LATIN AMERICAN REGION

Environmental Quarterly

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We are pleased to provide you the First Edition of Beveridge & Diamond's Latin American Region Environmental Quarterly. This newsletter is intended to provide quarterly highlights of major initiatives from key countries in the Region, including: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico and Peru. We plan to add additional countries over time. If you have any questions about the article, please feel free to contact any member of our Team. We would be pleased for your feedback and suggestions. If you would like additional information about our Latin American Forum, please contact Maddie Kadas at mkadas@bdlaw.com. Additional information about our Firm's Latin America Practice is available at http://www.bdlaw.com/practices-122.html.

ARGENTINA HIGHLIGHTS

Argentina Makes Environmental Insurance Mandatory

Companies that engage in potentially hazardous activities in Argentina are now required to have insurance to cover environmental damage. The Argentine environmental agency (*Secretaría de Ambiente y Desarrollo Sustentable* or SAyDS, by its Spanish acronym) recently concluded a series of rulemakings aimed at implementing this obligation that was initially established under Law No. 25.675, Argentina's General Law of the Environment which was enacted in 2002. Reportedly, 35,000 companies are affected by the implementation of this requirement and a private environmental insurance market appears to be emerging.

Article 22 of Law No. 25.675 provides that every person who undertakes activities that pose risks to the environment must obtain insurance with sufficient coverage to guarantee financing of the restoration of any damage that may result. However, until recently, no such insurance coverage was available, it was unclear what activities would be deemed to require such coverage and the requirement was not enforced.

In a series of rulemakings initiated in 2007 and completed in September of 2008, SAyDS has now established: (i) a list of activities posing environmental risks, including mining, crude oil and natural gas extraction, infrastructure construction, recycling and manufacturing activities, among others; (ii) a self-insurance option; and (iii) a formula for determining the level of coverage required that includes a calculation of the minimum insurable amount. Based on information currently available on the SAyDS website, five insurance companies currently have approval to offer the required environmental insurance. A division within SAyDS, the Unit for Evaluation of Environmental Risks (UERA), is now charged with overseeing implementation of the environmental insurance requirement.

Reference Sources (in Spanish)

- Law No. 25.675
- Resolution No. 177/07

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- Resolution No. 178/07
- Resolution No. 303/07
- Resolution No. 1639/07
- Resolution No. 1398/08
- Joint Resolutions 98/07 and 1973/07

Argentina Adopts Implementing Rule for Forestry Law

In February 2009, Argentina adopted the implementing regulation for its Forests Law, Law No. 26.331 (Nov. 2007) (*Ley de Presupuestos Mínimos de Protección Ambiental de los Bosques Nativos*). Among other things, Law No. 26.331 established a one-year ban on deforestation and required the provinces to define those forest areas that would be protected, those designated for sustainable use and those that could be converted to other uses. It also provides for creation of a National Fund for the Enrichment and Conservation of Native Forests to be distributed to the provinces. The implementing regulation, Decree 91/09, adopted by Argentina's environmental agency (SAyDS) is intended to ensure a harmonized and consistent application of the Law.

Under the Decree, a National Program for Protection of Native Forests is established. (Art. 12) SAyDS is responsible for monitoring the progress of the provinces in developing Norms for Native Forests (*Ordenamientos de los Bosques Nativos*) and providing technical and financial assistance. Together with COFEMA, the National Council for the Environment, SAyDS shall promote activities to harmonize conservation categories established by jurisdictions sharing eco-regions. Each jurisdiction is responsible for updating their Norms for Native Forests every five years according to the standards developed by SAyDS together with local implementing authorities. (Art. 6)

As provided by Article 23, local implementing authorities are required to provide annual reports to SAyDS that include information related to the following:

(i) type, quantity and description, including surface area and conservation category, of proposed projects;
(ii) declarations or certifications of environmental impacts related to any deforestation or sustainable use authorizations;
(iii) approved plans for sustainable use and changes of use;
(iv) plans for sustainable use for which an environmental impact study was not required; and
(v) public comment and participation opportunities.

Local implementing authorities that have approved Norms for Native Forests must also submit them to SAyDS, along with maps that allow identification of each established category of conservation and information relating to consistency with conservation categories of neighboring provinces. (Art. 33) Benefits to the provinces may be suspended upon failure to submit required reports, absent good cause. (Art. 38)

Reference Sources (in Spanish)

- Law No. 26.331
- Decree No. 91/09

New Argentine Contaminated Site Bill Filed

In March of 2009, an Argentine bill that would address contaminated site issues was introduced in the national Congress. Perhaps intended to reinvigorate the Program for Environmental

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Management of Contaminated Sites (PROSICO, by its Spanish acronym), which was established in 2006 by the Argentine environmental agency (SAyDS), the objectives of this measure would include the following: (i) identification of contaminated sites in the national territory; (ii) classification of such sites according to the levels of risk established by rule in each jurisdiction (iii) development of a Registry of Contaminated Sites in each jurisdiction that would be incorporated into the National System of Information; (iv) restoration of priority contaminated sites; and (v) carrying out of audits for contaminated and potentially contaminated sites. (Bill No.0101-D-2009, Art. 2)

Under the Bill, local implementing authorities would be responsible for identifying sites in each jurisdiction where potentially contaminating activities are taking or have taken place. (Art. 3(a)) Potentially contaminating activities are defined to include, among others, waste storage, treatment and disposal facilities, petroleum refineries, and certain manufacturing activities. (Annex II) Owners of such sites would be required to develop environmental studies and provide these to local implementing authorities. Based on such studies and other available information, local authorities would classify the sites according to risks presented. (Art. 3(b) and (d)) Owners of sites classified as requiring priority remediation would be required to submit a remediation plan using best available technology to local authorities for review and approval. (Art. 7)

The Bill would establish a National Registry of Potentially Contaminated Sites as well as a National Program for Historic Contaminated Sites for those sites where responsible persons could not be identified. This program would be implemented by SAyDS and would, among other things, include the creation of a fund for the environmental management of historic contaminated sites. (Art. 16)

Reference Sources (in Spanish):

- Bill No. 0101-D-2009

BRAZIL HIGHLIGHTS

Brazil Launches National Plan for Climate Change

In December of 2008, Brazilian President Lula da Silva launched the National Plan for Climate Change ("Plan"). The Plan is the result of a year long effort by the Inter-ministerial Committee on Climate Change and its Executive Director that included a public consultation process. It is intended to be a dynamic plan that will be subject to ongoing evaluation during the course of its implementation.

The Plan sets forth measures aimed at mitigation and adaptation of climate change. Specifically, it includes the following objectives:

(1) Fostering efficient use of resources in economic sectors;
(2) Sustaining the country's high share of renewable energy;
(3) Encouraging an increase in sustainable biofuels;
(4) Seeking sustained reductions of deforestation rates;
(5) Eliminating the net loss of forest coverage by 2015;
(6) Promoting actions to reduce vulnerabilities of populations; and
(7) Identifying environmental impacts of climate change and promoting scientific research to minimize socio-economic costs.

Actions in support of these stated objectives include, among a host of others, the following: (i) implementation of the National Policy for Energy Efficiency that will result in gradual energy

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savings of up to 106 TWh/yr by 2030; (ii) increasing electricity supply from cogeneration to 11.4% of the total supply in the country in 2030; (iii) adding 34,460 MW from new hydropower plants; (iv) encouraging industry to achieve an average annual consumption increase of 11% in ethanol in the next ten years; (v) implementing the National Public Forests Register created by the Brazilian Forestry Service; (vi) preventing the use of illegal timber in the construction industry; and (vii) strengthening the climate network of research centers throughout the country.

The Plan recognizes that economic, technical, political and institutional mechanisms are necessary for its implementation. In particular it emphasizes the use of the Clean Development Mechanism (*Mecanismo de Desenvolvimento Limpo* or MDL) to promote voluntary measures to mitigate greenhouse gas emissions, noting that as of August 2008 Brazil has had 310 projects at some phase of the MDL process.

Reference Sources (in Portuguese)

- National Plan for Climate Change available at

CONAMA Establishes Parameters for Management Plans for Forests

In February of 2009, Brazil's National Council on the Environment (CONAMA) issued Resolution 406/09 to establish the technical parameters for the development, presentation, technical evaluation and implementation of Plans for Sustainable Forest Management (PMFS, by its Portuguese nomenclature) involving wood exploration purposes for native forests in the Amazon Biome. The PMFS shall be applied by competent authorities at all levels of the National Environmental System.

Generally speaking, the parameters required depend on whether the PMFS involves the use of logging machinery. (Art. 3) The intensity of cutting proposed in the PMFS must take into account various technical criteria intended to regulate forest production. (Art. 4) However, the Resolution allows for variances where justified based on studies undertaken by a technical expert. (Art. 7)

The Resolution expressly authorizes the re-use of wastes such as branches and roots. However, the methods and procedures for the extraction and measurement of such wastes must be described in the PMFS. (Art. 8)

Reference Sources (in Portuguese)

- Resolution 406/09 available at

New Packaging Bill Would Affect Consumer Goods

A brief measure presented in Brazil's Chamber of Deputies in March of 2009 has the potential to impact the packaging of all consumer goods. Bill 4834/09 filed by Deputy Jefferson Campos would require each product made available for retail sale to be packaged with the least material possible. The Bill does not target specific products. Instead, it provides that a future regulation would define the scope of covered goods.

The Bill would require that materials used in packaging be biodegradable or suitable for reuse or recycling. The packaging would also need to be labeled with instructions on the best disposal option. (Art. 2) The scope of the products covered by the Bill would be defined by a future regulation based on diverse categories of materials and functions. The implementing rule would also need to set forth the type of packaging that would be most appropriate and establish

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deadlines for compliance by commercial establishments. (Art. 3)

Reference Sources (in Portuguese)

- Bill 4834/09 available at

CHILE HIGHLIGHTS

Pending Senate Recycling Bill Would Amend Constitution

A Senate bill (Bill) was filed in December 2008 that calls for the concepts of reduction, reuse and recycling to be added to the national Constitution. The Bill would amend Chile's Constitutional provision guaranteeing the right to live in a pollution-free environment by requiring the government to promote waste reduction, reuse and recycling. Although the Senate's Environment Committee recently rejected the Bill, it remains pending for further consideration by the Senate.

Notably, the Committee's consideration of the Bill included statements made by Ana Lya Uriarte, Chile's Minister of the Environment indicating that the agency intends to submit a draft General Waste Law to Congress later this year. She emphasized the importance of a waste management hierarchy that includes not only reuse and reduction, but also prevention and extended producer responsibility concepts in particular for products of mass consumption such as e-wastes.

Although Chilean environmental policy moves slowly and the development of a General Waste Law has been anticipated since the unveiling of the Integral Solid Waste Management Policy three years ago, local sources confirm that the draft legislation being developed by CONAMA will likely be circulated in the near term.

Reference Sources (in Spanish)

- Recycling Bill (Bulletin No. 6.317-12) av

Chile Proposes Change to Toy Regulation That Would Extend Restriction of Substances to Imported Goods

A draft modification to Chile's existing Toy Safety Regulation was recently posted for comment by the Ministry of Health. The modification proposes to extend a restriction of substances provision that currently applies to goods manufactured in-country to imported toys. Because a "toy" is broadly defined, the proposed requirement may potentially impact importers in a number of sectors. Under Chile's existing Toy Safety Regulation, which tracks the EU Directive on Safety of Toys, a "toy" is defined as any product conceived, destined for, or manufactured in a manner evident for use in play or entertainment for a child under 14 years of age. (Toy Safety Regulation, Art. 2(a)) The draft modification would extend Chile's existing testing and certification requirements to imported goods. That is, imported "toys" would need to be accompanied by a certification from the country of origin stating that the daily bioavailability limits for eight substances (*i.e.*, antimony, arsenic, barium, cadmium, chromium, lead, selenium and mercury) were not exceeded. The certification would need to be based on chemical analysis of the products. (Draft Modification of Art. 16 of the Toy Safety Regulation) If the Ministry of Health adopts this modification, covered products will be subject to new obligations prior to import.

Reference Sources (in Spanish)

- Toy Safety Regulation
- Draft Modification of Art. 16 of the Toy Safety Regulation

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COLOMBIA HIGHGHLIGHTS

Product Take-Back High on Colombia's Agenda

Earlier this year, Colombia's Ministry of the Environment (MinAmbiente) issued regulations implementing the take-back requirements for expired pharmaceuticals and lead-acid vehicle batteries imposed under Decree 4741 adopted in December of 2005 ("Decree"). With these recent adoptions, Colombia continues to press ahead with its stated plans to address end-of-life management of hazardous products.

By way of background, under the Decree, end-of-life (expired, used or retired) pharmaceuticals and medications as well as used lead-acid batteries are deemed hazardous products. (Decree, Art. 20) Manufacturers and importers of these hazardous end-of-life products are required to develop and present post-consumer management plans. (Decree, Art. 21) The recently enacted measures further define these obligations and set forth specific timetables for implementation.

Pharmaceuticals. Under Resolution 371/2009, which covers pharmaceuticals, MinAmbiente has established a phased-in approach to implementing take-back. In the first year, pilot plans will need to be developed by manufacturers, importers, distributors and retailers. The following year, each management plan (Plan) formalizing take-back would be required to reach 10% of the population. After the third year, the Plan would be required to increase its coverage by 10% each year until 70% of the population was covered. (Resolution 371, Art. 6)

In addition, Resolution 371 includes significant detail regarding the required content and implementation of the Plans. For example, it requires detailed information regarding how take-back will take place, how consumer communications will occur and mechanisms to ensure that take-back goals will be satisfied. (Resolution 371, Art. 7) The Resolution also anticipates that some companies will enter collectives in order to satisfy Plan obligations.

Lead-Acid Batteries. Under Resolution 372/2009, which covers lead-acid batteries, both manufacturers and importers have 18 months from March 5, 2009 to present their Plans to MinAmbiente. (Resolution 372, Art. 7) However, only companies that import 300 or more batteries would be subject to this obligation. Resolution 372 would also allow affected responsible persons to satisfy this obligation collectively. (Resolution 372, Art. 2)

The Plans will require, among other things, product information, a description of the management structure, user return details and monitoring mechanisms. (Resolution 372, Art. 6) Further, manufacturers and importers must ensure that phased-in collection quotas are met. (Resolution 372, Art. 5 and 6)

Both of these measures will undoubtedly affect the framework of future producer responsibility programs as Colombia moves forward with its environmental agenda. Additional products that may be subject to additional take-back requirements are electronic wastes and pesticide wastes, among others. Colombia has recently appointed a new environmental minister, Carlos Posta Posada. However, he has not yet outlined a specific environmental agenda.

Reference Sources (in Spanish)

- Resolution 371/2009
- Resolution 372/2009

Colombia Finalizes Approval of Stockholm Convention

In February 2009, Colombia took action to approve, by executive order, the Stockholm Convention on Persistent Organic Pollutants ("POPs Convention"). (*See*, Ministry of Foreign

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Relations Decree No. 377, February 9, 2009) The POPs Convention had been previously approved by Congress in 2008, but this action was needed to finalize the approval. Colombia will now move forward with enacting legislation to satisfy its obligations to prohibit the production, use, import and export of substances listed in the Convention.

Reference Sources (in Spanish)

- Decree No. 377

Colombia Publishes Draft Air Pollution Protocol

In January 2009, Colombia's Ministry of Environment (MinAmbiente) published a draft Protocol for the Control and Vigilance of Air Pollution Generated by Fixed Sources. ("Protocol") The draft Protocol would implement the provisions of Resolution 909 establishing standards for emissions of air pollutants by fixed sources adopted by MinAmbiente in June of 2008 ("Resolution 909").

Resolution 909 requires that the Protocol include reference methods for measurement of fixed sources, procedures for the evaluation of emissions and implementation of air emissions studies. (Resolution 909, Art. 72) The Protocol is also required to set forth the conditions under which competent environmental authorities may require continuous emissions monitoring. (Resolution 909, Art. 75)

The draft Protocol, which is 122 pages long, consists of four chapters addressing the following broad categories: (i) Procedures for Air Emissions Measurement; (ii) Air Emissions Studies; (iii) Monitoring Frequency; and (iv) Best Engineering Practices. The activities subject to control and vigilance are specifically identified in Annex 1 of the draft Protocol and include, among others, petroleum refineries, various manufacturing facilities, graphic arts industries and waste incineration.

Reference Sources (in Spanish)

- Resolution 909
- Draft Protocol for the Control and Vigilance of Air Pollution Generated by Fixed Sources

Colombia Enacts New Law to Ban Hazardous Waste Imports

Late last year, Colombia enacted a Law to ban all imports of hazardous wastes into the country, Although Colombia's 1991 Constitution bans import of toxic and nuclear wastes, Law 1252/08 makes clear that any introduction, import or traffic of hazardous wastes into the country is prohibited. The implications of the new law, which overlaps with existing laws and decrees, but also abrogates any contrary provisions, will likely take some time to unravel.

Law 1252/08 also imposes limitations on the export of hazardous wastes. Exports of hazardous wastes are only allowed when they cannot be environmentally and sanitarily managed in Colombia due to their complexity. (Art. 13)

Law 1252/08 also reaffirms Colombia's adoption of producer responsibility principles and a broad cradle-to-grave hazardous waste management regime. For example, under the new law, manufacturers, importers and now transporters of products or substances with hazardous characteristics are deemed "generators" for purposes of assigning obligations and liabilities. (Art. 8) In this regard, except for the addition of transporters as generators, Law 1252/08 restates the policies of existing Colombian hazardous waste law under Law 430/98 and Decree 4741/05. On the other hand, although the new law's list of generator responsibilities generally follows those set forth in Decree 4741/05, it requires that generators test their hazardous wastes using

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specially certified labs. (Art. 12(1)) If strictly interpreted, this provision may eliminate the option to use generator knowledge that was allowed under Decree 4741/05.

Reference Sources (in Spanish)

- Law 1252/08
- Decree 4741/05

COSTA RICA HIGHLIGHTS

Draft Regulations Would Require Environmental License for Ongoing Activities Without EIAs

The Ministry of Environment, Energy and Telecommunications ("MINAET") has developed a draft "Environmental License Regulation for Activities in Operation, Without an Environmental Impact Assessment" that would establish new licensing procedures for existing projects that have never prepared an environmental impact assessment. A sub-agency under MINAET, known as the National Technical Environmental Secretary (SETENA), would be charged with implementing the licensing program. (Art. 14) The Regulation's requirements would apply to any "activity in operation," which is defined to include "all activities that, without having been the object of an EIA, have been started prior to the solicitation of the environmental license regulated by the present Regulation, and that require an environmental license in order to renew or receive for the first time a permit from another public entity." (Arts. 3(a)) The Regulations would exempt construction projects that do not entail the operation of any activity. (Art. 1)

All "activities in operation" would be required to provide SETENA with a Sworn Statement of Environmental Compliance that conforms with the format provided in Annex 2 of the Regulation. (Art. 16) Projects that may be categorized as moderate impact (above a B2) under Costa Rica's General Regulation Concerning the Procedures for Environmental Impact Evaluation (No. 31849-MINAE-S-MOPT-MAG-MEIC) as amended must also prepare and submit to SETENA as part of the licensing application an Environmental Diagnostic Study ("EDA"). (Art. 15) The EDA would identify and assess potential environmental impacts and establish a "plan for corrective measures" necessary to address any potentially negative impacts identified in the study. (Art. 7) Depending on the categorization of the project, activities in operation would be subject to environmental controls and monitoring and oversight procedures developed and implemented by SETENA, including for example reporting requirements and periodic audits. (Art. 18) These procedures would be required to be developed within three months of publication of the Regulation. (Transitional Provision III)

The Regulation would exclude activities in operation that are managed under certain acceptable environmental management systems (e.g., accredited by the Costa Rican Accreditation Entity, or ECA) from the requirement to prepare a Sworn Statement. (Art. 23) It also establishes a number of incentives, including a new Environmental Prize similar to a form of eco-seal that SETENA would award to promote good performance under the Regulation. The Regulation calls on the Executive to further develop the implementing requirements for the Prize through a Decree. (Art. 24)

The draft Regulation was completed on February 15, 2009, but it is unclear whether the turmoil caused by the removal of the previous Minister of MINAET will delay or derail this proposed Regulation.

Reference source (in Spanish)

- Draft Environmental License Regulation

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Legislative Assembly Advancing Towards Enactment of National Waste Law

Costa Rica's unicameral legislature is nearing completion of a comprehensive national waste law that would include provisions for extended producer responsibility ("EPR"), generator responsibilities, identification of special management wastes, green purchasing, and import and export controls. The "Law on Integral Waste Management" (Bill 15.897), first published in the Official Gazette on June 29, 2007, has been passed by the Environment Committee of the Legislative Assembly and is currently up for debate before the plenary session. During the legislative process, the Bill has undergone several modifications, the most notable of which was to shift the principal waste management agency from MINAET to the Ministry of Health.

Among the key provisions in the bill are broad EPR provisions that would apply to importers, manufacturers and other listed responsible parties that introduce or sell products that after use become a waste or that generate wastes. Responsible parties would also be required to take measures related to product design, as well as the operation of waste management and take back programs. (Art. 44) Waste "generators" would be subject to a significant list of requirements; however, it is unclear in the Bill whether manufacturers and other responsible parties would have to meet these requirements as well. (Art. 41)

In addition, the Bill broadly defines "special management wastes" as those ordinary wastes that, due to their volume, quantity, special transport needs, storage conditions, or recovery value must be taken out of the normal waste stream. (Art. 6) These wastes will be defined in subsequent regulations, and it remains unclear whether they will be linked directly to the section on EPR. The Bill would also encourage government green purchasing measures through a provision that would permit the government to grant up to 20% more in the valuation process for environmentally-friendly products. (Art. 31) The Bill would prohibit the import of hazardous wastes, unless granted an exemption due to its potential value for materials recovery within the country. (Arts. 36-7) It would also expand the definition of waste to include expired or damaged products, obsolete products, products whose registration was cancelled in the country of origin, and end-of-life products. (Art. 38)

Reference source (in Spanish)

- Law on Integral Waste Management (Bill 15.897)

ECUADOR HIGHLIGHTS

Ecuador's New Green Constitution Establishes Sweeping Environmental Rights

Ecuador's new national Constitution, which entered into force in late 2008 following a voter referendum, is the first in the region to recognize both a citizen's right to a healthy environment and separate rights for nature, including the right to be respected in its entirety through its vital cycles, as well as the right to restoration. (Arts. 14, 66, 71 and 72) Citizens have the right of "amparo" to protect their constitutional right to a healthy environment from acts or omissions by the government or by individuals. (Art. 88) Notably, any person, community or nationality can assert the constitutional rights pertaining to nature by applying the principles established under the Constitution. (Art. 71) Granting rights to nature is a dramatic paradigm shift in constitutional law in the region and may open the door to more citizen suits.

Additional environmental rights and obligations in the new Constitution include: (i) the right to water (Art. 12); (ii) the protection of consumer rights, including imposition of criminal and civil

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penalties for violations of those rights (Arts. 52-4); (iii) prohibitions on the introduction of toxic wastes and imports, production and use of POPs and GMOs found to be harmful to human health or that threaten local cultivation or ecosystems; and (iv) indigenous rights related to the use of natural resources and biodiversity, among others. The Constitution assigns significant environmental responsibilities to the government, including specific provisions related to natural resources, soil, water, urban environment and alternative energy, and grants the state patrimony over non-renewable natural resources (e.g., mining, oil and gas, biodiversity). (Arts. 395-415) The government is also called upon to undertake a number of transitional actions to implement the provisions of the Constitution, including the development of a Water Resources Law and provisions for auditing water and sanitation companies and ensuring proper tariffs and fairer distribution to the country's poor.

There are significant questions as to the ability of Ecuador to implement the far-reaching environmental principles and rights in the new Constitution, particularly if it begins to impact the extractive industries that the country relies on for much of its income.

Reference source (in Spanish)

- Constitution

Ecuador Passes Controversial Mining Law

Ecuador's controversial Mining Law, which entered into force on January 29, 2009, establishes a new administrative and regulatory framework providing for significant government oversight and authority over the sector. The Law creates an entirely new administrative regime under the Sectoral Ministry; a Mining Regulation and Control Agency will be responsible for oversight and enforcement, and a National Institute for Geological Investigation, Mining and Metallurgy will serve as an autonomous technical agency focused on developing mining information and technology. (Arts. 5-11) The Law also creates an autonomous National Mining Company that would undertake mining operations either individually or in association with private interests. (Art. 12) The National Mining Company would have the first opportunity to obtain concessions on "Special Mining Zones," which the President of Ecuador would identify as areas with significant mining potential. (Art. 24)

In accordance with Ecuador's new Constitution, the State has patrimony over all non-renewable resources, and mining rights may be transferred through procedures established under the Law for concessions, contracts for mining extraction operations, and appropriate licenses and permits for a range of activities at various stages in a mining operation. (Arts. 1, 16, 17) The Law includes a number of details on the scope and nature of mining concessions, including rights accorded to the concessionaire, the size and duration of a concession, and specific limitations and requirements for exploration and extraction operations. (Arts. 29-39) Concessionaires must also meet a number of obligations related to labor (e.g., prohibition on child labor), the environment (e.g., environmental impact assessments, water quality and waste management requirements) and community participation. (Arts. 67-93) The government maintains the right to receive payments from concessionaires, known as "regalias," based on a percentage of the sale of the materials extracted from the concession. (Arts. 92, 93) The Sectoral Minister can declare the expiration of concessions for a number of reasons listed specifically in the Law, and it also maintains the right to nullify titles to mining rights for violation of the Law. (Arts. 106-122)

The Law replaces the previous 1991 and 2000 national mining laws. It will require additional regulations, to be promulgated 120 days following the entry-into-force of the law. The law garnered significant controversy in Ecuador, with marches and demonstrations by indigenous and local community groups claiming the law fails to protect the environment and favors multinational corporations. These demonstrations will likely continue, raising concerns that despite the new law, mining concessionaires may face increased scrutiny from the public

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and potentially higher risks of citizen suits given the new environment rights granted under Ecuador's new national Constitution.

Reference source (in Spanish)

- Mining Law

MEXICO HIGHLIGHTS

SEMARNAT Developing Rules to Define Producer Responsibilities for Special Management Wastes and Urban Solid Wastes

Mexico's federal environmental agency, SEMARNAT (*Secretaría de Medio Ambiente y Recursos Naturales*), is developing technical standards (*normas oficiales mexicanas* or NOMS) that will define two key categories of waste, namely special management waste and urban solid waste. Once final, these NOMS will define the scope of wastes subject to producer and importer management plans under Mexico's 2003 General Waste Law (*Ley General para la Prevención y Integración de los Residuos*). Although a Regulation to the Law was implemented in 2005, its terms were quite generic, and as a consequence, many aspects of the Law relating to the scope and applicability of the management plans for these waste streams have remained unenforced (and largely unenforceable). Once final, these drafts will have significant impacts on the way in which a number of wastes are managed in Mexico and are the last step in implementing the sweeping producer responsibility policies outlined in the Law.

By way of background, the Law requires that large quantity generators (10 tons or more), producers, importers, exporters and distributors of products that become solid urban wastes or special management wastes develop management plans that include their take-back, management and disposal. (General Waste Law, Art. 28) Not all such product wastes, in theory, are subject to a management plan; instead, SEMARNAT is charged with developing criteria and listings for which these wastes will be subject to a management plan. (General Waste Law; Art. 30) The criteria and lists are at the very heart of the current rulemaking efforts. The NOMS will also include what the management plan requirements will entail, although much of the debate until now has been focused on the classification of the waste streams themselves.

Special Waste Management NOM. Under drafts of the proposed special management waste NOM, a number of criteria for requiring that wastes be subject to a plan have been developed over time and they are currently categorized into so-called obligatory criteria, technical criteria and preventative criteria. On their face, they would appear to grant SEMARNAT significant discretion in the determination of whether a certain product stream is subject to a management plan. (Draft, Art. 6) These would presumably be applied on a case-by-case basis and require additional evaluation by SEMARNAT. What may have more immediate impact to a number of sectors is the list of special management wastes that would be required to be subject to a management plan. These include, for now:

- wastewater treatment sludges
- construction wastes
- health sector wastes
- electronic wastes
- used automobiles at their end-of-life
- used tires
- agro-plastics
- organic wastes from large quantity generators

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- plastic wastes from large quantity generators
- glass wastes from large quantity generators
- paper and cardboard wastes from large quantity generators
- metal wastes from large quantity generators

Because these special management wastes are currently part of the municipal solid waste stream and are not subject to separate management requirements or producer responsibility requirements, implementation of this NOM, if adopted as proposed, could be significant for a number of producers, importers and distributors. We have been told that this list and its criteria remain fairly dynamic, however, and it is unclear at this point to what extent the list will remain as currently drafted. However, the General Waste Law itself identifies a number of waste streams that are categorically "special management wastes" and which form the basis for these draft lists, and, accordingly, it is quite conceivable that the list as drafted will remain intact or only slightly modified. (General Waste Law, Art. 19)

Urban Solid Waste NOM. Separately, SEMARNAT is also developing criteria that would define which urban solid wastes will be subject to a management plan. Most striking are recent drafts of the NOM that would list the following categories of wastes as requiring a management plan:

- Glass Containers and Packaging
- Cardboard Containers and Packaging
- Plastic Contains and Packaging
- Metal Containers and Packaging
- Electrodomestics (*i.e.*, household appliances)
- Furniture

The urban solid waste NOM is less developed than the special management waste NOM and we have been told that the negotiations have stalled in large part because key stakeholders -- the municipalities -- have not been part of the negotiating process. A key issue for the urban solid waste NOM will be the degree to which municipalities will be required to absorb the costs and logistics for management plan wastes. The General Waste Law calls for "shared responsibility" as a policy for all waste streams, but it is a concept which to date has not been assigned meaningful legal parameters.

Reference sources (in Spanish)

- Draft Special Management Waste NOM
- Draft Urban Solid Waste NOM

Plastic Bag and Packaging Restrictions Emerging in Mexico

Restrictions on plastic bags and packaging are at the forefront of emerging environmental issues in countries throughout Latin America. Two in Mexico are noteworthy -- the first is Mexico City's recent ban on non-biodegradable plastics and packaging, and the second is a bill in the Mexican Congress that would institute a similar program at the national level.

In late March 2009, Mexico City's legislative assembly passed a measure that amends the City's Solid Waste Law and is intended to ban the use of non-biodegradable plastic shopping bags. However, the broad mandate also sets the groundwork for Mexico City to restrict the use of non-biodegradable plastics in a wide range of plastic packaging. Under the amendments, the Law prohibits commercial establishments from giving away free plastic bags for the purposes of transportation, carrying or containing their products or services (Art. 25,XI Bis) and permits plastic bags and packaging only when the plastic is biodegradable (Art. 26, Bis1).

However, the Secretary of the Environment is also charged with developing a program aimed

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toward reducing the consumption of non-biodegradable bags, packaging, containers and packing which arguably gives the City room to institute a program that covers far more than bags. (Mexico City Law Amendments, Article 11Bis.) Finally, the City is also charged with developing technical standards that would define biodegradability content in plastics. Based on a recent news headline, the Mexican Association of Plastics Industry (*La Asociación Nacional de Industrias de Plástico*) intends to bring an *amparo* action (constitutional law suit) to enjoin the legislation.

Mexico's focus on plastic packaging and bags may not remain at the municipal level. Mexico's Green Party recently announced that it will push for passage of a Bill that will phase out plastic bags at the national level and believes it has support to do so soon. The Party sponsored a bill in October 2008 similar to the Mexico City Bill that would charge national environmental authorities with developing a progressive replacement program to reduce consumption of bags, containers, packaging and packing of non-biodegradable plastic used in general commerce and provided to the public to contain, package or transport goods. (PVEM Bill, Proposed Revision to Art 7 of General Waste Law.) In any event, even without a national ban, the fact that Mexico City has acted first may inspire other large municipal areas to implement similar legislation, and key market areas could well become regulated at the local level.

Reference sources (in Spanish)

- Mexico City Solid Waste Law Amendments
- PVEM Proposed Plastic Ban Bill

Mexico Proposes Comprehensive Site Remediation Program

Mexican environmental authorities continue to signal that site remediation will remain at the top of their regulatory agendas and have released a comprehensive proposed program for addressing contaminated sites. See, *Proyecto del Program Nacional de Remediación de Sitios Contaminados*. Mexico has one of the most stringent federal waste management regimes in the Americas, surpassing the waste management policies of even the United States in some instances, and which includes a comprehensive remediation program. The legal framework for the existing program was adopted in 2003 under the General Law for the Prevention and Comprehensive Management of Wastes (*Ley General para la Prevención y Gestion Integral de los Residiuos*) (the "Waste Law" or LGPGIR) as part of sweeping reforms to Mexico's waste laws. Although the waste management regime still remains in its infancy and numerous ambiguities remain, it is plain that Mexico is serious about dealing with contaminated sites largely through a very broad set of polluter pays policies similar to those of the United States. For example, development of the National Inventory of Contaminated Sites appears to be well underway. According to local sources, SEMARNAT has now identified nearly 300 abandoned sites contaminated with hazardous wastes in Mexico.

The proposed program sets forth a comprehensive administrative program to deal with these sites, although it appears mainly to be a guidance document that would not have any legally binding requirements in itself. The proposal identifies a number of advances in Mexico's regulatory and administrative structure over the past few years but outlines numerous improvements that SEMARNAT believes are necessary as well. These include a full range of inter-agency coordination measures, programmatic efficiency objectives, consolidation of consultant and laboratory services, mechanisms for identifying and registering contaminated sites, and measures to develop funding for clean-up actions. The proposal also identifies a number of regulatory changes it believes should be adopted to accommodate the programmatic objectives, including: (i) changes to the existing Waste Regulation; (ii) adoptions of new technical standards to address sampling and clean-up standards, in particular halogenated hydrocarbons, persistent organic pollutants and pesticides; and, perhaps most ambitious of all,

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(iii) a new General Law for the Protection of Soil. *See generally*, Program at 44-46.

While it is yet unclear as to how many elements of the proposed program will be adopted, Mexican environmental authorities are keenly aware of its massive problems with contaminated sites and appear ready to begin seriously addressing them. This will remain a dynamic area of law that will affect a broad range of industries in Mexico.

Reference source (in Spanish)

- National Program for the Remediation of Contaminated Sites

PERU HIGHLIGHTS

Peru's Highest Court Prohibits Further Oil Exploration in Protected Area

On February 26, 2009, Peru's Constitutional Tribunal suspended oil exploration and future extractive operations in a regional conservation area known as the Cordillera Escalera pending the completion by the "competent authorities" of a Master Plan for land use in the area. The suit, originally filed in October of 2006 by an umbrella group of environmental associations known as the "Cordillera Escalera Group," claimed operations by Brazil's Petrobras, Spain's Repsol YPF and Canada's Talisman Energy threatened the Group's constitutional rights to a clean environment. Plaintiffs sought to suspend exploration and eventual extraction in the area based on concerns that operations would contaminate the significant water resources in the area, which in turn would impact future water use for human consumption and degrade the environment.

The lower trial and appeals courts determined that Plaintiffs' claims were unfounded because the project's environmental impact assessment adequately provided that no water would be used in operations (except for treated drinking water) and any impacts from operations would not effect human consumption. The Constitutional Tribunal overturned the appellate court's decision, holding that the Plaintiffs' claims were founded because the companies involved in the project had proceeded without a Master Plan. Such a Plan was required to provide the necessary environmental protections and limits or restrictions for operations in the area. Although the Tribunal provides little in the way of support for its decision to require a Master Plan, the opinion includes significant discussion of broad international and constitutional legal principles regarding sustainable development, environmental protection, corporate environmental and social responsibility, and the rights of native communities, all of which presumably underlie its decision. The Tribunal does provide that the project could continue following completion of a Master Plan, although it is unclear what level of government would be responsible for preparing such a Plan.

Reference Source (in Spanish)

- Constitutional Tribunal Opinion

Peru Issues Regulations on Access to Genetic Resources

Peru's Ministry of Environment recently issued a "Regulation for Access to Genetic Resources" that provides the procedures for obtaining government permission to extract genetic resources from Peru. The scope is defined broadly to include genetic resources that originate in Peru, products derived from these resources, their intangible components, and migratory species that by natural causes are encountered in the national territory. (Art. 4) The Regulation provides for some limited exceptions, including, for example, human genetic resources and products derived from them and the interchange of genetic resources between indigenous peoples and local

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communities. (Art. 5)

The Regulation establishes an institutional and procedural framework for evaluation and approval of solicitations for access to genetic resources, completed through formal contracts with appropriate government agencies as prescribed by the Regulation. The Ministry of Environment maintains general normative and oversight authority under the Regulation, and three separate government agencies (or "Sectoral Authorities") are responsible for completing contracts as determined by the origin of the genetic material:

(a) Ministry of Agriculture (land-based wildlife resources);

(b) Institute for Agrarian Innovation (INIA) (domesticated or cultivated resources); and

(c) Ministry of Production, Vice-Ministry of Fisheries (marine resources). (Arts. 13-15)

A multi-sectoral National Commission for Biodiversity (CONADIB) would guide policy and coordinate the work undertaken by the Sectoral Authorities. (Art. 16) The Regulation also creates a new National Mechanism for Supervision and Integrated Monitoring of Genetic Resources, which would have responsibility for maintaining a public registry of contracts and coordinating efforts by the three contracting governmental agencies. (Art. 37)

The Regulation provides a detailed description of the terms and conditions necessary to complete two separate types of access contracts with the appropriate Sectoral Authority, one for commercial and the other for non-commercial purposes. (Arts. 20-26) Sectoral Authorities would be responsible for coordinating with the Ministry of Environment on developing a Standard Model for Agreement of Transfers of Material for transfer of material *ex situ*. (Art. 30) The Regulation also addresses potential limitations on access and requirements for export and import of genetic resources. (Arts. 27, 28)

The Regulation, initially issued as Ministerial Resolution No. 087-2008-MINAM, was elevated to the level of Supreme Decree No. 003-2009-MINAM on February 7, 2009 to account for the multi-sectoral functions provided for in the Regulation. Although fully in force, the Regulation calls for numerous complementary actions and transitional actions that suggest it may take some time for the system it establishes to be operational.

Reference Source (in Spanish)

- Regulation for Access to Genetic Resources

Peru's New Ministry of Environment Taking Steps to Develop Initial Priorities and Improve Enforcement

Peru's Ministry for the Environment has issued a draft National Environmental Policy for 2009-2021 that lays out in general terms the priorities for the Ministry under five thematic groups: (i) management of natural resources; (ii) management of environmental quality; (iii) international commercial and environmental agreements; (iv) citizen environmental education; and (v) administrative framework. The Policy also includes as Annexes helpful summaries of the current environmental legal framework in Peru and existing broad national policies related to the environment.

Although general in nature and not legally binding, the Policy does provide a roadmap of potential priorities for a Ministry still taking shape after its creation in May 2008 under Legislative Decree 1013. (Decree 1013 is one of fourteen environment-related Presidential Legislative Decrees to implement the conditions of the U.S. - Peru Trade Promotion Agreement.) In November 2008, the Administration dismantled the prior agency, the National

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Environmental Council ("CONAM"), and in December made public the proposed structure for the new Ministry. Importantly, the Minister is a Cabinet-level position, suggesting that environmental issues will have greater visibility and potentially attract greater funding and support for the Ministry's environmental agenda.

Concurrently, the Congress has been very active in passing legislation that implements key elements of Legislative Decree 1013. This February, for example, Congress passed the Law for the National Environmental Evaluation and Monitoring System, which operationalizes the Environmental Evaluation and Oversight Agency ("OEFA") function called for under Decree 1013. Under the new system, OEFA will monitor environmental compliance and issue fines within guidelines provided in the Law. (Art. 11) Efforts to consolidate and operationalize the new Ministry framework will likely continue through 2009 as the Ministry concurrently attempts to address initial priorities in waste management, forestry and air quality.

Reference Sources (in Spanish)

- Draft National Environmental Policy 2009-2021
- Legislative Decree 1013
- Law for the National Environmental Evaluation and Monitoring System

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California