

LATIN AMERICAN REGION

ENVIRONMENTAL QUARTERLY



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NOTES FROM THE LATIN AMERICAN PRACTICE GROUP

New Year's Greetings from the Latin American Practice Group! We are pleased to bring you the last installment of the Latin American Quarterly for 2009 and look forward to continuing our coverage of this dynamic region during 2010. Questions or comments about our newsletter articles can be directed to Madeleine Kadas at mkadas@bdlaw.com or Lydia González Gromatzky at lgromatzky@bdlaw.com.

The last quarter continued to see strong regional attention to environmental law and policy, a trend that will undoubtedly continue during 2010. Although all areas of environmental law are in play, this issue highlights the following:

- ***Changes in Environmental Administration and Licensing Authority.*** The biggest regional news, perhaps, is **Chile's** acceptance to the OECD, which will trigger a suite of significant changes to existing authorities and laws over the next few years. The first set of those changes has begun: President Bachelet signed two laws establishing a new Environmental Ministry and a new Energy Ministry and the Senate is evaluating a bill to create a separate environmental tribunal system. Other countries continue to streamline their environmental administrations and licensing processes as well: **Brazil's** Chamber of Deputies is considering a bill to clarify the licensing authority of IBAMA and **Rio de Janeiro** has adopted a new state environmental license program based on environmental impacts. **Colombia's** environmental ministry has proposed changes that would significantly amend the scope of its existing environmental licensing rules.
- ***Increased Attention to Mining Sector Wastes.*** Regional attention to the environmental impact of mining activities is noteworthy. **Ecuador** has issued three new regulations to implement its new Mining Law, including one specifically directed to environmental standards. **Mexico** has proposed new standards for management plan requirements for generators of mining wastes. **Peru's** environment ministry has established a working group to address illegal mining activities. And, although not covered in this newsletter, **Colombia's** environmental Minister made public statements urging passage of environmental reforms to the existing Mining Code, now before the Colombian Congress.
- ***Continued Focus on Water Resources.*** Attention to water rights, conservation and pollution control remains a significant regional concern. **Uruguay** adopted a comprehensive framework law on water resources, supply and conservation, implementing its Constitutional rights to water supplies. **Peru** issued implementing regulations to its new water law, passed only last year. **Costa Rica** and **Colombia** issued national water policies that could lead to changes in laws governing water resources and conservation. Finally, the **Argentine** Senate is evaluating two bills to conserve its fresh water resources, including one to protect glaciers.
- ***New Commitments to Climate Change and Sustainability.*** In preparations for Copenhagen negotiations, climate change and sustainability initiatives have been in play in several jurisdictions this year. Recently, **Brazil** adopted a Climate Change Policy that commits to reduce national greenhouse gases by at least 36% by 2020. A global first, **São**

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Paulo became the first state of a developing country to pledge to greenhouse gas reductions of 20% by 2020. **Mexico** has issued a sustainability plan for 2009-2012, with the aim of significantly reducing consumer energy use. **Uruguay** adopted new building codes to mandate solar energy use.

In this issue, we are pleased to provide new country coverage for Uruguay. We are currently reviewing additional countries to expand our geographic coverage in the future.

ARGENTINA HIGHLIGHTS

CHAMBER OF DEPUTIES CONSIDERS COMPREHENSIVE PACKAGING WASTE BILL

Argentina's Chamber of Deputies is considering a bill (PL 4882-D-2009, *Ley de Presupuestos Mínimos Para el Uso Sostenible de Envases y Sus Residuos*) that would hold manufacturers and importers of packaging and packaged products responsible for packaging wastes. Under the Bill, packaging is defined to include any product manufactured with materials of any kind used to contain, protect, manipulate, distribute, transport and present goods, from raw materials to finished product, in any phase of the chain of manufacture, distribution and consumption. It also includes disposable articles used for the same ends, including secondary and tertiary packaging. (Bill, Art. 2)

Responsibility for managing packaging waste would fall on the following responsible entities: (i) producers, packagers, importers, and manufacturers of raw materials for packaging; (ii) manufacturers and importers of packaging; and (iii) importers, distributors and merchants of packaged products. (Art. 2) When impossible to identify the responsible entity, responsibility would fall to the one who first placed the product on the market. (Art. 6) Responsible entities would be required to comply with the regulations under one of two options: (i) a Deposit/Return System; or (ii) a Packaging & Waste Management System. Under the Deposit/Return System, responsible entities would operate individual programs whereby a deposit would be paid upon purchase of the package or container, and then a refund would be provided upon its return. The entities would be responsible for taking back the packaging and providing for its recycling and disposal. (Art. 27) Under the other option, covered entities could join a collective, quasi-governmental third-party managed system, which would handle the take-back and recycling or disposal of packaging on their behalf. The entity would have to pay a fee to the third-party managed system for each covered item placed on the market. (Arts. 12, 18-23) The Bill also includes labeling and reporting requirements. (Arts. 22, 35, 17 and 19)

The Bill is now in three different committees for review. If passed, the bill would be the most comprehensive packaging take-back and recycling law in Latin America.

Reference Source (in Spanish):

- Packaging Bill (PL 4882-D-2009), available at www.bdlaw.com/assets/attachments/Argentina%20Packaging%20Waste%20Bill.pdf

ARGENTINA TAKES ACTION TO PROTECT WATER RESOURCES

Two recently introduced bills in the Argentine Senate highlight a growing awareness and concern within the country over the need to protect and preserve national water resources. The first bill (S-2362/09, *Proyecto de Modificación a la Ley de Gestión Ambiental de Aguas*) would amend Argentina's Law for the Environmental Management of Water (25.688) to incorporate provisions to prohibit the export of fresh water, subject to two limited exemptions: (i) when the export corresponds to the execution of a treaty obligation or for emergency or humanitarian



reasons; and (ii) water bottled at the source, water-based drinks or sparkling water that conforms to Argentina's Food Code (Código Alimentaria). (Bill 2362, Art. 3) In addition, the bill would amend Article 1 of the Water Law to include a provision that recognizes water as a natural strategic resource that is essential for life, and that it is the government's responsibility to ensure that the fundamental human right to water and sanitation is guaranteed throughout the country. (Art. 1)

The second bill (S-2200/09, *Presupuestos Mínimos Para la Protección de los Glaciares y del Ambiente Periglacial*) establishes a framework for protection of the country's glacial resources as strategic reserves for future water supply for human consumption. (Art. 1) Among other things, the Law would prohibit any activities that could affect the natural condition of glaciers, including in particular: (i) the release of contaminating substances or elements, chemical products or wastes of whatever volume; (ii) mining or oil exploration or exploitation; (iii) construction of buildings, except for those necessary for scientific study; and (iv) the installation of industrial facilities or industrial activity. (Art. 6) All other non-prohibited activities in glacial areas would be subject to an environmental impact evaluation. (Art. 7) The Law also includes a number of penalty provisions. (Arts. 11-14) Responsible governmental authorities, including the Administrator for the National Parks and, where applicable, the National Office for the Antarctic, would be called upon to implement the law in coordination with the Federal Environmental Council. (Arts. 8 and 10(a))

It is not clear whether either of these bills will gain enough support to pass both houses in the Argentine Congress, but the glacier bill in particular has attracted significant attention in the press and by environmental NGOs. Both bills, if passed, could have immediate impacts on some industries, but also might have longer term implications for the country's water allocation scheme in a manner that could impact all industries.

Reference Sources (in Spanish):

- Bill to Amend the Water Resources Law (S-2362/09), available at www.bdlaw.com/assets/attachments/Argentina%20Senate%20Bill%20S-2362-09.pdf
- Bill to Create Glacier Protection Law (S-2200/09), available at www.bdlaw.com/assets/attachments/Argentina%20Senate%20Bill%20S-2200.pdf

CLEAN-UP OF THE RIACHUELO WATERSHED MOVES FORWARD

On December 7, 2009, the Authority for the Matanza-Riachuelo River Basin published Resolution 76/2009, creating the Registry for Contaminating Agents of the Matanza Riachuelo River Basin (the "Polluter Registry") (known as *Registro de Agentes Contaminantes de la Cuenca Matanza-Riachuelo*). This represents the latest step in what has been a groundbreaking environmental citizen suit case that has garnered significant attention both in the region and around the world.

Argentina's Supreme Court ruled in June 2006 that the government has a non-discretionary duty to uphold the constitutional right to a clean environment and to restore it in the event of environmental harm. The Court required the federal, provincial and local governments to develop a clean-up plan and called for the 44 companies to assess their effluent discharges and to comply with the requirement to obtain environmental insurance under Article 22 of Law 25.675.

The recently created Polluter Registry represents initial steps to comply with its responsibilities under the ruling. Those industries declared to be "Contaminating Agents" must provide information on the Polluter Registry as prescribed under the Resolution. Industries on the Polluter Registry will be responsible for having cleanup plans.



Reference Source (in Spanish):

- Resolution 76/2009, available at www.bdlaw.com/assets/attachments/Argentina%20Resolucion%20Nro_%2076_2009.pdf

BRAZIL HIGHLIGHTS

NATIONAL DEVELOPMENTS

CONAMA ISSUES FEDERAL SITE REMEDIATION STANDARDS

On December 28, 2009, following three years of debate, Brazil's National Environmental Council ("CONAMA") issued Resolution No. 420 (the "Resolution"; *Resolução 420/2009*), establishing federal standards for the environmental management of contaminated sites. The Resolution provides state and municipal environmental agencies with a framework of guidelines for the management of site remediation programs. (Ch. IV, Arts. 21-38) The Resolution also contains monitoring and reporting requirements that may apply to Brazilian facilities. Subject to implementation by state agencies, all facilities with the potential to pollute may be required to establish soil monitoring programs and submit technical reports on the results with each renewal of their environmental licenses. (Art. 14)

The core of the new federal standards is a multi-stage process under which potentially contaminated sites are to be identified, investigated, classified, remediated and monitored. (Arts. 23-36) The process and its classification system resemble those of the existing program in São Paulo, which was expanded and strengthened under that state's new site remediation law (which created a "Superfund" analog called "FEPRAC"), enacted in July 2009. The Resolution assigns the planning of on-site intervention to whoever is "responsible" for the contamination (Art. 34), although it provides no guidance as to who can be held "responsible."

Responsible parties must submit to the appropriate environmental agency a plan that addresses: (i) the control and elimination of the sources of contamination; (ii) the current and future use of the area; (iii) an evaluation of risks to human health; (iv) the intervention alternatives considered technically and economically viable; (v) a monitoring program; and (vi) the costs and timeframes for implementing the intervention alternatives. Notably, the Resolution allows for various means of addressing site contamination including zoning options and use restrictions. (Art. 34)

The Resolution also creates technical criteria for use by environmental agencies, setting reference values for contaminants and procedures for determining the analytical methods to be employed by state environmental agencies. The federal environmental agency IBAMA is also directed to create a National Database of Contaminated Sites using information obtained by the state agencies. (Art. 38, § 3) Incorporation of the Resolution's standards into laws, permits and other requirements can be expected.

Reference Source (in Portuguese):

- CONAMA Resolution No. 420 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20CONAMA%20Resolution%20420%20of%202009.pdf

BRAZIL ADOPTS CLIMATE CHANGE POLICY

On December 29, 2009, President Luiz Inácio Lula da Silva signed Law No. 12.187 (the "Law"; *Política Nacional sobre Mudança do Clima*), the National Climate Change Policy, pledging a voluntary reduction of Brazil's greenhouse gas emissions of between 36.1% and 38.9% by 2020. The proposed reduction is relative to the country's projected emissions for 2020, as determined by a nationwide inventory of emissions that is to be completed in 2010. (Art. 12) The Law



provides general objectives and principles, but does not establish binding obligations or order specific actions to achieve its stated objectives. Most details, such as reductions targets for the various economic sectors, remain to be determined by presidential decree.

Apart from broad statements of policy, the Law names various institutions and programs as actors that will participate in the articulation and implementation of the federal response to climate change. Among others, the Law promises to provide incentives for the trading of certified emissions reduction credits through the Brazilian Emissions Reduction Market, organized under the Brazilian equivalent of the U.S. Securities and Exchange Commission. (Arts. 6 and 9) The Law also adopts Brazil's commitments to the United Nations Framework Convention on Climate Change and the Kyoto Protocol as standards of the policy. (Art. 5) Consistent with these agreements, Brazil has recently strengthened its approach to forest protection, particularly through the recent expansion and extension of its Amazon anti-deforestation program. Reducing or reversing reforestation is a means of reducing net greenhouse gas emissions, and Brazil's forest stock stands to gain value in the trade of emissions reduction credits.

Following the advice of cabinet ministers, President Lula vetoed three provisions of the Law as passed by the Congress. One of the vetoed provisions would have made a national goal of eliminating fossil fuels as a source of energy. Another provision deleted from the Law would have made federal budgets contingent on action to address climate change. The third vetoed provision was intended to provide incentives for hydroelectric power as a renewable source of energy, but was controversial because it favored small projects exclusively.

Reference Source (in Portuguese):

- Law No. 12.187 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Law%20No.%2012187%20of%202009.pdf

NEW BRAZILIAN CLIMATE CHANGE FUND BASED ON OIL REVENUE

On December 9, 2009, President Luiz Inácio Lula da Silva signed Law No. 12.114 (the "Law"; *Fundo Nacional sobre Mudança do Clima*), to create the National Climate Change Fund (the "Fund"; also "FNMC" by its Portuguese acronym). The Fund will be supplied by 60% of the share of oil revenues already guaranteed to the federal Environment Ministry under the Petroleum Law of 1997. The existing share is 10% of federal revenues generated from fields that are above certain production levels. It is still unclear whether the oil eventually produced from the recently discovered "pre-salt" reservoirs in the deep ocean will be subject to this provision, as the legal framework for the pre-salt fields is still being debated in the Congress. At current production levels, the estimated annual revenue to the Fund would be in the range of 800 million to 1.2 billion reais (or about \$450 million to \$700 million). The Law lists thirteen program areas for projects to be supported by the Fund, including adaptation, forest conservation, agroforestry, habitat restoration, and payments to communities and landowners who maintain land in its natural condition. (Art. 5, § 4) The selection of priorities and projects will be under the authority of a management committee composed of six representatives of the federal government and five representatives of the non-profit sector. (Art. 4)

Reference Sources (in Portuguese):

- Law No. 12.114 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Law%20No.%2012114%20of%202009.pdf

CHAMBER OF DEPUTIES PASSES BILL TO CLARIFY ENVIRONMENTAL LICENSING AUTHORITY

In an effort to resolve an unsettled area of Brazil's environmental law, on December 16, 2009,



the Chamber of Deputies passed Bill No. 12-B of 2003 (the “Bill”; *Projeto de Lei Complementar 12-B/2003*), which would establish a consistent national standard for determining which environmental agency -- federal, state or municipal -- has the licensing authority over particular projects. Historically, the federal agency IBAMA had de facto authority whenever it decided to act, but in 2004 the Environment Ministry’s Office of Legal Counsel issued an opinion that the proper authority should be determined by a project’s likely environmental impact. (Opinion No. 312/CONJUR/MMA/2004) The Bill shares the same approach to licensing that is contained in the 2004 opinion: for most smaller projects the municipal agency would exercise jurisdiction; IBAMA would have authority only over projects affecting more than one state or in areas of special federal jurisdiction, such as national parks, indigenous reserves, and marine areas, both coastal and offshore, and state agencies would have authority over projects not subject to municipal or federal authority. (Arts. 7, 8 and 9)

Objections to the Bill have been aimed primarily at two controversial provisions: Article 17 would limit the authority of the federal and state agencies to review decisions of the lower agencies -- instead of its existing general authority to revoke permits and impose fines, for operations licensed by state and local agencies IBAMA would be empowered only to investigate and write reports. Article 4 would create special commissions to foster shared and decentralized environmental management, which some observers believe would infringe the existing authority of Brazil’s National Environmental Council, CONAMA, to decide disputes over licensing.

Reference Sources (in Portuguese):

- Bill No. 12-B of 2003, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Bill%20No.%2012-B%20of%202003.pdf
- MMA Opinion No. 312, available at www.bdlaw.com/assets/attachments/Brazil%20-%20MMA%20Opinion%20No.%20312%20of%202004.pdf

BRAZIL PASSES TAX CREDIT FOR SOME RECYCLED PRODUCTS

On December 23, 2009, President Luiz Inácio Lula da Silva signed Provisional Measure No. 476 (*Medida Provisória 476/2009*), granting a credit for some recycled products against Brazil’s Industrialized Product Tax (“IPI”). The credit is limited in the following ways:

- It may only be claimed against the IPI paid on shipments of products with recycled waste content.
- It may not be claimed for products that are otherwise exempt from the IPI.
- It may only be claimed if the recyclable materials were acquired directly from a *catador* cooperative. (Note: *catador* cooperatives are informal organizations of trash collectors and recyclers that are increasingly being recognized under Brazilian solid waste laws.)
- It may be claimed up to 50 percent of the amount paid by the company for the recyclable material. The maximum potential credit will be determined by subsequent regulation, and may vary among product categories. (Art. 2)

The Provisional Measure requires subsequent regulation to determine which types of materials will qualify for the credit and to publish tax credit tables for eligible products. The credit is set to expire at the end of 2014. (Art. 1)

Reference Source (in Portuguese):

- Provisional Measure No. 476 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Provisional%20Measure%20No.%20476%20of%202009.pdf



STATE DEVELOPMENTS

SÃO PAULO ENACTS CLIMATE CHANGE POLICY

On November 9, 2009, São Paulo Governor José Serra signed Law No. 13.798 (the “Law”; *Política Estadual de Mudanças Climáticas*), the State Climate Change Policy. The Law commits the state to reducing its CO₂ emissions by 20% in 2020, using 2005 emissions as a baseline. (Art. 32, § 1) It is reportedly the first emissions reduction policy adopted by a state of any developing country.

The means to achieve the mandatory reduction are not prescribed in full detail, but the Law anticipates the use of certain methods, including the authorization of greenhouse gas emissions taxes and financial incentives to restore natural habitats and stimulate projects that qualify for the Kyoto Protocol’s Clean Development Mechanism. (Art. 22) To implement the new policy, the Law creates a State Climate Change Council, which the Governor must establish within six months of the Law’s publication. (Art. 29) The Law also creates a Public Emissions Registry for the measurement and reporting of emissions using certified procedures. Participation in the Registry will be voluntary, stimulated by incentives such as low-interest loans and extension of deadlines for renewing environmental operating licenses. (Art. 9)

In addition to its emissions objectives, the Law provides for state regulation of other aspects of environmental sustainability, such as authorizing a sustainable procurement policy for the state government and imposing product stewardship requirements. (Art. 12) The Law also provides broad authority for land use planning to serve various priorities, including the promotion of sustainable transportation and protection of watersheds to mitigate the state’s vulnerability to changing weather patterns. (Art. 16)

Reference Source (in Portuguese):

- Law No. 13.798 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Law%20No.%2013798%20of%202009.pdf

RIO DE JANEIRO ESTABLISHES NEW ENVIRONMENTAL LICENSING SYSTEM

On November 12, 2009, Governor Sérgio Cabral of Rio de Janeiro issued Decree No. 42.159 (the “Decree”; *Sistema de Licenciamento Ambiental*), instituting new procedures for environmental licensing in the state. The Decree creates a system known by the acronym “SLAM” (from the Portuguese for “Environmental Licensing System”) to replace “SLAP” (“Licensing System for Polluting Activities”). SLAM is intended to accelerate the process for most applicants by sorting projects according to their expected impact. Projects of local impact, such as gas stations and laundromats, will be licensed on the municipal level in municipalities that have been certified to perform this function. The Decree creates six classes of projects, with Class 1 being small projects of insignificant pollution potential and Class 6 being large projects of “exceptional” pollution potential. (Art. 19) Similar changes in licensing procedures, both devolution to local authorities and accelerated processing, have been instituted recently in other Brazilian states, notably São Paulo. The Decree goes into effect on February 3, 2010.

Reference Source (in Portuguese):

- Decree No. 42.159 of 2009, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Decree%20No.%2042159%20of%202009.pdf



CHILE HIGHLIGHTS

CHILE'S PRESIDENT MICHELLE BACHELET SIGNS NEW LAW CREATING ENVIRONMENTAL MINISTRY

On January 12, 2010, President Michelle Bachelet signed Law 20.417 creating a new Ministry of Environment, Service for Environmental Evaluation and Superintendency for the Environment. This measure, driven in part by Chile's accession to the Organization for Economic Cooperation and Development, redesigns the institutional environmental framework for the country.

The Ministry of Environment is charged with primary responsibility for development of environmental policies and regulation as well as the conservation of biodiversity, water and renewable natural resources. The Service for Environmental Evaluation will have, as one of its key functions, responsibility for streamlining environmental permitting requirements and providing information to applicants and the general public. The Superintendency for the Environment will now be responsible for oversight and monitoring of compliance for environmental permits, decontamination plans and environmental regulations. Lauded by Chilean environmental groups, the new law also allows for greater public participation in environmental permitting decisions.

Reference Sources (in Spanish):

- CONAMA website at <http://www.conama.cl/portal/1301/article-47268.html>
- Bulletin No. 5947-12, see http://www.camara.cl/pley/pley_detalle.aspx?prmID=6331&prmBL=5947-12

SENATE CONSIDERING BILL TO CREATE CHILEAN ENVIRONMENTAL TRIBUNAL

Chile's Senate is currently considering an Executive Branch initiative that would create an Environmental Tribunal (*Proyecto de Ley Que Crea Tribunal Ambiental* or "Bill"). Under the Bill, the Environmental Tribunal would have jurisdiction to address decisions of the newly-created Superintendency for the Environment, resolve administrative controversies related to environmental issues and address environmental damage complaints. (Art. 17).

The Environmental Tribunal would be comprised of: (i) a presiding officer, who would be a lawyer appointed by the President; (ii) two environmental lawyers; and (iii) two environmental experts with backgrounds in science or economics. (Art. 2) The stated objectives for creating this new specialized court are to create greater certainty in judicial decisions related to environmental matters and a balanced approach to decisions involving the common good and individual interests.

Reference Source (in Spanish):

- Bill to Create Environmental Tribunal (*Proyecto de Ley Que Crea Tribunal Ambiental*), available at www.bdlaw.com/assets/attachments/Chile%20-%20Bill%20to%20Create%20Environmental%20Tribunal.pdf

CHILE ADOPTS NEW LAW CREATING MINISTRY OF ENERGY

In November of 2009, Chile adopted a new law creating a Ministry of Energy and ending an institutional framework that grouped mining and energy activities under the same ministry. (*Ley No. 20.402, Crea el Ministerio de Energía* or "Law"). With a heavy dependence on imports for primary energy consumption needs, Chile has been focusing significant attention on developing



sufficient and sustainable energy supplies. The strengthening of the institutional framework for the energy sector has been one of Chile's strategic priorities. Under the new Law, the Ministry of Energy has full power over regulatory, policy and planning for the energy sector with a view to promoting its development. The new Ministry of Energy will have under its purview the Superintendency of Electricity and Fuel, the National Energy Commission and the Chilean Commission for Nuclear Energy. (Art. 2)

The Law provides for the establishment of new non-profit organizations to promote, develop and coordinate research efforts, exchange technical and economic knowledge and other energy sector experiences. (Art. 2) The National Energy Commission is charged with creating the Chilean Agency for Energy Efficiency, a private non-profit organization, to study, evaluate and promote initiatives related to the diversification and efficient use of energy. (Art. 4)

Reference Source (in Spanish):

- Law No. 20.402 (*Ley No. 20.402, Crea el Ministerio de Energía*), available at www.bdlaw.com/assets/attachments/Chile%20-%20Law%20No.%2020.402.pdf

CONAMA PROPOSES LIMITS ON EMISSIONS FROM THERMOELECTRIC PLANTS

In December of 2009, Chile's National Environment Commission ("CONAMA") proposed new limits on air emissions from thermoelectric plants. The proposed norm would set limits on emissions of particulate material, sulfur dioxide, nitrogen dioxide, mercury, nickel and vanadium. (Art. 4)

Under the proposed norm (*Anteproyecto Norma Emisión Para Termoeléctricas*), both new and existing thermoelectric plants, particularly furnaces and turbines with more than 50 MW of capacity, would be regulated. However, the new standards would not apply to internal combustion engines and cogeneration plants. (Arts. 2, 3). Existing plants, defined as those that begin operations before January 1, 2012, would have a delayed compliance date. (Arts. 3 and 5)

Regulated thermoelectric plants would also be required to comply with annual reporting requirements. Published on December 15, 2009, the proposed norm will be subject to a 60-day public comment period.

Reference Source (in Spanish):

- Proposed Norm Limiting Emissions from Thermoelectric Plants (*Anteproyecto Norma Emisión Para Termoeléctricas*), available at www.bdlaw.com/assets/attachments/Chile%20-%20Proposed%20Norm%20Limiting%20Emissions%20from%20Thermoelectric%20Plants.pdf

COLOMBIA HIGHLIGHTS

COLOMBIA PROPOSES NEW NATIONAL AIR AND WATER POLLUTION POLICIES

Colombia has recently issued two draft national policies intended to address air and water pollution on a comprehensive national basis. While these policies are only in proposed form, and even when final will not provide binding legal requirements, both demonstrate MinAmbiente's attention to key areas that have not been of considerable focus over the past years, taking a back seat to waste and product stewardship issues. MinAmbiente has a reputation for being both proactive and progressive -- should the Agency take on air and water quality platforms as key strategic objectives, these will be areas of regulatory activity to watch.



Air Policy. To date, Colombia has not had a national, comprehensive air policy. Most of Colombia's efforts have been to focus on air pollution monitoring and a handful of criteria pollutants. The new policy, *Política de Prevención y Control de la Contaminación del Aire* (Dec. 2009) (the "Policy"), proposed by the MinAmbiente aims to change that. Although much of the document provides a high-level discussion of past approaches to control air pollution, existing legal instruments that address air pollution control, and general principles and objectives that a final policy should entail, it also includes an important Action Plan. At its core, the Action Plan proposes a comprehensive technical review of air quality issues throughout the country that will then be followed by an ambitious regulatory agenda to review, update and amend existing standards on noise and air pollution control for all mobile and fixed sources.

Water Policy. Entitled *Política Nacional Para la Gestión Integral del Recurso Hídrico*, the policy, like the air policy, is intended to provide a comprehensive approach to both water quantity and water quality in the country. Unlike the air policy, the objectives of the Water Policy are less specifically regulatory in nature, but call primarily for improved water planning and conservation and governance overall. These objectives may reflect the existence of numerous water resource laws in Colombia already and implicitly signal that implementation of existing initiatives is required. Nevertheless, based on these policies and regional activities in other countries, such as Peru and Mexico, it is quite possible that there will be calls for additional water laws to be established, especially if a recent call for a constitutional amendment granting the right to water is passed.

Reference Sources (in Spanish):

- *Política de Prevención y Control de la Contaminación del Aire*, available at www.bdlaw.com/assets/attachments/Colombia%20-%20Politica%20Calidad%20Aire.pdf
- *Política Nacional Para la Gestión Integral del Recurso Hídrico*, available at www.bdlaw.com/assets/attachments/Colombia%20-%20doc%20politica%20hidrica%20nacional.pdf

MINAMBIENTE OUTLINES METHODOLOGY FOR CALCULATING ENVIRONMENTAL PENALTIES

MinAmbiente has developed and published a slide presentation on an approach to calculating penalties for violating environmental laws. The presentation appears to reflect an internal effort to provide more certainty regarding the imposition of fines and penalties and provides an equation intended to reflect factors for assessing optimum penalties and apply them evenly.

These factors include: intended benefit for violating the law; amount of time the law was violated; environmental harm or risk; extenuating or aggravating circumstances; costs of compliance; and socioeconomic position of the violator. In turn, each of these elements, are divided into sub-formulas. While no set of enforcement equations can likely be applied precisely equally to every case, the slides are notable for their effort to provide some level of certainty and transparency regarding how penalties should be assessed -- and perhaps negotiated.

Reference Source (in Spanish):

- *Propuesta metodológica para el cálculo de sanciones pecuniarias-- multas -- derivadas de las infracciones a la normativa ambiental*, available at www.bdlaw.com/assets/attachments/Colombia%20-%20propuesta%20metodologica%20para%20el%20clculo%20de%20sanciones%20pecuniarias.pdf

CHANGES TO ENVIRONMENTAL LICENSING RULE PROPOSED FOR COMMENT

Colombia's environmental ministry recently proposed for public comment draft changes to Decree 1220/2005, a set of regulations that implements its environmental license (*licencia*



ambiental) requirements stemming from Law 99/1993. See Decreto (XXX), *Por el cual se modifica el Decreto 1120 de 21 de abril de 2005, reglamentario del título VIII de la Ley 99 de 1993 sobre licencias ambientales y se toma otras determinaciones*. While some of the changes appear minor, several proposed revisions could institute significant changes, as follows:

- The new rules would expand the scope of activities required to receive an environmental license. For example, environmental licenses would now be specifically required for cement kilns, construction and operation of solid waste treatment plants, the construction of a number of manufacturing facilities (beverages, chemical substances and products, textiles, paper and cardboard mills, leather tanning, etc.), certain aquaculture and agricultural activities, and road construction for mining activities. See Draft Art. 8 (amending Article 9).
- The proposed rules would create an administrative mechanism to streamline (or “integrate”) all existing environmental license requirements under a single permit and set forth an application process for doing so. See Draft Art. 19-20.
- Finally, the rules would also grant MinAmbiente specific authority to revoke or suspend Environmental Licenses or its Management Plan (Draft Art. 24) as a enforcement mechanism for failure to comply with license terms. Licenses would also automatically expire if the projects authorizing them had not been developed within five years. *Id.*

Reference Source (In Spanish):

- Decreto (XXX), *Por el cual se modifica el Decreto 1120 de 21 de abril de 2005, reglamentario del título VIII de la Ley 99 de 1993 sobre licencias ambientales y se toma otras determinaciones*, available at www.bdlaw.com/assets/attachments/Colombia%20-%20Decreto%20XXX.pdf

COSTA RICA HIGHLIGHTS

MINISTRY OF ENVIRONMENT ISSUES NEW NATIONAL WATER POLICY

The Ministry of Environment, Energy and Telecommunications (the “Ministry”) issued in November 2009 a National Water Policy (or *Política Hidrica Nacional*) that may pave the way for a new national water law. The existing water law, Ley de Aguas No. 276, dates back to 1942, and efforts to develop a new law date back to 2002, when Costa Rica’s General Assembly first considered a draft Water Resources Law (expediente 14.585). The draft Water Law, however, has seen numerous revisions since 2002 and has never been completed due to disagreements over certain key provisions (e.g., human right to water). The National Water Policy, however, appears to address many of the larger policy issues and may help to spur passage of a new water law.

The National Water Policy includes a number of basic principles to guide future water resources management in the country, including, among others: (i) the human right to access to potable water and basic sanitation; (ii) the ecosystem as an integral focus of water resources management; (iii) prioritization of water use for human needs; (iv) harmonization of land use planning and water resources development; and (v) the polluter pays principle, where the state guarantees the internalization of environmental and social costs for water contamination. (Section 5.1) In addition, the National Water Policy outlines eight strategic areas for action, many of which focus on establishing an administrative framework to ensure that these principles will be addressed. (Section 5.4) The Ministry is charged with implementing this Policy. (Section 5.1)

Costa Rica appears to be following the general water reform trend in the region by addressing the human right to water, realigning water management priorities to take into account environmental needs and water quality concerns, and increasing citizen participation in water resource management decision-making. These changes will significantly impact how water is allocated and managed in the country and may ultimately lead to the passage of a new water law.



Reference Sources (in Spanish):

- National Water Policy, available at www.bdlaw.com/assets/attachments/Costa%20Rica%20National%20Water%20Policy.pdf

COSTA RICA ISSUES INTERNAL REGULATION FOR MINISTRY COORDINATION ON CHEMICALS

In late September 2009, the Environmental Quality Division of the Ministry of Environment, Energy and Telecommunications issued a regulation establishing the administrative framework for a Technical Secretary for Coordination for the Management of Chemical Substances (known as the *Reglamento Interno de la Secretaría Técnica de Coordinación para la Gestión de Sustancias Químicas*). The Technical Secretary would be made up of representatives from a number of Ministries, as well as NGO and industry association representatives. (Art. 3) Among the functions assigned to the Technical Secretary would be:

- Development of policies, programs and strategies for managing chemicals;
- Facilitate ratification and/or implementation of chemicals treaties;
- Improve coordination among government agencies on chemicals management;
- Provide recommendations on new draft laws and technical regulations addressing chemicals;
- Support development of ministry action plans; and
- Take the lead in undertaking studies on potential chemicals that may be of concern and making recommendations for their regulation. (Art. 4)

The effort to harmonize and augment chemicals regulation in Costa Rica mirrors the recent global focus on chemicals management, particularly through the advent of EU Registration, Evaluation, Authorization and Restriction of Chemicals (“REACH”) and the Strategic Approach to International Chemicals Management (“SAICM”). While the Technical Secretary function may help to streamline and better harmonize domestic chemicals regulation, it may also signal an intention to more aggressively regulate and control chemical use in the country.

Reference Source (in Spanish):

- Internal Regulation of the Technical Secretary for Coordination for the Management of Chemical Substances, available at www.bdlaw.com/assets/attachments/Costa%20Rica%20Internal%20Regulation%20Chemicals.pdf

NATIONAL WASTE BILL EXPIRES IN THE GENERAL ASSEMBLY

Costa Rica’s national solid waste bill (Bill 156.897) expired in Costa Rica’s unicameral General Assembly in early November 2009. Specifically, the bill’s four-year period of consideration had expired, and a vote on a motion to keep the Bill alive another four years failed to pass in an extraordinary session on November 5, 2009. The progressive Bill included provisions for extended producer responsibility (“EPR”), generator responsibilities, identification of special management wastes, green purchasing, and import and export controls. Over the course of the four years since it was first proposed, the Bill had undergone significant revisions, but appeared to have enough momentum for possible passage in the late summer of 2009. While the parliamentary news service had indicated that there were motions to revisit the voting on the Bill, there was no indication that the Bill would be revived and it faces an uncertain future.



ECUADOR HIGHLIGHTS

ECUADOR ISSUES NEW MINING REGULATIONS UNDER REFORMULATED MINISTRY

Ecuador has taken significant steps to refashion its management of mining operations, which were halted through a dramatic revocation and suspension of concessions in April 2008. The first step in January 2009 was the enactment of a new Mining Law (*Ley de Minería*). In September 2009, the former Ministry of Mines and Petroleum was officially renamed the Ministry of Non-Renewable Resources, signaling a fundamental change in the country's attitude toward its mineral wealth. Most recently, on November 4, 2009, President Rafael Correa signed three decrees containing regulations to implement the Mining Law: Decree No. 119, the General Regulation of the Mining Law (*Reglamento General de la Ley de Minería*); Decree No. 120, the Regulation of the Special Regime of Small and Artisanal Mining (*Reglamento del Régimen Especial de Pequeña Minería y Minería Artesanal*); and Decree No. 121, the Environmental Regulation of Mining Activities (*Reglamento Ambiental para Actividades Mineras*).

The new law and regulations give the government of Ecuador at least 50 percent of the earnings from mining operations (Mining Law, Art. 93) and impose stricter environmental controls (Mining Law, Arts. 78-85). The federal government will have exclusive authority to approve new mining concessions. (Mining Law, Art. 29) Prior to final approval of their projects, companies will be required to submit environmental impact studies and technical plans that indicate the use of environmentally protective technology and practices. (Mining Law, Art. 78) The General Regulation organizes two new agencies under the Ministry: the Mining Control and Regulation Agency (Decree No. 119, Arts. 7-8); and the National Institute of Geological, Mining and Metallurgic Research (Decree No. 119, Arts. 18-19). The Mining Law also created the National Mining Company, which will have preferential rights to obtain mining concessions (Decree No. 119, Art. 20) and may participate in joint ventures with foreign companies (Mining Law, Art. 12).

Reference Sources (in Spanish):

- Ecuador 2009 Mining Law, available at www.bdlaw.com/assets/attachments/Ecuador%20Mining%20Law%20of%202009.pdf
- Ecuador Decree No. 119 of 2009, available at www.bdlaw.com/assets/attachments/Ecuador%20Decree%20119%20of%202009.pdf
- Ecuador Decree No. 120 of 2009, available at www.bdlaw.com/assets/attachments/Ecuador%20Decree%20120%20of%202009.pdf
- Ecuador Decree No. 121 of 2009, available at www.bdlaw.com/assets/attachments/Ecuador%20Decree%20121%20of%202009.pdf

MEXICO HIGHLIGHTS

MEXICO'S ENVIRONMENTAL AGENCY PUBLISHES DRAFT MANAGEMENT PLAN STANDARDS FOR MINING WASTES

SEMARNAT, Mexico's federal environmental agency, recently published for public comment a draft Official Mexican Norm (*Norma Oficial Mexicana* or NOM) proposing management plan standards for mining wastes. The NOM, PROY-NOM-157-SEMARNAT-2009 (*Que establece los elementos y procedimientos para instrumentar planes de manejo de residuos mineros*) was published on December 4, 2009 and has a sixty-day public comment period.

The NOM would be binding on any person who generates hazardous and non-hazardous wastes



during mining activities. (Art. 2) The management plan requirements are comprehensive and as proposed, would require demonstration of “integral management” of wastes, including: source reduction, separation, “valorization” (recycling), treatment, storage and disposal, and the means for evaluating and improving the plan. (Arts 5.2.3.1; 5.2.3.2) The draft NOM also proposes maximum permissible limits (MPLS) for contaminants.

The NOM is one of a series of standards that SEMARNAT has been evaluating for some time and represents a key implementing step for Mexico’s 2003 General Waste Law (*Ley General para la Prevención y Gestión Integral de los Residuos and its companion Regulation*). Other NOMS currently under development are standards that will establish the management plan standards for hazardous wastes, so-called special management wastes, and urban solid wastes, among others.

Reference Source (in Spanish):

- PROY-NOM-157-SEMARNAT-2009, available at www.bdlaw.com/assets/attachments/Mexico%20-%20PROY-NOM-157-SEMARNAT-2009.pdf

MEXICO PUBLISHES COMPREHENSIVE SUSTAINABLE ENERGY PLAN

In late November, Mexico published a four-year national plan to optimize its use of sustainable energy, through the National Program for Using Sustainable Energy (2009-2012), *Programa Nacional para el Aprovechamiento Sustentable de la Energía*, 2009-2012. The Program sets forth a series of actions, ranging from technology improvements to consumer education, intended to improve consumer energy use in the medium and short terms. The Program notes that more than 56 percent of Mexico’s energy consumption is from consumers.

While the Program itself is not binding, nor does it set forth financial commitments, it may well influence regulatory focus on consumer energy use. Within days of the Program’s publication, Mexico’s Secretary of Energy announced the formation of a working group to establish a NOM that would mandate the substitution of incandescent lights with more energy-efficient lighting, a global issue for environmental groups. While such norms are typically long in development, Mexico has plainly begun to recognize the need for sustainable energy commitments.

Reference Source (in Spanish):

- *Programa Nacional para el Aprovechamiento Sustentable de la Energía*, 2009-2012, available at www.bdlaw.com/assets/attachments/Mexico%20-%20Programa%20Nacional%20para%20el%20Aprovechamiento%20Sustentable%20de%20la%20Energia.pdf

SECRETARY OF ENERGY PUBLISHES STREAMLINED BIOFUELS PERMIT APPLICATION FORMS

As part of Mexico’s aggressive efforts to promote its domestic biofuels market, driven by its 2008 Law on the Promotion and Development of Biofuels, (*Ley de Promoción y Desarrollo de los Bioenergéticos*), its Secretary of Energy (SENER) recently published two companion agreements that provide streamlined forms and instructions for biofuels license applications. *See Acuerdo por el que se emiten los formatos de solicitudes de permisos para la producción, el almacenamiento, el transporte y la comercialización de bioenergéticos del tipo etanol anhidro y biodiesel; Acuerdo por el que se emiten los lineamientos para el otorgamiento de permisos para la producción, el almacenamiento, el transporte y la comercialización de bioenergéticos del tipo etanol anhidro y biodiesel.*

The application forms and instructions are intended to cover the range of permitting for biofuels activities, including: production and storage; transportation; and marketing of biofuels. The forms only apply to anhydrous ethanol and biodiesel. The application forms and instructions



went into effect on their date of publication, November 13, 2009.

Reference Sources (in Spanish):

- *Acuerdo por el que se emiten los formatos de solicitudes de permisos para la producción, el almacenamiento, el transporte y la comercialización de bioenergéticos del tipo etanol anhidro y biodiesel*, available at www.bdlaw.com/assets/attachments/Mexico%20-%20Acuerdo%20-%20formatos%20de%20solicitudes%20de%20permisos%20-%20bioenergicos%20-%20etanol%20anhidro%20y%20biodiesel.pdf
- *Acuerdo por el que se emiten los lineamientos para el otorgamiento de permisos para la producción, el almacenamiento, el transporte y la comercialización de bioenergéticos del tipo etanol anhidro y biodiesel*, available at www.bdlaw.com/assets/attachments/Mexico%20-%20Acuerdo%20-%20lineamientos%20para%20el%20otorgamiento%20de%20permisos%20-%20bioenergicos%20-%20etanol%20anhidro%20y%20biodiesel.pdf

PERU HIGHLIGHTS

PERU ADOPTS IMPLEMENTING RULES FOR NATIONAL ENVIRONMENTAL QUALITY STANDARDS FOR WATER

In December of 2009, Peru adopted implementing rules for its national environmental quality standards (or ECAs, by their Spanish nomenclature) for water. (*See, Decreto Supremo No. 023-2009-MINAM* or “Supreme Decree” implementing the ECAs adopted in 2008 under *Decreto Supremo No. 002-2008-MINAM*) The Supreme Decree defines key provisions of the water ECAs (e.g., water body categories) and requires the National Water Authority to implement the ECAs for those water bodies receiving effluent discharges. (Arts. 1 and 5) However, under certain circumstances, the ECAs will not apply to those water bodies that under natural conditions exceed maximum permissible limits. (Art. 7)

Beginning April 1, 2010, compliance with the ECAs is required for issuance of discharge permits. If the environmental quality of a water body exceeds one or more of the ECAs, only those discharges that do not contain any such parameter will be approved. For those water bodies exceeding ECAs, development of decontamination and rehabilitation plans under the procedures established by the Ministry of Environment (MINAM) will be required. (Art. 8)

In addition, competent environmental authorities for each of the three levels of government are required to report any water quality information generated to MINAM on an annual basis so that it will be included in the National System of Environmental Information. (Art. 9) MINAM shall revise the water ECAs based on technical evidence and monitoring results as necessary. (Art. 10)

Reference Sources (in Spanish):

- Supreme Decree No. 023-2009-MINAM, available at www.bdlaw.com/assets/attachments/Peru%20-%20Supreme%20Decree%20No.%20023-2009-MINAM.pdf
- Supreme Decree No. 002-2008-MINAM, available at www.bdlaw.com/assets/attachments/Peru%20-%20Supreme%20Decree%20No.%20002-2008-MINAM.pdf

MINAM ESTABLISHES WORK GROUP TO ADDRESS ILLEGAL MINING ACTIVITIES

In November of 2009, Peru’s Ministry of Environment (MINAM) established a Work Group to address illegal mining activities in the southeastern area of the country known as the Mother of God (*Madre de Dios*) Region. (*Resolución Ministerial No. 234-2009-MINAM* or “Resolution”)



Driven by the high price of gold, thousands of impoverished miners have flocked to the region. The large scale of mining exploitation in the area has led to significant deforestation and mercury contamination of rivers.

Under the Resolution, the Work Group includes representatives of the Ministry of Environment, Mining Federation of the Mother of God Region (FEDEMIN), National Federation of Artesanal Mining of Peru (FENAMARPE), Ministry of Energy and Mines, Secretariat of Coordination and Congress. (Art. 3) The Work Group is charged with addressing: (i) suspension of mining petitions; (ii) banning of mining activities in certain areas; (iii) dredging activities and (iv) formalization of mining in the Mother of God region. (Art. 2) A Technical Sub-Group has now been formed and is developing a proposal that would ban mining in certain areas such as those under forestry concession, protected natural areas and other areas incompatible with mining activities.

Reference Source (in Spanish):

- Ministerial Resolution (*Resolución Ministerial* No. 234-2009-MINAM), available at: www.bdlaw.com/assets/attachments/Peru%20-%20Ministerial%20Resolution%20No.%20234-2009-MINAM.pdf

URUGUAY HIGHLIGHTS

GENERAL ASSEMBLY PASSES NATIONAL WATER POLICY LAW

On October 2, 2009, Uruguay's General Assembly approved a new water policy law that sets broad policies and an administrative framework for management of water resources and water supply and sanitation in the country. The law (Ley 18.610, *Establécense los Principios Rectores de una Política Nacional de Aguas*) establishes, in accordance with Article 49 of the Constitution, the human right to water supply and sanitation and requires the national government to provide for that right. (Arts. 2, 3 and 8(k)) It also provides that all persons should abstain from causing negative environmental impacts and should adopt necessary precautionary and preventative measures to avoid such impacts. (Art. 7) Those that cause harm to water resources, either in quantity or quality, would incur responsibility for those harms. (Art. 8(E)) The Law also establishes, among a number of broad principles, priority uses (water supply is the top priority) that take into account equity, solidarity and sustainability and the concept of watershed management and more widespread citizen involvement in water planning and decision-making.

The law also assigns administrative responsibility for national water management to the Ministry of Housing, Land Planning and Environment and creates within the Ministry a new National Council for Water, Environment and Land. The Council will be made up of government officials, users and civil society members, and will be charged with national water resource planning, including the formation of a National Water Plan to be updated annually, and implementation of the broad principles and instruments created in the Law. In an effort to decentralize water management, the Law also creates Regional Councils for Water Resources, made up of government representatives, users and civil society members, who will be responsible for drafting regional water plans, settling water use conflicts, and creating local watershed and aquifer management organizations.

The Law follows a recent trend in Latin America to decentralize water resources management but to retain for the government responsibility for providing water supply and sanitation to all citizens. As these new regimes take shape, and with future water resource constraints looming, it is foreseeable to see new challenges for access to water for companies operating in countries such as Uruguay. As a general matter, water allocations for industrial uses may be impacted. The Law also signals a renewed effort to address water pollution, which mirrors efforts in other countries in the region as well and potentially opens companies up to liability.



Reference Source (in Spanish):

- Water Policy Law (Ley 18.610), available at www.bdlaw.com/assets/attachments/Uruguay%20Water%20Policy%20Law%2018610.pdf

URUGUAY MAKES COMMITMENT TO SOLAR ENERGY

Uruguay's General Assembly approved late last year Law 18.585 declaring a national interest in the investigation and development of the use of solar thermal energy (known as *Energía Solar Térmica: Se Declara de Interés Nacional la Investigación, Desarrollo y Formación en Su Uso*). The Law requires new buildings, including all new government buildings, as well as new health centers, hotels and sports facilities, to incorporate solar energy into the overall plans for water heating where 20% or more of the total energy use would be dedicated to heating water. (Arts. 3 and 6) In such instances, the buildings would be required to cover 50% of the necessary energy needed to heat water from solar thermal energy. (Arts. 4 and 6) In addition, the Law calls for, within six months, a technical evaluation to determine the viability of solar use for heating water in the industrial and agricultural sectors. (Art. 7) Uruguay's Ministry of Industry, Energy and Mining will be responsible for developing the norms and regulations to implement the Law, and is also charged with working with other Ministries (Environment and Social Development) to develop a broader program to facilitate use of solar energy in the country. (Arts. 9 and 11) This Law, which appears to be one of the first of its kind in the region, could signal a new direction in Latin America requiring companies to incorporate alternative energy sources into their future operations.

Reference Source (in Spanish):

- Law declaring a national interest in the investigation and development of the use of solar thermal energy (Ley 18.585), available at www.bdlaw.com/assets/attachments/Uruguay%20Ley%20No.%2018.585%20Energia%20Solar%20Termica.PDF

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