SQUIRE SANDERS HAMMONDS | LEGAL COUNSEL WORLDWIDE

ENVIRONMENTAL, SAFETY AND HEALTH REVIEW – UK

Spring 2011

Welcome to the Spring edition of the Squire Sanders Hammonds *Environmental, Safety and Health Review – UK,* our quarterly update on developments in the fast moving area of environment, safety and health and other regulatory issues. This is our first edition following the combination of Hammonds and Squire Sanders on 1 January 2011 and we are delighted to include a contribution from Karen Winters, the Chair of the Environmental, Safety and Health Practice Group. For further information on any of the articles included in this review, please feel free to contact the individuals named after each article.

Inside:

DECC Issues Discussion Papers on CRC Simplification 1

REACH Update 3

Seeking to Cut the Red Tape – US Announces Regulatory Review 4

A Miscellany: The Protection of Freedoms Bill 5

DECC Issues Discussion Papers on CRC Simplification

Anita Lloyd – Birmingham

On 25 January 2011 the Department for Energy and Climate Change ("DECC") published five discussion papers on how the Carbon Reduction Commitment Energy Efficiency Scheme ("CRC") could be simplified.

The government has specifically expressed that these papers do not set out government policy. Rather, they indicate the areas of the CRC that the government considers a priority for simplification and have been issued to generate informal discussion between the government and participants. The papers set out a variety of options but make it clear that these are not exhaustive, and that feedback on other options and ideas is also welcomed.

Ideas for simplification that arise from these discussions papers will help inform further amendments to the CRC. However, any formal legislative proposals will be the subject of public consultation, with the intention that any changes will come into force before registration for phase 2 begins in April 2013.

The five discussion papers cover the following areas:

Private Sector Organisation Rules

The rules which define a participating organisation are complex and difficult to apply to many business structures, particularly private equity trusts and overseas parents. The current rules also do not properly address some business changes such as significant asset transfers. This discussion paper accepts that there have been unanticipated levels of administrative burden for some participants, and sets out six possible options for reform including:

- assessing qualification for the CRC at an individual undertaking level with the option to group undertakings together (although the qualification threshold would be lowered to maintain emissions coverage);

- introducing new provisions on the treatment of assets held in trust to respect the 'separateness' of individual trusts; and
- changes to the rules on 'designated changes' to accommodate a wider variety of business changes and structures.

Supply Rules

Stakeholder feedback has apparently indicated that the rules on responsibility for supplies of energy have been one of the main complexities. The government is concerned that this confusion may also contribute to emissions coverage being lost from the CRC as participants struggle to identify the supplies for which they are responsible. The discussion paper proposes eight possible options for reform including:

- determining responsibility solely by reference to the counterparty to an energy supply contract (without requirements for payment and metering);
- applying the CRC to electricity and gas only and excluding other fuels; and
- allowing organisations to decide on CRC responsibility between themselves, as long as the relevant supplies were still included within the CRC.

One of the options in the supply rules discussion paper is potentially the most significant of the potential reforms. This option would assign responsibility for energy on the basis of consumption rather than supply. Therefore, landlords would no longer be responsible for energy supplied to them but consumed by their tenants.

The apparent willingness of DECC to consider this option is somewhat surprising. Previous calls from the real estate sector to assign responsibility on the basis of consumption were consistently resisted. DECC now says that it "welcomes ideas on how such an approach could work across the CRC sectors" but does make specific mention of the potential difficulty where a tenant's exact consumption is not accurately measured.

Qualification Criteria

According to DECC, some organisations are delaying the installation of 'smart meters' because supplies through them would contribute to their CRC qualifying supplies. DECC therefore proposes amending the qualification criteria to apply to electricity supplied through settled half hourly meters only. This would exclude for qualification purposes any supplies through other half hourly meters (such as smart meters). If this option is taken forward, the current 6,000 MWh qualification threshold would be reduced in order to maintain existing levels of participation and emissions covered by the CRC.

Overlap With Other Regulation

The CRC places a number of requirements on organisations which are also subject to the EU Emissions Trading Scheme ("EU ETS") and Climate Change Levy Agreements ("CCA"). The options contained in the discussion paper to reduce the administrative burden caused by these overlapping schemes include:

- a blanket exclusion from the CRC for organisations which are in the EU ETS or have a CCA;
- excluding CCA supplies at qualification, and (where an organisation still qualifies for CRC) removing the requirement to report on EU ETS and/or CCA emissions; or
- more fundamentally, merging the CRC with other measures such as the Climate Change Levy, Display Energy Certificates, or any new mandatory carbon reporting obligation.

Timing and Frequency of Allowance Sales From 2012 Onwards

This paper looks at allowance sale issues both in the introductory phase and in later phases.

Regarding the introductory phase, the main issue is the need to transition from the planned end of year 'compliance' sales in the introductory phase, to advance 'forecast' sales in phase 2 and beyond; whilst avoiding a compulsory double sale in any year.

Regarding phase 2 onwards, concerns have been raised by participants and the UK Climate Change Committee that the auctioning of allowances from the commencement of phase 2 of the CRC in 2013 would add further complexity. This paper indicates that DECC

is open minded about the methods for sale in phase 2 and subsequent phases, but sets out a number of options including various auctioning methods (such as auctions with a minimum price), sales of unlimited allowances at a fixed price, use of a carbon exchange, and "more fundamental reform" of the CRC (presumably meaning the removal of allowance trading altogether).

COMMENT

The discussion papers contain many proposals for reform, some of them radical, and they do not rule out further proposals being considered as part of the simplification review. However, for the time being all participants need to continue to comply with the existing CRC as set out in the current legislation.

Although uncertainty over the eventual form and operation of the CRC continues, and may only serve to impede measures to address energy efficiency and emissions, DECC does now appear willing properly to consider the concerns and potential reforms that have been raised by organisations for some time. DECC has requested feedback by 11 March 2011.

CRC AMENDMENT ORDER

On a connected note, the CRC Energy Efficiency Scheme (Amendment) Order 2011 has been published and came into effect on 1 April 2011.

This implements the interim changes proposed in the CRC consultation of 17 November 2010:

- **Changes to the Timing of the CRC** – extending the introductory phase by one year so that it will end on 31 March 2014, rather than 31 March 2013. Phase 2 (and subsequent phases) will be realigned so that the qualification year for phase 2 will be 2012/13 rather than 2010/11; registration for phase 2 will be postponed for 2 years to take place in April-September 2013; and the first surrender of allowances in phase 2 will be for compliance year 2014/5.
- **Removal of the Requirement to Make Information Disclosures** – the CRC originally required organisations that had at least one settled half hourly meter but had qualifying electricity supplies of less than 6,000 MWh in the relevant qualification year to make an information disclosure. The government has removed this requirement for phase 2 onwards.
- **Technical Corrections** – there are a number of minor technical corrections, including allowing participants claiming a CCA exemption at registration to choose how they report on their CCA emissions and amending the provision regarding landlords for a specific issue relevant to Northern Ireland Civil Service Buildings.
- **Amending the Division of Responsibility Between the Three Administrators** – moving some of the CRC responsibilities between the Environment Agency, Scottish Environmental Protection Agency and the Chief Inspector Northern Ireland, depending on a participant's location.

Anita Lloyd
anita.lloyd@ssd.com
+44.121.222.3504

REACH Update

Dave Gordon – Birmingham

Intermediates

The revised REACH guidance on intermediates is likely to have a significant impact on small and medium-sized enterprises and the fine chemicals sector.

Intermediates handled under strictly controlled conditions have reduced information requirements under REACH. Last year the regulators decided to revisit both the definition of intermediates under REACH, and to clarify what constitutes strict control. The updated guidance on intermediates was published in December 2010.

Trade organizations in the sector believe that the costs for either updating an intermediate dossier or investing in modifications to the installation in line with the new guidance will not be a viable option for many companies, especially SMEs.

Under the new guidance hazard data cannot be used as part of a containment strategy and that the use of local exhaust ventilation is considerably restricted .The

removal of these 2 approaches significantly reduces the flexibility in the implementation of 'strictly controlled conditions' and as a result, both non-hazardous and hazardous substances will often be treated in the same way when they are used as intermediates under 'strictly controlled conditions.'

The sector is also concerned that the revised guidance will mean additional data will be needed to update REACH registration dossiers, together with a detailed description of the applied 'strictly controlled conditions', which is beyond the requirements of the original REACH legal text.

Downstream users will also have to re-examine if their intermediates still fall under 'strictly controlled conditions' as defined in the revised guidance.

Extended Safety Data Sheets

Many of the substances registered in 2010 were classified as SVHCs so companies in the supply chain must now provide their customers with updated SDSs. For hazardous substances produced in volumes of 10 tonnes a year or more, exposure scenarios must also now be attached to the SDS.

Exposure scenario should include the uses and activities covered, and the operating conditions and risk management measures required to ensure safe use for a particular scenario. Unfortunately, the sector has dealt with exposure scenarios using a variety of formats so downstream users can expect to see a range of documents further adding to the complexity of the documentation required.

Dossier Updates

Although the deadline for 2010 registration has passed REACH registrants still need to update and mange their dossiers.

Article 22 of the Regulation specifies that registrants are expected to update:

- New uses
- New hazard/exposure information
- Changes in classification and labeling
- Chemical safety report changes, such as exposure scenarios
- The legal entity following a merger or acquisition or following the appointments or change of an only representatives
- The composition of the substance if it changes significantly

There is no time limit for these updates so the lead registrant should put procedures in place to monitor the areas that may change and budget accordingly.

Downstream User/Intermediates

According to research hundreds of substances registered in 2010 as intermediates are in fact used as non-intermediates by downstream users. Using substances registered as intermediates in non-intermediate applications will still be lawful provided volumes do not exceed the 1,000t/y threshold, but downstream users should re-check the registration status of all their substances and check tonnage use where appropriate.

The above issue is likely to impact most on chemical formulators such as detergent makers, paint manufacturers, construction chemicals and adhesive companies.

Dave Gordon
dave.gordon@ssd.com
+44.121.222.3204

Seeking to Cut the Red Tape – US Announces Regulatory Review

Karen Winters – Columbus

Earlier this year, the US announced the implementation of a regulatory review to improve regulation, provide greater co-ordination amongst agencies and reduce the regulatory burden while still promoting public freedom of choice. Karen Winters, Chair of the Squire Sanders Environmental, Safety and Health Practice Group and a partner in our Columbus office, looks at the implication and impact of the US Administration's latest issuance.

On January 18, 2011, President Obama announced the issuance of Executive Order 13563, "Improving Regulation and Regulatory Review," which outlines the Administration's principles to improve regulation and requires all federal

agencies to conduct a "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand, or repeal them in accordance with what has been learned." [1] Executive Order 13563 is essentially a restatement of Executive Order 12866 issued by President Clinton in 1993 and includes requirements that were part of the 1980 Regulatory Flexibility Act but were never fully implemented in earnest. Executive Order 12866 requires that each agency:

- propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and cost are difficult to quantify);
- tailor its regulations to impost the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- identify and assess incentives to encourage the desired behavior, such as use fees or marketable permits, or providing information upon which choices can be made by the public.

Executive Order 13563 reaffirms these principles and further requires that regulations be adopted through a process that involves public participation, that will require

- greater coordination across agencies to reduce redundant, inconsistent or overlapping requirements;
- agencies to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and
- agencies to ensure the objectivity of any scientific and technological information and processes used to support the agencies' regulatory actions.

Finally, Executive Order 13563 requires all federal agencies to develop and submit a preliminary plan documenting that agency's plan to periodically review its existing significant regulations within one hundred twenty (120) days of the order to eliminate the objectives outlined above.

In response to Executive Order 13563, US EPA issued a request for public input on its plan for periodic review of its significant regulations. [2] US EPA held a series of listening sessions and town hall meetings and accepted written comments through April 4, 2011. [3] Shortly after Executive Order 13563 was issued, the National Association of Manufacturers and other trade groups began calling for US EPA's recent greenhouse gas ("GHG")-related rulemakings to be included in the Agency's review. US EPA responded in a press release, however, that the Agency was confident its GHG regulations would "pass muster under the sensible standards the President has laid out." EPA is currently reviewing comments received and expects to submit a draft preliminary plan to the Office of Management & Budget's Office of Information and Regulatory Affairs shortly.

Karen Winters
karen.winters@ssd.com
+1.614.365.2750

A Miscellany: The Protection of Freedoms Bill

Nicola Smith – Birmingham

The Protection of Freedoms Bill was presented to Parliament on 11 February 2011 and has now been committed to a Public Bill Committee, which is due to report on 17 May.

[1] Regulation and Regulatory Review; Improvement (EO 13563), 76 Fed. Reg. 3821 (January 21, 2011).

[2] Improving EPA Regulation; Request for Comment; Notice of Public Meeting, 76 Fed. Reg. 9988 (February 23, 2011).
[3] Extension of Comment Period: EPA's Plan for Retrospective Review Under Executive Order 13563, 76 Fed. Reg. 14840 (March 18, 2011).

The bill includes a real miscellany of disparate and wide ranging proposals, dealing with issues such as police retention of fingerprints and DNA data; parental consent required for school collection of children's biometric data; maximum detention of terrorist suspects; CCTV systems; powers of entry; wheel-clamping and time restrictions on marriage and civil partnership ceremonies. However, it is difficult at this stage to advise what the specific effects of the legislation will be as the detail in key areas will be set out in secondary legislation, codes of practice, or future Orders.

The Bill has hit the headlines largely for the effect the proposals will have on individuals and their rights. *The Guardian,* for example, reported in February that "More than half of the 9 million people who have needed criminal record checks to work with children and vulnerable adults are to be freed from the burden under new legislation."[4]

However, the proposals in the Bill may also affect businesses. Clearly, the decision to curtail the vetting and barring scheme will be of benefit to a number of operators who would arguably have been caught by the scheme, for example gymnasiums/other fitness facilities. However, there are also a number of other proposals which may result in additional costs or administration for businesses.

Wheel Clamping

The Bill includes provisions intended by Government to deal with problematic clamping firms on private land, by making it a criminal offence to immobilise a vehicle, move a vehicle or restrict the movement of a vehicle without lawful authority. Further provision is made to extend the power to make regulations for the police and others (such as local authorities/traffic wardens/civil enforcement officers) to remove vehicles illegally, dangerously or obstructively parked on that private land.

If the Bill is passed in its current form, it is likely to prevent businesses with their own car parks from clamping vehicles of non-customers. There are a number of examples where this can be a problem for businesses – supermarket car parks used by persons avoiding town centre parking charges, hotel car parks used by persons as an alternative to airport parking and restaurant car parks used for free by persons who work nearby. Clearly, if this prevents your genuine customers being able to park, your business may be adversely affected.

Currently, clamping can lawfully take place if individuals responsible for clamping have the benefit of parking enforcement Licences issued by the Security Industry Authority. When the Bill is enacted, any such SIA Licences will be of nil effect.

However, the Bill does provide that the keeper of a vehicle can be held liable for unpaid parking charges arising under contract in circumstances where the identity of the driver is not known. If your business wants to enforce parking restrictions, you will be able to serve a written demand on the address for service of the owner. However, the ability to reclaim charges will be subject to compliance with the provisions in the Bill, including a requirement that a notice to the driver must be given before the vehicle is removed from the land in question (and while it is stationary) by fixing it to the vehicle or handing it to the driver. This may be difficult in practice.

Regulation of CCTV and Other Camera Surveillance Technology

CCTV systems (including Automatic Number Plate Recognition systems) are not currently subject to bespoke regulatory arrangements, although the processing of personal data captured by CCTV systems is governed by the Data Protection Act 1998. Currently, the Information Commissioner's Office ("ICO") has issued guidance to CCTV operators on compliance with their legal obligations under the Data Protection Act. In addition, the covert use of CCTV systems is subject to the provisions of the Regulation of Investigatory Powers Act 2000 and the Code of Practice on 'Covert Surveillance and Property Interference' issued under that Act.

Under the Protection of Freedoms Bill, this will change. The Secretary of State will be obliged to prepare a Code of Practice in relation to the use of CCTV or other surveillance technology (including Automatic Number Plate Recognition systems) and the Code will contain guidance on the development or use of systems and the use or processing of images obtained by use of those systems.

Certain specified bodies will be required to have regard to the code if they operate or intend to operate any surveillance camera systems covered by the code. These bodies will in the first instance be local authorities, police

[4] http://www.guardian.co.uk/law/2011/feb/11/criminal-checks-eased-freedom-bill

and crime commissioners and chief officers of police. The Code will not automatically apply to all CCTV systems.

However, the Code could potentially also apply to private sector organisations and businesses in the future as the Bill gives a power to the Secretary of State to designate other individuals or bodies as "relevant authorities" for the purposes of its provisions. This would require such designated bodies also to have regard to the Code. The Government foresees that this power may be used to cover instances where certain bodies have dual or multiple roles or, for example, exercise both public functions and private sector functions.

Although there is no draft Code in the Bill, it does provide that the Code may include considerations as to whether surveillance camera systems should be used, as well as considerations in relation to the types of systems, technical standards, camera locations, standards applicable to persons using or maintaining the systems and to persons using or processing information, disclosure of information obtained by surveillance systems and complaint procedures.

Powers of Entry

The Bill also makes provision in respect of powers to enter land or other premises. A power of entry is a right for a person (usually a state official of a specified description, for example, police officers, local authority trading standards officers, or the enforcement staff of a regulatory body) to enter into a private dwelling, business premises, land or vehicles (or a combination of these) for defined purposes. These purposes may include inspections of premises or entry to search for and seize evidence as part of an investigation.

The Government states, in the explanatory notes to the legislation, that there are currently around 1200 separate powers of entry contained in both primary and secondary legislation. The Bill enables a Minister, by order, to repeal any unnecessary powers and to add safeguards respect to the exercise of such powers. Ministers will also be able to replace existing powers with new powers subject to additional safeguards. These safeguards may include such restrictions as permitted times of entry and requirements for prior authorisation by a Magistrates Court.

The Bill places each Cabinet Minister under a duty to review existing powers of entry with a view to considering whether to exercise any of these powers. Provision is also made for the exercise of powers of entry to be subject to the provisions of a code of practice. However, there is no guarantee that changes will be made in practice by Ministers.

Conclusion

With so many proposal details confined to secondary legislation and Codes that are yet to be drafted, the extent of impact of the Protection of Freedoms Bill is a little difficult to predict. The Bill has hit the news for the changes it will make to individual freedoms and indeed the Home Office website states that the Bill "marks the next step in the Government's legislative programme to safeguard civil liberties and reduce the burden of government intrusion into the lives of individuals". However, there is clearly a possibility that proposals may also affect businesses.

Whatever the impact may be, the Bill perhaps heralds a new approach to legislation - it was used to pilot the Coalition's new public reading stage of a bill's passage through Parliament. This stage, which closed on 7 March, allows members of the public to comment upon individual clauses and make suggestions for how they could be improved. It is likely that it will not become clear for some time whether this will be of benefit to businesses in practice.

Nicola Smith
Nicola.smith@ssd.com
+44.121.222.3230

SQUIRE SANDERS HAMMONDS | LEGAL COUNSEL WORLDWIDE

Squire Sanders Environmental, Safety & Health Practice

Karen A. Winters
Chair, Environmental, Safety and Health Practice Group
Columbus, +1.614.365.2750

Rob Elvin
European Head of the Environmental, Safety and Health Practice Group
Manchester, +44.161.830.5257

Environmental, Safety & Health

In today's global economy, environmental issues know no boundaries – forcing companies across the globe to pay close attention to ongoing compliance issues and be prepared when a crisis or regulatory action surfaces. Whether it is the need of counsel pertaining to a compliance matter, an industrial accident, a proposed regulation or allegations of environmental violations, Squire Sanders is ready to assist companies in a range of industries including aerospace, automotive, biotechnology, mining, iron and steel, pulp and paper, chemical and waste management in navigating the maze of complex regulations that affect multinational business operations. We offer the full range of services to corporations with business operations and investment interests in the European Union, Russia, Asia, the Middle East and the Americas.

- Compliance audits
- Dispute resolution/litigation
- Emissions credit trading
- International trading issues in environmental law
- Environmental impact assessments
- Permitting and licensing
- Rapid emergency response counseling
- Regulatory counseling
- Market access
- Transactional support
- Accident and incident investigation including 24/7 Incident response service
- Defence of criminal prosecutions arising from environmental, safety and health breaches
- Mock incident response training

Beijing
Berlin
Birmingham
Bratislava
Brussels
Budapest
Cincinnati
Cleveland
Columbus
Frankfurt
Hong Kong
Houston
Kyiv
Leeds
London
Los Angeles
Madrid
Manchester
Miami
Moscow
New York
Northern Virginia
Palo Alto
Paris
Phoenix
Prague
Rio de Janeiro
San Francisco
Santo Domingo
São Paulo
Shanghai
Tampa
Tokyo
Warsaw
Washington DC
West Palm Beach

INDEPENDENT NETWORK FIRMS:
Beirut
Bogotá
Bucharest
Buenos Aires
Caracas
La Paz
Lima
Panamá
Riyadh
Santiago

www.ssd.com