

State and Regional Environmental Cooperation Committee Newsletter

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MESSAGE FROM THE CHAIR

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Happy Spring! Welcome to 2008 with a newsletter focused on all that is GREEN from the State and Regional Environmental Cooperation Committee's (SRECC pronounced "SHREK") perspective. From our feature article by Jim Price, our Region 7 vice chair, on the Kansas Department of Health's recent decision denying a coal-fired plant permit application on the basis of CO₂ emissions, to our regional updates featuring Greenhouse Gas Emissions Reductions Programs and other green themes in the regions, you will get a great survey of what is new in a state or region near you.

So far our committee has been busy bringing our state bar leader list serve back up to date and putting together a resource list of regional contacts. We were able to use these resources to host a State Bar Ideas Exchange at the Fall Meeting in Pittsburgh where we met fellow state bar environmental leaders from around the country and discussed ideas for regional programs.

Our next region to host a program will be Region 2, which is in the midst of planning "Key Environmental Issues in U.S. EPA Region 2" for June 3, 2008 at Fordham University School of Law in New York. Region 8 is working on a Quick Teleconference with the Air Quality Committee entitled "Clean Air Act Regional Developments Affecting the Energy Industry

in Region 8." Region 9 is working on a regional webinar featuring a discussion of the Western Governors' Agreement on Climate Change. Once these programs are final we will promote them through our committee list serve and Web page.

Please do not hesitate to contact me or any of our committee leadership in order to find out more about our committee or get involved in any of our activities. We are always looking for great new ideas and helpful feedback.

IS ANYTHING THE MATTER WITH KANSAS? ONE STATE'S STRUGGLES WITH CLIMATE CHANGE

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It was the proverbial shot heard around the world in the escalating war of words regarding coal-fired power plants and climate change: on Oct. 18, 2007, the secretary of the Kansas Department of Health and Environment (KDHE) denied an air permit to two proposed coal-fired generating units, citing only potential carbon dioxide emissions and concerns about climate change as the reasons. It was the first time a government agency in the United States had relied on carbon dioxide emissions to deny such a permit. This article examines that decision, the ensuing legal and legislative maneuverings, and the next steps.

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Kirstin M. Etela, Editor**

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The Secretary’s Ruling

For such a ground-breaking decision, the secretary’s ruling was surprisingly brief—slightly more than one page, single-spaced, on letterhead. Sunflower Electric Power Corporation, an electric cooperative power supplier, had sought Prevention of Significant Deterioration (PSD) air permits under Kansas and federal law to build two additional 750-megawatt coal-fired steam generating units at its Holcomb generating station in southwestern Kansas. KDHE held three public hearings on the permit application and received numerous comments during the public comment period. Environmental groups and attorneys general from eight other states opposed the permit on grounds of carbon emissions and their effect on climate change. KDHE’s Bureau of Air and Remediation recommended approval of Sunflower’s application, finding Sunflower had demonstrated it would meet Best Available Control Technology standards imposed by PSD permitting requirements. Along with recommending approval, KDHE staff issued a 109-page response to comments received during the permitting and hearing process. Among those comments were demands by the Sierra Club and others that KDHE deny the permit on the basis of carbon emissions. In response, the Bureau of Air and Remediation said, “There are no provisions to regulate carbon dioxide emissions in PSD permits. These comments were referred to Secretary Bremby for further policy considerations.” Responsiveness Summary, at 9.

One day later, KDHE Secretary Roderick L. Bremby issued his five-paragraph ruling denying the PSD permit request. In the fourth paragraph Secretary Bremby wrote:

I have given due consideration to the scientific and technical information related to carbon dioxide including but not limited to many oral and written comments submitted in the public hearing and comment period. The information provides support for the position that emission of air pollution from the proposed coal fired plant, specifically carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment.

Letter, Roderick Bremby, KDHE, to Wayne Penrod, Sunflower Electric Power Corporation, Oct. 18, 2007 (Bremby Letter), at 1-2. The Secretary made no other factual findings about carbon dioxide emissions from the proposed generating units, nor about evidence linking such emissions to global climate change.

Although the Secretary's ruling did not say so, given the approval recommendation of the KDHE Bureau of Air and Remediation and the Responsiveness Summary dated just one day earlier, the Secretary's ruling presumes the Sunflower application met applicable PSD and other air emission requirements. The Secretary's permit denial set off a storm of comments and reactions. Environmental groups were ecstatic; industry groups were aghast.

The Decision's Underpinnings

The linchpin of Secretary Bremby's decision was Kansas Statutes Annotated 65-3012(a):

Notwithstanding any other provision of this act, the secretary may take such actions as may be necessary to protect the health of persons or the environment: (1) Upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment . . .

According to the Secretary, K.S.A. 65-3012 gives the Secretary authority:

to take such action as is necessary to protect the health of persons or the environment, notwithstanding compliance with all other existing provisions of the Kansas air quality act, upon the receipt of information that the emission of air pollution presents a substantial endangerment to health of persons or the environment. The endangerment may be a threatened or potential harm as well as an actual harm.

Bremby Letter at 1.

The Secretary's decision cited and heavily relied on a Sept. 24, 2007 opinion of the Kansas Attorney General responding to the Secretary's question whether he could deny an air quality permit absent

state or federal regulations setting limitations for a specific pollutant. In that opinion, the Attorney General stated:

Based upon the plain language of K.S.A. 65-3012, it appears that the statute contemplates preventive as well as remedial actions on the part of the secretary in order to protect persons and the environment in situations where the secretary receives information that emission of air pollution presents substantial endangerment to either . . . [A]s K.S.A. 65-3012 does not condition the secretary's action upon pollutant levels, the secretary is not obligated to wait until there are federal or state regulations establishing limitations on a particular pollutant before taking action to prevent air pollution provided he makes the findings required in subsection (a).

Kan. Atty. Gen. Op. No. 2007-31, Sept. 24, 2007, at 2.

The Secretary's decision denying Sunflower's permit cited *Massachusetts v. Environmental Protection Agency*, __ U.S. __, 127 S. Ct. 1438 (2007), for the proposition that carbon dioxide meets the broad definition of an air pollutant under the Clean Air Act and its Kansas counterpart. Neither the Secretary's ruling nor the Attorney General's opinion, however, cited any circumstance in which an agency had denied an air permit based on carbon dioxide emissions or after the applicant demonstrated compliance with Clean Air Act emissions limitations.

Reaction and Response

As noted, the Secretary's ruling set off a firestorm of comments and response. Environmental groups hailed the ruling as a watershed event in opposing coal-fired power plants as agents of global warming. Industry groups and many in the Kansas legislature criticized the decision as contrary to the rule of law and beyond the Secretary's authority. Almost immediately opponents of the decision attacked it in the legislature, courts, and public pronouncements.

On the legislative front, the 2008 session of the Kansas legislature was dominated by efforts to pass a bill that

would clear the way for the Sunflower expansion. Democratic Gov. Kathleen Sebelius and her staff proposed a compromise under which Kansas would allow Sunflower to build one, but not both, of the new generating units. Sunflower refused, contending that both units were required to support the expansion's financing. The Republican-dominated legislature approved a bill that would limit the KDHE Secretary's power under K.S.A. § 65-3012 and would allow Sunflower to seek another permit. Gov. Sebelius vetoed the bill, and her veto survived an override effort. As this paper was being prepared, other efforts to find a legislative fix were under way.

In the courts, Sunflower filed a petition with the Kansas Court of Appeals seeking review of Secretary Bremby's decision to deny the permit. Sunflower argued the Secretary's decision was unlawful. Sunflower argued K.S.A. § 65-3012, upon which both the Secretary and Attorney General relied for their decisions, previously had been applied only to existing pollution presenting an air pollution emergency but never to deny a PSD permit for a new source.

Sunflower asserted the Secretary's decision violated Sunflower's due process rights. As with most states, Kansas law requires that actions to deny a permit trigger due process protections, including hearings on issues of adjudicative facts. *Rydd v. State Board of Health*, 202 Kan. 712, 726 (1969). In *Hallmark Cards, Inc. v. Kansas Dept. of Commerce and Housing*, 32 Kan. App. 2d 715 (2004), the court held that due process and equal protection concerns require an agency to demonstrate internal and written standards of eligibility for statutory benefits that are objective, ascertainable, and applied consistently and uniformly. Sunflower complained that these requirements had been violated.

Analysis

Now that it appears a legislative solution and a political compromise are out of the question, attention turns to how the Kansas courts will review Secretary Bremby's decision. The courts' consideration of his decision becomes important for two reasons, even if some resolution of the Sunflower dispute eventually

develops. Other states' environmental regulators are being urged to follow Secretary Bremby's lead, and other PSD permitting projects are being proposed in Kansas itself. Indeed, some have argued that if allowed to stand, the Secretary's denial of Sunflower's PSD permit for a facility that meets established PSD emissions limits will be used in Kansas and elsewhere as a precedent to deny permits for other types of industrial facilities, not just coal-fired power plants.

In denying the Sunflower permit on the basis of carbon dioxide emissions, the Kansas Secretary unquestionably departed from settled expectations (notwithstanding the fact that he was urged to do so by numerous commenters). Now the question is whether Kansas courts will uphold it. Supporters of the decision will have two significant advantages. First, K.S.A. § 65-3012(a) does contain broad language. Secondly, courts often try to defer to decisions by regulators—especially environmental regulators—when they can.

The question is whether this decision strays so far from the norm and administrative law principles of notice, due process, and fair play that it will be stripped of a favorable presumption. On this point opponents of the decision have several strong arguments. They begin with the assertion that the power plant expansion meets all applicable PSD and Kansas air quality act standards. On what principled basis, they ask, can a regulatory agency turn down an application by an industrial facility on the basis of emissions of a pollutant that is not even regulated? And furthermore, what are the rules going forward in doing so? How are participants to discern the standards for granting or denying such request? Opponents further argue that carbon dioxide emissions are not regulated under state or federal law. The Supreme Court in *Massachusetts v. EPA* held that carbon dioxide emissions are a "pollutant" under the Clean Air Act, but the Environmental Protection Agency (EPA) has not yet made the determinations under Clean Air Act § 112 that would begin the process of regulating carbon dioxide under that statute. Likewise, Kansas itself has passed no limits on carbon dioxide emissions, and carbon dioxide is not specified in Kansas' state implementation plan approved by EPA.

EDITOR'S NOTE

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To opponents, Secretary Bremby's ruling denying the permit was remarkably thin and lacking in analysis, especially considering its impact, precedential value, and departure from settled expectations. For starters, it went against the recommendation of KDHE staff, although staff did not purport to address the question of carbon emissions that formed the basis for the Secretary's ruling. As noted in the quotes above in this paper, the Secretary in his ruling said he had determined carbon emissions presented a "substantial endangerment to the health of persons or the environment" (Bremby Letter at 2), but his ruling specifies no such findings or the factual, scientific, technical, or environmental basis other than a passing reference to information submitted during the public comment period. Without detailed factual and legal findings in this regard, the Kansas courts may be less inclined than otherwise to grant deference to the Secretary's determination.

Opponents further argue that at no time during the permit approval process were they notified that unregulated carbon emissions might form the basis for a permit denial. This violates administrative procedure and due process, they contend. Kansas courts will be called on shortly to sort through these arguments.

Conclusion

The debate over carbon and climate change emissions will continue, long after circumstances regarding the Sunflower expansion have been finally determined. Most observers concede that in time regulators will establish limits on carbon emissions. The Sunflower case presents the questions and struggles surrounding whether and how regulators can address such emissions in the meantime and whether and how regulators can regulate emissions when no limits have been set. Until these questions are resolved in Kansas and elsewhere, those seeking permits will experience substantial uncertainty and will feel they are caught in the crossfire.

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A critical mass of states have now entered into regional agreements to combat Climate Change by taking coordinated steps to reduce the emission of carbon dioxide (CO₂), methane (CH₄), sulfur hexafluoride (SF₆), chlorofluorocarbons (CFCs), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), nitrous oxide (N₂O), and ozone (O₃). These gases are collectively referred to, and now commonly known as, greenhouse gases (GHG). These agreements include:

- › Midwestern Greenhouse Gas Accord: the state signatories to this agreement are Illinois, Iowa, Indiana, Kansas, Michigan, Minnesota, Ohio, South Dakota, and Wisconsin as well as the Canadian province of Manitoba.
- › Regional Greenhouse Gas Initiative: the state signatories are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.
- › Western Climate Initiative: Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington as well as the Canadian provinces of British Columbia and Manitoba.

Each of these initiatives contemplates a market-based cap and trade system in which regulated entities buy and sell the ability to emit greenhouse gases. This approach, based largely on the federal Acid Rain Reduction Program, is anticipated to reduce the costs associated with implementing the controls necessary to reduce emissions and meet more stringent caps on emissions. Because each of our Regional Round-ups describes in more detail these initiatives, as well as other efforts the states have undertaken to tackle the challenge of Climate Change, we will first provide our readers with a primer on the basics of "cap and trade."

CAP AND TRADE BASICS: A PRIMER

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What is Cap and Trade?

A cap and trade program is a “market based” way of reducing greenhouse gas (GHG) emissions. It differs from the more traditional “top down” regulatory approaches of permits and penalties, or a carbon tax. A cap and trade program instead establishes a market for GHG emissions, and lets the marketplace figure out how to attain needed emission reductions. The first step in a cap and trade program is the government setting an overall GHG emissions cap, and giving individual sources an assignable right to emit a certain amount of GHGs. If the source emits less than its assigned amount, it can sell the right to emit the excess to other sources. Companies are then free to buy and sell rights to emit GHGs in the marketplace. This allows each company to operate in a way that maximizes its profits within the overall emission limits imposed by the program.

There are several advantages to a cap and trade system over the more traditional government regulation. For example, a cap and trade program places a specified cap on emissions and is focused on ensuring the cap is not exceeded. Under a carbon tax system, there is no incentive to reduce emissions to a certain capped amount, as long as it is cheaper for a given source to pay the carbon tax than to implement emission reduction measures. Similarly, under a permit system, there is no incentive for a source to reduce emissions below the level set in the permit. It is unlikely a source will invest money in pollution control technologies if it does not make financial sense for it to do so.

A cap and trade system, however, provides both an overall emissions cap and incentives for sources to reduce their emissions. The cap and trade programs used in the eastern United States to address acid rain pollutants were considered unqualified successes, because they led to greater emission reductions at a far lower cost than experts originally anticipated. For

example, amendments to the 1990 Clean Air Act established a cap and trade system for sulfur dioxide. This program resulted in a reduction of 4 million tons of sulfur dioxide annually at a fraction of the expected costs. *See* NAPAP, Biennial Report to Congress: An Integrated Assessment, National Acid Precipitation Assessment Program, Washington D.C. (1998); Ellerman, *et al.*, Emissions Trading Under the US Acid Rain Program: Evaluation of Compliance Costs and Allowance Market Performance, MIT Center for Energy and Environmental Policy Research, Cambridge, MA (1997). The cost savings came from the flexibility sources had to determine how to achieve the needed emission reductions.

How is a Cap and Trade Program Developed?

In a cap and trade program, the starting point is the government’s identification of the specific sources to be covered by the program. (For example, the cap and trade program established by the amendments to the 1990 Clean Air Act only covered sources of sulfur dioxide.) Next, the government requires those covered sources to measure, monitor, and report their emissions. From that reported data, the government can establish an aggregate emissions baseline for the covered sources. The government then sets an overall cap on emissions from the covered sources, usually less than the current aggregate baseline. Often, the government also determines the emission reductions it wants over time.

The government then allocates allowances (tradable rights to emit a specified amount of GHG, usually measured as one ton) to covered sources. The total number of allowances allocated should equal the emissions cap. The government then establishes a compliance period (typically annual), and requires each source to “true up” at the end of the compliance period. Each participating source’s emissions must, at the end of the compliance period, match the allowances they have—either the ones they were initially allocated, or the ones they purchased on the market. Finally, the government must put some kind of enforcement mechanism in place for those whose emissions exceed their allowances.

There are many nuances in putting these programs together, and what appear to be small decisions can have wide policy or financial impacts. This is likely to be particularly true in the case of developing a program to reduce GHG emissions, because there are so many sources of GHG gasses. For example, one decision that will have to be made is whether initial allowances will be allocated to sources for free, or auctioned by the government. Auctioning allowances means that right at the outset of the program, covered sources will have an added cost to doing business—a cost that did not exist for them before. However, there are some benefits to auctioning allowances, such as that an auction raises revenue that the government can use to create incentives to encourage sources not covered by the program to reduce their emissions. In addition, an auction has a side benefit of setting an initial “market” price for allowances.

Another question that is generally addressed through the program design process is whether offsets will be allowed and whether those offsets must be located within the capped region. Offsets are projects that result in emission reductions, but which come from sources other than those subject to the emissions cap. Typical offset projects include carbon sequestration through afforestation and landfill methane capture. Credits generated by the offsets could be purchased by a covered source that does not have enough emission allowances to cover its actual emissions and needs to “purchase” a reduction from outside the program to meet its allowance budget. To be an effective tool, however, offsets should be verifiable, permanent, and enforceable as well represent additional reductions in emissions, meaning that the reductions would not have occurred without the project. The downside of the use of offsets is that the capped region experiences an increase in actual emissions by covered sources. The benefit is that they provide an incentive for innovation and further emission reductions, even if they are outside the cap.

In the case of a GHG cap and trade system, another decision that will have to be made is whether the program should be “load-based” or “source-based.” A load-based program is one that is focused “upstream” where carbon enters the economy, such as where fossil

fuels are imported into the covered area or produced in the area. These entities would then hold allowances equal to the estimated GHG emissions that will be released when their fuel is used (or more specifically, combusted) by end users of the fossil fuels. A source-based program is one that focuses instead on the “downstream” entities that burn the fuel and release the GHGs into the atmosphere.

A load-based system has the advantage of being easier to administer—the number of fossil fuel importers and producers is smaller and more manageable than the number of entities that burn fuels and release GHGs. Intuitively, one would think a load-based system would rely on a lot of assumptions about the amount of GHG emissions that a given amount of fossil fuel will produce, since fossil fuels are burned downstream by different businesses using different technologies with varying efficiencies. Yet, the amount of carbon released by a given amount of fossil fuel is constant. Even if a source burns fossil fuel more efficiently, each unit of fuel will still release the same amount of carbon. By comparison, a source-based system is more unwieldy, given the number of tailpipes and stacks that emit GHGs. Another consideration that factors into this decision is where the various entities to be regulated are located. It is often the case that the producer of a fuel is located outside the geographic region within which the cap and trade system operates. These kinds of considerations have to be carefully evaluated to ensure the system runs efficiently and fairly, and does not allow for the outsourcing of emissions (known as “leaking”).

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REGIONAL ROUNDUPS

REGION 1: Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, Vermont and Ten Tribal Nations

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I. Greenhouse Gas Emission Reductions—RGGI

All of the New England states, plus Delaware, Maryland, New Jersey, and New York, are members of the Regional Greenhouse Gas Initiative (RGGI). The goal of this initiative is to develop a regional program for controlling greenhouse gas (GHG) emissions that contribute to global warming without unduly threatening energy affordability and reliability. In general, the plan will apply to electric generating units that have a nameplate capacity of at least 25 megawatts and burn more than 50 percent fossil fuel. Some exceptions may apply, such as for sources that sell less than 10 percent of the electricity they produce to the grid in RGGI states that incorporate this exemption into their regulations.

Central to the RGGI program is the creation of a multi-state cap and trade program with a market-based emissions trading system. The plan, released initially as a Memorandum of Understanding (MOU) among the RGGI participants, proposed a cap that would approximately stabilize carbon dioxide (CO₂) emissions from 2009 until 2015, and then reduce emissions by 10 percent from 2015 to 2019. As with any cap and trade program, the details of how the allowances are calculated are not without controversy. For example, the allocation of intrastate allowances is left to each individual state to determine, although each state has agreed to allocate 25 percent of their allowances for so-called consumer benefit or strategic energy purposes. On Aug. 15, 2006, the participating states released a model rule, which was later amended in January 2007, to implement RGGI.

The model rule limits GHG emissions by establishing a regional cap, which is approximately equivalent to the average CO₂ emissions (or CO₂ equivalents) of affected sources during the highest three years between 2000 and 2004. Each state has been given an initial CO₂ emissions budget that reflects CO₂ emissions from affected sources in the state during the baseline years.

Each participating state is in the process of using the model rule as the basis for its own regulatory and/or statutory proposals to implement the program. Key issues that have been left for the individual states include the size and types of projects that could be supported by the consumer benefit set-aside, and how to allocate allowances.

The status of RGGI in each of the New England states as of this writing is as follows:

A. Connecticut

The Connecticut General Assembly adopted legislation (H.B. 7432) last summer to authorize participation in RGGI. Connecticut's statute provides that 100 percent of allowances shall be auctioned off, rather than given to generators, with the proceeds going to energy conservation, load management, and Class I renewable energy programs.

The Connecticut Department of Environmental Protection has proposed two new regulations, Section 31—Control of Carbon Dioxide Emissions/Carbon Dioxide Budget Trading Program and Section 31a—Greenhouse Gas Emission Offset Projects, to implement RGGI. Section 31 will govern the control of emissions and create a budget trading program, while Section 31a is intended to regulate GHG offset projects. The comment period for these proposed rules ended on Feb. 8, 2008, and final action on the regulations was taken on April 15, 2008.

For more information, see http://www.ct.gov/dep/cwp/view.asp?a=2684&q=332278&depNav_GID=1619.

B. Maine

Maine enacted new legislation in 2007 to authorize implementation of the RGGI program. P.L. 2007, c. 317. Maine's version of the legislation requires that all of the allowances be sold at auction.

The Maine Department of Environmental Protection (DEP) has since proposed two new rules to carry out RGGI, Chapter 156: CO₂ Budget Trading Program and Chapter 157: CO₂ Budget Trading Program Waiver and Suspension. Chapter 156 establishes the Maine component of the CO₂ Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of CO₂ from budget trading sources. Chapter 157 would grant the Maine DEP the authority in exceptional circumstances to waive or suspend requirements of the Budget Trading Program. The comment period for both proposed rules closed on Sept. 20, 2007.

For more information, see www.maine.gov/dep/air/rggi.htm.

C. Massachusetts

Although Massachusetts was one of the original members of RGGI, it initially declined under Governor Mitt Romney to participate in the initiative. Massachusetts ultimately joined in January 2007 following the election of Governor Deval Patrick.

Despite being one of the last states to join, the Massachusetts Department of Environmental Protection and Division of Energy Resources have already promulgated final rules to implement RGGI, the first member state to do so. *See* 310 CMR 7.00 (Appendix B), 310 CMR 7.29, 310 CMR 7.70 & 225 CMR 13.00. The rules require auctioning off all of the allowances, with proceeds going to reduce energy use and electric bills, and build upon an existing program that already restricted GHG emissions from the six largest power plants in the state.

For more information, see <http://www.mass.gov/dep/air/climate/index.htm#rggi>.

D. New Hampshire

New Hampshire, which was one of the first states to join RGGI, is the only state yet to approve any legislation or rules to carry out the program. The legislature is in the process, however, of considering a bill (H. 1434) authorizing New Hampshire's participation.

For more information, see www.des.state.nh.us/ARD/ClimateChange/rggi.htm.

E. Rhode Island

As with Massachusetts, Rhode Island temporarily declined to participate in RGGI, but has since enacted a bill, codified at Chapter 23-82 of the General Laws, that authorizes participation in RGGI and directs the Rhode Island Department of Environmental Management (DEM) to draft regulations to establish the program. In addition, similar to the other states that have addressed the issue thus far, the new legislation requires that all of the allowances will be auctioned off. The Rhode Island DEM has convened a stakeholder group to begin that process.

For more information, see <http://www.dem.ri.gov/rggi/index.htm>.

F. Vermont

The Vermont Agency of Natural Resources (ANR) has issued a pre-proposal draft rule, the Vermont CO₂ Budget Trading Program, to implement RGGI. The comment period ended on April 16, 2007. Under the Vermont version of the rule, all of the state's CO₂ allowances will be allocated to a consumer benefit or strategic purpose set-aside account in accordance with 30 V.S.A. § 255(c)(2). The account will be managed by trustees, appointed by the Public Service Board, to provide the maximum long-term benefit to Vermont electric consumers.

For more information, see www.anr.state.vt.us/air/htm/RGGI.htm.

II. Additional “Green” Initiatives

There are numerous “green” initiatives throughout Region 1. A sampling includes the following:

A. Regional Efforts

In 2001, in cooperation with provincial governments in eastern Canada, the governors of all six New England states developed through the Conference of New England Governors and Eastern Canadian Premiers a Climate Change Action Plan. The goal of the plan is to achieve 1990 GHG emission levels by 2010 and 10 percent below 1990 levels by 2020. Since then, the governors have expanded that commitment by calling for leadership from colleges and universities, launching initiatives for LED traffic lights throughout the region, and encouraging energy efficient vehicles state vehicle fleets.

B. Connecticut

Connecticut recently adopted new legislation that establishes a system for consumer recycling of used electronics, including televisions and computer components. The system will be a so-called “producer responsibility” program, which means that manufacturers must facilitate and fund the collection and recycling program. The statute requires that manufacturers participate by Jan. 1, 2009, and, beginning Jan. 1, 2011, prohibits knowingly discarding specified electronic devices at a solid waste disposal facility other than a transfer station.

For more information, see <http://www.cga.ct.gov/2007/ACT/PA/2007PA-00189-R00HB-07249-PA.htm>.

C. Maine

Maine law already requires that manufacturers of televisions and computer monitors must pay the reasonable costs of recycling those products. 38 M.R.S.A. § 1610(5)(D). Chapter 415 of the Maine DEP’s rules then sets forth the procedure for determining reasonable costs. To be eligible for reimbursement by manufacturers, those in the business of collecting and consolidating discarded household

TVs and computer monitors for recycling, known as consolidators, must demonstrate financial capacity and technical ability, and have their cost schedule approved by the Maine DEP.

Chapter 415 currently calls for the department to annually approve up to ten consolidators who submit the lowest cost schedules. The Maine DEP has initiated rulemaking to allow it to add consolidators to the approval list outside of the annual review process, which currently is undertaken in the last quarter of each year.

For more information, see <http://www.maine.gov/dep/rwm/rules/noticeforchap415.htm>.

D. Massachusetts

The Massachusetts legislature adopted the Green Communities Act last fall, which provides for a wide-range of green initiatives. Among other things, the statute sets a goal to provide by 2020 25 percent of the state’s electric load with clean demand side resources, including energy efficiency, load management, demand response, and generation located behind a customer’s meter with a combined heat and power system meeting specified efficiency targets. In addition, the act creates a Department of Clean Energy to focus on energy efficiency and renewable energy programs, provides an income tax deduction to those who buy hybrid or alternative fuel vehicles, and expands low interest loans to homeowners that wish to make energy efficient upgrades to their homes.

For more information, see http://www.mass.gov/legis/house/ht04365_summary.pdf.

E. New Hampshire

New Hampshire enacted the Renewable Energy Act last year, which will establish a renewable energy portfolio standard toward achieving Gov. John Lynch’s goal of ensuring that 25 percent of the state’s energy comes from renewable sources by 2025. The new law is intended to encourage development of biomass, geothermal, and wind power resources.

For more information, see <http://www.gencourt.state.nh.us/legislation/2007/hb0873.html>.

F. Rhode Island

The Rhode Island DEM recently announced an effort to reinvigorate that state's commercial recycling program. DEM began by requesting that businesses report information about recycling and waste via a secure on-line system. DEM will then use that information to assess the current level of recycling, identify the strengths and weaknesses of the current system, and track progress. This data will ultimately be used to develop a joint Rhode Island DEM and Rhode Island Resource Recovery Corporation education and compliance assistance program.

For more information, see <http://www.dem.ri.gov/ews/2008/pr/0116081.htm>.

G. Vermont

The Vermont ANR recently announced an initiative to promote small hydro projects. The program seeks to work closely with developers to assist them with understanding whether a site is feasible and then identifying the issues and permits that must be addressed. The Vermont ANR states that Vermont is the only state in the region that conducts these so-called "prefeasibility assessments" to help streamline the permitting process. The goal is to add an additional 25 megawatts of electric generation to the state's renewable energy portfolio.

For more information, see <http://www.anr.state.vt.us/dec/fed/damsafety/docs/smallhydroreport.pdf>.

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In Region 2, the states of New Jersey and New York have been very active in creating and implementing regional and state programs to combat climate change. In fact, it was New York Gov. George E. Pataki who, in 2003, initiated discussions among eight governors that ultimately lead to what is now known as the Regional Greenhouse Gas Initiative (RGGI).

The Region 1 Round-up provides an overview of RGGI's goals and how it is structured to achieve those goals. One of the key components of RGGI from a regional perspective is the establishment of a regional auction of carbon dioxide (CO₂) emissions allowances. RGGI announced on March 17 that it will hold the first regional auction on Sept. 10, 2008, with a second auction to be held on Dec. 17, 2008. RGGI has set the initial reserve price at \$1.86 for one allowance, which is equal to one ton of (CO₂) emissions. In subsequent auctions, the reserve price will be set at the higher of \$1.86 adjusted for inflation or 80 percent of the current market price.

While RGGI is arguably the most developed of all the regional cap and trade programs that have sprung up over recent years, it still faces significant challenges. Perhaps its greatest challenge will be to overcome "leakage." It is for this reason that Pennsylvania announced on Feb. 5, 2008 that after participating as an observer only, it has decided not to join RGGI. Leakage refers to a potential shift to cheaper and higher-emission imported power to avoid the increased costs of power supply within the capped region. If this were to occur, the ability of the regional cap on emissions to actually reduce atmospheric loading of (CO₂) would be compromised. On April 1, 2008, RGGI staff released a final report that evaluates three potential policies to address leakage: (1) reduce electricity demand in the RGGI region through implementation of policies and programs to promote

energy efficiency, (2) require load serving entities to be responsible for the amount of carbon contained in the energy they are supplying through such mechanism as an “adder” (i.e., include the cost of carbon in investment evaluations), and (3) placing a cap on absolute emissions associated with all electricity load serving entities delivering energy into the region for retail sale. The report recommends participating states to aggressively invest in and promote expanded energy efficiency programs as the most cost effective option with the shortest implementation lead-time.

Another question regarding the long-term viability of the RGGI is what, if any, preemptive effect federal legislation might have. Currently, the Lieberman-Warner Climate Security Act of 2007, which was passed by the Environment and Public Works Committee on Dec. 5, 2007, does not address this issue, but there are rumblings that other lawmakers would like to see a federal bill that preempts state programs.

New Jersey’s Implementation of RGGI

On Jan. 13, 2008, New Jersey’s governor signed into law legislation adopting RGGI. The program will be administered by the New Jersey Department of Environmental Protection (NJDEP), which is charged with developing regulations to implement the program. The legislation authorizes the DEP to auction up to 100 percent of the allowances. It also exempts from regulation cogeneration and combined heat and power facilities located on electricity consumer sites that sell less than 10 percent of the gross electricity generated by the facilities.

More information on New Jersey’s implementation of RGGI can be found at: http://www.nj.gov/global_warming/initiatives/.

New York’s Implementation of RGGI

New York proposed draft rules for notice and comment through Dec. 24, 2007. Under the proposed rules, New York would auction off 98 percent of its emissions allowances. The remaining 2 percent would be reserved for two set asides. Of the reserved

allowances, 700,000 allowances would be set aside for the voluntary renewable energy market. These allowances would be retired (i.e., subtracted from the cap and cancelled) upon proof of qualifying voluntary renewable energy purchases. Another 1,500,000 allowances would be set aside for a long-term contract account. These allowances would be available to regulated entities who, as the result of entering into a long-term power supply contract prior to March 2006, demonstrate that they will suffer losses in excess of the value of allowances sought to cover their emissions. Any excess allowances would go to an energy efficiency and clean technology account to fund development.

New York’s draft rules also take advantage of an exception in the model rule to exclude certain sources that would otherwise be regulated and require permits to emit. Generally, any fossil-fuel fired electricity generating unit with a nameplate capacity of least 25,000 megawatts requires allowances to emit. New York’s proposed rule would provide a limited exemption for industrial sources that restrict the supply of a unit’s electrical output to the grid to less than 10 percent of the gross generation of the unit.

At present, the New York Department of Environmental Conservation has stated that the rules will not be final before the first regional auction date of Sept. 10, 2008, but it does anticipate that the final rules will be published by the second regional auction date of Dec. 17, 2008. Links to the draft rules, Proposed Part 242 and revisions to Part 200 may be viewed at: <http://www.dec.ny.gov/regulations/39161.html>.

In addition to RGGI, both New Jersey and New York have taken other significant steps to address climate change, including:

New Jersey

- › New Jersey amended its Air Pollution Control Act in 2005 to classify CO₂ as an air contaminant;
- › New Jersey joined California’s lawsuit against the United States Environmental Protection Agency seeking a waiver under Section 112 of

the Clean Air Act to implement its own GHG emission limits on vehicles;

- › New Jersey's Clean Car Program requires vehicle makers to reduce fleet-wide GHG emissions from vehicles sold in the state by 30 percent by 2016;
- › On Feb. 13, 2007, Gov. Corzine signed an executive order mandating that the state reduce its GHG emission to 1990 levels by 2020, and achieve an 80 percent reduction below 2006 levels by 2050, surpassing its emissions reduction commitment under RGGI;
- › New Jersey's Renewable Portfolio Standard requires the state's electricity suppliers to provide 20 percent of the electricity they supply from renewable sources by 2020, and specifically requires 2 percent of that electricity to be supplied from solar power by that date;
- › New Jersey's Department of Community Affairs established a *Green Homes Office* to promote consumer demand for energy efficient products and building materials;
- › New Jersey's Electronic Waste Recycling Act, which became effective in January 2008, prohibits the disposal of personal computers, computer monitors, portable computers, and televisions as solid waste after Jan. 1, 2010. These items will have to be recycled through a new recycling program to be funded by manufacturers who must pay a fee to continue to sell their goods in the state.

New York

- › New York joined California's lawsuit against the United States Environmental Protection Agency seeking a waiver under Section 112 of the Clean Air Act to implement its own GHG emission limits on vehicles;
- › New York's amended its Low Emissions Vehicles program to regulate emissions GHG gases including CO₂, methane, nitrous oxide, and hydrofluorocarbons beginning in 2009;
- › Beginning in model year 2010, all new vehicles, including trucks, must bare a *global warming index* label that discloses the vehicles' GHG emissions;
- › New York law requires the state to reduce GHG emissions by 5 percent below 1990

levels by 2010 and by 10 percent below 1990 levels by 2020, consistent with RGGI goals;

- › New York's Renewable Portfolio Standard requires 25 percent of the state's electricity to come from renewable sources by 2013;
- › New York has had a Green Building Tax Credit in place since 2000, which allows individuals and businesses to take a tax credit for implementing building measures that increase energy efficiency and reduce environmental affects.

REGION 5: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Linda Mindrutiu

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Green Update

These days, the theme is going "green" in Region 5, covering Illinois, Indiana, Michigan, Montana, Ohio, and Wisconsin. Alternative energy is on the minds of state leaders, state bars, and state industries, manifested in programs and initiatives of all shapes and sizes.

Everyone is talking "green." Michigan's state bar environmental law section teamed up with the Air and Waste Management Association last November for a conference on alternative energy and two bills are pending in the legislature to pass a renewable portfolio standard in the state. Minnesota passed a law last year setting long-range goals for GHG emissions. Ohio's Senate passed a renewable energy portfolio. The Minnesota state bar environmental law committee even changed its name officially to Environment, Natural Resources and Energy in order to further highlight the importance of energy issues.

The governors of the Region 5 states are also thinking "green." Ohio's and Wisconsin's governors have set goals of 25 by 25: making 25 percent of the state's energy uses come from renewable energy by 2025. To help reach these goals, Ohio's governor has established an energy team, while Wisconsin's

governor has established an Office of Energy Independence. Likewise, Minnesota's governor established a panel to study GHG emissions, which presented a report to the governor in January.

The Region 5 states also see the value of becoming leaders in the renewable energy industry. Wisconsin has set a goal for garnering a 10 percent share of the U.S. market for renewable energy production by 2030. Wisconsin is also seeing a push to build ethanol plants, of which numerous have already been constructed, and there are projects in the works to use paper industry wastes as a source for producing biofuels. In Michigan, ranked fourteenth in the nation for wind energy potential, the governor is pushing for Michigan to become a leader in wind energy manufacturing, a move that industry strongly supports.

On a more global level, almost all of the Region 5 states have joined the Climate Registry, a collaboration between states, provinces, and tribes to establish a common GHG emissions reporting system. Regionally, the governors of all the Region 5 states have signed the Midwestern Regional Greenhouse Gas Reduction Accord. The accord is designed to establish GHG reduction targets and time-frames, develop a market-based and multi-sector cap and trade mechanism to achieve them, and establish a system for tracking, management, and crediting for entities that reduce GHG emissions.

Alternative energy initiatives and programs naturally raise legal issues. One emerging issue in some of the Region 5 states is the siting of wind turbines. As states like Ohio and Michigan, which border the Great Lakes, consider building wind energy projects, municipalities and property owners on the shorelines are bringing up concerns about aesthetics and height. For tourist communities, such issues are a real concern. This raises issues about zoning and property lines in general. As wind energy becomes more prevalent so will these issues. Stay tuned.

Other News

In Ohio, the state bar environmental law committee teamed up with the state's environmental protection

agency and state bar natural resources committee for Ohio's twenty-third annual Environmental Law Seminar from April 24-26, 2008 at Deer Creek Resort and Conference Center in Mount Sterling, Ohio. This comprehensive seminar included the latest hot topics in the environmental, energy and natural resources sectors. Keynote speakers included the director of Ohio EPA and the director of the Ohio Department of Natural Resources as well as some of Ohio's top elected officials.

REGION 8: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming

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The states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming are covered by U.S. EPA Region 8, headquartered in Denver. Some of the more significant developments and initiatives of the past six months in each state and Region 8 are set forth below, with an emphasis on climate change and other "green" initiatives.

Nov. 15, 2007 Region 8 issued a summary of enforcement and compliance activities for fiscal year 2007. Taken as a whole, such activities resulted in legal commitments by companies, governments, and other regulated entities to reduce pollution by more than 28 million pounds. During fiscal year 2007, Region 8 issued ninety-five administrative orders, eighty-five administrative penalty orders, and referred eighteen cases to the Department of Justice. Concluded enforcement actions secured nearly \$20 million in injunctive relief to correct violations and restore and prevent future harm to human health and the environment. Such actions also secured an additional sum of \$563,848 in administrative and judicial penalties. Cumulatively, Region 8 enforcement actions resulted in the clean-up of 441,080 cubic yards of contaminated soil, 473,555 cubic yards of contaminated water cleaned up, 700 stream miles and 19 acres of wetlands were protected or restored, and 84,037 people received cleaner drinking water.

Colorado

1. Climate Change Policy

On Nov. 5, 2007, Colorado Gov. Bill Ritter announced the Colorado Climate Action Plan, which calls for 20 percent reductions in 2005-level greenhouse gas emissions (GHG) by 2020 and 80 percent reductions by 2050. The Colorado Climate Action Plan contemplates certain rulemaking by standing boards and commissions, such as the Colorado Air Quality Control Commission, to adopt Colorado-specific regulations that help Colorado progress toward the plan's goals. The Colorado Department of Public Health and Environment's (CDPHE) Air Pollution Control Division is further directed to examine guidelines for phased-in, mandatory reporting of GHG emissions by major emitters.

The plan does not increase Colorado's renewable energy portfolio standard of 20 percent renewables by 2020, but does expect that the planned 20 percent GHG emissions reductions occur while the renewables mix in Colorado's energy portfolio increases statewide. Colorado also continued its observer status in the Western Climate Initiative, while the state continues to consider participant status.

2. Regulations/Legislation

a. Ozone Stakeholder Process for New Regulations

In response to Gov. Bill Ritter's request that the Denver-based Regional Air Quality Council (RAQC) move quickly to adopt ozone control measures by summer 2008, the RAQC initiated an ozone stakeholder involvement process in October 2007. This actually preceded EPA's expected designation of the Denver Metropolitan Area as non-attainment for the 8-hour ozone standard last November. The RAQC-led effort is ongoing and expected to support rulemaking to adopt a new ozone State Implementation Plan (SIP) by December 2008.

b. Oil and Gas Regulation

Of particular note recently in Colorado's environmental regulatory framework is the passage of legislation in 2007 that further regulates oil and gas activity. House Bills 1341 and 1298 were signed into law this past June and have significantly altered the composition and purposes of the Colorado Oil and Gas Conservation Commission (while increasing the role of the state Health Department and Division of Wildlife in oil and gas regulation). The new laws require rulemaking later this year to implement the legislative changes.

3. Biofuels

Colorado also recently recognized Lignol Innovations and its corporate, Suncor Energy (U.S.A.) Inc. as among four companies chosen by the U.S. Department of Energy (DOE) for federal funding to build a small-scale demonstration by a refinery project. Suncor operates Colorado's only oil refinery and it's seeking to locate a cellulosic ethanol plant on one of its Colorado properties to convert hard and soft wood residues into ethanol and commercial products.

4. High-Polluting Vehicle Enforcement Begins in Earnest

The first batch of notification letters to the owners of high-polluting vehicles were sent in January, requiring recipients to contact the Colorado Department of Public Health and Environment for a more detailed compliance inspection. This program is the result of legislation passed in 2006 that uses existing roadside testing equipment employing remote-sensing technology to identify high-emitters in the Denver area. State regulators indicate that twenty-five to thirty-five vehicles will be identified each week during the implementation phase, and their owners will be notified by mail and instructed how to make an appointment for further inspection. Should the compliance inspection validate the roadside data, the identified vehicle must be repaired or the owner could face the suspension of vehicle registration and subsequent fines.

Montana

1. Climate Change

In December 2005, the Montana Department of Environmental Quality (MDEQ) established a Climate Change Advisory Committee (CCAC), which is comprised of industry, public and government stakeholders. CCAC is charged with developing a GHG inventory, evaluating state level GHG emission reduction opportunities in all sectors in Montana by taking into consideration opportunities to “save money, conserve energy, and bolster the Montana economy,” and devising an action plan for Montana.

In November 2007, CCAC issued its final report entitled, Montana Climate Change Action Plan: Final Report of the Governor’s Climate Change Advisory Committee. In the report, the CCAC evaluated state-level greenhouse gas reduction opportunities in various sectors of Montana’s economy. The CCAC met six times from July 2006 through July 2007 to evaluate recommendations from various technical work groups representing four sectors of Montana’s economy. The CCAC followed a process designed and implemented by the non-profit Center for Climate Strategies. MDEQ provided coordination and oversight to the process. The CCAC agreed upon fifty-four policy recommendations that are designed to help reduce Montana’s emissions of GHGs to 1990 levels by the year 2020.

2. Bio-Diesel Production Workshop

In January 2008, MDEQ sponsored a Bio-Diesel Production Workshop, the materials from which can be obtained via the MDEQ Web site. Its workshop was the latest in a series beginning June/July of 2006 held by MDEQ, in partnership with the Montana Department of Agriculture, University of Idaho, the Montana Farmers’ Union, and many other co-sponsoring and supporting entities.

3. Strategic Plan for Wetlands Issued

MDEQ and the Montana Wetland Council issued a strategic framework for wetland and riparian area

conservation and restoration in January 2008. This report documents a strategic five-year framework to prioritize and direct collective efforts on wetland and riparian area conservation and restoration in pursuit of Montana’s goal of no loss of the wetland resource base as of 1989 and an overall increase in the quality and quantity of wetlands in Montana. The strategic framework report can be downloaded from the MDEQ Web site.

North Dakota

1. Erionite Identification and Mitigation

The North Dakota Department of Health has an ongoing program to evaluate the presence and potential impacts of erionite, a naturally occurring, microscopic, fibrous mineral that occurs in parts of North Dakota and may be liberated during gravel pit operations in western North Dakota. This problem was first identified in 2006 and has resulted in ongoing sampling and evaluation, as well as outreach and education to mitigate any potentially adverse affects of erionite exposure associated with historic gravel pit operations. An erionite fact sheet and other materials are available to be downloaded from the North Dakota Department of Health Web site.

2. Proposed Permitting of Gascoyne 500 MW Generating Station

The North Dakota Department of Health has been taking public comments on its analysis of the affects of emissions from the proposed Gascoyne 500 Generating Station, a coal-fired electric power plant, may have on visibility in the PSD Class I areas of North Dakota. Last July the U.S. Department of Interior submitted comments on a preliminary finding by North Dakota that indicated the station would have an adverse impact on visibility in the Theodore Roosevelt National Park. Last November, Westmoreland Power, which proposes to permit and construct the facility, responded at length to the comments of the National Park Service regarding North Dakota’s air quality effects analysis for the Gascoyne 500 Generating Station and adjacent mine operation.

South Dakota

1. Public Comment on TMDL Assessments

The South Dakota Department of Environment and Natural Resources (DENR) recently issued public notices of its total maximum daily load (TMDL) assessments for impaired waters in four water sheds, including Lower Rapid Creek, Legion Lake, Belle Fourche River, and Spring Creek. Comment periods for these TMDL assessments were scheduled to close in February. The draft assessments are available via the DENR Web site.

2. Proposed Hyperion Energy Center Permits Available for Review

The South Dakota DENR has announced availability of environmental permits for review and comment associated with proposed Hyperion Energy Center. Representatives of Hyperion Energy, a Dallas-based oil company, have indicated that an area in Union County, South Dakota, is one of several potential locations they are considering and have started submitting applications for and in connection with a proposed oil refinery and power plant facility. Already posted in connection with this potential project is an air quality modeling protocol and a PSD permit application. AERMET and AERMOD modeling data, as well as visibility modeling data, were posted in late December 2007, as well. Recent correspondence between the applicant, DENR, and other agencies is also available via the Web site.

3. Roadside Dumper Prosecuted

Last October, a tank truck driver from Iowa was convicted and sentenced for dumping concentrated liquid fertilizer from his semi-trailer along I-29 in southeastern South Dakota. James Anderson of Sioux City, Iowa, was ordered to pay up to \$45,000 in fines and serve up to 180 days in jail, though the incarceration could be suspended if Anderson pays his fines within six months. A concerned citizen in Union County notified officials in April 2007 about activities that led to Anderson's arrest and conviction. Anderson was observed dumping liquid fertilizer from his semi and charged with causing pollution of waters and

intentional dumping on a highway right-of-way. DENR will continue to work with Union County, the South Dakota Department of Transportation and the Highway Patrol to work jointly to stop illegal dumping along I-29 and other roadways.

Utah

1. Climate Change

In May 2007, the state of Utah joined the Climate Registry, an organization of thirty states, Indian tribes, and two Canadian provinces. The registry will assist in measuring, tracking, and verifying emissions of GHGs and provide the measurement and reporting infrastructure to support voluntary, mandatory, and market-based GHG emission reductions. The registry will begin to accept reporting data in 2008.

Gov. Jon Huntsman announced in January 2008 that five Utah businesses and two government entities have joined the state to be among the first to sign up for the Climate Registry. Kennecott Land, Kennecott Utah Copper, Salt Lake County, and the state of Utah's executive branch, among others, have become "founding reporters" for the Climate Registry.

2. Radon

The Utah Department of Environmental Quality encouraged home owners to test for radon gas in recognition of January as National Radon Action Month. Each year U.S. EPA designates January as National Radon Action Month to raise awareness about radon and send a message that all home owners and home buyers should test for radon. Exposure to indoor radon is the leading cause of lung cancer for non-smokers, and since elevated levels of radon can occur in three out of every ten homes in Utah, Utah residents are encouraged to test for radon. Information regarding radon exposure and how to test for it is available via the Utah DEQ Web site.

3. Yucca Mountain Nuclear Waste Site

In January 2008, the state of Utah submitted additional comments on the Supplemental Environmental Impact Statement (SEIS) for the geologic repository for the

disposal of spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nye County, Nevada. Utah's comments include concern regarding inaccuracies and lack of specificity in the Draft Supplement EIS, actions outside the scope of DOE's authority, and the lack of inadequate accident and transportation analyses, among many others criticisms.

Wyoming

1. Climate Change

The state of Wyoming is one of the founding members of the Climate Registry, which is one of the largest multi-state efforts to track GHG emissions. The Climate Registry was formed in May 2007 and will provide states and tribes with third-party, verified emissions information that is consistent across borders and industry sectors. The registry will support both voluntary and mandatory GHG emissions reporting programs.

2. Wyoming VRP Pollution Prevention Requirements

Under Wyoming's Voluntary Remediation Program (VRP), an individual, business, or unit of government that conducts environmental investigation and clean-up of a contaminated property may receive a release from future environmental liability. During the development of the Wyoming VRP, the Wyoming legislature recognized the need to encourage those handling contaminants to do all they could to prevent a release to the environment. As a result, a requirement to implement a pollution prevention plan was added to the eligibility criteria necessary for VRP participation, and a draft rule to establish this requirement is currently before the Environmental Quality Council of the Wyoming Department of Environmental Quality (DEQ). The proposed P2 Plan rule establishes two categories of facilities, each with a different level of required pollution prevention plan documentation to be required.

3. SO₂ Emissions

Wyoming DEQ took comments through Feb. 11, 2008 on a draft regional SO₂ emissions and milestone report.

The report determined whether or not average adjusted SO₂ emissions from 2004, 2005, and 2006 emitted by large industrial sources exceeded the 2006 SO₂ emissions milestone set in the Regional Haze State Implementation Plans for Arizona, New Mexico, Utah, and Wyoming. The draft report shows that adjusted emissions of SO₂ from large industrial sources in the four states in 2006 were less than the 2005 adjusted emissions, and based on a comparison of averages a preliminary determination was made that the four states have met the 2006 regional SO₂ milestone of 420,194 tons.

4. Subsidence Issues

The Wyoming Abandoned Mine Land Division has been investigating subsidence issues in the Rock Springs area associated with historic coal mining. Last November, investigative drilling in non-developed areas of Rock Springs was performed to provide additional subsurface information for future mitigation efforts. Additionally, Wyoming DEQ hosted a public workshop in Rock Springs in December 2007. Topics covered included home subsidence insurance, damage claims, and current and future abandoned mine land projects in and around Rock Springs.

5. Regulations/Guidance—Oil & Gas Permitting Efficiency Review

In June 2007, the Wyoming Department of Environmental Quality (Wyoming DEQ) and interested stakeholders embarked on a comprehensive review of the minor source permitting process for the oil and gas industry, particularly with respect to information technology systems. The team used a Kaizen tool to evaluate the permitting process and recommend improvements to the process. As a result of the evaluation, Wyoming DEQ adopted a streamlined approach and issued new permitting guidance for the oil and gas industry, which became effective Sept. 1, 2007. The revised guidance includes new timeframes for submitting permit applications and compliance documents, new control requirements, and new installation deadlines. The streamlined process includes the use of electronic documents and permitting forms available on the DEQ Web site.

REGIONS 9 and 10: Region 9 serves Arizona, California, Hawaii, Nevada, the Pacific Islands subject to U.S. law, and approximately 140 Tribal Nations; and Region 10 serves Alaska, Idaho, Oregon, Washington, and 267 Tribal Nations.

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The Western Climate Initiative and its Development of a Regional Cap and Trade Program

Climate change has become the primary environmental focus of federal, state, and local leaders, as global warming and its potential impacts have surged to the forefront of national media coverage. In the West, state leaders have been proactive and have been taking steps ahead of the federal government to address climate change. One of the steps they are taking is the development of a regional cap and trade program for greenhouse gas (GHG) emissions. Western leaders intend for the regional cap and trade program to significantly reduce GHG emissions at a far lower cost than would happen under a more traditional regulatory model.

The Western Climate Initiative (WCI)

In February of 2007, the governors of Washington, Oregon, California, Arizona, and New Mexico signed a document that established the Western Regional Climate Action Initiative, now known as the Western Climate Initiative, or WCI. The WCI was formed in recognition of the fact that GHG emissions have impacts that go beyond individual states' borders, and a coordinated regional GHG reduction effort would have a broader impact than individual state efforts. British Columbia, Utah, and Manitoba subsequently joined the WCI. There are also five western states and three Canadian provinces "observing" the WCI's efforts.

The WCI was tasked with three primary goals: (1) setting a regional GHG reduction goal; (2) joining a

regional or national registry for tracking and managing GHG emissions; and (3) developing a "regional, market-based multi-sector mechanism, such as a load-based cap and trade program," to achieve the regional GHG reduction goal. So far, the group has met two of the goals. On Aug. 22, 2007, the WCI announced the regional GHG reduction goal, setting a goal of an aggregate reduction of 15 percent below 2005 levels by the year 2020. The WCI also accomplished the second, goal by joining The Climate Registry, a repository for verified, accurate GHG emission reporting data.

The third goal remains unfinished—establishing a regional cap and trade program. The WCI has until Aug. 26, 2008 to finalize a regional cap and trade system.

How Will a Regional Cap and Trade System Work?

The WCI is developing a regional cap and trade system, rather than individual states going off and developing their own systems. There are several advantages to a regional system, which the WCI is trying to exploit. First, more sources are included in a regional program, which means a greater chance for lower cost allowances. Second, the more "players" in the cap and trade market, the better the system works. Third, the more states that are covered under the emissions cap, the less chance there is for companies to outsource their emissions to other states.

The WCI will develop the regional program as a "model," and individual states will then adopt the "model" as their cap and trade programs. Each state in the program will get an emissions allowance budget. The total of all participating states' allowance budgets will equal the regional cap. Each state must also recognize allowances from other states, so sources in one state can buy and sell allowances to sources in other states. Finally, state registries are linked to allow for easy trading across state lines. If the WCI is successful in developing the regional cap and trade program by August 2008, Washington state will seek authority to implement the cap and trade program in Washington in the 2009 legislative session.

