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# ENVIRONMENT, ENERGY AND RESOURCE CLIENT ALERT

January 2009

DURHAM JONES & PINEGAR IS PLEASED TO ANNOUNCE THE FIRM'S NEW  
ENVIRONMENT, ENERGY AND RESOURCES PRACTICE GROUP

## Obama's Energy & Environment Team

President Barack Obama's highly commended energy and environmental nominations seem to provide credibility to his promises of achieving energy independence and take on climate change regulation as part of his larger "green collar" economic stimulus effort.

Former EPA Administrator Carol Browner will serve in the newly-created position of Assistant to the President for Energy and Climate Change. Nobel laureate Steven Chu has been nominated to become Secretary of the Department of Energy (DOE). Lisa Jackson has received Mr. Obama's nomination to be Administrator of the Environmental Protection Agency (EPA), while Senator Ken Salazar has been nominated as the Secretary of the Department of the Interior (DOI). All nominees have shown strong support for aggressive federal regulation to reduce greenhouse gas emissions and to facilitate the development of renewable energy.

**Carol Browner**, *Assistant to the President for Energy and Climate Change*. Ms. Browner is the longest-serving EPA Administrator, serving for both of President Clinton's terms. Browner's role has been referred to as the "energy czar" in popular media. Because of her long experience in the federal government, many believe that she will be in a good position to influence and coordinate policies implemented by DOE, EPA, DOI, and other agencies. While a supporter of renewable energy, she is expected to advance Mr. Obama's reluctant acceptance of nuclear energy as a needed technology for clean, domestically produced power.

**Lisa P. Jackson**, *Administrator of the Environmental Protection Agency*. After spending 16 years in the EPA Superfund program, Ms. Jackson later served as the commissioner of the New Jersey Department of Environmental Protection. While at that agency, Jackson was a strong supporter of greenhouse gas emission regulation and the development of renewable energy.

**Steven Chu**, *Secretary of Energy*. Focusing his research in the field of molecular biology, Steven Chu is a Nobel Prize-winning experimental physicist. Prior to joining the DOE, Dr. Chu was the Director of the Lawrence Berkeley National Laboratory and a professor at the University of California, Berkeley, where he pushed for advancement of technologies to reduce greenhouse gas emissions. He is expected to continue his support for renewable energy, particularly advanced biofuels. While Mr. Chu supports greater funding for scientific research, he has indicated only limited support for clean-coal technology and nuclear energy.

**Senator Ken Salazar**, *Secretary of Interior*. Senator Ken Salazar (D-CO) currently serves on both the Committee on Agriculture, Nutrition and Forestry, and the Committee on Energy and Natural Resources. Mr. Salazar is expected to exert influence over the use of energy, mineral, and natural resources including fossil-fuel resources on public lands. His position on renewable energy is similar to that of Steven Chu at DOE. It is notable that he supports expanded domestic oil and gas development and increasing refining capacity, particularly offshore development. He does not support development of oil shale resources,

## ENVIRONMENT, ENERGY AND RESOURCE CLIENT ALERT, page 2

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*Bret Randall recently joined DJP to head up the firm's Environment, Energy, and Resources practice group. He graduated summa cum laude from the J. Reuben Clark Law School at BYU in 1993, where he served as an editor of the Law Review, graduated Order of the Coif, and worked as a teaching assistant. Mr. Randall clerked for the Honorable Larry M. Boyle, United States District Court for the District of Idaho. After starting his career with the law firm of Parry & Murray, Mr. Randall joined the New-York based international law firm of LeBoeuf, Lamb, Greene & MacRae LLP, where he practiced for eight years. Mr. Randall was most recently a partner at the Chicago-based firm of Chapman and Culter LLP. He is an active member of the Solid Waste Association of North America, the Utah Municipal Attorneys Association, and the Utah League of Cities and Towns.*

citing limited water supplies. Mr. Salazar has also expressed support for expanding domestic nuclear generation.

### The Obama Energy Platform

Obama's energy and environmental platform has been a central focus of his candidacy. He has promised to create a "government-propelled alternative energy economy" one of his primary initiatives, suggesting the creation of five million "green collar" jobs and the investment of over \$150 billion in the national energy infrastructure. Perhaps the most aggressive and controversial policy relates to his aggressive cap-and-trade program with GHG reduction targets at 80% below 1990 levels by 2050. A significant open question is whether the administration will move forward with greenhouse gas legislation or direct EPA to undertake GHG regulation under the Clean Air Act, or both. EPA has already issued an Advanced Notice of Proposed Rulemaking on GHG regulations. It appears that Obama is relying on the fact that several of the appointees know each other and have worked well together in the past, combined with the new coordination position filled by Browner.

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### New Wetlands Guidance

EPA and the U.S. Army Corps of Engineers ("COE") recently issued revised joint guidance for making jurisdictional determinations for wetlands and waters under Section 404 of the Clean Water Act ("CWA"). While the new, amended guidance is intended to clarify problems arising under the original version, its effectiveness remains to be seen. Underlying the amended guidance is the Supreme Court's fractured, 4-1-4 jurisdictional decision in *Rapanos v. United States*.

have assumed that EPA and the Corps would easily be able to promulgate new jurisdictional rules, the agencies instead opted to develop guidance attempting to interpret *Rapanos* and establish agency policy for implementing jurisdictional determinations. The newly revised guidance represents the agencies' latest attempt to satisfy what it perceives to be the applicable legal standards while offering at least some certainty to the regulated community. It is notable that the agencies received some 66,000 comments on the initial guidance.

While the revised guidance is substantially to the 2007 version, three changes are noted. First, the definition of "traditional navigable waters" has been expanded by listing more specific qualifying features. Second, the new guidance elaborates on features qualifying as "adjacent wetlands." Finally, the new guidance refines the concept of the "relevant reach" of relatively permanent waters considered to be jurisdictional. Under the original guidance, the agencies interpreted a tributary to include the entire reach of the stream that is of the same order.

These revisions are seen by many as being favorable to the regulated community. Because the guidance does not have the effect of law, it may be withdrawn or amended at any time. A number of Obama supporters have been particularly critical of the current guidance and are mounting pressure to revisit the guidance altogether. ◇

*The foregoing has been prepared by Bret Randall of the Durham Jones & Pinegar Environment, Energy & Resources Practice Group to highlight, in summary form, current legal concepts and is not intended to provide legal advice.*

While the Supreme Court seems to

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