LATIN AMERICAN REGION

ENVIRONMENTAL QUARTERLY

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NOTES FROM THE LATIN AMERICAN PRACTICE GROUP

It has been an unusually busy summer for legislatures and administrative agencies alike in the Region. With such a range of issues and high level of activity, our challenge for this newsletter was to select the most newsworthy items to report. We highlight the following:

- **Creative Enforcement Approaches.** The Region continues to have surprise initiatives intended to enhance environmental enforcement, some of which could have sweeping implications for affected industries. **Colombia** adopts an environmental enforcement law that assigns a presumption of guilt to those accused of environmental violations and can trigger a wide range of penalties and restitution obligations. **Argentina's** Securities and Exchange Commission requires certain companies engaged in the public offering of stock and securities to report environmental activities. **Mexico's** environmental agency releases a draft regulation that would significantly change its audit program from one that has been historically voluntary to one that can be imposed by fiat.

- **Renewed Attention to Air Quality and Monitoring.** For some time, much of the Region's regulatory activity has been focused on waste and water issues with less attention given to air quality. That trend may be changing. **Mexico** proposes a new standard for emissions from stationary sources and an air monitoring standard. **Colombia** issues a revised draft protocol for emissions monitoring from stationary sources that will implement its 2008 emissions limits. **Brazil** issues new vehicle emissions limits for light passenger vehicles and two categories of commercial vehicles. **Chile** is evaluating a new particulate matter standard.

- **Energy Developments -- Traditional Sources and Renewables.** Some of the most significant Regional news surrounds the discovery of new oil reserves off the coast of **Brazil**, estimated to hold between 50 and 100 billion barrels of hydrocarbons and which has engendered a series of legislative proposals. Otherwise, much of the Regional legislative focus this quarter seems to remain on sustainability. **Mexico** adopts regulations requiring energy consumption reporting and mandatory product labeling. **Brazil** itself evaluates a proposal to create incentives for renewable energy and create a clean energy development fund.

- **Continued Focus on Product Stewardship.** Product stewardship requirements for end-of-life products continue to remain high on the Region's environmental agenda. **Brazil** amends its tire take-back requirements to address an issue that has garnered significant political debate over the years. **Chile** launches a voluntary cell-phone take-back program, signaling its first (but not likely last) foray into producer responsibility initiatives. **Colombia's** environmental ministry issues two proposals imposing stringent take-back quotas on producers and importers of batteries and computers.

- **Vanguard Packaging and Recycling Initiatives**. Taking its cue from the European Union and leading cities in the U.S., a wave of plastic shopping bag initiatives has been implemented in the Region. This quarter, **Buenos Aires Province** phases out plastic bags and **Rio de Janeiro** imposes retailer responsibility in ways that seem intended to

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effectuate a ban. **Peru** adopts a novel law intended to promote recycling by creating incentive programs for waste segregation.

- **Brazilian Industrial States Remain Active.** Last quarter, we began to monitor activity in key Brazilian states, recognizing their importance to our clients. **São Paulo** continues to lead the nation with its unique programs on waste management and remediation. Following close behind with new framework waste legislation of their own are **Minas Gerais** and **Espírito Santo.** In the absence of federal laws, state regulation in Brazil remains paramount and these initiatives are ones to watch.

Suffice to say, even in a time of global economic recession, environmental issues continue to remain high on legislative agendas and environmental agencies remain active on enforcement and regulatory fronts.

We welcome your comments and feedback. If you have any questions, please contact Madeleine Kadas at mkadas@bdlaw.com or Lydia González-Gromatzky at lgromatzky@bdlaw.com.

ARGENTINA HIGHLIGHTS

Argentina's Securities and Exchange Commission Requires Disclosure of Environmental Matters

In August of this year, the Argentine Securities and Exchange Commission ("CNV" by its Spanish acronym) issued General Resolution No. 559/09 ("Resolution") requiring certain companies that are engaged in the public offering of stock and securities to report on environmental activities. Specifically, this new reporting obligation is imposed on companies under the public offering system whose corporate purpose contemplates activities that are considered to present environmental risks. (Art. 21) Resolution No. 177/07, issued by the Argentine Secretariat of Environment (SAyDS), provides that activities considered to present environmental risks are those listed in Annex I (e.g., crude oil and natural gas extraction activities, production of chemical substances and products, and plastics manufacturing) that satisfy certain medium or high complexity levels. (Art. 2)

Covered companies must report to the Argentine CNV information related to: (i) undertaking of environmental audits; (ii) compliance programs and their respective schedules; (iii) environmental insurance; and (iv) implementation of measures to prevent environmental damage. (Art. 21) The adoption of this Resolution is the result of recent joint efforts by SAyDS and CNV to promote the consideration of environmental issues in the public offering system. The agencies have also agreed to collaborate on technical assistance programs and the development of rules.

Reference Sources (in Spanish):

- Securities and Exchange Commission General Resolution No. 559/09 available at www.bdlaw.com/assets/attachments/Argentina-General%20Resolution%20No.%20559-09.pdf
- SAyDS Resolution No. 177/07 (as amended) at www.bdlaw.com/assets/attachments/Argentina%20-%20SAyDS%20Resolution%20No.177-2007.pdf

Buenos Aires Province and City Phase Out Plastic Shopping Bags

The province of Buenos Aires has recently adopted Decree No. 1.521 ("Decree") to implement legislation adopted last year that phases out the use of plastic shopping bags in supermarkets and other commercial establishments over a period of one to two years. Now, the Buenos Aires City legislature has also recently approved legislation to phase out the use of non-biodegradable shopping bags ("Bill").

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Under the Bill, supermarkets and large food stores have four years to phase out the use of non-biodegradable shopping bags. All other stores will have five years to complete the phase out. The Bill also requires the Executive Branch to develop an implementation plan that includes economic incentives to encourage the production of biodegradable bags and public awareness campaigns encouraging shoppers to use their own reusable bags.

In the face of limited landfill capacity, plastic packaging issues are plainly in the spotlight not only in Argentina, but also in other Latin American jurisdictions. Bans on non-biodegradable plastic packaging are also emerging in Mexico. Mexico City has recently banned the use of free plastic shopping bags and a broad plastic packaging initiative is also being considered at the national level.

Reference Sources (in Spanish):

- Decree No. 1.521 available at www.bdlaw.com/assets/attachments/Argentina%20-%20Decree%20No.%201.521.pdf
- Approval of Buenos Aires City Bill

Argentine Congress Considering Green Government Purchasing Bill

A bill currently under consideration by the Argentine Congress (Bill 3882-D-2009) would require the national government to take into account a new green purchasing guide in the procurement of public works, goods and services.

The Secretariat of the Environment would be charged with developing the purchasing guide, or Manual on Sustainable Public Contracting, within six months of the adoption of the Bill ("Manual"). (Art.3) SAyDS would need to involve environmental and consumer rights NGOs and trade associations in the development of the Manual and update it on an annual basis to take into account new laws, scientific advances and improvements in technology. (Arts. 3 and 4)

Once the Manual was developed, the government's procurement of public works, goods and services would need to take into account pertinent environmental factors identified in the Manual. (Art. 6) The Bill specifies that the Manual will provide criteria that takes into account, among other factors, energy efficiency, waste generation and treatment, and toxicity. (Art. 2)

Reference Sources (in Spanish):

- Bill 3882-D-2009, available at www.bdlaw.com/assets/attachments/Argentina%20-%20Bill%203882-D-2009.pdf

BRAZIL HIGHLIGHTS

National Developments

Brazil Debates New Regulatory Framework for Pre-Salt Petroleum

In response to a series of significant new oil discoveries approximately 170 miles off the coast of Brazil in the Atlantic Ocean, President Lula has recently proposed, and the Brazilian Congress is currently considering, various initiatives that will allow government to play a larger role in exploiting such reserves. The new oil discoveries -- estimated to hold between 50 to 100 billion barrels of hydrocarbons-- are located in the so-called "pre-salt" region, identified as such because the fields lie miles beneath water, rock and a thick layer of salt. With the finds being hailed by the government as a second declaration of independence for Brazil, and environmentalists increasingly concerned about the potential environmental costs associated with exploiting the reserves, the legislative debate surrounding the proposed new regulatory framework is bound to

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be intense.

The first of the four measures under consideration, PL 5938/09, would amend Brazil's Law of Hydrocarbons and establish a shared production model for exploration of pre-salt fields. (Art. 3) PETROBRAS, Brazil's state-controlled oil company, would be granted a 30% stake in all joint ventures or consortia set up to bid for licenses. (Art 10) The second initiative, PL 5939/09 would create the PETRO-SAL, a public company under the Ministry of Mines and Energy, that would be charged with managing the sharing production agreements established for the pre-salt area. (Art. 4) The third bill, PL 5940/09, would create a Social Fund consisting of, among other things, resources generated by the pre-salt fields, to support the fight against poverty and encourage the development of education, culture, science, technology and environmental sustainability. (Art. 1) The fourth bill, PL 5941/09, makes PETROBRAS the sole operator in new pre-salt areas and addresses, among other issues, the capitalization of PETROBRAS. (Art. 1 and Art. 9)

Although President Lula initially attached a constitutional urgency clause requiring that the Brazilian Congress vote on the measures on a fast-track basis, he subsequently withdrew the urgency clause giving both houses additional time to debate the bills. Nevertheless, the bills remain at center stage of legislative debate and commenters anticipate a vote on the measures sometime in November.

Reference Sources (in Portuguese):

- PL 5938/09 available at www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205938-09.pdf
- PL 5939/09 at www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205939-09.pdf
- PL 5940/09 at www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205940-09.pdf
- PL 5941/09 at www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205941-09.pdf

Brazilian Initiative Would Create Incentives for Renewable Energy

A bill recently filed in the Brazilian Congress (PL 5519/09 or "Bill") is intended to create incentives for renewable energy. Among other things, the Bill would establish a National Council as well as a Fund for the Promotion of Research and Development of Clean Energy. (Art. 2)

The National Council, which would include technical experts, researchers and other public and private entities, would be charged with developing measures that would result in better utilization of clean and renewable energy, creating incentives for consumption and supply of renewable energy and encouraging renewable energy research projects. (Art. 4) The National Fund would be funded in part by oil royalties. (Art. 7) The Bill would require the three branches of government to work on creating incentives for, and increasing the use of, renewable energy. (Art. 5) The Ministries of Finance, Environment, Mines and Energy would be charged with establishing national objectives for its use. (Art. 3)

With its long-established bio-ethanol industry, Brazil is already considered a leader in use of renewable energy sources. Brazil continues its focus on the renewable energy market even as it seeks to exploit newly discovered offshore oil fields including the Tupi field -- reportedly the largest single Western Hemisphere find in the last thirty years.

Reference Source (in Portuguese):

- PL 5514/09 www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205514-09.pdf

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Brazilian Bill Would Require Environmental Licensing for Import of Chemical Substances and Products

A Brazilian Congressman has recently introduced a bill (PL 5687/09 or "Bill") that would require environmental licensing prior to import of chemical products or substances as well as any other substances or products that pose risks to life, quality of life or the environment. (Art. 1) As drafted, the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA) is designated as the licensing authority, but could delegate this function to any state authority. (Art. 2) The specific list of substances and products covered by the Bill would be established and updated by future rulemaking. (Art. 3)

The Bill would require importers, producers and sellers, among others, of covered substances and products to maintain detailed registries of their operations for a minimum period of five years. (Art. 3) Responsible persons would be required to demonstrate sufficient technical and operational capacity for carrying out their activities in accordance with environmental standards and regulations. (Art. 4) The Bill also anticipates that future rulemaking may require the development of transit guides and labeling of packaging. (Art. 3)

This broadly written Bill has the potential to impact a wide variety of industry sectors. Implementing agencies would have broad discretion to establish and add covered substances and products. Generally speaking, Brazil's approach to regulating hazardous or toxic substances has been to target specific substances (e.g., mercury and asbestos). This Bill's comprehensive scope would be a significant departure from that approach.

Reference Source (in Portuguese):

- PL 5687/09, available at www.bdlaw.com/assets/attachments/Brazil%20-%20PL%205687-09.pdf

Brazil Targeting Illegal Waste Shipments

Following the discovery of 99 shipping containers from the United Kingdom at three Brazilian ports consisting of an assortment of household and medical wastes, including syringes and used diapers, that were labeled as recyclable plastic, Brazil reportedly plans to pursue legal action against the United Kingdom and has invoked the settlement mechanism of the Basel Convention in order to do so.

In addition to addressing this specific waste shipment, Brazil is focusing heightened attention on preventing illegal waste traffic. Brazil's Interministerial Commission to Combat Environmental Crimes, consisting of representatives from the Ministry of Environment, Federal Police and National Force, is discussing proposals to use enhanced measures to identify the contents of containers imported into Brazil and foster increased communications with international intelligence agencies. Brazil's Minister of Environment, Carlos Minc, has suggested that legislative changes may also be in order to expand the regulatory approaches available to address illegal shipments.

Brazil currently prohibits the import of hazardous and household waste from any country for any purpose. The additional measures contemplated would reinforce and strengthen this broad prohibition.

Reference Sources (in English and Portuguese):

- "Brazil Takes Action Over UK Waste Shipment," available at www.bdlaw.com/assets/attachments/Brazil%20-%20Brazil%20Takes%20Action%20Over%20UK%20Waste%20Shipment.pdf

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- "Brazil Wants to Close the Door on Illegal Waste Imports," available at www.bdlaw.com/assets/attachments/Brazil%20-%20Brazil%20Wants%20to%20Close%20the%20Door%20on%20Illegal%20Waste%20Imports.pdf
- CONAMA Resolution 235/1998, available at www.bdlaw.com/assets/attachments/Brazil%20-%20CONAMA%20Resolution%20235-1998.pdf

CONAMA Adopts New Tire Requirements

On October 1 of this year, a new Resolution (Resolution 416/09) issued by Brazil's National Environmental Council (CONAMA) that requires tire producers and importers to provide for adequate destination (e.g., processing or recycling) of one used tire for every new tire placed on the market went into effect. (Art. 3) The new Resolution replaces a prior Resolution (Resolutions 258/99, as amended by Resolution 301/02) that required tire producers and importers to provide for adequate destination of five used tires for every four new ones produced or imported. (Art. 3, Paragraph IV) Tire disposal issues have long been a source of significant concern in Brazil, but this new Resolution signals that the government may, to a certain extent, view this as an area where some progress has been made.

Under the Resolution, tire manufacturers and importers are required to develop a management plan for collection, storage and adequate destination of used tires within six months of the publication date of the Resolution (i.e., April 1, 2010). (Art. 7) Manufacturers and importers of new tires, on a collective or individual basis, must also establish collection locations for used tires. (Art. 8) For municipalities with a population of 100,000 inhabitants or greater, manufacturers and importers of new tires must establish at least one collection point no later than October 1, 2010. (Art. 8, Paragraph 1)

Reference Sources (in Portuguese):

- Resolution 416/09, available at www.bdlaw.com/assets/attachments/Brazil%20-%20Resolution%20416-09.pdf
- Resolution 258/99 (as amended), available at www.bdlaw.com/assets/attachments/Brazil%20-%20Resolution%20258-99.pdf

CONAMA Reduces Emission Limits for Vehicles

Brazil's National Environmental Council (CONAMA) has established new emission limits for automotive vehicles intended to improve air quality in Brazil. Resolution 415/09 includes reduced emission limits for carbon monoxide, nitrogen oxide and particulate matter. Under the Resolution, published on September 24 of this year, limits are established for light passenger vehicles and two categories of commercial vehicles, by weight. (Art. 1-3) The new limits are phased in depending on the type of fuel (e.g., diesel or gasoline). (Art. 4)

The National Petroleum Agency (ANP) is required to develop fuel specifications that will allow the emission limits established by the Resolution to be satisfied. (Art. 9) ANP is also responsible for developing and presenting a plan for supplying the fuel that will be needed to come into compliance with the Resolution. (Art. 11) Under certain circumstances, vehicles may be exempted from the new requirements of the Resolution (e.g., military and agricultural use vehicles) (Art. 21 and 22) The Resolution further anticipates that IBAMA, Brazil's environment agency, may coordinate studies for future revision of these standards. (Art. 20)

Reference Source (in Portuguese):

- Resolution 415/09 available at www.bdlaw.com/assets/attachments/Brazil%20-%20Resolution%20415-09.pdf

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State Developments

São Paulo Issues Implementing Regulations for 2006 Waste Policy Law

On August 5, 2009, São Paulo Governor José Serra issued Decree No. 54.645 ("Decree"), the implementing regulation for the State Solid Waste Policy Law, No. 12.300 (March 16, 2006). Among its more significant regulatory developments are the following:

- extended producer responsibility for products that, "by their characteristics," generate environmentally significant wastes (Art. 19);
- waste management plans for all solid waste generators that are subject to environmental licensing (Arts. 10-12);
- an annual reporting requirement for all generators, transporters and receivers of solid wastes (Art. 14);
- creation of a category of "wastes of environmental interest," according to their toxicity, hazardousness, or volume (Art. 14); and
- responsibility for remediation of sites contaminated by wastes that result from one's economic activities (Art. 20).

The scope of many of the Decree's provisions that potentially affect industry remains unclear pending further rulemaking by the state Environment Ministry. For example, whereas the Decree establishes that the extended producer responsibility provision will apply to manufacturers, distributors and importers, it does not specify the classes of products that will fall within its scope. (Art. 19) Instead, the Decree anticipates a resolution of the Environment Ministry listing the affected products. The category of "wastes of environmental interest"--likely to entail special management--also awaits the publication of a list. Similarly, the site remediation requirement is a brief provision that anticipates future publication of a set of procedures, also by the Environment Ministry. (Art. 20)

The Decree provides greater detail on its planning and reporting requirements, which appear to apply to all businesses that generate solid wastes and are required to have an environmental operating license. (The term "generator of solid wastes" is inclusively defined as any physical or legal person who, by virtue of its products or activities, including consumption, takes actions that involve the management or flow of solid wastes.) Every generator of solid wastes who either applies for or renews an environmental operating license, is required to present a solid waste plan. The Decree provides a list of issues that each plan must address, including classification and quantification of waste streams, storage, treatment, recycling, and disposal methods, as well as evaluation and contingency plans. The Decree separates generators of "low impact wastes," who also must submit waste management plans, but with fewer required elements. (Art. 12)

In addition to waste management plans, businesses covered by these provisions are also required to submit an annual declaration in which they report on their waste practices over the past year, covering the same content required in the plans. (Art. 14) Within six months of the Decree, the Environment Ministry is to produce an electronic form for the submission of declarations. The declaration for each calendar year will be due January 31 of the following year. However, the Decree provides that "wastes of environmental interest" will be subject to a different reporting schedule--presumably more frequent, but which remains to be determined by resolution of the Environment Ministry. Overall, the Decree takes São Paulo one large step toward a general solid waste management system, but leaving significant outstanding details for the Environment Ministry to address during the next year or so.

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Reference Sources (in Portuguese):

- São Paulo Decree No. 54.645 of 2009, available at www.bdlaw.com/client/beveridge/www/assets/attachments/Sao%20Paulo%20Decree%20No.%2054645%20of%202000.pdf
- São Paulo Law No. 12.300 of 2006, available at www.bdlaw.com/assets/attachments/Sao%20Paulo%20Law%20No.%2012300%20of%202006.pdf

São Paulo Establishes Superfund-like Site Remediation Program

On July 8, 2009, São Paulo Vice-Governor Alberto Goldman, acting in lieu of Governor José Serra, signed Law No. 13.577 (the "Law"), creating a Superfund-like entity and authorizing a site remediation program. The State Fund for Prevention and Remediation of Contaminated Sites ("FEPRAC") is intended to support immediate "interventions in contaminated sites to remove imminent danger to public health." (Art. 32) The environmental enforcement agency, CETESB, is to collect reimbursement from the "legally responsible" parties. The Law assigns legal responsibility to five categories of parties: (1) those who caused the contamination and their successors; (2) owners; (3) operators; (4) those in effective control of the site; and (5) direct or indirect beneficiaries of the site. (Art. 13)

The Law's remediation program follows the same basic outline as the administrative rules that previously defined São Paulo's site remediation process, providing a statutory foundation for the program, and making a few changes. Like the previous program, the Law establishes a Registry (cadastro) of Contaminated Sites. (Art. 5) Sites in the Registry are classified as either "under investigation," "contaminated," or "remediated." The Law's remediation process comprises a series of steps that the legally responsible party or parties must undertake to restore the site to a level of contamination low enough to qualify as rehabilitated for its "declared use" (not defined in the Law, but in the previous program included uses such as residential and industrial). (Arts. 15-29)

On the day he signed the Law, Vice-Governor Goldman also issued Decree No. 54.544 (the "Decree"), which adds a special FEPRAC fee to the environmental licenses of projects that have the potential to result in site contamination. (Art. 2) The Decree does not set a fixed value or formula to determine the size of such fees. Instead, it provides factors for the environmental agency to consider (Art. 3) and anticipates the future issuance of standards (Art. 5) that will presumably guide these assessments. The Decree provides that forthcoming regulations will include a provision to reduce the fee by 50% in return for the adoption of procedures to mitigate the risk of contamination.

Reference Sources (in Portuguese):

- São Paulo Law No. 13.577 of 2009, available at www.bdlaw.com/assets/attachments/Sao%20Paulo%20Law%20No.%2013577%20of%202009.pdf
- São Paulo Decree No. 54.544 of 2009, available at www.bdlaw.com/assets/attachments/Sao%20Paulo%20Decree%20No.%2054544%20of%202009.pdf

São Paulo Consolidates Environmental Licensing, Delegates Small Projects to Municipalities Under New Standards

As previously reported, environmental licensing in São Paulo is undergoing two transformations: consolidation in a single agency and devolution from the state to municipal level. Consolidation was accomplished legally on May 9, 2009, through the publication of Law No. 13.542, which dissolved three small state agencies and relocated their functions within CETESB. The reconstituted agency has been renamed the São Paulo State Environmental Company (but retains the acronym CETESB) and acquired authority over environmental impact assessments, protection of natural resources, and metropolitan land use. These changes went into effect on

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August 7, 2009.

As it aggregates licensing authority, CETESB is also in the midst of an ongoing process to transfer much of the same authority to municipal environmental agencies. Since 2007, CETESB has been training municipal personnel, then certifying them to take over the licensing of enterprises that have only local environmental impacts. As of September 2009, CETESB had certified the agencies of fifteen municipalities, including such industrialized districts as Campinas, Ribeirão Preto, Guarulhos, Santo André, and the city of São Paulo.

On September 22, 2009, the state environmental policy council, CONSEMA, issued Deliberation No. 33: "Standards for the Decentralization of Environmental Licensing" (the "Standards"). The Standards establish minimum criteria that the municipal agencies must meet to be eligible to assume responsibility for licensing. An Annex to the Standards lists the types of projects and enterprises that may be licensed municipally as long as their direct environmental impact does not cross a municipal boundary. The list includes a wide variety of public works projects, such as bridges, road modifications, sewers, water towers, and electrical transmission lines, as well as some light industrial facilities, such as manufacturers of products made from wood, paper, plastic, leather and textiles.

Reference Sources (in Portuguese):

- São Paulo Law No. 13.542 of 2009, available at www.bdlaw.com/assets/attachments/Sao%20Paulo%20Law%20No.%2013.542.pdf
- CONSEMA Deliberation No. 33 of 2009, available at www.bdlaw.com/assets/attachments/Sao%20Paulo%20CONSEMA%20Deliberation%2033%20of%202009.pdf

Rio de Janeiro Imposes Retailer Responsibility for Plastic Shopping Bags

On July 15, 2009, Governor Sérgio Cabral of Rio de Janeiro signed Law No. 5.502 (the "Law") to curtail the use of plastic bags by retail stores by requiring stores either to stop using them or to buy them from their customers. While the Law does not outright prohibit the manufacture or use of plastic bags, it is designed to impose additional costs on stores that continue to use them such that it is likely, and evidently intended, to have the practical effect of a ban. Since 2007, at least three other Brazilian states (Espírito Santo, Goiás and Maranhão) have passed laws to eliminate the use of plastic shopping bags, as have numerous municipalities in Brazil and elsewhere. Rio's new Law will affect a larger share of the marketplace than any of the previous Brazilian laws, and is distinctive in its incentive-based approach.

The Law applies to polyethylene, polypropylene, and similar plastic bags, typically used to carry groceries or other retail items. It directs stores to substitute unspecified alternatives (the Law implies that either biodegradable or reusable bags are acceptable) or be subject to additional responsibilities. Stores that fail to substitute will be required to accept any quantity of plastic bags, from any source, and will be responsible for the recycling or proper disposal of these deliveries. In addition, these stores will be required to compensate the public in one of the following ways: (1) a customer who declines to use the store's plastic bags is entitled to a discount of 3 centavos for every five items purchased; or (2) for every 50 bags brought to the store, the customer is entitled to a kilogram of either rice or beans or, in their absence, another staple food.

The Law is scheduled for phased implementation over three years. For supermarkets and other large stores, the obligations begin one year after the Law's publication, whereas smaller stores, depending on their precise size classification, must comply either two or three years after publication. Apart from their compliance with the bag substitution provision, all stores will be required to participate in a public education campaign by posting beside each cash register a sign that explains the environmental impacts of plastic bags and encourages customers to use other

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alternatives.

Reference Sources (in Portuguese):

- Rio de Janeiro Law No. 5.502 of 2009, available at www.bdlaw.com/assets/attachments/Rio%20de%20Janeiro%20Law%20No.%205502.pdf

Minas Gerais Issues Preliminary Regulations for State Solid Waste Policy Law

On September 25, 2009, Aécio Neves, Governor of Minas Gerais, issued Decree No. 45.181 (the "Decree") a regulation to implement the new State Solid Waste Policy Law (Law No. 18.031 of January 12, 2009; the "Law"). Those seeking clarification of the Law's potentially groundbreaking and burdensome "reverse logistics" program (reported in a previous issue of the newsletter) may be disappointed. Instead, the Decree's primary effect is to assign tasks to agencies. For businesses that may be subject to this regulatory program, the Decree gives little guidance as to what will ultimately be required.

Among the Decree's few imperatives that could apply to private parties are provisions that "generators of wastes will be required to elaborate their Integrated Solid Waste Plans" (Art. 6) and that "the generator of solid wastes will be required to guarantee adequate final disposal of these wastes through a duly licensed enterprise or activity" (Art. 10). However, the Decree does not define its terms and contains nothing to indicate which types of "generators" will ultimately be subject to either of these requirements. The Decree does not indicate whether the difference in phrasing (generators of "wastes" versus "solid wastes") represents an intentional distinction or merely imprecise drafting. Instead, the Decree leaves only the Law's exceedingly broad definition of a "generator of solid wastes": "a physical or legal person who discards a good." (Law, Art. 4) In light of the Law's expansive terms and the Decree's lack of clarification, additional regulations will be necessary to define businesses' waste management obligations.

Reference Sources (in Portuguese):

- Minas Gerais Decree No. 45.181 of 2009, available at www.bdlaw.com/assets/attachments/Minas%20Gerais%20Decree%20No.%2045181%20of%202009.pdf
- Minas Gerais Law No. 18.031 of 2009, available at www.bdlaw.com/assets/attachments/Minas%20Gerais%20Law%20No.%2018031%20of%202009.pdf

Espírito Santo Enacts Comprehensive Solid Waste Policy Law

On July 15, 2009, Governor Paulo Gomes of Espírito Santo signed Law No. 9.264 (the "Law"), the "State Solid Waste Policy" for the small southeastern state situated between Rio de Janeiro and Bahía. The Law leaves most details to future implementation, but provides sufficient authority for the state to impose extended producer responsibility provisions for many products according to the characteristics of their wastes, and to impose general responsibility on all generators of wastes to ensure adequate disposal.

The Law repeatedly articulates the core concept that the generator of a waste bears responsibility for its disposal. For ordinary solid wastes, this amounts to a partnership (or "teaming") between generators and the appropriate municipal authorities. (Art. 33) The Law assigns broader responsibilities for wastes that cause environmental damage or create risks to health or the environment. Where these effects are the result of the characteristics, composition, volume, quantity, or hazardousness of certain products, the Law provides that the manufacturers or importers of those products retain ongoing--but as-yet undefined--responsibility. (Art. 34) In addition, the Law lists a set of "obligations" borne by the generators of wastes, which would be highly demanding if ultimately implemented. (Art. 35) The obligations include such ambitious goals as "the adoption of technologies to absorb or reuse [their] solid wastes" and "the

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implementation of the structure necessary to guarantee the return flow of reverse solid wastes." As with most of the Brazilian states' efforts to create comprehensive solid waste policies, the practical details of Espírito Santo's new Law remain undetermined, pending regulation.

Reference Sources (in Portuguese):

- Espírito Santo Law No. 9.264 of 2009, available at www.bdlaw.com/assets/attachments/Esprito%20Santo%20Law%20No.%209264%20of%202009.pdf

CHILE HIGHLIGHTS

Chile Considers New Particulate Matter Standard

Chile has recently unveiled a proposal to implement a new particulate matter standard. CONAMA, Chile's environmental agency, has developed a draft bill (anteproyecto) intended to reduce levels of respirable fine particulate matter (less than 2.5 micrometers) (PM 2.5) over a phased-in period beginning with 2012 with the goal of achieving acceptable levels by 2032. (Art. 3) Specifically, PM 2.5 levels on an annual average basis would be set at 25 micrograms per cubic meter (µg/m3) for 2012, 20 µg/m3 by 2022, and finally, 10 µg/m3 by 2032.

The initiative has been published and is available on CONAMA's website. The public comment period will close on November 11, 2009. CONAMA will factor these public comments into any revisions that are made prior to presentation of the bill before the Chilean Congress.

Reference Source (in Spanish):

- Draft Bill on Primary Environmental Quality Norm for Respirable Fine Particulate Matter PM 2.5, available at www.bdlaw.com/assets/attachments/Chile%20-%20Draft%20Bill%20on%20Primary%20Environmental%20Quality%20Norm%20for%20Respirable%20Fine%20Particulate%20Matter%20PM%202.5.pdf

Chile Cell Phone Industries Launch Take-Back Initiatives

As Chile continues its focus on e-wastes, Chile's cell phone companies are moving forward with take-back initiatives of their own. In one instance, cell phone provider Claro Chile and Santiago Metro have developed a recycling initiative for cell phones that involves collection of cell phones at Santiago subway stations. More recently, another cell phone provider, ENTEL PCS, has launched its own cell phone take-back plan. Under this plan, any funds that result from the collection of used cell phones will be donated to a charitable organization, Christ's Home (*Hogar de Cristo.*)

Concurrently with the announcement of this latest voluntary initiative, Chile's Minister of Environment, Ana Lya Uriarte, reported that a public-private agreement for the sustainable management of cell phones is about to be finalized. This public-private agreement will provide for the voluntary implementation of extended producer responsibility.

Reference Sources (In Spanish):

- "Metro and Claro Unveil Recycling Network for Cell Phones," available at www.bdlaw.com/assets/attachments/Chile%20-%20Metro%20and%20Claro%20Unveil%20Recycling%20Network%20for%20Cell%20Phones.pdf
- "Minister of Environment, Christ's Home and Entel PCS Give Green Light to Cell Phone Recycling Campaign," available at www.bdlaw.com/assets/attachments/Chile%20-%20Minister%20of%20Environment%20Christs%20Home%20and%20Entel%20PCS%20Give%20Green%20Light%20to%20Cell%20Phone%20Recycling%20Campaign.pdf

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COLOMBIA HIGHLIGHTS

Colombia Adopts Procedures for Enforcement of Environmental Violations

In landmark legislation, Colombia has adopted sweeping reforms to its environmental laws, establishing an unprecedented presumption of guilt where environmental damage has occurred. Law 1333 of 2009, passed on July 21, 2009, creates a procedural framework for enforcement of environmental laws and penalties for violations. The Law can be widely used to enforce all environmental standards in Colombia and has special provisions for endangered species protections. (Art.5) The law has been met with controversy, and two bills to repeal the law have already been filed.

Where environmental harm has occurred, violators are presumed guilty (or liable) and are required to repair any harms caused by their acts and have the burden of proving their innocence. (Art. 4(1), (2)) The presumption of guilt allows environmental authorities to impose a broad range of preventive measures, including written warnings and the requirement to attend environmental education courses, the decommissioning of products, equipment, activities or implements causing the violations, seizure of specimens or products, and suspension of authorized activities. (Art. 36)

The Law establishes several "mitigating" factors for off-setting liability, including self-reporting prior to enforcement, undertaking mitigating actions prior to enforcement, and demonstrating that no harm to environment occurred. (Art. 6) Conversely, the Law also establishes a number of aggravating factors, including repeat violations, severe harm to the environment, obstructing environmental authorities, failure to complete preventive harms, and where the underlying violations involve hazardous wastes. (Art. 7) Presumably, these factors will be used in the assessment of sanctions, which broadly includes fines and penalties, temporary and final closure, revocation of licenses, permits and concessions, demolition of facilities at the cost of the violator, restitution of species or harms, or community service. (Art. 40) The imposition of fines does not exempt violators from the obligation to undertake remediation activities and can be independently imposed in addition to other civil and criminal penalties that may apply. (Art. 40(1))

Reference Sources (in Spanish):

- Law 1333/2009, available at www.bdlaw.com/assets/attachments/Colombia%20-%20Law%201333-2009.pdf
- Decree 2811/1974, available at www.bdlaw.com/assets/attachments/Colombia%20-%20Decree%202811-1974.pdf
- Law 99/1993, available at www.bdlaw.com/assets/attachments/Colombia%20-%20Law%2099-1993.pdf

MinAmbiente Moves Forward With Product Stewardship Requirements for E-Waste and Batteries

MinAmbiente continues to press its aggressive agenda to address product stewardship requirements for end-of-life computer equipment and used portable batteries. The Agency issued two new proposals in late September 2009 which are modeled on existing take-back requirements for other kinds of end-of-life products.

Like their companion regulations, these proposals would require producer/importer take-back programs that would be free of charge to consumers. Each program includes a significant quota requirement, phased-in over time (85% market-share by 2011 for batteries; 80% market-share by 2011 for covered computers).

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Manufacturers would be required to submit plans, subject to approval by MinAmbiente, that would demonstrate how the quotas would be met; establish a system of collection points for consumers to drop off their used equipment; transport used equipment to recycling centers; demonstrate how used equipment would be recycled, reused or "valorized," and provide information to inform consumers of disposal restrictions and take-back requirements.

Colombia has been a regional leader in implementing take-back laws for end-of-life products and has been focused on e-wastes for some time. While these initiatives come as little surprise, they could have significant impact on manufacturers and importers of covered products if adopted as proposed. They may also face logistical barriers to implementation, including recycling capacity.

Reference Sources (in Spanish):

- Draft Resolution on Batteries (Unnumbered), available at www.bdlaw.com/assets/attachments/Colombia%20-%20Draft%20Resolution%20on%20Batteries.pdf
- Draft Resolution on Computers (Unnumbered), available at www.bdlaw.com/assets/attachments/Colombia%20-%20Draft%20Resolution%20on%20Computers.pdf

Colombia Issues New Draft Air Protocol for Measuring Emissions from Fixed Sources

In a further sign that Colombia's environmental ministry, MinAmbiente, is closer to adopting implementing standards that will allow it to measure and enforce its air quality standards, the Agency has released a revised draft Protocol for measuring air emissions from fixed sources. The Protocol is a highly technical document based in large part upon U.S. EPA standards for air emissions monitoring. The most recent version does not reflect a significant departure from the last draft, which was covered in a previous LAR Quarterly (http://www.bdlaw.com/assets/attachments/2009%20LAR%20Environmental%20Quarterly.pdf). The Agency has moved quickly to develop these Protocols, which will implement Resolution 909, adopted last year. That Resolution created new air quality standards for several criteria pollutants and that apply to a broad range of industrial sources.

Reference Sources (In Spanish):

- Draft Protocol (July 2009 Version), pages 1-56 available at www.bdlaw.com/assets/attachments/Colombia%20-%20Draft%20Protocol%20p1-56.pdf, pages 57-122 available at www.bdlaw.com/assets/attachments/Colombia%20-%20Draft%20Protocol%20p56-122.pdf
- Resolution 909, available at www.bdlaw.com/assets/attachments/Colombia_-_Resolution_909.pdf

COSTA RICA HIGHLIGHTS

Costa Rica Hosts Conference on Pollutant Release and Transfer Registries

On September 22 and 23, Costa Rica hosted a conference of representatives from governments, NGOs and the private sector from Costa Rica, El Salvador, Guatemala, Nicaragua and the Dominican Republic to discuss Pollutant Release and Transfer Registries ("PRTRs"). The meeting was organized by the United Nations Institute for Training and Research ("UNITAR"), in cooperation with the U.S. Environmental Protection Agency ("U.S. EPA") and the Central American Commission for the Environment and Development. Participating countries were all members of the Central American Free Trade Agreement ("CAFTA-DR"), and each country presented on its capacity and existing infrastructure to develop a PRTR in-country. In addition, the U.S. EPA presented on its Toxics Release Inventory, and Chile presented on its experience

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implementing a PRTR in its country.

Notably, the Central American Commission for the Environment and Development closed the meeting by outlining a national and regional work plan designed to implement PRTRs in all of the participating NAFTA-DR countries. Currently, the only countries in Latin America that have working PRTRs are Chile and Mexico. There have been, however, a number of initiatives similar to the recent meeting in Costa Rica that suggest many countries in the region are considering developing PRTRs. For example, the MERCOSUR Ad Hoc Group on Management of Hazardous Chemical Substances and Products has developed an Action Plan on Chemicals that calls for, among other things, the development of a PRTR for POPs. (MERCOSUR is the trade agreement between the Southern Cone countries: Argentina, Paraguay, Uruguay and Brazil.) This is an area to watch, as PRTRs are often precursor programs for subsequent regulation of restrictions on chemicals.

Congress Considering Draft Mining Code Bill

The Ministry of Environment, Energy and Telecommunications ("MINAET") has recently proposed to Congress a new Mining Code that would establish a new concession and permitting process for onshore and offshore mining exploration and exploitation operations. Carbon, oil and other hydrocarbon deposits, as well as radioactive minerals, would be excluded from the scope of the draft Code. (Art. 26) The General Directorate for Geology and Mines, a sub-agency within MINAET, would be responsible for administering the Mining Code. (Arts. 10-11) The Executive Power would have the final authority to issue concessions, based on the recommendations given by the Directorate. (Art. 1)

The Code outlines two types of concessions, one for exploration and one for exploitation, and provides the procedures that private parties (national or foreign) must take to obtain these concessions. (Arts. 31-45) Government agencies must also seek authorization from the General Directorate for any mining activities. (Art. 89) All concessionaires are required to register with the National Mining Registry within 60 days of receiving the concession and meet a number of other requirements for the duration of the concession, which differ depending on whether it is an exploration or exploitation concession. (Arts. 63-65) The maximum area for concessions would be 2,000 hectares for exploration and 500 hectares for exploitation. (Art. 22)

The draft Code outlines a number of rights of the concessionaire, such as, for example, the right to seek an extension of the concession. (Art. 70) Concessionaires must also provide a financial guarantee for the completion of the concession by the first month of the second year following the grant of the concession. (Art. 30) The Code would grant authority to the General Directorate to cancel a concession for failure to meet the obligations, as well as to administer penalties and fines. (Arts. 73, 75-85)

The Code prohibits the granting of concessions to certain government officials and also prohibits any mining concessions in protected forests, as defined in Chapter VII of the General Environmental Law (1995), as amended. In addition, any mining activity in indigenous areas may proceed only with the express, written authorization of the indigenous community. There are also special procedures in place that would cover mining rights on private property and discovery of minerals during civil works. (Arts. 86-87) The draft Code also addresses servitudes (Arts. 101-105), taxes (Art. 11) and importation of equipment (Art. 106). Any party that does not have a concession for exploitation but that acquires minerals with the intention of processing them for sale must also obtain a permit from the General Directorate. (Art. 46)

Reference Sources (in Spanish):

- Draft Mining Code, available at www.bdlaw.com/assets/attachments/CR%20Draft%20Law%20re%20Mining%20Code.pdf

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The Ministry of Environment Issues for Comment Draft Regulation on Control of ODSs

MINAET has recently issued draft regulations that will implement Costa Rica's obligations under the Montreal Protocol with regard to certain restrictions and bans on the import, production and/or use of covered ozone depleting substances ("ODSs"), or those listed in Annexes A, B, C and E of the Protocol. (Arts. 1 and 3) The General Directorate for Environmental Quality ("DIGECA"), a sub-agency of MINAET, would be responsible for implementing the regulation. (Arts. 4-6) DIGECA would be required to coordinate with other agencies that have jurisdiction over covered substances for certain matters, including, for example, the registration of methyl bromide under the Ministry of Agriculture's National Pesticides Registry. (Art. 7) DIGECA would also be required to coordinate closely with the General Customs Directorate with regard to specific import procedures. (Arts. 8-10)

The draft Regulation would prohibit the import and production of all ODSs that have been designated as prohibited by the Montreal Protocol and its amendments, and would also prohibit the production of all ODSs included in the Protocol. (Arts. 14 and 16) Specifically, the Regulation would:

- Prohibit the import and production in-country of methyl bromide, but would allow for certain exceptions to be made for "special uses" determined to be critical by DIGECA. (Arts. 3, 19-24)
- Prohibit the import and use of certain chlorofluorocarbons ("CFCs") used as refrigerants, and would require certain equipment (e.g., refrigerators, dehumidifiers) to obtain a certificate from DIGECA that provides that the covered equipment does not contain prohibited CFCs. (Arts. 25-32)
- Prohibit the manufacture and import of aerosol products that contain dichlorodifluoromethane, with the exception of pharmaceutical devices such as inhalers. (Arts. 33-34)

The regulation sets out a detailed licensing procedure for import and export of ODSs. (Arts. 35-45) In addition to obtaining a license, all importers and exporters of ODSs (including equipment containing them) would be required to register with DIGECA, as would any business that has activities related to the management of refrigerants. (Arts. 6, 13 and 30) MINAET would have the authority to prohibit the import, export and use of new substances identified as ODSs as they are included under the Montreal Protocol. (Art. 12)

Reference Sources (in Spanish)

- Draft Regulation for the Control of Ozone Depleting Substances in Accordance with Law 7223 and Its Amendments, available at www.bdlaw.com/assets/attachments/CR%20Regulation%20of%20ODSs.pdf

ECUADOR HIGHLIGHTS

Ecuador Debates Two Proposals That Would Fundamentally Reform Its Water Law

The Ecuadorian National Assembly is considering two bills, each proposing to establish a national water resource policy. Representative Jorge Escala, of the National Democratic Movement, submitted Bill No. 2009-057, "Law Regulating Water Resources, Uses and Allocations," ("Bill No. 57") on August 20, 2009. A few days later, on August 26, the government of President Rafael Correa submitted Bill No. 2009-066, "Organic Law Regulating Water Resources, Uses and Allocations" ("Bill No. 66").

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The existing Water Law of 2004 that either bill would supersede is a comparatively brief enactment that is largely concerned with a system of concessions for industry, agriculture and communities. In contrast, both of the bills under consideration proclaim the right to water as a fundamental human right, rather than a property right. The bills share various other features in common, including their emphases on water quality, conservation of aquatic and terrestrial ecosystems, and adoption of hydrographic basins as the basic administrative unit in the water management system. They differ significantly in the degree with which each would transform the existing regime.

Bill No. 57 is the more far-reaching of the two proposals. It would prohibit most industries from operating wherever the industrial consumption of water affects the quantities that the bill guarantees for human consumption and ecological uses. (Art. 78) While agricultural and energy-producing facilities both would be exempt from this general prohibition, hydroelectric projects would be permitted to use water only when their use had no effect on the availability of water for agricultural, human and ecological uses, and would be subject to the approval of local communities. (Arts. 79-80) Bill No. 57 would nullify water rights previously granted to mining interests, domestic or foreign, under most circumstances. (Art. 81)

Bill No. 66 is a politically moderate document in comparison, and claims the mantle of rationality in this debate by proposing an orderly, science-based approach to water management. Nevertheless, it proposes some bold ideas, such as the "vital share" of water to which each person is entitled (Art. 23), and an exegesis of how the water management system enables the exercise of a human right to water (Art. 24). Bill No. 66 provides a hierarchy of entitlement to use water: ranking human consumption, irrigation, and ecological saturation above industries. (Art. 53) Unlike its competitor, this bill permits industrial uses such as mining, although it ranks them near the bottom of its hierarchy.

The bills have entered the "socialization" phase of Ecuadorian lawmaking, in which the proponents hold public meetings in population centers across the country. In its press statements on behalf of Bill No. 66, the Correa Administration explains that the National Water Ministry developed the bill through a series of workshops conducted throughout the country, and that it was developed through the collaboration of water management professionals with local community representatives. Despite this effort to "pre-socialize" Bill No. 66, it has been the subject of street protests by indigenous and leftist groups, who appear to prefer the more radical policy changes of Bill No. 57. The debate over how much to reform Ecuador's water management policy remains lively at this early stage.

Reference Sources (in Spanish):

- Ecuador Bill No. 2009-057, available at www.bdlaw.com/assets/attachments/Ecuador%20Bill%20No.%202009-057.pdf
- Ecuador Bill No. 2009-066, available at www.bdlaw.com/assets/attachments/Ecuador%20Bill%20No.%202009-066.pdf

MEXICO HIGHLIGHTS

New Regulations Require Energy Consumption Reports and Mandatory Product Labeling

The Mexican government has adopted new standards implementing its 2008 Law for Promoting Sustainable Energy that will require large energy consumers to provide annual energy consumption reports and that sets the framework for a mandatory labeling scheme for products.

Under the new program, "high" users of energy are required to provide annual reports of their energy consumption. (Art 22-24) High users include those entities that consume more than 6 gigawatt-hours of electricity in the prior year, whose annual combustibles consumption exceeds

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9000 barrels of petroleum crude equivalent (excluding transportation fuels) or that have fleets of more than 100 cargo or passenger vehicles. (Art. 22) Annual reports will be due March 31 of each year.

The new Regulation also establishes a mandatory labeling system for products and appliances, to be identified in a Catalogue published by the Secretary of the Economy and the Consumer Protection Commission (Art. 25). Once listed, covered products distributed or sold in Mexico will be required to include clear and visible information on their energy consumption. (Art. 25) At a minimum, the information shall include:

1. Energy consumption per unit of time under normal operating conditions,
2. Energy Consumption in standby mode, if applicable, and
3. The quantity of product or service offered by the equipment or device, per unit of energy consumed, when applicable.

(Art. 27) Manufacturers, importers, distributors and merchants are responsible for compliance and have one year from product listing in the catalogue to meet the labeling obligation. (Art. 25)

The Regulation creates a voluntary certification process allowing participants to label their products as energy-efficient and that will also allow companies to become energy-efficient. (Arts. 31-32). Finally, the Regulation directs CONUEE (The National Commission for Efficient Energy Use) to develop a comprehensive 15-year program for promoting sustainable energy use in Mexico within six months of adoption of the Regulation. (Art. 8).

Reference Sources (In Spanish):

- Regulation to the Law for Promoting Sustainable Energy, available at www.bdlaw.com/assets/attachments/Mexico%20-%20Regulation%20to%20the%20Law%20for%20Promoting%20Sustainable%20Energy.pdf
- Law for Promoting Sustainable Energy, available at www.bdlaw.com/assets/attachments/Mexico%20-%20Law%20for%20Promoting%20Sustainable%20Energy.pdf

Mexican Environmental Audit Regulation in the Works

Mexico's federal environmental agency, SEMARNAT, has recently circulated copies of a Regulation that would, if adopted, replace the existing environmental audit regulation in its entirety. Mexico is one of the few Latin American countries to adopt voluntary environmental audit regulations, which it has had on the books since 2000, as a way to promote compliance.

The changes to the Regulation are fairly comprehensive, although most seem focused on improving the process for developing audit programs, ensuring changes are made once compliance opportunities are identified, and receiving and maintaining certifications as a participant in the Clean Industry Program (Industria Limpia). The new Regulation also sets forth new sanctions against companies that obtain certifications based on false or incomplete information or that fail to maintain the standards for participating in the Program. Regulation (Art. 45)

One notable change in the new Regulation is that the enforcement branch of SEMARNAT, the Procuradaría, has now been granted authority to execute environmental audits on its own. (Art. 7) Under the previous regulation, environmental audits were developed as a voluntary program. Under the new regulation, although participation in the audit program could remain voluntary, it is now clear that audits can be imposed involuntarily. (Art. 7).

As of this writing, the new Regulation has not been published in the Diario Oficial. Under the

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existing proposal, it would become effective within 30 days of publication.

Reference Sources (In Spanish):

- Environmental Audit Regulation (2000), available at www.bdlaw.com/assets/attachments/Mexico%20-%20Environmental%20Audit%20Regulation%202000.pdf
- Proposed Environmental Audit Regulation (2009), available at www.bdlaw.com/assets/attachments/Mexico%20-%20Proposed%20Environmental%20Audit%20Regulation%202009.pdf

Stationary Source Emissions Limits and New Air Quality Monitoring Standards Proposed for Public Comment

In continuing signs that SEMARNAT is stepping up efforts to strengthen its air quality standards, two new air monitoring standards were published in September for public comment.

The first proposal would amend existing maximum emissions limits set forth under NOM-SEMARNAT- 085-1993 for smoke, total suspended particulates, sulfur dioxide, nitrogen oxides and carbon monoxide for existing and new combustion units. The proposed standard is structurally similar to the previous NOM and sets limits based upon the geographic location of the stationary source, with more stringent standards set for those units located in designated critical zones and the Federal District air shed. While the emissions limits do not appear to have changed in many categories, many of the equipment categories have been redesignated, with the effect of strengthening the standards overall. In addition, a new standard for carbon monoxide has been proposed. Finally, the proposal would also establish new standards for the method and frequency of determining compliance. The proposal was published on September 3, 2009 and comments are due within sixty days.

The second norm, PROYECTO-NOM-156-SEMARNAT-2008, proposes standards for creating and operating air quality monitoring systems. The NOM is intended to improve the quantity and quality of data in Mexico's regional air sheds. As with other emissions monitoring systems (such as pollution emissions and transfer registries), these systems will not have direct regulatory implications for industry. They will, however, likely be used to generate data that will over time lead to more stringent regulations, enforcement of existing regulations, as well as citizen suits. The proposal was published on September 30, 2009 and comments are also due within 60 days.

Reference Sources (In Spanish):

- PROYECTO-NOM-085-SEMARNAT-2008, available at www.bdlaw.com/assets/attachments/Mexico%20-%20PROYECTO-NOM-085-SEMARNAT-2008.pdf
- PROYECTO-NOM-156-SEMARNAT-2008, available at www.bdlaw.com/assets/attachments/Mexico%20-%20PROYECTO-NOM-156-SEMARNAT-2008.pdf
- NOM-085-SEMARNAT-1994, available at www.bdlaw.com/assets/attachments/Mexico%20-%20NOM-085-SEMARNAT-1994.pdf

Four-Year National Waste Management Program for Mexico Published

Mexico has published its long-awaited 2009-2012 National Program for Prevention and Integral Management of Wastes (the "Waste Program"). The lengthy plan sets forth an ambitious template of action items intended to implement a suite of waste management policies that include: shared producer responsibility, polluter pays, waste prevention and minimization, recycling and valorization, and the precautionary principle.

While the Plan itself is not binding, it provides important insight into the priorities that

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SEMARNAT has set for itself to improve Mexico's waste management programs in the near term. Perhaps most noteworthy is SEMARNAT's regulatory agenda in the four priority waste areas: hazardous wastes, special management wastes, urban solid wastes and mining-metallurgic wastes (including petroleum wastes). Among other proposals, SEMARNAT plans modifications to the hazardous waste classification standards (including hazardous waste lists); a new hazardous waste treatment standard; new norms identifying special management wastes and urban solid wastes that require management plans; amendments to solid waste landfill standards; and several standards related to management of wastes from the mining and petroleum sectors.

While it is unlikely that SEMARNAT will accomplish the entirety of its regulatory agenda, some of these standards are well under way. In particular, draft NOMS listing special management wastes and urban solid wastes that require a management plan are fairly advanced and when made final, will impose new requirements on generators, producers, manufacturers and importers of listed wastes and end-of-life products.

Reference Sources (In Spanish):

- National Program for the Prevention and Integral Management of Wastes (2009-2012), pages 1-57 available at www.bdlaw.com/assets/attachments/Mexico%20-%20Natl%20Program%20Prevention%20Integral%20Management%20of%20Wastes%20p1-%2057.pdf, pages 58-103 available at www.bdlaw.com/assets/attachments/Mexico%20-%20Natl%20Program%20Prevention%20Integral%20Management%20of%20Wastes%20p58-%20103.pdf

PERU HIGHLIGHTS

Ministry of Environment Approves Regulation Establishing National System for Environmental Impact Assessments

Peru's Ministry of Environment has approved regulations that will implement the country's National System for Environmental Impact Assessment (the "Regulation"), as established under Law 27446 (April 20, 2001). (See Supreme Decree No. 019-2009-MINAM.) Under the Regulation, the Ministry of Environment is charged with overseeing a decentralized process for evaluation of environmental impacts that will be implemented at regional and local levels through appropriate "Competent Authorities." (Arts. 7 and 8) The recently formed Environmental Oversight and Evaluation Agency will be responsible for enforcing compliance with obligations set out in approved environmental impact assessments ("EIAs"). (Art. 10)

The Regulation applies to all new public, private or mixed capital investment projects, as well as any modifications to preexisting projects, that may generate "significant" negative environmental impacts. (Art. 18) Projects that fall under the Regulation must first submit a Preliminary Evaluation form that includes, among other things, a request for project classification. (Art. 41, Annex VI) The Competent Authority will review these forms and determine whether a project should be classified as Category I, II or III, depending on the nature and extent of possible impacts. (Art. 36) The Regulation includes a list of projects that would normally require submission of a Preliminary Evaluation form. (Annex II) In addition, the Regulation provides a set of criteria that may also be used by proponents and Competent Authorities to classify projects. (Annex V)

Category I projects, which would have the least impact, would be required to submit a Declaration of Environmental Impact ("Declaration"). (Art. 11) A completed Preliminary Evaluation form will meet the requirements for a Declaration. (Art. 41) Category II projects would require a "Semi-Detailed EIA" that meets the requirements in Annex III, and Category III projects would require a "Detailed EIA" that conforms with the requirements in Annex IV. (Art. 11) EIAs for Class I projects should include a Citizen Participation Plan, mitigation

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methods, a Monitoring and Control Plan, a Contingency Plan and a Closure Plan. Class II and III projects should include a Citizen Participation Plan, an Environmental Management Plan, an Environmental Surveillance Plan, a Contingencies Plan, a Community Relations Plan and a Closure Plan. (Art. 28)

The Regulation assigns time limits for each level of the evaluation process. (Annex VII) Projects that have approved Declarations or EIAs receive an "Environmental Certification," which must be obtained prior to seeking licenses, permits or other authorizations for a particular project. (Arts. 16 and 22) The Certificate will also establish the specific obligations to prevent or mitigate potential environmental impacts. (Annex I)

All information provided through the EIA process is publicly available, and the Regulation has in place significant provisions for citizen involvement and transparency through the EIA process. (Title IV) The Regulation also incorporates a procedure, which is called a Strategic Environmental Evaluation, for reviewing government policies, plans and programs to look for potential negative environmental impacts. (Art. 61) Also notable is a provision that calls for the Ministry of Environment to develop special criteria for evaluation of projects in areas identified as part of the national heritage. (Art. 25)

Reference Sources (in Spanish):

- Supreme Decree 019-2009-MINAM (including the Regulation), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation.pdf
- Annex I (Definitions), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20I%20-%20Definitions.pdf
- Annex II (List of Projects), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20II.pdf
- Annex III (Terms of Reference for Semi-Detailed EIAs), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20III.pdf
- Annex IV (Terms of Reference for Detailed EIAs), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20IV.pdf
- Annex V (Criteria for Environmental Protection), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20V.pdf
- Annex VI (Minimum Contents for Preliminary Evaluation), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20VI.pdf
- Annex VII (Flow Diagram for EIA Process), available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20019-2009-MINAM%20EIA%20Regulation%20Annex%20VII.pdf

Peru's Congress Passes Recycling Law

Peru's "Law that Regulates the Activity of the Recyclers" (Law 02819/08) is the first law in Latin America to address directly the recycling industry. The Law covers all solid waste and is intended to implement certain provisions in Peru's General Solid Waste Law and General Environmental Law. (Art. 1) It calls upon local governments to establish registries for recycling associations that operate within their respective jurisdictions. The registry will support corresponding authorization and certification of recycling operations. (Art. 5)

Municipalities are called upon to implement incentive programs for waste segregation, with certain wastes directed to registered recyclers. (Art. 7) The Ministry of Environment will

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oversee a capacity building program for local governments, educational institutions and local recycling groups. (Art. 8) The Law calls for the creation of a new form of insurance for recyclers, which is intended to cover worker health and safety. (Art. 9) It also creates a National Environmental Fund to facilitate access to credit for recyclers, establishes a National Prize for Recycling, and sets June 1 as "National Day of the Recycler." (Art. 11 and Complementary and Final Dispositions)

Reference Sources (in Spanish):

- Law that Regulates the Activity of the Recyclers, available at www.bdlaw.com/assets/attachments/Peru%20Law%20for%20Recyclers.pdf

Peru's Ministry of Environment Issues Draft Water Quality Standards

The Ministry of Environment recently issued for comment a draft Supreme Decree that implements Peru's national water quality standards, as set out in Supreme Decree 002-2008-MINAM (June 31, 2008). The draft Decree, entitled "Dispositions for the Implementation of the National Standards for Environmental Quality for Water," provides in the main text specific details on categorization of designated uses for water and outlines procedural mechanisms for classifying and monitoring water quality standards. In addition, the draft Decree specifies the testing methodologies to be used for each of the water quality standards identified in the existing Supreme Decree 002-2008-MINAM, as divided among the various categories. (Annex I)

The draft Decree defines four basic designated uses for water, which include (i) recreational and for human use; (ii) coastal marine activities; (iii) agricultural irrigation and animal drinking sources; and (iv) conservation of the aquatic environment. Each category is further divided into subcategories, and each of these subcategories must be defined by the appropriate Competent Authority and registered with the Ministry of Environment. (Art. 2) In the case where two or more categories may apply, the draft Decree would require application of the most stringent applicable standard. (Art. 4)

The draft Decree calls on Competent Authorities to develop monitoring protocols that meet criteria established in the Decree. (Art. 7) It also identifies a number of environmental management instruments (e.g., environmental management plans), each of which must take into account water quality standards. In cases where a water body fails to meet the standards, the Competent Authority can only authorize new projects in that area if it can be demonstrated that such projects will not release effluents containing any of the pollutants that are causing the water body to exceed its limits. (Art. 9) The draft Decree allows for variable approaches for what it calls "intangible zones," or areas that may require special controls to preserve or recuperate water quality, including for example, fragile environmental areas (e.g., headwaters) and bodies of water in national protected areas. (Art. 5) There are also provisions that take into account receiving bodies of water for effluents, and certain limited exceptions to the full application of water quality standards (e.g., geologic characteristics, extreme natural phenomena). (Arts. 6 and 8)

Competent Authorities are responsible for remitting annually to the Ministry of Environment all information related to water quality, which is to be integrated into the National System for Environmental Information. (Art. 10) The Ministry of Environment is granted the authority to revise any of the water quality standards based on monitoring efforts and new information, and must review standards at least every five years. (Art. 12)

Reference Sources (in Spanish):

- Dispositions for the Implementation of National Standards for Environmental Quality

BEVERIDGE & DIAMOND PC

of Water, available at www.bdlaw.com/assets/attachments/Peru%20draft%20Water%20Quality%20Standards.pdf
- Annex I, Category 1, available at www.bdlaw.com/assets/attachments/Peru%20Water%20Quality%20Standards%20Annex%20I.pdf
- Annex I, Category 2, available at www.bdlaw.com/assets/attachments/Peru%20Water%20Quality%20Standards%20Annex%20I%20Category%202.pdf
- Annex I, Category 3, available at www.bdlaw.com/assets/attachments/Peru%20Water%20Quality%20Standards%20Annex%20I%20Category%203.pdf
- Annex I, Category 4, available at www.bdlaw.com/assets/attachments/Peru%20Water%20Quality%20Standards%20Annex%20I%20Category%204.pdf
- Supreme Decree 002-2008-MINAM, available at www.bdlaw.com/assets/attachments/Peru%20Supreme%20Decree%20002-2008-MINAM.pdf

Congress Suspends Peruvian Forestry and Agricultural Regulations in the Wake of Protests by Indigenous Groups

On June 10, 2009, Congress passed a law (No. 29376) suspending two controversial national laws and their implementing regulations, both of which indigenous groups had claimed were unconstitutional and in violation of internationally-accepted indigenous rights. Specifically, the Law suspends the application of Legislative Decree 1090, which established the national Forestry and Wildlife Law, and Legislative Decree 1064, which set out the Juridical Regimen for the Agricultural Use of Land. (Art. 1) The Law also reinstitutes the following laws and their associated regulations:

- Law 27308, the prior Wildlife and Forestry Law;
- Law 26505, the Law for the Private Investment in the Development of Economic Activities in the National Territory and of the Native and Rural Communities; and
- Certain sections of Legislative Decree 653, the Law for Promotion of Investment in the Agricultural Sector. (Arts. 2 and 3)

The passage of this law follows on the heels of significant indigenous protests, which culminated in a violent confrontation with government police officers that led to more than 30 deaths. The root cause for the protests centered on a critique of the now suspended Forestry and Wildlife Law, which indigenous leaders claimed provided President Alan Garcia's government with unfettered ability to pursue oil and gas contracts in indigenous lands, particularly in the Amazon region of the country. The government, however, has noted that these decrees are critical for implementation of the Free Trade Agreement with the United States and, in fact, provide a number of measures that are improvements over the previous law.

A congressional committee determined in May that Decree 1090 was unconstitutional, and in early June also determined that several provisions in Decree 1064 were unconstitutional. These findings, combined with continued mass anti-government protests, ultimately led to the passage of the law in spite of clear disapproval from the Garcia government. Since the passage of the Law, tensions have eased, but it remains unclear how Peru's national government will proceed, specifically with regard to future concessions.

Reference Sources (in Spanish):
- Law 29376, available at www.bdlaw.com/assets/attachments/Peru%20Law%2029376.pdf

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