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construction

Carbon Reduction Commitment: how does this affect construction?

The construction industry is awash with initiatives, codes of best practice and legislation which all have the aim of reducing carbon emissions. On 1 April this year the Carbon Reduction Commitment (CRC) came into force.

What is CRC?

This is not, as the name might suggest, some kind of moral aspiration. It is much more mundane - a form of levy on those who use more than a certain amount of energy each year. One significant difference between this and other government initiatives is that it relates to the overall energy use of an organisation such as a developer, rather than relating to individual buildings.

The scheme requires large energy users to offset their carbon emissions by buying carbon allowances from the Government. Although the first allowances will not need to be bought until April 2011, there is still plenty of work to be done by businesses that fall within the scheme. If a business used more than 6,000 MW of electricity in 2008 – which equates to about £500,000 at current prices – it will be affected. The Government estimates that up to 30,000 businesses nationwide will fall within the scheme. It is relevant to most new build and refurbishment as a building could become part of a larger portfolio of properties falling within the scheme, at some point during its life.

Operation of CRC

So, how will the system work? Those organisations that exceed the 6,000 MW threshold must register to join the CRC scheme by the end of September 2010, or face large fines.

Organisations that qualify for the scheme will have to buy carbon allowances to cover their carbon emissions. For the first two years of the scheme, these will be purchased direct from the Government at a fixed price of £12 per tonne. In this first phase, the minimum use of 6,000 MW will translate into carbon allowances costing approximately £40,000 - a significant sum. After this, a market will be set up where the allowances will be openly traded. Low energy users will be able to sell excess allowances to heavy users.

Revenue from the scheme will not be kept by the Government but will be returned to the participants, depending on their position in a league table. Those organisations that have managed to cut their energy consumption will receive a partial refund, whereas those that finish lower down the table will receive nothing. Buildings with a low energy usage, therefore, become more attractive to commercial owners and prospective purchasers.

Changes in the building contract

The CRC scheme provides a significant incentive to produce buildings which minimise the use of energy, so as to reduce the overall amount of carbon allowances which the owner of the building may have to purchase. However, developers, contractors and designers have already been grappling with the requirements to reduce the energy consumption of buildings for some time, in response to Part L of the Building Regulations, the Code for Sustainable Homes etc.

There is also a passing reference in the JCT contracts (revision 2 of 2009) which could be relevant, though it is phrased as a nice-to-have rather than an obligation. The contractor is “encouraged to suggest economically viable amendments to the

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Works which … may result in an improvement in environmental performance in the carrying out of the works or of the completed works." The reference to "environmental performance" could include a reduction in energy use, as well as other environmental issues. If the contractor does make such a suggestion and it is accepted, it will then be instructed as a variation. If the cost of introducing a feature which reduces energy consumption is more than balanced by a reduction in the need for carbon allowances, this could be attractive for the developer.

There is a further requirement in JCT 2005 revision 2 - the contractor must on request provide to the employer information about the environmental impact of materials and goods selected by the contractor. This is a contractual obligation. However, the reference to "environmental impact" could cover, for instance, transportation costs to site rather than energy use during the life of the building.

It is also worth noting that these requirements, in Schedule 8 of SBC 2005, only apply if the contract particulars state that they will do so. Since the requirements of Schedule 8 are worded in such gentle terms, there should be no objection to incorporating it into the contract.

As far as designers are concerned, they should be aware of the CRC scheme and its potential application to a project. It is an added reason for developers to take an interest in the sustainability of the design.■

Gillian Birkby, Partner

Retrospective liability for contaminated land

Developers, contractors and professionals may be surprised to learn that they can be found liable for contaminated land (and be made to pay the costs of remediation) many years after their involvement with it has ended. Alarmingly, it is possible to be liable even if remediation that met the required standards of the time was undertaken.

A case involving Redland Minerals (Redland) and Crest Nicholson Residential (Crest) shows how the contaminated land regime under the Environmental Protection Act 1990 can have far-reaching and very expensive consequences for those with prior connections to contaminated land.

In 1983, Crest purchased a site, from Redland, which between 1955 and 1980 had been used as a chemical works. The works had contaminated the site with bromide (which Redland informed Crest about) and bromate (which Crest was not told about).

Crest intended to redevelop the site as a housing estate, and demolished the existing buildings and hardstanding but did nothing further until 1986. Aware that there were contaminants in the ground, Crest removed the topsoil before constructing the new houses, which were all sold in 1987, after which, Crest's interest in the site ended.

However, in the time between breaking up the hardstanding and removing the topsoil, rain had caused the contaminants to be washed deeper into the ground than would otherwise have been the case. This meant that the excavation of the topsoil did not remove all of the contamination, which eventually polluted several nearby aquifers that were used to supply drinking water for the local population.

When this came to light, the Environment Agency issued a "remediation notice" to Crest and Redland, which required them to meet the costs of remediating the site and the aquifer. Both companies appealed to the Secretary of State, who substantially confirmed the notice. An application to the High Court for judicial review was rejected earlier this year, so the companies now face the prospect of spending tens of millions of pounds to remediate a site that they sold more than 20 years ago.

Both companies will feel aggrieved. Crest resisted liability on the grounds that it had not brought the pollutants onto the site. By breaking up the hardstanding and then leaving the site exposed to the elements, however, Crest was held to have both caused contamination and to have aggravated its effect. This was used to justify making Crest 85 per cent. liable for the costs of cleaning up the bromide and 15 per cent. liable for the bromate (even though Crest had not known about it).

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Redland's defence was based upon the fact that the land had been sold to Crest "with information" about the pollutants on the site (which is one of the few ways that liability under the contaminated land regime may be avoided), but this was considered insufficient.

The outcome of this case is of significance to the construction industry for several reasons. Firstly, although the regime came into force in 2000, it has retrospective effect, so the fact that a company was involved with a site before 2000 does not affect liability. Secondly, the regime is one of "strict liability" – Crest was liable even though it had attempted to remediate the site; what had been done was good practice at the time; and it had no knowledge of the bromate contamination. Another concern will be that even if a site is sold to a buyer who knows how the site was used, and who is informed about what pollutants may be present, the seller still might not escape liability.

Contractors and professionals should be concerned, too. Although the Redland/Crest case focused on two previous landowners, there is no reason why a contractor who might have caused or aggravated contamination, or a consultant who designed a defective remediation scheme would be immune from liability.

Even if the Environment Agency did not pursue this course, employers faced with remediation notices and large bills may seek to recover contributions from their construction team.

There are steps that can be taken to mitigate these risks. The most straightforward approach is for the parties to agree how any liability will be apportioned – it is not uncommon, for example, for contractors and professionals to seek caps on their liability for pollution and contamination. Regulators are generally required to respect such agreements, but they can overrule them if necessary to ensure that remediation costs are met.

Another possibility is for land to be "sold with information" about existing pollution but, following the Redland/Crest case, few sellers will feel comfortable relying on this. Other options include taking out insurance, or using a "special purpose vehicle" to purchase potentially contaminated sites to "compartmentalise" the risks.

Regardless of which approach is taken, all involved in developing a potentially contaminated site should make sure that it is properly surveyed so that they are informed about the risks that may lie beneath.■

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