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MARCELLUS SHALE OPERATIONS: PREPARING FOR AND HANDLING CATASTROPHES

As recent events in the Gulf of Mexico demonstrate, dealing with catastrophes such as explosions, releases, fires, and natural disasters that affect business operations is difficult and fraught with peril. A relatively manageable crisis that is not handled correctly can rapidly turn into a much larger financial and legal problem, increasing a company's liability and creating a public-relations and financial nightmare.

The business opportunities arising from the development of the Marcellus Shale resources in Pennsylvania, West Virginia, Ohio, and New York are unparalleled. However, as with most commercial opportunities, there are potential risks, ranging from releases to the environment to events that result in property damage or personal injury. Planning and

preparing for such events in advance will help position a company to address any issues that may arise in a prompt, decisive, and deliberate manner.

If such events occur, the first few hours and days likely will be critical in determining the ultimate outcome of the crisis, both in terms of mitigating the losses of third parties and minimizing legal risk to the company. Developing detailed and comprehensive response action plans in advance will put the company in the best possible position during that difficult time. In the period immediately following an incident, the site is likely to be overrun with government officials or investigators, potentially adverse parties, insurance company personnel, witnesses, experts, and other parties whose interests may not

be completely aligned with those of the company. Saying or doing the wrong thing can directly and negatively effect the company's interests and the company's decisions and actions during that period can have long-term and far-reaching consequences. Having thorough and fully developed plans in place to address any situation that may arise can make the difference between effectively managing a crisis and having it spiral out of control, creating additional risks and potentially exacerbating liabilities.

These plans should address, among other things: (1) substantive disaster-response actions; (2) resource mobilization; (3) communications/public relations; (4) evidence preservation; and (5) litigation risk minimization. Among the key issues that need to be addressed immediately after a catastrophe are the following:

- Does the company have a reporting obligation to state and/or federal environmental or workplace-safety agencies? What is the timing and scope of the reporting required and how should it be accomplished?
- Does the company have a reporting obligation to investors, shareholders, and/or securities regulators? What is the nature and extent of that reporting obligation?
- Does the company have insurance and is it adequate? If so, what types does it have and what steps can be taken to maximize coverage? If there is potentially applicable insurance, notice must be given and the insurers must be kept informed and provided with the opportunity to investigate, but what is the best way to handle insurance matters to avoid later coverage disputes?
- Are government agencies investigating on- or off-site? What is the best way to manage the relationship with these agencies and how can the flow of information be properly controlled?
- How should the company respond to requests for information, documents, or public comment, or search warrants and grand jury subpoenas?
- Should the company conduct an internal investigation concerning the incident? If so, who should lead the investigation and who should be involved?
- How should the company handle communications with interested stakeholders, including the audit committee and the board of directors?
- What document-preservation obligations might the company have with respect to electronic and hard-copy documents, email, and data files? How can the company ensure that any document-preservation obligations are fully met?

- What steps should be taken to prepare for possible civil litigation arising from the event?
- How should the company handle claims by persons and entities affected by the event?
- What are the company's obligations under federal and state labor and employment laws?

Jones Day has assisted a wide array of clients in developing disaster-response plans and corporate planning activities that are designed to address many of these issues *before* a crisis occurs, to ensure that the company's immediate responses are appropriate and strategic. These plans are also intended to ensure that communication, decision making, and action responsibilities are clear. Jones Day has in-depth experience handling crises of all sorts, ranging from events, such as explosions, fires, chemical releases, and workplace injuries, to natural disasters, such as hurricanes and floods. As just one relevant example, the company is representing Transocean in litigation, insurance, and other matters arising from the April 2010 explosion and fire on the Deepwater Horizon drilling platform in the Gulf of Mexico.

As further described herein, Jones Day has a fully integrated and cross-disciplinary team that can assist clients with virtually any issue pertaining to a Marcellus Shale-related catastrophic event, including pre-incident planning and post-incident insurance coverage; government agency interaction; public relations; and litigation matters, such as evidence preservation. Among the practice disciplines represented by Jones Day's Marcellus Shale team are tort defense and civil litigation, environmental litigation and regulation, insurance counseling and coverage, government investigation, media and governmental relations, construction litigation, and corporate and securities. The attorneys on the team are listed here:

MARY BETH DEEMER – Mary Beth has wide-ranging experience in environmental regulation and litigation. She frequently speaks at environmental conferences and seminars, including programs focused on the environmental issues arising from Marcellus Shale development, and she is intimately familiar with the state and federal environmental regulations that will govern Marcellus Shale gas extraction. Mary Beth's crisis-response experience includes the representation of CITGO in connection with the OSHA investigation of a fatal explosion and fire at the company's facility in Lake Charles, Louisiana; the representation of Zinc Corporation of America in connection with the OSHA investigation of the

overhead-bin weld failure that resulted in two fatalities at the company's plant in Monaca, Pennsylvania; and the representation of PCS Nitrogen Fertilizer, L.P., in connection with the grand jury investigation into alleged environmental crimes at the company's facility in Geismar, Louisiana.

ANTONIO DIAS – Tony regularly represents companies facing scrutiny arising from incidents or conduct alleged to pose risks to the community, such as the release of allegedly toxic substances. He develops strategic responses to government investigations and inquiries as well as private litigation risks, and he creates and implements external communication plans for use during crisis situations. Tony has experience with energy exploration and transportation explosions, construction accidents, international consumer product safety issues, multistate toxic material usage issues, and investigations related to business conduct. Among the companies Tony has represented in crisis situations are Sherwin-Williams and Mattel.

KEVIN HOLEWINSKI – Kevin has extensive experience across a number of regulatory areas and investigations, ranging from environmental issues to criminal and OSHA matters. Companies represented by Kevin include Temple-Inland Forest Products Corporation, in connection with the investigation by OSHA and the Pennsylvania State Fire Marshal of a fatal explosion and fire at the company's particleboard plant in Mount Jewett, Pennsylvania; Texas Keystone, in connection with a three-month OSHA investigation arising from a drilling-operation fatality and injuries; and Cameron Family Glass Packaging, in a variety of OSHA, environmental, and regulatory claims that arose during the commissioning of the company's glass plant in Kalama, Washington.

JOHN IOLE – John has represented policyholders in a wide variety of insurance claims arising from accidents and natural disasters. He represented Royston Chemicals, Inc., in a claim alleging chemical contamination of a municipal drinking-water supply; a policyholder in claims involving extensive water damage to a shopping mall; and Macy's, Inc., in claims involving extensive hurricane damage, including the complete destruction of several of its department stores. These claims have involved both property damage and business-interruption losses. John is familiar with first-party property and casualty coverage issues under both domestic and international policy forms. He also has substantial environmental litigation experience, having acted as lead trial coun-

sel for Atlas Minerals & Chemicals and Exide Corp. in the *U.S. v. Atlas Minerals & Chemicals* multiparty cost-recovery action involving extensive liabilities associated with a landfill site.

THOMAS JONES – Tom has litigated matters ranging from complex toxic exposure and business disputes to cases involving securities disclosures, partnership and investment agreements, and corporate acquisitions. He has served as counsel in numerous commercial arbitrations and has significant appellate experience involving novel questions of law. Tom routinely represents clients in matters involving technical, medical, and scientific issues and has extensive experience working with experts in a variety of fields, as well as in the preparation of challenges to expert testimony. Representative matters include cases claiming community exposure to allegedly toxic air and groundwater released by manufacturing facilities; cases claiming community exposure to allegedly toxic elements of paints and coatings; and multiple disputes over the terms of partnership, LLC, and joint-venture agreements.

PETER LAUN – Peter has represented policyholders pursuing insurance coverage for different types of property and liability insurance claims arising from fires, explosions, and natural causes. His insurance experience includes the following: representation of PepsiCo in liability and property insurance claims in the United States, South America, the Middle East, and Europe arising from fires, floods, structural failures, and product recalls; representation of TECO Energy in claims arising from the catastrophic failure of generator and turbine units at a power plant in Guatemala; representation of Cameron Family Glass Packaging in insurance claims arising from the sudden and catastrophic failure of the company's glass furnace in Kalama, Washington; representation of Bridgestone/Firestone in insurance claims arising from a tire recall and a variety of accidents allegedly attributed to Firestone tires; representation of Beazer East, Inc., in environmental insurance coverage claims involving more than 200 sites in the U.S. and Canada; and representation of STERIS Corporation in connection with liability and insurance claims arising from personal injuries and deaths allegedly resulting from a STERIS product.

FRANCIS MURACCA – Fran provides corporate counseling to clients before, during, and after crises, on such matters as bank and investor relations, debt and equity restructuring, and corporate governance. Among his recent engagements

was the representation of Cameron Family Glass Packaging in negotiations with lenders and equity holders necessitated by the sudden and catastrophic failure of its glass furnace in Kalama, Washington.

ROY POWELL – Roy has handled a wide range of litigation and counseling matters involving a broad variety of business operations, including power generation, chemical manufacturing and distribution, oil and gas exploration and transportation, and mining. He has been involved at the earliest stages of many catastrophic events, including explosions arising from natural gas extraction; chemical releases, fires, and other crises associated with manufacturing facilities; underground mine explosions; and mine-roof failures; his experience also includes handling workplace injuries and fatalities. Roy has worked with clients to develop best practices for preventing these events and to formulate coordinated response plans to address them if they do occur. He has represented a number of public and privately held companies engaged in oil and gas exploration and transportation, including the Williams Companies, Transco, Occidental, The Shaw Group, and Parsons Energy and Chemicals.

JEFFREY SCHLEGEL – Jeff represents energy-industry participants in transactional matters, including mergers and acquisitions, distressed sales and purchases, construction, operations, maintenance and services contracts, and other

related matters in upstream, midstream, and downstream sources and uses of energy, both traditional and alternative. He has been involved in matters in Africa, Asia, Europe, and North America, including transactions and issues for the following shale resources: Antrim, Barnett, Marcellus, Chattanooga, Haynesville, and Utica.

STEPHEN SOZIO – Steve, a former Assistant U.S. Attorney, has represented clients in an array of government investigations conducted by a variety of state and federal authorities, including the DOJ, EPA, the IRS-CID, the FBI, the FDA, and the SEC. Steve recently represented Diebold, Inc., in an SEC/DOJ investigation; STERIS Corporation in the criminal investigation related to a sterilizing system marketed by the company; and a medical-equipment manufacturer in a grand jury investigation.

ADDITIONAL INFORMATION

For additional information on preparing for and handling catastrophes, please contact your principal Firm representative or one of the lawyers listed in this publication. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

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