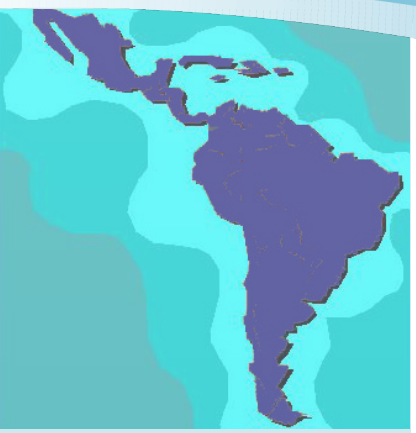
LATIN AMERICAN REGION

ENVIRONMENTAL QUARTERLY



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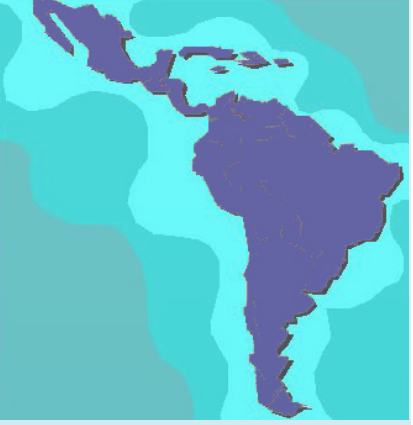
JULY 2009

NOTES FROM THE LATIN AMERICAN PRACTICE GROUP

The breathtaking pace of new and significant environmental laws and policies is not letting up in Latin America and no media seems immune. For this quarter, our newsletter includes articles that highlight the following trends, some of them long-standing, some of them signals of change to come:

- **More Stringent Waste Management and Site Contamination Initiatives:** An ever dynamic regional issue, several jurisdictions have seen significant movements on waste policy. A new version of Brazil's federal Omnibus Solid Waste Bill, pending for almost two decades, was finally issued by the congressional Special Committee. Several Brazilian states, which retain jurisdiction in the absence of federal legislation, continue to press forward: São Paulo passes a site remediation law and Minas Gerais enacts a comprehensive solid waste law. Chile evaluates a proposal to require detailed closure plans and financial guarantees for mining operations. Perhaps most significantly, Ecuador proposes comprehensive implementing regulations to its hazardous chemicals and waste management regulation.
- **Renewed Focus on National Water Laws and Rights:** Peru ushers in a sweeping new framework Water Resources Law that creates new administrative oversight bodies and permitting regimes. Mexico moves closer to adopting broad changes to its existing National Waters Law intended to improve management of water rights and wastewaters. Meanwhile, Colombia's House of Representatives approves a constitutional referendum that would guarantee the right to water. Costa Rica adopts a new concessions law for water use in hydroelectric generation.
- **New Attention to Comprehensive Chemicals Regulations.** Historically an area of regulatory weakness for the region, two new initiatives suggest that some countries may be starting a serious foray into developing chemicals policies. Chile finalizes its National Policy for Chemical Security outlining a roadmap for chemicals policy development and Cost Rica completes a major diagnostic of its chemicals management regime under the SAICM and moves forward to implement some of its international chemicals commitments.
- **Continuing Climate Change Developments.** The Region is plainly readying itself for Climate Change mitigation and investment opportunities from climate change off-set projects. Two countries, Colombia and Peru adopt measures setting forth procedures for approving Clean Development Mechanism (CDM) projects. Meanwhile, Mexico proposes for public comment a massive Special Program on Climate Change outlining hundreds of measures to reduce its greenhouse gas emissions by 50 million tons. Chile adopts an historic measure to protect glaciers.
- **Initiatives to Promote Alternative Energy.** In a wave of vanguard initiatives, several countries adopt programs and rules to promote alternative fuels and energy. Argentina adopts implementing regulations on renewable energy and releases a wind industry report. Mexico adopts regulations on biofuels and releases a draft regulation on renewable fuels and energy transition.



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- **Focus on Product Stewardship and E-Waste Management.** Borrowing mainly from European initiatives, the Region maintains a steady focus on product stewardship with an eye on e-wastes in particular. Argentina and Colombia review comprehensive WEEE legislation that would impose significant take-back obligations on a range of electronic goods. Brazil adopts a law limiting exposures to electric, magnetic and electromagnetic fields and its state legislatures, São Paulo and Rio de Janeiro adopt measures targeted towards electronics, batteries and fluorescent bulbs.
- In addition to these articles, this Quarterly covers a number of other key regional developments in air quality, packaging and labeling, civil liability, and public transparency, to name a few. As we have noted, this remains a highly dynamic and unprecedented time of change for environmental law and policy in Latin America with no foreseeable slowing.

If you have questions about this issue or other developments, please feel free to contact Madeleine Kadas (mkadas@bdlaw.com) or Lydia González-Gromatzky (lgromatzky@bdlaw.com.)

ARGENTINA HIGHLIGHTS

Argentina Adopts Implementing Regulation for Law on Renewable Energy

In May, Argentina adopted implementing regulations for its 2006 Law 26.190, establishing a System of National Promotion of Renewable Sources for the Generation of Electrical Power. Law 26.190 is intended to promote electric power generation from renewable sources and establishes as a goal that alternative sources reach 8 per cent of the electric power consumption over a period of ten years.

Decree 562/09 ("Decree") is a significant step forward in the implementation of Law 26.190. Among other things, it grants jurisdiction to the Ministry of Federal Planning, Public Investment and Services ("Ministry of Federal Planning") and the Ministry of Economy to foster development of renewable energy initiatives. (Art. 1) The Decree provides broadly that any investment in production of electrical energy using renewable energy sources, whether in connection with new generation plants or expansions of existing plants, is within the scope of Law 26.190. (Art. 3) The Ministry of Federal Planning, in coordination with the provinces, and through the Federal Electric Energy Council, is charged with defining criteria for selecting investment projects, taking into account the following: (i) the creation of jobs; (ii) minimization of environmental impact; (iii) use of capital goods of national origin and (iv) the use of the electrical energy within the wholesale electrical market (MEM) or the provision of public services. (Art. 7)

Signaling apparent commitment to greater use of renewable sources, Argentina's Energy Secretary, Daniel Calderon has recently announced that Argentina's state-run utility (ENARSA, by its Spanish acronym) will purchase 1,000 megawatts of electricity from renewable sources in order to reduce greenhouse emissions.

Reference Source (in Spanish):

- Implementing Regulation for Law 26.190 (Decree 562/09), available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Implementing_Regulation_for_Law_26.190_(Decree_562_09).PDF
- Law 26.190, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Law_26.190.PDF

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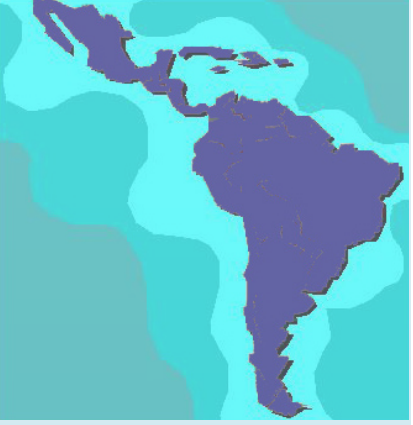

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CADER Releases Wind Industry Report

Argentina's Renewable Energies Chamber (CADER) recently released a report on the Argentine wind industry ("Report"). Generally, the Report describes the Argentine legal framework for renewable energy, existing wind energy projects, market potential and the benefits of wind energy. The Report indicates that given Argentina's large land mass but relatively low population, it would be possible to install wind farms in more than half of the national territory. Southern Patagonia, with its strong winds, is particularly suitable for wind farms. However, the report notes that Argentine wind energy output is only 30 MW of a total installed energy capacity that is projected at a little under 30 GW. By comparison, in 2008, Argentina spent almost $1.8 million on imported fuels for electricity generation and electricity from neighboring countries.

Argentina's favorable conditions for the wind industry development are increasingly being recognized. Reportedly, the Spanish group Guascor has announced the development of the largest wind farm in the world in Santa Cruz, Argentina.

Reference Source (in Spanish):

- "The State of the Argentine Wind Industry" (CADER May 2009), availabel at www.bdlaw.com/assets/attachments/ARGENTINA_-_The_State_of_the_Argentine_Wind_Industry.PDF

Argentina Product Stewardship Update: Electronics and Mercury in Medical Devices

Argentina product stewardship initiatives continue to gain momentum. Over the last several years, a host of measures aimed at imposing take-back obligations or addressing the restriction of substances have been proposed. WEEE initiatives remain at the forefront of the legislative agenda. In addition, Argentina has recently adopted a measure to impose mercury restrictions on medical devices.

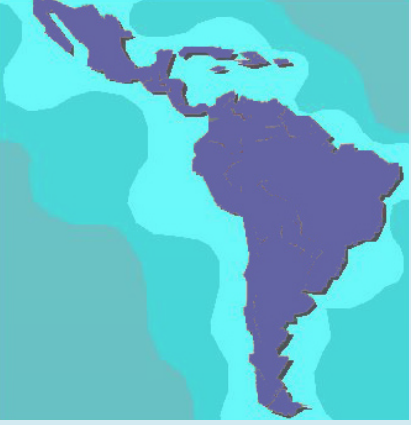
Three major WEEE bills are currently pending in the Argentine Congress. Although their passage is difficult to predict, it is plain that WEEE initiatives have garnered significant attention from Argentine lawmakers. Briefly, the pending WEEE bills of note are the following:

- Senate Bill S-3532/2008 is a sweeping and progressive bill that incorporates both WEEE and RoHS concepts. Supported by Greenpeace, it would directly impact both producers and importers of electric and electronic products active in Argentina. Among other things, the bill would require the payment of fees to a national WEEE management entity (ENGERAEE, by its Spanish nomenclature) based on the type and quantity of products placed on the market. (Art. 12(e)) Producers and importers would also be required to design covered devices so that the six RoHS substances and other contaminants were reduced or eliminated. (Art. 16)

- Senate Bill S-567/2008 was initially introduced in 2006 as Bill S-207/2006, but lost its parliamentary status in early 2008. It was then re-introduced as Bill S-567/2008. This initiative also incorporates WEEE and RoHS concepts.

- The third proposal, Chamber of Deputies Bill 0187-D-2009, a duplicate of a previously-filed bill, is primarily aimed at companies providing WEEE management services. However, it also seeks to impose design for environment obligations on manufacturers and importers of a broad range of electric and electronic products.

Unrelated to electric and electronic products but nevertheless evidencing Argentina's focus



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on mercury reduction, Argentina's Health Ministry has recently adopted a Resolution that establishes a mercury reduction plan for the health care sector. (Resolution 139/09) In broad terms, the Resolution adopts the policy of the World Health Organization in defining a plan to minimize exposure to mercury and replace its use in the health care sector. (Art. 1) Hospitals and health care centers are instructed that newly acquired sphygomanometers and thermometers must be mercury-free. (Art. 2) Further, a work group shall be established to, among other things, discuss the feasibility of a national plan to progressively restrict the use of mercury in medical and dental practices and equipment. (Art. 3)

Reference Source (in Spanish):

- Senate Bill S-3532/2008, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Senate_Bill_S-3532_2008.PDF
- Senate Bill S-567/2008, avaiable at www.bdlaw.com/assets/attachments/ARGENTINA_-_Senate_Bill_S-567_2008.PDF
- Chamber of Deputies Bill 0187-D-2009, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Chamber_of_Deputies_Bill_0187-D-2009.PDF
- Resolution 139/09, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Health_Ministry_Resolution_139-09.PDF

UK and Argentina File Competing Claims to Seabed Around Falkland Islands

The United Kingdom and Argentina have recently filed competing claims to the seabed around the Falkland Islands with the United Nations Commission on the Limits of the Continental Shelf, a body created under the United Nations Convention on the Law of the Sea. The submission of the United Kingdom states that it "has no doubt about its sovereignty over the Falkland Islands, South Georgia and the South Sandwich Islands and the surrounding maritime areas." The Argentine submission indicates that "the Organization of American States and other international and regional fora and organizations acknowledge the existence of sovereignty dispute." Undoubtedly, this dispute surrounding an area believed to be rich in natural resources will take years to resolve.

Reference Sources (in English):

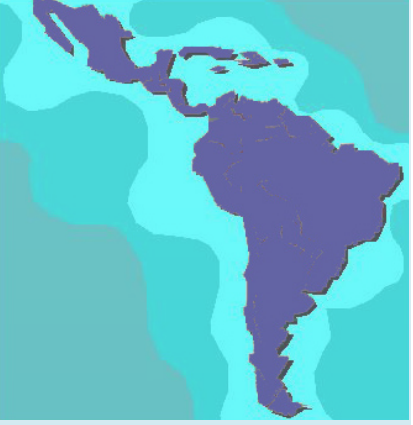
- United Kingdom of Great Britain and Northern Ireland, Submission to the Commission on the limits of the Continental Shelf, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_U.K._Submission_to_the_Commission_on_the_limits_of_Continental_Shelf_.PDF
- Argentine Submission, Outer Limit of the Continental Shelf, available at www.bdlaw.com/assets/attachments/ARGENTINA_-_Argentine_Submission,_Outer_Limit_of_the_Continental_Shelf.PDF

BRAZIL HIGHLIGHTS

National Developments

Brazil Adopts Law Limiting Exposure to Electric, Magnetic and Electromagnetic Fields

In May, the Brazilian Congress enacted Law No. 11.934 setting maximum limits for human exposure to electric, magnetic and electromagnetic fields. Intended to ensure the protection of human health and the environment, the Law covers those emissions associated with the operation of radiocommunication transmitters, user terminals (i.e., cell phones) and electrical



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energy systems with frequencies up to 300 GHz. (Art. 1) The Law adopts the limits established by the International Commission on Non-Ionizing Radiation Protection and recommended by the World Health Organization. (Art. 4)

Under the Law, telecommunication service providers are required to share their transmission towers located less than 500 meters away from one another absent sufficient technical justification. (Art. 10) Suppliers of user terminals marketed in Brazil are required to clearly state on the product package or the operations manual that the product complies with maximum exposure limits. (Art. 14) The Law provides for the creation of a registry by federal authorities that is to include all necessary information to demonstrate compliance with these new obligations. (Art. 17)

With exposure to electromagnetic fields becoming a growing source of concern for the general public, governments -- in the European Union and elsewhere -- have been focusing greater attention on establishing allowable limits. With this Law, Brazil joins about 30 countries that have adopted ICNIRP guidelines as national standards.

Reference Source (in Portuguese):

- Law No. 11.934, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_No._11.934.PDF

New Version of Omnibus Waste Bill Released

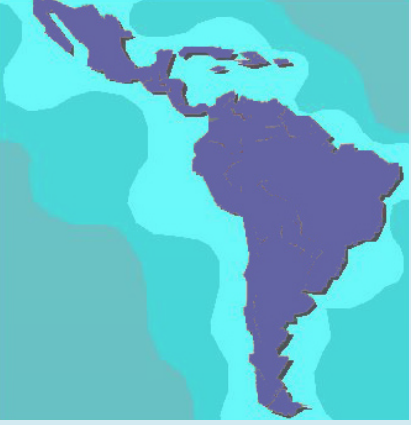
In June, the latest draft of the Omnibus Solid Waste Bill ("Bill"), a product of a Special Working Group of the Brazilian Chamber of Deputies, was released. The Bill, the latest development in Brazil's long-standing efforts to adopt a national framework solid waste law, is intended to balance government and industry interests and facilitate passage. However, given the long history of this Bill (as well as prior versions and predecessor measures), it is difficult to predict whether or when the Bill will be adopted. The new version now moves to a vote by the Special Working Group before heading to the floor for a vote.

The Bill sets forth a broad regulatory framework for the management of solid wastes including hazardous wastes. The Bill would provide a national legal definition for hazardous wastes, regulate hazardous waste management companies and define bans on waste imports. (See, Art.13, II(a), Chapter IV and Art.53). The Bill also calls for shared responsibility among government, business and consumers over a product's life cycle and would establish "reverse logistics" or take-back for certain end-of-life products. The end-of-life products to be covered by a "reverse logistics" system include: (i) agrotoxins and their packaging, (ii) batteries, (iii) tires and (iv) oil lubricants and their packaging. (Art. 31) However, the Bill provides that the "reverse logistics" system may be extended to other products. (Art. 31, Section 1)

The Bill also includes a number of provisions related to product packaging. Packaging would need to manufactured from materials that allow reuse or recycling when technically and economically feasible. These packaging obligations would broadly apply to manufacturers and anyone who places packaging, materials for packaging or packaged products on the market. (Art. 32) If enacted as proposed, the Bill would have broad implications for a number of product sectors and industry. In the meantime, Brazilian states are beginning to act. One notable example is São Paulo State's adoption of Law 12.300, its Solid Waste Policy Law. Continued obstacles to passage of the Omnibus Waste Law may result in patchwork regulation in this area.

Reference Source (in Portuguese):

- Omnibus Waste Bill, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Omnibus_Waste_Bill.PDF



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- Law 12.300, São Paulo State Solid Waste Policy Law, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_12.300.PDF

Various Federal Bills in Brazilian Congress Would Impose Packaging and Labeling Obligations

In recent months, Brazil has renewed its focus on product packaging and labeling. Generally, these pending initiatives are brief but broad in scope and in several instances, seek to amend Brazil's Consumer Protection Law (Law 8.078/90). Highlights of the bills follow:

- Senate Bill 170/2009 would require all product packaging to include information on greenhouse gas emissions emitted during production, use and disposal. Failure to comply with its provisions would be subject to sanctions under the Consumer Protection Law. (See, Bill 170/2009).
- Chamber of Deputies Bill 5199/2009 would amend Brazil's Consumer Protection Law to require that companies provide information on environmental impact and any take-back obligations. Environmental authorities could require labeling on both the product and packaging as well as advertising and marketing materials. (Art. 2)
- Chamber of Deputies Bill 5305/09 would require that all consumer products that are provided in non-biodeegradable packaging include a label on the packaging clearly describing its non-biodegradability. (Bill 5305/09)
- Bill 220/07 would require that the offer and presentation of a product or service include information on its energy efficiency and consumption.

These single issue bills may face fewer obstacles than framework initiatives such as the Omnibus Solid Waste Bill, which cover a broad range of waste management issues. If passed, these bills would likely affect a broad range of product sectors.

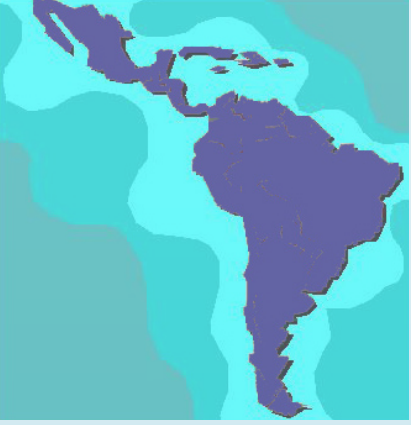
Reference Sources (in Portuguese):

- Bill 170/2009, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_170_2009.PDF
- Bill 5199/2009, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_5199_2009.PDF
- Bill 5305/2009, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_5305_2009.PDF
- Bill 220/07, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_220_07.PDF

IBAMA Gains Authority To Call Upon National Public Security Force for Enforcement

In March, the Ministry of Justice granted the Brazilian Institute for the Environment and Natural Resources (IBAMA) the authority to call upon the National Public Security Force (FNSP) in connection with its environmental enforcement activities. As a result, IBAMA will no longer need to seek formal approval of state governors prior to calling upon FNSP resources. A specialized force within FNSP is being trained to handle environmental emergencies.

Undertaken in the wake of local resident and business opposition to IBAMA's stepped-up efforts to prevent illegal deforestation in the Amazon, the expanded authority under this measure may well be used to support other enforcement initiatives of IBAMA - a prominent agency with a history of pursuing aggressive environmental enforcement.



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Reference Sources (in Portuguese):

- Portaria Interministerial No. 292, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Portaria_Interministerial_No._292.PDF
- Ministry of Justice news release, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Ministry_of_Justice_News_Release.PDF

State Developments

São Paulo Legislature Passes Site Remediation Bill

On June 19, 2009, the Legislative Assembly of São Paulo made final revisions to Bill No. 368/2005 ("Bill") which, if approved by Governor José Serra, would create a new Superfund-like entity to manage site remediation in the state that historically has predominated in Brazil's industrial production. The State Fund for Prevention and Remediation of Contaminated Sites ("FEPRAC") would be available for "intervention in contaminated sites to remove imminent danger to public health." (Art. 32) Parties found to be "legally responsible" for such sites would then be required to reimburse FEPRAC. The Bill defines "legally responsible" to include those who caused the contamination, as well as owners, operators, possessors, successors, and those who "benefit" from the site. (Art. 13)

The bulk of the Bill's text closely recapitulates portions of the administrative rules that currently govern site remediation in São Paulo, and would provide a more formal statutory foundation for these rules without radically changing them. The Environmental Sanitation Technology Agency ("CETESB") has been managing site remediation under its general authority to control pollution, using management procedures issued through administrative "decisions," most recently Decision No. 103/2007/C/E. As in the existing program, the Bill establishes a Registry (cadastro) of Contaminated Sites, in which sites are classified as either "under investigation," "contaminated," or "remediated." (Art. 5) The Bill presents a series of steps required for those who are legally responsible for a site to evaluate and address its contamination, beginning with a preliminary investigation and continuing through the proposal and implementation of a remediation plan, with the Registry serving as the central repository for the records of the process.

The Bill was originally proposed in 2005 by then-governor Geraldo Alckmin. After four years of debate and some modifications, the Legislative Assembly has presented the Bill to Alckmin's successor, José Serra, who is of the same party as Alckmin. Serra has until July 13 to act on the Bill or allow it to become law.

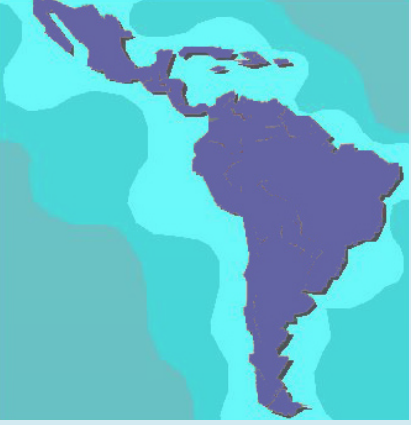
Reference Sources (in Portuguese)

- Bill No. 368/2005, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_No._368-2005.pdf

São Paulo Requires Take-Back of Electronics and Batteries

On July 6, 2009, Governor José Serra signed Law No. 13.576 ("Law"), which requires manufacturers, importers and other sellers of electronic products and batteries to label, take back and adequately dispose of their products. With the Governor's line-item veto of four sections, the Law lacks some controversial features of the original bill (No. 33/2008) that the Legislative Assembly had passed in June. The Assembly has 30 days to override the line-item vetoes, requiring majorities in both chambers, in which case the deleted sections could be reinstated for judicial review of their constitutionality.

The Law appears to apply to all electronic products, although its precise scope remains somewhat



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unclear: in one provision it indicates coverage of "electronic products and components considered to be technological wastes" (Art. 1) and in another it lists certain examples: computers, computer peripherals, monitors, televisions, batteries and "magnetized products" (Art. 2). The responsibilities set forth in the Law are to be shared by "companies that produce, commercialize or import" covered products. (Art. 1)

The Law requires that covered products be labeled conspicuously with certain information, including a warning against disposal with household trash and guidance on where to dispose of technological wastes. (Art. 4) The Law also requires the responsible companies to maintain collection points for technological wastes (Art. 5) and ensure "environmentally adequate" disposal in harmony with other environmental, health and safety laws (Art. 3). Among the sections vetoed was an unusual provision that would have required the executive branch to set limits on the quantities of electronic products made or brought into São Paulo. (Art. 6) The governor also rejected the bill's penalty provisions as excessive under Brazil's federal constitution. (Art. 7)

Reference Sources (in Portuguese):

- Bill No. 33/2008, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Bill_No._33-2008.pdf
- Law No. 13.576 (Diário Oficial, Vol. 119, No. 125, July 7, 2009), available at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_No._13.576,_Partial_Veto_of_Bill_No._33-2008.pdf

São Paulo Reorganizes its Environmental Agencies and Licensing Authorities

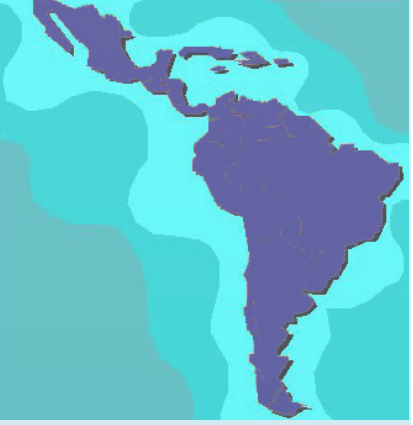
São Paulo's largest environmental agency, the Environmental Sanitation Technology Company ("CETESB") will absorb three other state-level agencies, unifying all environmental licensing and enforcement in São Paulo within a single institution. The new statute that establishes CETESB's expanded role, Law No. 13.542, goes into effect August 7, 2009, 90 days after its publication in the May 9 Diário Oficial. The official name of the agency will change to the São Paulo State Environmental Company, although it will continue to be known by the acronym CETESB.

Since its creation in 1968, CETESB has had broad authority over activities that generate pollution. With the coming change, CETESB takes on the functions currently performed by the departments of Natural Resource Protection, Metropolitan Land Use, and Environmental Impact Evaluation. The agency's expanded licensing authority will encompass, among other things, any project that would entail the removal of native vegetation.

The statutory consolidation of authority under CETESB occurs amid a period of decentralization and devolution of authority over some environmental licensing from state agencies to local governments. Under a policy that was announced in 1998 but not implemented until recently, the state Environment Ministry is authorized to agree with municipalities to transfer the environmental licensing and inspection authority for projects that are determined to have only local impacts. During the past two years, in an effort to reduce delays imposed on businesses, CETESB has worked to develop the competence of municipal governments in environmental matters, training officials and certifying local agencies to assume responsibility for the licensing of small enterprises.

Reference Sources (in Portuguese):

- Law No. 13.542, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_No._13.542.pdf



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Minas Gerais Enacts Comprehensive Solid Waste Policy Law

On January 12, 2009, Brazil's second largest state by population passed Law No. 18.031, its Solid Waste Policy Law ("Law") that sets forth, among other things, a policy of "reverse logistics"--which is akin to the concept of extended producer responsibility and has been an important and controversial component of the long-debated federal Omnibus Waste Bill (No. 203/1991). Other features of the Law that will be of particular interest to companies doing business in Minas Gerais include provisions for: total private sector responsibility for industrial and mining wastes (Art. 14); requiring manufacturers and importers to adopt or develop waste reduction technologies (Arts. 26, 33); labeling requirements (Art. 33); and green procurement policies in the public sector (Art. 16).

The concept of reverse logistics embodied in the Law is a return flow of consumer product wastes back to the same companies that initially place the products into the stream of commerce in the state. The Law allocates certain responsibilities for the return flow to consumers, municipal authorities, and retailers, but places the responsibility for ultimate disposal, and for alternatives to disposal, on manufacturers and importers. (Art. 26) The Law enumerates certain requirements, the most prominent being the establishment of a system of collection, transport, storage, and "environmentally adequate final destination" for wastes that are not reusable. (Art. 26)

The Law is written in largely aspirational terms, with abundant references to purposes, goals, intents, etc., so the eventual form of its requirements is difficult to predict in advance of implementing regulations. The Law is particularly ambitious in its stated intention to stimulate waste reduction and recycling. Although the pertinent provisions are vague with respect to any plausible method of enforcement, they are supported by a set of rigorous producer responsibilities that, if strictly interpreted, could make the production or import of materials that become unrecovered wastes an expensive proposition in Minas Gerais.

Reference Sources (in Portuguese):

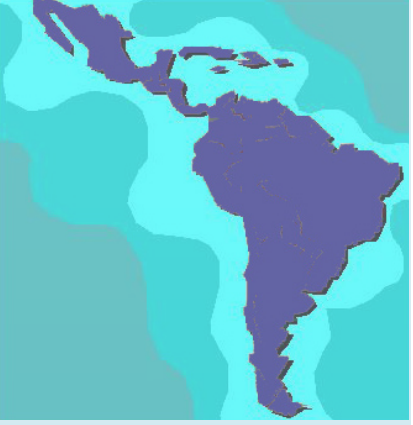
- Law No. 18.031, available at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_No._18.031.pdf

Regulation in Rio de Janeiro Implements Fluorescent Bulb Take-Back Law

The state of Rio de Janeiro imposes extended responsibility for environmentally sound management of end-of-life fluorescent bulbs. Decree No. 41.752 ("Regulation"), effective immediately upon its publication in the Diário Oficial on March 18, 2009, implements Law No. 5.131 ("Law"), which was passed in November 2007. Under the Regulation, all sellers of fluorescent bulbs -- which includes manufacturers, distributors, importers, resellers and retailers -- are required to provide receptacles for the collection of used bulbs from the consumer.

The Regulation goes farther than the sparsely drafted Law. Most importantly, affected companies are required to package the discarded bulbs securely to prevent breakage and consequent release of the contents into the environment, and to arrange for either recycling or appropriate final disposal. The Regulation also extends the responsibility to power utilities and lighting companies, neither of which is mentioned in the Law.

The newly established State Environmental Institute ("INEA") has authority to enforce the take-back requirement, and may impose a daily fine of 100 "fiscal reference units" ("UFIR," currently valued at about U.S. $1) for a first offense, doubled for repeat offenses. INEA assumed responsibility for implementing the environmental laws of Rio state from three predecessor agencies in January 2009.



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Reference Sources (in Portuguese):

- Law No. 5.131 & Decree No. 41.752, avialable at www.bdlaw.com/assets/attachments/BRAZIL_-_Law_No._5.131__Decree_No._41.752.pdf

CHILE HIGHLIGHTS

CONAMA Adopts Measures Targeting Management of Chemical Substances

Chile has recently finalized a number of measures intended to comprehensively address the handling and management of chemical substances. One notable example is the adoption by Chile's National Environmental Commission (CONAMA) of its National Policy for Chemical Security ("National Policy"). The National Policy is intended to reduce risks related to the handling and management of chemical substances, throughout their life cycles. Although the National Policy does not itself establish binding obligations, it does include a comprehensive plan of action to strengthen the institutional framework for management of chemical substances and promote consistency in the regulatory scheme applicable to the safe management of chemical substances.

CONAMA has also recently published a National Plan for Management of Risks of Mercury ("National Plan"). The National Plan's objective is to implement priority actions to reduce the risks associated with mercury use, consumption and emissions to protect human health and the environment. Specific objectives include the development of incentives to advance voluntary and mandatory instruments for environmental management to improve the rational management of mercury as well as the strengthening and harmonization of the regulatory framework for mercury.

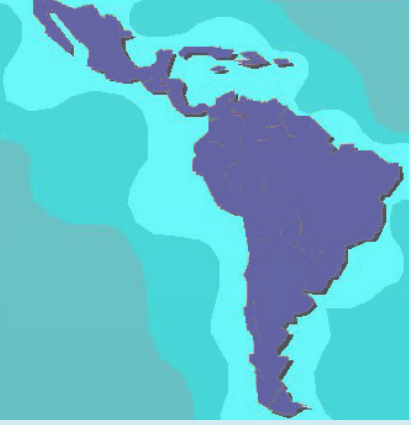
As evidenced by the adoption of these measures and likely influenced in some measure by Chile's bid to join the Organization for Economic Cooperation and Development (OECD), Chile is actively working towards the development of a comprehensive regulatory framework for restricted substances. While chemical restrictions have been slow to develop in the Region, there is also increased focus on harmonization. Therefore, Chile's initiatives --and particularly, whether these are modeled on the U.S. or EU regulatory regime -- merit attention

Reference Sources (in Spanish):

- National Policy for Chemical Security, available at www.bdlaw.com/assets/attachments/CHILE_-_National_Policy_for_Chemical_Security.PDF
- National Plan for Management of Risks of Mercury, available at www.bdlaw.com/assets/attachments/CHILE_-_National_Plan_for_Management_of_Risks_of_Mercury.PDF

Chilean Legislation Would Regulate Mine Closures

Chile's Congress is currently considering a bill that would require detailed closure plans and financial guarantees for mining operations (Bulletin No. 6415-08 or "Bill"). Under the Bill, mining companies would be required to submit proposed closure plans for approval by Chile's National Geology and Mining Service (SERNAGEOMIN, by its Spanish acronym) prior to beginning operations. (Art. 4, 7 and 9) Existing mines would have delayed compliance schedules and mines producing small quantities of ore would be able to submit streamlined plans. (Art. 17 and Transitory Articles) Failure to comply with the new legislation would subject mining companies to fines. (Art. 48)



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The closure plans would need to include, among other things, possible environmental impacts and measures, community information programs relating to plan implementation, a budget and schedule for closure activities and a financial guarantee. (Art. 13) The Bill anticipates that the amount of the financial guarantee may change over time. (Art. 56) The plans would be required to be reviewed every five years by an independent auditor approved by SERNAGEOMIN. (Art. 19) Upon mine closure and verification of approved closure, a certificate would be issued to the mining company by SERNAGEOMIN. (Art. 34)

This new legislation is intended to reinforce and expand upon existing requirements covering mine closures. As one of the world's largest mineral producers, Chile faces significant environmental challenges arising from the closure of mines. This measure, if adopted, would establish a detailed and enforceable framework for dealing with these environmental issues.

Reference Source (in Spanish):

- Bill Regulating Mine Closures (Bulletin No. 6415-08) , available at www.bdlaw.com/assets/attachments/CHILE_-_Bill_Regulating_Mine_Closures_(Bulletin_6415-08).PDF

Chile Adopts National Glacier Policy

In April of this year, Chile's National Environment Commission (CONAMA) approved a National Glacier Policy ("Policy"). The Policy identifies glaciers as fragile ecosystems that require special care as components of the landscape and water resources, but that are also susceptible for sustainable use so long as restrictions on their use and management are undertaken. The specific objectives of the Policy include: (i) the development of a national registry that would build upon the ongoing efforts of Chile's General Water Directorate to register the country's glaciers; (ii) creation of a classification system; (iii) defining permissible uses for glaciers; (iv) establishing measures to preserve and conserve glaciers; and (v) designing institutional mechanisms for the implementation of the Policy.

Although the principal objective of the Policy is the preservation of Chile's glaciers, the Policy expressly recognizes that human intervention may be appropriate if the higher interests of the nation so require it. The adoption of the Chilean Policy follows on the heels of the Argentine President's veto of the Law for Minimum Environmental Standards for Protection of Glaciers and Periglacial Environment (Law 26.418) passed by the Argentine Congress last year. In her veto of the Argentine legislation, President Fernández de Kirchner stated that the bill gave "pre-eminence to environmental aspects over activities that could be developed in perfect harmony with the environment." The Chilean Policy's "higher interest" exception appears intended to strike a balance between glacier preservation and sustainable development.

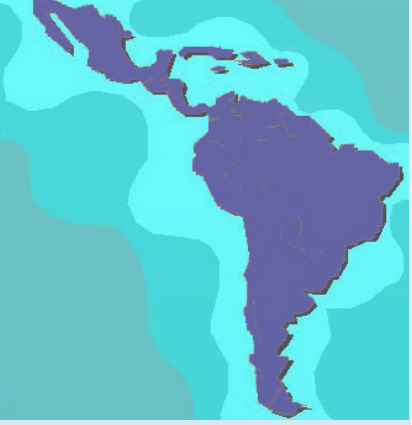
Reference Sources (in Spanish):

- National Glacier Policy, available at www.bdlaw.com/assets/attachments/CHILE_-_National_Glacier_Policy.PDF
- Argentine Presidential Veto (Decree 1837/2008), available at www.bdlaw.com/assets/attachments/CHILE_-_Argentine_Presidential_Veto_(Decree_1837_2008).PDF

COLOMBIA HIGHLIGHTS

Comprehensive WEEE Bill Proposed in Colombian Senate

The Colombian Senate recently proposed a comprehensive waste electric and electronic equipment ("WEEE") measure. Bill 273/09 (the "WEEE Bill") would create a national policy and framework for regulating WEEE based on extended producer responsibility policies. As



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drafted, the Bill would hold importers, manufacturers, and merchants of covered products responsible for:

- establishing take-back and collection plans for their covered EOL products, either collectively or individually,
- informing consumers of those plans,
- securing and paying for proper final disposal of WEEE, directly or through a third-party provider, and
- ensuring that the WEEE service providers have the information necessary on the characteristics and components of the EOL products in order to facilitate reuse and recycling. (Bill, Art. 6(2))

The remainder of the Bill sets out the general outlines of the proposed system, defining terms, establishing the roles of government (including regional authorities), consumers, and WEEE service providers, setting out underlying principles such as shared responsibility and EPR, and describing the interplay of government and industry in crafting future standards which would in part be through development of a proposed National Committee on e-waste that would act as a consulting body to the Ministry of the Environment (MinAmbiente). The implementing details of this system would emerge once the MinAmbiente developed the National WEEE Policy. (See Arts. 8-12)

Colombia has long-standing producer repsonsibility provisions under its hazardous waste regime and has been a regional leader in their application to products. This new WEEE policy, if passed, would be a natural extension of those policies, but would cover a signficantly broader range of products, including those that are not hazardous.

Reference Sources (In Spanish)

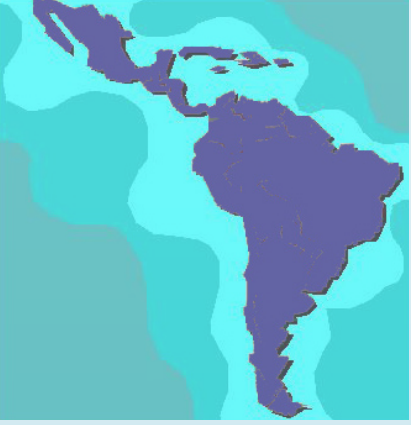
- Bill 273/09 (the "WEEE Bill") , available at www.bdlaw.com/assets/attachments/COLOMBIA_-_Bill_273-09_(the_WEEE_Bill).pdf

Colombian Congress Contemplates Constitutional Changes Guaranteeing a Right to Water

The Colombian House of Representatives approved text that would reform the Colombian Constitution to include broad new rights to water. The brief bill, Bill 171/2008, would amend the Constitution to provide that:

- The State shall guarantee the proctection of water in all of its forms as an essential part of life for all species and for present and future generations (Proposed Article 10A);
- Water in all of its forms and states, the natural beds, rivers and beaches, are property of the Nation and of public use, excepting waters that begin and end in the same estate. The law shall regulate these matters. (Proposed Article 63).
- The State has the obligation to ensure, directly or indirectly, that potable water is provided to all persons, ensuring that a minimum amount is free to the most impoverished, in accordance with Chapter V, Title XII of the Political Constitution. (Proposed Article 77A).

While these provisions, if adopted, would not have immediate impacts and would need implementing laws and regulations, they could form the basis for sweeping changes to existing Colombian water quality and use standards. A constitutional right to water and water santitation could also create a new basis for civil suits and constitutional claims alleging that water rights have been denied or breached.



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Notably, the issue of rights to water and water sanitation has become a key issue for the region. Colombia's efforts -- like those of Mexico -- appear to be motivated, at least in part, by recent global efforts, in particular the work of the United Nations, calling for nations to recognize the right to water and sanitation as an unalienable human right.

Reference Sources (In Spanish):

- Draft Law 171/2008, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_Draft_Law_171_2008.PDF

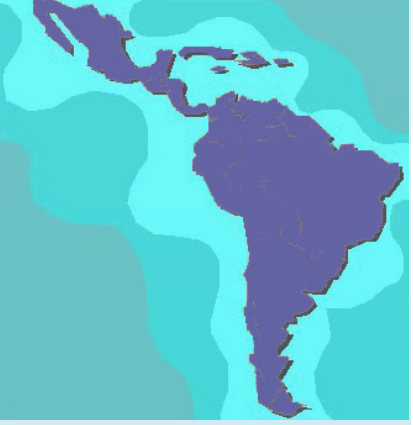
MAVDT Adopts Procedures for Climate Change CDM Project Approvals

Colombia's Ministry of the Environment (MAVDT) recently issued two Resolutions intended to formalize its program for approving climate change mitigation projects. The first Resolution 552/2009, creates a new Technical Committee on Climate Change Mitigation (CTMCC), which will act as a new consulting body within MAVDT on climate change projects. The new Committee, which appears to be intended as an interdisciplinary body comprised of high-level MAVDT staff and headed by a Technical Secretary, is charged with the review and recommendations on applications for Clean Development Mechanism (CDM) projects. (Arts. 2, 5).

The second, Resolution 551/2009, together with four Annexes, creates a comprehensive procedure for submitting applications for projects to be approved as CDM projects and mechanisms for demonstrating carbon dioxide reductions. (Art. 5) Generally speaking, a CDM project application must include a project design document and detailed support demonstrating that the project will contribute to sustainable development (including declaration of compliance with laws, copies of laws, permits and concessions, declarations of the emission reductions and their monetary value, evidence that local communities have been consulted about the projects, mechanisms for receiving citizen compliants about the process, and then a fairly detailed narrative about the project's contributions to sustainable development). *See generally,* Annex 2B. The Annexes also provide explanations of the CDM process and outline the multi-stepped approval process (from initial letters of intent through recommendations to MAVDT from the CTMCC). Like other LAR countires, Colombia is plainly readying itself to take advantage of the capital investments and projects generated by the Climate Change Convention and Kyoto Protocol.

Reference Sources (In Spanish):

- Resolution 551, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_Resolution_551.PDF
- Resolution 552, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_Resolution_552.PDF
- Annex 1, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_res_0551_anexo_1.pdf
- Annex 2A, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_res_0551_anexo_II_A.pdf
- Annex 2B, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_res_0551_anexo_II_B.pdf
- Annex 3, available at www.bdlaw.com/assets/attachments/COLOMBIA_-_res_0551_anexo_3.pdf



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COSTA RICA HIGHLIGHTS

California Federal District Court Issues Opinion on Class Jurisdiction in Central American Products Liability Case

The U.S. District Court for the Central District of California recently issued an opinion that will allow 2,485 banana plantation workers from Costa Rica and other Central American countries to proceed in state court and avoid federal jurisdiction under the Class Action Fairness Act ("CAFA"). (See *Vanegas v. Dole Food Co.*, 2009 U.S. Dist. LEXIS 22885 (2009)). Plaintiffs initially filed 30 separate cases in Los Angeles Superior Court alleging a number of products liability and related claims for injuries sustained due to exposure to 1, 2-Dibromo-3-chloroporpane ("DBCP"), a substance used on banana plantations owned and/or operated by Dole Food Co. and a number of other defendants. Each case had fewer than 100 plaintiffs, which brought it under the statutory limitations set by CAFA for federal jurisdiction. Defendants removed the action to the federal district court, at which time the plaintiffs filed the motion addressed in the present case to remand the case to Los Angeles Superior Court. (Vanegas at 22885-6)

Defendant Dow Chemical filed an opposition to plaintiff's motion that argued that

- the amount in controversy would exceed $5 million in the aggregate, or $75,000 for an individual plaintiff, which are thresholds for CAFA (Vanegas at 22888); and
- plaintiffs have attempted to "gerrymander their lawsuit to circumvent CAFA" and the claims should be filed as one mass action (Vanegas at 22893).

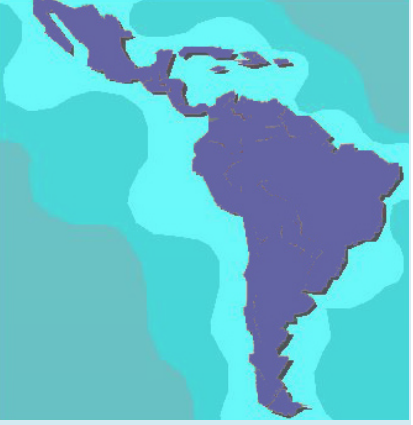
The Court concluded on defendant's first argument that it failed to overcome the "strong presumption" against removal jurisdiction and had not satisfied the burden of setting forth the underlying facts to support its assertions. (Vanegas at 22890) In support of its decision, the court noted that Dow had made "nearly identical" allegations in Abrego v. Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006), and the Ninth Circuit had also refused to reach the conclusion that the amount in controversy exceeded the CAFA limits in that case. (Vanegas at 22891-3) On the second argument, the court did not find defendant judicially estopped from arguing that the combined cases were a "mass action" under CAFA, but it ultimately held that nothing in CAFA prevented plaintiffs from filing multiple actions. (Vanegas at 22893-4) As "masters of the complaint," plaintiffs were entitled to work within the parameters set by CAFA to keep their cases in state court. (Vanegas at 22894)

Reference Source (in Spanish):

- *Vanegas v. Dole Food Co.*, 2009 U.S. Dist. LEXIS 22885 (2009), available at www.bdlaw.com/assets/attachments/COSTA_RICA_-_Vanegas_v._Dole_Food.pdf

Costa Rica Steps Up Efforts to Manage Chemical Substances

Costa Rica has recently taken several measures to address the environmentally sound management of chemical substances, driven largely by international obligations and initiatives to which Costa Rica is a party or participant. On June 29, 2009, Costa Rica's Legislative Assembly passed Law 8705 implementing domestically the Rotterdam Convention on the On the Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides in international trade. The Convention establishes a prior informed consent (PIC) procedure for imports and exports of listed chemicals, imposes labeling requirements for listed chemicals, compels provision to importers of safety data sheets for chemicals to be used for occupational purposes, and includes a mechanism for adding new listed chemicals. Parties such as Costa Rica may choose to prohibit the import of listed chemicals under the PIC procedure.



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Costa Rica has also recently issued draft regulations for the control of ozone depleting substances in accordance with Costa Rica's obligations under the Montreal Protocol. (See DAJ-005-2009) The draft regulations assign responsibility for implementation of regulations to the Office of Management of Environmental Quality under the Ministry of Environment, Energy and Telecommunications. The regulation also provides specific controls for the in-country use and management of ozone depleting substances, as well as detailed import controls.

Finally, Costa Rica has also recently completed a major diagnostic of its chemicals management regime through support from the UN Institute for Training and Research and funds from the Strategic Approach to International Chemicals Management ("SAICM"). The study covers the management of pesticides, chemical substances used in industrial processes, petrochemicals, and commercial chemical substances for public use, but it does not address pharmaceuticals. It takes a comprehensive look at current legal, administrative, technical and public outreach capacity and activities and identifies a number of options for improving management of chemical substances in these areas. The study also makes a number of general and specific recommendations for future action, including for example, the development of legislation for chemical products in domestic use and to promote the elimination of problematic products used in Costa Rica that are prohibited in other countries.

Costa Rica's recent focus on chemicals regulation is in line with a broader trend throughout Latin America to address weaknesses in existing chemicals management. These efforts are largely influenced by international and other key jurisdictions (e.g. the EU), and many of the policies and procedures developed at that level are incorporated directly into domestic regimes in Latin America.

Reference Sources (in Spanish):

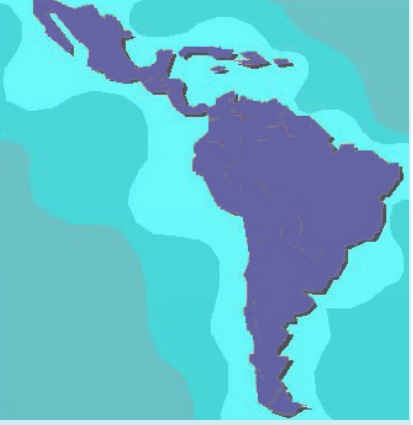
- Law 8705/09, available at www.bdlaw.com/assets/attachments/COSTA_RICA_-_Rotterdam_PIC.pdf
- DAJ-005-2009, available at www.bdlaw.com/assets/attachments/COSTA_RICA_-__Regulation_re_ODSs.pdf
- National Profile on the Rational Management of Chemical Substances, available at www.bdlaw.com/assets/attachments/COSTA_RICA_-_Chemicals_Study.pdf

Costa Rica's Congress Passes New Concession Law for Water Use in Hydroelectric Generation

Costa Rica's Legislative Assembly has passed a new Framework Law on Concession for the Utilization of Hydraulic Power for Hydroelectric Generation that will regulate the use of water for hydroelectric generation (Law 8723) (the "Law"). The Law authorizes the Ministry of Environment, Energy and Telecommunications (MINAET) to administer the concession system. Water use permits will be granted in accordance with Law 7200, which regulates power generation in Costa Rica and allows for participation of private enterprises in hydropower generation, the capacity of which does not exceed 50 megawatts. (Law, Art. 2) (Legislative Assembly approval is necessary for generation above 50 MW.)

The Law outlines the procedures for preparing and submitting concession requests. (Art. 3-4) Concessions may be granted for a term of 25 years, which may be extended for the same period of time by MINAET. (Art. 5) The Concessionaires' rights to water would be confined to the concession agreement, and the government reserves the right to recover the concession for public interest reasons, but under previous indemnification to the concessionaire. (Art. 8) The Regulation also provides details on the expiration and extinction of concession rights, and calls for the creation of a National Registry of Concessions. (Arts. 11 and 15)

The Executive is required to issue regulations to implement the Law within six months of



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publication, or November 7, 2009. (Art. 18)

Reference Source (in Spanish):

- Framework Law on Concession for the Utilization of Hydraulic Power for Hydroelectric Generation, available at www.bdlaw.com/assets/attachments/COSTA_RICA_-_Water_Concession_Law.pdf

MINAE Issues Draft Regulation on Protection of the Landscape and Visual Contamination

Costa Rica's Ministry of Environment, Energy and Telecommunications has issued a draft Decree on the Regulation of Protection of the Landscape that would fully integrate considerations of prevention and correction of visual contamination into local government land use planning. The Regulation requires responsible government authorities to employ a number of planning tools to prevent visual contamination and preserve the landscape, including:

1. Landscape Action Plans for each local community, to be integrated into traditional land use management procedures and plans (Art. 19);
2. Landscape Studies, which would define the quality objectives for countryside and provide the methods and actions necessary to complete the objectives (Arts. 20-30);
3. Landscape Integration Studies that would predict and place a value on the magnitude and importance of the effect of new actions or remodeling activities on the landscape and to identify means to avoid or mitigate possible negative impacts (Arts. 35-43);
4. A Landscape Catalogue, to be prepared based on the Landscape Studies (Art. 44); and
5. Landscape Programs designed to preserve the natural, visual, cultural or urban value of the landscape (Arts. 45-49).

The draft Decree would potentially have an impact on existing and planned industrial infrastructure throughout Costa Rica both indirectly, through future land use planning, and directly, through specific restrictions and corrective measures. For example, the draft Decree provides limitations on construction of buildings over three stories or nine meters tall. (Art. 55) There are also a number of provisions intended to prevent visual contamination, especially in environmentally sensitive areas. (Arts. 62-65)

The approach taken by Costa Rica with this law is novel and therefore it is difficult to predict the potential impact should it be promulgated.

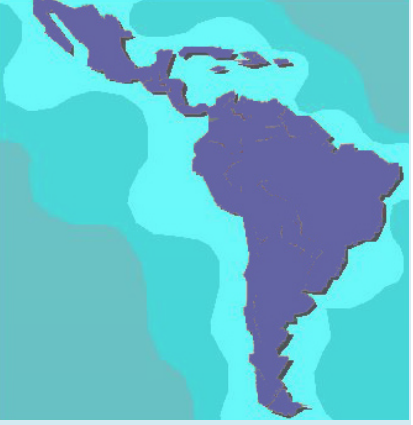
Reference Source (in Spanish):

- Draft Decree on the Regulation of Protection of the Landscape, available at www.bdlaw.com/assets/attachments/COSTA_RICA_-_DAJ-002-2009.PDF

ECUADOR HIGHLIGHTS

Ecuador Proposes for Comment Major Hazardous Chemicals and Waste Management Regulation

Ecuador's Sub-Secretary for Environmental Quality in the Ministry of Environment has issued for comment a draft Regulation for the Prevention and Control of Contamination by Hazardous Chemical Substances and Hazardous Wastes. The draft Regulation would replace



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Titles V and VI within Book VI (Environmental Quality) of Ecuador's Unified Text. In addition to the Regulation, the Sub-Secretary has issued for comment three lists of hazardous wastes, a number of new forms to be used to fulfill regulatory obligations, and amendments to Ministerial Accord No. 026/08 (Procedures for Registration of Hazardous Waste Generators and for Environmental Licensing for Dangerous Goods Transport). The proposed Regulation and related documents could have a major impact on the costs associated with management of a wide range of chemicals and products in Ecuador. A public stakeholder comment period for all of these documents ended on May 15, 2009.

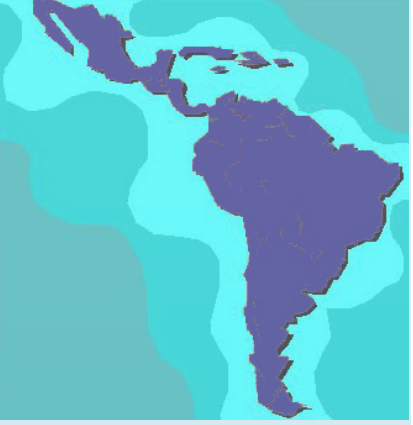
The proposed Regulation would define hazardous chemicals as those solid, liquid or gas substances that possess explosive, toxic, reactive, radioactive, or corrosive characteristics or harmful biological action and that can affect the environment or human health or cause material damage. (Glossary of Terms) In addition, hazardous chemical substances would include those substances in National Lists approved by the National Environmental Authority, as well as any substances prohibited or subject to restricted use. (Art. 2) The Regulation also proposes definitions for waste, hazardous waste and special wastes. Wastes would include those substances (solids, liquids, gasses or pastes) or objects to which elimination follows, is proposed to follow, or is obligated to follow by virtue of requirements under national law. (Glossary of Terms)

Hazardous wastes would be defined as those wastes that result from production, transformation, recycling, use or consumption processes and that contain some composition that has reactive, flammable, corrosive, infectious or toxic characteristics that represent a risk for human health, natural resources and the environment in accordance with the current law in force. (Glossary of Terms) The Sub-Secretary has proposed three lists of classification of hazardous wastes (i) from a specific source (List 1); (ii) from a non-specific source (List 2); and (iii) off-specification, expired, or other chemical products that have a defect that converts them into a hazardous waste (List 3). List 1 and List 2 would address predominantly production wastes, although there may be some ambiguity that would permit the regulator to extend the listings to cover end-of-life products as well. List 3 would include a number of specific chemicals, listed by CAS number. Notably, the Regulation would also classify all packaging of hazardous chemicals as hazardous waste. (Art. 18)

Special wastes would be those materials that, without being hazardous, by their nature, can impact strongly the entire environment, due to the volume of generation or inability to degrade, and for which should be implemented a system for recuperation, reuse and/or recycling with the end goal of reducing the quantity of the waste generated. Special wastes would also include those wastes that contain substances defined as hazardous that do not exceed concentration limits as provided in future environmental norms and for which it is necessary to maintain periodic monitoring. (Glossary of Terms and Art. 4) The regulation is not clear as to the scope of this category, although in other jurisdictions it has been defined to include a wide range of end-of-life products.

Manufacturers and importers of hazardous chemical substances would be required to inscribe and register hazardous chemical substances with the appropriate Technical Unit within the Ministry of Environment, who will create the procedures for registration in subsequent regulations. (Art. 12) Manufacturers and importers would also need to provide annual reporting using one of the proposed new forms linked with the Regulation. (Art. 93) Other duties include guaranteeing the safe management of the product, providing adequate information to consumers of the potential risks of the product and minimizing the generation of wastes. (Arts. 14-17)

The Regulation would also propose duties to generators of hazardous waste, defined to include manufacturers and importers of products or chemical substances with hazardous properties that at end-of-life convert to hazardous wastes. (Glossary of Terms) Generators would be responsible for the management of their waste until its final disposition. (Art. 22) Generators



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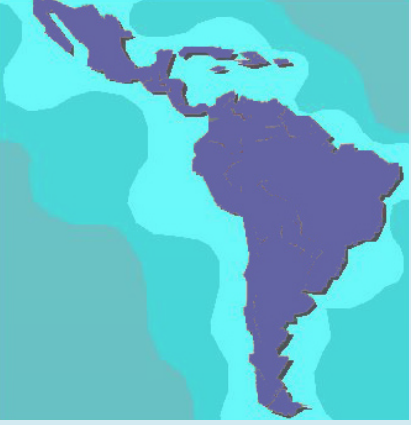
must also register and submit annual reports quantifying hazardous wastes generated using the proposed forms linked to the new Regulation. (Ministerial Accord No. 026/08, as amended; Regulation, Art. 93) The Regulation would provide a number of provisions governing proper storage, transport and final disposal. (Chapter II, Section II, paragraphs 2-5) It would also explicitly calls for the preparation of management plans for a number of wastes listed in Table 1 under Article 37, which includes pesticides, batteries and piles, used oil, electronic equipment, toner and ink cartridges, pharmaceuticals and incandescent bulbs. Management plans would be due 180 days after entry-into-force of the Regulation. (Art. 109)

The proposed Regulation provides other detailed deadlines for completion of certain responsibilities for both hazardous chemicals and wastes. (Arts. 106-111) Other key provisions in the draft Regulation would include definitions for life-cycle of hazardous wastes and chemicals, as well as definitions for principles such as cradle-to-grave, polluter pays and co-responsibility. (Chapter I, Section II) The Regulation would also cover exports of hazardous wastes. (Arts. 87-91)

This new Regulation would plainly impose sweeping new changes to Ecuador's existing waste management standards. And, even if not adopted in the near term, the proposal certainly serves as a reflection of Ecuadorian policies and objectives in the future. The Ecuadorian government has become increasingly active in its enforcement efforts regarding waste management and in particular, waste remediation; this is a key and dynamic area of law and one to monitor closely.

Reference Sources (in Spanish):

- Draft Regulation for the Prevention and Control of Contamination by Hazardous Chemical Substances and Hazardous Wastes, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Draft_Hazardous_Chemicals_and_Waste_Regulation.pdf
- Draft Classification of Hazardous Wastes by Specific Source (List 1), available at www.bdlaw.com/assets/attachments/ECUADOR_-_Haz_Waste_List_1.pdf
- Draft Classification of Hazardous Wastes by Non-Specific Source (List 2), available at www.bdlaw.com/assets/attachments/ECUADOR_-_Haz_Waste_List_2.pdf
- Draft Off-Specification, Expired or Defective Chemical Products Converted into Hazardous Wastes (List 3), available at www.bdlaw.com/assets/attachments/ECUADOR_-_Haz_Waste_List_3.pdf
- Draft Ministerial Accord No. 026/08 (Procedures for Registration of Hazardous Waste Generators and for Environmental Licensing for Dangerous Goods Transport), available at www.bdlaw.com/assets/attachments/ECUADOR_-__Ministerial_Decree_Generator_Registration.pdf
- Draft Guideline on Key Terms, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Guia_de_Claves.pdf
- Draft Hazardous Waste Manifest Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Haz_Waste_Manifest_Form.pdf
- Draft Annual Declaration of Hazardous Waste Generation Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-__Format_for_Annual_Haz_Waste_Generation_form.pdf
- Draft Hazardous Waste Generator Registration Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-__Haz_Waste_Generator_Registration_Form.pdf
- Draft Transport License Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-__Transport_License_form.pdf
- Draft Annual Identification and Management of Hazardous Waste Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Annual_Chemicals_Reporting_Form.pdf
- Draft Annual Identification and Management of Hazardous Chemical Substances Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Annual_Haz_Waste_Reporting_Form.pdf
- Draft Registration Form, available at www.bdlaw.com/assets/attachments/ECUADOR_-_Registration_Form.pdf



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International Arbitration Panel Issues Order in Oil and Gas Dispute

The International Centre for the Settlement of Investment Disputes ("ICSID") recently issued an important, precedent setting order in a dispute between Perenco Ecuador Limited ("Perenco"), an operator in Ecuador for the upstream Perenco Group, and the Republic of Ecuador and Petroecuador. The dispute stems from Ecuador and Petroecuador's efforts to collect revenues in accordance with Law 42 (2006), which provides that Ecuador would receive 99% of revenues from oil sales above certain reference prices. (See generally paras. 1-16) Perenco objected to the application of the law, which was issued after completion of its contract with the government. (para. 17) The contract language provides for a much smaller participation share. (para. 2)

In April 2008, Perenco commenced the arbitration procedures under the ICSID challenging the applicability of Law 42 given the existence of Perenco's contractual rights and in light of Perenco's rights under the Franco-Ecuador bilateral investment treaty. (para. 11) Beginning in February 2009, Ecuador and Petroecuador began efforts to collect the approximately $327 million they claimed was due under Law 42, including the seizure of crude oil produced by Perenco and a threat to sell the seized oil to cover the debt owed under the Law. (paras. 12-15) On May 8, 2009, the ICSID Tribunal issued an order, which provides a number of provisional measures to restrain Ecuador and Petroecuador from:

(1) demanding payments under Law 42;

(2) instituting or further pursuing actions to collect payments;

(3) instituting any actions against Perenco or its officers or employees arising from the participation contracts; and

(4) unilaterally amending, rescinding, terminating or repudiating the participation contracts or engaging in conduct that could directly or indirectly affect or alter the legal situation under the contracts. (para. 79)

The Tribunal may still decide to hold that it has no jurisdiction to hear this dispute, or that Ecuador and Petroecuador are entitled to claim and enforce the enhanced payments required by Law 42. Therefore, the Tribunal also ordered the creation of an escrow account by Perenco, and the funds in the account could be disbursed following direction from the tribunal or through agreement between the parties. (para. 80) Perenco has publicly welcomed the decision and has stated it continues to negotiate independently with Ecuador and Petroecuador on a resolution of the dispute.

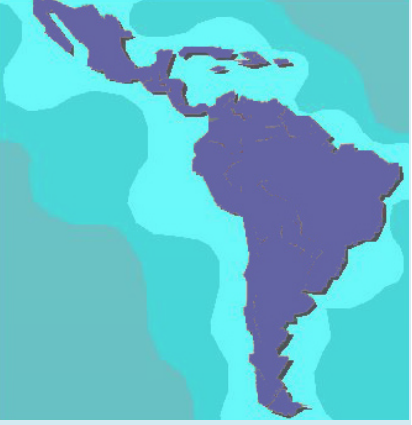
Reference Source (in Spanish):

- *Perenco Ecuador Ltd v. The Republic of Ecuador and Empresa Estatal Petróleos de Ecuador (Petroecuador),* available at www.bdlaw.com/assets/attachments/ECUADOR_-__Perenco_Case.pdf

MEXICO HIGHLIGHTS

SEMARNAT Publishes 2008-2012 Climate Change Program for Public Comment

Mexico's federal environmental agency, SEMARNAT, quietly posted for public comments its Special Program for Climate Change for 2002-2012 in late May, likely in anticipation of President Calderon's announcement that Mexico can reduce its carbon dioxide emissions by



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50 million tons by 2012. The Special Climate Change Program reviews the impacts Mexico will face as a consequence of climate change and then outlines more than 300 actions and programmatic developments Mexico will undertake to reduce its carbon footprint. The program, remarkable for its ambitiousness, would involve or affect nearly every Mexican federal agency and industrial sector at some level.

Despite its ambitiousness, the Special Program has already been deemed insufficient by environmental groups, in particular Greenpeace Mexico, to meet the challenges Mexico believes it will face as a consequence of climate change. In particular, Greenpeace faults the program for being voluntary and lacking any meaningful funding for its implementation. Instead, Greenpeace calls for mandatory greenhouse gas reductions and commitments.

Even in the absence of binding commitments, the Special Program is noteworthy for its scope and detail. In light of the significant Green Party presence in Mexico's Congress, it may only be a matter of time before some of the Special Program actions begin to make their way into proposals for legislation or regulatory programs that are enforceable. Just in late June, the Senate officially requested information regarding probable dates for program finalization and commencement of the actions, reflecting keen Congressional interest in the Program. Climate change has become a Regional focal issue, and Mexico is plainly no exception.

Reference Sources (In Spanish):

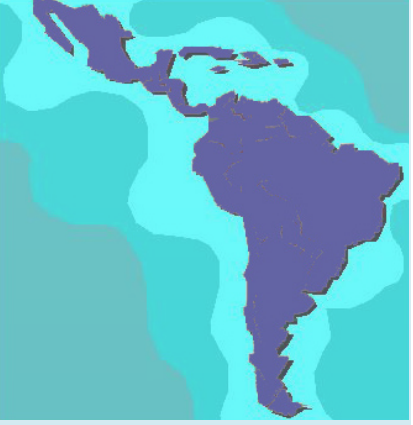
- Announcement of Availability of Special Program on Climate Change, available at www.bdlaw.com/assets/attachments/MEXICO_-_Announcement_of_Availability_of_Special_Program_on_Climate_Change.PDF
- Draft Special Program on Climate Change, pages 1-30 available at www.bdlaw.com/assets/attachments/MEXICO_-_Draft_Special_Program_on_Climate_Change_(1-30).pdf; pages 31-96 available at www.bdlaw.com/assets/attachments/MEXICO_-_Draft_Special_Program_on_Climate_Change_(31-96).pdf
- Draft Annexes to the Special Program on Climate Change, pages 1-70 available at www.bdlaw.com/assets/attachments/MEXICO_-_Draft_Annexes_to_the_Special_Program_on_Climate_Change_(1-70).pdf; pages 71-109 available at www.bdlaw.com/assets/attachments/MEXICO_-_Draft_Annexes_to_the_Special_Program_on_Climate_Change_(71-109).pdf
- Senate Communication on Special Program on Climate Change, available at www.bdlaw.com/assets/attachments/MEXICO_-_Senate_Communication_on_Special_Program_on_Climate_Change.PDF

Mexico Issues Regulations Implementing Its Biofuels Law

On June 18, 2009, regulations implementing Mexico's 2008 Law on the Promotion and Development of Biofuels ("Biofuels Law") were adopted. The new Regulation will likely do little to stem some of the criticism engendered by the Law, but it does move Mexico one step closer to development of an administrative structure overseeing its growing biofuels and alternative energy market, which it appears to be aggressively pursuing.

Industry advocates have criticized the law for failing to provide any meaningful incentives for actually promoting the use of biofuels and doing little more than proposing a complicated federal permitting regime across several agencies with competing and ambiguous jurisdictions. Environmental groups have already been quick to point out that the Regulation fails to provide environmental protections, establish food safety and sovereignty for any products other than corn, and lacks public participation and transparency mechanisms.

Although the Biofuels Regulation does little more than flesh out some of the framework provisions outlined in the Law, based on Mexico administrative law structure, little more could likely be expected at this point, and it is quite typical for implementing Regulations to anticipate



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that additional technical standards will be developed by competent authorities. Here, while the Biofuels Regulation provides general contours for various permitting standards and some basic procedural elements, it also plainly expects each of agencies with primary jurisdiction -- the new Intesecretarial Commission for the Development of Biofuels, the Secretary of Agriculture (SAGARPA), Secretariat of Energy (SENER), and the Secretariat of the Environment (SEMARNAT) -- to develop implementing norms (*normas oficiales mexicanas*) and permitting standards.

Very briefly, SAGARPA has authority to issue permits for the use of corn in the production of biofuels and monitoring existing inventories of corn); SENER has authority to issue permits for the storage, transportation, distribution, marketing, and production of biofuels, and SEMARNAT will issue environmental impact authorizations for activities regulated by SENER and establish soil conservation, environmental and sustainability criteria for biofuels cultivation. Thus, it is likely that we will see more administrative standards going forward relative to each Agency's jurisdiction.

Nevertheless, Mexico seems committed to the developing its alternative fuels market. On the same day, SENER also published its internal pre-publication draft of a Regulation implementing the Law for Development of Renewable Fuels and Financing of the Energy Transition. While that standard will likely undergo additional changes and deliberation, it is plain that Mexico sees alternative fuels as core to its national interest and is aggressively seeking the legislative framework it needs to facilitate those markets.

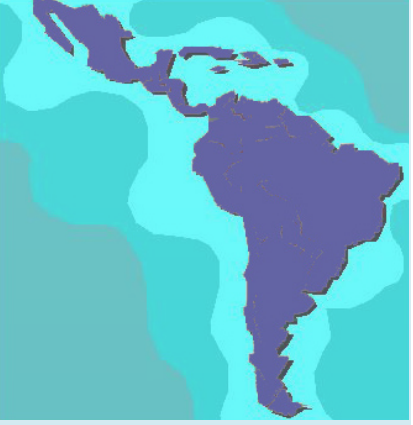
Reference Sources (In Spanish):

- Law on the Promotion and Development of Biofuels, available at www.bdlaw.com/assets/attachments/MEXICO_-_Law_on_the_Promotion_and_Development_of_Biofuels.PDF
- Regulation Implementing the Law on the Promotion and Development of Biofuels, available at www.bdlaw.com/assets/attachments/MEXICO_-_Regulation_Implementing_the_Law_on_the_Promotion_and_Development_of_Biofuels.PDF
- Law for the Development of Renewable Fuels and Financing of the Energy Transition, available at www.bdlaw.com/assets/attachments/MEXICO_-_Law_for_the_Development_of_Renewable_Fuels__Financing_of_the_Energy_Transition.PDF
- Draft Regulation on the Law for the Development of Renewable Fuels and Financing of the Energy Transition, available at www.bdlaw.com/assets/attachments/MEXICO_-_Draft_Regulation_on_Law_for_Development_of_Renewable_Fuels__Financing_of_Energy_Transition.PDF

Reforms to Mexico's National Water Law Inch Toward Final Passage

In mid-April, the Mexican Senate issued a Directive calling for amendments reforming the existing National Water Law that have been approved by both the Senate and the Chamber of Deputies to be sent to the President for adoption. The amendments, which have been under way since 2006, and largely supported by both chambers and Mexico's National Water Commission (CONAGUA), would institute changes to administration of Mexico's comprehensive water concessions and permitting programs, which has long been viewed -- even by Conagua -- as a key source for much of Mexico's water use and quality control issues. Only a few differences between the Chamber of Deputy bill and Senate bill remained as of last December. Rather than return the entire bill for additional discussions and reconciliation, the Senate appears ready to move the reforms forward on those measures that have been approved.

The amendments have a number of critical reforms as their objectives, including, among others: delineation of CONAGUA's jurisdiction and strengthening of national regional hydrological authorities and the Mexican Institute of Water Technology; improving provisions relative to



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water and sewerage distribution; strengthening the public register of water rights; allowing for issuance of provisional permits and temporary transfers of water rights; streamlining the permitting process and timeframes for issuing permits; and strengthening the enforcement and penalties provisions.

Importantly, the Law creates a new definition for wastewaters (*aguas residuales*), which would now be defined as the composition of multiple generators of discharges from water for the following uses, public urban, domestic, industrial, commercial, service, agriculture, livestock, or wastewater treatment plants or any other use, as well as any mixture of those wastewaters. Proposed Law at 3(VI). Although the existing law has a number of provisions governing wastewaters, this new definition is intended to clarify the breadth of CONAGUA's jurisdiction to permit and enforce wastewater discharges, which goes largely untreated in many areas.

One key element of the original Bill would not be sent to the President -- that requiring that environmental impact statements be prepared as part of a water rights concession or permit application to CONAGUA. This original proposal has been rejected as redundant with provisions in other laws that require environmental impact statements be submitted as part of permits for hydraulic infrastructure development.

The last revisions to Mexico's National Water Law were in 2004; the original law was passed in 1992 as part of sweeping reforms in anticipation of the ratification of NAFTA. While these changes would provide important and significant reforms, they do not appear intended to entail a massive restructuring or reorganization of existing water administration, but instead would institute somewhat modest efforts intended to clarify ambiguities and jurisdictional short-falls that have been evident for years.

Source Documents (In Spanish):

- National Waters Law, pages 1-50 available at www.bdlaw.com/assets/attachments/MEXICO_-_National_Waters_Law_(1-50).pdf; pages 51-97 available at www.bdlaw.com/assets/attachments/MEXICO_-_National_Waters_Law_(51-97).pdf
- Proposed Reforms to the National Waters Law, available at www.bdlaw.com/assets/attachments/MEXICO_-_Proposed_Reforms_to_the_National_Waters_Law.PDF
- Senate Directive, available at www.bdlaw.com/assets/attachments/MEXICO_-_Senate_Directive.PDF

Secretariat of Health Seeks Comment on Proposed Air Quality Standards for Sulphur Dioxide

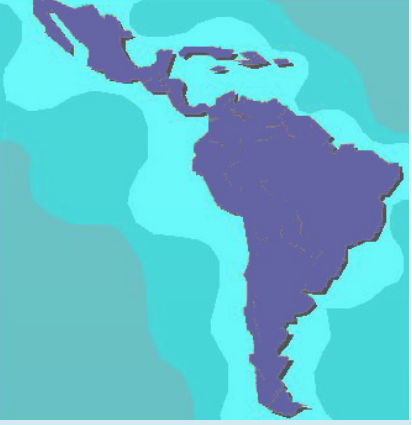
Mexico's Secretariat of Health recently proposed for comment long-awaited changes to its existing air quality standards for sulphur dioxide (SO2), which have been under revision since at least 2006. Comments are due 60 days after publication of the proposed NOM (published on June 18, 2009). The proposed standards, set forth under draft NOM-022-SSA1-1993, would ratchet down SO2 standards considerably and include a new 8-hour standard. As proposed, ambient SO2 standards would not be able to exceed:

(i) .110 ppm as a daily average (from an existing standard of .130 ppm);

(ii) .025 ppm as an annual average (from an existing standard of 0.03 ppm); or

(iii) .200 ppm as an 8-hour average, no more than two times per year (new threshold).

How these air quality standards will be used, if adopted, from an enforcement context has never been altogether clear under Mexico's existing air pollution control laws. Although Mexico has also adopted similar standards for ozone, carbon monoxide, particulate matter, and nitrogen dioxide, it is not altogether clear whose responsibility it is to ensure that these standards are met under the Law. Air pollution prevention and control is generally assigned to states



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and municipalities, but to date, these standards have not been incorporated into binding or enforceable regional agreements (such as state implementation plans) or plainly connected to fees or sanctions if they are not met. See, e.g., Art. 4, Air Regulation. And, for the most part, maximum permissible limits established by SEMARNAT for industrial permitting purposes operate independently from these air quality standards.

Nevertheless, these standards have been clearly been relied upon by environmental groups and are in force. For example, the regulations were used as one of the bases for a citizen's complaint brought before the NAFTA Commission for Environmental Cooperation against SEMARNAT for failure to effectively enforce its environmental laws with respect to Molymex. These standards have also been used on an ad hoc basis by administrative regulators as well and will likely continue to be used in similar fashion going forward.

Reference Sources (In Spanish)

- NOM-022-SSA1-1993, available at www.bdlaw.com/assets/attachments/MEXICO_-_NOM-022-SSA1-1993.PDF
- Proposed NOM--22-SSA1-2006, available at www.bdlaw.com/assets/attachments/MEXICO_-_Proposed_NOM-22-SSA1-2006.PDF
- Regulation on Material Relating to Prevention and Control of Air Contamination, available at www.bdlaw.com/assets/attachments/MEXICO_-_Regulation_on_Material_Relating_to_Prevention__Control_of_Air_Contamination.PDF

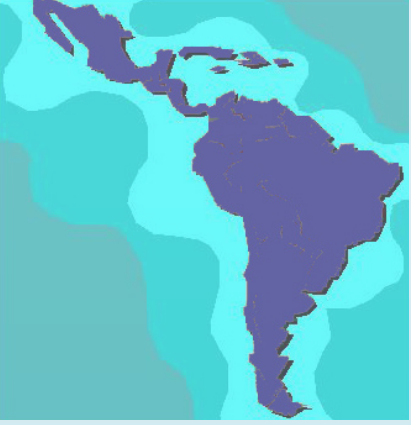
PERU HIGHLIGHTS

Congress Passes New Water Law

On March 13, 2009, Peru's Congress passed a new framework Water Resources Law (Law 29338), creating a comprehensive National System for the Management of Water Resources. The Law provides that there are no private rights to water, but rather they are owned by the Nation and administered by the national government through input from regional, watershed and local water use groups and government authorities. (Art. 2) The Law also allocates rights over natural (e.g., glaciers) resources associated with water to the public domain, and related man-made (e.g., dams) resources to the state. (Arts. 5-8) It outlines a hierarchy of uses, identifies and describes the various types of water use rights (e.g., licenses, permits) and provides some detail on appropriate water valuation. (Titles III, IV and VI) The Law also includes provisions on water management planning, the protection of the resource, and management of infrastructure, aquifers and the Amazon. (Titles V, VII, VIII, IX and X) As this is a framework law, it will need significant implementing regulations.

A National Authority for Water is responsible for implementing the law, which is made up at the national level of a Board of Directors, a Head of the National Authority ("Jefetura") and a National Tribunal for Resolution of Water Disputes. (Title II) Most of the administrative responsibilities, however, would appear to fall to decentralized Administrative Authorities of Water, who would execute the law and subsequent regulations on behalf of the National Water Authority. (Art. 23) (The specific allocation of responsibilities is not well defined under the Law and will require further clarification in subsequent regulations.) In addition, the Law allocates certain roles to regional and local authorities, watershed advisory bodies and water user organizations, although these groups appear to hold little regulatory authority and instead operate in more of an advisory fashion. (Title II)

As is often the case, productive uses of water fall at the bottom of the priority of water uses. (Art. 35) The Law further divides productive uses into nine categories, with agricultural uses at the top, followed by aquaculture and fishing, energy, industry, medicinal, mining, recreation,



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tourism and transport. (Art. 43) Water use rights are allocated by the National Water Authority primarily through the issuance of licenses, although the law also provides procedures for permits and authorizations for certain specified uses and addresses the basic rights associated with water servitudes. (Title IV) The Law also recognizes special water rights for indigenous and rural communities. (Art. 64) Rights holders are responsible to pay for water rights, as well as associated water services, in accordance with future regulations but under criteria established in the Law. (Art. 90)

The new Law replaces Law 17752 (1969) and Legislative Decrees 1081 and 1083 (2008) and represents an important modernization and streamlining of Peru's existing water rights law. Following the free trade agreement with the U.S., Peru appears to be taking seriously its environmental commitments under the agreement. Even in the absence of a trade impetus, water rights and use are an issue of regional concern in the Americas and will likely take on increasing importance for a number of countries in the region.

Reference Source (in Spanish):

- Water Resources Law, available at www.bdlaw.com/assets/attachments/PERU_-_Peru_Water_Law_No._29338.pdf

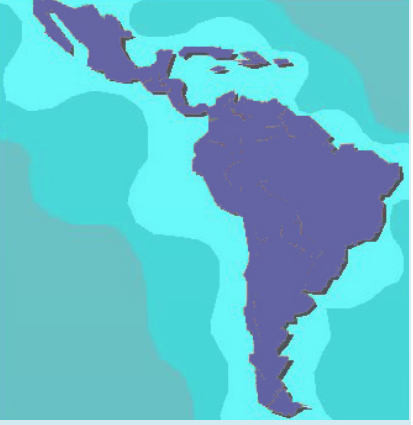
Ministry of Environment Issues Procedures for Evaluation of CDM Projects

Peru's Ministry of Environment recently issued "Procedures for Evaluation for the Approval of Projects for Reduction of Greenhouse Gas Emissions and Carbon Capture." (See Directive 002-2009-MINAM) The Procedures identify the responsible government entities and outline the process and evaluation criteria for approval of all greenhouse gas and carbon capture projects. Covered projects would include, for example, those under the Clean Development Mechanism ("CDM") and Reducing Emissions from Deforestation in Developing Countries ("REDD") programs. The Procedures would apply to all public and private entities.

The lead agency charged with implementing the Procedures is the General Office for Climate Change, Desertification and Water Resources, which operates under the recently created Ministry of Environment. The General Office is responsible for receiving the proposal, preparing a summary to facilitate future review and shepherding the proposal through various reviews. An Ad Hoc Committee, convoked by the General Office, would have a key role in reviewing the project proposal, based on general criteria provided in the Procedures, and issuing an opinion. After having received the Ad Hoc Committee opinion, the General Office would issue to the soliciting party a letter of conformity affirming that the project contributes to sustainable development in Peru and accepting the transfer of credits. The General Office would also be responsible for undertaking annual site visits and reviews of approved projects and drafting annual reports.

Soliciting parties would be required for each proposal to use the forms provided by the United Nations that meet the requirements for projects before the Executive Board for the CDM. (See www.unfccc.int/cdm.) In addition, the Procedures provide in Annex I other documentation that would be required for energy projects of both major and minor scale, forestry and CDM projects. Once the soliciting party receives the Letter of Conformity, it must transmit a copy, along with the final, validated Project Design Document, to the Vice Minister of Strategic Development of Natural Resources (within the Ministry of Environment) for formal registration and publication.

Peru is not unique for its preparation for CDM project applications and climate related programs. Colombia has also recently adopted CDM project application procedures and



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Mexico recently proposed a massive domestic program to mitigate climate change.

Reference Source (in Spanish):

- Procedures for Evaluation for the Approval of Projects for Reduction of Greenhouse Gas Emissions and Carbon Capture, available at www.bdlaw.com/assets/attachments/PERU_-_Peru_CDM_Procedures.pdf

Peru Enters Final Stage of Extractive Industries Transparency Initiative

Peru is in the final stage of completing the requirements to become a recognized implementing country of the Extractive Industries Transparency Initiative ("EITI"), a global initiative that seeks to strengthen governance by improving transparency and accountability in the extractive industry sector. Specifically, the EITI provides a globally developed standard to promote transparency, as well as a methodology for countries to become fully compliant with the EITI. Peru was admitted officially as a candidate country by the EITI Board on September 27, 2007 and is one of 29 candidate countries working through the compliance process. It is the only candidate country from the Americas.

Peru's effort is guided by an Action Plan, approved by Executive Decree 027 in March 2006, which included the creation of a working group representing all involved stakeholders. The EITI Working Group in Peru includes 19 mining companies and eight oil and gas companies, representing a significant percentage of the country's overall extractive industrial capacity. The mandate of this group was renewed in late 2008 (Presidential Decree 5), in part to focus efforts on the final stage of the EITI approval process, validation. Validation will entail a number of processes, including stakeholder conferences to confirm and reconcile figures disclosed by companies, the government and other key stakeholders and to verify compliance (and the capacity to comply). Peru has until March 9, 2010 to complete this final stage and be recognized as "compliant" or remain as a candidate country. Compliant countries are required to undertake validation every five years.

Reference Source (in English):

- EITI Web page: http://eitransparency.org/.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California