

# ARTICLE

## GONE WITH THE WIND: COAL, FIRE & BRIMSTONE—A LEGAL ANALYSIS OF THE NEW REALITY FACING THE COAL INDUSTRY

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## I. INTRODUCTION

We will feel mounting pressure to plunder the environment. We will have a crash program to build more nuclear plants, strip-mine and burn more coal, and drill more offshore wells than we will need if we begin to conserve now. Inflation will soar, production will go down, people will lose their jobs. Intense competition will build up among nations and among the different regions within our own country. If we fail to act soon, we will face an economic, social and political crisis that will threaten our free institutions.<sup>1</sup>

The haunting words of President Carter still ring true today, perhaps even more so than when he made them. Of course, premonitions of what was to come differ from reality. As the world's non-renewable resources continue to deplete and President Carter's past pleas and warnings of U.S. dependency on foreign oil come true, many have diverted back to relying on coal. For hundreds of years, coal has been a staple energy resource in the United States. Unlike some energy sources, coal seems to have enjoyed popular acceptance, if not celebration. From the expansion of the railroad to the movie *Coal Miners Daughter*, the use and view of coal in the United States has often been seen as synonymous with patriotism and hard work.

The realities of environmental degradation are no longer thought of as problems for third-world countries. While the problems associated with environmental degradation that come from using coal have always been an issue, increasingly, we are coming to understand the costs of relying on coal. Still, even though we supposedly know better and have the technology to do better, we still employ standards fifty years behind the times. With the advances in research and technology we can make informed decisions about our land and resource use. We can do better. Unfortunately, due to long term presidential neglect, outdated laws, and a lack of state initiatives, the United States is still making detrimental decision that seemingly is working off of the mindset that fossil fuels were plentiful.

This article will explore the environmental and public health realities of coal, particularly in the context of how coal has affected Kansas. From the way coal is extracted, to the foreseeable use of coal in Kansas, the environmental and public health effects of coal use are devastating.<sup>2</sup> By-products of coal

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1. Jimmy Carter, *President's Proposed Energy Policy*, 43 VITAL SPEECHES OF THE DAY 418, 419 (1977).

2. ALICE MCKEOWN, SIERRA CLUB, THE DIRTY TRUTH ABOUT COAL: WHY YESTERDAY'S TECHNOLOGY SHOULD NOT BE PART OF TOMORROW'S ENERGY FUTURE 4

production are emitted in the air, disposed of in the water and absorbed in our skin. The first part of the article will briefly focus on water quality and how the regulatory protections of the Clean Water Act and the Surface Mining Control and Reclamation Act have failed. Due to the regulatory neglect in not requiring proper disposal of mining waste near waterways, the domino effect inevitably includes air and public health concerns. Extraction involves all three factors of air, water and public health. The remaining portion of the article will connect all three factors together in focusing on air quality initiatives in relation to the Supreme Court case of *Massachusetts v. EPA* and its trendsetting application in Kansas. The real life effects and opposition to coal related environmental and health risks were clearly illustrated in a three year battle between two Governors, an industry supported state legislature and an environmentally conscious state agency. Kansas has become a primary case study of how future climate change reform will create an atmosphere of conflict. From the internal past and present debate within the state, to the recent actions by the newly appointed Governor, EPA and proposed federal incentives have created lessons learned for other states in their approach to climate change reform.

## II. EXTRACTION METHODS AND CONSEQUENCES

What do dinosaurs, sulfur, mercury and arsenic have in common? Coal. Fossil fuels, which include coal, petroleum, and natural gas, make up eighty-five percent of the world's primary energy sources.<sup>3</sup> While coal is highly combustible and well suited to create energy, these resources take millennia to renew themselves. Sadly, however, we are depleting our fossil fuel reserve much faster than we are developing alternative energy sources. We continue to rely on fossil fuels to our own detriment. Annually, 120 million tons of solid waste are produced from the burning of fossil fuels.<sup>4</sup> Using fossil fuels has increased the levels of carbon dioxide in the global atmosphere and has greatly contributed to the elevated warming of the Earth's surface. At a

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(2007), <http://www.sierraclub.org/coal/dirtytruth/coalreport.pdf> (12,000 Miners died of black lung disease between 1992 and 2002.).

3. American Coal Foundation, FAQs About Coal, <http://teachcoal.org/aboutcoal/articles/faqs.html> (last visited Mar. 6, 2010); U.S. Department of Energy, Energy Sources, Fossil Fuels, <http://www.energy.gov/energysources/fossilfuels.htm> (last visited Mar. 6, 2010).

4. MCKEOWN, *supra* note 2, at 4.

more local and regional level, chemical elements such as sulfur, mercury, and chromium are deadly by-products of coal plants.<sup>5</sup>

While the use of coal was declining in the 1950s, it increased 14.4% between 1973 and 1976 due to the shortage of petroleum, accompanied with a drive to end U.S. dependence on foreign oil.<sup>6</sup> With production at 560 million short tons in 1950 and increasing to 1.07 billion short tons in 2003, the nation's dependency on coal has increased at 1.2% annually.<sup>7</sup>

According to the U.S. Department of Energy, the United States contains one quarter of the world's coal reserve. There is no area more known for coal in the United States than the Appalachian Mountains.<sup>8</sup> Surface or sub-surface mining are the two primary ways of coal extraction.<sup>9</sup> Sub-surface or underground mining consists of digging tunnels or shafts into the earth to extract mineral deposits.<sup>10</sup> Surface, or strip mining, is the removal of vegetation and bedrock.<sup>11</sup> The most devastating form of strip mining is mountain top removal. Mining companies devised the method of mountain topping in order to excavate the coal more quickly than the traditional method of strip and open pit mining.<sup>12</sup> Occurring in the Appalachian region of West Virginia, Virginia, Tennessee, and Kentucky, the mountain is usually clear cut, removing all vegetation and topsoil. According to the End Mountain Removal Action and Resource Center, because coal companies frequently are responding to short-term fluctuations in coal prices, "trees are often destroyed, burned or illegally dumped" into the waterways.<sup>13</sup> Second, using millions of pounds of explosives on a daily basis, 500 to 800 feet of a

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5. MCKEOWN, *supra* note 2, at 11.

6. ENERGY INFO. ADMIN., COAL PRODUCTION IN THE UNITED STATES – AN HISTORICAL OVERVIEW 1 (2006), [www.eia.doe.gov/cneaf/coal/page/coal\\_production\\_review.pdf](http://www.eia.doe.gov/cneaf/coal/page/coal_production_review.pdf) (In 1978, the Power Plant & Industrial Fuel Use Act required the conversion of most oil burning power plants to coal or natural gas. This change was prompted to rid the US of foreign oil and adopt new coal liquid and gasification technologies).

7. *Id.*

8. U.S. Department of Energy, Energy Sources, Coal, <http://www.energy.gov/energysources/coal.htm> (last visited Mar. 6, 2010).

9. ENERGY INFO. ADMIN., *supra* note 8, at 5. In 1973 underground and surface mining equally accounted for fifty percent of production. In 2003, surface mining like mountain topping accounted for sixty seven percent while underground mining that employs the most manpower accounted for thirty three percent. According to the Energy Information Administration "[c]oal production increased by 2.2%, or 24.8 million short tons from the 2007 level to reach a record level of 1,171.5 million short tons." However, overall United States coal consumption in all sectors decreased in 2008. *Id.*

10. American Coal Foundation, *supra* note 3.

11. *Id.*

12. ENERGY INFO. ADMIN., *supra* note 8, at 5.

13. End Mountaintop Removal Action and Resource Center, Learn More About Mountain Top Removal Coal Mining, <http://www.ilovemountains.org/resources> (last visited Mar. 6, 2010).

mountain top is blown off.<sup>14</sup> Weighing up to 13,000 tons, a dragline extractor then removes tons of coal that would take years for miners to extract.<sup>15</sup> Developed as a quick and cost-saving tool, the dragline has eliminated the use of manpower in the mining industry, which has changed the cultural and economic region of the Appalachians.

Although the productivity of the Appalachian region has remained the same over the past thirty years, the dynamic has totally shifted. In 1973, there were 124,000 employees in the mining industry. Of those, 96,302 were traditional underground miners and 27,989 were surface miners.<sup>16</sup> In 2003, the total number in the industry had decreased to 46,507 total employees. Of that total 30,744 were underground and 15,763 were surface miners.<sup>17</sup> Because of its efficiency and high rate of return, in addition to saving the industry money, the dragline has increased unemployment, environmental destruction, and public health risks. After clearing, blasting, and digging, the remaining steps of extraction often include the illegal dumping of waste. Extraction is regulated under several federal laws which include the Clean Water Act and the Surface Mining Control and Reclamation Act.

The purpose of the Clean Water Act (“CWA”) is purportedly “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>18</sup> Under shared authority the Environmental Protection Agency (“EPA”) and the US Army Corp of Engineers (“Corp”) have permitting authority under section 404 to prohibit material discharge of soil, sand and fill into any U.S. waterway.<sup>19</sup> Prior to the release, movement, or excavation of any dredged or fill material from any U.S. water body, the Corp must issue a permit. The Act also gives the EPA permitting authority to regulate “point source” pollutants that polluters release into any U.S. waterway under the National Pollutant Discharge Elimination System (“NPDES”) program.<sup>20</sup>

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14. *Id.*

15. Absolute Astronomy, Dragline Excavator, [http://www.absoluteastronomy.com/topics/Dragline\\_excavator](http://www.absoluteastronomy.com/topics/Dragline_excavator) (last visited Mar. 6, 2010).

16. ENERGY INFO. ADMIN., *supra* note 8, at 8 (The average annual salary for a dragline operator is \$36,990; the Coal mining industry employed 3,780 operators in 2007; WY, OK, WV, ID, OR have the highest concentration of dragline operator workers); Bureau of Labor Statistics, Excavating and Loading Machines and Dragline Operators, May 2007, <http://www.bls.gov/oes/2007/may/oes537032.htm>.

17. ENERGY INFO. ADMIN., *supra* note 8, at 8 (Number of mines decreased from 4,423 (1973) to 1,143 (2003)).

18. 33 U.S.C. § 1251 (2009).

19. *Id.* at § 1344.

20. *Id.* at § 1342. Compensatory Mitigation Final Rules, 33 C.F.R. Part 325 and 332 II General Comments (B)(1) Section 404(b)(1) guidelines. Under shared authority the Army Corps of Engineers and the EPA are also given authority to prevent “no net loss of

Under the CWA, the EPA can stop pending Corp permits if it finds a disposal site will have negative effects on a waterway. In an effort to exclude the term “mining waste” from the definition of “fill material,” House Bill 1310 was introduced into the US Congress on March 3, 2009.<sup>21</sup> Without congressional approval or public comment in 2002 the Corp changed the definition of “fill material” to include mining waste.<sup>22</sup> This change has allowed the mining industry to use U.S. waterways as a disposal site for coal waste under a permit.<sup>23</sup> To restore the language to its appropriate state, House Bill 1310 proposes to add the following language to the CWA: “fill material means any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose. The term does not include any pollutant discharged into the water primarily to dispose of waste.”<sup>24</sup>

Proposed legislation such as the Hardrock Mining & Reclamation Act will also provide further reform. The Hardrock Mining & Reclamation Act will require increased inspection of federally mined land. § 203(a)(2) reaffirms National Environmental Policy Act (“NEPA”) compliance, specifically in relation to meeting permit requirements as well as additional reform.<sup>25</sup> Permit applications for an exploration permit will require a detailed plan outlining all potential environmental effects such as “a description of potential impacts to groundwater and surface water, including appropriate hydrological assessments and analyses.”<sup>26</sup> The Act also applies the “unnecessary or undue degradation” standard currently applicable to the Bureau of Land Management (“BLM”) and the National Forest System.<sup>27</sup> Some criticize the act as reiterating existing NEPA regulations. Under the Federal Land Policy & Management Act, the BLM Secretary is required to impose stricter regulations to ensure the protection of land excavation and “roadless areas.”<sup>28</sup> However, existing legislation like the Surface Mining Control & Reclamation Act (“SMCRA”) already

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wetlands” by requiring, avoiding, minimizing, or considering alternative discharge sites that are less invasive.

21. H.R. 1310, 111th Cong. § 2 (2009).

22. End Mountaintop Removal Action and Resource Center, African American Environmentalist Association Supports the Clean Water Protection Act, July 2009, <http://www.ilovemountains.org/news/575>.

23. *Id.*

24. H.R. 1310.

25. S. 796, 111th Cong. § 203 (2009).

26. *Id.* at § 302(c).

27. *Id.* at § 306.

28. Patrick Mitchell & Wendy Anderson, *Recent Federal Actions: Impacts on Mining*, AMERICAN BAR ASSOCIATION PUBLIC LANDS COMMITTEE NEWSLETTER, May 2000, <http://www.abanet.org/enviro/committees/publiclands/newsletter/may00/mitc.html>.

provides more environmental and public oversight in terms of mining excavation methods.

### III. THE WATER FACTOR

All surface coal mining operations and reclamation conducted on non-federal land must be regulated under a state program.<sup>29</sup> The state must enact a state law that is in accordance with SMCRA.<sup>30</sup> The law must include permitting, violation, and sanction guidelines supported by adequate personnel to fulfill all of the administrative obligations.<sup>31</sup> Additionally, the law must provide a process of assessing when areas are unsuitable for coal surface mining.<sup>32</sup> According to section 522(a)(1), “each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in paragraphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the Act of any area so designated.”<sup>33</sup>

A state must designate an area unsuitable if it “is not technologically and economically feasible” under the regulation of this Act.<sup>34</sup> An area can be considered unsuitable for some or all surface mining methods if such operations:

- (A) are incompatible with existing State or local land use plans or programs; or
- (B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems; or
- (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or
- (D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.<sup>35</sup>

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29. 30 U.S.C. § 1253 (2009).

30. 30 U.S.C. § 1253(a)(1).

31. 30 U.S.C. § 1253(a)(2), (3).

32. 30 U.S.C. § 1253(a)(5).

33. 30 U.S.C. § 1272(a)(1).

34. 30 U.S.C. § 1272(a)(2).

35. 30 U.S.C. § 1272(a)(3)(A)–(D)

Surface mining is not permitted on federally protected park land or any area within the vicinity.<sup>36</sup> Mining is also prohibited:

[W]ithin one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.<sup>37</sup>

The purpose of SMCRA is to regulate industry and protect public health and the environment, but with the past actions of the Bush Administration, many of the protections listed in the CWA and SMCRA have been blatantly violated. To resolve the conflict between the Corps' § 404 permitting authority and SMCRA, the Office of Surface Mining ("OSM") published its final rule regarding the placement and disposal of coal waste resulting from mountain top removal.<sup>38</sup> The old rule states that mining companies must place coal waste or valley fill within the permitted area allowed under the reclamation standards of SMCRA.<sup>39</sup> However, environmentalists challenged this rule in the Federal District Court for the Southern District of West Virginia. In 2002, *Kentuckians for the Commonwealth v. Rivenburgh* argued SMCRA did not allow coal waste disposal in U.S. waterways under a CWA § 404 permit.<sup>40</sup> Affirming the Fourth Circuit's decision, OSM stated that SMCRA standards allow coal waste to be disposed of in U.S. waterways under section 404 of the CWA.<sup>41</sup> The overall objective of the final rule was to remove confusion but instead it will inevitably create more litigation for environmental organizations.

Although water protection is essential, the need for better air quality is equally important. As the scientific community substantiates more and more information about the effects of

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36. 30 U.S.C. § 1272(e)(1)–(3).

37. 30 U.S.C. § 1253(e)(4), (5).

38. Excess Spoil, Coal Mine Waste, 73 Fed. Reg. 75, 814–15 (Dec. 12, 2008) (to be codified 30 C.F.R. pt. 780, 784, 816, and 817).

39. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95–87, §§ 522(e)(4)–(5).

40. *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

41. 73 Fed Reg. 75, 814–15 (Dec. 12, 2008).

global warming, the need for climate change legislation will be over-debated and unrealized. The Supreme Court took the first initiative to move the legislature forward in passing regulation in the 2007 ruling of *Massachusetts v. Environmental Prot. Agency*. In recognizing the supreme law of the land, states can no longer sit idly by while the industry debates over whether GHG meets regulatory definitions. Kansas was the first state to recognize the need for change in state permits and GHG reform under the *Massachusetts* ruling.

#### IV. THE AIR FACTOR: MASSACHUSETTS V. EPA

In 1999, a group of private entities petitioned the EPA to begin regulating “greenhouse gases” (“GHGs”) under the Clean Air Act (“CAA”).<sup>42</sup> § 202(a)(1) of the act requires the EPA to regulate air pollution that is a risk to public health.<sup>43</sup> The Act defines an air pollutant as an “air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.”<sup>44</sup>

Denying the petition, the EPA stated:

(1) the Act does not authorize it to issue mandatory regulations to address global climate change and (2) even if it had the authority to set greenhouse gas emission standards, it would have been unwise to do so at that time because a causal link between greenhouse gases and the increase in global surface air temperatures was not unequivocally established.<sup>45</sup>

Additionally, the Administrator believed that mandatory regulation would hinder President Bush’s initiative in creating a voluntary reduction program for industry and block potential talks with other countries to reduce emissions.<sup>46</sup> Having an indirect connection to the proceedings, Massachusetts intervened in 2003 when the petitioners requested review from the D.C. Circuit Court.<sup>47</sup> Consisting of a three judge panel, two of the three affirmed the EPA’s decision.<sup>48</sup>

In a five to four vote delivered by Justice Stevens, the Supreme Court concluded that scientific evidence proves that the

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42. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497 (2007).

43. 42 U.S.C. § 7521(a)(1) (2008).

44. 42 U.S.C. § 7602(g).

45. *Massachusetts*, 549 U.S. at 497.

46. *Id.*

47. *Id.*

48. *Id.* at 498.

buildup of GHGs (specifically the release of carbon dioxide) is the potential cause of global warming thereby falsifying EPA's claim that no casual link exists.<sup>49</sup>

Congress responded to the scientific discoveries of global warming in the 1960s and 70s by establishing the National Climate Program Act in 1978 and the Global Climate Protection Act in 1987.<sup>50</sup> In 1990, the United Nations created the Intergovernmental Panel on Climate Change (IPCC), which is an international scientific body made up of world renowned experts to combat global warming.<sup>51</sup> In 1995, the IPCC issued the Kyoto Protocol urging industrialized nations to commit to GHG reduction.<sup>52</sup> They recognized developed nations like the United States as being one of the biggest contributors. The US has signed on but has not ratified the agreement with the present 184 signatories due to past opposition from the Bush Administration and Congress opposing the stringent emissions guidelines of the Kyoto agreement.<sup>53</sup> Although past EPA general counsel recognized the agency's authority to regulate GHGs, the Bush administration was adamant in denying a petition requesting regulation.<sup>54</sup> In September 2003, the EPA denied the petition to regulate GHGs stating "contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change."<sup>55</sup> Arguing that the original objectives of the CAA were to address local, not global, air pollution issues, the EPA argued that GHGs did not meet the "air pollutant" definition under the CAA.<sup>56</sup>

The EPA further argued that since most GHGs are generated from transportation, any potential regulation would conflict with the Department of Transportation's ("DOT") current mandatory fuel economy standards, which are the most feasible means of regulating GHGs.<sup>57</sup> Backed by ten states, surprisingly including Kansas, the EPA argued Massachusetts lacked

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49. *Massachusetts*, 549 U.S. at 504–05. *See id.* at 507 (1959 report that recorded CO<sub>2</sub> levels at 316 parts per million (ppm), by 2006 CO<sub>2</sub> levels reached 382 ppm); U.S. Dep't of Commerce, National Oceanic & Atmospheric Administration, Trends in Atmospheric Carbon Dioxide: Mauna Loa, <http://esrl.noaa.gov/gmd/ccgg/trends> (same).

50. *Id.* at 507–08.

51. *Id.* at 508.

52. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22.

53. *See* Sen. James M. Inhofe, Senate Floor Statement, <http://inhofe.senate.gov/pressreleases/climateupdate.htm> (last visited Apr. 21, 2010).

54. *Massachusetts*, 549 U.S. at 510.

55. *Id.* at 511.

56. *Id.* at 512–13.

57. *Id.*

standing.<sup>58</sup> The Supreme Court concluded the petitioner, particularly Massachusetts, met all the standing requirements stating, “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both *actual* and *imminent*.”<sup>59</sup>

The EPA argued that regulations would not change the pace of climate change, nor be an aid to the petitioner’s injury.<sup>60</sup> Second, EPA’s reasoning of opposing domestic GHG regulation due to potential imposition on former President Bush’s agenda to develop global voluntary programs with other developing nations was not convincing.<sup>61</sup> According to the Court, “while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.”<sup>62</sup> Third, the Court stated the EPA has clear authority under the CAA to regulate GHG emissions.<sup>63</sup> Fortunately the EPA’s argument that GHGs, like carbon dioxide, did not meet the CAA definition of “air pollutant” was not convincing to the Court. According to the Court, “carbon dioxide, methane, nitrous oxide, and hydro fluorocarbons are without a doubt . . . *physical, [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air*. The [Clean Air Act] statute is unambiguous.”<sup>64</sup> EPA’s refusal to regulate GHGs was “arbitrary, capricious . . . or otherwise not in accordance with the law.”<sup>65</sup>

One state that acted on the Supreme Court’s initiative was Kansas. Within a short time after the *Massachusetts* ruling, the Kansas Department of Health and Environment (“KDHE”) denied the construction permits to build two new coal fire plants within the state.<sup>66</sup>

#### V. HOLCOMB COAL FIRE PLANT

According to Roderick Bremby, Secretary of KDHE, “I believe it would be irresponsible to ignore emerging information

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58. *Massachusetts*, 549 U.S. at 505–06 (The ten states of support for the EPA include: AK, ID, KS, MI, NE, ND, OH, SD, TX, UT).

59. *Id.* at 521.

60. *Id.* at 523.

61. *Id.* at 525.

62. *Massachusetts*, 549 U.S. at 534.

63. *Id.* at 532. “EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate.” *Id.* at 533.

64. *Id.* at 529.

65. *Massachusetts*, 549 U.S. at 534; *see Ethyl Corp. v. Env’tl. Prot. Agency*, 541 F.2d 25 (D.C. Cir. 1976) (en banc) (holding that the Clean Air Act was “a common sense...demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable”).

66. Kansas Dept. of Health and Environment, KDHE Denies Sunflower Electric Air Quality Permit (Oct. 18, 2007), [http://www.kdheks.gov/news/web\\_archives/2007/10182007a.htm](http://www.kdheks.gov/news/web_archives/2007/10182007a.htm).

about the contribution of carbon dioxide and other greenhouse gases to climate change and the potential harm to our environment and health if we do nothing.”<sup>67</sup> Citing the U.S. Supreme Court decision of *Massachusetts v. EPA*, which recognized carbon dioxide as an air pollutant under the CAA, Bremby’s denial of Sunflower Electric Corp.’s permits to construct and operate two new coal fire plants in Western Kansas set precedent.<sup>68</sup> However with the state legislature supportive of Sunflower’s efforts, the Kansas legislature introduced several bills to strip the KDHE Secretary of the right to deny a permit specifically based on climate change.<sup>69</sup> Following Bremby’s footsteps, former Governor Kathleen Sebelius vowed to veto any bill that restricted Bremby’s permitting authority.<sup>70</sup> True to her word, Sebelius vetoed three bills over a two-year period.<sup>71</sup> Being the first of its kind, Bremby’s actions have forced the energy industry to reevaluate if the old way of conducting business will be feasible in states that no longer accept sub-standard technology at the expense of their residents’ health.<sup>72</sup>

Knowing that the two proposed plants would become the largest new source of GHGs in the United States was not a distinction that neither Sebelius nor Bremby wanted for Kansas.<sup>73</sup> The fact that the plants represent an estimated cost of \$3.6 billion, emit eleven million tons of carbon dioxide per year, and increase state mercury levels up to eighty percent justified

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67. *Id.*

68. *Id.* See Kan. Stat. Ann. § 65–3012 (2009).

69. John Hanna, *Analysis: Sunflower Fighting 2 Battles: THE TOPEKA CAPITAL-JOURNAL*, Nov. 5, 2007, available at [http://cjonline.com/stories/110507/sta\\_215015370.shtml](http://cjonline.com/stories/110507/sta_215015370.shtml); Governor Kathleen Sebelius, Message from the Governor (May 16, 2008), [http://www.kslegislature.org/bills/2008/gov\\_2802.pdf](http://www.kslegislature.org/bills/2008/gov_2802.pdf).

70. Message from the Governor, *supra* note 69.

71. Kansas Office of the Governor, Executive Orders 08–04 (Mar. 27, 2008); 07–16 (June 6, 2007); 06–13 (Dec. 6, 2006); Nichole Corcoran, *Governor Sebelius Vetoes Coal Plants*, Sierra Club–Kansas Chapter, (March 21, 2008), <http://kansas.sierraclub.org/Wind/GovernorVeto.htm>. In wanting to reach a compromise in 2008 Sebelius proposed to: build one new plant similar in size to the Sand Sage permit previously approved (660 MW); Kansas base load power needs must receive top priority; plant must be able to implement carbon sequestration technology; commitment for twenty percent wind power (132 MW); commitment for 100 MW of energy efficiency; net metering allowed in the Sunflower service area. Message from the Governor, *supra* note 69. In 2008 Sunflower bombarded the Kansas Energy & Utilities Committee with forty energy bills. Simran Sethi, *What’s the matter with Kansas? The Fight Against Big Coal Hits the State Legislature with National Repercussions*, Huffington Post, April 19, 2009, [http://www.huffingtonpost.com/simran-sethi/whats-the-matter-with-kan\\_b\\_164408.html](http://www.huffingtonpost.com/simran-sethi/whats-the-matter-with-kan_b_164408.html).

72. KDHE, *supra* note 66.

73. Sethi, *supra* note 71.

Sebelius' and Bremby's actions.<sup>74</sup> The proposed Holcomb plants will be located in Finney County, Kansas.<sup>75</sup>

Many others including the Republican State Legislature did not view the Holcomb plants as an environmental threat but rather as a source of state revenue and job growth.<sup>76</sup> Lon Wartman of Garden City, Kansas and former Finney County Chairman of the Democratic Party resigned in anger stating:

[A]s despicable as I find the National Republican Party, I find the leaders of the Kansas Democratic Party even more despicable. Anyone who would throw a \$3.5 billion investment away when it offered the citizens of this great state an opportunity to show the world what can be done with one of the most innovative energy programs ever conceived does not and will not get one minute of my time.<sup>77</sup>

Wartman is not the only western Kansas politician who has expressed frustration. After Bremby's actions, John Doll, Garden City Commissioner, formed the "Kansans for Affordable Energy" pro-coal group to assist in the advocacy of Sunflower's initiatives.

Although the state has a history of bleeding red, this issue has become more contentious in terms of east versus west

74. *Id.* (eleven million tons of CO<sub>2</sub> per year is equivalent to putting 1.7 million gas-powered vehicles on the road).

75. Press Release, Holcomb Expansion Project Reaches Legislative Milestone, Sunflower Electric (May 7, 2008), <http://www.holcombstation.coop/News/Passageof2412pdf.pdf>.

76. Matthew Brown, *Montana Considers Cashing In on 1.2 B Tons of Coal*, *Am. Press*, July 5, 2009, *available at* <http://www.mtstandard.com/articles/2009/07/06/state/hjjajcjdjcgfhf.txt>. The Cheyenne Indian Reservation has 9,500 members, with 4,000 on the reservation. Ironically, Montana is experiencing a similar situation. Montana is looking for bids to extract more than 1.2 billion tons of coal for the cost of \$1.9 billion. As the outlook of job creation and revenue entice Powder River County Commissioners like Don McDowell they should look towards Kansas for lessons learned. With one in every two residents living in poverty, Cheyenne Indian Reservation residents do not wish to comprise the land for revenue. "The companies that want to do this, they act like locusts and move on, leaving nothing behind but bad water and dead cattle," said tribal member Jody Curley. Brown, Confronted by Governor Brian Schweitzer who is vowing, "to move the process forward" does not help landowners, residents and environmental groups who oppose the initiative. Overall the project would force landowners and the Indian tribe to give way to railroad construction and the stripping of thousands of acres. In a 2002 settlement agreement between the Land Board and the reservation "any company that mines the tracts must give hiring preference to tribal members. As part of the settlement, Montana's Congressional delegation promised the tribe \$10 million a year for seven years to offset mining impacts." *Id.*

77. Lola Wheeler, *Thank you, Rod Bremby*, EVERYDAY CITIZEN, October 21, 2007, [http://www.everydaycitizen.com/2007/10/rodneyn\\_and\\_goliath\\_environment.html](http://www.everydaycitizen.com/2007/10/rodneyn_and_goliath_environment.html). Wartman, like Governor Parkinson, has altered his party relations. After the 1970's Watergate scandal, Wartman moved from Republican to Democrat and now to Independent. According to Wartman, "[a]t this point in time, when you find issues with both parties, to be fair to everybody it would probably be best if I was an independent." Jon Ruhlen, *Plant Ruling Enrages some Democrats*, *The Hutchinson News Online*, October 23, 2007, *available at* <http://hsn.live.mediaspanonline.com/Todaystop/angry>.

Kansas as opposed to party affiliation. According to Joe Aistrup, Chairman of the Political Science Department at Kansas State University, Democrats do not have a favorable history in western Kansas; however the Breiby and Sebelius's decisions "ha[ve] tainted them in the context of east vs. west decision."<sup>78</sup> Apparently "in western Kansas, it's the Sebelius administration vs. western Kansas legislators" said Aistrup.<sup>79</sup> In eastern Kansas, there has been opposition from both political parties.

The reality of the situation is that eighty-five percent of the proposed power would leave the state, while nearly all of the acute health risks would remain in Kansas.<sup>80</sup> Leaving 550 million tons of carbon for generations to live with is not feasible governance. According to Sebelius, "we are committed to achieving growth but we must make smart choices about the future. This project was sited in western Kansas but its impact was not confined to one part of our state; it's a decision that affects our entire state and nation."<sup>81</sup>

Another problem with the use of coal as a source of power generation is the requirement of extensive water usage. On average, a single coal fire plant uses twelve million gallons of water per hour.<sup>82</sup> Unlike eastern Kansas, where water is plentiful, western Kansas' primary water source is the depleting Ogallala Aquifer. According to a Kansas Geological Survey ("KGS") study, the aquifer and well levels in southwest Kansas are depleting.<sup>83</sup> In January 2009 the KGS and the Kansas Department of Agriculture measured levels in nearly 1,400 water wells in forty-seven counties in central and western Kansas.<sup>84</sup> Of the 39,000 wells in the state, eighty percent reside in western Kansas, which is home to the High Plains Aquifer that has unfortunately experienced the most severe decline.<sup>85</sup> According to KGS, "the Ogallala portion of the High Plains aquifer were greatest in the southwestern counties, particularly the counties

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78. Wheeler, *supra* note 77. Democrats make up about twenty percent of registered voters in Finney County, while Republicans make up forty-nine percent. The remaining voters belong to third parties or are unaffiliated, according to the Finney County Clerk's Office. Gwen Tietgen, *Dems look to Rebound from Fallout*, THE GARDEN CITY TELEGRAM, November 15, 2007, available at <http://www.gctelegram.com/News/142179>.

79. Wheeler, *supra* note 77.

80. *Id.*

81. *Id.*

82. MCKEOWN, *supra* note 2, at 4.

83. Cathy Evans, *Ground-water Levels Continue Decline in Western, Kansas, Rise Slightly Farther East*, KANSAS GEOLOGICAL SURVEY, March 23, 2009, [http://www.kgs.ku.edu/General/News/2009/water\\_levels.html](http://www.kgs.ku.edu/General/News/2009/water_levels.html).

84. *Id.*

85. *Id.*

centered around Grant and Haskell counties where dry conditions have been the most severe.”<sup>86</sup>

Matching the trend of their annual assessment since 1996, the water levels in western Kansas are consistently dropping due to a decline in rainfall.<sup>87</sup> In 2008, water levels fell an average of 2.85 feet, with some areas experiencing up to a five foot drop.<sup>88</sup> In 2007, levels decreased an average of 1.72 feet, followed by 2.09 feet in 2006.<sup>89</sup> 1998 is the only year that saw growth, with an increase of 0.10 feet.<sup>90</sup> KGS does not conduct assessment in eastern Kansas, due to its numerous sources of water.<sup>91</sup> Unfortunately, the counties that are experiencing the worst drought in the state surround Finney County, which is the location of the proposed Holcomb site.<sup>92</sup> With constantly depleting water levels, the ability of the water supply to sustain two coal fire plants based on no renewable equipment/standards is dubious.<sup>93</sup> In 2006, Sunflower predicted that the initial three proposed 700 megawatt (“MW”) plants would each require 8,000 acres-ft per year.<sup>94</sup> Sunflower has owned and operated a single coal fire plant in the area since 1983.<sup>95</sup> Adding the three coal plants initially proposed would have required the extraction of eight billion gallons of water per year to operate from an Aquifer that is already suffering a severe decline from the present plant.<sup>96</sup> Prior to 1983 “the water table before initial operation of Holcomb 1 averaged 87 feet.”<sup>97</sup> The level in 2003 and 2004 was about 180 feet below the surface.<sup>98</sup> Thus, the water table had declined ninety-three feet since the initial operation of Holcomb 1 in 1983.<sup>99</sup> Operating any additional facilities from the Ogallala Aquifer is essentially unrealistic, especially when irrigation usage is factored in. Permitted or not, the environment will ultimately be the deciding factor.

With Kansas’ oil and natural gas production valued at \$6.58 billion in 2008, Doll’s radical proposals to filter Wyoming coal

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86. *Id.*

87. Evans, *supra* note 83.

88. *Id.*

89. *Id.*

90. *Id.*

91. Evans, *supra* note 83.

92. *Id.*

93. *Id.*

94. Kansas Chapter, Sierra Club, Water Usage at Sunflower Electric’s Holcomb, Kansas, Coal Plants (Sept. 4, 2006), <http://kansas.sierraclub.org/Wind/SunflowerPlant-WaterUsage.htm>.

95. *Id.*

96. *Id.*

97. *Id.*

98. Kansas Chapter, Sierra Club, *supra* note 94.

99. *Id.*

slurry into the Ogallala Aquifer for recharging purposes to use at the Holcomb plants indicates the state's unhealthy dependency on fossil fuel revenue.<sup>100</sup> After a ten percent increase in oil and natural gas production and a \$1.9 billion gain in 2008, many politicians like Doll want to make this a reality for coal.<sup>101</sup> Governor Sebelius focused less on the revenue and more on the effects. Sebelius vowed that she would not compromise public health.<sup>102</sup> Unfortunately, Mark Parkinson—former Lieutenant Governor to Sebelius—ultimately did not hold to the same standard.

## VI. STATE AND FEDERAL LEGAL ISSUES

Due to former Governor Kathleen Sebelius' appointment to the U.S. Health and Human Services Department on April 28th, 2009, Mark Parkinson resigned from his then current position as Lieutenant Governor to become Governor.<sup>103</sup> After six days of being in office, on May 8th, 2009, Parkinson went against his pre-sworn promise to veto the energy bill and passed state legislation allowing construction of one 895 MW coal fire plant.<sup>104</sup> Parkinson's actions differ from his voiced viewpoint as Lieutenant Governor: "you cannot say that you are an environmentalist, that you support the environment, that you are part of the green movement, and vote for coal-fired plants that are not needed for this state."<sup>105</sup> With no aspirations to run for Governor in 2010, Parkinson's indecisiveness seems to not faze him. Switching from Republican to Democrat in 2005, Parkinson's recent actions, some would argue, seem to match his past party affiliation.<sup>106</sup> Criticized for leaving the Republican party in 2005 to run as Sebelius's running mate, the Kansas GOP labeled Parkinson "a hypocrite and point[ed] out that four years ago Parkinson had called Sebelius a 'left-wing liberal Democrat' and said Republicans who supported her were 'either insincere or

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100. News Release, Kansas Geological Survey, Kansas Oil and Gas Production rises in 2008 (Mar. 13, 2009), <http://www.kgs.ku.edu/General/News/2009/oil2008.html>.

101. *Id.*

102. Corcoran, *supra* note 71.

103. David Goldstein & David Klepper, *Sebelius sworn in to Cabinet, Parkinson becomes Kansas governor*, KAN. CITY STAR, Apr. 29, 2009, at A1.

104. David Klepper, *New Governor Approves One Coal-fired Power plant for Kansas*, KAN. CITY STAR, May 5, 2009, at A1.

105. KTKA.com, *Parkinson Vows Continued Fight Against Coal Plants*, KTKA.COM, April 22, 2008, [http://www.ktka.com/news/2008/apr/22/parkinson\\_vows\\_continued\\_fight\\_against\\_coal\\_plants/](http://www.ktka.com/news/2008/apr/22/parkinson_vows_continued_fight_against_coal_plants/).

106. David Twiddy, *Kan. Gov. Selects Running Mate for Race*, THE ASSOCIATED PRESS, May 31, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/31/AR2006053101150.html>

uninformed.”<sup>107</sup> However, according to Sebelius, “I was looking for a Kansan who shares my independent approach to leading this state; someone willing to set partisanship aside for the sake of achieving real progress.”<sup>108</sup> As the forty-fifth Governor, some could see Parkinson’s actions as a left or right-wing move, but, in general, it seems to be a “compromised business decision” to meet the actions of all parties involved.

Originally proposing three 700 megawatt plants, the compromise calls for the construction of one 895 megawatt plant, and in exchange, Sunflower will invest in alternative energy resources, “close two oil-fired plants in Garden City, increase its use of biofuels, build two transmission lines to carry power west, and dedicate one percent of gross sales to energy efficiency programs.”<sup>109</sup> From reading media reports on the agreement, one would think the compromise was fair, but realistically the two oil-fired plants in Garden City have not been in operation for twenty years, which begs the question of how this will offset “future emissions from a new plant.”<sup>110</sup> Additionally, in regards to the “increase[d] use in biofuels,” Sunflower must reach a goal of ten percent biomass use to offset carbon emissions.<sup>111</sup> However, the market costs of biomass have to be less than 200 percent the price of coal.<sup>112</sup> Currently, the price of biomass is 200 percent more expensive than coal, allowing Sunflower to avoid mitigation.<sup>113</sup> According to Parkinson, “a little coal and a lot of environmental legislation was better than nothing.”<sup>114</sup> Regrettably, after looking at the fine print, there seems to be little environmental legislation and a lot more coal.<sup>115</sup>

According to the new state law, administrative penalties will be assessed to set “a level that will promote compliance with the Renewable Energy Standards Act.”<sup>116</sup> However, for the years 2011 and 2012, the state will not enforce penalties against a utility if it “can demonstrate it made a good faith effort to

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107. *Id.*

108. *Id.*

109. Klepper, *supra* note 104.

110. GPACE Analysis of the Provisions of the Governor’s Coal Plant Agreement (May 5, 2009), <http://www.gpace.org/?p=460>.

111. Kan. Stat. Ann. § 19-101a (2008) *amended by* H.B. 2369, 83d Leg., Reg. Sess. (Kan. 2009). Utilities must produce ten percent by 2011; fifteen percent by 2016; twenty percent by 2020.

112. GPACE, Analysis of the Provisions of the Governor’s Coal Plant Agreement, *supra* note 110.

113. *Id.*

114. Klepper, *supra* note 104, at A8.

115. *Id.*

116. Renewable Energy Standards Act, 2009 Kan. Sess. Laws ch. 141, § 6 (Act codified in scattered sections of Kan. Stat. Ann.).

comply. . .” with the present ten percent standard.<sup>117</sup> This provision allows utilities a grace period of three years to meet the present ten percent standard. However, the State Corporation Commission does have the discretion to consider *mitigating circumstances* when assessing penalties.<sup>118</sup> It has the freedom to establish the rules and regulations that govern the entire energy program. Issues of appointment and oversight could lead to further deregulation.

In § 26, the law redefines cooperatives to allow more utilities to become “exempt from the jurisdiction, regulation, supervision and control of the state corporation commission.”<sup>119</sup> Less oversight and deregulations can often lead to chaos, which should be a lesson learned due to the current housing market. Although provisions require co-op’s to inform customers of a rate change prior to the change going into effect, the fact that the utilities are exempt from state supervision poses a real risk of abuse.<sup>120</sup> Unfortunately, the pursuit to strip the present and future KDHE Secretaries of their permitting authority was also granted.

In § 23, the bill limits the Secretary of KHDE power to promulgate rules and regulations that are more stringent than the federal law.<sup>121</sup> The language states:

[T]he standards so established shall not be any more stringent, restrictive or expansive than those required under the Federal Clean Air Act. If the secretary determines that more stringent, restrictive or expansive rules and regulations are necessary, the secretary may implement the rules and regulations are necessary, the

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117. *Id.*

118. *Id.*

119. *Id.*

120. Renewable Energy Standards Act § 26(j); *see also id.* § 17(a) (ASHRAE means American Society of Heating, Refrigerating and Air-conditioning engineers); *id.* § 17(b) (Energy Star means federal standard for energy conserving products); *id.* § 18 (State Agencies must purchase Energy Star products); Kan. Stat. Ann. § 19 (All state agencies must conduct an energy audit at least every five years on all state-owned real property); *id.* § 20 (Increase promotion of school district and local government involvement in meeting the new recommended changes); *id.* § 21 (All newly constructed state building and renovations (if possible) meet ASHRAE/IECC standards); *id.* § 22(2) (Every utility which provides retail electric services in the state shall enter into a parallel generation services contract with all customers if the person is a residential customer and owns a renewable generator of 25 kilowatts or less; commercial owns a renewable generator of 200 kilowatts or less; school owns a renewable generator of 1.5 megawatts or less. Generators must be appropriately sized to meet each customer’s usage needs. For commercial users whose generator usage is connected to irrigation pumps, no more than ten pumps can be attached to the generator); Kan. Stat. Ann. § 27 (Increased the fuel efficiency standards for all state vehicles); *id.* § 31 (Requires that “any new coal-fired electricity generating facility in Kansas” purchase at least five percent of coal from Kansas).

121. *Id.* § 23(b)(1).

secretary may implement the rules and regulations only after approval by an act of the legislature.<sup>122</sup>

In § 24 the bill prohibits the Secretary from denying, approving, renewing, modifying or reopening a permit without a public comment or hearing process.<sup>123</sup> Any person who participated in the comment or hearing session and has standing can obtain judicial review of the Secretary's final action.<sup>124</sup> Any person other than the permit applicant is not required to exhaust their administrative remedies prior to obtaining a judicial review.<sup>125</sup> The Court of Appeals will have original jurisdiction, and the agency's record will be the only documentation of review.<sup>126</sup>

Since the KDHE Air Permitting program is governed under the federal authority of the Clean Air Act, Governor Parkinson and the state legislature's attempt to restrict KDHE Secretary of its power preempts the new state law. Fortunately, the EPA recently reminded Kansas of its preemptive authority.<sup>127</sup>

## VII. FEDERAL ISSUES

With the ink barely dry on Sunflower's agreement, the EPA held a meeting on May 28, 2009 with Sunflower and Kansas representatives to discuss the submission of a new permit.<sup>128</sup> Sunflower's original 2006 permit to build three 700 MW coal plants has changed greatly within the last three years by reducing the number of plants from two in 2007 to the present one 895 MW plant.<sup>129</sup> According to David Bryan, EPA spokesperson, "the Holcomb plant has really changed over that time. [W]e believe they [Sunflower] need a new permit."<sup>130</sup>

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122. Renewable Energy Standards Act § 23(b)(1).

123. *Id.* § 24.

124. *Id.*

125. *Id.*

126. Renewable Energy Standards Act § 24.

127. Letter from Robert J. Meyers, Principal Deputy Assistant Administrator, EPA, to Roderick L. Bremby, Secretary, Kan. Dep't of Health and Env't (July 1, 2009), *available at* [http://www.epa.gov/region07/programs/artd/air/nsr/archives/2009/r7comments/sunflower\\_holcomb\\_2009\\_project\\_comments.pdf](http://www.epa.gov/region07/programs/artd/air/nsr/archives/2009/r7comments/sunflower_holcomb_2009_project_comments.pdf).

128. David Sassoon, *EPA Likely to Send Kansas' Sunflower Coal Plant to the Drawing Board*, SOLVE CLIMATE, July 1, 2009, <http://solveclimate.com/blog/20090701/epa-likely-send-kansas-sunflower-coal-plant-back-drawing-board>.

129. *Id.*; *see generally* SUNFLOWER ELEC. POWER CORP., 2006 ANNUAL REPORT, at 3 (2006), *available at* <http://www.sunflower.net/documents/2006AnnualReport.pdf>. Sunflower presently operates six coal fired plants in Kansas. Westar Energy currently owns four coal fire plants in Kansas. Westar Energy Profile, [http://www.westarenergy.com/corp\\_com/contentmgt.nsf/publishedpages/our%20energy%20home](http://www.westarenergy.com/corp_com/contentmgt.nsf/publishedpages/our%20energy%20home) (last visited Mar. 6, 2010).

130. Sassoon, *supra* note 128; *see generally* SUNFLOWER ELEC. POWER CORP., *supra* note 129, at 8. Total production at the existing Holcomb plant in 2006 was 2,384,974

Sunflower argued “that they should be allowed to file another amended permit application instead of starting over.”<sup>131</sup> After meeting on July 1, 2009, the EPA affirmed their decision to require Sunflower to submit a new permit in a letter.<sup>132</sup> According to Bryan, “we can give states implementation authority under the Clean Air Act and Kansas has indeed opted into the process . . . but EPA still maintains review authority over permit decisions, and as a result we’ve been in discussions on the issue with all parties.”<sup>133</sup>

In the letter, the EPA reminded Sunflower and Parkinson that no matter what agreement they reached, both parties are liable to meet the permit standards under the CAA.<sup>134</sup> Under the CAA, “large stationary sources of pollution” such as coal plants and refineries must obtain an air quality permit.<sup>135</sup> States are allowed to enforce the program under EPA approval.<sup>136</sup> EPA reserves the right to object to a state’s issuance of a permit if it does not meet the CAA standards.<sup>137</sup> New Source Review (“NSR”) and Title V Operating Permit Systems are the two permitting programs under CAA preconstruction program.<sup>138</sup> The EPA issues Title V permits to operating facilities.<sup>139</sup> Since the Holcomb plant is still in the pre-construction phase, the EPA is requesting Sunflower to meet NSR permit requirements.<sup>140</sup> NSR consists of three types of permits:<sup>141</sup>

- Prevention of Significant Deterioration (“PSD”) required for new facilities or existing facilities that are undergoing major changes;
- Non-attainment NSR permit;<sup>142</sup>

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MWh, which was a decline from 2005. *Id.* at 10. The Board of Directors of Golden Spread Electric Cooperative, Amarillo, Texas was granted ownership in not less than 400 MW in the proposed new plant in 2006. *Id.* at 15. In 2006, Sunflower had \$305,232,952 in capital & \$41,296,498 in liabilities. *Id.*

131. Sassoon, *supra* note 128.

132. *Id.*

133. *Id.*; see generally, MCKEOWN, *supra* note 2 (Currently, there are over 150 new plants set for construction across the US. 85% of the proposed plants implement the old technology).

134. Letter from Robert J. Meyers to Roderick L. Bremby, *supra* note 129.

135. U.S. Env’tl. Prot. Agency, New Source Review Basic Information, <http://www.epa.gov/nsr/info.html> (last visited Mar. 6, 2010).

136. 40 C.F.R. § 70.1(a) (1992).

137. 40 C.F.R. § 71.4(k) (1996).

138. *Id.*

139. 40 C.F.R. § 71.21(a) (1994).

140. Letter from Robert J. Meyers to Roderick L. Bremby, *supra* note 129.

141. U.S. Env’tl. Prot. Agency, New Source Review Basic Information, *supra* note 135.

142. Non-Attainment Areas are areas that do not meet one or more of the National Ambient Air Quality Standards for the criteria pollutants designated in the Clean Air Act. Environmental Protection Agency, Terms of Environment: Glossary, Abbreviations and Acronyms, <http://www.epa.gov/OCEPAterms/nterms.html> (last visited March 6, 2010).

- Minor source permit is issued to facilities that opt to limit emissions levels to avoid PSD or non-attainment permits.<sup>143</sup>

According to the EPA letter, Sunflower needs to meet NSR permit standards that include building specifications, operation, emissions limitations, monitoring, reporting, and record-keeping requirements.<sup>144</sup> PSD specifically addresses:<sup>145</sup>

- Installation of the Best Available Control Technology (“BACT”);
- An Air Quality Analysis;
- Additional Impact Analysis; and
- Public Involvement

BACT is an emissions restriction established on an individual basis according to design, technology, equipment, and work/operational standards.<sup>146</sup>

Air Quality Analysis demonstrates “that new emissions emitted from a proposed major stationary source or major modification, in conjunction with other applicable emissions increases and decreases from existing sources, will not cause or contribute to a violation of any applicable NAAQS or PSD increment.”<sup>147</sup> Additional impact analysis:

[A]ssesses the impacts of air, ground, and water pollution on soils, vegetation, and visibility caused by any increase in emissions of any regulated pollutant from the source or modification under review, and from associated growth. Associated growth is industrial, commercial, and residential growth that will occur in the area due to the source.<sup>148</sup>

In switching from the technical to the public outreach aspects, the CAA has three public involvement options. First, an individual can respond during the public commenting session and request a public hearing prior to the issuance of the permit.<sup>149</sup> If individuals do not comment during the drafting of the permit,

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143. U.S. Env'tl. Prot. Agency, New Source Review Basic Information, *supra* note 135.

144. *See id.*

145. *See id.*

146. *Id.*

147. U.S. Env'tl. Prot. Agency, New Source Review Basic Information, *supra* note 135. The analysis involves “(1) an assessment of existing air quality, which may include ambient monitoring data and air quality dispersion modeling results, and (2) predictions, using dispersion modeling, of ambient concentrations that will result from the applicant's proposed project and future growth associated with the project.” *Id.*

148. *Id.*

149. U.S. Env'tl. Prot. Agency, Public Involvement, <http://www.epa.gov/nsr/public.html> (last visited Mar. 6, 2010) [hereinafter EPA, Public Involvement].

their opportunity to appeal the states or the EPA's decision to the Environmental Appeals Board or federal court is barred.<sup>150</sup> Before issuing a permit, a state or EPA must assess if the application is complete.<sup>151</sup> Once a draft is prepared, public notice is issued, the public is given thirty days to respond to the draft and request a public hearing.<sup>152</sup> Local and state publications advertise the notice.<sup>153</sup> If the state or EPA deems it necessary, the permit is altered based on the public comments.<sup>154</sup>

Second, the EPA publishes any proposed federal, state or local regulatory changes to NSR program in the federal register for public comment.<sup>155</sup> Lastly, an individual could bring a lawsuit against a polluter under the citizen's suit provision of § 304 of the CAA.<sup>156</sup> EPA is requiring KDHE to repeat the initial thirty day public comment session since the last public hearing took place over three year ago.<sup>157</sup>

In a letter dated July 1, 2009, the EPA emphasized that although HB2369 was signed into law by Governor Parkinson, applicants must meet federal and state environmental air standards prior to construction.<sup>158</sup> In accordance with Kansas's State Implementation Plan, the EPA requires KDHE to enforce the Clean Air Act pre-construction permits.<sup>159</sup> Preempting Kansas's new restriction on KDHE's permitting power, the EPA stated, "[n]otwithstanding KDHE's responsibilities under State law, as amended by HB2369, KDHE retains a responsibility under its approved PSD program to ensure that construction permits issued by KDHE meet the requirements of the PSD program under the Clean Air Act."<sup>160</sup> As the public and EPA comments of February, 2006 pertain to the initial proposal of three 700 MW plants, the new changes and a three year lapse in time have made the technical and public commentary outdated.<sup>161</sup> According to the EPA, the Governor's agreement does not mandate KDHE to issue a permit according to the two

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150. *Id.*

151. *Id.*

152. *Id.*

153. EPA, Public Involvement, *supra* note 149.

154. *Id.*

155. *Id.*

156. *Id.*

157. EPA, Public Involvement, *supra* note 149.

158. *Id.*

159. *Id.*

160. Letter from William W. Rice, Acting Regional Administrator, U.S. EPA Region VII, to Roderick L. Bremby, Kansas Department of Health and Environment (July 1, 2009) available at <http://solveclimate.com/sites/default/files/EPA%20Letter%20on%20Sunflower%20Coal%20Plant.pdf>.

161. *Id.*

party's specifications.<sup>162</sup> The redesign, technical criteria, and public comments all have to be considered prior to permit approval.<sup>163</sup> Due to facility changes, stack relocation, and scrubber modules, the potential air quality impact could differ from the initial permit.<sup>164</sup> The EPA emphasized that KDHE must conduct a thorough analysis of the following to meet all the PSD requirements prior to permit approval:<sup>165</sup>

- Best Available Control Technology;
- Air Quality and increment Impacts;
- Emissions standard.

After the analysis is complete, a thirty day public notice and comment period must commence.<sup>166</sup> KDHE is required to respond to public comments prior to making a final decision.<sup>167</sup>

Additionally, under § 112(g)(2), new sources of potential hazardous air pollutants ("HAPs") must meet KDHE, EPA approved permit levels.<sup>168</sup> Fortunately, in a 2008 U.S. Court of Appeals District of Columbia ruling, the court vacated § 112(n) excluding coal and oil fired electric generating units from § 112(g)(2) regulations,<sup>169</sup> thereby adding coal and oil fired units to the list of regulated entities and requiring Sunflower to meet § 112(g)(2) regulations.<sup>170</sup> Since no rules have been promulgated by the EPA or passed by Congress, each new 112(g)(2) permit is evaluated on a case-by-case basis.<sup>171</sup> According to the EPA, "the construction permit proposed and denied by KDHE contained no limits on HAP's other than mercury, and would not effectively satisfy Sunflower's obligation to comply with 112(g)."<sup>172</sup> The EPA requires Sunflower to meet the 112(g) case-by-case regulations that, to Sunflower's dismay, were not met in its May 4th agreement with the Governor.<sup>173</sup> KDHE is required to investigate, set strict emission standards and conduct an extensive review of Sunflowers proposed permit after a thirty day public comment session.<sup>174</sup> Although the Kansas legislature had

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162. *Id.* at 2.

163. *Id.*

164. Letter from William W. Rice to Roderick L. Brembly, *supra* note 160, at 2.

165. *Id.*

166. *Id.*

167. *Id.*

168. Letter from William W. Rice to Roderick L. Brembly, *supra* note 160, at 3; 40 C.F.R. pt. 60, Subpart Da.

169. *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008); *see* Letter from William W. Rice to Roderick L. Brembly, *supra* note 160, at 3.

170. Letter from William W. Rice to Roderick L. Brembly, *supra* note 160, at 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. Letter from William W. Rice to Roderick L. Brembly, *supra* note 160, at 3.

stripped Bremby's power, the EPA has reinstated KDHE's power through its federal obligations under the CAA.

For two years, environmental organizations like the Great Plains Alliance for Clean Energy ("GPACE") have fought Sunflower's proposal. According to Scott Allegrucci, GPACE Director, "[he] wouldn't be surprised in that as the regulatory authority they [EPA] would want to take a close look at it given that it was done between just the two parties and behind closed doors."<sup>175</sup> In a letter to KDHE, Earthjustice and the Kansas Sierra Club Chapter demanded public concerns be heard pertaining to the two party agreement between Parkinson and Sunflower.<sup>176</sup> According to Stephanie Cole, Kansas Sierra Club Chapter member, "[b]uilding a massive, new polluting coal facility will have serious long-term consequences for Kansas, and the public's voice should be heard on such an important matter."<sup>177</sup> On July 31, 2009, Sierra Club and Earthjustice filed a request in U.S. District Court to force the federal Rural Utilities Service, which is the federal government's financing agency to evaluate the environmental impacts of the Holcomb expansion and alternative energy choices.<sup>178</sup> Earthjustice attorney Jan Hasselman "discovered that Sunflower in the past had defaulted on its debt service payments to the federal government, and that as a consequence the federal government now has effective oversight over Sunflower's business decisions."<sup>179</sup>

Surrounded by three years of legislative, legal and veto challenges, Sunflower's position to build based on outdated standards is more of a financial hindrance than an advantage. With all of the existing and proposed federal/state incentives, it would be cheaper for Sunflower to comply with GHG regulations rather than fight. The following section will briefly discuss some of the federal incentives offered in the Energy Independence Now Act, the American Recovery & Reinvestment Act, the American Clean Energy & Security Act, and the Energy Improvement & Extension Act.

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175. David Klepper & Jeannine Koranda, *EPA: Sunflower must seek new coal permit*, WICHITA EAGLE (Kan.), July 2, 2009, at A1.

176. *Id.*

177. GPACE, Earthjustice and Sierra Club ask for Open Permitting Process for Coal Plant, June 24, 2009, <http://www.gpace.org/?p=545>.

178. Terry Winckler, *New Wrinkle in Sunflower Coal Story: We "Own" the Loan*, August 3, 2009 <http://uneearthed.earthjustice.org/blog/2009-august/new-wrinkle-sunflower-coal-story-we-own-loan>.

179. *Id.*

## VIII. NEW &amp; PROPOSED FEDERAL INCENTIVES

The Energy Improvement and Extension Act of 2008 (“TARP”), part of President Bush’s 2008 Stimulus Bill, allocates over “100 tax provisions, 290 amendments to the Internal Revenue Service Tax Code and over \$150 billion in separate tax incentives” for alternative energy investments, research and incentives.<sup>180</sup>

Refined coal producers must meet a twenty percent nitrogen oxide and forty percent sulfur dioxide or mercury reduction to receive new production tax credits.<sup>181</sup>

Under the American Recovery and Reinvestment Act of 2009 (“ARRA”), the objective is to provide funding for alternative energy research while creating jobs.<sup>182</sup> Allocated twenty billion dollars for alternative energy initiatives, of this amount, six billion dollars guaranteed loan program, \$2.5 billion research and development, \$6.3 billion for local, state and tribal government investments.<sup>183</sup> The following is a general breakdown of some of the revenue that was allocated:

- Department of Energy received \$3.5 billion for projects and research;
- Department of Interior received one billion dollars;
- US Environmental Protection Agency received four billion dollars for clean drinking water projects;
- Bureau of Land Management received \$305 million;
- National Park Service received \$250 million;
- Department of Parks and Wildlife received \$280 million.<sup>184</sup>

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180. Shawna M. Bligh & Chris A. Wendelbo, *Federal Government as Angel Investor for Environment & Energy Projects?*, 24 NAT. RESOURCES & ENV'T 25 (A.B.A.) (2009).

181. *Id.* at 26-27. Section 111 of Subtitle B modifies Section 48A of the Tax Code to allow a qualifying advanced coal project credit equal to thirty percent of the qualified investment for particular projects qualifying for the credits. *Id.*; see 26 U.S.C. § 48A (2009). The aggregate credit of \$2.55 billion allowed under Section 111 is allocated among the following: (1) \$800 million for integrated gasification combined cycle projects; (2) \$500 million for projects that use other advanced coal-based generation technologies; and (3) \$1.25 billion for advanced coal-based generation technology projects. 26 U.S.C. § 48A(d)(3)(B). The fuel ingredients of integrated gasification requires that seventy five percent of the coal has a generating capacity of 400 megawatts, the facility must be located in the US, and meet a sixty five percent CO2 reduction with the use of separating and sequestering equipment. Bligh & Wendelbo, *supra*, note 180 at 26-27.

182 The American Recovery and Reinvestment Act, Pub. L. No. 111-05 (2009).

183. *The Back Page*, 24 NAT. RESOURCES & ENV'T 62 (A.B.A.) (2009).

184. *Id.*

### A. Proposed Incentives

Two climate change bills were introduced in the House in May 2009.<sup>185</sup> The purpose of both bills is to promote energy independence through research and the use of alternative energy resources.<sup>186</sup> Rep. Dan Burton of Indiana proposed the Energy Independence Now Act, and the bill has been referred to the House Readiness Committee.<sup>187</sup> Rep. Henry Waxman of California proposed the American Clean Energy & Security Act, which made greater strides in passing the House in late June.<sup>188</sup> Seen as the primary climate change bill, the Senate Committee on the Environment and Public Works convened on August 6, 2009 to consider the 1,400 page bill.<sup>189</sup> Politics and voting obstacles seems to be the present barrier in the Senate.<sup>190</sup> Questions on bipartisanship, democratic votes, and House changes to the original bill that President Obama proposed will inevitably create further delay.<sup>191</sup> Due to brevity purposes, sections of both bills that primarily focus on coal will be briefly discussed. Some of the Congressional findings on which the Energy Independence Now Act bill is established on are too vague. For example, findings that up to eight trillion barrels of oil shale deposits reside in Colorado, Utah, and Wyoming, or the industry belief that NEPA enforcement has hindered future expansion of new coal facilities has decreased the US fuel supply indicates impartiality.<sup>192</sup> In denouncing NEPA, Congress does

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185. H.R. 2250, 111th Cong. (1st Sess. 2009); H.R. 2454, 111th Cong. (1st Sess. 2009).

186. American Clean Energy Leadership Act of 2009, Senate Committee on Energy and Natural Resources Highlights, [http://energy.senate.gov/public/\\_files/TheAmericanCleanEnergyLeadershipActof2009.pdf](http://energy.senate.gov/public/_files/TheAmericanCleanEnergyLeadershipActof2009.pdf) (last visited Mar. 6, 2010) (“On June 17, 2009, the Senate Committee on Energy and Natural Resources voted fifteen to eight to report a new original bill, the American Clean Energy Leadership Act of 2009”).

187. H.R. 2250.

188. H.R. 2454.

189. CARBON POSITIVE, US CLIMATE BILL: UNCERTAIN SENATE PATH, August 6, 2009, <http://www.carbonpositive.net/viewarticle.aspx?articleID=1634>.

190. *Id.*

191. *Id.*

192. H.R. 2250 § 2, at 3. Congressional findings for the justification of this bill:

- (1) Over the course of the past few years, gas prices have fluctuated from a cost as low as \$2 per gallon to as high as over \$4 per gallon.
- (2) Volatile fuel costs present daunting challenges to American families, small businesses and corporations making it difficult to budget and plan efficiently.
- (3) Hidden taxes on American oil companies provide an unfair advantage to foreign competitors. This serves only to increase dependence on foreign oil and eliminate domestic jobs.
- (4) The Federal regulations that restrict drilling impose prohibitive costs on the development of new sources of energy, artificially inflating the price of oil and gasoline.

not send a clear message of support for GHG regulation particular to the industry. Basing the bill on unsubstantiated claims of possible oil deposits within the Arctic Refuge/Outer Continental Shelf and promoting the need for alternative energy sources under the same findings is contradictory.<sup>193</sup> Under the proposed bill, domestic oil refineries will receive tax exempt financing and public land availability for new plant construction.<sup>194</sup> Only if the designated land is abandoned for ten years will the law allow “for leasing for renewable energy

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(5) It has been estimated that oil shale deposits in Colorado, Utah, and Wyoming hold as little as 1.8 trillion barrels of oil and as many as 8 trillion barrels.

(6) The United States is the only Nation in the world that has gone to such great lengths to restrict its own energy supply.

(7) It is estimated that 19 billion barrels of oil exist untouched within areas that the United States has restricted from drilling. This is equivalent to nearly 30 years worth of current imports of oil from our second largest foreign source of oil, Saudi Arabia.

(8) The Federal gasoline tax contributes to the burden of high prices for American families, business, and truckers.

(9) While many oil companies do hold leases on various plots of land, the most promising areas for oil and gas development, such as the Arctic National Wildlife Refuge and the Outer Continental Shelf, are currently off limits.

(10) Expanding drilling in these areas would create an upwards of 750,000 well-paying, long-term, privately funded American jobs.

(11) Allowing private parties to delay, or even halt, the construction of new refineries through litigation over the National Environmental Policy Act of 1969's Environmental Impact Statement requirement reduces the supply of gas thus raising gas prices.

(12) Food sources should not be used for the production of fuel, driving up food prices. Rather, it is essential to designate specific land for biofuels while investing in technology that can produce ethanol from nonfood sources.

(13) It is necessary to invest in emission-free energy sources, such as wind and solar energy technologies, to prepare for the future.

(14) Extending the biomass tax credit from only producers who sell their power into the grid, to also producers who use that energy on-site, will increase the number of Americans and American companies eligible for tax credits.

(15) Promoting locally produced greener biofuels will encourage private ownership as well as a more environmentally friendly energy source.

193. *Id.*

194. H.R. 2250 §§ 102-103 (Tax-exempt financing of domestic use oil refinery facilities and Designation & Availability of Federal Lands for Oil & Natural Gas Refineries). The President must designate a minimum of ten sites for refinery development eighteen months after the bill is enacted. H.R. 2250 § 103. Additionally, the President has twenty four months after enactment to open the sites up to private sector construction. *Id.* There is a designation Requirement that “[n]ot later than ninety days after the date of enactment of this Act, the President shall designate no less than three closed military installations” for refinery locations. *Id.* § 112. State Participation and Presidential Designation (a) If the Governor objects to the proposed designation after sixty days of its nomination, the site will no longer be considered. *Id.* § 112(c). State Participation and Presidential Designation Any designated land that is not developed for refinery use after ten years “shall be made available for leasing for renewable energy development purposes, such as wind or solar energy installations or an ethanol refinery.” H.R. 2250 § 114.

development purposes, such as wind or solar energy installations or an ethanol refinery.”<sup>195</sup>

Fortunately, the bill does provide incentives for biofuel development; the Coal-to-Liquid provision encourages the conversion of coal to a “synthetic fuel suitable for transportation.”<sup>196</sup> Dating back to the 1920’s, the Fischer-Tropsch (“FT”) process has primarily been used to transform coal to a liquid.<sup>197</sup> Recent developments have altered the traditional conversion process.<sup>198</sup> By using biomass as a catalyst during the gasification process a mixture of carbon monoxide (“CO”) and hydrogen (“H<sub>2</sub>”) synthetic gas is produced.<sup>199</sup> Wood, grasses, and other agricultural material can be used as the biomass.<sup>200</sup> After

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195. H.R. 2250 § 114 (Alternative Uses of Land); *see generally* Federal Requirements Under the Underground Injection Control Program for Carbon Dioxide Geologic Sequestration Wells, 73 Fed. Reg. 43492, 43496 (proposed July 25, 2008) (EPA proposed rules for Geological Sequestration (GS) regulations that concentrate on the technical, operational, monitoring, testing, and risk assessments associated with GS); Duncan Clark, *Just Add lime to the sea—the latest plan to cut CO<sub>2</sub> emissions*, THE GUARDIAN, July 6, 2009, <http://www.guardian.co.uk/environment/2009/jul/06/lime-sea-carbon-dioxide-emissions> (About a third of the CO<sub>2</sub> released in the air annually by humans are absorbed by the ocean. This slows the rate of global warming but has increase the level of ocean acidity. Tim Krueger, proposes adding lime to the ocean would resolve the problems. By converting limestone to lime, the rate of absorption would increase and the rate of ocean acidity would decrease. Krueger predicts that “the world would need to mine and process about ten cubic kilometers of limestone each year to soak up all the emissions the world produces); David P. Flynn & Susan M. Marriott, *Carbon Sequestration: A Liability Pathway to Commercial Viability*, 24 NAT RESOURCES & ENV’T 1, 37 (A.B.A.) (2009) (GS is the process of injecting CO<sub>2</sub> injecting as a liquid deep underground. The EPA estimates that there is enough storage area “to store a thousand years of CO<sub>2</sub> emissions from nearly 1,000 coal-fired power plants”); Abhay Singh & Pratik Parija, *Coal India Seeks Faster Approvals, Imports, Overseas Miners*, BLOOMBERG NEWS, July 1, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aTGLk9JaTGBw> (“Coal India Ltd., the world’s biggest coal producer” has requested that the regulatory approval be sped up to increase coal production in a country that plans to add 13,000 MW on new capacity annually ... India’s coal imports will more than double to 100 million tons by 2012 from forty million tons, estimates Kaamil Fareed, a senior trading manager at the Coal & Oil Group, which supplies coal in India and Pakistan”).

196. H.R. 2250 § 502.

197. Fischer-Tropsch Diesel, <http://www.refuel.eu/biofuels/fischer-tropsch-diesel/>.

198. *Id.*

199. *Id.*

200. *Id.* According to Section 126 of the American Clean Energy & Security Act of 2009, H.B. 2454, “Renewable biomass” is:

(i) Materials, pre-commercial thinnings, or removed invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)), including those that are byproducts of preventive treatments (such as trees, wood, brush, thinnings, chips, and slash), that are removed as part of a federally recognized timber sale, or that are removed to reduce hazardous fuels, to reduce or contain disease or insect infestation, or to restore ecosystem health, and that are-

(ii) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including-

this two-step process, some of the waste product, such as methane, waxes, and alcohols which “are made with water or carbon dioxide as a by product” are converted into diesel fuel.<sup>201</sup> Similar in energy content, FT and fossil diesel combined do not cause damage to vehicle engines.<sup>202</sup> Although there is no need for mechanical alterations, the production process contains many problems. Unfortunately, the same use of coal high temperature gasification process cannot be used on FT diesel.<sup>203</sup> Due to a difference in biomass properties, new technologies that are designed specifically for carbon dioxide’s biomass composition are needed.<sup>204</sup>

Large-scale coal-to-liquid facilities are eligible for a guaranteed loan if production is at a minimum of 10,000 per day, not exceeding 100,000 barrels per day of liquid transportation fuel.<sup>205</sup> Under the Facilities Loan program, any *eligible recipient*, “meaning individual, organization or other entity that owns, operates, or plans to construct a coal-to-liquid facility” can

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- (I) renewable plant material, including--
    - (aa) feed grains;
    - (bb) other agricultural commodities;
    - (cc) other plants and trees; and
    - (dd) algae; and
  - (II) waste material, including--
    - (aa) crop residue;
    - (bb) other vegetative waste material (including wood waste and wood residues);
    - (cc) animal waste and byproducts (including fats, oils, greases, and manure);
    - (dd) construction waste;
    - (ee) food waste and yard waste; and
    - (ff) the non-fossil biogenic portion of municipal solid waste and construction, demolition, and disaster debris.
  - (iii) Residues and byproducts from wood, pulp, or paper products facilities.

201. Fischer-Tropsch Diesel, *supra* note 197. The Columbia Encyclopedia, Sixth Edition, 2008, Columbia University Press. [http://www.encyclopedia.com/topic/Fischer-Tropsch\\_process.aspx](http://www.encyclopedia.com/topic/Fischer-Tropsch_process.aspx).

202. Fischer-Tropsch Diesel, *supra* note 197.

203. *Id.*

204. *Id.* According to Refuel, research funded European Commission program biomass difficulties include: First, the biomass pre-treatment and feeding need a different process, because milling biomass to small particles is too energy-intensive. *Id.* Moreover, small biomass particles can also aggregate and plug feeding lines. Fischer-Tropsch Diesel, *supra* note 197. Pre-treatment processes like torrefaction or pyrolysis (which produces a liquid oil) could be developed to overcome these problems. *Id.* Second, due to the higher reactivity of biomass (compared to coal) the gasification temperature might be decreased, resulting in higher efficiencies, but this will require different gasification and burner design. *Id.* Third, the ash composition in biomass is different from that in coal, which results in different ash and slag behavior, which is an important factor in the gasifier and still needs to be studied thoroughly. *Id.* This ash and slag behavior is also important for the cooling of the syngas, for which innovative development is desired. Fischer-Tropsch Diesel, *supra* note 197. Other research topics are the cleaning and conditioning of synthesis gas, development of several types of catalysts, and the utilization of by-products such as electricity, heat and steam. *Id.* In Germany, a pilot production facility for Fischer-Tropsch liquids from biomass is currently in operation. *Id.*

205. H.R. 2250 §§ 503 (a), (c)(3)(A) (Coal-to-Liquid Loan Guarantee Program).

become a participant.<sup>206</sup> The borrower must provide non-federal match “dollar for dollar.”<sup>207</sup> Repayment must occur no later than five years after disbursement.<sup>208</sup> Once the initial \$200 million appropriated for the program are exhausted, the program will only be renewed upon Congress’ approval.<sup>209</sup> One year after enactment, the program will become open for applications.<sup>210</sup> Funds can be used for planning, permitting and construction costs.<sup>211</sup> Similar to the oil refineries, public lands shall be designated for private coal-to-liquid development.<sup>212</sup> The Secretary of Defense is allowed to enter into a contract with private entities “to develop and operate coal-to-liquid facilities on or near military installations.”<sup>213</sup> Projects can receive a federal tax credit of twenty percent of the qualified investment per taxable year.<sup>214</sup>

### *B. American Clean Energy and Security Act of 2009*

According to the proposed standards, any new coal utility permitted on or before January 1, 2020 must meet a sixty-five percent carbon dioxide reduction limit.<sup>215</sup> Units permitted after January 1, 2009 and prior to January 1, 2020 must meet a fifty percent reduction limit.<sup>216</sup> Additionally, each utility must establish the infrastructure to support electric vehicles.<sup>217</sup> The Act will require state agencies to provide regulatory support.<sup>218</sup>

206. *Id.* § 504 (a) (Coal-to-Liquid Facilities Loan Program).

207. *Id.* § 504(d) (Non-Federal Match).

208. *Id.* § 504(e)(1) (Repayment of Loan).

209. H.R. 2250 § 504(h) (Authorization of Appropriations).

210. *Id.* § 504(f)(2) (Requirements).

211. *Id.* § 504(b) (Establishment).

212. *Id.* § 505 (Location of Coal-to-Liquid Manufacturing Facilities).

213. H.R. 2250 § 508(2)(A) (Coal-to-Liquid Long-Term Fuel Procurement & Department of Defense Development).

214. *Id.* § 48C (a) (Qualifying Coal-to-Liquid Fuels Project Credit).

215. H.R. 2454 § 812(b)(1).

216. *Id.* § 812(b)(2) Eventually all commercial units must be equipped with carbon capture and sequestration capabilities by January 1, 2025. *Id.* According to section 812(A):

(i) have a total of at least four gig watts of nameplate generating capacity of which--

(I) at least three gigawatts must be electric generating units; and

(II) up to one gigawatt may be industrial applications, for which capture and sequestration of three million tons of carbon dioxide per year on an aggregate annualized basis shall be considered equivalent to one gigawatt;

(ii) include at least two electric generating units, each with a nameplate generating capacity of 250 megawatts or greater, that capture, inject, and sequester carbon dioxide into geologic formations other than oil and gas fields; and

(iii) are capturing and sequestering in the aggregate at least twelve million tons of carbon dioxide per year, calculated on an aggregate annualized basis.

217. *Id.* § 121(20)(A)(B).

218. *Id.*

Smart Grid Integration must be provided within three years after the statute is effective.<sup>219</sup>

The American Clean Energy and Security Act seemed the promise of things hoped for until Washington politics and pro-coal interest groups sold their interest to legislators.<sup>220</sup> Diluting the bill until it was blue in the face from CO<sub>2</sub> exhaustion, many environmental groups no longer advocate for the current version.<sup>221</sup> Requiring no emissions reductions until after 2020, the new bill denies the current science, which “tells us to reduce greenhouse gas emissions to at least eighty percent below 1990 levels by 2050 as a key step toward stabilizing our climate.”<sup>222</sup> In contrast, we need to cut our current rate of emissions by forty percent by 2020 to reach the 2050 goal.<sup>223</sup> Unfortunately, the current version does not place any limits on the number of new coal plants being built until after 2015.<sup>224</sup> Additionally the bill:

- Offers coal plants allowances instead of limitations;
- Strips away oversight of existing laws that limited ethanol plant greenhouse emissions;
- Replaces the Energy Efficiency Resource Standard with a less restrictive standard.<sup>225</sup>

Lamentably, when it comes to passing environmental legislation, there is a history of bureaucracy interrupting the process. For example, the Clean Air Act 1990 amendments, which were originally introduced in 1981, “took nine years of negotiations, fifty-nine days of hearings, forty-nine days for mark-ups, and five weeks of debate on the Senate floor before it was finally enacted.”<sup>226</sup> Sadly, all the regulations that were once innovative are now outdated because they are still pending and not finalized after eighteen years.<sup>227</sup> Because of these reasons, it is imperative for states to build a regulatory alliance. On November 15, 2007, the governors of Wisconsin, Minnesota, Illinois, Iowa, Michigan, and Kansas signed the Midwest Regional Greenhouse Gas Reduction Accord.<sup>228</sup> Joining the seven

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219. H.R. 2454 §§ 121(20)(D), (7)(A).

220. John Kassel, *Turning Baby Steps into Long Strides in Warming Fight*, THE BOSTON GLOBE, July 6, 2009, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/07/06/turning\\_baby\\_steps\\_into\\_long\\_strides\\_in\\_warming\\_fight/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/06/turning_baby_steps_into_long_strides_in_warming_fight/).

221. *Id.*

222. *Id.*

223. *Id.*

224. Kassel, *supra* note 220.

225. *Id.*

226. Arthur J. Harrington, *Safe Harbor in Financial Storms: Renewable Energy Projects*, 24 NAT. RESOURCES & ENV'T 64 (A.B.A.) (2009).

227. *Id.* at 64.

228. MIDWEST GREENHOUSE GAS REDUCTION ACCORD, <http://www.midwesternaccord.org/> (last visited Mar. 6, 2010).

states, Manitoba, Canada has pledged to regionally reduce GHG emissions by a proposed timeline and implement a cap and trade program.<sup>229</sup> Recognizing itself as the most “coal dependent” region, the proposed target standards include a twenty percent reduction of 2005 levels by 2020 and an eighty percent reduction by 2050.<sup>230</sup> Fortunately for Kansas, the wind that flew Dorothy away in the “Wizard of Oz” is still a presently untapped energy source.

### IX. KANSAS WIND ENERGY INITIATIVES

Like Bob Dylan’s song “Blowin in the Wind,” so is Kansas’ solution to alternative energy. Kansas is the third windiest state, but seventy-five percent of the state’s electricity comes from coal fired plants, exceeding the nation as a whole.<sup>231</sup> In a 2007 Survey of Renewable Energy, Kansas ranked forty out of fifty in renewable energy use. Washington, which doesn’t even match Kansas’ wind capacity, ranked number one.<sup>232</sup> Kansas is making small steps, but not enough to maximize the use of its total wind potential. In 2008, 450.3 MW were installed, and as of March 2009, 199 MW were installed with a total of 1,011.9 MW proposed for 2009.<sup>233</sup>

In 2007, former Governor Sebelius set a ten percent goal for wind energy by 2010, twenty percent by 2020.<sup>234</sup> Discouraging

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229. *Id.*

230. MIDWEST GREENHOUSE GAS REDUCTION ACCORD, DRAFT FINAL RECOMMENDATIONS OF THE ADVISORY GROUP 2 (2009), *available at* [http://www.ef.org/documents/Accord\\_Draft\\_Final.pdf](http://www.ef.org/documents/Accord_Draft_Final.pdf).

231. Holly Smith, *Is Sebelius’ Call for more Wind Power All Hot Air?*, KANSAS LIBERTY, August 22, 2008, *available at* <http://www.kansasliberty.com/liberty-update-archive/25aug2008/sebelius-calls-for-more-reliance-on-wind-power>. Kansas’ energy percentage of seventy five percent is close to the nation of China’s eighty percent. Leonora Walet, *China Builds \$17.6 billion Wind Project*, REUTERS, July 6, 2009, <http://www.reuters.com/article/GCA-GreenBusiness/idUSTRE5650Z820090706>. China, who is known for meager environmental regulations, seems to be embracing wind before Kansas. *Id.* China began construction on a \$17.6 billion wind project in July to expand the country’s use of renewable energy. *Id.* Beijing is also set to increase its wind power use to 100 GW by 2020, which is eight times its current level. *Id.*

232. ENERGY INFORMATION ADMINISTRATION, 2007 RENEWABLE ELECTRICITY RANKED BY GENERATION, STATE RENEWABLE ELECTRICITY PROFILE (2007), [http://www.eia.doe.gov/cneaf/solar.renewables/page/state\\_profiles/r\\_profiles\\_sum.html](http://www.eia.doe.gov/cneaf/solar.renewables/page/state_profiles/r_profiles_sum.html) (Kansas had a rate of 1,163 MW, Washington 82,560 MW).

233. KANSAS CORPORATION COMMISSION ENERGY OFFICE, PUBLICATION OF KANSAS COMMERCIAL WIND PROJECTS (2009), *available at* [http://www.kansas.gov/ks\\_wind\\_projects.pdf](http://www.kansas.gov/ks_wind_projects.pdf).

234. KANSAS CHAPTER SIERRA CLUB, ANALYSIS OF GOVERNOR WIND POWER GOALS (2007), *available at* <http://kansas.sierraclub.org/Wind/GovWindGoalAnalysis.pdf>. Former Governor Sebelius created the Kansas Wind Working Group in January, 2008 to assist in the promotion of wind power in the state. *Id.* The Group consists of a thirty three member panel whose goal is to “educate stakeholder groups with the current information on wind energy markets, technologies, economics, policies, prospects and issues.” *Id.*

development in the Flint Hills, many advocacy groups estimated that Sebelius' goals will result in the destruction of over thirteen million scenic acres.<sup>235</sup> With twenty-one proposed wind projects in 2006, totaling 2,847 MW, the 2020 goals of 3,200 MW could easily be attained.<sup>236</sup> In 2008, Sebelius pushed the energy community even further by setting a 1,000 MW goal by 2015.<sup>237</sup> According to Earl Watkins, President and CEO of the Sunflower Electric Power Corporation, he believes that Sebelius's 2015 goal is attainable but concerns about costs would be the wavering factor.<sup>238</sup> Watkins further stated that "the Sunflower Electric system runs on approximately forty eight percent natural gas, forty two percent coal and ten percent wind. . . . [W]hile Sunflower Electric had already met an earlier Sebelius goal of having ten percent renewable energy by 2010 . . . he does not have an issue with expanding Sunflower's wind resources as long as it makes economic sense."<sup>239</sup>

While retail prices may increase, according to the Kansas Corporation Commission Energy Office, these measures could reduce Kansans' health related expenses by twenty dollars per megawatt hour.<sup>240</sup> In balancing the retail versus health cost, converting to wind energy clearly brings greater benefits.<sup>241</sup>

Besides retail cost, several other factors continue to deter Sunflower's investment into wind energy. With turbine cost at two million dollars per unit per megawatt, fluctuating wind capacity, and lack of transmission lines, Sunflower's reluctance is understandable.<sup>242</sup> According to Sunflower, "today you could not drop a 200 megawatt wind farm and then deliver the energy anywhere because there is inadequate transmission capacity so you would have to build substantial transmission lines."<sup>243</sup>

Recognizing this as an obstacle but seeing the potential for future wind power, the two companies proposed in March 2009 a 765,000 volt transmission line project.<sup>244</sup> Costs are estimated up to \$800 million, and the completion date is scheduled for 2013.<sup>245</sup> Several 150 foot towers will be installed along with three bundles

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235. *Id.*

236. KANSAS CHAPTER SIERRA CLUB, *supra* note 234, at 3.

237. Smith, *supra* note 221.

238. *Id.*

239. *Id.*

240. *Id.*

241. Smith, *supra* note 221.

242. *Id.* (Greatest wind capacity is generated more in the winter and least in the summer when it is needed the most).

243. *Id.* (One mile of transmission line cost \$1 million).

244. Steve Everly, *Rival High-voltage Power Lines Proposed for Carrying Kansas Wind Power Out of State*, KANSAS CITY STAR, May 9, 2009 at A1.

245. *Id.*

of cables (the size of a pickup truck tires), which will carry six times the electricity of a standard 345 kilovolt line.<sup>246</sup> By the end of the year 1,012 MW will be available.<sup>247</sup> An additional 7,000 MW will be available by 2030.<sup>248</sup> Not all costs will be placed on the customer, especially since other state grids will benefit.<sup>249</sup> The added transmission will supply two million homes with electricity. Regulatory and route factors have to be approved before Prairie Wind LLC and ITC Great Plains move forward.<sup>250</sup> During the solicitation stages, Prairie Wind proposed to construct 230 miles of line from “Dodge City to Wichita and from Medicine Lodge south to the Oklahoma border, where another high voltage line is planned to take it from there.”<sup>251</sup> ITC proposed to “build a 180 mile line from Dodge City to Medicine Lodge and Wichita, dipping south into Comanche County which borders Oklahoma.”<sup>252</sup> On May 22, 2009, the Kansas Corporation Commission (“KCC”) approved both proposals as a joint partnership for Phase I.<sup>253</sup> If both parties can not come to an agreement regarding Phase II, KCC will select one party at a later date.

Whether wind power is a politically correct trend for politicians remains to be seen, but for Kansas it is becoming a way of life. Recognizing wind as an abundant resource, counties like Saline have taken the initiative to pass Planning and Zoning Ordinances allowing private and commercial wind development projects.<sup>254</sup> With so many existing and proposed federal incentives, corporations like Sunflower are able to take the initiative to expand their use of renewable resources without going bankrupt. Governor Parkinson requires Sunflower to meet a fifteen percent net production capability by 2016.<sup>255</sup> With a thirty percent investment tax proposed in the pending climate

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246. *Id.*

247. *Id.*

248. Everly, *supra* note 244, at A1.

249. *Id.*

250. *Id.* Prairie Wind LLC is a joint proposal between Westar Energy, American Electric Power & Warren Buffet’s Mid American Energy Holdings Co. ITC Great Plains “is a subsidiary of ITC Holdings the country’s largest independent transmission company.” *Id.*

251. Everly, *supra* note 244, at A1.

252. *Id.*

253. Press Release, Abbie Hodgson, KCC Approves Transmission Line Stipulation & Agreement (May 22, 2009), <http://www.kcc.state.ks.us/pi/press/09-09.htm>.

254. Saline County, Kan., Code of Saline County, Kan., art. 12, pt. 1, app. A, § 12.12, *available at* <http://www.kansasruralcenter.org/publications/SaCoResTA07-104.pdf>.

255. GPACE, *supra* note 110.

change bill, which previously was only applicable to solar ventures, the wind could definitely be blowing Kansas' way.<sup>256</sup>

## X. CONCLUSION

The words “voluntary” and “mandatory” clearly have two different meanings. But for the past administration the lackadaisical term of “voluntary” has lead to higher emissions, temperatures, and the rapid melting of glaciers. Bureaucracy must no loner alter the gray line between voluntary and mandatory that clever language and exceptions can. The need for legislative mandates to address climate change is fifty years overdue. Industry concerns over expense and uneasiness regarding new technology are secondary compared to the primary concerns of health and our present shortage of non-renewable resources. The present rates of consumption can no longer continue. Federal incentive programs should curb industry anxiety into research and development. Due to the lack of federal initiatives, state environmental agencies like KDHE are now becoming the trendsetters. Creating backdoor deals to oppress state agency power is not feasible.

Most federal environmental regulations are governed by state agencies like KDHE, which preempts state laws from stripping federal permitting authority. Whether or not state legislatures or industry like it, the old way of doing business is no longer self-sustaining. As the price of non-renewable services goes up for customers, the drive for change will exceed the current tactics that Sunflower, the Governor, and the State Legislature are attempting to maneuver. The options to invest in alternative energy will no longer be voluntary, but mandatory. For Kansas, the wind should be the driving force, not fossil fuel dependency. If more states required industry to invest in more renewable energy resources as a condition of conducting business within the state, industry would have no choice but to divert from non-renewable sources, especially if it was a joint collective effort between various states. Suddenly the look of green roofs on top of box stores would be a part of the general design aesthetic.

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<sup>256</sup>. Harrington, *supra* note 226, at 30 (In 2008, the Low Carbon Economy Act and the American Climate Security Act were initiated to regulate GHG emissions).