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## Environmental Governance

**Rio+20.** The first meeting of the Preparatory Committee on the United Nations Conference on Sustainable Development (“UNCS D”, or “Rio+20”) will be held on May 17-19, 2010 at the UN Headquarters in New York. The meeting will focus on substantive themes of Rio+20, which are outlined as follows: (i) review of commitments; (ii) emerging issues; (iii) green economy in the context of poverty eradication and sustainable development; and (iv) institutional framework



for sustainable development. It also will discuss pending procedural matters. As for Rio+20 itself, it will be the largest international conference on environmental issues since the 2002 UN World Summit on Sustainable Development (Johannesburg, South Africa) and will be held in **2012, in Brazil** (city of Rio de Janeiro), pursuant to a UN General Assembly Resolution adopted in December 24, 2009 (A/RES/64/236). ■

## Climate Change

**State of Rio de Janeiro.** On April 15, 2010 State Law No. 5,690 has been published, establishing the State Policy on Climate Change. Among the goals of the Policy are the change of the production and consumption patterns of production towards a low carbon economy, the support of renewable energy use and the identification and promotion of adaptation measures. In order to achieve such goals, certain instruments have been established, such as the monitoring of the removal and reduction of greenhouse gases (GHG) through the **State Emissions Registry**, the

inclusion of the need of assessing adaptation measures in the **State Ecological-Economic Zoning** and the establishment of specific requirements for the environmental licensing of undertakings with significant GHG emissions. Therefore, the issuance or renewal of installation or operation licenses will require the submission of a **GHG emissions inventory** and the adoption of a **GHG emission mitigation plan**. The Law also provides that specific criteria will be adopted in connection with GHG emissions of products and services in the realm of public biddings and ↕

## Environmental Justice

↻ contracting procedures performed by the State. The Law also addresses the possibility of establishing **emission reduction targets**. ■

**State of Bahia.** On April 17, 2010 the Executive Branch submitted to the Legislative Assembly the Bill No. 18,630, which establishes the **State of Bahia Policy on Climate Change**. Among others, the Policy seeks to harmonize economic and social development with the climate system protection and the reduction of GHG emissions growth rate. Therefore, the Policy contemplates specific instruments, such as the elaboration of

a State Emissions Inventory and a Vulnerability Map, the availability of **special financing to promote the development of low GHG emission technologies** and **tax measures** to encourage GHG emission reductions and removal. ■

Resolution No. 102 of the Federal Justice Council has been published on April 20, 2010. Such Resolution has defined the location of 230 Federal Courts that were created pursuant to Federal Law No. 12,011/2009. According to the Resolution, at least one of the courts to be installed in the municipalities of Manaus - AM, Porto Velho - RO, Belém - PA and São Luís - MA should be **specialized in environmental and agrarian matters** and installed in 2010. The Municipalities of Marabá - PA and Santarém - PA will also host those specialized courts as from 2011 and 2012, respectively. ■

## Specially Protected Areas

**National Forests.** Pursuant to Normative Instruction No. 9 of the Chico Mendes Institute for the Conservation of Biodiversity (the *Instituto Chico Mendes de Conservação da Biodiversidade*, or “ICMbio”), as published on April 29, 2010 new procedures have been established for the analysis of requests for the issuance of **authorizations to remove vegetation in National Forests** in the implementation of undertakings having public utility or social interest. The Instruction provides that an authorization may only be issued when it is in accordance with the Management Plan and other regulations applicable to the relevant National Forest. In ad-

dition, it establishes that the applicant must submit an inventory on flora and fauna, a Vegetation Removal Plan and a copy of the respective installation or operation license issued by the competent authority. The issuance of the authorization is also subject to the **payment of an indemnity** based on the forest to be removed, and such indemnity will be calculated based on the above mentioned inventory. Once the above described procedure has been thoroughly fulfilled, the wood originated from the vegetation removal will belong to the relevant entrepreneur. ■

**Family Agriculture.** On its 55<sup>th</sup> Special Meeting (on April 29, 2010), the Brazilian Council for the Environment (the *Conselho Nacional do Meio Ambiente*, or “CONAMA”) approved a resolution recognizing certain **activities undertaken in permanent preservation areas** as having social interest. Such activities include extensive grazing in altitude grassland areas, the cultivation of perennial wooden species and the cultivation in swamp areas. However, one must prove that the relevant activities were consolidated until July 24, 2006 and were developed by a **family farmer or rural family entrepreneur** - those who do not own an ↻

➔ area larger than a specified size, use mostly the own family labor force, have family income originated primarily from the activities of their own property, which is managed by the person itself or his/her family. The resolution in question has not been published, yet. ■

**State of Bahia.** State Decree No. 12,071, published on April 24, 2010 regulates the **State Plan for Rural Property Environmental Adequacy and Adaptation** (State Law No. 11,478/2009), which seeks to promote the recovery and registry of the **legal forestry reserve**, the recovery of **perma-**

**nent preservation areas** and the adequacy of environmental permits and licenses necessary to the development of activities like farming, poultry, suineculture, cattle raising etc. The voluntary adhesion can be performed until December 11, 2012 by land owners or rural possessors, individuals or legal entities. Within 360 days after joining the Plan, the party shall submit a project containing the measures to be implemented and its corresponding schedule to solve pending environmental non-conformities. During such term, the imposition of administrative penalties will be suspended. Previous fines can

be reduced by up to 90% of its original amount. ■

**State of Pará.** State Law No. 7,398 has been published on April 22, 2010. Such Law has approved the Ecological-Economic Zoning (“ZEE”, in Portuguese) of the East and North Zones. Like what happened to the ZEE of the West Zone - as reported in our Bulletin of April/2010 – the Zoning indicated areas for **reducing the legal reserve** to 50% for purposes of recovery. To become effective, the reduction must be recommended by the Brazilian Council for the Environment to the Federal Executive Branch, which in turn can allow the reduction. ■

## Water Resources

**São Francisco Basin.** On April 13, 2010 at its 23<sup>th</sup> Special Meeting, the National Council of Water Resources (the *Conselho Nacional de Recursos Hídricos*, or “CNRH”) approved the **charging for the use of water resources in the São Francisco River Basin**, which will be applicable to water exploitation and disposal of organic effluents in water bodies. In order to become effective, the CNRH needs to approve the delegation of the activities of the Water Agency - responsible for investing the collected proceeds – to the entity chosen by the São Francisco River Basin Committee (“CBHSF”, in Portuguese). The mechanisms and criteria for the charging were defined pursuant

to Committee Resolutions Nos. 40/2008 and 45/2009 and the charging shall start in the second half of 2010. ■

**Shared resources I (Brazil + Paraguay).** Federal Decree No. 7,170, of May 6, 2010 has promulgated the **Cooperation Agreement** between Brazil and Paraguay for Sustainable Development and Integrated Management of **Apa River Watershed**. The River is located in the **Southern part of the Pantanal biome** in the state of Mato Grosso do Sul and in part of the Paraguayan territory. The Agreement in question is consistent with the Plata Basin Treaty of 1969, pursuant to which the two countries pledged to identify

areas of common interest and to carry out studies, programs and works aiming the rational, equitable and multiple use of water. Thus, the Agreement provides for the **integrated management** of transboundary water resources in order to protect watershed areas and surface and groundwater sources, to allow the adequate use and recovery of the soils of the relevant region and to harmonize the regulations of both countries in connection with the region. ■

**Shared resources 2 (Argentina + Uruguay).** On April 20, 2010 the International Court of Justice (The Hague, The Netherlands) reached a verdict on the dispute filed by ➔

## Forestry Resources

Federal Decree No. 7,167, published on May 6, 2010 regulates the **National Fund for Forestry Development** (the *Fundo Nacional de Desenvolvimento Florestal*, or “FNDF”), created by Federal Law No. 11,284/2006, which aims to promote sustainable forestry activities and technological innovation. The resources of the Fund will be used, among others, in technological development in forest management, restoration of degraded areas, monitoring of forestry activities and deforestation, conservation of natural resources etc. The use of resources will be made through the annual plan prepared by the Brazilian Forestry Service and the main source of the Fund will be the amounts paid for forest concessions. ■

➔ Argentina against Uruguay regarding the **installation of pulp mills** on the Uruguay River. Pursuant to the final ruling, Argentina’s claim on the **alleged pollution caused to the Uruguay River** has been rejected. The Court ruled that, pursuant to the treaty entered into between Argentina and Uruguay in 1975 on the use of the shared water course, Uruguay should have involved the Uruguay River Management Commission (*Comissão Administradora del Río Uruguay*, or “CARU”) to inform Argentina about the plans to build two pulp mills on the river before authorizing construction.

However, the Court did not consider it necessary for the mill that was eventually built to be

relocated, due to the **lack of evidence** indicating that the mill was effectively contaminating the river. In addition, it rejected Argentina’s demand for compensations, based on the understanding that the Court’s **reprimand to Uruguay** would constitute an “appropriate satisfaction” already. ■

## Hazardous Products

**State of Pará.** Since May 5, 2010, when State Law No. 7,048 has been published, the State of Pará has a specific regulation for the construction and verification of safety of **dam for storage of industrial toxic waste**. According to the Law, the construction of the dam is conditioned, among others (in addition to environmental licensing requirements), to the presentation of hydrological study with a recurrence period of at least 10 years and spatial scope to include the watershed upstream of the dam and to a spillway that can

drain the flood peak flow. Regarding verifications, the following data must be kept available for inspection: **the daily levels record of groundwater** located beneath the dam and tank, quarterly record demonstrating the absence of contamination of groundwater in the vicinity and under the area occupied by the waste etc. In the case of dams and tanks already in place, one must submit to the environment and water resources official agencies, within

two years, technical studies evidencing its safety. ■

## Environmental Police Power

**State of São Paulo.** The São Paulo State Secretariat of the Environment (“SMA”, in Portuguese) No. 32, of May 11, 2010 established **procedures for imposing penalties for administrative environmental violations**, ranging from a simple warning and embargo of development or activity to the restriction of rights (such as suspension of business and cancellation of environmental licenses). The Resolution also describes the violations against fauna and flora, those committed against conservation areas and those against the proper functioning of the environmental administrative activity (e.g. to create obstacles to inspection, to provide false or missing information etc.). As far as procedures are concerned, the Resolution disposes about the formalities of the notice of violation and the imposition of penalties, the applicable appeals and the functioning of trial commissions. ■

## Solid Waste

**State of Rio Grande do Sul.** Rule No. 16 of the State Environmental Protection Foundation (the *Fundação Estadual de Proteção Ambiental*, or “FEPAM”), published on April 26, 2010 established an **18-month term** for “class I” (hazardous) waste - such as oily sludge and petrochemical process waste, solvents, soil contaminated with fuels and others - to be hindered from been sent to “class I landfills” and to “class I waste reception and disposal centers”.

Thus, **generators of such type of waste** – such as industrial, commercial and service providing establishments – must send such waste to reprocessing, recovery, recycling, biological treatment, incineration or co-processing (clinker stoves) establishments. Class I waste reception and disposal centers will

be allowed to receive such wastes as long as they have temporary storage for subsequent remittance, or have a pre-treatment system for incineration or use in clinker stoves. ■

## Agribusiness

On May 6, 2010 the Federal Government has launched the **Sustainable Palm Oil Production Program** in Brazil. The Program stands out for its measures to promote the expansion of cultivation in an orderly fashion and with less environmental impact, such as the permission for planting only in areas already anthropized by 2007, so there will be no conversion of native forests to plant palm. Under the Program, it is

anticipated that the Federal Government will send to the Brazilian Congress a bill establishing two other restrictions: the prohibition against the removal of native vegetation for the planting of palm and the prohibition against environmental licensing for industries that use palm oil grown in disagreement with the agroecological zoning (Federal Decree No. 7,172, of May 7, 2010), preventing cultivation from becoming a deforestation

vector. In addition, a Sector Board was established under the Council of Agribusiness (Federal Decree of May 7, 2010) in order to create a permanent dialogue between the Government and representatives of the productive chain. ■

## Urban Environment

**Municipality of São Paulo, SP.** Municipal Law No. 15,150 has been published on May 7, 2010. Such Law establishes the procedures for the approval of projects and implementation of mitigation measures concerning impacts on the road system due to the modification or installation of **traffic-generating activities** (“PGT”, in Portuguese). Pursuant to the Law, PGTs include, among others, residential buildings with 500 or more parking lots, non-residential buildings with 280 parking lots or more (when not

included in Traffic Special Areas) and meeting or event facilities with capacity for 500 people or more. The Law provides that the reform or implementation of PGT developments will depend on the issuance of a certificate by the Municipal Transit Secretariat, which will include mitigation measures required to minimize the negative impact caused to the road system from the trips generated by the relevant development. The mitigation measures in question shall be determined by the Traffic Engineering Company (the *Companhia de*

*Engenharia de Tráfego*, or “CET”) based on the presented project as well as additional information submitted by the entrepreneur. When mitigation measures require road improvements, the cost may not represent more than 5% of the total cost of the project. ■

## Global Links



### USA - Offshore Oil Spill Liability.

The April 20, 2010 explosion of the Deepwater Horizon drilling rig in the Gulf of Mexico, off the coast of the State of Louisiana, is causing the United States legislature to reexamine current federal law addressing liability for oil spills. In 1990, largely in response to public concern following the 1989 Exxon Valdez oil spill, the U.S. Congress passed the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701-2761. OPA established a comprehensive prevention, response, liability, and compensation regime similar in a number of respects to the U.S. Superfund law to address oil spills in or threatening U.S. navigable waters, including spills from offshore vessels and facilities. Under OPA, the “responsible party” (“RP”) for a vessel or facility that experiences an oil spill is liable for all “removal costs” and “damages” resulting from the spill, subject to limited defenses to liability and specified limitations on the amount of liability.

**Who is Responsible?** For offshore facilities other than pipelines or certain deepwater ports, the RP is the lessee or permittee of the area where

the facility is located or the holder of a use right under applicable law. For pipelines, the pipeline owner or operator is the RP. For deepwater ports licensed under the Deepwater Port Act of 1974, the licensee is the RP. Any person that owns, operates or demise charters a vessel is the RP for spills from the vessel. The RP is not liable if it can establish that the oil spill and resulting damages were caused **solely** by an act of God, an act of war, or an unrelated third party, but only if the RP follows reporting requirements and provides reasonable cooperation and assistance requested by the government in connection with removal activities. However, if the RP asserts that a third party is responsible, the RP must pay the removal costs and damages and will be entitled by subrogation to the rights of the government and claimant to recover from the third party and the Oil Spill Liability Trust Fund. OPA also makes clear that it is not intended to prohibit or preclude the enforcement by an RP of private party indemnity agreements. However, OPA provides that the existence of such an agreement does not transfer liability under OPA to the indemnifying party. 📍

➔ **What is the RP liable for?** As noted, the RP is liable for removal costs and damages. Removal costs are the costs associated with the containment and cleanup of the spill. Damages for which an RP is responsible include (i) injury to, loss of, or loss of use of natural resources; (ii) real or personal property damages, including resulting economic losses; and (iii) loss of subsistence use of natural resources; as well as net revenue losses and losses of profit or earning capacity that result from damages to property or natural resources. Section 1004 of OPA establishes limits on an RP's liability for each incident; provided the limits, which are described below, do not apply if the proximate cause of the incident was a safety, construction, or operating regulatory violation by, or gross negligence or willful misconduct of, the RP or an agent or employee of, or party contracting with, the RP. Nor do the limits apply if the RP fails to follow applicable reporting requirements or provide reasonable cooperation and assistance requested by the government in connection the removal activities.

Under OPA, the liability limit for vessels varies depending on the weight of the vessel and whether the vessel is single-hulled. The liability limit for single hulled tank vessels ranges from \$3,000 per gross ton to \$22 million. For other tank vessels, the limit ranges from \$1900 per gross ton to \$16 million. The liability limit for other vessels is the greater of \$950 per gross ton or \$800,000. RPs at onshore facilities and deepwater ports are liable for up to \$350 million per spill, provided the U.S. government has the authority by regulation to adjust this limit. The foregoing limits cover both removal costs and damages. Under current law, RPs for offshore facilities are subject to a \$75 million limit on liability that extends to damages, but not removal costs. Such RPs are liable for all removal costs under OPA. In addition to liability for removal costs and damages, Section 4301(b) of OPA authorizes the assessment of civil penalties in the amount of \$25,000 for each day of violation, or \$1,000 per barrel of oil discharged.

**What other funding is available?** OPA re-

quires offshore facilities to maintain evidence of financial responsibility of \$150 million, and vessels and deepwater ports must provide evidence of financial responsibility up to the maximum applicable liability amount. Claims for damages and removal costs that could be asserted against the RP may be asserted directly against the guarantor providing evidence of financial responsibility. In addition to funding required of the RP, the federal Oil Spill Liability Trust Fund (Fund) is available for removal costs and damages, subject to statutory requirements and limitations. The amount of the Fund is capped at \$2,7 billion. The Fund reportedly has a current balance of approximately \$1,6 billion. The Fund is funded through a barrel tax collected on petroleum produced in or imported to the United States (currently 8 cents per barrel), interest, cost recoveries, and penalties. OPA authorizes the use of the Fund to pay for certain costs, including removal costs incurred by federal or state authorities, costs incurred by federal, state, and Indian tribe trustees to conduct natural resource damage assessments and restorations, and claims for uncompensated removal costs and damages. OPA establishes claims procedures to be followed for claims against the Fund and generally requires that claims first be presented to the RP. Use of the Fund is subject to a \$1 billion per incident limit, with a per incident limit of \$500 million for natural resource damage purposes.

**What changes are being considered?** As the efforts to respond to the Deepwater Horizon incident continue, it is unknown whether or what changes will be made to the existing laws governing liability for offshore oil spills. Legislation under consideration include measures that would significantly increase an offshore facility RP's maximum liability for damages, increase the maximum amount of the Fund and per incident limits and limits on natural resource damages funding under the Fund. For example, concerns over rising costs from the recent oil spill in the Gulf of Mexico have prompted three U.S. senators from coastal states, Nelson from Florida and Menendez and Lautenberg from New Jersey 📍

to introduce legislation that would raise the \$75 million damage liability cap for offshore facilities to \$10 billion. Another bill, sponsored by the two senators from Alaska, takes a different approach. Their bill would increase the barrel tax that provides the primary revenue source for the Fund by one-cent per barrel and increase the amount of the Fund to a maximum of \$10 billion.

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