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CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

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Ministry of Finance
Information Unit
P.O. Box 8008 Dep
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Norway

Attention: **Expert Group on Investments in Coal and Petroleum Companies** (Martin Skancke, Elroy Dimson, Michael Hoel, Laura Starks, Gro Nystuen, Magdalena Kettis)

Dear Members of the Expert Group,

The Center for International Environmental Law (CIEL) respectfully submits the following comments regarding the Norwegian Government Pension Fund Global's (GPFG) investments in coal and petroleum companies. These investments expose Norway to legal, financial, and reputational risks inherent to the fossil fuel sector. Currently, such risks are most intense in the coal sector. Moreover, continued fossil fuel investment is inconsistent with the GPFG's duty to ensure inter-generational equity as well as Norway's international obligations. Norway has committed to both protect the interests of future generations and to lead efforts to address climate change. In light of these commitments, the risks inherent to the fossil fuel industry, and the critical need to reduce global emissions, we call on the Expert Group to recommend that the GPFG divest.

1) Legal risks to fossil fuel investments threaten GPFG's assets.

Coal and petroleum companies are exposed to legal risks that could significantly dampen returns from fossil fuel investment. Continued investment in fossil fuels threatens GPFG assets because of increased litigation and regulatory risks.

Litigation risk

Entities in the fossil fuel industry are exposed to a large number of diverse litigation risks. With respect to climate change specifically, there are two types of litigation that could lead to significant financial liabilities: (1) direct claims for damage caused by climate change; and (2) financial claims for damage caused to shareholder or consumer assets.

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Climate change direct damage claims

This year, the scientific journal *Climatic Change* published new research that traces nearly two-thirds of all industrial emissions of greenhouse gases to only 90 entities.[1] The paper analyzes historic contributions to industrial emissions based on self-reported production records, regulatory filings, and industry reports spanning more than 150 years and finds that these 90 entities—known as "Carbon Majors"— have contributed an estimated 914 billion tons of carbon dioxide equivalent (GtCO2e). This pollution constitutes 63% of industrial greenhouse gas emissions from 1854-2010.

The ability to connect 63% of industrial green house gas emissions to only 90 companies dramatically increases the likelihood of successful climate change claims against CO^2 producers. Indeed, this analysis coupled with increasing ability to document the impacts of climate change on specific regions, countries, and even communities, adds a vital link in the causal chain essential to all successful litigation: connecting the actions of identifiable defendants to the harms suffered by identifiable plaintiffs.

According to the Norges Bank Investment Management's website, the GPFG invests in 44 of the 90 Carbon Majors.[2] Analysis based on the Carbon Majors research and forthcoming attribution science will increase litigation risks against the 44 Carbon Majors in which GPFG invests. This is especially true for the coal Carbon Majors—according to the International Energy Association, coal is more emission intensive than other fossil fuels.[3] GPFG invests in 10 coal Carbon Majors: Alpha Natural Resources Inc. ("Alpha"), Anglo American PLC, Arch Coal Inc. ("Arch Coal"), BHP Billiton, Ltd, Coal India Ltd., Consol Energy Inc., Peabody Energy Corp ("Peabody"), Repsol SA, RWE AG, and Sasol Ltd. For all 44 Carbon Majors, there will likely be an upsurge in both the frequency of lawsuits filed as well as monetary penalties resulting from either successful adjudication or class action and government settlements.

Financial claims

In addition to claims made against the Carbon Majors for direct damages from climate change, fossil fuel producers are exposed to a variety of financial claims. Financial claims that

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[1] Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 2014(2) Climatic Change, *available at* http://link.springer.com/article/10.1007/s10584-013-0986-y.

[2] These 44 entities are: Chevron Corporation, Exxon Mobil Corp, BP, PLC, Gazprom OAO, Royal Dutch Shell PLC, ConocoPhillips, Coal India Ltd, Peabody Energy Corp, Total SA, PetroChina, Consol Energy, Inc., BHP Billiton, Ltd, Anglo American PLC, RWE AG, Eni Spa, Arch Coal, Inc., Petronas Gas, Anadarko, Occidental Petroleum Corp, Oil and Natural Gas Corp, Lukoil, OAO, Sasol Ltd, Repsol SA, Marathon Petroleum Corp, Rosneft, OAO, Hess Corp, Alpha Natural Resources, Inc., Ecopetrol SA, Encana Corp, Devon Energy Corp, BG Group PLC, Sinopec Shanghai Petrochemical Co Ltd, Suncor Energy Inc., LaFarge SA, Holcim, Ltd, Canadian Natural Resources Ltd, Apache Corp, Talisman Energy Inc., Husky Energy Inc., HeidelbergCement AG, Cemex. Government Pension Fund Global's Holdings, *available at* http://www.nbim.no/en/the-fund/holdings-/holdings-and-voting/ SAB de CV, Italcementi SPA, Italy, Murphy Oil Corp, USA, and OMV AG.

[3] International Energy Agency, *CO2 EMISSIONS FROM FUEL COMBUSTION Highlights* (2013) at 9, *available at* http://www.iea.org/publications/freepublications/publication/co2emissionsfromfuelcombustionhighlights2013.pdf.

could be brought in the context of climate change include those due to misleading statements or omissions made to purchasers, consumers, investors, or regulatory authorities.[4] A wide variety of statements may establish these types of claims, including improper valuation of shareholder assets based on the "stranded assets" theorem that: "The budget [for a 2°C scenario] is only a fraction of the carbon embedded in the world's indicated fossil fuel reserves . . . . A precautionary approach means only 20% of total fossil fuel reserves can be burnt to 2050."[5] Stranded assets could also lead to claims regarding mismanagement and corporate governance failures.[6] In addition to these shareholder claims, consumers and governments may also sue the fossil fuel industry for misleading disclosures, advertisements, and engagement in campaigns of disinformation.[7]

In sum, escalated litigation risk (and corresponding pecuniary penalties) loom over the fossil fuel industry's financial trajectory.

Regulatory risk

With climate change acceleration, there is an intensification of both its direct impacts (e.g., sea level rise, heat temperature spikes, warming oceans, shrinking ice sheets and glaciers, declining Arctic sea ice, extreme weather events, and ocean acidification)[8] as well as its indirect impacts (e.g., drought, conflict, decreased agricultural production, communicable disease upsurges, displacement, loss of life and property).[9] As governments face the growing impacts and corresponding concerns of their citizens, they are using[10] and will continue to use regulation to answer the urgent need to reduce greenhouse gas emissions. Two growing regulatory avenues that will decrease the profitability of the fossil fuel industry are: (1) more stringent performance standards; and (2) increases to carbon prices. Performance standards include fossil fuel process changes, output reductions, and shifts to different inputs and/or alternative technologies.[11] More stringent performance standards are a key mode by which

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[4] *See, e.g.,* Carol Zacharias, Climate Change Is Heating Up: D&O Liability (2009), *available at* https://www.advisen.com/downloads/JLR-Spring2009ClimateChangeZacharias.pdf; *c.f., Vaughn Leroy Meyer v. JinkoSolar Holding Co.,* 2014 WL 3747181 (2nd Cir. 2014).
[5] Carbon Tracker Initiative, *Unburnable Carbon 2013: Wasted Capital and Stranded Assets*, at 4, *available at* http://www.carbontracker.org/site/wastedcapital.
[6] Corporate managers cannot disregard a known risk. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).
[7] *Cf. Kasky v. Nike, Inc.,* 45 P.3d 243 (Cal. 2002).
[8] United States National Aeronautics and Space Administration (NASA), *Evidence/ Climate Change: How do we know? available at* http://climate.nasa.gov/evidence/.
[9] *See, e.g.,* Jon Barnett and W. Neil Adger, *Climate Change, Human Security and Violent Conflic*t, Political Geography 26 (2007).
[10] On June 2, 2014, the United States Environmental Protection Agency proposed rules to reduce carbon emissions from coal-fueled power plants. The rules aim for a substantial reduction—30% below 2005 levels—by 2030. United States Environmental Protection Agency, *Clean Power Plan Proposed Rule*, *available at* http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule.
[11] Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change 2007,* Climate Change 2007: Working Group III: Mitigation of Climate Change, *available at* http://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch13s13-2-1-1.html.

demand for fossil fuels will decrease and correspondingly, fossil fuel companies will be left with unburnable fossil fuel reserves or "stranded assets."[12]

With respect to carbon taxes and pricing, the global movement to demand that fossil fuel companies internalize the costs that they have externalized for far too long is growing stronger.[13] Norway already levies carbon taxes and prices.[14] As people and communities around the world continue to experience extreme weather events and other climate impacts, the social cost of carbon will rise, which in turn drives the need for more countries to adopt carbon pricing and taxes.[15] Indeed, after the September 2014 Climate Summit, 73 countries signaled their support for some sort of carbon pricing mechanism.[16] These and other kinds of regulation could affect fossil fuel industry bottom lines and, correspondingly, endanger GPFG's investment returns.

2) GPFG should divest from coal immediately.

The risks described above are amplified within the coal industry. GPFG invests significantly in coal – the dirtiest fossil fuel – despite the industry's financial decline and the reputational harm GPFG risks if it continues to invest in the global coal industry.[17] Given the immediate challenges faced by the coal industry, GPFG should divest from coal now.

An industry in decline

A future financial decline of the fossil fuel industry is foreshadowed by the current decline of the global coal industry. Profitability of coal companies in India is plunging.[18] Recent

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[12] *See* Carbon Tracker Initiative, *supra* note 5.
[13] For instance, former U.S. treasury secretary, Hank Paulson, stated "Climate change is the single biggest risk to the global economy today. The solution . . . is to put a price on carbon." Sustainable Business News, *Paulson: Climate Change is the Biggest Risk to the Global Economy* (Sept. 30, 2014) (internal quotations omitted), *available at* http://www.greenbiz.com/blog/2014/09/30/paulson-climate-change-biggest-risk-global-economy?page=full.
[14] NOU 2012: 16, *Cost-Benefit Analysis: Review from a Committee Appointed by Royal Decree of 18 February 2011*, 9 Carbon price paths (Oct. 3, 2012) *available at* http://www.regjeringen.no/en/dep/fin/Documents-and-publications/official-norwegian-reports-/2012/nou-2012-16-2/10.html?id=713585.
[15] "As countries begin to construct their 2030, 2040, and 2050 greenhouse gas mitigation scenarios, they have increasingly identified [sic] cost-efficient policies, including carbon pricing instruments, as essential elements of proposed climate action." World Bank, *Carbon Pricing Readiness: Looking Ahead*, *available at* http://www.worldbank.org/en/programs/pricing-carbon#3. Moreover, "40 national and over 20 sub-national jurisdictions have already implemented or scheduled emissions trading schemes or carbon taxes." World Bank, *Statement Putting a Price on Carbon* (June 3, 2014), *available at* http://www.worldbank.org/en/programs/pricing-carbon#1.
[16] World Bank, *73 Countries and Over 1,000 Businesses Speak Out in Support of a Price on Carbon* (Sept. 22, 2014) *available at* http://www.worldbank.org/en/news/feature/2014/09/22/governments-businesses-support-carbon-pricing.
[17] As an international environmental organization primarily based in the United States, CIEL is uniquely suited to discuss problems with the American coal industry.
[18] Rajhkumar K Shaaw, *Most Indian Stocks Drop on Coal-Mine Verdict as Jindal Tumbles* (Sept. 24, 2014) Bloomberg News, *available at*

ratings downgrades include one of China's biggest coal companies.[19] Additionally, three GPFG coal investees – Alpha, Arch Coal, Peabody – struggle against insolvency. Peabody was removed from the S&P 500 Index on September 19, 2014.[20] Alpha, Arch Coal, and Peabody were called the "Worst Performing Stocks" on September 2, 2014.[21] This is because they, like the rest of American coal, are suffering from systemic declining demand and thus long-term diminished share prices.

Reputational risk

Although the fossil fuel industry is exposed to its own reputational risk (and consequently potential GPFG asset degradation), the fossil fuel industry[22], and the coal industry in particular, also poses risks to GPFG's reputation. Coal-based energy production results in significant harms to people and the planet, both in terms of its contribution to climate change as well as its negative impact on local people (e.g. loss of life, deteriorating health, and displacement) and the surrounding environment (e.g. water, air, and land pollution). For instance, GPFG invests in companies—Alpha, Arch Coal Inc., CONSOL Energy Inc., and TECO Energy Inc.—that engage in mountain top coal removal, a process that involves blasting mountains, burying streams, polluting the surrounding environment, and displacing local people. Furthermore, GPFG investee, Coal India Ltd., was found to be running 2/3 of its mines without environmental permits in 2011, and, moreover, "90% of India's coal comes from open pit mines, with severe impacts in terms of displacement, loss of livelihoods, destroyed forest, polluted water bodies and air pollution."[23] China, the country responsible for 46% of the world's coal consumption, has rampant water loss as a result of coal energy production.[24] And air pollution concerns have caused 113 Chinese cities to start tracking fine particle pollution levels.[25]

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http://www.businessweek.com/news/2014-09-23/india-s-nifty-index-futures-little-changed-a-day-before-expiry.

[19] Moody's Global Credit Research, *Moody's Downgrades Yanzhou Coal's Ratings to Ba2, Outlook Negative* (Sept. 3, 2014), *available at* https://www.moodys.com/research/Moodys-downgrades-Yanzhou-Coals-ratings-to-Ba2-outlook-negative--PR_307007.

[20] St. Louis Staff Reports, *Peabody Energy to be Removed from S&P 500 index* (Sept. 12, 2014), *available at* http://www.stltoday.com/business/local/peabody-energy-to-be-removed-from-s-p-index/article_601ff555-f353-5df4-8f02-6ecae78e79d4.html

[21] Brett Deane, *Worst Performing Stocks: Arch Coal (ACI), Alpha Natural Resources,,Yamana Gold (AUY), Peabody Energy(BTU),* Boardwalk Pipeline Partners, LP (Sept. 2, 2014), http://www.investorwired.com/best-performing-stocks-arch-coal-aci-alpha-natural-resources-yamana-gold-auy-peabody-energybtu-boardwalk-pipeline-partners-lp/173479/.

[22] For example, GPFG investee, Chevron Corporation, has a large global human rights infringement footprint. *See, e.g.,* Karen Hinton, *From Ecuador to Richmond to Nigeria, Chevron Flouts Safety, Lacks Respect for Communities Where It Operates* (Oct. 13, 2012), *available at* http://www.huffingtonpost.com/karen-hinton/chevron-oil-richmond_b_1766170.html.

[23] Heffa Schücking, *Banking On Coal* (Nov. 2013) at 51, *available at* http://www.banktrack.org/show/news/banking_on_coal_undermining_our_climate.

[24] A report published by the Chinese Ministry of Water Resources in March 2013 shows that "the country has lost roughly half of its rivers and streams" since 1990. *Id.* at 36.

[25] *Id.*

In addition to the environmental and human harms identified above, safety issues within the industry itself are a significant cause for concern. Safety violations in the United States, one of the world's most developed nations, exemplify the problems that coal poses to the global community, especially to emerging economies with limited enforcement capability. For example, in 2011, GPFG investee, Alpha, acquired Massey Energy, a company that owned a mine where a massive explosion occurred on April 5, 2010. The explosion killed 29 people. Before the explosion, 10,653 safety violations had been assessed against Massey in 2009 alone.[26] After the explosion, Massey argued that its "history of safety violations was just a normal part of the mining process. Its safety procedures were no worse than other American coal companies."[27] It is unclear whether Alpha has corrected its predecessor's safety procedures and whether these safety procedures are normal for the American industry. These kinds of safety issues are not limited to the United States. Earlier this year, 301 people died in a mining explosion in Soma, Turkey.[28]

Environmental degradation and human rights concerns, in addition to the financial decline of the industry, provide ample reasons for GPFG to divest from coal immediately.

3) Failure to divest conflicts with Norway's commitments.

While recognizing the Ministry of Finance's statement that the GPFG is "not an instrument in Norwegian foreign or environmental policy,"[29] continued investment in fossil fuels is a *de facto* policy decision to support an industry that drives climate change. Such investment fails to align with Norway's commitments to ensure inter-generational equality and to address climate change.

Inter-generational equity

Inter-generational equity was a founding premise of the GPFG and continues to be central to the aims of the GPFG and the Norwegian Government.[30] The Minister of Finance has declared that the GPFG is based on inter-generational equality and saving for future governmental expenditure.[31] Thus, simply saving *funds* for future generations is insufficient,

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[26] *In re Massey Energy Co. Derivative & Class Action Litig.,* 2011 Del. Ch. LEXIS 83, *35 (May 31, 2011) (internal quotations omitted).
[27] *Id.*
[28] Turkish Press, *Four People Arrested Over Turkey Mine Disaster* (May 18, 2014), *available at* http://www.turkishpress.com/news/406791/.
[29] Siv Jensen, *The Norwegian Government Pension Fund Global- a Financial Investor, Not a Political Policy Tool*, (Apr. 4, 2014), *available at* http://www.regjeringen.no/en/dep/fin/news/Speeches-and-articles/ministerens-taler-og-artikler/taler-og-artikler-av-finansminister-si-2/2014/The-Norwegian-Government-Pension-Fund-Global---a-financial-investor-not-a-political-policy-tool.html?regj_oss=1&id=755283.
[30] The Minister of Finance of Norway has noted the great importance of ensuring that the GPFG benefits the future generations of Norway. Anita Halvorseen, *Addressing Climate Change Through the Norwegian Sovereign Wealth Fund (SWF) – Using Responsible Investments to Encourage Corporations to take ESG Issues into Account in their Decision-Making*, 26, *available at* http://sssrn.com/abstract=1712799.
[31] Jenson, *supra* note 29.

the GPFG must also address inter-generational equity.[32] Climate change affects inter-generational equity because of its disproportionate impact on youth and future generations. Indeed, there is no equity between present and future generations if climate change destroys our habitable globe.[33] As a self-declared proponent of inter-generational equity, the GPFG must consider how continued investment in a sector that significantly increases global emissions affects the rights of present and future generations, and take steps to ensure that inter-generational equity can be achieved. In this case, the necessary step is to divest.

International leadership

Norway has committed to the international community that it will lead in the global transition to a low-carbon economy. As an Annex I Party to the UN Framework Convention on Climate Change, Norway is obligated under Article 4.2(a) to adopt national policies and take corresponding measures to mitigate climate change that will demonstrate it is "taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention."[34]

While Norway has been deeply engaged in efforts to reduce emissions in the forest sector globally,[35] it is only recently that Norway has turned attention to its investments in fossil fuels. For example, late last year, Norway made a commitment to end public financing of new coal plants.[36] GPFG's continued investment in the coal industry conflicts with this commitment as well as Norway's international climate obligations. Furthermore, Norway can make a meaningful impact on emissions by joining the movement to divest from fossil fuels. The divestment movement has grown considerably within the past three years and, as of September 19, 2014, assets worth 320 billion Kroner (or 50 billion USD) are committed to divestment.[37] The GPFG with its considerable market power and assets would significantly

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[32] The GPFG has non-financial obligations, such as the ethical guidelines for investment that include environmental principles. *See, e.g.,* Ministry of Finance, *Guidelines for Observation and Exclusion from the Government Pension Fund Global's Investment Universe,* (March 1, 2010), *available at* http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/guidelines-for-observation-and-exclusion.html?id=594254; *see also* Ministry of Finance, *A Sound and Responsible Management of the Government Pension Fund*, (Apr. 4, 2014), *available at* http://www.regjeringen.no/en/dep/fin/press-center/press-releases/2014/A-sound-and-responsible-management-of-the-Government-Pension-Fund.html?id=755312.
[33] *Cf. id*. at 5.
[34] UN Framework Convention on Climate Change Art. 4.2(a).
[35] Norway has invested heavily in initiatives like REDD+ (Reducing Emissions from Deforestation and Forest Degradation). In 2013, the GPFG also agreed to divest from companies that engage in tropical deforestation. Mongabay (Mar. 11, 2013) *available at*, http://news.mongabay.com/2013/0311-norway-divestment.html
[36] The White House Office of the Press Secretary, *Joint Statement by Kingdom of Denmark, Republic of Finland, Republic of Iceland, Kingdom of Norway, Kingdom of Sweden, and the United States of America* (Sept. 4, 2013) *available at* http://www.whitehouse.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdo.
[37] Arabella Advisors, Measuring the Global Fossil Fuel Divestment Movement, *available at* http://www.arabellaadvisors.com/wp-content/uploads/2014/09/Measuring-the-Global-Divestment-Movement.pdf.

scale up divestment. Accordingly, GPFG's divestment would not only provide the usual benefits of divestment – revealed preferences for low carbon economy, avoided reputational harm – but would also change the market signals that presently drive fossil fuel investments and thus would be a powerful step towards reduced global emissions.

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GPFG's divestment from fossil fuels would show that Norway truly leads the world in a global shift towards a low-carbon economy. It would also protect long-term shareholder value by avoiding the legal and financial risks particular to the fossil fuel industry. And while we recommend that GPFG divest from all fossil fuel investments, they should divest from coal immediately.

Sincerely,

Niranjali Amerasinghe
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Center for International Environmental Law