

ENVIRONMENTAL LAW

Newsletter

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BRAZIL'S NATIONAL PLAN ON CLIMATE CHANGE PRAISED AT UN CLIMATE CHANGE CONFERENCE IN POLAND

The Brazilian Government launched its National Plan on Climate Change on December 1, 2008, during the 14th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 14) in Poznan, Poland. The National Plan, provided for under Federal Decree 6263/2007, is the result of work by the Interministerial Committee on Climate Change and its Executive Group, after public consultation by various ministries.

Bruno Kerlakian Sabbag, an attorney in BM&A's Environmental Law practice group, represented the Interministerial Commission on Global Climate Change in the negotiations at COP 14, and took part in the discussions which gave rise to the National Plan on Climate Change.

The Plan contains a number of specific objectives: (i) to encourage more efficient performance in all sectors of the economy, in order to achieve best practices; (ii) to seek to maintain a high proportion of renewable energy in the national electric power network, preserving Brazil's leading position in the international context; (iii) to encourage a sustainable increase in the use of biofuels in the national transportation network and to work toward structuring an international market in sustainable biofuels; (iv) to seek a constant reduction in the four-year average rates of deforestation in all Brazilian biomes, until a zero rate of illegal deforestation is reached; (v) to eliminate the net loss of forest coverage in Brazil by 2015; (vi) to reinforce intersectoral actions to reduce vulnerabilities among Brazil's populations; and (vii) to seek to identify the environmental impacts resulting from climate change and to support scientific research into strategies to minimize the socio-economic costs associated with the country's adoption of the National Plan.

The Brazilian Government's initiative was highly praised at COP 14, with former Vice President of the United States and winner of the Nobel Peace prize, Al Gore, describing the plan as impressive. The Secretary-General of the United Nations classified Brazil as a country with a sustainable economy, providing an example to be followed by other nations. With the launch of its National Plan, Brazil appears once again to have taken a leading position in international negotiations on climate change. 2009 will be a decisive year, as the 15th Conference on Climate Change will see the developed countries set their targets for reduction in greenhouse emissions "post-2012", when the Kyoto Protocol expires, determining the future of carbon credit market.

NEW AMENDMENTS TO THE REGULATIONS GOVERNING ADMINISTRATIVE OFFENCES AGAINST THE ENVIRONMENT

Decree 6514/2008, which revoked Federal Decree 3170/1999 and established new regulations under the Environmental Crimes Law, was amended in December 2008. The Decree contains a number of provisions that are highly significant for Brazilian Environmental Law, such as the limitation period of five years for prosecuting environmental infractions and the prohibition against any agency within the National Environmental System imposing more than one fine for an environmental offence.

After numerous expressions of discontent with some of Decree 6514's provisions, especially from the agricultural sector, and various meetings between representatives of the Ministry of the Environment and the agrobusiness industry, Decree 6686 of December 10, 2008 was issued to

soften some of the requirements that were considered to be difficult to meet, such as the period for registering legal reserves on property titles. The penalties for failure to register legal reserves was also changed to a warning and a daily fine of R\$50.00 to R\$500.00 per hectare of the unregistered legal reserve, and will come into effect on December 11, 2009.

CONAMA RESOLUTION 403 ESTABLISHES NEW LIMITS FOR VEHICLES EMISSIONS

Resolution 403 issued by the National Environmental Council (*Conselho Nacional do Meio Ambiente* – CONAMA) on November 11, 2008 deals with Phase P-7 of the Vehicle Emissions Control Program (*Programa de Controle de Poluição do Ar por Veículos Automotores* – PROCONVE) and establishes new emissions limits for newly-manufactured heavy vehicles. The limits come into effect on January 1, 2012 and will bring Brazil into line with the standards in effect in Europe.

Resolution 403 was issued at the same time as a Compliance Commitment (*Termo de Ajustamento de Conduta* – TAC) which extended the deadline for compliance with CONAMA Resolution 315 of October 29, 2002. Under CONAMA Resolution 315/2002, new diesel-fueled motor vehicles were required to meet the emissions standards of Euro 4 and diesel S-50 engines (50 parts per million for sulphur) bringing in 2009. According to a note published by the Minister of the Environment on November 3, 2008, the failure to meet the deadline was due to delays in the National Petroleum Agency's (*Agência Nacional do Petróleo* – ANP) regulations on S-50 diesel.

FEDERAL DECREE ISSUES REGULATIONS ON THE ATLANTIC RAINFOREST

Federal Decree 6660 of November 21, 2008, issues regulations under Federal Law 11.428/2006 (the “Atlantic Rainforest Law”) and provides for the use and protection of vegetation native to the Atlantic Rainforest Biome. The Decree defines the territory of its application, which covers the remains of primary native vegetation as well as secondary native vegetation in the initial, medium and advanced stages of regeneration shown on the Area of Application Map for Law 11.428/2006 published by the Brazilian Institute of Geography and Statistics (IBGE). Among other provisions, the Decree governs (i) occasional use of native species of flora, without any direct or indirect commercial purpose; (ii) the ecological enrichment of secondary vegetation in the Atlantic rainforest; (iii) planting and reforestation with native species; and (iv) procedures for suppression of vegetation.

SÃO PAULO STATE DECREE CREATES REGULATIONS ON LEGAL RESERVES

State Decree 53.939 of January 6, 2009 issues regulations under the Forest Code and State Law 12.927/2008 on the maintenance, recuperation, natural regeneration, compensation and composition of legal reserve areas on rural properties in the State of São Paulo. Legal reserves are a mechanism to protect the environment created by the Forest Code, which provides that a certain area of every rural property must be dedicated to sustainable use of natural resources, conservation and rehabilitation of ecological processes, conservation of biodiversity and the protection of native flora and fauna.

The new regulations establish time periods for landowners who are not in compliance with the maintenance and registration requirements for legal reserves. The time periods range from eight to 30 years, and include recuperation rates, depending on whether species native to the region will be used, or exotic trees will also be used as pioneers along with native vegetation.

The regulations are intended to improve the poor rate of compliance with legal reserve requirements in the State of São Paulo: according to the government's own information, the legal reserves on more than 80% of the rural properties are smaller than the 20% required under the Forest Code. Under the Decree, the agency responsible for approving the location of legal reserves is the State National Resources Protection Department (*Departamento Estadual de Proteção dos Recursos Naturais* – DEPRN). DEPRN is also responsible for approving substitution of a legal reserve on one property by an area on another property, which the Forest Code allows as long as the substitute area belongs to the same ecosystem in the same hydrographic microbasin and has the same ecological importance and size.

The new Decree may be useful in light of the dominant position in Brazil's Superior Tribunal of Justice, which holds that “in matters of forest reserves, given that the limitations are imposed by law, the new owner, in acquiring the property, assumes the burden of preserving the reserve and becomes liable to recover it, even if he was not responsible for its degradation.” (Special Appeal no. 504.626-PR and Special Appeal no. 282.781-PR).

RIO DE JANEIRO'S STATE ENVIRONMENTAL COUNCIL APPROVES DIRECTIVES FOR THE DISCONTINUANCE OF ACTIVITIES POTENTIALLY HARMFUL TO THE ENVIRONMENT

On October 7, 2008, the State Environmental Council of Rio de Janeiro (*Conselho Estadual de Meio Ambiente do Rio de Janeiro* – CONEMA) approved Directive DZ-077, which provides for the discontinuance of activities that are potentially harmful to the environment and are licensed under the state's Polluting Activities Licensing system. The purpose of the Directive is to establish procedures, define responsibilities and provide for Discontinuance Certificates (*Termo de Encerramento*) in connection with activities that have the potential to pollute or degrade the environment, in order to avoid the abandonment of buildings, equipment, and dangerous substances and products and so minimize the risks to the environment and public health.

In order to obtain a Discontinuance Certificate, the applicant must present an Environmental Situation Assessment Report, containing information on the environmentally correct disposal of residue, the removal and destination of all facilities, equipment and dangerous substances and products, and compliance with environmental obligations and established soil and water quality standards. If the technical studies show the existence of environmental damage, the Environmental Situation Assessment Report must also contain an environmental remediation plan, including quarterly targets, which must be completed in no more than two years.

SUPERIOR TRIBUNAL OF JUSTICE DENIES STRICT LIABILITY IN ENVIRONMENTAL CRIMES

A decision of Brazil's Superior Tribunal of Justice (*Superior Tribunal de Justiça* – STJ) published on October 6, 2008, granted an order to stay a criminal action brought against the mayor of a city in the state of Minas Gerais, who had been accused of the crime of pollution under article 54 §2 (I) of Law 9605/98. The 5th Panel of the STJ reversed a decision by the Minas Gerais appeal court, which had admitted the criminal charge, and reinforced its position against strict liability in environmental crimes. According to the STJ, the charge must contain elements to support the crime imputed to the accused, including a description of the accused's subjective conduct and the causal nexus between the accused's conduct and the environmental damage. The STJ held that theory of objective or strict liability that exists in the case of civil liability for damage to the environment does not apply in the criminal sphere: "To charge the accused with this offence simply because he was the head of the Municipal Administration, without any evidence as to his participation in implementing the administrative acts relating to the collection and disposal of waste, is to subject him to the hateful theory of objective criminal liability."

SÃO PAULO'S COURT OF APPEAL REJECTS STRICT LIABILITY FOR ADMINISTRATIVE ENVIRONMENTAL INFRACTIONS

In a decision issued April 19, 2007, the Special Environmental Law Chamber of São Paulo's court of appeal, the Tribunal of Justice, held that the imposition of fines for environmental offences is only possible where the accused party has engaged in an illegal act, denying the environmental agency's argument in favor of strict liability for administrative environmental infractions. The court granted a transportation company's request to quash a fine imposed for a spill of a dangerous substance, on the grounds that the spill resulted from a traffic accident caused by a third party, and consequently the carrier had not acted in an illegal manner.

This newsletter is merely informative, presenting only a general overview of the subjects. Thus, it is not a legal opinion.

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