Texas Environmental Update

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Texas Developments

Texas Challenges EPA's Greenhouse Gas Emissions Endangerment Finding

On February 16, 2010, the State of Texas filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit challenging the U.S. Environmental Protections Agency's ("EPA") December 2009 finding that greenhouse gas emissions endanger public health and the environment. Texas also submitted to EPA a petition for reconsideration of that endangerment finding pursuant to Section 301 of the Federal Clean Air Act. In the petition for reconsideration, Texas asserts that the endangerment finding is legally unsupported because the accuracy and objectivity of the International Panel on Climate Change's scientific assessment upon which EPA relied in making the finding has been discredited. Accordingly to that petition, "while the State of Texas remains committed to working cooperatively with EPA to protect the environment, this State must exercise its legal right to challenge a fundamentally flawed and legally unjustifiable process that will have a tremendously harmful impact on the lives of Texans and the Texas economy."

The states of Virginia and Alabama also filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit. Among the organizations that filed petitions are the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Iron and Steel Institute, the Portland Cement Association, the Utility Air Regulatory Group, and the Competitive Enterprise Institute. Texas' petition for review and its petition for reconsideration can be accessed on the Office of the Attorney General of Texas' website at http://www.oag.state.tx.us/oagnews/release.php?id=3218.

Railroad Commission Seeks Informal Comment on Draft Rules Implementing Surface Equipment Removal and Inactive Well Certification/Bonding Requirements

The Railroad Commission of Texas ("RRC") recently publicized new draft rules to implement House Bill 2259, enacted by the 81st Texas Legislature, which imposes surface equipment removal requirements and inactive well certification and bonding requirements on oil and gas operators in Texas. RRC is seeking informal comment on the draft rules until March 15, 2010. This informal comment period is intended to assist the RRC in further developing the rules before finalizing them for submittal to the Texas Register for public comment.

The draft rules would amend Statewide Rules ("SWR") 1, 14, 15, 21 and 78, with the substantive incorporation of the new requirements found in SWR 15. The new surface equipment removal provisions would include the following requirements: (1) electrical lines must be disconnected at all inactive wells, unless a waiver is obtained; (2) all tanks, lines and vessels must be purged of fluids at wells inactive for 5 years; and (3) all surface equipment must be removed at 10-year inactive wells, unless a waiver is approved due to safety concerns or required maintenance of the well site. Under the draft rules, the removal of surface equipment for 10-year inactive wells would be phased in for each operator over the next five years for any 10-year inactive well as of September 1, 2010. Wells that became 10-year inactive wells after September 1, 2010, or were acquired by a new operator after September 1, 2010 would not be subject to the 5-year phase in period.

Proposed SWR 15 would also incorporate the HB 2259 requirements regarding inactive well certification and bonding requirements. Consistent with HB 2259, SWR 15 provides operators with seven options for addressing their inactive wells. As described in the RRC's notice of the draft rules, two of the options are blanket options that would address an operator's complete inventory of inactive wells: (1) plug or restore to active status a number of wells equal to 10% of inactive wells; or (2) if the operator is publicly traded, provide financial documents to the RRC that names the RRC as a secured creditor or post a blanket bond. Two of the options require additional fees for each inactive well: (1) filing an abeyance of plugging report with RRC which includes a $100 fee; and (2) if an operator is not otherwise required to test the well, filing a fluid level or pressure test and paying a $50 fee. Two of the options allow filing of additional financial security based on estimated costs to plug an individual inactive well in the form of: (1) a supplemental bond, letter of credit or cash deposit; or, (2) establishing an escrow account in which 10% of the estimated cost to plug the inactive well is deposited annually.

Under the proposed amendments, all operators would be required to annually address their complete inventory of inactive wells in order to obtain approval of their annual organization report (Form P-5). Further information about the draft rules, including information about how to submit comments, can be found at http://www.rrc.state.tx.us/rules/draft.php.

TCEQ Pharmaceutical Disposal Advisory Group Formed

As part of the implementation of Senate Bill 1757 ("Bill") requiring that TCEQ complete a study on methods of disposal of unused pharmaceuticals, the agency has formed the Pharmaceutical Disposal Advisory Group ("Advisory Group"). Meetings of the Advisory Group are currently planned on a monthly basis during the first six months of 2010.

An introductory meeting of the Advisory Group was held in January. The next meeting is scheduled for February 26, 2010 at TCEQ headquarters offices in Austin. The agenda for the February meeting includes, among other things, presentations by USGS and TCEQ staff, an update on a stakeholder questionnaire and break-out discussion group sessions on advantages and issues faced with current disposal methods. Additional information about the Advisory Group and upcoming meetings is available at TCEQ's website at http://www.tceq.state.tx.us/permitting/water_supply/pdw/pdagroup.

TCEQ Reports More Than 12 Million Pounds of Computers Collected Under New Take-Back Program

TCEQ has announced first-year results of Texas' computer recycling program, which requires manufacturers that sell computers in Texas to offer consumers convenient, free recycling for their brands of computer equipment. As part of this program, manufacturers collected for reuse or recycling 12,400,000 pounds of computer equipment in Texas from Jan. 1, 2009, through Dec. 31, 2009. According to TCEQ, eighty-one manufacturers representing 116 brands are participating in the program.

Under the mandatory program, manufacturers are responsible for collecting and recycling their own brand(s) of computer equipment. Computer equipment is defined as a desktop or notebook computer, including a computer monitor or other display device that does not contain a tuner as well as keyboards and mice. 30 Tex. Admin Code at §328.135. All computer equipment must be collected, reused, and recycled as allowed for by law. *Id.* §328.149. The report is available at: http://www.tceq.state.tx.us/assistance/P2Recycle/electronics/manufacturer-list.html.

TCEQ Requests Comment on Draft 2010 Texas Integrated Report for Clean Water Act Sections 305(b) and 303(d)

TCEQ is requesting public comment on the Draft 2010 Integrated Report for Clean Water Act Sections 305(b) and 303(d) ("Texas Integrated Report") that describes the status of Texas surface waters based on historical data. Comments must be submitted in writing to

TCEQ no later than March 8, 2010.

Among other things, comment is requested on the Draft 2010 Texas 303(d) list, which identifies the water bodies for which effluent limitations are not stringent enough to implement water quality standards and for which associated pollutants are suitable for measurement by maximum daily load. Comments on proposed listings and changes in use attainment must be based on an analysis performed in accordance with TCEQ's Draft 2010 Guidance for Assessing and Reporting Surface Water Quality in Texas. Additional information about the Texas Integrated Comments and submitting public comment is available at TCEQ's website at http://www.tceq.state.tx.us/compliance/monitoring/water/quality/data/10twqi/public_comment.html.

TCEQ Public Comment Period on 2010 Texas Surface Water Quality Standards and Implementation Procedures Underway

In January, TCEQ's Commissioners approved the proposal for public comment of the 2010 Texas Surface Water Quality Standards ("Standards") and Implementation Procedures. The Standards are the basis for establishing discharge limits in wastewater and storm water discharge permits and setting targets for the development of Total Maximum Daily Loads (TMDLs). The Implementation Procedures include the procedures used to screen wastewater discharges and establish permit limits to protect water quality. The deadline for submitting public comment on the Standards and Implementation Procedures is March 17, 2010.

Major proposed revisions to the Standards include changes to the recreational criteria and the addition of nutrient criteria. Among other things, the Implementation Procedures include revisions related to nutrient screening procedures, whole effluent toxicity testing and minimum analytical levels. Additional information about the proposed Standards and Implementation Procedures is available at TCEQ's website at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/2010standards.html.

Texas Governor Recommends Harris County Remain in Attainment for the 1997 Annual Fine Particulate Matter ($PM_{2.5}$) Standard

On February 4, 2010, the governor submitted to the United States Environmental Protection Agency (EPA) a recommendation that Harris County remain designated as attainment for the 1997 annual $PM_{2.5}$ standard (available at www.bdlaw.com/assets/attachments/2010-02-04%20Governor%20Perry%20Letter%20to%20EPA.pdf). The recommendation was in response to the EPA's October 8, 2009 letter requesting an attainment designation recommendation for Harris County for the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). Additional information about the data TCEQ developed to support this recommendation was reported in our November 2009 Update (TCEQ Presents Data for Maintaining $PM_{2.5}$ Attainment Designation for Harris County, available at http://www.bdlaw.com/assets/attachments/November%202009%20Texas%20Update.pdf).

TCEQ Approves CAIR Revisions and CAMR Rule Repeal

On February 10, 2010, the TCEQ Commissioners approved the Executive Director's recommended revisions to the Clean Air Interstate Rule ("CAIR") state implementation plan ("SIP") and rule. The SIP revision implements five revisions that EPA has made to the federal CAIR rule since May 12, 2005, and revisions addressing Senate Bill ("SB") 1672, 80th Texas Legislature, Regular Session. The Commissioners also approved the repeal of the Texas Clean Air Mercury Rule ("CAMR") and withdrawal of the Texas State Plan for Mercury, based upon the U.S. Court of Appeals District of Columbia Circuit's February 8, 2008 vacatur of the federal CAMR rule. Documents relating to these actions are available on TCEQ's "Clean Air Interstate Rule and Clean Air Mercury Rule" home page at http://www.tceq.state.tx.us/implementation/air/sip/caircamr.html.

Application Period Opened for New TERP Rebate Program

On February 8, 2010, TCEQ's Texas Emissions Reduction Plan (TERP) Program opened the application period for its recently announced American Recovery and Reinvestment Act (ARRA) Rebate Grants Program. The new rebate program was described in the January 2010 issue of the Texas Environmental Update (see http://www.bdlaw.com/assets/attachments/January%202010%20Texas%20Update.pdf). Applications are being accepted on a first-come-first-served basis until April 30, 2010. The application form, which has been revised since the previous grant program, is available at http://www.tceq.state.tx.us/implementation/air/terp/arra.html. As of February 22, 2010, the amount of funding available for ARRA Rebate Grants is $1,286,932.

Upcoming TCEQ and Railroad Commission Meetings and Events

- TCEQ will host **Petroleum Storage Tank Compliance Workshops** on March 23 and March 24 in the Abilene and Lubbock areas. These free workshops are hosted by TCEQ's Small Business and Local Government Assistance Section. Online registration is required. Additional information is available at http://www.tceq.state.tx.us/assistance/sblga/pst_wkshp.html.

- TCEQ will host a series of **Risk Assessment Workshops**, beginning in March. The first workshop will be presented by the Alliance for Risk Assessment in Austin on March 16–18, 2010. Additional information is available at http://www.tceq.state.tx.us/implementation/tox/workshop-presented-by-the-alliance-for-risk-assessment.

- The Railroad Commission of Texas has announced that it will conduct a 2-1/2 Day **Oil & Gas Seminar** in Houston on March 31-April 2, 2010. The purpose of the seminar is to provide oil and gas operators with a better overall understanding of the forms, procedures and filing requirements necessary to achieve compliance with the RRC's statewide rules relating to prevention of waste and protection of correlative rights. The seminars will emphasize recent changes to the rules, procedures and forms. The early registration fee for the seminar is $300. The RRC will also be conducting one-day seminars in April - July to demonstrate the proper procedures for using the new web-based on-line filing system for well completion packets. The early registration fee for those seminars is $55.00. More information on the Houston seminar and the one-day seminars can be found at http://www.rrc.state.tx.us/education/seminars/og/index.php.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in February can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/2-10Agenda2-24 and http://www.tceq.state.tx.us/comm_exec/communication/media/2-10Agenda2-10.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

CEQ NEPA Guidance Documents Available for Public Comment

In connection with the 40th anniversary of the National Environmental Policy Act ("NEPA"), the White House Council on Environmental Quality ("CEQ") published recently in the *Federal Register* three draft guidance documents that: (i) explain when and how an agency should

analyze greenhouse gas ("GHG") and climate change impacts; (ii) promote implementation and monitoring of mitigation commitments, including when mitigation supports Findings of No Significant Impact ("FONSI"); and (iii) clarify how agencies adopt and use categorical exclusions. 75 Fed. Reg. 8046 (Feb. 23, 2010) available at www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%208046.pdf. According to CEQ, these items will "modernize" NEPA and enhance public involvement in, and the transparency of, the NEPA process. A comment period has been established for the draft guidance, with CEQ raising some direct questions for public input. Taken together, these guidance documents represent the biggest developments in NEPA practice in the last 30 years.

Analysis of a Project's Potential GHG Impacts

Perhaps the most anticipated of the three draft guidance items issued by CEQ directs federal agencies to consider GHG emissions and climate change impacts generally when conducting NEPA reviews. Federal agencies had informally asked, and a number of environmental groups had formally petitioned, CEQ for such guidance following a series of federal court opinions holding that agencies must consider GHG emissions and climate change during the environmental review process. *See, e.g.*, *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2008); *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003); *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007); and *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003). This CEQ guidance comes on the heels of California's recent announcement that GHG emissions will constitute a formal component of the environmental review process under that state's NEPA analog. The federal draft guidance provides some direction on when and how federal agencies must consider GHG emissions, while reserving certain practical issues for further refinement.

I. Proposed Direction to Federal Agencies

Recent federal court decisions left little doubt that GHG/climate change impacts were just one more of the lengthy list of resources an agency should consider under NEPA. The real question was: "How do we do that?" CEQ's guidance attempts to strike a balance between the preparation of relatively unhelpful purely quantitative analyses and a more qualitative review stressing the context of a particular agency action. While generally useful, the draft guidance leaves several key questions unanswered, opting instead for a more flexible approach that defers implementation to individual agency discretion.

Specifically, the draft guidance advises agencies to conduct an emissions-related NEPA analysis where that analysis will provide meaningful information to decision-makers and the public -- a hallmark goal of previous CEQ guidance over the years. CEQ proposes a reference point of 25,000 metric tons of GHG emissions per year as a useful indicator that a project may meet the foregoing "meaningful" standard. But the draft guidance also clarifies that the 25,000 metric tons reference point is neither an absolute standard nor an indicator of a level of emissions that may "significantly" affect the quality of the human environment, as that term is defined in CEQ's NEPA regulations. Moreover, the guidance encourages agencies to assess project alternatives that may have annual emissions lower than 25,000 metric tons per year. Examples of actions that may warrant a discussion of emissions impacts include approval of a large solid waste landfill, approval of energy facilities such as a coal-fired power plant, and authorization of a methane-venting coal mine.

The draft guidance makes it clear that climate change impacts should be considered throughout the NEPA process. For example, CEQ encourages agencies analyzing the direct effects of a proposed project to quantify cumulative emissions over the life of the project; to discuss measures to reduce emissions, including mitigation measures and the consideration of reasonable alternatives; and to discuss from a qualitative perspective the link, if any, between the project's GHG emissions and climate change. Importantly, the draft guidance recognizes scientific limits on an agency's ability to predict climate change effects, and therefore cautions agencies against engaging in speculative analyses or attempting to link a particular project to specific climatological changes. The draft guidance discourages agencies from relying on the 25,000 metric tons reference point for use as a measure of indirect effects (for example, the growth-inducing impacts of a new or improved

transportation facility), noting that such an analysis must be bounded by limits of feasibility in evaluating the upstream and downstream effects of federal agency actions. Above all else, the guidance adheres to NEPA's "rule of reason," which ensures that agencies determine whether and to what extent to prepare their NEPA analysis based on the usefulness of new information to decision-makers and the public.

With many competing tools available to estimate an action's GHG emissions, the draft guidance seeks to promote uniformity through the federal government's assessment of climate change impacts. It proposes that agencies employ, as needed, one of the following three technical documents:

- **for quantification of emissions from large direct emitters**: 40 C.F.R. Parts 86, 87, and 89 (note that applicability tools for determining whether a project exceeds the 25,000 metric ton reference point can be found at http://www.epa.gov/climatechange/emissions/GHG-calculator/);
- **for quantification of Scope 1 emissions (i.e., a project's direct emissions)**: GHG emissions accounting and reporting guidance that will be issued under Executive Order 13514 §§ 5(a) and 9(b) (http://www.ofee.gov); and
- **for quantification of emissions and removal from terrestrial carbon sequestration and various other types of projects**: Technical Guidelines, Voluntary Reporting of Greenhouse Gases, 1605(b) Program, U.S. Department of Energy (http://www.eia.doe.gov/oiaf/1605/).

The draft guidance notes that agencies may also find the following sources useful:

- Renewable Energy Requirements Guidance for EPACT 2005 and Executive Order 13423 (http://www1.eere.energy.gov/femp/regulations/guidance.html); and
- United States Environmental Protection Agency Climate Leaders GHG Inventory Protocols (http://www.epa.gov/climateleaders/resources/inventory-guidance.html).

Finally, the draft guidance distinguishes between NEPA analysis and Clean Air Act direct reporting of GHG emissions. NEPA does not require the submission of formal reports or participation in reporting programs. Instead, the agency need only consider methodologies relevant to the project and disclose the same to decision-makers and the public. In this regard, the draft guidance underscores NEPA's commitment to process rather than to a particular outcome.

II. Issues Reserved for Public Comment

CEQ encourages public comment on a number of practical issues not addressed by the draft guidance. For example, CEQ does not propose to make the guidance applicable to federal land and resource management actions, such as the preparation of Forest Plans or Resource Management Plans. Instead, the guidance seeks comment on the appropriate means of assessing GHG emissions affected by such actions. CEQ also seeks recommendations regarding how agencies can tailor their NEPA analyses in proportion to the importance of climate change in the decision-making process. Additionally, CEQ asks whether it should provide guidance to agencies to determine whether GHG emissions are "significant" for NEPA purposes and at what level should GHG emissions be considered to have significant cumulative effects. The public comment period will last for 90 days.

Increased Implementation and Ongoing Monitoring of Mitigation Commitments, Including for a "Mitigated FONSI"

The second document, "Draft Guidance for NEPA Mitigation and Monitoring," proposes a "comprehensive approach to mitigation planning, implementation and monitoring." In terms of relative importance, this document may in time overshadow the more highly anticipated GHG guidance. CEQ perceives a shortfall in agencies' accountability for mitigation commitments made during NEPA review. Accordingly, the draft guidance lists three broad goals to revamp agency mitigation and monitoring: consideration of mitigation throughout the NEPA process; robust monitoring plans and programs to ensure mitigation implementation and effectiveness; and public transparency of mitigation monitoring reports and documents. An Appendix highlights the U.S. Army's NEPA regulations as a model for other agencies to

follow in reevaluating their respective NEPA mitigation and monitoring policies. After a 90-day comment period, CEQ expects to finalize its guidance "expeditiously."

Whereas the GHG guidance stresses the more generally accepted "procedural" elements of NEPA review, this guidance has a distinctly "substantive" feel. CEQ sends a strong message that it may not be satisfied with the federal government's NEPA compliance, particularly in the vast majority of actions that result in a FONSI following the generally less demanding Environmental Assessment ("EA") process. In many cases, agencies promise to implement mitigation measures, or, beyond that, represent that such mitigation will successfully reduce otherwise significant impacts to insignificant levels. Through this guidance, CEQ tells the federal government: "Show me!"

The draft guidance emphasizes the implementation and ultimate success of mitigation commitments. CEQ calls for formal internal processes and plans to ensure that the planned mitigation is carried out. For example, CEQ posits that projects not move forward unless mitigation commitments are fully funded or the effects of a shortfall are addressed in the NEPA analysis. Agencies are encouraged to include adaptive management in their mitigation commitments in the event of changed circumstances or mitigation failure. The appropriate steps to address a mitigation failure depend on available options and whether there is any remaining federal action. CEQ sanctions agencies' reliance on outside resources and experts in planning and implementing mitigation measures. CEQ also instructs agencies to clearly state their mitigation goals using "measurable performance standards to the greatest extent possible." CEQ appears to envision objective criteria and technical parameters by which mitigation success (or failure) may be tangibly measured.

The draft guidance has particular application to projects for which adopted mitigation measures to reduce a proposal's environmental effects obviate the need to prepare a more detailed Environmental Impact Statement ("EIS"). CEQ reconfirms the vitality of a so-called "mitigated FONSI," but also expresses a clear preference that such decisions actually play out as predicted. CEQ would require that the mitigation measures be made public and accompanied by monitoring and reporting. In the most severe of all its recommendations, CEQ proposes that inadequate funding or substantial ineffectiveness of mitigation may actually trigger preparation of a full EIS.

CEQ stresses the need for ongoing mitigation monitoring plans to be included or referenced in agency decision documents. Two separate types of monitoring are discussed. Implementation monitoring determines whether mitigation commitments are being performed. Effectiveness monitoring evaluates whether the implemented mitigation is successful. The adopted monitoring method should also incorporate a system for reporting results. One comprehensive offered example for effective monitoring is an Environmental Management System ("EMS"), such as the standardized ISO 14001 protocols. An EMS provides a systematic framework and steps for a federal agency to plan, monitor, evaluate, and ultimately improve its environmental performance.

Finally, the draft guidance highlights public involvement in mitigation monitoring. The lead agency is responsible for communicating monitoring results to the public. CEQ encourages affirmative disclosure of mitigation and monitoring information as opposed to only in response to formal Freedom of Information Act requests. CEQ encourages agencies to use their Web sites and information technology capabilities to disseminate information. CEQ acknowledges that an agency's efforts should be "commensurate to the importance of the action and resources at issue"; that is, it appears that an agency need not engage in a full-scale media blitz of information for more routine, non-controversial projects. As with all three guidance documents, these recommendations stress government "transparency" in NEPA decision-making.

Draft Guidance for Categorical Exclusions

The third draft guidance issued by CEQ is entitled "Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act." Categorical exclusions permit recognized types of actions with insignificant environmental effects to go forward on an expedited basis. Agencies have relied on them since the 1970s as a method to satisfy their NEPA obligations and focus limited resources on proposed projects posing appreciable environmental issues. Citing the expanded number and use of categorical exclusions,

as well as previous recommendations of the CEQ NEPA Task Force, the draft guidance provides for the consistent and appropriate development and use of categorical exclusions as well as greater public involvement in the process. As CEQ previously sought public comment on these issues, it has limited the public comment period for its new draft guidance to 45 days.

The draft guidance comprehensively addresses how agencies should: (i) establish categorical exclusions; (ii) use public involvement and documentation to support a proposed categorical exclusion; (iii) apply an established categorical exclusion, and determine when to prepare documentation and involve the public; and (iv) periodically review categorical exclusions' continued propriety and usefulness. The new guidance applies only to categorical exclusions established by federal agencies pursuant to 40 C.F.R. § 1507.3, as opposed to those enacted by statute. Rather than speaking to the propriety of specific exclusions, the guidance focuses on the basic administrative process governing categorical exclusions generally.

Importantly, the draft guidance fosters the development of new categorical exclusions, tempered only by a concern that agencies follow certain substantive and procedural predicates to ensure that new categorical exclusions are administered to further the purposes of NEPA and its implementing regulations. CEQ sets forth a summary of steps to promulgate new categorical exclusions, reminding agencies that they must afford public notice and comment, consult with CEQ, and obtain a NEPA conformity determination from CEQ. The guidance also encourages agencies to use "the best available scientific and technical information" and to share their experiences with regard to categorical exclusions.

CEQ's draft guidance generally discourages additional paperwork, particularly lengthy documentation, to support an agency's use of an existing categorical exclusion. However, in what CEQ characterizes as a departure from most agencies' routine practices, CEQ encourages agencies to notify the public where appropriate before exercising a categorical exclusion, as well as to publicly disclose categorical exclusion determinations after the fact. These recommendations may derive from the distinct lack of an administrative record in most cases when an agency applies an existing categorical exclusion. Some agencies have adopted so-called "checklists" designed to provide at least some documentation of the process leading to application of a categorical exclusion to a specific proposal for federal action. This guidance seems to endorse that sort of approach, together with an additional layer of public notice in certain circumstances.

Finally, the guidance announces that CEQ will embark on a regular review of agency categorical exclusions, with a special focus on agencies "currently reassessing or experiencing difficulties implementing their categorical exclusions as well as agencies facing litigation challenging their application of categorical exclusions." CEQ intends to provide agencies and the public with more information about the scope of its new review through its Web sites: www.whitehouse.gov/ceq and the significantly revamped www.nepa.gov.

For more information on any of these guidance documents or to obtain assistance in the preparation of comments to the CEQ, please contact Fred Wagner at (202) 789-6041, fwagner@bdlaw.com, Bill Sinclair at (410) 230-1354, wsinclair@bdlaw.com, or James Auslander at (202) 789-6009, jauslander@bdlaw.com.

Making Sense of Eco-labels: A Primer on "Green" Seals of Approval

The demand for environmentally responsible products and corporate practices remains strong despite the current economic climate. According to a survey by Green Seal, an environmental certification organization, 82% of consumers buy "green" products and services.[1] As a result, companies continue to flood the marketplace with such products and actively assert environmental marketing claims. In an effort to gain increased credibility for their green claims, companies are increasingly turning to third-party environmental certification programs (or seals of approval) to distinguish their products in a crowded green marketplace and gain competitive advantages. While such certification programs have proved beneficial in helping consumers identify environmentally preferable products or features, the overabundance of such programs has led to confusion and skepticism.[2]

Businesses using third-party environmental certification programs should be mindful of the standards behind these various programs and the legal risks associated with deceptive environmental labeling.

Environmental Labeling Basics

Environmental labeling is the practice of identifying products based on a wide range of environmental considerations.[3] The term "environmental label" can encompass a broad array of classifications, ranging from mandatory labels, *e.g.*, those required by EPA, to individual corporate-based programs, *e.g.*, Home Depot's Eco Options, to voluntary, third-party verified certification programs, *e.g.*, the United States' Green Seal or Norway's Nordic Swan. Labeling programs most relevant to corporate green marketing initiatives are comprised of the latter – commonly referred to as seals of approval or eco-labels.[4]

The International Organization for Standardization ("ISO") 14024:1999 classifies a third-party environmental certification as a "Type I claim", defining it as "a voluntary, multiple-criteria based, third party program that awards a license which authorizes the use of environmental labels on products indicating overall environmental preferability of a product within a particular product category based on life cycle considerations."[6] The Global Ecolabelling Network ("GEN"), a non-profit association of third-party, environmental performance recognition, certification, and labeling organizations, has adopted the principles set forth in ISO standard 14024 as a "code of good practice to guide ecolabelling program designers, developers, managers, and operators."[7] Companies seeking credible environmental labeling programs for purposes of green marketing may want to focus on voluntary, third-party certification programs, but also be aware of their various characteristics and costs.

Determining the best or most appropriate eco-label for a particular product or business may be difficult, as specific product categories and evaluation criteria vary between programs. Common standards, such as energy efficiency, recycled content, and compliance with industry standards, are present among some or all of them. But the specifics of those common standards and the environmental attributes considered for each product may differ. The following chart compares the standards considered in certifying, for example, printing and writing paper under the U.S. Green Seal certification and the Canada-based EcoLogo certification.

Printing & Writing Paper		
	GreenSeal	**EcoLogo**[8]
Industry Standards	General Compliance	General Compliance
Toxins	Lead, cadmium, mercury, or hexavalent chromium in packaging < 100 ppm	Release no measurable levels of dioxins or furans.
Other	Comply with recycled content requirements (at least 30% postconsumer content) or Comply with production process requirements	Balanced weight of seven criteria: resource consumption, energy use, global warming potential, acidification potential, COD discharge, sub-lethal toxicity, and solid waste generation

Similar criteria apply to products across the board – including office supplies, construction materials, and cleaning products. As a result, companies should center their attention on which certification programs might be most suitable to their needs rather than attempting to harmonize the various programs.

In doing so, businesses should also be mindful of the varying fees associated with each program. Using the above example, Green Seal's certification fee ranges from $3,000 to $9,500 depending on the applicant's revenue and the number of products under consideration.[9] EcoLogo's initial certification fee ranges from $1,500 to $5,000 depending

on the type and number of products.[10]

Legal Implications of Environmental Labeling

The Federal Trade Commission ("FTC") Guides for the Use of Environmental Marketing Claims ("the Green Guides"), 16 C.F.R. Part 260, provide interpretive guidance on the use of environmental marketing claims, including claims made in labeling.[11] In *Complying with Environmental Marketing Guides*, the FTC staff specifically address eco-labels:

> Environmental seals-of-approval, eco-seals and certifications from third-party organizations imply that a product is environmentally superior to other products. Because such broad claims are difficult to substantiate, seals-of-approval should be accompanied by information that explains the basis for the award. If the seal-of-approval implies that a third party has certified the product, the certifying party must be truly independent from the advertiser and must have professional expertise in the area that is being certified.
>
> The FTC analyzes third-party certification claims to ensure that they are substantiated and not deceptive. Third-party certification does not insulate an advertiser from Commission scrutiny or eliminate an advertiser's obligation to ensure for itself that the claims communicated by the certification are substantiated.[12]

Broad, vague, unqualified, and/or unsubstantiated claims may run afoul of the Green Guides, subjecting companies to complaints from the FTC or various self-regulatory organizations, such as the National Advertising Division of the Better Business Bureau. Companies should also be cautious in communicating green labeling claims in light of the FTC's recent activity in bringing environmental marketing enforcement actions.[13]

Environmental labels that give a false impression of a credible third-party verified certification may also face scrutiny. In April 2009, TerraChoice Environmental Marketing, a prominent U.S. environmental marketing agency, published *The Seven Sins of Greenwashing*[14] as an update to its 2007 publication, *The Six Sins of Greenwashing*. The new addition: The Sin of Worshipping False Labels. This seventh sin is committed by a product that "gives the impression of third-party endorsement where no such endorsement actually exists."[15] First-party labeling claims run the most risk of this type of greenwashing. As a result, company-based environmental labels should be used with qualifying language and substantiated by sound scientific evidence. In addition, general environmental benefit claims should not be used in conjunction with certification-like images or graphics. Legitimate third-party eco-labels and adequately qualified and substantiated first-party environmental labels offer a reduced risk of greenwashing.

A Sampling of Eco-labels

When considering environmentally preferable products, "eco-labels can increase trust and confidence in 'green' products. In fact, 88% of purchasers use and/or recognize at least one eco-label."[16] However, the amount of third-party environmental labels in the marketplace is high and continues to increase, making it difficult for companies to decipher their differences. Consequently, businesses serious about green marketing should become aware of what is considered a good, independently verified eco-label and what is not.

The following chart provides a sampling of well-developed third party verified eco-labels from around the world. Also included are the ten most recognized eco-labels in the United States.

The listings below are those identified in a 2009 TerraChoice Environmental Marketing Eco Markets Summary Report.[17]

Country	Seal	Reference
Australia	Good Environmental Choice	http://www.geca.org.au/
Austria	Austrian Eco Label	http://www.gen.gr.jp/austria.html
Canada	EcoLogo/ Environmental Choice	http://www.terrachoice-certified.com/en/

China	Environmental Labeling	http://www.greencouncil.org/eng/greenlabel/china.asp
Croatia	Environmental Label	http://www.mzopu.hr/default.aspx?id=5145
Denmark, Iceland, Finland, Norway	Nordic Swan	http://www.svanen.nu/Default.aspx?tabName=StartPage
EU	European Flower	http://ec.europa.eu/environment/ecolabel/
Germany	Blue Angel	http://www.blauer-engel.de/en/index.php
India	Ecomark	http://www.envfor.nic.in/cpcb/ecomark/ecomark.html
Indonesia	Ekolabel	http://www.menlh.go.id/
Japan	Eco Mark	http://www.ecomark.jp/english/
Korea	Ecolabel	http://www.koeco.or.kr/eng/business/business01_01.asp
Philippines	Green Choice	http://ecolabelling.org/ecolabel/green-choice-phillipines
Russia	Ecolabel Vitality	http://www.ecounion.ru/en/site.php?&blockType=251
Taiwan	Green Mark	http://www.greenmark.org.tw/
Thailand	Green Label	http://www.tei.or.th/greenlabel/
Ukraine	The Ecological Marking	http://www.ecolabel.org.ua/
United States	Green Seal	http://www.greenseal.org/
United States	EcoLogo	http://www.ecologo.org/
United States	ENERGY STAR	http://www.energystar.gov/
United States	EPEAT	http://www.epeat.net/
United States	FSC (Forest Stewardship Council)	http://www.fsc.org/
United States	USDA Organic	http://www.usda.gov/
United States	SFI (Sustainable Forestry Initiative)	http://www.sfiprogram.org/
United States	Greenguard	http://www.greenguard.org/
United States	Fair Trade Certified	http://www.transfairusa.org/
United States	Processed Chlorine-Free	http://www.chlorinefreeproducts.org/

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[1] Green Seal, 2009 National Green Buying Research, http://www.greenseal.org/resources/green_buying_research.cfm.

[2] See Committee on Certification of Sustainable Products and Services, Certifiably Sustainable?: The Role of Third-Party Certification Systems: Report of a Workshop (2010), http://www.nap.edu/catalog/12805.html.

[3] For a dated but extensive review of the issues involved in environmental labeling, see EPA, Environmental Labeling Issues, Policies, and Practices Worldwide (1998), http://epa.gov/epp/pubs/wwlabel3.pdf. For a discussion of third-party certification of sustainability claims, see National Research Council, Certifiably Sustainable?: The Role of Third-Party Certification Systems: Report of a Workshop (2010), www.nap/edu/catalog/12805.html.

[4] For an extensive discussion on eco-labels, see UNOPS, A Guide to Environmental Labels – for Procurement Practitioners of the United Nations System (2009), http://www.ungm.org/Publications/sp/Env_Labels_Guide.pdf.

[5] *See* GEN (citing ISO standard 14024:1999, http://www.iso.org/iso/catalogue_detail.htm?csnumber=23145).

[6] GEN, GEN Position on ISO standard14024 Guidance Standard, http://www.globalecolabelling.net/pdf/epc_02.pdf.

[7] Green Seal Environmental Standard for Printing and Writing Paper (1999), http://www.greenseal.org/certification/standards/gs-7.pdf.

[8] EcoLogo, Certification Criteria Document (1998), http://www.terrachoice-certified.com/common/assets/criterias/CCD-077.pdf

[9] Green Seal, Green Seal Product Certification Fee Schedule (2007, last updated 2009) http://www.greenseal.org/certification/gs_certification_fees.pdf.

[10] EcoLogo Program, Cost of Certification, http://www.ecologo.org/en/certified/cost/.

[11] FTC, Guides for the Use of Environmental Marketing Claims, http://www.ftc.gov/bcp/grnrule/guides980427.htm.

[12] FTC. Complying with the Environmental Marketing Guides, http://www.ftc.gov/bcp/edu/pubs/business/energy/bus42.pdf.

[13] *See* Beveridge & Diamond, Going Green Update: The FTC Brings Additional Marketing Enforcement Actions, http://www.bdlaw.com/news-656.html.

[14] TerraChoice Environmental Marketing, The Seven Sins of Greenwashing (2009), http://sinsofgreenwashing.org/?dl_id=2; TerraChoice Environmental Marketing, The Six Sins of Greenwashing (2007), http://sinsofgreenwashing.org/?dl_id=3.

[15] TerraChoice Environmental Marketing, The Seven Sins of Greenwashing (2009), http://sinsofgreenwashing.org/?dl_id=2

[16] TerraChoice Environmental Marketing, Eco Markets Summary Report (2009), http://www.terrachoice.com/files/2009%20EcoMarkets%20Summary%20Report%20-%20September%2018,%202009.pdf.

[17] *Id.*

Bisphenol A: A Hot Topic at FDA, EPA, States, and the Courts

On January 15, 2010, the Food and Drug Administration ("FDA") announced that it has changed its position on the safety of bisphenol A ("BPA") in food contact applications. Previously, it had approved numerous polymers made from BPA as safe for their intended use in food and beverage containers. Now FDA expresses "some concern" about the potential of BPA to leach from those polymers in harmful amounts and has commenced a comprehensive review and additional studies of the potential health risks that BPA may present. Meanwhile, EPA is preparing an action plan to address BPA; states and localities continue to adopt bans on food contact materials made with BPA; and a federal court is reviewing some 50 BPA lawsuits.

For the full analysis, please go to http://www.bdlaw.com/news-810.html.

For more information please contact Mark Duvall at mduvall@bdlaw.com, or Russell Fraker at rfraker@bdlaw.com.

TSCA Reform Efforts Turn to Biomonitoring Studies for Support

Biomonitoring, the science of measuring human exposure to chemicals through analysis of bodily fluids, has taken center stage in current debates about amending the Toxic Substances Control Act ("TSCA"). Most of the time, biomonitoring results tell us nothing about the health consequences, if any, of the exposure levels detected. Nevertheless, advocates for changing TSCA are citing biomonitoring results, some produced for advocacy purposes, as evidence that this 1976 statute has failed to protect the public from the adverse effects of chemicals. They recently received a boost from a new report by the Centers for Disease Control and Prevention ("CDC"). Biomonitoring-based advocacy contributed to the passage of Europe's REACH legislation and could play a similar role with TSCA. This was suggested by a recent Senate hearing ostensibly about biomonitoring but mostly intended to build support for TSCA legislation expected to be introduced soon.

To read the full alert on biomonitoring and the CDC report, please go to http://www.bdlaw.com/news-809.html.

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Nanosilver Developments at EPA's Office of Pesticide Programs

Nanoscale silver, or "nanosilver," is used in an increasing variety of industrial and consumer products, from electrically conducting ink to odor-free consumer products. The U.S. Environmental Protection Agency ("EPA") potentially regulates many of these nanosilver products under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

EPA's review and regulation of nanosilver will likely be heavily shaped by recommendations released on January 28, 2010 by the FIFRA Scientific Advisory Panel ("SAP"), the primary scientific peer review mechanism of EPA's Office of Pesticide Programs ("OPP"). EPA requested advice from the SAP on its general approach to scientific issues relating to evaluation of nanosilver hazards and exposures. The SAP's report suggested that existing information on conventional silver or silver ion products would not be particularly helpful in assessing the risks posed by any particular nanosilver product. It therefore recommended that EPA treat nanosilver differently from conventional silver in evaluating applications for approval of new nanosilver pesticide products, in terms of both data requirements and the conduct of risk assessments. In particular, it called for EPA to require additional data on physico-chemical properties, exposure potential, and health and environmental effects.

This alert reviews the conclusions of the SAP and other nanosilver science policy developments at EPA. These developments are likely to influence future regulatory actions by other federal and state agencies, and even international regulators.

The full alert is available via http://www.bdlaw.com/news-805.html.

For more information, please contact Mark Duvall at mduvall@bdlaw.com.

EPA Issues Final Renewable Fuel Standard Regulations

The U.S. Environmental Protection Agency ("EPA") finalized its long-awaited regulations under the federal Renewable Fuel Standard ("RFS") program on February 3, 2010. Required by the Energy Independence and Security Act of 2007 ("EISA") to have the new rules in place by December 19, 2008, EPA's proposal was delayed in large part due to the complexity of adding new greenhouse gas ("GHG") emission lifecycle assessments to the eligibility determination for renewable fuels.

Significantly, EPA has now determined that corn-based ethanol produced at facilities using certain "advanced" technologies will meet the minimum GHG reduction threshold requirements for renewable fuels under the RFS. The Agency's original proposal had described two possible options for assessing GHG emission impacts over varying time periods, and suggested that corn ethanol might in many circumstances be associated with increased GHG emissions when compared to petroleum gasoline. (For more information about EPA's 2008 proposal, see Beveridge & Diamond, "EPA Proposes New Renewable Fuel Standard Regulation Using Lifecycle Greenhouse Gas Analysis," available at http://www.bdlaw.com/news-news-567.html.) EPA's final regulations confirm that corn-based ethanol can meet the RFS program's eligibility requirements for renewable fuels.

A pre-publication version of EPA's regulations, along with the Agency's 418-page regulatory preamble, are available on the Agency's website at: http://www.epa.gov/OMS/renewablefuels/. For more information about the new regulations, or fuel or climate change regulation more generally, please contact Stephen Richmond at srichmond@bdlaw.com or Alan Sachs at asachs@bdlaw.com.

A. General Requirements of the RFS Program

The RFS program mandates that EPA set annual benchmarks representing the amount of renewable fuel that must be used by each fuel refiner, blender, or importer ("obligated parties"). Initiated in 2007, the RFS also established a trading market in renewable fuel credits, known as Renewable Identification Numbers ("RINs"), and includes registration, recordkeeping and reporting requirements for obligated parties as well as all renewable fuel producers.

Among other changes, EPA's new regulations set the national RFS volume standard for 2010 at 12.95 billion gallons, which means that 8.25 percent of every obligated party's gasoline and diesel volume this year must be renewable fuel. As required by EISA, EPA has also for the first time set volume standards for specific categories of "advanced" renewable fuels -- including cellulosic fuels and biomass-based diesel -- as components of the overall volume requirement.

B. New GHG Lifecycle Emission Analysis

In order to qualify as a renewable fuel under the RFS, fuels must now demonstrate that they meet certain minimum GHG reduction standards when compared to the petroleum fuels they displace, based on a lifecycle assessment. Under the EISA, EPA was required to evaluate the aggregate quantity of GHG emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes) related to a fuel product's full lifecycle, which includes all stages of fuel and feedstock production, distribution and use by the ultimate consumer.

In EPA's final analysis, fuels derived from cellulosic materials – as well as soy-based biodiesel, biodiesel made from waste grease, oils, and fats, and sugarcane-based ethanol – will all meet or exceed the required GHG reduction standards. In addition, corn-based ethanol produced by facilities using specified technologies to increase efficiency will also meet the minimum 20 percent GHG emissions reduction threshold set for renewable fuels under the RFS. According to EPA's modeling, corn-based ethanol achieves a 21 percent GHG reduction compared to gasoline when indirect land use change is included as a factor.

This finding reflects several significant revisions to the Agency's proposed modeling, which allowed EPA to reduce its estimated lifecycle GHG emissions for ethanol. It also marks a notable departure from California's recently adopted Low Carbon Fuel Standard ("LCFS"), which concluded that most corn-based ethanol will have a "carbon intensity" that is comparable to — or even higher — than the threshold emissions baseline for gasoline. California's regulations are now subject to two lawsuits, the first brought by the renewable fuel industry along with state and local farm groups, and a second filed more recently by refiners, petrochemical manufacturers, and the trucking industry. For more information about California's LCFS requirements, please go to http://www.bdlaw.com/news-773.html.

C. Additional Federal and Regional Renewable Fuel Initiatives in the United States

EPA announced its new regulations on February 3, 2010 in conjunction with a number of other new federal initiatives related to renewable fuels:

- The U.S. Department of Agriculture ("USDA") proposed a new Biomass Crop Assistance Program ("BCAP"), which will provide financial incentives to farmers, ranchers and forest landowners who invest in and produce biomass for energy and other purposes;
- The newly established Biofuels Interagency Working Group – comprised of participants from EPA, USDA, and the U.S. Department of Energy ("DOE") – released its first report (see http://www.whitehouse.gov/sites/default/files/rss_viewer/growing_americas_fuels.PDF), laying out a strategy to advance the development and commercialization of a sustainable biofuels industry; and
- President Obama established a new interagency task force on Carbon, Capture and Sequestration ("CCS"), a technology that seeks to collect and sequester GHGs released during the burning of coal and sequester.

Separately, 11 Northeast and Mid-Atlantic states — the ten members of the Regional Greenhouse Gas Initiative ("RGGI"), as well as Pennsylvania — are committing themselves to the development of their own low carbon fuel standard. The RGGI states signed a Memorandum of Understanding (see http://www.mass.gov/Eoeea/docs/eea/low-carbon-fuel-std.pdf) on December 30, 2009, agreeing to include indirect land use changes in their evaluation of lifecycle carbon intensities similar to California's and planning to develop a proposed framework by early 2011. While the agreement doesn't set forth specific carbon intensity targets, it expresses a commitment to "monitor" low carbon fuel standards in other states and may very well be shaped both by EPA's new regulations and the California LCFS.

A similar regional low carbon fuel standard is also under consideration by Midwestern states.

SEC Issues Guidance on Climate Change Disclosure Requirements

On February 2, 2010, the Securities and Exchange Commission ("SEC") issued guidance clarifying that existing SEC rules require publicly-held companies to disclose material climate-related information. The guidance, which was issued in the form of an interpretive release, does not create new legal requirements or modify existing requirements. Instead, the guidance underscores the provisions of existing reporting rules that make it necessary for SEC-reporting companies to assess whether climate-related risks or opportunities – both positive and negative – have a material impact requiring disclosure. The SEC indicated that it may consider additional guidance or rulemaking relating to climate-related disclosure following a public meeting to be scheduled in Spring 2010.

The interpretive release was published in the Federal Register on February 8, 2010. A copy of the release is available at http://edocket.access.gpo.gov/2010/pdf/2010-2602.pdf.

Background

In a public meeting held January 27, 2010, the SEC voted 3-2, along party lines, to issue guidance clarifying that existing SEC disclosure rules require public companies to consider climate-related information when reporting other financial risks. The decision to hold a public meeting was in part a response to a 2007 investor petition seeking SEC guidance on climate-related disclosure obligations.

Additional background relating to the 2007 petition and related activity is available at http://www.bdlaw.com/news-776.html. A webcast of the January 27, 2010 meeting may be viewed at http://www.connectlive.com/events/secopenmeetings/.

Overview of Rules Requiring Disclosure of Climate Change Issues

The interpretive release outlines the "most pertinent" SEC non-financial statement disclosure rules and regulations that may give rise to climate-related disclosure obligations. Although not exhaustive, the following list summarizes the key disclosure provisions identified in the guidance. The SEC states in the interpretive release that disclosure of the impact of climate change could be required under each of the items discussed below.

Description of Business. Item 101 of Regulation S-K requires disclosure of the material effects on a public company's capital expenditures, earnings and competitive position of compliance with federal, state, and local environmental requirements. Disclosure of material estimated capital expenditures for environmental control facilities also is required.

Legal Proceedings. Item 103 of Regulation S-K generally requires a public company to describe material pending legal proceedings, other than ordinary routine litigation incidental to business, to which the company is a party or of which any of its property is the subject. Specific requirements apply to certain types of environmental litigation that otherwise might not be deemed material to a company. In particular, proceedings involving environmental matters in which a governmental authority is a party must be disclosed if there are potential monetary sanctions, unless the company reasonably believes that monetary sanctions will be less than $100,000.

Management's Discussion and Analysis ("MD&A"). Item 303 of Regulation S-K requires a public company to disclose known trends, material events and uncertainties that would cause financial information not to be necessarily indicative of future financial condition. Prior SEC interpretive releases have provided guidance on MD&A disclosure obligations, and have indicated, inter alia, that disclosure might be required due to new legislation requiring future capital expenditures to install pollution control devices, designation of a company as a "PRP" at a Superfund site, and recurring costs associated with managing hazardous substances and pollution.

Risk Factors. Item 503 of Regulation S-K requires a company, where appropriate, to provide a discussion of the most significant factors that would make investment in the company's

securities speculative or risky. This Item does not specifically mention environmental risks, but such risks must be disclosed if significant to the company or the offering.

Issues that May Trigger Climate-Related Disclosure Requirements

The SEC release describes four specific areas in which climate-related issues may trigger corporate disclosure obligations.

Impact of Legislation and Regulation. The guidance identifies a number of significant developments in federal and state legislation and regulation regarding climate change, including in particular the Environmental Protection Agency's ("EPA") endangerment finding for GHGs under the Clean Air Act and mandatory GHG reporting rule; proposed federal legislation in the U.S. Congress, and the California Global Warming Solutions Act of 2006. According to the guidance, these developments may trigger disclosure obligations pursuant to all of the provisions identified above. For example:

- Item 101 (Description of Business) may require the disclosure of environmental compliance costs relating to climate change, such as the cost to purchase allowances or credits under a cap-and-trade scheme or the cost incurred to improve facilities and equipment to reduce GHG emissions to comply with regulatory limits. In addition, climate-related legislation or regulation may give rise to changes in earnings arising from increased or decreased demand for goods and services, or from changes in costs of goods sold.
- Item 303 (MD&A) could require disclosure of the potential effect of climate-related legislation or regulation, as well as material difficulties involved in addressing the timing and effect of the pending legislation or regulation. Changes in law and related developments also could provide new opportunities (such as the sale of offset credits) for some companies that, if material, could trigger a disclosure obligation.
- Item 503(c) (Risk Factors) may require disclosure of new risks from climate change developments, particularly for companies that are highly sensitive to the regulation of GHGs (e.g., companies in the energy sector), or for companies that may face significantly different risks compared to companies that are currently reliant on products that emit GHGs (e.g., companies in the transportation sector).

International Accords. The guidance highlights activities in the international community that address climate change, including the Kyoto Protocol and the European Union Emissions Trading System. The guidance also notes that international negotiations pursuant to the United Nations Convention on Climate Change may form the basis for future international treaties. Companies are expected to consider and disclose the material impacts of treaties or international accords on business activities, and the potential sources of disclosure obligations related to international accords are the same as those outlined with respect to domestic legislation and regulation (see above).

Indirect Consequences of Regulation or Business Trends. The guidance notes that legal, technological, political, and scientific developments regarding climate change may create new opportunities and risks for companies by creating demand for new products and services, or by decreasing demand for existing products or services. These indirect consequences may have material impacts on a company requiring disclosure. For example:

- Disclosure of business trends or risks with particularly significant impacts on a company's operations, such as planned material acquisitions of plants or equipment might be needed in the description of a company's business.
- Indirect consequences of decreased demand for goods that produce significant GHGs or increased demand for generation and transmission of energy from alternative energy sources might need to be included as risk factors, or might need to be disclosed in the MD&A section.
- The indirect impact of climate change on a company's reputation might also be a new risk factor. A company may need to consider whether the public perception of any publicly available data relating to its GHG emissions could expose the company to adverse impacts resulting from reputational damage.

Physical Impacts of Climate Change. The guidance directs public companies to consider

whether significant physical impacts of climate change have the potential to affect operations and results. According to the SEC, companies whose businesses may be vulnerable to severe weather or climate-related events should consider disclosing the material risks of such events in SEC filings. For example:

- Severe weather may cause catastrophic harm to physical plants and facilities and has the potential to disrupt manufacturing and distribution processes.
- Companies with operations concentrated on coastlines may suffer property damage and disruptions to operations.
- Disruptions to the operations of major customers or suppliers from severe weather events, such as hurricanes or floods, may have indirect financial and operational impacts.

Limitations of the Guidance and Practical Impact

Although the guidance marks the SEC's first formal recognition that public companies must specifically consider climate-related information in public disclosures, it leaves open key questions regarding the materiality of climate-related impacts and whether such impacts constitute known trends within the meaning of SEC reporting rules. For example, the guidance does not specify which sources can be relied upon for scientific information relating to the physical impacts of climate change or how companies should determine the materiality of varying provisions in proposed climate-related legislation. These unanswered questions, coupled with the SEC's lack of experience in legal and scientific environmental issues, may affect the SEC's ability to bring enforcement actions for violations of climate-related disclosure obligations.

Next Steps

The SEC plans to monitor the impact of the guidance on corporate filings as part of its ongoing disclosure review program. In addition, the SEC's Investor Advisory Committee is considering climate change disclosure issues as part of its overall mandate to provide advice and recommendations. The SEC is planning to hold a public roundtable on disclosure issues relating to climate change in Spring 2010 to determine whether further guidance or rulemaking relating to climate change is necessary.

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Firm News & Events

Beveridge & Diamond, P.C. Elects New Shareholders

Beveridge & Diamond, P.C., the Environmental, Land Use, and Litigation Law Firm is pleased to announce that ***David A. Barker and Elizabeth M. Richardson*** in our Washington, D.C. office, ***Amy M. Lincoln*** in our San Francisco office, ***Paula J. Schauwecker*** in our New York office and ***Timothy M. Sullivan*** in our Baltimore office, have been elected as Principals and Shareholders of the Firm.

David Barker's practice is focused on environmental litigation and counseling, with a particular emphasis on representing clients in the pesticide industry in litigation, administrative proceedings, providing counsel on regulatory matters, and drafting agreements. He has litigated a wide range of environmental and commercial disputes, including contaminated site litigation, commercial contract disputes, white collar, copyright, trademark, insurance coverage, and employee benefits matters.

Amy Lincoln's practice is focused primarily on the Clean Air Act and comparable state laws. In both regulatory and litigation matters, Ms. Lincoln has represented clients on a variety of air compliance, permitting, and enforcement issues, including New Source Review, air toxics, and EPA and state Title V operating permit programs.

Elizabeth Richardson's practice is primarily focused on regulatory and transactional issues associated with hazardous wastes and consumer and industrial products. She has represented clients from a variety of industries in administrative proceedings, litigation, regulatory counseling, permitting, transactions, and enforcement matters related to product stewardship, recycling, hazardous wastes, transportation of hazardous materials and dangerous goods, environmental audits, due diligence, and drafting of environmental agreements.

Paula Schauwecker's practice is focused on complex litigation in which she represents major industrial manufacturing and refining companies in toxic torts and product liability suits, as well as suits brought under federal and state environmental statutes.

Timothy Sullivan's practice focuses primarily on environmental and natural resources litigation before federal and state courts. He has represented and advised public and private clients in litigation and other matters involving many federal and state environmental and natural resources laws, with a particular emphasis on CERCLA, the Endangered Species Act, and the Clean Water Act.

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