HOW BEST TO PROTECT?

The Government issued its response to the Penfold Review of non-planning consents in November 2010, indicating that it would simplify and streamline non-planning consents required for development, in an effort to reduce the burden on businesses resulting from the complexity of the interplay between planning and non-planning consents.

One of the key non-planning consents identified for streamlining was protected species licensing under regulation 44 of the Conservation (Natural Habitats etc) Regulations 1994. The 1994 Regulations set out various offences in connection with deliberately or recklessly disturbing or harassing various protected species and habitats.

Regulation 44 provides for a licence to be granted effectively allowing a developer to disturb such species and habitats where:

- this is for reasons of overriding public interest;
- there is no satisfactory alternative; and
- the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

At the point of making an application under regulation 44, a developer must already have planning consent for the proposed development. The Review recommended that the Government assess whether some of the duplication between the planning authority and Natural England in this context be removed, and suggested that there should be a clearer demarcation of responsibilities. It suggested that the planning authority should determine both whether there are reasons of overriding public interest justifying the development, notwithstanding the impact it has on protected species and habitats, and whether there is a satisfactory alternative, while Natural England should confine itself to determining the "favourable conservation test".

The Government response indicates that the recommendation has been taken on board, and will be explored further, with full conclusions expected by July 2011.

The review and Government response also highlighted a variety of other issues relevant in the context of renewables projects, including:

- **renewable energy infrastructure** – the response indicated that Defra, the Department of Energy and Climate Change (DECC) and the Environment Agency (EA) would continue to work to streamline the consenting process for renewable energy infrastructure. The Department for Communities and Local Government (DCLG) will also continue to work on a unified consenting regime for major infrastructure schemes.
- **interplay with planning** – Defra and DCLG are looking at a protocol and guidance on the interface between environmental permitting and planning consent to reduce duplication, increase co-ordination between consenting bodies and generally make for a smoother process.
- **protected species licensing** – Natural England is looking at the potential to use class licensing and registration schemes for low impact activities, and intends to pilot the proposed scheme in respect of low risk survey activities before Spring 2011. Natural England has also begun sharing ecological assessments with developers prior to issuing formal decisions, in order to minimise delays caused by the need to resubmit licence applications. It is also exploring the potential for reducing the information requirements for licence applications concerning a low impact on

protected species. The Government intends to generally increase good practice in development management, including in particular the provision of pre-application advice for developers.

- **water abstraction and impoundment** – Defra intends to bring water abstraction and impoundment within the comprehensive Environmental Permitting Regime, and will also examine whether other consent regimes may be brought within that framework.

The Government has undertaken to provide an update as to progress in implementing the Penfold Review's recommendations in Spring 2011.

Meanwhile, Defra has written to the European Commission effectively seeking clarification as to how to comply with EU environmental legislation, and in particular the Habitats Directive, in the context of large scale renewables projects. The letter refers to DECC's studies into the Severn Barrage, which concluded that around half of the intertidal habitat in the Severn estuary could be lost were a scheme of such a scale to go ahead.

Under the Habitats Directive a developer of such a scheme would be required to put in place compensatory measures, and existing guidance suggests that this could only be like for like habitat replacement in an area close to the Severn estuary. Defra is interested in exploring the possibility for alternative compensatory measures, not involving like for like replacement of habitats, which does not appear to be permitted under existing guidance. It has therefore asked the Commission to give a view on how to achieve such large scale renewables projects, while meeting relevant requirements under EU environmental legislation.

While the Severn Barrage is at the large end of the scale in terms of renewables projects, the potential for alternative compensatory measures to be allowed under the Habitats Directive is of clear interest to all developers.

ELECTRICITY MARKET REFORM: THE CONSULTATION

On 16 December 2010, the Government opened a consultation on its proposals to reform the electricity market. The aim of the proposals is to strike a balance between the best possible deal for consumers, at the same time as giving existing players and new entrants in the energy sector the stability they require for investment. More specifically, the Government hopes that the changes will attract investment in the low-carbon technologies required to help the UK meet its carbon targets.

The Government feels that the changes to the market are required for a number of reasons:

- to assist the UK to meet it's greenhouse gas emission reduction targets under the Climate Change Act 2008 and the Kyoto Protocol;
- to meet increased electricity demand triggered by the market's decarbonisation;
- to move away from the electricity market's bias towards fossil fuels and to encourage low-carbon technologies;
- to help meet the UK's 2020 renewable energy targets; and
- to attract investment in, and access to the market for, a wider range of technologies, including low-carbon technologies, and technology needed to reduce or manage electricity demand.

The proposals set out in the consultation are fourfold and stem directly from the Government's coalition agreement:

1. **Carbon price support**: the Government has proposed that a mechanism to support a carbon price floor is introduced from 2013, since it does not believe that the EU Emissions Trading Scheme provides a sufficiently stable price. Currently fossil-fuel generation plants are able to benefit from an exemption from the existing climate

change levy and fuel duty. However, following the changes, it is proposed that these charges be levied on all fossil fuels used to generate electricity in the UK, with proposals to tax fuels at a rate which takes account of their average carbon content. Partial relief is proposed for fossil fuels burnt in CCS enabled power stations. The Government hopes that the changes proposed will make investment in low-carbon generation a far more attractive pursuit and it will clarify for those running fossil fuel-fired power plants, the costs of doing so in the future. Consequently, HM Revenue & Customs are currently undertaking a separate consultation on the climate change levy, so the full extent of these changes will not be known until the outcome of both consultations has been revealed.

2. **Feed-in tariffs**: the Government has indicated that long-term contracts would provide more certainty for the revenues of low-carbon generation and make clean energy investment more attractive. A "contract for difference" model for low-carbon generation is proposed, the objective of which is to control costs for consumers, provide stable returns for investors, and maintain the market incentives to generate when electricity demand is high. It would be a long term contract at a fixed level where variable payments are made to ensure the generator receives the agreed tariff.

3. **Capacity payments**: the Government proposes to introduce a system of targeted payments to encourage security of energy supply through the construction of flexible reserve plants or demand reduction measures (so-called "negawatts"). The Government hopes that capacity payments will ensure there remains an adequate safety cushion of electricity capacity available as the amount of intermittent and inflexible low-carbon generation increases. It is also hoped that the prospect of this will promote modernisation and innovation in the storage device sector as both capacity and generation would be awarded.

4. **An emissions performance standard**: the Government understands that coal-fired power stations will have a role in providing electricity in the future – but they want such generators to do so in as an emissions-friendly way as possible. The Government thus are seeking to introduce an Emissions Performance Standard which is a regulatory limit on how much carbon such power stations emit. The real aim being that no new coal-fired power stations will be built without incorporating carbon capture and storage technologies.

The consultation will run until 10 March 2011, following which the Government will publish a white paper setting out the Government's formal response to the consultation, as well as their legislative and administrative proposals to introduce the reforms.

HIGH COURT JUDGEMENT NOT SO SWEET FOR TATE & LYLE

A recent High Court decision has dealt with the allocation of bands to particular technologies in the Renewables Obligation Order 2009 (ROO 2009), and a subsequent decision under an "Early Review" of the band for "co-firing regular biomass with CHP" (CoCHP).

Tate & Lyle sought judicial review of both the ROO 2009 and a decision following the Early Review to maintain a band of 1 ROC / MWh for CoCHP.

Initial proceedings

Initial proceedings were brought after the Government allocated 1 ROC / MWh for CoCHP under the ROO 2009. Tate & Lyle disputed the Department for Business, Enterprise & Regulatory Reform's (BERR) approach in setting the band for CoCHP. In determining the bands, BERR had commissioned a report by Ernst & Young, which set "levelised costs" for various technologies (effectively the amount of electricity revenue required throughout the life of the technology to make it commercially viable). However, Ernst & Young had not specifically considered CoCHP in its report. There was therefore no clear cost analysis of the technology, and it would have been allocated 1 ROC / MWh based on the proposals in the consultation.

The Government did not have time to commission a new independent report on the costs of CoCHP, and so carried out its own analysis of the costs. In doing so, it erroneously applied the percentage saving in capital costs to the total levelised costs. In 2008, the Government indicated that it intended to allocate 1 ROC / MWh for CoCHP, based on its (erroneous) cost analysis.

Tate & Lyle responded, enclosing a further report by Ernst & Young, which sought to provide a clear cost analysis, and proposed an allocation of 1.5 ROCs / MWh for CoCHP. However, the Government nonetheless concluded that this technology should receive only 1 ROC / MWh, and therefore provided for this in the Renewables Obligation Order 2009.

In the course of preparing its defence, the Government discovered that the figures on which it had relied in calculating the appropriate band were erroneous. Having uncovered this error, the Secretary of State decided to hold an Early Review under the ROO 2009 for CoCHP. Court proceedings were stayed pending the outcome of this Review.

Early review

In the context of the Early Review, BERR used updated electricity price data, published in July 2009, in the analysis.

Due to a substantial increase in the wholesale electricity price, beyond that predicted in setting the original bands, the financial analysis indicated that CoCHP merited only 0.6 - 0.7 ROCs / MWh. The Government noted that this was not the only relevant factor, and ultimately assessed the technology as meriting 1 ROC / MWh. The level of support proposed resulted solely from the increased wholesale electricity price, which had been used in the calculation of the band for CoCHP, but not in the calculation of the relevant band for any other technology covered by the scheme.

Tate & Lyle argued that it could deduce a consistent approach in setting the bands, with the Government matching the mid-range of costs, except for the most expensive technologies, which would need more than 2 ROCs / MWh. It therefore argued that it was unfair and discriminatory to apply a different methodology to the technology used by Tate & Lyle, by using the updated and increased wholesale electricity prices without also applying that increase to every other technology under the scheme. It argued that the Early Review should have been confined to correcting the error in BERR's own figures.

The Secretary of State argued that he had not sought to match the bands to the mid-point of costs, and had in fact taken into account each of the various factors that he was required to, as set out in s.32D Electricity Act 1989. He also argued that it would have been wrong not to take into account updated wholesale electricity prices.

The Court held that to ignore the updated electricity price figures for the purposes of maintaining consistency between CoCHP and other technologies covered by the scheme would have amounted to an over-subsidy, and over-compensation contrary to the prohibition on competitive distortion attributable to State Aid. It therefore considered that the Government was justified in using these figures in the analysis under the Early Review, and in maintaining, as a result, the banding allocation of 1 ROC / MWh for CoCHP.

It is hard to draw general lessons from such a complex and fact-specific case. The Court did not go so far as to analyse whether a failure to apply the updated electricity price figures to the CoCHP category would in fact have resulted in the Government falling foul of State Aid rules, nor did it provide any real analysis as to whether all of the technologies should have been reviewed on the basis of the updated electricity prices, in order to both maintain consistency and avoid over-subsidy in respect of those technologies.

As the judgement stands, it suggests that there is likely always to be a discrepancy between the figures used in an Early Review of a particular technology, and the figures used in setting bands for the remainder of the technologies covered. It remains to be seen whether Tate & Lyle opt to appeal the decision. However, in light of the Government's proposals for electricity market reform, and likely demise of the RO, the question may effectively be moot.

INVESTING IN RENEWABLES: A BALANCING ACT

ARTICLE

At a time when the UK's budget deficit is precluding real treasury backing of renewables projects, the Government has unveiled a number of measures to try to force the hand of private investment. These measures, along with a myriad of consultations and responses issued in December 2010, rendered it a month of policy revolution for the renewables industry.

Renewables Obligation

It all kicked off on 8 December 2010 with the Department of Energy and Climate Change (DECC) announcing changes to the timetable for reviewing banding under the Renewables Obligation (RO) following industry feedback that:

1. the RO was not working for larger projects due to uncertainty that the projects could be commissioned in time to benefit from the current banding levels; and

2. the scheduled 2013 RO Banding Review by DECC was so far in advance that it further promoted uncertainty for investors.

DECC therefore announced that it would bring forward its 2013 RO Banding Review to Autumn 2011. However, despite the intention to confirm the new bands one full year ahead of schedule, the bands will still come into effect as planned on 1 April 2013 (1 April 2014 for offshore wind).

Now that the date has been brought forward, this should avoid delays in investment in early stage technologies that are crucial for the evolution of the industry. The accelerated timetable means that investors will know sooner how much support they will receive under the RO and consequently ought to provide investors and developers with certainty and confidence to invest.

Government response to Renewables Obligation Order Consultations

Shortly after DECC announced the changes to the Banding Review timescale, both DECC and the Scottish Government (SG) published their responses to the Renewables Obligation Order Consultations for England and Wales, and for Scotland]. The responses take into account industry opinion and set out a "to do" list of policy changes which can be summarised as follows:

- **wave and tidal bands** – (relevant for Scotland only) industry suggested that the tidal band should increase to the same as wave i.e. from 3 ROCs to 5 ROCs. The SG has not committed to such an increase but does acknowledge the need to assess this further;

- **biomass support and grandfathering** – the SG announced that biomass generating stations, as well as stations using energy from waste and anaerobic digestion, will be grandfathered in Scotland at the rate applicable at the point of accreditation. They also noted that they will be undertaking a review of the current blend of incentives for biomass for heat and power in 2011;

- **phased support for offshore wind** – the SG had suggested that there be annual accreditation for registering phases for offshore wind developments, however, this was rejected. As such, the SG will bring in phased support for these. Offshore wind generators will be able to register up to 5 phases of turbines at any time over a maximum period of 5 years. A minimum of 20% of the entire capacity of the station would be required to be registered in the first phase. This is in line with DECC's proposals for England and Wales;

- **sustainability criteria for solid and gaseous biomass** – mandatory sustainability criteria will be introduced from April 2011 and all generators above 50 KWe will require to report against those criteria from that date. Further targets and binding criteria for the sustainability of these types of generators will be introduced at a later date. Waste, biomass wholly derived from waste, landfill gas and sewage gas will not have to meet such sustainability criteria, and will not require to report on sustainability; and

- **sustainability reporting for bioliquids** – the changes implemented will be as consulted upon, however, the eligibility for receipt of ROCs for electricity generated from bioliquids will be dependant upon generators demonstrating that the sustainability criteria has been met from 1 April 2011 (as required by the Renewable Energy Directive). Biodiesel partially derived from fossil fuel will also be included in the Renewables Obligation, with ROCs awarded for the biomass proportion of its energy content.

Green Investment Bank

The changes outlined above are all seen as ways of bridging the funding gap in a manner designed to entice private sector investment into renewables projects and to provide certainty for the industry. However, is this private investment necessary given the introduction of the Green Investment Bank (GIB)? It seems so.

In an interview with the Guardian in mid-December, Secretary of State for Energy and Climate Change, Chris Huhne, announced that the GIB will no longer be set up as previously indicated – amongst other things, it will no longer have the ability to issue green bonds, which is a loss of a solid lending facility.

Albeit controversial and somewhat disheartening, the change in focus of the GIB to a fund has led some to question the commitment of the Government's backing of the renewables industry. As a fund, the GIB will be more akin to a grant body and will only have the ability to distribute loans up to the extent of the amount pledged by the Government. If, however, the GIB were fully implemented as a bank, its scope would be greater, meaning that it is likely it would be able to leverage funds from its original capitalisation thereby increasing the amount being available for investment in the renewables sector as a whole. This coupled with the fact that the amount pledged by the Government for the GIB has slowly diminished from £6 billion to £1 billion means that the sector will remain reliant on the private sector for funding.

It seems unsurprising therefore that there has been a policy shake-up in December to try to attract such investment and to dispel focus away from this Government back-track.

Electricity Market Reform Consultation

The day after the announcements regarding the changes to the GIB, Chris Huhne unveiled one of the most radical reforms to the UK's electricity market for decades: the consultation on Electricity Market Reform (EMR). The proposed changes aim to increase the pace at which the industry can secure investment, ultimately assisting the UK in meeting its carbon targets through four interlocking policy instruments, being:

- introducing a floor price for carbon;
- introducing a full system for feed-in tariffs (and doing away with the Renewables Obligation);
- delivering capacity payments; and
- introducing an emissions performance standard.

So there you have it, a month of policy shake-ups, Government backtracks and future aspirations rendered December an exciting month for renewables. It's evident that the Government wants to be seen to be progressing and investing in the sector through its policy changes, however, it's difficult to really take this seriously in light of the reducing level of the Government's financial commitment to the GIB.

Has the giving of policy assurances offset the reduced investment in the GIB and will it provide a catalyst to boost private investment in the sector? It could well be and, if so, the Government will have got their balancing act spot on. It may be, however, that the Government will have to rethink its approach to the GIB to lead by example. Time will tell.

THE LOCALISM BILL: POWER TO THE PEOPLE OR A NIMBYISM CHARTER?

The Localism Bill, which marks a reform of the planning system in England, had its first reading in the House of Commons on 13 December 2010. The Bill is set to shake up the local planning process, giving people and communities a greater say in planning and other local matters.

Although the full nature and extent of some of the provisions in the Bill will not be understood until secondary legislation has been published, the following key areas are of particular importance for the renewables and energy sector, if the Bill is enacted in its current form:

Neighbourhood planning

Provision is made for Neighbourhood Development Orders (NDO) and Neighbourhood Development Plans. A qualifying body such as a neighbourhood forum (minimum of three residents) would be entitled to seek the making of an NDO, which will grant planning permission in a particular area. Community Right to Build Orders would be a particular type of NDO made at the instigation of a "community organisation". Following an NDO's submission for consideration by an independent examination, a local authority must make an Order if more than half of those voting in a public referendum have voted in favour of the Order. There is similar provision for Neighbourhood Development Plans.

There is undoubted potential here for innovation but questions remain as to how neighbourhoods will be defined, what process and funding will be used to adopt plans and their ratification. The Bill also wrongly assumes commonality in purpose within communities. There is a danger that those more articulate and better educated interests within communities – for example, incomers to rural communities who perhaps want the area to stay the same as it is – will carry more weight in planning decisions. Developers are likely to be nervous about organised objectors abusing the process to frustrate development proposals.

Community Right to Buy

There is no definition yet of what types of assets might be considered to fall within a "Community Right to Buy" category but it is conceivable that "community groups" could organise themselves to withhold assets or land with development potential in a "not in my back yard" (NIMBY) like manner. Again, this would be worrying for developers.

Local referendums

A referendum on local issues is proposed. This would be called by at least 5% of the local electorate and the Council must consider what actions are to be taken in response. Decisions would obviously need to be made on the basis of qualified professional advice but well resourced communities might start to hold referendums on 'issues' such as their attitude to wind farm or energy from waste projects. Although the results of such referendums are non-binding, they might be considered in the context of policy formulation and will certainly be looked at by elected members. This may inevitably become a tool for those against a development, and could force developers into expensive local campaigns.

Pre-application consultation

The renewables industry already has an excellent track record in engaging with communities at the pre-planning stage. Akin to the system already operating in Scotland, the Bill proposes a new legal requirement for applicants to consult local communities before submitting planning applications for certain developments (to be specified at a later date). There would also be an express duty for an applicant to take into account consultation responses before submitting their planning application. This process could elongate the timeframe for delivery of development and applicants who fail to consult properly or take views into account would face the prospect of having their consent legally challenged.

Nationally Significant Infrastructure Projects

As expected, the Infrastructure Planning Commission would be abolished with the fast-track development consent process for major energy projects remaining and a major infrastructure planning unit established within the Planning Inspectorate. The main change would be that the final decision on whether or not to grant development consent will be taken by the Secretary of State, who would initially use a panel or single appointed person for considering such applications.

Community Infrastructure Levy

The intention of the Bill is that some of the money generated by the new Community Infrastructure Levy (CIL) will go directly to neighbourhoods – there may be scope here for money to be ploughed back into local renewable energy generation schemes.

Conclusion

The Bill contains a few helpful pointers on the way to a new localism focused development system but it is not the fundamental re-write of the planning legislation that was expected. For example, there is no statement of any kind to be found underpinning the much-heralded "presumption in favour of sustainable development". Also absent is the requirement for local plans to be in conformity with national policy.

Much will depend on its parliamentary scrutiny and the further details contained in secondary legislation. The Bill has not been published in draft form for consultation so the only opportunity to influence its terms is during the committee stages and by lobbying MPs – as the proposals could have a profound impact on developing renewable and energy projects, project economics, and overall renewable targets, those engaged in development ought to seriously consider doing so.

SKYCON: TOUGH FINANCIAL TIMES CONTINUE

The closure of Skycon's wind turbine manufacturing plant in Campbeltown on 6 January 2011 is not a positive start to the year for the UK renewable energy sector, despite the recent announcement that a deal had been struck with Siemens to keep the plant open whilst its future is determined. Only nine months ago, Skycon's future looked much brighter having secured a £9.7 million Government grant to take control of the factory from Vestas (which had been planning on closing the plant). However, following the news that Skycon's Danish parent company hit financial troubles three months ago, it seemed only a matter of time before the cascading effect of insolvency hit our shores.

Indeed, the prospect of insolvency is a real worry that many businesses are facing in the current climate, whether caused through difficult trading conditions or difficulties in securing sufficient long-term investment/working capital.

If your company does encounter financial difficulties then there are a number of factors you should be aware of and consider. The following provides a brief guide to two of the key factors that should be at the forefront of your mind in those circumstances.

Directors' duties

The general rule is that directors owe their duties to the company i.e. its current and future shareholders. However, in circumstances where the company is, or there is a real risk of it being, unable to pay its debts as they fall due, those duties shift such that they are owed to the company's creditors and you must ensure that you act in their best interests. The timing of when this shift in duties occurs may not be clear.

Directors' duties are as set out in sections 170 – 177 of the Companies Act 2006 and, in short, cover duties to:

- act within powers;
- exercise independent judgment;
- exercise reasonable care, skill and diligence;
- promote the success of the company;
- avoid conflicts of interest;
- not accept benefits from third parties; and
- declare interests in proposed transactions or arrangements.

On insolvency, if the insolvency practitioner suspects that you have breached your duties, he may submit a report to the DTI which could ultimately result in a disqualification order being granted against you. Those subject to a disqualification order are not able to act as a director of a company for a set period of time thus showing the importance of obeying your duties.

Wrongful trading

Wrongful trading is a statutory offence under section 214 of the Insolvency Act 1986 and occurs when a company continues to trade when its directors know, or ought reasonably to have known, that there is no reasonable prospect of it being able to pay its debts as they fall due.

The offence only crystallises if the company has gone into insolvent liquidation and is being wound-up and can only be pursued by the liquidator of the company. A company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding-up.

The consequence of wrongful trading is that the director(s) can be held personally liable to make such contribution to the company's assets as the courts think proper. As a director of the company, you could be ordered to personally make a financial contribution to the company's assets. You could also be subject to a disqualification order.

Section 214 does contain a defence to an allegation of wrongful trading. This is that you took every step with a view to minimising the potential loss to the company's creditors you ought to have taken (assuming you knew that there was no reasonable prospect that the company would avoid going into insolvent liquidation.

While this is a high standard – you must take "*every step*" – a key point to note is that it is not necessary to avoid creditors suffering any loss at all, but rather you are to minimise that loss.

In order to mitigate the risks to you, both under the Insolvency Act and common law, there are a number of practical steps you can take:

- continue to trade only if you are, having considered the company's trading prospects and financial projections, reasonably confident that to do so is to the benefit of creditors i.e. their position will, as a minimum, be no worse than if you ceased trading now;
- ensure that your financial records are as up to date and accurate as possible;
- ensure that the financial position is monitored regularly by all the directors – how regular will depend upon circumstances and could be daily; and
- keep strict control over all expenditure and only incur further creditors where there is a clear benefit to the company and its creditors in doing so.

In reality all of these steps are good business practice and common sense, however in times of stress, their level of priority can sometimes slip. Semple Fraser's Corporate and Corporate Recovery & Insolvency teams would be happy to discuss any of these issues in further detail.

FOR FURTHER INFORMATION PLEASE CONTACT: BILL FOWLER