



# Environmental Practice BRIEFING

SPRING 2004

Following are recent developments in environmental law and policy that may be of interest to our colleagues, clients and friends:

## European Union: Directive on Environmental Liability Enacted

The European Union's first law specifically governing liability relating to environmental contamination entered into force on April 21, 2004. Directive 2004/35/CE on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (the "Directive") was adopted following 15 years of intense discussion and lobbying within the EU. Member States have until April 31, 2007 to transpose and implement the Directive's provisions into their own national law.

The Directive is intended to prevent and respond to "environmental damage." "Environmental damage" is defined in the Directive to include: (i) damage to protected species and natural habitats, (ii) damage that significantly affects the ecological, chemical and/or other important qualities of water bodies governed by EU law and (iii) land contamination that creates a significant risk of adverse human health effects. The Directive does not cover damage resulting from noise or air emissions and specifically excludes damage caused by diffuse pollution that is not linked to the activities of a specific operator. The Directive does not apply to personal injury or to private property damage. The Directive is not retroactive and applies only to pollution incidents occurring after the law comes into force.

The Directive affirms and implements the "polluter pays principle." It intends to hold individuals or entities whose professional activities have caused environmental damage primarily liable for the damage. The Directive applies to all professional activities undertaken by private or public individuals or entities, other than certain activities related to national defense, international security and protection from natural phenomena. Liability applies only when one or more polluters are clearly identified, quantifiable environmental damage has been established and there is a causal link between the activities of the identified polluter and the environmental damage. There is no limit on a polluter's financial liability.

The Directive provides for two distinct but complementary liability regimes, distinguishing between activities considered "dangerous" and other activities. Operators of certain inherently hazardous or potentially risky activities (including industrial and agricultural activities, waste management operations, or the production, storage, use or release of certain dangerous chemicals, pollutants or genetically modified organisms), which are also governed by other EU directives, must take necessary preventive measures to avoid environmental damage and the necessary remedial actions when their operations have caused environmental damage. *Strict liability* is applied to operators of such activities. The application of strict liability, however, may be rare due to a number of exemptions and legal defenses allowed by the Directive. Legitimate exemptions from strict liability include that (a) the environmental damage was caused by force majeure, including storms and armed conflicts, (b) the regulated activities were believed to be safe for the environment when they occurred and (c) the environmental damage was permitted or otherwise authorized by competent authorities. The Directive applies *fault-based liability* for all professional activities resulting in environmental damage other than "dangerous" activities. The Directive is designed to ensure that negligent operators are always held liable.

The Directive provides neither a right of compensation to private parties who have suffered environmental damage or an imminent threat of such damage nor a mechanism for citizens or nongovernmental organizations ("NGOs") to sue polluters directly. However, the Directive provides that a natural or legal person "with a sufficient interest" (to be defined by each Member State), including an NGO promoting environmental protection, may request that the competent authorities take action in the case of environmental damage or imminent threat thereof. Authorities are then obliged to respond to requests for action, and, where environmental damages that are subject to the Directive have occurred, such authorities must require the polluter to take action to remedy or prevent further damage.

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## International: POPs Treaty Comes Into Force

The Stockholm Convention on Persistent Organic Pollutants (the “Convention”) became legally binding on May 17, 2004. Adopted and opened for signature at a diplomatic conference in Stockholm, Sweden on May 22, 2001, 59 countries (excluding the United States) have now ratified the Convention.

The Convention is a global treaty that aims to protect human health and the environment by restricting the use and production of persistent organic pollutants (“POPs”). POPs are highly toxic chemicals that are released into the environment due to human activity and are characterized by:

- Persistence—ability to resist degradation in various media (air, water, sediments and organisms) for months and even decades
- Bioaccumulation—the ability to accumulate in living tissues at levels higher than those in the surrounding environment
- Potential for long-range transport—the potential to travel great distances from the source of release through various media (air, water and migratory species).

POPs can be passed from mother to fetus and have been linked to serious health problems in humans and other animals, including cancers, damage to the nervous, reproductive and immune systems and birth defects.

The Convention initially covers what are informally referred to as the “dirty dozen” of POPs: 12 highly toxic dioxins, polychlorinated biphenyls (“PCBs”) and pesticides (including DDT). The Convention requires all parties to stop production and new uses of these POPs and to implement strong controls on emissions of POPs.

The Convention also specifies a procedural review mechanism that permits the addition of other POPs to Convention coverage. In addition to banning uses, the Convention focuses on limiting and cleaning up the growing accumulation of unwanted and obsolete stockpiles of already-produced POPs.

Although the Convention allows countries to claim exemptions for continued use of specific POPs, particularly on health-related grounds, it contains strict restrictions covering the quantity of the exempted POPs that a country may store, how far ahead such chemicals can be obtained and when such chemicals can be used. Such restrictions have been highly controversial, particularly in developing countries, where DDT is still actively relied upon for use in agriculture or to fight diseases such as malaria. One of the priorities of the Convention will be to assist countries in researching chemical and nonchemical alternatives that are cost effective and environmentally friendly.

In the United States, the entry into force of the Convention will not have a significant, immediate effect. According to the United States Environmental Protection Agency (“EPA”), none of the pesticide POPs are currently registered for sale and distribution in the United States. Furthermore, since 1978, Congress has prohibited the manufacture of new PCBs and severely restricted the use of remaining stocks of PCBs. The entry into force of the Convention has, however, spurred a renewed call for Congress to take actions to allow the United States to ratify the Convention.

## European Union: Directive on the Registration, Evaluation, Authorization and Restriction of Chemicals

On October 29, 2003, the EU Commission proposed regulations concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (the “REACH Proposal”). The REACH Proposal is currently under review by the EU Parliament and the EU Council. If adopted, it is expected to have a substantial economic impact on the European chemical industry. According to a study by the EU Commission, compliance with the registration process for chemical substances under the adopted REACH Proposal alone would cost the chemical industry 2.3 billion euros during the 11 years following its adoption.

The REACH Proposal is the outgrowth of several years of discussions. The current EU regulations regarding chemical substances are criticized for not providing sufficient information regarding the impact of chemical substances on human health and the environment. Under these existing regulations, producers or importers of covered chemical substances must only provide information about the potential risk to human health and the environment of exposure to a chemical substance when: (i) for “existing” chemical substances (i.e., those on the market prior to September 1981), which are estimated to represent 99% of the chemicals currently sold in the EU, such chemical substances are produced or imported in quantities exceeding 1,000 tons/year; and (ii) for “new” chemical substances (i.e., those introduced to the market after September 1981), such chemical substances are put on the market in quantities exceeding 10 kilograms/year. As a result of this criticism, in February 2001 the EU Commission issued a White Paper entitled “Strategy for a Future Chemical Policy.” The Commission launched an expansive public survey in 2003 regarding the proposed legislation laid out in the White Paper and received about 6,400 responses, including comments from public authorities, nongovernmental organizations, industrial organizations and individual chemical manufacturers. The REACH Proposal is a direct outgrowth of the White Paper and the responses thereto.

The REACH Proposal has four primary goals: (i) the protection of human health and the environment, (ii) the harmonization and centralization of procedures in the EU chemical substances market, (iii) the improvement of public access to information regarding chemical substances and (iv) the promotion in the chemical industry of an increased sense of responsibility regarding the risks associated with chemical substances.

The following measures are included in the REACH Proposal as a means of meeting these goals:

1. **Registration:** The REACH Proposal requires manufacturers, producers and importers to register chemical substances that they manufacture, produce or import in a quantity of one or more tons/year, regardless of the date of introduction to the market. This regulation would be progressively implemented during the course of 11 years with a priority for substances generated in high quantities or to which exposure is considered particularly harmful. The registration process will be largely handled by the new European Chemical Agency (the “Agency”), which will be created with the enactment of the REACH Proposal. Manufacturers, producers and importers of covered chemical substances will present the Agency with a technical file identifying the chemical substance in question and its uses, along with a chemical safety report. Several manufacturers and/or importers using the same substance may form a consortium for registration purposes.
2. **Evaluation:** All chemical substances produced or sold in quantities exceeding 100 tons/year, or quantities of less than 100 tons/year and which are considered “sensitive,” will be submitted to a risk evaluation by the Member State where the registrant is established or where the chemical substance in question is produced. Each chemical substance will also be subject to a risk evaluation by the authorities of each Member State where it will be put on the market. The cost of the evaluation tests will be the responsibility of the manufacturers and/or importers. The results of the tests will be shared between Member States and passed along the supply chain so as to inform all users of that chemical substance.
3. **Authorization:** There will be a special authorization process for chemical substances of very high concern (e.g., those with carcinogenic or bioaccumulative characteristics). Authorization to distribute the chemical substance in question would only be granted if the applicant is able to demonstrate to the Agency that the risks presented by the substance are adequately controllable or that the social and economical benefits from such substances exceed their risks.
4. **Restrictions:** Each Member State or the Commission may request certain restrictions or prohibitions on the manufacture, sale or usage of chemical substances when the results of the evaluation testing (described in item 2 above) indicate that restrictive measures should be imposed. Such restrictions or prohibitions will ultimately be set forth by the Agency.

## Mexico: New General Law for the Prevention and Integrated Management of Waste

Mexico’s new General Law for the Prevention and Integrated Management of Waste (the “Law”) went into effect in January 2004, 90 days after it was signed into law by President Vicente Fox. The Law is Mexico’s first attempt to regulate the management of wastes in an integrated fashion. The Law also modifies existing laws regarding the cleanup and transfer of contaminated real property in Mexico.

The Law requires various parties to participate in the management of waste, which the Law regulates as “hazardous waste,” “special management waste” or “urban solid waste.” Federal, state and local authorities are required to establish programs promoting the prevention and integrated management of all types of regulated waste. Producers, importers, exporters and distributors of products that upon consumption and/or disposal may become specified hazardous or special management waste must implement “management plans” for the collection, management, transportation, treatment and disposal of such waste. The management plans must be approved by Mexico’s Ministry of the Environment and Natural Resources (“SEMARNAT”). These management plans may have a consumer responsibility (e.g., packaging return, recycling) component, and accordingly, the regulated parties also must educate consumers as to the role and the precautions that must be taken by consumers under the plans. In addition, the Law establishes general requirements for the handling of hazardous wastes.

In addition to creating a regulatory scheme for the management of waste, the Law promotes the cleanup of sites contaminated with hazardous wastes. For example, while parties responsible for the contamination of real property still are responsible for cleaning up site contamination, the Law establishes that owners and “possessors” (i.e., tenants and other operators) of a contaminated site are jointly and severally liable for the cleanup of the site. Pursuant to the Law, new regulations will be promulgated setting cleanup standards as well as protocols for the investigation of contaminated sites.

The Law also provides that in certain cases (e.g., with respect to abandoned contaminated sites or sites contaminated with specified pollutants) the federal government will be entitled to issue a Declaration for the Remediation of Contaminated Sites which may: (i) establish conditions for the site’s cleanup, (ii) impose restrictions on the site’s use and transferability, and (iii) ensure that the deed or other instrument of transfer will contain a notice of any restrictions and/or obligations relating to the environmental condition of the site.

The Law imposes restrictions on the transfer of an interest (i.e., either ownership or possession) in a site contaminated with hazardous waste. In addition to obtaining SEMARNAT's approval for the transfer of an interest in such a site, the Law requires the party transferring the interest to inform the acquiring party about the known presence of the contamination. The Law does not, however, expressly obligate a transferor to determine whether or not the site is contaminated.

Many aspects of the Law will be clarified by regulations that have yet to be enacted.

## European Union: Public Access to Information About Environmental Matters

The European Union has recently taken two steps to improve public access to information concerning environmental matters.

On March 31, 2004, the EU Parliament adopted a proposal of the EU Commission regarding the application of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to certain EU institutions and bodies. The proposed regulation provides that certain EU institutions and bodies make relevant environmental information available to the public, including via electronic databases. Such "environmental information" is defined as any information in written, visual, aural, electronic or other material form on the state of the elements of the environment, on the factors affecting or likely to affect these elements, and on measures, such as policies, legislation, plans, and activities affecting or likely to affect the

environment. It includes in particular reports on the implementation of environmental legislation, as well as environmental impact assessments. The proposed regulation also provides that covered institutions and bodies will promote public participation in the preparation of programs and plans relating to the environment. Finally, the proposed regulation provides that environmental organizations, once they have gone through a qualification process, be granted legal standing before European courts to bring actions to protect the environment. Specifically, such a "qualified" environmental organization will be allowed to request that an applicable EU institution undertake a review of a regulated entity's compliance with environmental law. If the environmental organization's request is rejected or if the organization believes that the decision of the EU institution is not satisfactory, it will have the right to bring the issue before the European Court of Justice.

On February 23, 2004, the EU Commission and the European Environmental Agency relaunched the European Pollutant Emission Register ("The Register") in an effort to improve public access to environmental information. The Register, which existed prior to the new effort, was created pursuant to Directive 96/61/EC on Integrated Pollution Prevention and Control (IPPC) and to Commission Decision 2000/479/EC, and now has been expanded. According to Article 1 of the 2000 Commission Decision, every three years each Member State must submit to the Commission a list of emission exceedances of air and water standards set forth in Annex 1 to the Commission Decision for all facilities in specified industrial sectors. The data provided in such lists will be compiled and made publicly accessible on the Internet at: <http://www.eper.cec.eu.int>. This website currently lists "pollution reports" from about 10,000 industrial facilities and "overview reports" from each Member State with aggregated emission data for that country.

## Environmental Practice BRIEFING

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