reducing greenhouse gas emissions “relative to Gross Domestic Product to an amount that is equal to or less than 50% of

1990 levels.” The government announced its intention in March 2007 to amend this act and certain regulations to require companies that emit more than 100,000 tons of carbon dioxide equivalent greenhouse gases to reduce their emissions intensity by 12 percent as of July 1, 2007. Limiting emissions as a function of productivity was also preferred in the original version of Bill C-30 and continues to be the strategy in the federal government’s latest plan.

In June 2006, the Government of Quebec issued, “Quebec and Climate Change: A Challenge for the Future,” a plan explaining how the Government of Quebec intends to reduce greenhouse gas emissions. Ontario is also expected to issue a plan soon. Municipal governments are also preparing plans, including the City of Toronto, Canada’s largest city. Toronto published its own plan, “Change is in the Air,” which includes a 6 percent reduction of greenhouse gas emissions below 1990 levels by 2012 and an 80 percent reduction of greenhouse gas emissions below 1990 levels by 2050. None of these plans have the force of law, however. Coordination of provincial activities with respect to climate change does not seem imminent. As recently as May 1, 2007, premiers, especially for Ontario and Alberta, disagreed in interviews with reporters about creating an inter-provincial trading system for climate change abatement credits.

The Next Step in Managing Toxic Substances

The Canadian Environmental Protection Act (CEPA) requires the federal Minister of the Environment to maintain a “Domestic Substances List” (this is not unlike the United States Toxic Substances Control Act’s Chemical Substances Inventory). Substances the Minister is satisfied were manufactured in, imported into, or in commerce in Canada between 1984 and 1986 were automatically included in this list, and manufacture or import of these substances could continue without further restriction. More than 23,000 substances were included. Substances not on the list, that is, “new substances,” could only be manufactured or imported in large quantities according to regulations, which require certain information be submitted to the

Minister (*via* Environment Canada, the Minister's bureaucracy) before any manufacturing or importing, so that the Minister can assess the risk the substance may have on the environment and manage those risks through regulatory controls.

CEPA also required that all of the substances that were automatically included on the Domestic Substances List (DSL) be "categorized," which means flagging the substances that either present the greatest potential for exposure to Canadians, or that are persistent or bioaccumulative, and inherently toxic to human beings and other living organisms. CEPA gave the Minister of the Environment and the Minister of Health (which includes Health Canada) until September 2006 to complete this work, which it did. About 4,000 substances were categorized.

The announcement of the conclusion of categorization was small, but an announcement on Dec. 8, 2006 about what the federal government planned to do next was massive in comparison, including a press conference, national coverage on news programs and popular newspapers and magazines, and a new Web site. The "Chemicals Management Plan" was born. The news release stated, "Prime Minister Stephen Harper... today unveiled Canada's new Chemicals Management Plan. The plan takes immediate action to regulate chemicals that are harmful to human health or the environment."

Many presented this announcement as a brand new policy initiative, but some of the government's activities in this plan are driven by legal obligations, that is, they would have happened anyway. For example, CEPA compels the Ministers of Health and Environment to subject categorized substances to a "screening assessment" to determine if the substances are toxic (as that term is defined by CEPA). On the other hand, the form a "screening assessment" takes is not defined in CEPA, and the Chemicals Management Plan does set out how the government intends to meet this obligation. Of the 4,000 substances, most will be subject to a review by a committee to determine if more assessment or controls are required because while exposure to humans is, perhaps, high, threats to the environment are probably low. Two hundred

categorized substances, however, did cause government scientists concern about their impact to the environment. Consequently, these substances form part of a "Challenge to Industry," where the Ministers exercise their powers under CEPA to compel production of information from persons with knowledge of the substances to determine "appropriate controls." Some Canadian toxicology experts have characterized this exercise as, "tell us why this substance should not be banned."

The Chemicals Management Plan also includes the government's intent to impose "Significant New Activity" (SNAc) restrictions on substances that are on the DSL, but that the government believes are imported presently in small quantities and for limited purposes. These restrictions are imposed on substances the government does not want imported or manufactured in larger quantities or for new purposes without being consulted. The government also intends to re-evaluate older pesticides and is planning to consider restricting 9,000 pharmaceuticals and personal care products for environmental concerns.

\$300 million over four years has been assigned to implementing this plan. This is a significant financial commitment for the purposes of domestic environmental protection in Canada. However, it may be foreign suppliers of chemicals and products into Canada that are affected most. Canadian importers often rely on foreign suppliers to ensure their products may be imported into the country and these suppliers are less likely to be aware the government of Canada is considering banning or significantly restricting substances, including those on the DSL, unless the government hears about how the substance is being used in Canada. There have been occasions when foreign suppliers and Canadian importers were surprised to learn a substance they used regularly was banned, resulting in costly disruptions to supply and manufacturing as well as legal and consultant costs to persuade the government to reopen and revise its import restrictions.

Despite this large commitment and the potential for disruptive regulations, many Canadians in the chemical manufacturing, importing, and use communities have

been expecting activities like these for some time. Some estimate that the amount of energy invested in announcing this plan was in part due to the coincidental conclusion of the categorization process with the environment becoming an important political issue in the minds of Canadians.

New Water Rules in Ontario

In May 2000, *E. coli* O157:H7 and *Campylobacter jejuni* entered the drinking water system for a small, rural, Ontario town called Walkerton. Seven people died and more than 2,300 people were made ill as a result. A “Public Inquiry” (*i.e.* a fact-finding body with subpoena and oath-taking powers), led by Judge Dennis O’Connor, concluded this incident was caused by a combination of manure spread on a farm near a drinking water well and the delinquent actions of the drinking water system operators. The Inquiry recommended Ontario institute several new regulatory regimes in response.

The Safe Drinking Water Act, 2002 was passed soon after the Inquiry issued its reports. This legislation aimed to restrict the design, installation and operation of drinking water systems in the province and institute an improved accreditation system for drinking water system operators. In October 2006, the Ontario legislature passed the Clean Water Act, 2006, which was enacted to address the issues of contamination entering drinking water sources. Though not yet in force, once implemented, this act may restrict land use and development in areas designated as “source protection areas” by Conservation Authorities, which are local groups in Ontario responsible for watershed management in the province.

Finally, as recently as April 3, 2007, the Minister of the Environment proposed Bill-198, short-titled to “*Safeguarding and Sustaining Ontario’s Water Act, 2007.*” If passed, the effect of this statute is expected to prohibit diversions of water from the Great Lakes-St. Lawrence River, Nelson, and Hudson Bay basins and charge fees to people who take or use any Ontario waters for commercial or industrial purposes. Unlike the other examples, this bill implements an agreement between the provinces of Ontario and Quebec and the

states of Michigan, Ohio, Illinois, Indiana, Minnesota, Wisconsin, New York, and Pennsylvania.

An election is scheduled in Ontario for the Fall of 2007 and while there is not quite the same volatility in the provincial legislature as there appears to be in the House of Commons (the provincial Liberals have a majority in Ontario), these laws on Ontario’s water seem to represent, at least in part, an effort by the Liberals to distinguish themselves from the Progressive Conservatives, who were in power at the time the drinking water system failed in Walkerton, Ontario. In light of the environment’s current popularity in political discussion, we may see more environmental rules in Ontario before the voters head to the polls in October.

Conclusion

Some have speculated that this is the first time in over a decade that environmental issues have enjoyed this much attention from politicians and political opinion-makers. Whether this will result in significant changes in Canada’s environmental laws and policies still seems unclear, at least with respect to highly divisive issues such as climate change. There appear to be many examples by all levels of government where political leaders make large announcements about how they are working hard to protect the environment, but closer scrutiny of plans and policies suggests the activities may not be as substantial as they seemed. If Canadians reward a political party with a majority of seats in the House of Commons, we may be able to predict the future environmental laws in Canada with greater accuracy. On the other hand, if environmental issues continue to be as divisive politically as they have been, in spite of the issue’s current popularity, the laws themselves may continue to include increased content intended to distinguish the party in power today from the one in power in the past, which may not always produce the most sound and reasonable environmental laws and policies for everyone.

DEVELOPMENTS IN EUROPE

Nigel Howorth
Clifford Chance LLP
London, United Kingdom

I. Climate Change

A. EU ETS

The European Union (EU) has agreed under the Kyoto Protocol adopted in 1997 to collectively reduce its greenhouse gas emissions by 8 percent from 1990 levels in the period 2008 to 2012. The EU has allocated each Member State an individual target in order to achieve this. To help meet these targets the EU has set up an emissions trading scheme known as the “EU ETS,” under a Directive adopted in October 2003. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

The EU ETS is split into two compliance periods. Phase 1 runs from Jan. 1, 2005 until Dec. 31, 2007, and Phase 2 runs from Jan. 1, 2008 until Dec. 31, 2012. Phase 1 is effectively a trial for when the Kyoto Protocol commitments become effective. Phase 2 coincides with the Kyoto commitment period. Compliance periods after 2012 have not yet been determined.

The EU ETS applies to specified heavy industrial activities and establishes a mandatory cap-and-trade system. Participants are allocated allowances for the purposes of their permit by their member state for the relevant compliance period. Each allowance permits the emission of one ton of carbon dioxide. Operators are required to surrender allowances equal to the total emissions of their installation in each calendar year. Companies emitting more than their allocated allowance can purchase additional allowances to cover their emissions for the year, and failure to comply results in a penalty.

Member States must produce a national allocation plan specifying the number of allowances they require for

the compliance period and the allocation per installation. The national allocation plan must be approved by the European Commission. Typically, emissions allocations are based on a company’s historical emissions.

To participate in the EU ETS an operator of an installation must have an account with the EU ETS Registry, an online register that records the number of allowances granted to operators and regulates the trading of allowances. Organizations and individuals can also open accounts if they wish to take part in emissions trading.

As part of the EU’s efforts to integrate its own scheme with its obligations under the Kyoto Protocol (Protocol), the Council of the European Union has adopted a Directive, referred to as the “Linking Directive,” which links the EU ETS with the Protocol’s project-based flexible mechanisms:

- (1) Projects to reduce emissions in developing countries (Clean Development Mechanism (CDM)).
- (2) Qualifying projects to reduce emissions in industrialised countries and certain countries in economic transition (Joint Implementation (JI)).

Directive of the European Parliament of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol’s project mechanisms 2003/0173(COD). The Linking Directive came into force on Nov. 14, 2004.)

The Linking Directive, which Member States should have implemented into national law by Nov. 13, 2005, recognizes credits generated through the Kyoto mechanisms as equivalent to EU emissions allowances and allows operators to surrender Certified Emission Reductions (CERs) or emission reduction units (ERUs) obtained through CDM or JI projects respectively, towards meeting their compliance targets for EU allowances under the EU ETS. Operators may use CERs or ERUs by requesting their relevant registry administrator to transfer CERs or ERUs from their operator account to their surrender account and once surrendered such CERs or ERUs will be treated as equivalent to the surrender of one EU allowance by

that operator towards its compliance targets. The Linking Directive requires that Member States include in their annual reports to the European Commission under the EU Directive details of CERs and ERUs used.

The Linking Directive enables European companies to meet their emissions targets in part through projects in other (non-EU) countries at a lower cost than implementing emissions-reduction projects at home. The Linking Directive is expected to increase the interest in emissions-reduction projects around the world and ultimately improve liquidity in, and decrease the price of, emissions allowances.

B. European Climate Change Programme

In October 2005 the European Commission launched its second European Climate Change Programme (ECCP II). Its purpose is to further explore cost effective options for reducing greenhouse gas emissions. The ECCP II was launched on Oct. 24, 2005 (see <http://ec.europa.eu/environment/climat/eccpii.htm>).

Five working groups have been set up to look at various issues of European climate change policy:

- WG1: ECCP I review (to include the review of the EU ETS)
- WG2: Impacts and Adaptation
- WG3: Carbon Capture and Geological storage
- WG4: Aviation
- WG5: Reduce CO₂ emissions from light duty vehicles.

C. The EU ETS Review

In preparation for the second phase of the EU ETS—2008-2012 (Phase II)—the EU Directive specifies a review process under which the European Commission had to submit a report to the European Parliament and the Council by June 30, 2006 containing the results of its review of the EU ETS, including any proposals to amend the scheme.

In response to this requirement, as well as to further issues in respect of the operation of the EU ETS raised

by the stakeholders, the European Commission issued its report “Building a global carbon market” on Nov. 13, 2006. (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Building a global carbon market—Report pursuant to Article 30 of Directive 2003/87/EC, COM(2006)676 final, 13.11.2006.)

The report concludes that it would be premature at this stage to make legislative proposals and, instead, announces a further review to be carried out. The intention is to provide a legislative proposal in 2007. The European Commission proposes that in most cases any adaptations to the Directive should take effect only at the start of the third trading period in 2013.

The additional review to be undertaken by WG1 of ECCP II will focus on four categories:

- (1) the scope of the Directive;
- (2) further harmonization and increased predictability;
- (3) robust compliance of enforcement; and
- (4) links to third countries.

Scope of the Directive

In an attempt to streamline the scope of the EU ETS, the review will seek to clarify the definition of combustion installation and consider the cost effectiveness of covering small installations in the EU ETS.

Secondly, the review will look at including other sectors and gases, such as N₂O from the production of nitric acid and methane from coal mines. An assessment will also be made as to what extent carbon dioxide capture and storage should be recognized in the EU ETS.

Further Harmonization and Increased Predictability

The allocation of allowances under the EU ETS is carried out at national level via the national allocation plans. Although certain allocation criteria were set out

in the Directive, it was found that the national allocation plans differed, and concerns have been raised as to the impact on the internal market. The review will look at sector-specific allocation methodologies and the rules on allocation at installation level.

The working group will consider better harmonization in the treatment of new entrants (in particular by having them buy allowances in the market or in an auction), auctioning and closure of installations.

The European Commission also regards further harmonization of the cap setting and allocation process, as well as increased predictability, as key issues to be explored. In particular, the review will look at the option of a single EU-wide cap and that of separate national caps after 2012.

Robust Compliance of Enforcement

The review will be looking at further harmonization of compliance and enforcement procedures. In respect of monitoring and reporting of emissions, they believe guidelines should be laid down in the regulation in order to aid harmonized application of legislation.

Linking with Emissions Trading Schemes in Third Countries

The review will consider extending arrangements for linking emissions trading schemes to other mandatory emissions trading schemes in third countries. This includes looking at linking with countries which have yet to ratify the Protocol (e.g., the U.S.A.). The working group was required to submit conclusions in the form of a report by June 30, 2007 but it is now likely to be late 2007 before it is issued.

D. Aviation

The European Commission proposed in December 2006 legislation to bring greenhouse gas emissions from civil aviation into the EU ETS. The proposed Directive will cover emissions from domestic and international flights between the EU airports from 2011 and all international flights to and from EU airports from 2012. Both EU and foreign aircraft operators would be covered. Airlines will be able to sell surplus

allowances if they reduce their emissions and will need to buy additional allowances if their emissions grow. Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, COM(2006) 818 final, 2006/0304 (COD).

The total number of emission allowances available will be capped at the average emissions level in 2004-2006. Some allowances will be auctioned by Member States but the overwhelming majority will be issued for free on the basis of a harmonized efficiency benchmark reflecting each operator's historical share of traffic.

To reduce administrative costs, very light aircraft will not be covered, and each operator will be administered by only one Member State. The proposed Directive is part of a comprehensive approach to addressing aviation emissions which also includes more research into greener technologies and improvements in air traffic management.

E. Energy Efficiency

The European Commission issued an Action Plan for Energy Efficiency (EEAP) in October 2006. Communication from the Commission—Action Plan for Energy Efficiency: Realising the Potential, COM (2006) 545 Final. This EEAP arises out of the Spring 2006 European Council's call for the adoption of an action plan to help realize the potential to save 20 percent of the EU's energy consumption by 2020. Presidency Conclusions of 23/24 March 2006. 7775/1/06 REV1 of 18.05.2006 and Green Paper on Energy Efficiency "Doing More with Less," COM (2005) 265 Final of 22.06.2005.

The EEAP details a number of policies and measures aimed at improving energy efficiency in the residential and commercial business sectors, manufacturing industry and transport. In particular, the EEAP proposes ten priority actions to be implemented as soon as possible by Member States:

- (1) Developing labelling and minimum energy performance standards for appliances and other energy-using equipment.

This will be achieved by utilising the Eco Design Directive to adopt standards for fourteen priority product groups by the end of 2008 and revising the Framework Directive on labelling. Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, OJ L191, 22.7.2005; Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, OJ L297, 13.10.1992.

- (2) Proposing EU minimum energy performance requirements for new and renovated buildings. The Energy Performance of Buildings Directive will be expanded and adapted. Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, OJ L1, 4.1.2003.
- (3) By 2008 developing minimum binding efficiency requirements for new electricity, heating, and cooling capacity lower than 20MW.
- (4) If necessary, developing legislation in 2007 to ensure the car industry achieves the 120g CO₂/km target by 2012.
- (5) Calling upon the banking sector to offer finance packages for small and medium enterprises to adopt energy efficiency savings.
- (6) Spurring energy efficiency in new Member States.
- (7) Integrating energy efficiency and environmental considerations into energy taxation.
- (8) Raising energy efficiency awareness by education and training.
- (9) Establishing a "Covenant of Mayors" from twenty to thirty of Europe's cities to promote and improve energy efficiency in urban areas.
- (10) Promoting energy efficiency worldwide through external trading partner countries and international organizations.

The action plan is to be implemented over the next six years.

F. Fluorinated Greenhouse Gases

In May 2006, a regulation was adopted dealing with certain fluorinated greenhouse gases. Regulation (EC) No. 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases, OJ L161/1, 14.6.2006.

The regulation is aimed at reducing emissions of certain fluorinated gases (hydrofluorocarbons, perfluorocarbons, and sulphur hexafluorides) to improve containment and monitoring of these gases and restrict their marketing and use. The regulation provides for the prevention of leakage of any of these gases from refrigeration, air conditioning, and heat pump equipment, including their circuits as well as fire protection systems.

Provision is made for the recovery of these gases from the cooling circuits of refrigeration equipment, equipment containing solvents, fire protection systems, and from high voltage switch gear. There are also provisions restricting the marketing and use of fluorinated gases and imposing a reporting requirement on anyone producing, importing, or exporting more than 1 ton per annum of any of the gases.

G. Climate Change Policy

The European Commission has on Jan.10, 2007 published a new climate change policy. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Limiting Global Climate Change to 20 Celsius, The way ahead for 2020 and beyond," COM(2007) 2 final. This contains significant new features with the ultimate aim of limiting global climate change to 2°C, including:

- (1) by 2020, the EU should reduce its emissions by at least 20 percent below 1990 levels, extending the reduction increasing to 30 percent assuming a satisfactory global agreement can be reached with other developed countries.

- (2) Improving the EU's energy efficiency by 20 percent by 2020, in line with the EEAP announced by the European Commission in October 2006.
- (3) Increasing the share of renewable energy to 20 percent by 2020.
- (4) Putting in place an environmentally safe strategy to promote the industrial use of carbon capture and storage technology.
- (5) Strengthening and expanding the EU ETS.
- (6) Limiting emissions from transport through action focusing e.g. on cars, civil aviation, and transport fuels.
- (7) Reducing CO₂ emissions from other sectors, eg., residential and commercial buildings, and emissions of other greenhouse gases from a range of different sources.

2. Chemicals

A. REACH

After some three years of negotiation, the EU's REACH (Registration, Evaluation and Authorisation of Chemicals) regulation was agreed in December 2006. REACH will ensure that new chemicals and some 30,000 chemicals currently used in everyday products will undergo health and safety testing, probably leading to a significant number of chemicals being withdrawn over time. Regulations (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1994/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC; Directive 2006/121/EC of the European Parliament and of the Council of 18 December 2006 amending Council Directive 67/548/EEC on the approximation of laws, regulations, and administrative provisions relating to the classification, packaging, and labelling of dangerous substances in order to adapt it to Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals

(REACH) and establishing a European Chemicals Agency.

REACH aims to achieve this by the establishment of a single system replacing the previous complex regime with five main constituents:

- (1) the registration in an EU database of basic information about all substances where the production or import volume exceeds 1 ton per year; information on hazards, risks, and uses will need to be passed down and up the supply chain, placing obligations on downstream users and distributors;
- (2) evaluation by the authorities of the information provided about chemicals with a view to determining whether chemicals should be subject to authorization or other restrictions;
- (3) specific authorization of substances giving rise to "very high concern"; this will be backed up with requirements to consider and substitute for less harmful alternatives for the most dangerous chemicals;
- (4) restrictions on use of the most dangerous substances, providing a safety net to ensure the risks of such chemicals are adequately controlled on a consistent EU-wide basis;
- (5) access to information—a far greater level of public access to information, in particular over the Internet, relating to chemical data and risks subject to protection of confidential business information.

The timeline for entry into force of the relevant obligations is as follows:

- June 1, 2007—REACH entered into force
- June 1, 2008—All new substances subject to registration under REACH
- June 1, 2008-End October 2008—Pre-registration of existing chemicals ("Phase-in chemicals") which allows full registration to be delayed until the Extended Deadlines
- November 2010/June 2013/June 2018—Extended Deadlines to register substances in quantities of 1000 (and the most hazardous substances), 100 and 1 tons and over, respectively

B. Globally Harmonized System of Classification and Labelling of Chemicals (GHS)

REACH is likely to be complemented by the adoption of the UNECE GHS system under a proposed new Regulation. Proposal for a Regulation of the European Parliament and of the Council on classification, labelling, and packaging of substances and mixtures Brussels 27.6.07 COM(2007) 355 final. This will replace the existing system of classification and labelling of chemicals under three sets of EC Directives. The Dangerous Substances and Preparations Directives 67/548/EEC and 1999/45/EC and the Safety Data Sheet Directive 91/155/EEC.

The new system, called “Globally Harmonized System of Classification and Labelling of Chemicals (GHS),” addresses classification of chemicals by types of hazard and proposes harmonized hazard communication elements, including labels and safety data sheets. It aims at ensuring that information on physical hazards and toxicity from chemicals be available in order to enhance the protection of human health and the environment during the handling, transport, and use of these chemicals. The GHS also provides a basis for harmonization of rules and regulations on chemicals at national, regional, and worldwide level.

3. Extended Producer Responsibility and Product Regulation

A. Energy Using Products

In 2005, the EU passed a directive establishing a framework for the setting of eco design requirements for energy using products in residential, commercial business, and industrial sectors. Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council, OJ L191, 22.7.2005. It is a framework Directive which in itself does not introduce directly binding regulations but enables implementing measures establishing eco design

requirements to be adopted by the European Commission. The rationale for the Directive is that it has been estimated that 80 percent of all product-related environmental impacts are determined during the product design phase. The Directive therefore aims to integrate environmental considerations into the product development process.

The Directive is, in principle, applicable to any product using energy to perform the function for which it was designed, manufactured, and put on the market. All energy sources are covered, although it is likely that only those using electricity, solid, liquid, and gaseous fuels will be the subject of implementing measures.

The European Commission announced in October 2006 that it would begin the process of adopting minimum energy performance standards for fourteen priority groups including boilers, water heaters, consumer electronics, copying machines, televisions, standby modes, charges, lighting, motors, and air conditioning. This work is now ongoing.

B. Waste Electrical and Electronic Equipment Directive Review

The Directive on Waste Electrical and Electronic Equipment (WEEE) requires producers to finance the collection, treatment, recycling, and recovery of used electronic and electrical equipment (EEE). Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment, OJ L037, 13.02.2003. The WEEE directive is based on the principle of “producer responsibility” and targets for reuse, recovery, and recycling of WEEE are introduced at Member State level. Producers will not only have to bear the costs of dealing with new products but also WEEE from EEE products already on the market.

The Directive requires the European Commission to submit a report to the European Parliament and the Council based on the experience of the application of the Directive. The report shall, as appropriate, be accompanied by proposals for the revision of the relevant provisions of the Directive and, in particular, of the collection and recovery targets.

In response, the European Commission has decided to examine a range of defined issues during 2006 and 2007. The review will look at four main areas:

Targets

The review will examine new targets for the quantities of Electrical and Electronic Equipment (EEE) collected in Member States and new targets for the recovery and the use and recycling of EEE, including targets for medical devices.

Article 5(5) provides that “The European Parliament and the Council, acting on a proposal from the Commission and taking account of technical and economic experience in the Member States, shall establish a new mandatory target by Dec. 31, 2008. This may take the form of a percentage of the quantities of electrical and electronic equipment sold to private households in the preceding years.” Article 7(4) provides that “The European Parliament and the Council, acting on a proposal from the Commission, shall establish new targets for recovery and reuse/recycling, including for the reuse of whole appliances as appropriate, and for the products falling under category 8 of Annex IA, by Dec. 31, 2008. This shall be done with account being taken of the environmental benefits of electrical and electronic equipment in use, such as improved resource efficiency resulting from developments in the areas of materials and technology. Technical progress in reuse, recovery, and recycling of products and materials, and the experience gained by the Member States and the industry, shall also be taken into account.

Scope

The review will examine the implementation of the WEEE Directive by Member States and, in particular, the exclusions. Options for change are stated to include the use of criteria to determine whether a product falls under the scope or not; the use of a fixed list of products; the inclusion or exclusion of certain types of equipment categories.

Producer Responsibility Provisions

The review will examine the implementation of the individual producer responsibility measures in each Member State. In particular, it will consider matters such as the interactions between different Member States’ approaches, inclusion of distance selling into the definition of producer, the use of the term “put on the market,” the financing obligations and the national producer register.

Treatment

The review will consider the impact of actual and future technologies on the treatment requirements specified in the WEEE Directive. In particular, it will look at requirements to use specific technologies or techniques and the inclusion of a set of criteria to determine if a treatment meets the requisite environmental standards and the inclusion of criteria on the required outputs of the treatment process.

4. Disclosure

A. Access to Information

Aarhus Convention

Since May 2005, the EU has been a party to the UN Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice of 25 June 1998 (the “Convention”). Two Directives concerning public access to environmental information and providing for public participation in respect of the drawing up of certain plans and programs relating to the environment work were adopted in 2003. These Directives relating to the first two “pillars” of the Convention required Member States to implement their provisions into national law by Feb. 14 and June 25, 2005 respectively. (Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and

amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.)

Extension to Community, Institutions, and Bodies

On Sept. 6, 2006, a regulation was adopted by the EU which applied the provisions of the Aarhus Convention to community institutions and bodies. Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies entered into force on Sept. 28, 2006 (OJ L 264, 24.9.2006, p.13). This regulation came into force on Sept. 28, 2006.

The regulation covers not only the EU institutions, but also bodies, offices, or agencies established by, or on the basis of the EC Treaty. All of these had until June 28, 2007 to adapt their internal procedures and practice to the provisions of the regulation. In addition, the Aarhus regulation enables environmental NGOs, meeting certain criteria, to request an internal review under environmental law of acts adopted, or omissions by, Community institutions and bodies.

B. Disclosure of Environmental Information by Companies

General

EU Directives and Regulations increasingly require Member States to implement measures to require reporting of environmental matters, for example, by the imposition of reporting conditions into operational permits. These requirements are usually passed down to companies by the national implementation legislation.

Business Reviews

The Accounts Modernisation Directive will require companies to report, where appropriate, on environmental performance in a business review forming part of its annual submitted accounts. The Directive required implementation by May 1, 2005.

Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L178, 17.07.2003.

The disclosure of environmental information will be required where it is necessary to understand the development, performance, or position of a Company's business. Companies are likely to need to report on their operational impact on the environment as well as impacts through use of natural resources and supply chain issues.

5. Clean-up Liability

A. Environmental Liability Directive

The most significant development in clean-up liability recently is the EU Environmental Liability Directive (the "ELD") which is gradually being implemented in the EU Member States. Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143/56, 30.04.2004. The ELD is concerned with the prevention and remedying of environmental damage to habitats, species, water, and land based on the "polluter pays" principle. An operator whose activity has caused the environmental damage or threat of is to be held liable; the Directive relates however only to damage caused after April 30, 2007. The ELD introduces two types of liability:

- (1) Strict (no-fault)—where damage is caused by a specified range of "occupational activities" (typically those regulated at the EU level); and
- (2) Fault-based—in respect of environmental damage to bio-diversity from all other occupational activities.

Operators will be required to carry out preventative measures or remediation. In respect of damage to land, the operator must remove the significant risk to human health caused by the damage. In respect of damage to water, species or habitats, then three types of measures may be required. In most cases, primary

remediation—restoring the baseline feature of the damaged resources will be required. An operator may also or alternatively have to carry out complementary or compensatory remediation where either the baseline cannot be completely restored or some interim compensation for interim loss of the resource is justified.

Environmental damage that is caused by an act of God or an act of war (including terrorism) is excluded. The Directive provides two defenses for an operator:

- (1) Where environmental damage is caused by a third party and occurs despite appropriate safety measures; or
- (2) Where the environmental damage arises because the operator is complying with an order of a regulatory authority.

Two further defenses can be adopted by Member States if they wish: where environmental harm is caused in compliance with a permit; or where the damage was not foreseeable in the light of the “state of art/knowledge,” provided in each case the operator was not at fault or negligent. These defenses could significantly dilute the impact of the Directive.

Members States can also require operators to put together financial security to guarantee they can satisfy future remediation obligations (including insurance policies) although this is not mandatory requirement of the Directive.

B. EU Soil Strategy and Proposed Soil Directive

The EU has adopted a soil strategy to look at an EU-wide approach to protecting/improving quality of soils. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Thematic Strategy for Soil Protection, COM/2006/0231 final 22.9.2006. A Directive has also been proposed to prevent deterioration of soil both in terms of its inherent quality but also in terms of the introduction of further contaminants. Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM/2006/

0232 final - COD 2006/0086. The Directive would require:

- (1) Member States to take appropriate measures to prevent specified “dangerous substances” being introduced into the soil;
- (2) Members States to identify “contaminated sites” (the criteria likely to be significant risk based on current and approved use) and create a national inventory of sites;
- (3) Listed polluting activities (current or historic) on sites to be mapped within 5 years;
- (4) All “contaminated sites” to be subject to investigation to identify contaminant levels of dangerous substances within 25 years (5 years: 10 percent of sites; 15 years: 60 percent of sites);
- (5) Seller or purchaser of a site to make soil status report available to the authorities and the other party—report has to be produced by authorized or approved body;
- (6) All contaminated sites to be remediated;
- (7) Member States to provide funding for Orphan Sites; and
- (8) National Remediation Strategy to be established within 8 years.

Until this proposed Directive is implemented, contaminated land will continue to be dealt with at national level.

The United Kingdom, for example, has a contaminated land regime which allows for the retrospective clean up of land. Local authorities inspect their land to identify “contaminated land” which is where significant harm is being caused, or there is a significant possibility of such harm being caused to the environment. The polluter is primarily liable but the owner of the land may be liable where the polluter cannot be found. A separate but associated regime exists for water pollution. Similar regimes which are variants of polluter pays regimes exist in other EU countries, e.g. Germany, Netherlands, Poland.

6. Officer/Director Liability

Officer and director liability for environment is not generally dealt with at EU level. It is a matter dealt with by Member States. This situation may have been

altered by the Environmental Liability Directive. This imposes liability for environmental damage on the “operator” of the economic activity that caused the damage.

An “operator” includes any natural or legal, private or public person who operates or controls any activity carried out in the course of an economic activity, a business, or an undertaking. An officer or director of the company could, if he controls the activity, be liable.

A further development in this area is the likely publication of a new proposal by the European Commission for a Directive on protection of the environment through the criminal law. Depending on the detail of the proposal and the current treatment of criminal law in the individual Member States, this may well lead to enhanced liabilities for directors and officers for certain types of serious environmental harm.

REVIEW OF CURRENT DEVELOPMENTS IN SOUTH AFRICAN ENVIRONMENTAL LEGISLATION

Adam Gunn
Edward Nathan Sonnenbergs Inc
Johannesburg, South Africa

Introduction

South Africa has a progressive and fairly comprehensive enviro-regulatory framework. The right to an environment that is not harmful to one’s health or well-being is enshrined in the Bill of Rights in the Constitution. It is also incumbent on the State to take reasonable legislative and other means which will give effect to this right.

This environmental right is then given further substance and form by other environmental statutes. A principle statute is the National Environmental Management Act (NEMA). The NEMA encapsulates the international best practice principles of economic growth based upon sustainable development and integrated

environmental management amongst others. The NEMA also creates an overarching framework within which government environmental authorities must make decisions regarding environmental development. And the NEMA creates the framework for further laws to be enacted which will allow for sustainable development.

Climate Change

South Africa is a party to the United Nations Framework Convention on Climate Control Change (UNFCCC) and the Kyoto Protocol. However South Africa is classified as a developing country for the purposes of the convention and thus there is no binding international obligation on South Africa to reduce its emissions of greenhouse gasses. A framework document was produced by the government department responsible for climate control change in 2004. The document was entitled “A National Climate Change Response Strategy for South Africa.” The document is unfortunately only, as the name suggests, a response strategy to the effects of climate change and does not attempt to address the primary issue of reducing greenhouse gas emissions. As a developing country, South Africa stands to benefit from the Clean Development Mechanism (CDM) under the Kyoto Protocol. Unfortunately very limited progress has been made in this regard with only a few projects thus far being registered under the CDM. A further handful of projects are in the process of obtaining domestic and international CDM certification.

Limited trade has taken place in terms of the opportunities created by the Kyoto Protocol namely in carbon trading. South Africa mainly sees the effects of the Kyoto Protocol trading mechanisms through the CDM whereby credits are bought in South Africa and traded back into larger markets such as the European Union market. Private individuals have attempted to set up limited trading schemes in various manners such as through South Africa’s securities exchange. The schemes have met with limited success.

An argument could be sustained to the effect that the Constitution places a positive duty on the State to protect its citizens from the effects of global warming

and thus also to implement policies to reduce greenhouse gas emissions.

Chemicals

South Africa's chemical legislation is rather fragmented and is to be found in various environmental impact legislation as well as in Hazardous Substances legislation. Standard legislation applicable to the remediation of sites contaminated with chemicals does apply. One of the difficulties experienced in this regard though is that specific standards are not set by the relevant authorities in order to determine what the acceptable levels of pollution are for individual chemicals in specific areas. Therefore international best practice and standards are often referenced for such levels.

The law regarding remediation of specific sites and reuse and recycling of all waste products is currently being overhauled in the form of the National Waste Management Bill which has been released for public comment. Amongst other important concepts to be found in the draft legislation are retrospective liability for rehabilitation of contaminated sites and industry specific waste management plans.

Where the use of chemicals affects a water resource, levels of pollutants are controlled by the National Water Act. Those wishing to discharge pollutants into water resources within acceptable limits are charged according to a tariff set by the Department of Water Affairs. Similarly chemicals released into the atmosphere are regulated by air pollution legislation. A new comprehensive piece of legislation was released in this regard in 2005, however the act is yet to be brought fully into effect.

South Africa does not have specific extended producer liability legislation such as is provided for in the European Union Registration, Evaluation Authorisation of Chemicals (REACH) legislation. In fact many South African companies have made submissions and continue to make submissions to the effect the REACH would detrimentally affect their business operations as compliance with REACH standards would not be feasible.

Extended Producer Responsibility and Product Regulation

The National Waste Management Bill referred to above attempts to extend producer responsibility for certain categories of product by statutory regulation. Previously producer responsibility was regulated through a consumer protection act as well as by the common law.

In terms of the Waste Bill, authorities may identify a product or class of products to which extended producer responsibility applies and what measures should be taken. Indicative measures that may be imposed by the authorities include: waste minimization programs, financial contributions to any fund that has been established to minimise waste and public awareness program regarding the impacts of waste.

Environmental Disclosure

The private sector has for the last few years, in accordance with the principles of sustainable development, reported on their impact on the environment in corporate sustainability reports. The trend seems to be changing, however, as more companies become interested and involved in accounting properly for environmental impacts. These principles are laid down in the International Financial Reporting Standards (IFRS). The South African Companies Act requires that all companies report in accordance with Generally Accepted Accounting Practice. In addition more companies, especially those with international associates, are reporting in terms of IFRS.

In terms of the State and its obligation to account for environmental impacts, State of The Environment Reports are prepared by the State. In addition, different departments responsible for various sectors of the environment produce their own sector-specific reports.

Clean Up Liability

The duty to rehabilitate environmental pollution and degradation is a fundamental principle of South African

Environmental Law. It is one that is often brought to the fore due to South Africa's mining-based economy and numerous old mining operations with substantial legacy issues and the associated duty to remediate.

A fundamental interpretational difficulty that has been encountered in regard to the duty to remediate is whether environmental statutes can apply retrospectively. In South Africa, there exists a common law presumption against retrospectivity unless the legislation specifically indicates otherwise. A major judgment in this regard which was handed down last year stated that South Africa's environmental clean up legislation affirmed this common law principle and held that as there was no specific indication in the legislation that it was indeed intended to apply retrospectively it would be unfair to force companies with historic operations to comply with current environmental standards. The Court thus held that for operations commenced prior to the enactment of the rehabilitation statute, there was no corresponding duty to remediate.

New legislation which is currently being drafted has taken cognisance of this judgment and certain sections dealing with rehabilitation liability specifically state that they are of retrospective application.

South Africa does not have any specific "Superfund" type legislation which has the consequence that where those responsible for rehabilitation cannot be traced, government must shoulder the duty to rehabilitate. With more than 100 years of intensive mining, the rehabilitation obligations facing the State are daunting.

Officer and Director Liability

The concept of separate legal persona (*vis-à-vis* a company and its directors) *prima facie* prevents directors from being held personally liable for the acts of a company. However under certain circumstances (such as fraud, dishonesty, or negligence) a Court will lift the corporate veil and hold directors personally liable. Recent Court judgments have affirmed this principle from an environmental perspective. One such recent case involved the pumping of water from mined-out gold mines west of Johannesburg. The Department of Water Affairs had issued directives against a number

of gold mining companies confirming their duty to pump out inflowing water in order to ensure that operating mines downstream were not flooded. The pumping costs amounted to a considerable amount. In order to escape their duties as directors, certain directors resigned from the dormant mining companies stating that it was the duty of the operating mining companies to ensure their mines were not flooded. The Court disagreed and held that the fiduciary duties of the directors prevented them from resigning and held that they could be held personally liable for the water pumping obligations of the company.

Certain legislation such as the Minerals and Petroleum Resources Development Act specifically provides that directors are strictly liable for the environmental damage caused by a company notwithstanding that they may not have had knowledge of the company's acts. This legislation is yet to be tested in our Courts and specifically whether or not it will stand up to constitutional scrutiny.

CHINA: AN INTRODUCTION TO CURRENT ENVIRONMENTAL TRENDS

Charles R. McElwee, II
Squire, Sanders & Dempsey, LLP

China's Environmental Regime

China began the development of a legal regime devoted to environmental regulation and protection in 1989 when the Environmental Protection Law of the People's Republic of China passed into law (after a 10 year "test" implementation). In the early 1990's, China was heavily influenced by American media-specific, end-of-pipe regulatory models. Thus, beginning in 1995 China enacted in quick succession a Clean Air Act (1995), Solid (and Hazardous) Waste Act (1995), and significant amendments to the Clean Water Act (1996). The Criminal Law was amended to include "serious" environmental damage as a crime in 1997. In 1998 the State Environmental Protection Administration (SEPA) was upgraded into a full ministerial level agency, although the Minister in charge

of SEPA still does not have a permanent seat on the State Council—the highest state administrative body which is charged with ensuring the implementation of the laws enacted and decisions adopted by the National People’s Congress and its Standing Committee.

As it became clear that China’s growth within the foreseeable future would outstrip both its resources and its ability to control pollutants at pipe end, it began to shift its attention in the late 1990’s towards the “sustainable development” models of environmental regulation championed by several European Union countries and Japan. Thus, in 2002 China adopted a Clean Production Law (effective 2003), which requires manufacturing enterprise “to reduce pollution at its source, to utilize resources more efficiently, and to reduce pollution generated in the production and use of products and in the provision of services.” China is currently drafting a “Circular Economy” law which will provide a legal framework for its national sustainable development strategy. The provisions of the current draft of this law reportedly extend the requirements of the Clean Production Law to more segments of the economy, including government, and impose some specific recycling requirements. A final draft was scheduled to be submitted to the National People’s Congress Standing Committee for review in August, and it is expected to pass at the end of the year.

While China has a fairly comprehensive set of environmental laws, these laws are not nearly as detailed as U.S. laws. They set forth general policy and leave significant areas to be fleshed out by regulations. However, the development of environmental regulations in China has proceeded very slowly. As of 2005, China reported that the State Council had promulgated only fifty administrative environmental regulations (although significantly more had been adopted at the ministerial, regional, and local level). The dearth of regulations, combined with the lack of binding, or even persuasive, judicial precedent means that attempting to discern and comply with China’s environmental laws and regulations requires a high tolerance for ambiguity. To further complicate matters, Chinese laws and regulations are not codified in any central location similar to the United States Code and

Code of Federal Regulations. Consequently, at times, simply finding the applicable Chinese requirements can be a challenge.

Enforcement has traditionally been the weakest link in China’s environmental regulatory chain. China does not report annual “enforcement” statistics, and obtaining accurate enforcement information is impossible. The consensus is, however, that environmental enforcement in China is lax and the national authorities have candidly admitted an inability to ensure a concerted enforcement regime at the local level. This inability stems from a lack of resources, a historical preference for economic growth above all else, local protectionism, and the lack of effective NGOs and legal vehicles for citizen participation in the enforcement process.

SEPA is the primary environmental regulatory body in China, but it has only 2,200 employees, with 220 based in its Beijing headquarters and the balance working at various national offices and centers affiliated to SEPA. Except for the highest profile matters, however, SEPA is not directly involved in administering environmental regulations or in issuing permits to regulate air and water emissions and hazardous and solid transportation. These tasks are handled by local Environmental Protection Bureaus (EPBs), which exist at the provincial, county, and township levels. While staffing levels at the EPBs are an issue, the biggest problem is lack of control by the national and, in many instances, even provincial authorities. The local EPBs, while theoretically taking direction from SEPA, are funded (and thereby controlled) by the local governmental authorities. For these local authorities, strong GDP growth is required to ensure a high level of local tax revenues and promotion within the political apparatus. In addition, a lack of public awareness (and avenues for effective public participation) and “relationships” between the local regulators and the regulated community, have created a situation where compliance with existing environmental regulations is lax at best.

The national government is taking measures to correct the enforcement situation. It has, for instance, started to include certain environmental indicators among the

factors considered when evaluating the performance of local officials. It had also enlisted the centrally-controlled banks in an effort to prevent loans to companies that can not certify their environmental compliance. However, fundamental changes to the current local enforcement model and remediation of the environmental harm already done will require the expenditure of significant amounts of financial and political capital. Despite the fact that the highest levels of the China's leadership are extolling the need for environmental compliance, there is no sign that the necessary expenditures will be made anytime soon.

Extended Producer Responsibility

China has become a world leader in the manufacture and consumption of electrical appliances and information products. The government now recognizes that such products present serious environmental challenges at the end of their life cycle and has taken steps to address these challenges. As noted above, China has begun to rely more on European models for its environmental regulation than on U.S. models. One area where this is most noticeable is in the area of product stewardship. The government has begun to formulate regulations that draw heavily upon European Union regulatory models particularly Directive (2002/95/EC) on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and Directive (2002/96/EC) on Waste Electrical and Electronic Equipment (WEEE).

The most significant development in this field in the past year has been the implementation of China's Measures for the Administration & Control of Pollution by Electronic Information Products (usually referred to as China RoHS, although it is not an exact analogue of that European Directive) administered by the Ministry of Information Industry (MII). China RoHS does not impose post-consumer obligations; however, it reflects China's move toward complete life-cycle product stewardship.

China RoHS is to be implemented in two phases. The first phase applies to "producers and importers" of "electric information products" (a specific list of which has been provided by the MII) that are placed "on the

market" in China after March 1, 2007. Such producers and importers must mark their products with the appropriate "recycling logo" and their "Environmental Friendly Use Period" (EFUP). The EFUP is, essentially, the period during which the product can be used without the release of any toxic or hazardous substances it may contain. In addition, the producer or importer must specify in the product instructions the names and contents of toxic or hazardous substances (lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), and polybrominated diphenyl ether (PBDE, not including decabromodiphenyl ether) contained in the product and identify the product parts where those substances are located. *Marking for Control of Pollution Caused by Electronic Information Products, SJ/T 11364-2006* (Nov. 11, 2006), Section 6.2.2. The product or product packaging must also contain the date on which the product was manufactured.

Additional requirements, or Phase 2 compliance, will only be imposed upon products set forth in the "Catalogue for Priority Prevention of Pollution from Electronic Information Products." This catalogue is currently empty, but will be subsequently populated with products with mature technologies where the control or elimination of hazardous substances has been demonstrated to be economically feasible. Products listed in this catalogue must have either eliminated the use of toxic or hazardous substances in the product or have met the relevant restriction standard before they can be sold in China.

In September of 2004, China issued draft regulations comparable to the EU's WEEE Directive. In August 2006, five central ministry level government agencies (lead by the National Development Reform Commission (NDRC)) jointly issued a new policy regarding the control of electronic waste: "Policy on Pollution Prevention Technology for Waste Domestic Appliance and Electronic Product" (WEEE Policy). The policy itself is not a law or regulation, but a guideline setting forth the government's new plans for the WEEE regulatory framework. The final WEEE regulation is being developed and is expected to be issued soon.

China's WEEE regulation will focus on domestic appliances and certain electronic products. Domestic appliances include TVs, air conditioning equipment, dishwashers, and others. Electronic products cover information technology products, primarily computers and other office equipment. Hazardous substances are defined as the same as those covered by China's RoHS regulations.

The objectives of China's WEEE regulations will be to reduce and recycle the amount of the e-wastes. To achieve these objectives, the government intends to impose a suite of obligations on manufacturers, importers, sellers, and consumers of electronic products. The final regulation will encourage the replacement of hazardous materials in electronic products, longer-life product designs, increased recyclability of products, and the use of environment-friendly packaging. The regulations will also address how to handle the transportation and storage of e-waste to guarantee no hazardous material leaks to the environment. "Producers" of covered products will be required to (i) identify recyclable and non-recyclable components of the products, (ii) reduce usage of environmentally harmful components, (iii) arrange for availability of disassembly for recycling and proper disposal of products and their components at the end of their usage life, and (iv) avoid incineration of recyclable products.

Renewable Energy and Energy Efficiency

China must rely on its abundant coal reserves to supply the increasing demands of its booming economy for electricity. This reliance contributes significantly to China's pollution woes. Consequently, China has taken steps to increase both the use of renewable energy in powering its economic growth and in improving the efficiency of its power use.

China's Renewable Energy Law (effective Jan. 1, 2006) aims to increase China's use of renewable energy from the present 10 percent to 20 percent of total energy consumption by 2020. The law:

- Grants grid access rights to electricity generated by renewable energy
- Requires existing large power producers to

enter power purchase agreements with renewable energy power providers

- Imposes mandatory renewable generation quotas on large power producers
- Provides governmental subsidies and other support for renewable energy projects
- Grants preferential tax and loan conditions
- Provides for "preferential" pricing for renewable energy through a government guided and government fixed pricing scheme

A total of twelve major implementing regulations are to be drafted to support this law, of which half have been issued to date. While the Renewable Energy Law was universally applauded when it was first passed, concerns have recently been voiced about the failure of the pricing mechanisms to provide the necessary incentives to encourage renewable energy projects, especially wind projects. Once this and several other issues are resolved, however, China's renewable energy market will become one of the largest in the world.

In addition to encouraging the use of renewable energy sources, the Chinese government is giving unprecedented priority to energy conservation. China uses 3.4 times the world average of energy to produce one unit of GDP. This is inefficient, expensive, environmentally disastrous, and a potential national security threat for an energy importer like China. The country's 11th Five-Year plan (2006-2010), therefore, has set ambitious national goals for energy efficiency improvements (20 percent by 2010) and assigned each province and provincial-level city an energy reduction target (ranging from 30 percent to 12 percent). Most significantly, China will start to evaluate the performance of local officials based, in part, on whether they meet energy conservation goals.

The legal framework for China's energy efficiency drive was enacted nearly 10 years ago, but the Energy Conservation Law (effective Jan. 1, 1998) has not been effectively implemented and applies primarily to energy saving in the manufacturing sector. Amendments to the law are currently being developed (and are planned to be adopted by the end of the year) which will expand the coverage of the law to include public

buildings, transportation, government agencies, and utilities. The amendments will reportedly require an energy conservation evaluation and examination system and impose standards and certifications upon a wide-range of energy using enterprises. The government is also working on preferential policies such as financial subsidies and tax breaks to encourage the construction of energy-saving buildings.

In addition, China plans to invest 180 billion U.S. dollars over the next 13 years to reduce energy consumption in existing buildings and require companies undertaking construction projects to live up to the energy conservation promises made in their project approval documentation. While new buildings in China are required to be designed with certain energy conservation measures, barely half of them are actually built that way, according to official statistics. The Ministry of Construction inspected over 600 construction projects around the country last year and ordered those that failed to comply with energy saving codes to make the improvements necessary to meet the standard.

Chinese Chemical Regulation

China is the third largest producer and the second largest consumer of chemicals in the world. Consequently, it has a reasonably well-developed chemical regulatory scheme. It has acceded to the Basel, Rotterdam, and Stockholm Conventions, and the Montreal Protocol, and it will implement by 2008 the Globally Harmonized System of Classification and Labeling of Chemicals. It also has rules, for instance, requiring the use of Material Safety Data Sheets (General Rules for Preparation of Chemical Safety Data Sheets for Hazardous Chemicals (effective June 1, 2000)) and governing hazardous product labeling (General Rules for Preparation of Precautionary Labels for Industrial Chemicals).

The law with the most pervasive impact upon chemical use in China regulates the introduction of “new” chemicals. China’s Provisions on the Environmental Administration of New Chemical Substances (effective 2003) established a regulatory framework that requires notification and registration before any new

industrial chemical can be used in or imported into China. Any substance not listed in the Inventory of Existing Chemical Substances (IECSC) (which was developed over a nine-year period prior to the enactment of the above legislation) is considered a “new” chemical substance and requires registration. If the notification registration is approved, a Registration Certificate is issued which establishes the approved uses of the chemical and the quantities which can be produced or imported. The certificate remains valid until SEPA adds the substances to the IECSC (it is planned to be updated approximately every two years).

China has established several categories of notification depending on the volume and/or the use of the chemical produced or imported. The categories are:

- Typical (< 10 tons/year)
- First level (10-1000 tons/year) & Second level (> 1000 tons/year)
- Simplified (for chemicals listed on inventories in other countries; the chemical must be on at least four other inventories, and an application form and a domestically conducted eco-toxicity test are still required)
- Exempted (for scientific research and > 100kg, polymers meeting certain criteria, R&D samples < 1000kg (if the exemption is granted it lasts for only one year))

Typically, a new chemical needs to have physico-chemical, toxicity, and eco-toxicity data for the application, as provided in guidelines from SEPA’s Chemical Registration Center (CRC), www.crc-sepa.org.cn/. Certain eco-toxicity tests (either acute fish toxicity or biodegradation test done in China using Chinese species) must be performed in China by a Chinese-accredited laboratory (there were seven accredited labs in China as of August 2006), and some additional tests may be required. The review period at CRC from application (with test results, including eco-toxicity tests) to certification lasts up to 120 days. Each violation of the law is subject to fines up to RMB 30,000 (\$3,800) and SEPA may halt manufacture or import and refuse approval of future notifications for up to three years.

The law differs from similar regulations elsewhere in the world in two major respects: (1) eco-toxicity testing in a Chinese laboratory is mandatory, regardless of whether similar tests have already been conducted elsewhere, and (2) exemption does not come automatically; an application for exemption must be submitted and approval usually takes at least two months.

Environmental Disclosure

Corporate public environmental reporting and disclosure are not currently mandated, except in limited situations, in China and has not been widely, voluntarily implemented. Most environmental information released by companies is provided solely to governmental environmental agencies for the purpose of regulatory compliance. This information is not designed for public disclosure and generally is not shared with the public. This state of affairs is gradually changing with increased discussions in China concerning Corporate Social Responsibility (CSR), demands of financial and other investors for more complete disclosure of environmental risks, and tentative steps at requiring the disclosure of some environmental information in some specific situations.

One such tentative step is found in the Clean Production Law (effective Jan. 1, 2003) (Article 17) which provides that local EPBs “may publish a list of the names of heavily-polluting enterprises in local primary media based on the pollution discharge conditions of such enterprises, where the pollutants discharged exceed the standards or the total volume of pollutants exceeds regulatory limits, in order to provide the public with a basis for policing enterprise implementation of cleaner production.” If a company is named on such a list, it “must periodically publicly publish the status of their discharge of their major pollutants, and submit to public supervision.” Article 31.

Another tentative step requires environmental disclosure in the context of an Initial Public Offerings (IPO). The China Securities Regulatory Commission (CSRC) has promulgated regulations which require that the Prospectus of the IPO analyze the

environmental risks (including the political risks caused by environment issues) of the projects for which the company seeks to raise money from the stock market. The company must also present a statement confirming that its current business meets all applicable environmental standards and the proposed projects for which it seeks to raise money from the stock market will meet those standards. Companies in a “polluting industry” must provide documents issued the provincial-level EPB confirming current compliance.

Conclusion

China’s legal framework for addressing environmental issues has developed in tandem with its economy. On paper China’s environmental legal system is approaching developed nation status, although lax enforcement has made its environmental regime more of a “paper tiger.” The foreign investor in China, however, must comply with the laws on the books, and new programs are constantly being implemented and the pace of regulation promulgation is quickening. This fact has created challenges for foreign companies operating in China, but it also creates opportunities for those in businesses, such as renewable energy or energy efficiency, which can help China meet its environmental goals.

Charles R. McElwee *acts as counsel in Squire, Sanders & Dempsey L.L.P.’s Shanghai, China office.*

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY,
AND RESOURCES**

**37th Annual Conference on
Environmental Law
March 13-16, 2008
Keystone, Colorado**

SAVE THE DATE!