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Garner's Environmental Law – This *Bulletin* should be filed immediately after the Bulletins guide card at the front of the Bulletins, Tables and Index Binder. ***Bulletin 121*** **may be removed from the Binder and discarded, or may be kept separately for future reference.** The Binder should now contain *Bulletins 122–127*.

COMMENT

Clearing up the confusion?

Despite publication of two HMRC briefing papers issued in May and June 2012 on how the lower rate of landfill tax should be applied, confusion and uncertainty persisted, resulting in the publication of yet more HMRC guidance on 4 July 2012.

Landfill tax is charged by weight and there are two rates. The standard rate (currently £64 per tonne) applies to active waste and the lower rate (currently £2.50 per tonne) to inert or inactive waste. The landfill site operator is responsible for paying the tax, although the operators pass the cost onto businesses and local authorities as a supplement on top of the normal fee charged for disposal to landfill.

On 18 May 2012, HMRC issued a briefing note in order to provide greater clarity regarding the consistent application of the correct rate of landfill tax (Brief 15/12). Instead of providing clarity, the briefing note caused uproar within the construction industry.

In relation to inert materials, Brief 15/12 explicitly stated that for material to attract the lower rate, the waste transfer note must demonstrate that it conforms with the Landfill Tax (Qualifying Material) Order 2011 (the 2011 Order). The 2011 Order only includes a limited range of mostly 'naturally

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occurring' rock and stone. The only soil is sub-soil and Brief 15/12 specifically excluded topsoil, construction soil and soil from the demolition of buildings and structures.

Brief 15/12 also stated that residue from rubbish sent for recycling by waste transfer stations would be liable for the standard £64 per tonne rate. This included waste such as 'trommel fines' (small waste residues left over from recycling) that could quite possibly consist entirely of materials that qualified for the lower tax.

Furthermore, Brief 15/12 states that the 'top fluff layer' (a layer of soft waste about a metre thick used to protect the cap membrane sealing a landfill cell) should now be liable to landfill tax as this constitutes the 'careful placement of soft waste'.

Brief 15/12 therefore caused huge alarm that the cost of sending to landfill materials previously regarded as 'inert' would rocket. In response to the concerns, HMRC said the perceived massive increase was based on a misunderstanding and so issued new guidance to the industry clarifying how the levy should be applied. On 1 June 2012, a further briefing note was issued (Brief 18/12) although HMRC was keen to assert that this was for clarification, and was not a change in policy. HMRC has long suspected that some businesses have been taking advantage of the previous lack of clarity to pay less tax. Brief 18/12 confirmed that in respect of rocks and soils, where waste consists of materials listed within the 2011 Order that meets the relevant condition and evidence can be produced, then the lower rate of landfill tax will apply. Nevertheless, in instances where such materials are contaminated with materials such as asbestos, metal, wood and plastic, or contain elevated levels of chemical contaminants (heavy metals, hydrocarbons), they would fall outside the conditions required by the 2011 Order and therefore be liable to the standard rate.

In respect of materials from waste transfer stations and recycling facilities that are sent to landfill, now, as before, the lower rate will apply if the materials are listed within the 2011 Order, meet the relevant conditions and appropriate evidence can be produced.

Material within the top fluff layer falls within the scope of the landfill tax. The rate of tax applied to this material would be dependent on whether it consisted of substances listed in the 2011 Order. Brief 18/12 states that HMRC would not expect material contained in these layers to be listed in the 2011 Order and would therefore expect it to be liable to tax at the standard rate. Again, only material listed in the 2011 Order that could be clearly evidenced as such would be liable to tax at the lower rate.

Although this further clarification has arguably not altered the position, it appears to have alleviated some, but not all, concerns. On 4 July 2012, HMRC produced yet more guidance, not to replace Briefs 15/12 or 18/12 but to clarify in particular what constitutes 'sufficient evidence' to substantiate application of the lower rate. The guidance also clarifies that 'incidental' amounts of contaminants in a load of waste can be permitted. Furthermore,

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the guidance suggests that the lower rate applies where the consignment sent to landfill consists of a number of differing qualifying materials, including qualifying materials from different groups within the 2011 Order.

More work may still be needed on how to describe and classify loads of waste, but it would appear that the lower rate of landfill tax will continue to apply to the vast majority of excavated soils disposed of from construction projects each year. Material used to cap landfill sites (the top fluff) became taxable from September 2009 under the Landfill Tax (Prescribed Landfill Activities) Order 2009. This change apparently passed unnoticed at the time, given the resulting shock in the industry when Brief 15/12 was released. So despite a wealth of clarification, nothing has really changed.

LEGISLATION

EUROPEAN

Dangerous substances: Council adopts Directive on control of major-accident hazards involving dangerous substances

On 26 June 2012, the General Affairs Council (a configuration of the Council of the European Union) agreed a new Seveso III Directive on the control of major-accident hazards involving dangerous substances.

Following a major accident at a chemical plant in Seveso, Italy, in 1976, the Seveso I Directive and subsequently Seveso II were introduced to help prevent major accidents involving large quantities of dangerous substances, as listed in its Annex I, and to limit the consequences of such accidents. The review of Seveso II was prompted by the need to amend the Directive due to changes to the EU system of classification of dangerous substances listed in Annex I.

The key aims of the Seveso III Directive are to:

— align Annex I to the Seveso II Directive, defining the substances falling within the scope of the Directive, to changes in the EU system of classification of dangerous substances to which it refers;

— adapt Annex I to the Seveso II Directive in order to deal with situations occurring after the alignment where substances are included/excluded, that do/do not present a major-accident hazard;

— strengthen the provisions relating to public access to safety information, participation in decision-making and access to justice, and improve the way information is collected, managed, made available and shared; and

— introduce stricter standards for inspections of installations to ensure the effective implementation and enforcement of safety rules.

Member States will have until 31 May 2015 to implement the laws, regulations and administrative provisions necessary to comply with Seveso III. These measures will have to apply as of 1 June 2015.

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European

Regulation 493/2012 on the recycling processes of waste batteries and accumulators

On 12 June 2012, the European Commission adopted Regulation 493/2012, having regard to Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators. Regulation 493/2012 sets out detailed rules in relation to the calculation of recycling efficiencies of the recycling processes for waste batteries and accumulators, in order to achieve specified minimum standards. Recyclers of waste batteries and accumulators have until 1 January 2014 to adapt their technological processes to the new recycling efficiencies calculation requirements.

Draft Council Directive laying down basic safety standards for protection against dangers arising from exposure to ionising radiation

On 30 May 2012, the EU Commission published a proposal for a Council Directive which would lay down basic safety standards for protection against the dangers arising from exposure to ionising radiation.

The explanatory note to the proposed Council Directive states that exposure to ionising radiation results in a health detriment and any exposure, however small, can be the cause of cancer later in life. The note further asserts, therefore, that a specific approach in radiation protection based on the three principles of justification, optimisation and dose limitation is required.

Draft Article 109 states that the Directive will enter into force on the twentieth day following its publication in the Official Journal of the European Union. It is not yet clear when this will be and therefore nor is it clear how long Member States will have to bring into force laws and regulations to comply with the Directive.

UK

STATUTES

Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the Act) received Royal Assent on 12 May 2012 and contains some changes which will affect the size of fines that can be handed out in magistrates' courts to offenders under environmental legislation.

The Act will remove the fines cap on all offences that are currently capped at £5,000 or more. This applies whether the maximum fine for the offence was previously expressed as either a specific sum or by reference to the standard scale. The new powers are checked by a power of the Secretary of State to set revised caps in secondary legislation if required.

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The new limits will impact upon many environmental offences such as offences under the Waste Electrical and Electronic Equipment Regulations 2006 and the Environmental Permitting (England and Wales) Regulations 2010.

The new regime is expected to hit larger companies hardest. The caps in the previous regime had been criticised for ensuring that fines did not have the necessary deterrent effect for large businesses. Offences which were previously treated as relatively minor may now have to be treated more seriously by companies.

Fines that are currently capped at less than £5,000 will remain capped at that level.

Note that although the Act has received Royal Assent, these particular provisions have not yet been brought into force.

Wind Turbines (Minimum Distance from Residential Premises) Bill is re-introduced in 2012–13 Parliamentary session

On 14 May 2012, a Private Members Bill, the Wind Turbines (Minimum Distance from Residential Premises) Bill, had its first reading in the House of Lords.

The Bill seeks to provide for a minimum distance between residential properties and wind turbines. The distance would be set according to the size of the wind turbine. The Bill proposes that the minimum distances should be based on the height of the turbine. Those measuring between 25m and 50m would be subject to a 1km limit, increasing incrementally up to those in excess of 150m in height, which would have to be situated a minimum of 3km from residential property.

A date for the second reading in the House of Lords has yet to be scheduled.

Statutory Instruments

CRC: Regulations on sale of allowances come into force

The CRC Energy Efficiency Scheme (Allocation of Allowances for Payment) Regulations 2012 were made on 23 May 2012. The CRC (formerly known as the Carbon Reduction Commitment) was introduced by the CRC Energy Efficiency Scheme Order 2010 and is the UK's mandatory emissions trading scheme.

The CRC aims to improve energy efficiency and reduce emissions in large public and private sector organisations and the purpose of the new Regulations is to exercise new powers to provide for the allocation of allowances under the CRC scheme in return for payments during Phase 1 of the CRC (2010–14). The Regulations set out:

— who will conduct allocations (sales) of allowances;

— when requests for allocation of allowances can be made;

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— how payment for allowances can be made and when allowances will be issued; and

— the consequences of late or non-payment and a transfer by the Environment Agency of excess allowances.

The Regulations are broadly in the same form as the version published in January 2012 and came into force on 24 May 2012.

The Waste (Scotland) Regulations 2012

The Waste (Scotland) Regulations 2012 came into force on 17 May 2012, amending the Environmental Protection Act 1990, the Pollution Prevention and Control (Scotland) Regulations 2000, and the Waste Management Licensing (Scotland) Regulations 2011. The 2012 Regulations provide for the collection, transportation and treatment of dry recyclable waste and food waste, and aim to:

— maximise the quantity and quality of materials available for recycling and minimise the need for residual waste treatment capacity;

— move residual waste management up the waste hierarchy (away from landfill) so as to extract resource value (energy and heat) from those materials that cannot be recycled;

— drive operational and cultural shifts in how waste is managed, including improved services to households and businesses; and

— create the market certainty needed to support investment by businesses in the recycling, materials reprocessing and waste management sector.

The Regulations will ensure the Scottish Government meets its requirements under the revised Waste Framework Directive. They also introduce measures to ensure that those producing or managing waste take steps to promote high quality recyclable materials, thereby increasing the likelihood that materials will be recycled in Scotland, supporting the local economy and insulating industry from global fluctuations and unpredictable future quality demands.

The Regulations will impact on all those who produce, store, transport or manage controlled waste in Scotland. A phased approach to rolling out the key measures has been adopted to ensure that there is sufficient time for businesses, particularly small ones, to adopt new recycling services.

The 2012 Regulations implement Arts 11(1) and 22 of the Directive 2008/98 on Waste, which introduces measures to protect the environment and human health by preventing or reducing adverse impacts of the generation and management of waste and by improving the efficiency and reducing the overall impacts of resource use.

Updated guidance published by Her Majesty's Revenue and Customs on when the lower rate of landfill tax applies to waste materials

HMRC has rewritten its guidance note to reflect changes in the law, most notably relating to ending the exemption for waste arising from the reclamation of contaminated land from 1 April 2012. The updated guidance offers

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advice to landfill operators and skip hire and waste transfer firms on how to ensure the lower rate is correctly applied, replacing the April 2011 edition. This is an area where HMRC has struggled with the clarity of the guidance; for further details please see the Feature on this subject.

Guidelines for developments requiring planning permission and an environmental permit

In May 2012, the Environment Agency (EA) published its working draft guidelines for developments requiring planning permission and an environmental permit. The working draft guidelines have been produced to help local planning authorities, the Planning Inspectorate, developers and EA staff by clarifying the relationship between planning and permitting issues. It is hoped that the guidelines will help to reduce costs and increase certainty over planning and permitting decisions. In particular, the EA expects the guidelines to secure the following advantages:

— making planning authorities and developers aware of permitting issues early on, reducing the chances of 'surprises' during the permit application process;

— facilitating faster decision-making in the planning process by identifying those developments that require complex permitting decisions early; and

— helping faster decision-making in the permitting process by advising developers on the requirements for their permit application early in the process, to help them to submit permit applications with all of the required information first time.

The working draft guidelines can be accessed via the EA's website, although the EA stopped receiving external feedback on 15 June 2012. The EA is currently considering the feedback and will publish the final guidelines later in the summer.

PROSECUTIONS

Illegal waste operator jailed for two years

A West Yorkshire man has been convicted of running an unlicensed waste site and handling stolen goods after appearing at Leeds Crown Court.

Russell Barratt, 50, of Maggot Farm, Knottingley, was sentenced to two years and three months in prison in respect of the charges, which included six months for operating a regulated facility without an environmental permit. Mr Barratt was estimated to have made savings of approximately £30,000 by not obtaining a licence, and further saved on disposal costs by burning waste illegally. The judge described Mr Barratt's failure to obtain a licence as a 'deliberate and reckless breach of the law' and noted his failure to comply with advice and guidance from the Environment Agency.

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PROSECUTIONS

The site, which lies 200m from the River Aire and next to the Willow Garth nature reserve, was raided by Environment Agency officers and West Yorkshire Police on 16 August 2011, and Mr Barratt was arrested. The site was used by Mr Barratt for the storage of scrap cars, which should have been drained of residual fluids and had their batteries removed. Evidence was found of the disassembly of vehicles without use of sealed surfaces or appropriate drainage, and tests carried out by the Environment Agency found that the soil at the site had become contaminated with fuel oils. The site was also well known to the local fire brigade, who had attended to extinguish car-tyre fires on a number of occasions. The cost to the taxpayer of attending the fires was estimated at several thousand pounds for each visit.

Mr Barratt was also convicted of handling stolen goods after a trailer, tanker and potato harvester, which had been reported as stolen, were found at the site.

First penalties imposed for CRC non-compliance

Four firms have been issued with fines totalling £99,000 for late submission of their annual reports under the CRC Energy Efficiency Scheme. Henkel, Saur, BI Group and Tomkins are the first companies to be hit with penalties under the CRC, which requires participants to submit carbon footprint data and annual emissions reports.

The largest fines were issued to Henkel, the company behind household names such as Persil, Schwarzkopf and Loctite, and French water company Saur. The two were fined the maximum £38,000 (for 28 days delay) and £41,000 (for 31 days delay) respectively. BI Group and Tomkins were served with smaller fines of £10,000, reflecting their efforts to comply once the Environment Agency (EA) had brought the problem to their attention.

The fines indicate that the EA is serious about enforcement, especially where there has been little attempt to rectify the problem, and serve as a timely reminder of the 31 July 2012 deadline for submitting an annual report for the 2011/12 compliance year. However, the EA has stated that although the deadline for surrendering allowances for 2011/12 is 31 July 31 2012, it will treat firms as compliant provided they make the necessary surrenders by 28 September 2012.

CONSULTATIONS

Ministry of Justice consults on deferred prosecution agreements

On 17 May 2012, the Ministry of Justice (MoJ) published a consultation paper on deferred prosecution agreements (DPA). The Government hopes the consultation, snappily entitled *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements*, will provide 'swifter alternatives to prosecution which can deal with wrongdoing effectively, proportionately and with a greater degree of certainty'.

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A DPA is an agreement between a prosecutor and a commercial organisation that the prosecutor will put on hold criminal charges on the proviso the organisation successfully complies with agreed terms and conditions stated in the DPA. The terms and conditions, for example, might include payment of a financial penalty, undertaking internal reforms, restitution for victims, disgorgement of the profits of wrongdoing and measures to prevent future offending (such as a monitoring or reporting requirements).

Under a DPA, a company would agree to admit the wrongdoing publicly. Furthermore, the whole process would be overseen by a judge and the threat of full prosecution would remain should the company fail to comply with the agreement. Solicitor General Edward Garnier QC said: 'If we can encourage companies to self-report and come clean, pay penalties and mend their ways, the time and expense of investigations and prosecutions will be better spent elsewhere, enabling us to bring more individuals and companies to justice.'

The proposals apply only to England and Wales and comments are requested on the paper by 9 August 2012. The MoJ intends to publish a response to the consultation by 31 October 2012.

BIS consultation on the cost of compliance with the WEEE Regulations 2006

On 28 May 2012, the Department of Business, Innovation and Skills (BIS) issued a call for evidence on the cost of compliance with the Waste Electrical and Electronic Equipment Regulations 2006 or WEEE Regulations (SI 2006/3289). The evidence obtained will be used to develop new proposals on the disposal of electrical and electronic goods in line with the government's aims of reducing burdens on business while still achieving environmental objectives.

In parallel with this at the EU level is a new WEEE Directive, which was adopted by the Council at second reading on 7 June this year. This Directive will recast the existing 2002 WEEE Directive. It is expected to be published in the Official Journal within the coming weeks, from which time Member States will have 18 months in which to implement the new provisions. The new Directive is intended to ensure proper treatment of such waste and remove unnecessary administrative burdens on businesses. It is expected BIS will therefore combine its proposals with the legislation necessary to comply with the new Directive.

The consultation closes on 23 July 2012.

Environment Agency consults on standard rules for industrial emissions, waste and water discharge environmental permits

On 12 June 2012, the Environment Agency (EA) published a consultation paper on the new and revised Standard Rules for environmental permits for installations that will be covered by the Industrial Emissions Directive (Directive 2010/75) and some waste and water discharge operations.

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CONSULTATIONS

The EA has stated that it would like views on a number of proposals, including revised rules for certain composting operations; anaerobic digestion facilities; activities involving the treatment of waste ashes and slags; waste operations combining metal recycling and de-pollution of waste motor vehicles; sewage and cooling water discharge; and storage of lead acid batteries.

The consultation closes on 4 September 2012 and the EA is expected to publish its response in November 2012.

CASES

Chandler v Cape plc [2012] EWCA Civ 525

This case concerns the liability of a parent company for damages to an employee who suffered industrial injury during the course of his employment with a subsidiary company. The case is important as sets a significant precedent by establishing that a parent company can owe a duty of care to an employee of one of its subsidiaries in the context of health and safety.

Mr Chandler, the claimant, was employed by Cape Building Products Limited (CBPL), a wholly owned subsidiary of Cape plc, for a short period during the late 1950s and early 1960s. Following a proven exposure to asbestos fibres during the course of this employment, he was diagnosed with asbestosis in 2007. Cape Building Products had ceased trading some time previously and was no longer in existence. In any event, CBPL's insurance policy specifically excluded liability for claims relating to this particular illness.

Mr Chandler was therefore left with no alternative other than to pursue a claim against Cape plc, despite the general rule that claims of this type should not 'pierce the corporate veil'.

The basis of the judgment in the High Court was not, in fact, that the claim should 'pierce the corporate veil', but stemmed from a direct duty of care that Cape plc owed to Mr Chandler. It was held that the threefold-test for establishing a duty of care, namely foreseeability, proximity and fairness, had been met.

Cape plc's appeal to the Court of Appeal was dismissed. The Court used four relevant factors when coming to its decision:

— the businesses of the parent and subsidiary are in a relevant respect the same;

— the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;

— the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and

— the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

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It was found that Cape plc had a group health and safety policy and this was enough to establish that overall responsibility for the policies at CBPL was taken by the parent company. Medical advice and scientific study into the risks was also applied at all the subsidiaries of Cape plc, satisfying the court that the duty of care existed.

This case is of vital importance when considering the liability of a parent company to the acts of their subsidiaries, covering a wide range of issues. Health and safety, environmental and employment policies are all areas that could be affected as a result of this decision. Organisations will need to consider the impact of group-wide policies and the associated legal implications, as well as the influence of senior management and boards on the operations of companies within group structures.

Olympic Delivery Authority v Persons Unknown [2012] EWHC 1012 (Ch)

In an important human rights ruling, a High Court judge has granted the Olympic Development Authority (ODA) a temporary injunction against protesters objecting to the development of a basketball ground in Hertfordshire.

The ODA had been granted a licence to occupy the site, on which it was to build a temporary basketball practice facility. The ODA was to complete the site on 30 May 2012 and hand it over to the London Organising Committee of the Olympic Games a week later. However, progress was slowed by protesters objecting to the development. The protesters prevented access to the site, interfered with deliveries and subjected the employees of the contractor and subcontractor to abuse. The ODA accordingly applied for an injunction on the basis of private and public nuisance.

In his judgment, Mr Justice Arnold considered the ODA's case to be unanswerable save on human rights grounds. Accordingly, the judge considered the effect of granting an injunction on the protesters' rights under Articles 10 and 11 of the European Convention on Human Rights (being the rights to freedom of expression and freedom of assembly). In reaching his conclusion, the judge noted that Articles 10 and 11 were not unqualified rights. As such, they must be balanced with the ODA's right to peaceful enjoyment of its possessions. This exercise is question of fact, and the judge relied heavily on the decisions in *Re S* [2004] UKHL 47 and *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160 (the St Paul's Churchyard protest).

Ultimately, the decisive factor was that the grant of the injunction did not in itself prevent the protesters from making their views known. In contrast with the St Paul's Churchyard case, the ODA was not seeking possession of the land, so the protesters were able to carry on their protest at the site. Accordingly, the injunction did not interfere with their Article 10 and 11 rights.

The outcome of this case is encouraging for developers. While the high tide of occupation by environmental activists may now have receded somewhat, it

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remains the case that such protests can have a very significant impact on a project in terms of increased costs and late completion fees. The prospect of a quick injunction that does not engage human rights considerations is likely to be welcomed by developers.

NEWS

Mandatory greenhouse gas reporting for FTSE companies

The Rio+20 Earth Summit on 20 June 2012 saw Deputy Prime Minister Nick Clegg announce Government plans for the mandatory reporting of greenhouse gas (GHG) emissions for businesses listed on the London Stock Exchange. The UK is committed to cutting its carbon emissions to 50% of 1990 levels by 2025, and is the first country to make the declaration of this information compulsory. The decision follows last year's consultation on greenhouse gas measurement and reporting, and fulfils Government obligations under section 85 of the Climate Change Act 2008, which required such measures to be implemented.

The initiative will take effect from 6 April 2013, and will necessitate all companies listed on the London Stock Exchange to declare their GHG emissions, measured in equivalent tonnes of carbon dioxide. It is estimated that the scheme will impact around 1,100 companies.

It is hoped that the initiative will have numerous benefits for businesses, investors, stakeholders, and the environment alike. Caroline Spelman, Secretary of State for the Department for Environment, Food and Rural Affairs (DEFRA), has said that 'investors are now looking hard at the green credentials of businesses, and the reporting of GHG emissions will give them vital information as they decide where to invest their money.' Furthermore, the benefits have been highlighted by Clegg, who commented that 'being energy efficient saves companies money on energy bills, improves their reputation with customers and helps them manage their long-term costs too.'

DEFRA has heralded the initiative as a potential 'driver for emissions reduction activity', with businesses using the report to regulate their GHG production. It is estimated that emissions of CO2 will be reduced by four million tonnes by 2021.

Whilst many LSE companies have already adopted the policy of reporting their emissions (the Environment Agency has found that 22% did so voluntarily in 2009/10 annual reports), this has not yet led to a satisfactory approach. According to the initiative's Impact Assessment, 'regulation is required because voluntary approaches have not led to a sufficiently high level of reporting, nor consistency in reporting'. It is anticipated that minimum levels of reporting will be required when the scheme takes effect next year, allowing for a more level playing field for businesses to be judged against one another.

A review of the initiative will take place in 2015, before a decision is made on whether to extend the requirement to all large companies in 2016.

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DECC delays cuts to FITs solar PV tariff

The Department of Energy and Climate Change (DECC) has announced a delay in the cuts to solar feed-in tariffs (FITs) that was intended to be introduced on 1 July 2012. The cuts, which were one of DECC's main proposals in its consultation on Phase 2A of the FITs review, have been pushed back by a month, and will now take effect on 1 August 2012.

The FITs scheme was originally introduced on 1 April 2010 under the Energy Act 2008. DECC hoped that the scheme would allow large numbers of people to invest in small-scale low-carbon electricity, in return for a guaranteed payment from an electricity supplier for the electricity they generate and use, as well as guaranteed payment for unused surplus electricity they export back to the grid. However, DECC has argued that the higher than expected take-up risks the future of the scheme and it would be better to support more installations at a lower tariff.

This has presented a number of legal issues for DECC, however, and in January 2012 Friends of the Earth, together with HomeSun Ltd and Solar Century Ltd, were successful in arguing that it is not within the Secretary of State's powers to reduce the tariff paid for electricity generated by small-scale PV generators. Consequently, DECC has incurred significant legal costs in its attempts to overturn the decision that it acted unlawfully.

The delay in the cuts has proved to be a positive step for the solar industry, with Paul Barwell, chief executive of the Solar Trade Association, commenting that 'the announcement proves that the industry has won its case for proper recognition for the role of solar in the UK'. More encouragingly for the solar power industry, the cuts will also be less severe than previously expected, as will future cuts. Tariffs are anticipated to fall by 3.5% every three months, as opposed to 10% every six. If take-up levels are much higher than expected, however, cuts could be up to 28% per quarter.

A number of other decisions have also been announced, including:

— the reduction of the period during which FITs will be paid from 25 years to 20 years (to match other renewable energy sources);

— an increase in payment for those who install solar from 1 August 2012 and who contribute to the grid through it, to be reviewed annually; and

— the reduction of FITs tariffs to organisations that own more than 25 solar panels, to 90% of the usual rate (previously 80%).

However, concern remains for the perceived stall in the solar market. Figures from last year show that two to three times more solar units were installed then than during the same period this year. Barwell has appealed to the Government to 'promote the message that tariffs can come down because the costs of solar can come down too'.

Small emitters and hospital installations to 'opt-out' of EU ETS from 2013

The Department of Energy and Climate Change (DECC) has enabled eligible emitters and hospital installations to 'opt out' of the EU Emission Trading

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Scheme (ETS) from 2013. Despite the 250 eligible organisations making up only 1% of the EU ETS emissions in the UK, the decision to offer this was taken as part of the Government's wider 'Red Tape Challenge'. The Red Tape Challenge aims to cut out 'burdensome regulations' that 'hurt business'. Article 27 of the EU ETS Directive 2003 gives the UK the authority to implement a scheme that enables eligible emitters and hospital installations to 'opt out'.

The rationale behind the decision is the disproportionately high administrative cost that organisations with relatively low emissions incur, meeting the 'burdensome regulation' test. The proportional difference is significant. The cost to large emitters is approximately £0.04/tCO2 in comparison to £1/tCO2 for smaller emitters.

Smaller emitters are defined as those emitting less that 25,000 tonnes of greenhouse gases per year and who have a thermal output of less than 35 megawatts. From January 2013, the opt-out scheme will mean that eligible installations will be given individual emission reduction targets, with individual penalties for exceeding their target.

DECC estimates that the opt-out scheme could save industry up to £80 million from 2013–2020, although this is dependant on how many eligible installations sign up. The installations had to apply to DECC by 18 July this year. The opt-out is only available to stationary installations and therefore aircrafts are excluded from the provisions.

DEFRA makes amendment to UK waste shipment plan

The *UK Plan for Shipments of Waste* (the Plan), published by the Department for Environment, Food and Rural Affairs (DEFRA) has received a minor amendment and was republished on 15 May 2012.

The Plan identifies the Government's policy on waste disposal both to, and out of, the UK. In general, the Plan provides that it is illegal either to import or to export waste shipments, subject to certain exceptions such as situations of emergency where there is a risk to human health or the environment. The Plan is derived from the Transfrontier Shipment of Waste Regulations 2007, which establish that the Environment Agency is the relevant authority where the shipment starts or ends in England and Wales, and also places the onus on the Secretary of State to have in place a waste management plan that incorporates the import and export of waste.

The latest exception to the UK Plan establishes the potential for the shipment of contaminated river sediments that are classed as non-hazardous waste. The Plan highlights that contaminated river sediments 'can be problematic to manage and require specialist facilities, and their inclusion in this exception is in recognition of this'.

The Plan also provides that the Government would foresee the application of the exception on a transitional basis should specialist disposal operations become economically feasible on a national basis. The Plan also makes it clear that this new exception does not apply to any waste shipped to or from

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the UK that does not require specialist landfill facilities, as all Member States should be able to do this within their own borders.

Changes to Green Deal

The Department of Energy and Climate Change (DECC) has now responded to the Green Deal and the Energy Company Obligation Consultation, and is proposing to make some changes to the Energy Company Obligation (ECO). In order to assist lower income communities to reduce carbon emissions from their homes, there is now to be a third element, the ECO, to supplement the existing Affordable Warmth and Carbon Savings Obligations elements. The ECO is intended to ensure that the poorest families have access to energy saving measures such as insulation measures, and will require specific targeting of low income communities. District heating schemes will now be eligible under the ECO Carbon Savings obligation where delivered as a package with other measures.

The new changes will also afford greater protection for consumers. Green Deal Assessors will now have to declare to the consumer any ties with providers or commission arrangements. The Government is also putting in place additional protections where consumers are contacted using 'cold calling' methods. Although under existing legislation consumers are able to cancel a contract agreed over the phone within seven days, it was felt this could still leave a consumer open to paying a charge as 'reasonable compensation' for any assessment work carried out before cancellation. The new protections will a require a 'cooling off' period of at least one day before any assessment can be carried out unless the consumer requests otherwise and gives consent in writing.

From a provider perspective, the consultation contains some welcome changes to reduce red tape. DECC now proposes to remove the obligation for providers to sign up to an independent conciliation service. Customer complaints will be handled directly by the Green Deal ombudsman although, where providers already have access to a conciliation service (for example, as membership of a trade body), DECC recommends offering this as an option to customers. Extended warranties for measures given by providers have also been limited to a minimum of five years, with longer terms enforced only in special circumstances.

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Any comments, information or material for possible inclusion in forthcoming issues of the *Environmental Law Bulletin* will be welcomed and may be addressed to the *Editor*: **Amanda Stubbs, Trowers & Hamlins**, Heron House, Albert Square, Manchester, M2 5HD (Tel: 0161 211 0000; Fax: 0161 211 0001; Email: astubbs@trowers.com) or to the *Publisher*: **LexisNexis**, Halsbury House, Chancery Lane, London WC2A 1EL (Tel: 020 7400 2994; Fax: 020 7400 2728).

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