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TO: Friends and Clients of Balch & Bingham LLP

FROM: Tripp Head  
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SUBJECT: Environmental Enforcement Priorities and Personalities in President Barack Obama's Pending Administration: Prognostications and Possibilities

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The results of this year's presidential election ended eight years of a Republican presidency and elevated the first African-American to the White House. In short, the historical ramifications of the 2008 elections were immediately and patently obvious. Less apparent – but, for the regulated community, perhaps equally compelling – are the environmental enforcement priorities that the Obama administration will possibly pursue and the personalities that will potentially lead such efforts. This memorandum (i) identifies the U.S. Environmental Protection Agency's ("EPA") likely enforcement priorities for 2009; and (ii) identifies several of the individuals that may take leadership roles, in pursuing such priorities as the future Administrator of EPA.

### **I. EPA Enforcement Priorities for 2009<sup>1</sup>**

The EPA Office of Enforcement and Compliance Assurance (OECA) recently announced it would continue to pursue many of the national enforcement and compliance assurance priorities established in FY 2005-2007 for 2009. These priorities include:

#### **Clean Air Act (CAA): Air Toxics—Maximum Achievable Control Technology (MACT)**

The 1990 CAA Amendments required EPA to promulgate technology-based emission standards for industry group categories and subcategories that produce hazardous air pollutants (HAP). The regulatory standard for the HAP sources is the Maximum Achievable Control Technology (MACT) standard. The MACT standard is a level of control that is currently being achieved by the best-performing similar sources and also requires sources to install monitors, keep records, and report to regulatory agencies.

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<sup>1</sup> FY 2009 Office of Enforcement and Compliance Assurance (OECA) National Program Manager Guidance (Rev. June 2008) and public statements of Adam Kushner, Director, EPA Air Enforcement Division, during November 19, 2008 teleconference sponsored by the American Bar Association, Section on Environment, Energy, and Resources, "Clean Air Act Enforcement Update 2008- Looking Back and to the Future."

For the first several years that the rules were in place, EPA mostly conducted outreach and compliance assistance to the regulated community. Now, however, it has begun a standard enforcement process of identifying priority violators and taking enforcement actions, including seeking civil penalties. According to EPA, over the last ten years, EPA has brought enforcement actions for alleged MACT violations in over 500 administrative penalty cases and nearly 100 judicial enforcement cases, some involving penalties and environmental projects over \$1 million each. According to recent public statements by Adam Kushner, Director of EPA's Air Enforcement Division, EPA will be narrowing the focus of its MACT enforcement strategy during FY 2008-2010 to three areas EPA considers "national problem areas": **leak detection and repair, industrial flares, and surface coating operations.**

### **Clean Air Act: New Source Review**

For the last decade, EPA has made enforcement of New Source Review (NSR) requirements a national priority, targeting industries such as **wood products, ethanol manufacturers, coal-fired utilities, and petroleum refineries.** Since the initial filing of civil complaints against seven electric utility companies in 1999, EPA and the United States Department of Justice have filed additional complaints, Notices of Violation and administrative orders, and settled many of the cases resulting in billions of dollars in penalties, additional controls, and supplemental environmental projects. Since 2000, EPA has entered over 20 settlements with petroleum refining companies, requiring more than \$5 billion in additional controls, more than \$72 million in civil penalties, and more than \$65 million in supplemental environmental projects. Settlements reached with Louisiana-Pacific, Georgia-Pacific, and Willamette resulted in penalties of \$289 million and required the companies to invest millions more in additional controls and supplemental environmental projects. EPA reached a global settlement with Archer Daniels Midland (ADM), the largest ethanol producer in the industry, which encompassed 52 plants in 16 states and which will require ADM to pay a \$4.6 million dollar civil penalty, and spend an estimated \$340 million to install new controls and implement supplemental environmental projects.

According to recent public statements by Kushner, in 2009, EPA will continue to pursue additional NSR cases against coal-fired utilities. Furthermore, OECA has identified the **cement, glass, and acid manufacturing sectors** for further investigation and potential enforcement in 2009. Finally, now that many NSR cases have settled, EPA will also make it a priority to closely monitor implementation of and compliance with NSR consent decrees.

### **Clean Water Act: Reduction of Water Pollution from Concentrated Animal Feeding Operations, Sewers, and Stormwater**

According to EPA, discharges from so-called "wet weather" events are the leading causes of water quality impairment today. The current EPA water enforcement national priorities in the following wet weather areas: combined sewer overflows (CSOs); sanitary sewer overflows (SSOs); concentrated animal feeding operations (CAFOs); and urban and construction stormwater run off. OECA has directed that enforcement of wet weather compliance problems be prioritized by looking at regulated facilities contributing to the impairment of watersheds, beaches and shellfish beds, source water protection areas, environmental justice areas, and other sensitive areas. For example, earlier this year, Home Depot agreed to pay a \$1.3 million penalty and implement a nationwide compliance program to settle alleged stormwater violations discovered at more than 30 construction sites in 28 states.

### **Waste: Enforcement of Financial Assurance Requirements**

The EPA has also identified the enforcement of financial assurance requirements as a "national priority" through FY 2010, and its Financial Advisory Board has been actively examining the issue. Financial assurance to ensure that sufficient funds are available to close out **hazardous waste facilities** is required under several



statutory regimes, including Superfund, RCRA, and underground storage tank regulations, yet many regulated companies are unfamiliar with—or even unaware of—their obligations. Financial assurance requirements address the cost of closing a hazardous waste facility in accordance with RCRA Subtitle C requirements; the annual cost required for post-closure monitoring and maintenance; liability coverage for sudden and non-sudden accidental occurrences; and corrective action required at solid and hazardous waste management units. Earlier this year, EPA announced a precedent-setting \$3.16 million dollar penalty against an owner of 23 gas stations in Maryland, Virginia, and Washington, D.C. for **underground storage tank** violations, including failure to maintain financial assurance.

### **Waste: Mineral Processing and Mining**

Finally, EPA will continue focusing on enforcing hazardous waste requirements with the mineral processing and mining sector as a national priority in 2009. According to EPA, it will place special emphasis on mineral processing facilities that dispose of hazardous waste in surface impoundments. EPA has determined that even if a portion of the hazardous waste generated at such facilities is continuously recycled on-site, surface impoundments can leak and cause widespread damage. Since 2004, EPA has completed inspections at what it considers “high risk” facilities, including approximately 20 **phosphoric acid facilities**, 25 other **mineral processing facilities**, and 5 **mine sites**. While most of the investigations are ongoing, the most common violations found were illegal disposal of hazardous waste and failure to identify and characterize hazardous waste. In addition to the high-risk facilities, EPA estimates there are more than 100 facilities in the mineral processing sector and potentially several hundred more in the mining sector. EPA expects most of these facilities will warrant some form of enforcement activity.

## **II. Potential EPA Administrators in the Obama Administration**

### **Ian Bowles**<sup>2</sup>

Ian Bowles currently heads the Massachusetts Office of Energy and Environmental Affairs, touted on the office’s website as “the only state Cabinet-level office in the country that oversees both environmental and energy agencies.” As such, he oversees the Commonwealth’s six environmental, natural resource and energy regulatory agencies: the Departments of Environmental Protection, Public Utilities, Energy Resources, Conservation & Recreation, Agriculture, and Fish & Game. He also serves as Chairman of the Massachusetts Water Resources Authority, the Energy Facilities Siting Board, and the Massachusetts Clean Energy Center, a new agency charged with promoting R&D, workforce training and economic incentives.

During the Clinton Administration from 1999 to 2001, Bowles served as Associate Director of the White House Council on Environmental Quality and as Senior Director of the Global Environmental Affairs directorate at the National Security Council, where he coordinated American foreign policy on global climate change, the Kyoto Protocol, and other matters. During this time, Bowles co-edited the book *Footprints in the Jungle: Natural Resource Industries, Infrastructure, and Biodiversity Conservation* (Oxford University Press, 2001).

Following his service in the Clinton Administration, Bowles held appointments as a Senior Research Fellow at Harvard’s Kennedy School of Government and as Senior Advisor at the Gordon and Betty Moore Foundation. Bowles also served as President and CEO of MassINC, a Boston-based research institute, and as

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<sup>2</sup> See “Secretary Ian Bowles, Secretary, Executive Office of Energy and Environmental Affairs,” at [http://www.mass.gov/?pageID=eoeeautilities&L=1&sid=Eoeea&U=Eoeea\\_bio](http://www.mass.gov/?pageID=eoeeautilities&L=1&sid=Eoeea&U=Eoeea_bio) (accessed November 21, 2008); Matt Viser, “Bowles Said to be on Obama’s List to Oversee EPA,” *Boston Globe*, Nov. 7, 2008.

Publisher of *CommonWealth* magazine. He also served with the Massachusetts Institute for a New Commonwealth, a centrist think tank in Boston.

Bowles earned his A.B. degree in Economics, *cum laude*, from Harvard University and began his career as a Legislative Assistant in the U.S. House of Representatives. Earlier in his career, Bowles was Vice President of Conservation International, a leading international conservation organization. Bowles reportedly played a key role in the creation of one of the world's largest tropical forest national parks: the 4 million acre Central Suriname Nature Reserve. He ran for Congress in 1996, losing in the Democratic primary to US Representative William D. Delahunt.

Earlier this month, Bowles seemingly discounted the idea of leaving Boston to head the EPA. "I love my job; I'm not looking for a new job," he told the Boston Globe. He added, however, "There's a lot of things in life I wouldn't rule out, including trying out for the Red Sox next year."

### **Carol Browner**<sup>3</sup>

Carol Browner is currently serving on the dozen-person advisory board to President-Elect Obama's official transition team and is also heading the team's policy working group on energy and the environment. For a video of an initial meeting of this group headed by Browner, visit [http://change.gov/newsroom/entry/inside\\_the\\_transition\\_meet\\_the\\_energy\\_environment\\_policy\\_transition\\_team/](http://change.gov/newsroom/entry/inside_the_transition_meet_the_energy_environment_policy_transition_team/) (accessed November 21, 2008).

Browner served as EPA Administrator from 1993 to 2001 during the Clinton administration, the longest tenure to date of any EPA Administrator. Her EPA Administrator official biography (circa 1999) declares that she "made it a top priority to protect the public from breathing polluted air . . . Browner took the toughest action in a generation to safeguard public health with updated standards for particulate matter (soot) and ozone (smog)." That same biography declares that she had "taken action against one of the nation's most serious threats: global warming" and credits her with leading the first-ever comprehensive restoration plan for the Florida Everglades, establishing broad protection for the Great Lakes, and helping to lead efforts to develop and implement President Clinton's Clean Water Action Plan.

After leaving the Clinton Administration, Browner founded and is today a principal with the Albright Group LLC, a global strategy firm headed by former Secretary of State Madeline Albright. Browner is also chairwoman of the National Audubon Society board of directors and she sits on the board of directors of the Alliance for Climate Protection, the Center for American Progress, and the League of Conservation Voters.

Prior to serving as EPA Administrator for President Clinton, Browner was, from 1991 to 1993, the Secretary of Florida's Department of Environmental Regulation. From 1986 to 1988, Browner worked in Washington for then-Senator Lawton Chiles and also served as Legislative Director for then-Senator Al Gore. The daughter of college professors at Miami-Dade Community College, she graduated from the University of Florida in 1977. She then earned a degree from its law school. Browner served as General Counsel for the Florida House of Representatives Government Operations Committee in 1980 and also worked for Citizen Action, a grassroots consumer group in Washington, D.C.

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<sup>3</sup> See EPA Office of Media Relations, "Carol M. Browner Biography," February 1999, at <http://www.epa.gov/history/admin/agency/browner.htm#bio> (accessed November 21, 2008); "The Albright Group: Who We Are," at [http://www.thealbrightgroupllc.com/Who\\_We\\_Are.htm](http://www.thealbrightgroupllc.com/Who_We_Are.htm) (accessed November 21, 2008).



## **David Hayes**<sup>4</sup>

David Hayes is a member of the Obama-Biden Transition Project's Agency Review Working Group responsible for the energy and natural resources agencies. As such, he is helping the new administration's transition planning for EPA and the Departments of the Interior, Energy, and Agriculture as the team's Energy and Natural Resources Team Leader.

Hayes is the Global Chair of the Environment, Land & Resources Department at Latham & Watkins, a department comprised of nearly 100 lawyers within a 2,300-attorney law firm, where he was a resident in the firm's Washington, D.C. office. Hayes served as the Deputy Secretary of the Interior during the Clinton Administration, during which he reportedly played a lead role for such matters as the acquisition and protection of threatened lands (e.g. acquisition of the Headwaters old-growth redwood forest in Northern California); the restoration of threatened ecosystems (e.g. the Bay-Delta ecosystem restoration project in California); the introduction of modern water management approaches in the west (e.g. the Colorado River initiatives undertaken by the Administration); the negotiation of habitat conservation plans under the Endangered Species Act; energy-related issues associated with federal lands and resources (e.g. oil and gas development, hydropower licensing, etc.); and the settlement of long-standing Indian water and land disputes.

Hayes has also served as the Chairman of the Board of the Environmental Law Institute, a nonprofit research and publication center for environmental law and management professionals. Additionally, he is the Vice Chair of the Board of American Rivers and is a Board member of RESOLVE and the Natural Heritage Institute. In the fall of 2007, Mr. Hayes served as Consulting Professor at Stanford University's Woods Institute for the Environment. While at Stanford, he directed a Woods Institute dialogue project on carbon offsets. The results of his work at Stanford are being published by the Center for American Progress. Hayes is also a Senior Fellow at the World Wildlife Fund, with a focus on climate change matters, and a Senior Fellow at the Progressive Policy Institute, the think tank that is affiliated with the Democratic Leadership Council.

Hayes is a 1978 graduate of Stanford Law School, where he was Notes Editor for the Stanford Law Review, and he is a *summa cum laude* graduate of the University of Notre Dame. He currently serves as the Chair of Stanford Law School's Board of Visitors.

## **Lisa Jackson**<sup>5</sup>

Lisa Jackson is one of three EPA Review Team Leaders within President-Elect Obama's Transition Team (the other two team leaders are Robert Sussman and Cecilia V. Estolano). Since 2006, Jackson has led New Jersey's Department of Environmental Protection ("NJDEP") as the first African-American woman to head that department. Her tenure there, however, is drawing to a close; New Jersey Governor Jon Corzine announced on October 24, 2008, that Jackson would become his new Chief of Staff effective December 1, 2008.

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<sup>4</sup> See "Working Group Members," at [http://change.gov/learn/working\\_group\\_members](http://change.gov/learn/working_group_members) (accessed November 21, 2008); "David Hayes" at <http://www.lw.com/attorneys.aspx?page=attorneybio&attno=00572> (accessed November 21, 2008).

<sup>5</sup> See "Energy and Natural Resources Team Lead," at [http://change.gov/learn/energy\\_and\\_natural\\_resources\\_team\\_leads/](http://change.gov/learn/energy_and_natural_resources_team_leads/) (accessed November 21, 2008); "About the Commissioner," at <http://www.nj.gov/dep/commissioner/bio.html> (accessed November 21, 2008); "Governor Corzine Names New Chief of Staff," at <http://www.state.nj.us/governor/news/news/2008/approved/20081024b.html> (accessed November 21, 2008).



Jackson's career prior to leading NJDEP included work with EPA from 1987 to 2002, both at EPA headquarters and at its New York regional office. She is a professional engineer, having received her Master's Degree in chemical engineering from Princeton University and her undergraduate degree from Tulane University. She is a native of New Orleans.

During her tenure as Commissioner of NJDEP, Jackson has reportedly worked on policies "that have put New Jersey in the forefront of states developing initiatives to combat global warming and reduce greenhouse gas emissions." She presently serves as Vice President of the Executive Board of the Regional Greenhouse Gas Initiative. She has also worked to revise the New Jersey's Energy Master Plan to expand New Jersey's leadership role in developing clean alternative energy sources within the state. During her tenure, New Jersey reportedly became one of the first states to legislatively mandate both short and long-term reductions in the emissions believed to contribute to climate change.

With respect to water resources, Jackson led New Jersey's Category One program, aimed at expanding protections for high quality surface waters that serve as sources of drinking water and as habitat for the state's threatened and endangered species. She also led the restructuring of the state's wastewater planning responsibilities and tightened standards for development in the state's flood plains to protect water resources and future homeowners.

In addition to her responsibilities as Commissioner, Jackson has served on numerous boards, committees and commissions including the New Jersey Outdoor Women's League, the New Jersey Sustainable State Institute, the Executive Committee of the Natural Resources Leadership Council of the States, the State Ethics Commission, the State Planning Commission, the regional Ozone Transport Commission, the Environmental Council of the States Compliance Committee and the Board of Advisors for the School of Science and Engineering. In 2007 she was recognized by the New Jersey Conference of Mayors as Cabinet Member of the Year.

### **Robert F. Kennedy, Jr.**<sup>6</sup>

Earlier this month, the *Washington Post* reported that "President-elect Barack Obama is looking at possibly appointing Robert F. Kennedy Jr. to head the Environmental Protection Agency, according to sources familiar with the process, though he is eyeing several other prominent environmentalists as well." Although Kennedy backed Sen. Hillary Clinton in this year's Democratic presidential primary, his cousin Caroline co-chaired Obama's vice presidential search committee.

Kennedy currently serves as the Chairman of the Board of the Waterkeeper Alliance, which he founded, the chief prosecuting attorney for Hudson Riverkeeper, and is also identified as "Senior Attorney" for the Natural Resources Defense Council. He is also a Clinical Professor and Supervising Attorney at the Pace Environmental Litigation Clinic at Pace University School of Law in New York. Earlier in his career he served as Assistant District Attorney in New York City.

Kennedy's books include *Crimes Against Nature* (2004), *The Riverkeepers* (1997), *New York State Apprentice Falconer's Manual*, (1987), and *Judge Frank M. Johnson, Jr: A Biography* (1977). His articles have appeared in such publications as the *New York Times*, *Atlantic Monthly*, *The Wall Street Journal*, *Esquire*, *The Village Voice*, *The Boston Globe*, *The Washington Post*, *Pace Environmental Law Review*, and *Rolling Stone*.

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<sup>6</sup> See Juliet Eilperin, "Robert F. Kennedy Eyed to Head EPA," *Washington Post*, November 6, 2008; "Robert F. Kennedy, Jr.," at <http://www.waterkeeper.org/mainboard.aspx> (accessed November 21, 2008); Robert F. Kennedy, Jr., "Deadly Immunity," at [http://www.rollingstone.com/politics/story/7395411/deadly\\_immunity/](http://www.rollingstone.com/politics/story/7395411/deadly_immunity/) (accessed November 21, 2008); "Kennedy Son Given Probation in Drug Case," *New York Times*, March 17, 1984.

Kennedy is a graduate of Harvard University. He later studied at the London School of Economics, received his law degree from the University of Virginia Law School, and later earned a Masters Degree in Environmental Law from Pace University School of Law. He is a licensed master falconer, and, as often as possible, he pursues a life-long enthusiasm for white-water paddling. He has organized and led several expeditions to Latin America, including first descents on three rivers in Peru, Colombia, and Venezuela.

Kennedy's career has not, however, been without controversy. For example, in 2005 he authored an article for *Rolling Stone* and Salon.com in 2005 entitled "Deadly Immunity," which "investigate[d] the cover-up of a mercury-autism scandal." This article continues to generate controversy today and, despite *Rolling Stone's* stated support of its author, required a number of post-publication corrections. Also, in 1983, Kennedy was arrested for possession of heroin and sentenced to two years of probation. He was thirty at the time.

### **Howard Learner**<sup>7</sup>

Howard Learner is the executive director of the Chicago-based Environmental Law and Policy Center ("ELPC"), an organization that describes itself as "protecting the Midwest's environment and natural heritage," which he founded in 1993. Before founding ELPC, Learner was the General Counsel of Business and Professional People for the Public Interest, a public interest law center, specializing in complex civil litigation and policy development. He is an Adjunct Professor at Northwestern University Law School, where he teaches an advanced environmental law seminar. Learner holds a J.D. from Harvard Law School (1980) and a B.A. in Political Science from the University of Michigan (1976).

In a November 17, 2008, post on *The Huffington Post*, Learner outlined what he viewed as likely policy goals of the Obama administration. His first action item: "put America on a leadership path for solving global warming problems: the moral, business, economic, policy, political and technology challenge of our generation." "It's time for Congress to enact strong federal legislation to reduce global warming pollution and provide stronger incentives for clean energy development solutions," he added.

Other areas of emphasis outlined in his post were (i) development of national policies to significantly boost energy efficiency standards; (ii) enactment of a national Renewable Energy Standard policy that "ramps up wind and solar power, and other clean energy to be 10% of the nation's energy supply by 2012 and 25% by 2025"; and (iii) investment in transit and high-speed rail.

In recent remarks celebrating the fifteenth anniversary of the ELPC, Learner reiterated his beliefs that climate change initiatives are necessary now, regardless of the current economic crisis. "We don't have a choice. We cannot hit the pause button and say, 'We'll come back in five years when the economy is better.' Climate change is occurring," Learner said. "We need to take corrective actions now."

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<sup>7</sup> See "Howard Learner," at <http://www.huffingtonpost.com/howard-learner> (accessed November 21, 2008); Environmental Law and Policy Center, at <http://elpc.org/> (accessed November 21, 2008); See Howard Learner, "Gearing Up to Advance the Green Economy," at [http://www.huffingtonpost.com/howard-learner/gearing-up-to-advance-the\\_b\\_144152.html](http://www.huffingtonpost.com/howard-learner/gearing-up-to-advance-the_b_144152.html) (accessed November 21, 2008); "Obama Advisers Call for Policy Shifts Focusing on Renewable Energy, Clean Cars," *Environmental Reporter*, Nov. 21, 2008.

### **Kathleen McGinty**<sup>8</sup>

From 2003 until earlier this year, Kathleen McGinty headed the Pennsylvania Department of Environmental Protection (“PDEP”), the first woman to do so. According to her official PDEP biography, “McGinty’s emphasis [was] in creating approaches to environmental problems that generate economic growth and encourage advanced technology development in Pennsylvania.”

Between 1989 and 2001, McGinty served in various capacities in national and international public policy leadership. She chaired the White House Council on Environmental Quality and created and headed the first-ever White House Office on Environmental Policy. In 1999-2000, McGinty spent a year in India as a Senior Visiting Fellow with the Tata Energy Research Institute. While there, she forged new business ventures between U.S. and Indian advanced energy technology companies and helped to craft an environmental cooperation compact between the two nation’s governments. Upon her return in 2000, she acted as counselor to Vice President Al Gore during the presidential campaign and served as a senior policy advisor to the Democratic National Committee.

In the private sector, McGinty served as vice president for asset management at Natsource LLC, a financial services firm specializing in energy transactions. She also served as director of Proton Energy Systems Inc, a leading fuel cell infrastructure company, and as an advisor for a European venture capital firm interested in clean energy. A founding partner of Peregrine Technology Partners, she joined the Board of Directors of NRG Energy, Inc. effective October 14, 2008. A native of Philadelphia, McGinty earned a chemistry degree from Saint Joseph’s University (for which she currently serves on the school’s Board of Trustees) and a law degree from Columbia University School of Law.

### **Mary Nichols**<sup>9</sup>

Mary Nichols currently serves at the Chairwoman of the California Air Resources Board, a state regulatory agency that employs roughly 1,200 engineers, scientists and attorneys, with an annual operating budget of more than \$750 million. She was appointed by Governor Arnold Schwarzenegger in July 2007, returning to the Air Board 30 years after serving as the Chairwoman under Governor Jerry Brown from 1978 to 1983.

In addition to her work at the Air Board, Nichols has held a number of positions, including: assistant administrator for the U.S. Environmental Protection Agency’s Air and Radiation program under the Clinton Administration, Secretary for California’s Resources Agency from 1999 to 2003, and Director of the University of California, Los Angeles Institute of the Environment. As one of California’s first environmental lawyers, she reportedly initiated precedent-setting test cases under the CAA and California air quality laws while practicing as a staff attorney for the Center for Law in the Public Interest. Nichols holds a J.D. from Yale Law School and a Bachelor of Arts degree from Cornell University (where she majored in Russian literature). She has two grown children, both attorneys, and is married to John F. Daum, a lawyer who reportedly represents Exxon Mobil.

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<sup>8</sup> See generally “Kathleen Alana McGinty,” at <http://www.depweb.state.pa.us/dep/cwp/view.asp?a=3&q=461275> (accessed November 21, 2008).

<sup>9</sup> See “Background Information: Chairman of the ARB – Mary D. Nichols,” at <http://www.arb.ca.gov/board/bio/chair.htm> (accessed November 21, 2008); Felicity Barringer, “The New Team: Mary D. Nichols,” *New York Times*, November 19, 2008; See Felicity Barringer, “The New Team: Mary D. Nichols,” *New York Times*, November 19, 2008; Debra Kahn, “Calif. Official – Said to be Candidate for Top Obama Post – Hints at National Strategy,” *Greenwire*, November 7, 2008.

Nichols was identified by the *New York Times* as a potential head of the EPA earlier this month. The article recognized that she would bring “expertise in environmental issues, particularly air pollution, experience in carrying out policy and familiarity with both state-level initiatives and the inner workings of the EPA” to the post but warned that “transportation and utility industry representatives . . . see her push on climate change regulation in California as evidence of an ingrained pro-regulatory bias.”

Although careful not to offer specifics as to a regulatory agenda were she to be selected to head EPA, Nichols recently told reporters that she recognized the need to tie together an increasing number of state-mandated auto-emission standards. “I do have some sympathy for automakers’ complaint that they’re being regulated by a number of sides,” she said. She also stated that EPA already possesses the authority to regulate greenhouse gases from vehicles and power plants under the Clean Air Act, although Congress would need to grant the agency authority to create a market-based system for selling greenhouse gas allowances – something that, according to her, would not happen nationally for at least another two years. “There are certainly some things that need to be added to [EPA’s] authority to implement cap and trade,” Nichols said. “But for cars and power plants, EPA has some authority they can exercise while waiting for Congress to act.”

### **Kathleen Sebelius**<sup>10</sup>

Kathleen Sebelius has served as governor of Kansas since 2003 (a surprise victory for the Democrats, given that Republicans outnumber Democrats in Kansas by a margin of 2 to 1). She was elected to a second term in 2006. During the recent presidential elections, she was identified as a possible vice presidential candidate.

Governor Sebelius serves on the National Governors Association’s Executive Committee and is co-chair of the National Governors Association’s initiative Securing a Clean Energy Future. Sebelius is the immediate past chair of the Education Commission of the States and, as past chair of the Democratic Governors Association, she currently serves on its Executive Committee. Her husband Gary is a federal magistrate judge; she is the daughter-in-law of late Kansas Republican Congressman Keith Sebelius. She is also the first daughter of a Governor (John Gilligan, Ohio, 1971-1975) in U.S. history to be elected to that same position. As the *Kansas City Star* noted in a recent editorial, “Sebelius’ main claim to fame in recent years was her correct decision to oppose expansion of a coal power plant [by Sunflower Electric] in western Kansas.” Sebelius holds an undergraduate degree from Trinity Washington University and a Master’s degree from the University of Kansas.

### **Robert M. Sussman**<sup>11</sup>

Robert Sussman is currently a senior fellow at the Center for American Progress. Previously, he headed Latham & Watkin’s environmental practice in Washington, D.C. for 10 years. During the Clinton administration, Sussman served as Deputy Administrator of the Environmental Protection Agency and, “as EPA’s second-in-command, he had responsibility for all the agency’s programs and played a leading role on Superfund, global warming, science policy, and the environmental aspects of the North American Free Trade Agreement.”

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<sup>10</sup> See “Governor Kathleen Sebelius Biography,” at <http://www.governor.ks.gov/about/bio.htm> (accessed November 21, 2008); Amanda Ripley and Karen Tumulty, America’s Five Best Governors, *Time* (November 13, 2005); Chris Cillizza and Shailagh Murray, “So, Candidates, Who’s It Going to Be?,” *Washington Post* (May 11, 2008); Yael T. Abouhalkah, “Kathleen Sebelius Poised to Leave Kansas in Time of Need,” *Kansas City Star* (November 7, 2008).

<sup>11</sup> See “Robert M. Sussman,” at <http://www.americanprogress.org/experts/SussmanRobert.html> (accessed November 21, 2008); Robert Sussman, “A Good Start, But Not Good Enough,” at [http://www.americanprogress.org/issues/2008/11/dingell\\_boucher.html](http://www.americanprogress.org/issues/2008/11/dingell_boucher.html) (accessed November 21, 2008).



Today, Sussman is on the Board of Directors of the Environmental Law Institute, the Board of Advisors of the Center for International Environmental Law, and was on the Board of the Environmental Alliance. He also served on the Steering Committee of the Enterprise for the Environment initiative chaired by former EPA Administrator Ruckelshaus and on the National Academy of Sciences Board on Chemical Sciences and Technology. Sussman is a prolific writer and commentator on environmental issues. Recently, in an article posted on the Center for American Progress' website on November 7, 2008, he shared his opinion on House Energy and Commerce Committee Chairmen John Dingell's and Subcommittee on Energy and Air Quality Chairman Rick Boucher's (D-VA) draft of climate change legislation unveiled in October – an effort that he labeled “a good start, but not good enough.”

“The draft bill has a number of strengths for which Dingell and Boucher deserve credit,” Sussman admitted. He elaborated:

It is economy-wide, covering 87 percent of U.S. greenhouse gas emissions. It sets a long-term target of reducing emissions by 80 percent of 2005 levels by 2050 that corresponds with prevailing scientific consensus. It contains strong energy efficiency programs. It uses the allowance allocation process both to stimulate low-carbon energy technologies and provide consumers relief from high energy prices. It provides for strict oversight of the carbon markets to prevent manipulation and assure transparency. And it creates a “strategic reserve” of allowances that would be auctioned if allowance prices are too high, but avoids a “safety valve” that would suspend the emission cap if allowance prices exceed a predetermined level.

Sussman added, however, that “[d]espite these positive features, two aspects of the bill—the absence of allowance auctioning in the cap-and-trade program and weak emission reduction targets for 2020—raise serious concerns and should not be the starting point for legislative action in the new Congress. . . . the draft bill calls for reducing emissions from covered sources by only 6 percent below 2005 levels by 2020. This is significantly less than nearly all other recent bills and California's AB 32, which require a 20 percent reduction by 2020. It is also well below the 15 to 20 percent 2020 target supported by 152 House members in an October 2 letter to Speaker Nancy Pelosi.”

Sussman is a graduate of Yale University and Yale Law School and, along with Lisa Jackson and Cecilia V. Estolano, is one of three EPA Review Team Leaders within President-Elect Obama's Transition Team.

### **Other Possibilities**

As *The Washington Post* has noted, picking potential selections for the new administration's cabinet positions is “Washington's favorite parlor game.” Therefore, for the sake of completeness, one should not discount the following possibilities: **Brad Campbell** (former commissioner, New Jersey Department of Environmental Protection; former Regional Administrator for EPA's Mid-Atlantic region during Clinton Administration); **Lincoln Chafee** (former U.S. Senator (R-RI)); **Cecilia V. Estolano** (Chief Executive Officer of the Community Redevelopment Agency of Los Angeles; former land use and environmental law attorney at Gibson, Dunn & Crutcher; Senior Policy Advisor to the Assistant Administrator for Air and Radiation at the U.S. Environmental Protection Agency; and member of the California Coastal Commission); **Jonathan Lash** (President, World Resources Institute); **Ed Markey** (U.S. Representative (D-Mass)); or **Lisa Renstrom** (former president of the Sierra Club).

