

EVERGREEN RESOURCES INC
 Form S-8
 November 05, 2003

UNITED STATES
 SECURITIES AND EXCHANGE COMMISSION
 WASHINGTON, DC 20549

FORM S-8
 REGISTRATION STATEMENT
 UNDER
 THE SECURITIES ACT OF 1933

EVERGREEN RESOURCES, INC.

(Exact name of registrant as specified in its charter)

COLORADO

(State or other jurisdiction of
 incorporation of organization)

84-0834147

(I.R.S. Employer
 Identification Number)

1401 17th Street, Suite 1200
Denver, Colorado 80202

(Address of principal executive offices, including zip code)

CARBON ENERGY CORPORATION
1999 STOCK OPTION PLAN
 (As Amended)

(Full title of the plan)

Mark S. Sexton
Chairman, President and
Chief Executive Officer
Evergreen Resources, Inc.
1401 17th Street, Suite 1200
Denver, Colorado 80202
(303) 298-8100

(Name, address and telephone number, including area code,
 of agent for service)

CALCULATION OF REGISTRATION FEE

Title of securities to be registered ⁽¹⁾	Amount to be registered	Proposed maximum offering price per share ⁽¹⁾	Proposed maximum aggregate offering price ⁽¹⁾	Amount of registration fee ⁽¹⁾
Common Stock, no par value	248,453	\$11.85 – 27.175	\$3,307,171.33	\$267.55
Common Stock, Purchase Rights ⁽²⁾	248,453	\$0	\$0	\$0

(1) Pursuant to Rule 457(c) and (h)(1), based on (i) the average (\$27.175) of the high (\$27.62) and low (\$26.73) sale prices of the Company's common stock on October 31, 2003, as reported on the New York Stock Exchange (23,687 shares), and (ii) the average option price (\$11.85) for 224,766 shares being registered herein which are available for issuance upon the exercise of outstanding options granted under the Carbon Energy Corporation 1999 Stock Option Plan, as amended.

- (2) Each share of the Company's common stock includes one common stock purchase right. No additional fee is paid with respect to these rights.

EXPLANATORY NOTE

This Registration Statement covers 248,453 shares of Evergreen common stock available for issuance upon the exercise of outstanding options granted under the Carbon Energy Corporation 1999 Stock Option Plan, as amended.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The following documents filed by Evergreen Resources, Inc. (the "Company") with the Securities and Exchange Commission (the "Commission") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), are incorporated herein by reference:

- (a) The Company's Annual Report on Form 10-K for the year ended December 31, 2002, as filed with the Commission on March 31, 2003;
- (b) The Company's Quarterly Reports on Form 10-Q for the quarters ended March 31, 2003, June 30, 2003 and September 30, 2003, as filed with the Commission on May 14, 2003, August 13, 2003 and October 29, 2003, respectively.
- (c) The description of the Company's common stock (the "Common Stock") that is contained in the Company's registration statement on Form 8-A filed with the Commission on August 22, 2000, including any amendment or report filed for the purposes of updating the description;
- (d) The description of the Company's Shareholders Rights Agreement, as amended, that is contained in the Company's registration statement on Form 8-A filed with the Commission on July 7, 1997 and in the Company's registration statement on Form 8-A/A filed with the Commission on March 8, 2001, including any amendment or report filed for the purposes of updating the description; and
- (e) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year referred to in (a) above.

All documents subsequently filed by the Company pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act, prior to the filing of a post-effective amendment which indicates that all securities offered hereby have been sold or which deregisters all securities remaining unsold, shall be deemed to be incorporated by reference herein and to be a part hereof from the date of the filing of such documents.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

The legality of the securities offered hereby has been passed upon by the law firm of Berenbaum, Weinshienk & Eason, P.C.

Item 6. Indemnification of Directors and Officers.

Section 7-108-402 of the Colorado Business Corporation Act (the "Act") provides, generally, that the articles of incorporation of a Colorado corporation may contain a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director; except that any such provision may not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its shareholders, (ii) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) acts specified in Section 7-108-403 (concerning unlawful distributions), or (iv) any transaction from which a director directly or indirectly derived an improper personal benefit. Such provision may not eliminate or limit the

Edgar Filing: EVERGREEN RESOURCES INC - Form S-8

liability of a director for any act or omission occurring prior to the date on which such provision becomes effective. The Company's articles of incorporation contain a provision eliminating liability as permitted by the statute. The Company's articles of incorporation further provide that directors and officers of the Company will not be held personally liable for any injury to persons or property caused by the wrongful act of any employee of the Company unless either (i) the director or officer was personally involved in the situation leading to litigation or (ii) the director or officer committed a criminal offense in connection with such litigation.

Section 7-109-103 of the Act provides that a Colorado corporation must indemnify a person who was wholly successful, on the merits or otherwise, in defense of any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative and whether formal or informal (a "Proceeding"), in which he was a party, against reasonable expenses incurred by him in connection with the Proceeding, unless such indemnity is limited by the corporation's articles of incorporation. The Company's articles of incorporation do not contain any such limitation.

Section 7-109-102 of the Act provides, generally, that a Colorado corporation may indemnify a person made a party to a Proceeding because the person is or was a director against any obligation incurred with respect to a Proceeding to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan) or reasonable expenses incurred in the Proceeding if the person conducted himself or herself in good faith and the person reasonably believed, in the case of conduct in an official capacity with the corporation, that the person's conduct was in the corporation's best interests and, in all other cases, his conduct was at least not opposed to the corporation's best interests and, with respect to any criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful. The Company's articles of incorporation and its bylaws provide for such indemnification. A corporation may not indemnify a director in connection with any Proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation or, in connection with any other Proceeding charging the director derived an improper personal benefit, whether or not involving actions in an official capacity, in which Proceeding the director was judged liable on the basis that he derived an improper personal benefit. Any indemnification permitted in connection with a Proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with such Proceeding.

Under Section 7-109-107 of the Act, unless otherwise provided in the articles of incorporation, a Colorado corporation may indemnify an officer, employee, fiduciary or agent of the corporation to the same extent as a director and may indemnify such a person who is not a director to a greater extent, if not inconsistent with public policy and if provided for by its bylaws, general or specific action of its board of directors or shareholders, or contract. The Company's articles of incorporation and bylaws provide for indemnification of officers, employees and agents of the Company to the same extent as its directors.

The Company's articles of incorporation and bylaws permit the Company to pay expenses incurred in defending a Proceeding in advance of the final disposition of the Proceeding if the person undertakes to repay the amount unless it is ultimately determined that he is entitled to such expenses.

The Company's articles of incorporation also provide that the Company may purchase and maintain insurance covering any person serving on behalf of, or at the request of, the Company against any liability incurred by him in such capacity or arising out of his status as such, whether or not the Company would have the power to indemnify him against such liability. The Company has obtained a policy of directors' and officers' liability insurance that insures the Company's directors and officers against the cost of defense, settlement or payment of a judgment under certain circumstances.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

The following exhibits are filed as a part of this Registration Statement:

<u>Number</u>	<u>Description</u>
4.1	Articles of Incorporation of the Company, as amended, which are incorporated by reference to Exhibit 3.1 of the Company's Registration Statement on Form S-1 (Commission File No. 33-273035), by reference to Exhibit I of the Company's Current Report on Form 8-K dated December 9, 1994, and by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed June 8, 1998.
4.2	Bylaws of the Company, which are incorporated by reference to Exhibit 3.2 to the Company's Current Report on Form 8-K filed June 8, 1998.

Edgar Filing: EVERGREEN RESOURCES INC - Form S-8

- 4.3 Shareholders' Rights Agreement, as amended, which is incorporated by reference to Exhibit 1 to the Company's Current Report on Form 8-K dated July 7, 1997 and by reference to Exhibit 4.2 to the Company's registration statement on Form 8-A/A filed March 8, 2001.
- 5 Opinion of Berenbaum, Weinshienk & Eason, P.C.
- 23.1 Consent of Berenbaum, Weinshienk & Eason, P.C. (included in Exhibit 5).
- 23.2 Consent of BDO Seidman, LLP.
- 23.3 Consent of Netherland, Sewell & Associates, Inc.
- 24 Power of Attorney (included in the signature page).
- 99 Carbon Energy Corporation 1999 Stock Option Plan, as amended.

Item 9. Undertakings.

(a) The Company hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933, as amended (the "Securities Act");

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of

securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective Registration Statement;

- (iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement;

provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the Registration Statement is on Form S-3, Form S-8 or Form F-3, and the information required to be

included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the Company pursuant to Section 13 or 15(d) of the Exchange Act that are incorporated by reference in the Registration Statement.

- (2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.
 - (3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.
- (b) The Company hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Company's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.
- (c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted

to directors, officers and controlling persons of the Company pursuant to the foregoing provisions, or otherwise, the Company has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Company of expenses incurred or paid by a director, officer or controlling person of the Company in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Company will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

THE REGISTRANT

Pursuant to the requirements of the Securities Act of 1933, Evergreen Resources, Inc. certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Denver, State of Colorado, on this 5th day of November, 2003.

EVERGREEN RESOURCES, INC.

By: /s/ Mark S. Sexton
Mark S. Sexton
Chairman, President and Chief Executive Officer

POWER OF ATTORNEY

Each of the undersigned, being a director and/or officer of Evergreen Resources, Inc. (the "Company"), hereby nominates, constitutes and appoints Mark S. Sexton and Kevin R. Collins, or any one of them severally, to be his true and lawful attorney-in-fact and agent and to sign in his name and on his behalf in any and all capacities stated below, and to file with the Securities and Exchange Commission (the "Commission"), a Registration Statement on Form S-8 (the "Registration Statement") relating to the issuance of certain shares of the common stock, no par value, of the Company (the "Common Stock") in connection with the Carbon Energy Corporation 1999 Stock Option Plan, as amended, and to file any and

Edgar Filing: EVERGREEN RESOURCES INC - Form S-8

all amendments, including post-effective amendments, exhibits and other documents and instruments in connection therewith, to the Registration Statement, making such changes in the Registration Statement as such attorney-in-fact and agent deems appropriate, and generally to do all such things on his behalf in any and all capacities stated below to enable the Company to comply with the provisions of the Securities Act of 1933, as amended (the "Securities Act"), and all requirements of the Commission.

Pursuant to the requirements of the Securities Act, this Registration Statement has been signed by the following persons in the capacities indicated on October 29, 2003.

/s/ Mark S. Sexton
Name: Mark S. Sexton, Chairman, President,
Chief Executive Officer and Director
(principal executive officer)

/s/ Kevin R. Collins
Name: Kevin R. Collins, Executive Vice President -
Finance, Treasurer and Chief Financial Officer and
Treasurer (principal financial and accounting officer)

/s/ Alain G. Blanchard
Name: Alain G. Blanchard, Director

/s/ Dennis R. Carlton
Name: Dennis R. Carlton, Director

/s/ Robert J. Clark
Name: Robert J. Clark, Director

/s/ Larry D. Estridge
Name: Larry D. Estridge, Director

/s/ Andrew D. Lundquist
Name: Andrew D. Lundquist, Director

/s/ John J. Ryan III
Name: John J. Ryan III, Director

/s/ Scott D. Sheffield
Name: Scott D. Sheffield, Director

/s/ Arthur L. Smith
Name: Arthur L. Smith, Director

EXHIBIT INDEX to Registration Statement on Form S-8 of Evergreen Resources, Inc.

Exhibit No.	Description
4.1	Articles of Incorporation of the Company, as amended, which are incorporated by reference to Exhibit 3.1 of the Company's Registration Statement on Form S-1 (Commission File No. 33-273035), by reference to Exhibit I of the Company's Current Report on Form 8-K dated December 9, 1994, and by reference to Exhibit 3.1 to the Company's Current Report on Form 8-K filed June 8, 1998.
4.2	Bylaws of the Company, which are incorporated by reference to Exhibit 3.2 to the Company's Current Report on Form 8-K filed June 8, 1998.
4.3	Shareholders' Rights Agreement, as amended, which is incorporated by reference to Exhibit 1 to the Company's Current Report on Form 8-K dated July 7, 1997 and by reference to Exhibit 4.2 to the Company's registration statement on Form 8-A/A filed March 8, 2001.
5	Opinion of Berenbaum, Weinshienk & Eason, P.C.
23.1	Consent of Berenbaum, Weinshienk & Eason, P.C. (included in Exhibit 5).
23.2	Consent of BDO Seidman, LLP.
23.3	Consent of Netherland, Sewell & Associates, Inc.
24	Power of Attorney (included in the signature page).
99	Carbon Energy Corporation 1999 Stock Option Plan, as amended.