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Virtual Fall Environmental Law Seminar

Event

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Bracewell's Environment, Lands and Resources group held its semiannual two-day Environmental Law Seminar virtually on November 9 & 10. With over 180 guests in attendance, the group of speakers, made up of partners and associates from the Firm as well as a guest speaker from Sol Systems covered a wide range of environment and natural resources topics.

On Day One, Tim Wilkins led the first panel, featuring Kevin Ewing, Brittany Pemberton, and guest speaker Hans Dyke, General Counsel of Sol Systems, a leading U.S. solar energy company. The group discussed *Renewable Energy Strategies for Mainstream Energy.* Discussion centered on solar, offshore wind (OSW), and renewable fuels, with focused attention to how they overlap with or complement incumbent fossil energies. The speakers provided overviews for their specialty areas and addressed the following questions:

- How does each renewable energy type contribute to the current energy mix?
- What is its current trajectory?
- What are the key obstacles and opportunities?
- What skills and resources in traditional energy provide advantage in renewable energy?

Key takeaways from the discussion:

- Solar power is the fastest growing electricity source in the U.S. Over the first half of 2021, 56% of the new electricity capacity installed was solar.
- 11 gigawatts of solar power were deployed in the first half of 2021. The top three states by installment capacity were Texas, Florida, and California.

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- 30 gigawatts of power generated from offshore wind are targeted or already in the planning and permitting stages, enough to power more than 20 million homes in the U.S.
- To carry or lead big OSW projects, mainstream companies bring not only large balance sheets but also enormous technical expertise (and often experience offshore) to help them navigate the technology issues, complex permitting, and the resource impact analysis.
- One challenge with OSW is the permitting timeline. It takes roughly six to eight years, and there is no defined timeline for return on investment. So each project must create its own blueprint for success amid uncertainty.
- The renewable fuel sector is largely focused on shifting some of the nation's demand for fossil transportation fuels to renewable fuels that have lower lifecycle greenhouse gas emissions.
- Second or third generation biofuels achieve an even greater carbon intensity reduction than conventional biofuels.
- The market for these fuels is expanding, supported in part by government incentives, but challenges (like competition for feedstock and regulatory hurdles) remain.

The second session on Day One was entitled *FOIA and CBI: Protecting Against Unexpected Disclosure*. This panel, led by partner Kevin Collins, included partners Jason Hutt, Brian Dumesnil and associate Kevin Voelkel, who discussed the Freedom of Information Act (FOIA), Confidential Business Information (CBI), evolving case law, and how to protect confidential company information from public disclosure. The speakers addressed the following questions.

- What is FOIA and how does it impact environmental reporting and other submissions to the government?
- What information is subject to disclosure to the public under FOIA and agency-specific implementing regulations, such as EPA's CBI regulations?
- Why are FOIA and its exemptions, particularly Exemption 4, important?
- What practical steps can companies take to protect information submitted to the government?

Key takeaways from the discussion:

- Many of the environmental statutes pertaining to the regulated community require the generation of data and records provided to the government. As a result, requests for the information pursuant to FOIA present a challenge for companies seeking to safeguard proprietary and otherwise confidential information and records.
- In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court held that commercial or financial information is "confidential" within the

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meaning of Exemption 4 at least where two prongs are met: (1) the information is both customarily and actually treated as private by its owner; and (2) the information is provided to the government under an assurance of privacy. The Court left open the question of whether the first prong alone is sufficient to render the information "confidential." The case law around this issue is evolving as lower courts confront circumstances in which agencies do not provide an express assurance of confidentiality.

- When submitting information to the government, companies will need to decide whether to ask the government for an express assurance of confidentiality.
- In determining whether information is "confidential" within the meaning of Exemption 4, courts will look at the context of the information and how it was treated by the owner, including the owner's treatment of similar information in the past. Courts will also look at the interaction between the agency that requested the information and the submitter of the information.
- On occasion, confidential information is submitted to the government by a third-party without notice to the owner of the information. Accordingly, companies should consider what third-party information they include in government submissions, as well as what confidential information they provide to sub-contractors.

The last session of Day One was a *Lightning Round* with topics and discussion related to the Latest Executive and Legislative Initiatives. The topics covered in this session included:

- Clean Water Act: Waters of the United States
- Methane Emissions
- Consideration of Greenhouse Gases (GHG) in the Federal Energy Regulatory Commission (FERC) Process

On Day Two, the first panel featured partners Kevin Ewing and Whit Swift and associate Daniel Pope. In *Environmental Justice: How Companies are Experiencing the Changes*, they took stock of the national conversation about Environmental Justice and the current administration's emphasis on achieving it with a "whole-of-government" approach. The Bracewell team focused on:

- Environmental Justice as both a concept and a goal
- The current Administration's formal articulation of its Environmental Justice goals
- Early efforts of various agencies, advocacy organizations and courts to put EJ in practice
- New statutory interpretations designed to draw EJ into the scope of federal actions

Environment, Lands and Resources
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Key takeaways from the discussion:

- Environmental Justice is receiving broader attention in federal reviews of new infrastructure projects, through such statutes as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).
- The Environmental Protection Agency (EPA) has issued a number of memoranda over the past year aimed at making Environmental Justice a priority in enforcement. Fenceline monitoring and similar data-focused efforts are top of mind.
- Courts, in particular the DC Circuit, are finding agencies are falling short in analyzing Environmental Justice (and climate) when issuing permit. Court decisions are overturning traditional analytical boundaries but have not yet established new standards for agencies to follow, so further jurisprudence is sure to follow.
- The range of Environmental Justice effects may reach past the physical footprint. Distant communities may experience socio-cultural impacts when ancestral areas are developed.
- Companies concerned about Environmental Justice are well served to expand their understanding of community engagement and the geographic scope of their physical and socio-cultural footprints.
- Early, proactive engagement is essential to hearing community concerns and expectations, sharing accurate information, and developing a shared view of the environmental and economic benefits of existing and proposed operations.

Day Two also included a *Lightning Round* focused on the latest updates from the executive and legislative branches led by partner Anne Navaro and Liam Donovan, a principal with Bracewell's Policy Resolution Group. The two provided overviews and discussion of the National Environmental Policy Act (NEPA) and the recently proposed changes as well as the reconciliation package under consideration by the U.S. Congress.

The final topic of Day Two was a panel discussion entitled *Carbon Capture: The State of Play*. This program was led by partner Jeff Holmstead, who moderated the panel and also discussed Class II and Class VI Underground Injection Control (UIC) permitting. The other panelists were partner Sara Burgin, who discussed state permitting of carbon capture and sequestration (CCS) projects, Ann Navaro, who discussed the possible use of federal lands for CCS. Substantive topics included:

- Federal and state permitting requirements for CCS projects
- Efforts by Texas and Louisiana to obtain EPA authorization to issue Class VIC UIC permits

- Federal natural resources issues and the prospects for geologic sequestration on federal lands
- The property rights needed to build and operate carbon sequestration facility

Key takeaways from the discussion:

- In most cases, a Class VI UIC permit is needed for a CCS project, but, in some circumstances, CO2 from gas processing plants can be injected under a Class II UIC permit.
- The process for obtaining a Class II permit is less burdensome (and will likely take much less time) than the process for obtaining a Class VI permit.
- In Texas, the Railroad Commission (RRC) will decide on a case-by-case basis whether a Class II or a Class VI is needed. RRC officials have said that the primary consideration is whether there may be a significant risk to underground sources of drinking water.
- In most cases, the right to store carbon underground is actually a right that needs to be acquired from the surface owner, as it is not part of the mineral estate. Just like any other right, the right to store CO2 can be severed from the surface rights.
- When looking to acquire storage rights, it is important to review the chain of title to make sure there's been no severance of that right.

Consent or cooperation agreements between the sequestration operator and the mineral owner or the mineral lessee should be obtained to prevent any type of interference claim or conversion claim that might arise from the mineral owner.