Approved: 3/10/2010
Date

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE

The meeting was called to order by Chairman Carolyn McGinn at 8:33 a.m. on February 25, 2010, in Room 144-S of the Capitol.

All members were present except:
Senator Morris - excused
Senator Bruce - excused

Committee staff present:
Kristen Kellems, Office of the Revisor of Statutes
Corey Carnahan, Kansas Legislative Research Department
Raney Gilliland, Kansas Legislative Research Department
Stanley Rasmussen, U.S. Army, Senate Fellow
Grace Greene, Committee Assistant

Conferees appearing before the Committee:
Tom Stiles, Chief, Watershed Planning Section, Kansas Department of Health and Environment (KDHE)
Edward P. Cross, President, Kansas Independent Oil and Gas Association (KIOGA)
Mark Schreiber, Director Government Affairs, Westar Energy

Others attending:
See attached list.

Tom Stiles, KDHE (Attachment 1) provided an informational presentation on the Kansas total maximum daily load (TMDL) program and nutrient management in Kansas waters.

Mr. Stiles discussed the history of KDHE's TMDL program in conformance with the requirements for States set by the Federal Clean Water Act, Section 303(d). If the State fails to meet the requirements, the Environmental Protection Agency (EPA) is required to perform the tasks. Mr. Stiles addressed the history, purposes, accomplishments, and upcoming challenges for the Kansas TMDL program.

Mr. Stiles stated that TMDLs are paper analyses trying to link cause and effect in water quality and that the implementation of the TMDL program is what will improve Kansas water quality. Mr. Stiles stated the program is dependent on three factors to be successful: funding, time, and participation.

Mr. Stiles took questions from the Committee.

Edward P. Cross, President, KIOGA (Attachment 2) addressed concerns of the proposed (EPA) air quality regulations on behalf of the KIOGA producers. Mr. Cross discussed the Clean Air Act and KIOGA's opposition to the EPA regulating green house gas emissions under the Clean Air Act. Mr. Cross also discussed recent actions of Congress and the national Governors Association aiming to stop the EPA from enacting the mentioned regulations.

Mark Schreiber, Director Government Affairs, Westar Energy (Attachment 3) discussed the proposed time line for EPA environmental regulatory requirements which would affect the utility industry, including the potential classification of coal combustion waste as hazardous waste and standards from the Clean Water Act which concerns thermal discharge from power plants.

2/25

The following provided additional information:

John Mitchell, Director of Environment, KDHE (Attachment 4)

The next meeting is scheduled for February 26, 2010.

The meeting was adjourned at 9:30 a.m.

SENATE NATURAL RESOURCES COMMITTEE

Guest Roster

2-25-2010
(Date)

Shani Albrecht	KDHE
Rick Brun	KDHE
Karl Mueldener	"
Tom Styles	"
Mike Tate	"
Mark Schreiber	Westar
Ed Cross	KIOGA
Janet Carlson	SCC
Earl Lewis	KCC
John Mitchell	KDHE
Kent Askren	KFB
TED HENRY	CS.
LON STANTON	NNG

Please use black ink only!!

KANSAS

DEPARTMENT OF HEALTH
AND ENVIRONMENT

Mark Parkinson, Governor
Roderick L. Bremby, Secretary

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Briefing on Total Maximum Daily Loads (TMDLs) And Nutrient Management in Kansas Waters

Presented to Senate Natural Resources Committee

By
Tom Stiles, Chief, Watershed Planning Section
Kansas Department of Health and Environment

February 25, 2010

Chairwoman McGinn and members of the committee, I am Thomas Stiles from KDHE's Bureau of Water overseeing the Kansas TMDL Program. Thank you for the opportunity to speak on Kansas' TMDL program. Kansas began developing Total Maximum Daily Loads in earnest in 1999 and continues to use them to analyze water quality impairments in the surface waters of the state.

History

Section 303(d) of the Federal Clean Water Act requires States to:

1. Identify waters that currently do not attain water quality standards; and;
2. Establish for those waters, a total maximum daily load (TMDL) that determines the allowable amount of pollutant loading into the impaired water to then attain water quality standards.

If the State fails to meet either of those two requirements, EPA is obligated to perform those tasks. Since 1992, and every two years thereafter, Kansas has produced Section 303(d) lists in conformance with the first requirement. However, no TMDLs were produced from the early lists and, in concert with similar litigation nationwide, the Kansas Natural Resource Council and Sierra Club sued EPA in 1995 for failing to perform its statutory duties under Section 303(d). A settlement in 1998 produced a Court Decree schedule for developing TMDLs over 1999-2006 in the twelve river basins of Kansas. The first TMDLs were to be developed for impaired waters in the Kansas-Lower Republican Basin by June 30, 1999.

KDHE developed over 400 TMDL documents addressing impairments over an eight-year period following the settlement and successfully complied with the terms of the Court Decree, leading to its dismissal in 2007. Thereupon, scheduling of TMDL development reverted back to KDHE discretion and through 2009, 440 TMDL documents have been developed, addressing 760

impairments in Kansas watersheds. The TMDL program is iterative and has cycled twice, and in some cases, three times through the State's twelve river basins. These TMDLs have addressed impairments ranging from ammonia in wastewater to bacteria and nutrient loading from storm water runoff into streams and lakes. Because of the watershed orientation of Kansas TMDLs, a single TMDL document may address up to a dozen individual water bodies. Hence, by EPA's count of individual impaired waters, Kansas has developed over 2700 TMDLs. KDHE visits each river basin every five years to develop new TMDLs or to revise existing TMDLs for the waters in that basin. These decisions are made in concert with local water managers and Basin Advisory Committees through the State Water Planning Process.

From the onset of TMDLs in 1999, their development and implementation was linked to guiding State water programs utilizing State Water Plan Funds for water quality improvement. Basin Advisory Committees have been used extensively to determine the priority of implementing TMDLs in their respective river basins. Those decisions are "codified" by incorporating the high priority TMDLs in each of the twelve basin sections of the *Kansas Water Plan,* specifying pollutants and water bodies to be the focus of any water quality management efforts on the part of the State agencies. TMDLs play a role in achieving the 2010 and 2015 objectives of the Kansas Water Plan as determined by the Kansas Water Office and Kansas Water Authority.

Purpose

The primary purpose of TMDLs is to re-attain the applicable water quality standard of an impaired water. As the 2010 Section 303(d) list is currently being prepared, KDHE has identified 78 TMDL watersheds that can now be at least partially "delisted" because they attain water quality standards. This attainment may be due to acquisition of new data indicating standards are now achieved, changes in the applicable standard (either use or criteria), or reduction in pollutant loadings from point and non-point sources.

TMDLs, in and of themselves, do not accomplish any water quality improvement. They analyze the impairment in the context of seasonality, flow condition and likely contributing sources and establish the appropriate goal to be achieved through load reductions. TMDLs distribute the new pollutant load "budget" through wasteload allocations to individual point sources and load allocations to non-point source activities in specific geographic locations within the watershed of the impaired water. Implementation of those allocations occurs through a variety of State programs primarily at KDHE or the State Conservation Commission (SCC), such as:

NPDES – Wasteload allocations to point sources are implemented through wastewater and stormwater discharge permits. Monitoring requirements, treatment upgrades and effluent limits on the amount of pollutant allowed in wastewater typically reflect the expectations of TMDLs. In some cases, a TMDL needs to be developed in order to allow a permit to be issued to a new or expanding facility. Such was the case for Wichita's Northwest Wastewater Treatment Plant discharging into Cowskin Creek.

WRAPS – Watershed planning to abate non-point source pollution is being accomplished through Watershed Restoration and Protection Strategy (WRAPS) groups, supported by Section 319 grants issued by KDHE, along with State Water Plan Funds. Forty-four of these groups of varying scale now exist within Kansas and all are tasked with developing watershed plans to guide implementation. These plans are driven by TMDLs and Section 303(d)

analyses of impaired waters. The scope of these plans ranges from working to reduce atrazine loading in the Little Arkansas River Watershed to nutrient load reductions into Marion Lake to sediment reduction along the lower Smoky Hill River. In each case, the TMDL program works with the local watershed groups to incorporate TMDL objectives into the local plans for implementation.

SCC – There are a suite of traditional and emerging land treatment and resource management programs supported by the State Conservation Commission. These programs support technical and financial assistance to landowners to install appropriate management practices to maintain the integrity of land and water resources. Terraces, filter strips, riparian buffers, livestock waste treatment sites, nutrient management and bank stabilization features are a few of the practices that are supported by SCC and on a larger scale, USDA, through EQIP and other Farm Bill programs. Targeting and priority of projects is influenced by the placement of those projects in areas that will implement high priority TMDLs. Implementation of those projects is dependent upon the availability of State Water Plan Funds.

Some Accomplishments

Over the course of the past decade, the TMDL program has made inroads in improving water quality of surface waters in Kansas. The following are some examples of successful implementation of TMDLs.

Ammonia – Ammonia was perhaps the key issue confronting municipalities in the early years of the TMDL program. A number of TMDLs were established to reduce toxic ammonia loadings from wastewater through enhanced treatment. Many more load reductions occurred as a result of routine NPDES permit issuance. Today, ammonia levels from wastewater are minute and impairments have largely been removed from streams such as the Little Arkansas River below Geneseo or the Marmaton River below Fort Scott. New criteria suggested by EPA for ammonia may cause the issue to be revisited, however.

Bacteria – Bacteria was the predominant stream impairment addressed by TMDLs from 1999-2002. Criteria changes in 2003 along with updated stream use designations for recreation altered the emphasis on bacteria from 2003 – 2007. These changes combined with disinfection of point source discharges have all but eliminated excessive bacteria in streams during low flows. Livestock management practices in watersheds such as Clarks Creek in Geary and Morris counties have successfully restored recreation water quality standards since 2000.

Interstate Waters – Excessive sulfate in the Arkansas River entering Kansas from Colorado led to development of a TMDL for the river in 2000. Subsequent impairments by selenium and now, uranium, continue to drive home the need for management of irrigation waters between John Martin Dam and Garden City. Using the TMDL process, Kansas has participated in Colorado's water quality standards process and now is engaged in working on non-point source management along the Arkansas River. Similar efforts occur with Nebraska (atrazine), Oklahoma (nutrients) and Missouri (bacteria and metals).

Chlorides – Reduction of wastewater loadings of chloride to the Arkansas River in the vicinity of Hutchinson through the TMDL process has helped integrate ground water

remediation, wastewater permitting and water supply development by directing certain salt-laden waste streams to Hutchinson's Reverse Osmosis Water Treatment Plant. Those wastewaters are treated, creating additional water supply for the city and disposed through deep well injection, eliminating their impact to the Arkansas River and Cow Creek.

Summary and Upcoming Challenges

The Kansas TMDL program is working as both strategic planning for water quality improvement and an impetus to integrate the various programs directed at water pollution control within KDHE and other State agencies. Targeting of resources, establishing priority among water pollution issues and guiding implementation of State water programs within the context of the State's water planning process have been key in directing State resources toward water quality improvement.

Two major challenges loom for Kansas in terms of water quality: sediment and nutrients. Sediments, or total suspended solids have historically been the most pervasive pollutants to impact surface water resources. The Kansas Water Office has initiated a major effort to attempt to mitigate or rehabilitate sedimentation impacts on reservoirs in the State. Sediment also is a major contributor to stressing the biological communities of the streams in Kansas. Sediment control through watershed treatment, riparian management and bank stabilization is an expensive and long term endeavor. KDHE has drafted a set of TMDLs in the Smoky Hill Basin to begin to address total suspended solids and their impact on stream resources.

Nutrients have dominated the Kansas TMDL process since its inception. To date, there are about 180 TMDLs or listings for lake eutrophication (excess algae growth), driven by excessive nutrient loadings. Another 110 watersheds have been identified for excessive phosphorus seen in streams. Nutrient criteria are expressed as narratives within the Kansas Water Quality Standards, calling for no excessive nutrients to cause nuisance algal blooms, disruption in the type or quantities of biology found in streams and lakes and taste and odor problems in surface water supplies to municipalities. All the while, there is a national push by EPA for numeric nutrient criteria. The Kansas approach has been to focus on nutrient load reductions before determining an exact level of nitrogen or phosphorus deemed to be adequate to protect our surface waters.

KDHE has first directed major wastewater dischargers to investigate the treatment upgrades necessary to reduce current loadings. Point sources have been very responsive and through 2009 of the targeted treatment plants, 90% now provide nitrification, 70% provide de-nitrification, and 41% provide phosphorus reduction.

The TMDL program is working to integrate these point source initiatives with concurrent targeted non-point source load reductions to reduce nutrient impacts on streams and lakes. Lake eutrophication TMDLs are present in all basins of the State and are a primary focus of current WRAPS efforts. Stream eutrophication TMDLs are being drafted for Prairie Dog and Big Creek in Northwest Kansas to further test this approach prior to establishing specific criteria.

In the end, TMDLs are simply paper analyses trying to link cause and effect in water quality. Their implementation is what will improve the condition of Kansas waters. That implementation is dependant upon three things to be successful: funding, time and participation. All three factors need to be abundant in order to turn the corner and seeing water quality improve.

Obviously, the shortfall in State Water Plan Funds the past two fiscal years has dampened the rate of implementation in high priority TMDL and WRAPS watersheds. Yet, even with improved revenue, the ability to improve water quality on the watershed scale will continue to be dependent upon the State's ability to better target those funds into the portions of those watersheds that contribute the most loading. Our ability to demonstrate success in a short time span will reflect our success at applying our resources effectively.

Thank you for the opportunity to appear before the committee today. I will now stand for questions.

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Testimony to Senate Natural Resources Committee

USEPA Proposed Air Quality Regulations

Edward P. Cross, President
Kansas Independent Oil & Gas Association

February 25, 2010

Good morning Chair McGinn and members of the committee. I am Edward Cross, President of the Kansas Independent Oil & Gas Association (KIOGA). KIOGA represents the interests of independent oil and natural gas producers in Kansas. With over 1,400 members across the entire state, KIOGA is the lead state and national advocate for Kansas independent oil and natural gas producers. Our members account for 86% of the oil and 63% of the natural gas produced in Kansas. I am responsible for public policy advocacy and interaction with external stakeholders including elected officials, regulators, governmental decision-makers, and community thought leaders. I am here this morning to express our concerns about proposed USEPA air quality regulations.

The Environmental Protection Agency (EPA) accurately characterizes the rationale for this regulatory proposal in its preamble:

> EPA is proposing to tailor the major source applicability thresholds for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and title V programs of the Clean Air Act (CAA or Act) and to set a PSD significance level for GHG emissions. This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions and, as a result, trigger PSD and title V applicability requirements for GHG emissions. If PSD and title V requirements apply at the applicability levels provided under the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate. On the basis of the legal doctrines of ''absurd results'' and ''administrative necessity,'' this proposed rule would phase in the applicability thresholds for both the PSD and title V programs for sources of GHG emissions.

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Attachment 2 - 1

EPA subsequently released its endangerment determination and created the scenario it projects will cause the "absurd results" that it must now concoct a regulatory framework to address. Fundamentally, EPA's flawed interpretation of the CAA causes its catastrophic results – results that run counter to its own assessments of congressional intent in crafting the CAA. As EPA observes in the Proposed Rule:

> ...to apply the statutory PSD and title V applicability thresholds to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program. This extraordinary increase in the scope of the permitting programs, coupled with the resulting burdens on the small sources and on the permitting authorities, was not contemplated by Congress in enacting the PSD and title V programs.

As EPA regularly restates in its justification for its proposal, these consequences were not anticipated by Congress. A good example is:

> The legislative history of the PSD provisions makes clear that Congress intended the PSD program to apply only to larger sources, and not to smaller sources, in light of the larger sources' relatively greater ability to bear the costs of PSD and their greater responsibility for the pollution problems. In enacting the PSD requirements during the 1977 Clean Air Act Amendments, Congress, focused as it was on sources of conventional pollutants and not global warming pollutants, expected that the 100/250 tpy applicability thresholds would limit PSD to larger sources. But because very small sources emit CO2 in quantities as low as 100/250 tpy, a literal application of the threshold to GHG emitters, without streamlining, would sweep in large numbers of small sources and subject them to the high costs of determining and meeting individualized BACT requirements, while also overwhelming permitting authorities' capacity to process those applications.

The clear and overwhelmingly obvious reality that EPA does not want to address is that these issues arise because Congress never intended to use the CAA to address GHG. EPA's own actions – taken for reasons beyond any legal requirement – create the "absurd results" it now seeks to address. Much like the apocryphal boy who murders his parents and then seeks leniency from the courts because he is an orphan, EPA plays the victimized agency that must deal with a regulatory crisis – a crisis of its own making.

These consequences were not unanticipated. KIOGA and other industry groups raised many of them during the comments that were submitted with regard to the endangerment proposal. We restate them here:

> In its Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act (GHG ANPR), the Environmental Protection Agency (EPA) presented wide ranging information and suggestions regarding the potential use of the Clean Air Act (CAA) to regulate greenhouse gases (GHG) and the consequences of those possibilities. In this proposal, "...the Administrator proposes to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the

meaning of Section 202(a) of the Clean Air Act." While this proposed action gives the appearance of a narrowly focused action, it disguises the reality that will lead to broad application of the CAA. While we produce American oil that becomes the fuel for America's vehicles, our primary interest is in this broader application. These comments will broadly discuss several issues including: broad policy considerations of using the CAA for GHG regulations, more specific issues regarding several of the approaches in the context of stationary sources that were raised in the GHG ANPR and the particular implications on American oil and natural gas exploration and production.

Broad Policy Implications of Using the Clean Air Act

The GHG ANPR and this proposal are driven almost exclusively by the United States (US) Supreme Court decision in *Massachusetts v. EPA*. While the Supreme Court seemed fascinated with the capaciousness of the definition of "air pollutant" under the CAA, it ultimately concluded that EPA "...must ground its reasons for action or inaction in the statute." To make such a decision it is essential that EPA consider the legislative history of the CAA to determine intent and scope.

Clearly, when the CAA was enacted in 1970, Congress was focused on addressing air pollution in the US. Its concept of these pollutants consistently shows its interest focused on industrial and vehicle-specific emissions. It did not view the common compounds in the atmosphere – nitrogen, oxygen and carbon dioxide – as air pollutants. The role of carbon dioxide was viewed as beneficial – essential for plant growth and oxygen generation – a role that is largely ignored in the GHG ANPR. The issues of the time are reflected in the early criteria pollutants – sulfur oxides, nitrogen oxides, particulates, carbon monoxide and ozone. These were the areas where Congress sought to change the nature of American society.

While international interest in addressing air pollution was growing in 1970, its focus was on national actions needed to address local pollution. Global climate concerns were too vague and too uncertain to suggest that Congress had any intent to address it in the structure of the CAA. Moreover, if it had, the likely concern would have been threats of global cooling. Roughly a decade before CAA enactment, scientists largely feared that the world was heading toward a new ice age, a concern so broadly held that it was reflected in publications as diverse as the elementary school newspaper, *The Weekly Reader*. Similarly significant, when Congress did have an opportunity to consider using the CAA to address a global climate issue, it chose not to. By 1977, when the first major amendments to the CAA were enacted, stratospheric ozone threats were significant policy issues. However, rather than assert active policy provisions in the CAA, Congress chose to explicitly limit the CAA to analysis while addressing regulation through other laws. Only after international agreements on stratospheric ozone protection were developed did Congress provide the specific authorities of Title VI in the CAA to address them. This history affirms that Congress oriented the CAA to address US-limited issues.

EPA needs to recognize that Congress' actions with regard to the authorities within the CAA show a level of detail not found in many laws. Congress set limits on the size of facilities to be regulated. It created entire programs to detail how nonattainment should be addressed for ozone and carbon monoxide. It defined the nature of the Prevention of Significant Deterioration

(PSD) program. It reached into structuring the composition of gasoline and other vehicle fuels. To suggest that GHG regulation should fall out of these complex sections of the CAA in the ad hoc fashion that EPA presents in the GHG ANPR and would create by adopting this proposal is simply inconsistent with the history of the CAA.

Global climate management is an enormously complex challenge, one that can only be addressed on an international stage. In contrast to the national air pollution programs in the CAA, global GHG emissions do not present a risk to public health at anything approaching current ambient levels. In fact, despite the public perspective that environmental advocates have encouraged, the environmental consequences are based on unsettled science. Data suggest that climate change is occurring, but determining the role of anthropogenic emissions remains elusive. Even the determination of environmental effects must be based on the results of complex and ever-changing computer models – not on clear evidence like those used to judge the effects of criteria pollutants. As EPA observes in the GHG ANPR, local actions – even national actions – will not produce measurable changes in the ambient concentrations of GHG. Realistically, only widespread action by all of the major GHG emitting nations can hope to produce significant results.

Failure to develop international action with broad commitment by all key GHG emitting nations could be catastrophic to the US if EPA pursues national regulation under the CAA. The policies EPA suggested in the GHG ANPR will do little to affect ambient GHG. However, they would define American industrial structure for the next half century. The GHG ANPR referenced the underlying challenge in its discussion of "leakage" – the movement of GHG emissions from the US to other countries. The past decade demonstrates the reality of this consequence. Largely unfettered industrial development in key countries, like China and India, has drawn enormous international investment – including shifting significant manufacturing capacity from the US. A US-only regulatory effort under the CAA would dramatically exacerbate this shift. It would be a change with no environmental benefit but produce substantial damage to the US economy and national security.

One area particularly affected would be energy and national energy security. Given the unstable energy world, these are consequences that cannot be endured. When the CAA was enacted in 1970, America's oil production had just then peaked. The 1973 Arab Oil Embargo had yet to occur. The US imported 1.3 million barrels/day of crude oil compared to 11.3 million barrels/day of American production. By 2009, over 66 percent of America's oil demand came from imports. Nevertheless, the US continues to be a large producer of petroleum – the third largest in the world. Oil accounts for about 40 percent of America's energy supply; natural gas provides approximately 23 percent. These fuels and coal – which provides another roughly 23 percent of American energy – would be the most significantly affected by CAA regulation of GHG. America's economy hinges on energy. Today, the US consumes about 22 percent of the world's energy. This energy produces 30 percent of the world's Gross Domestic Product. This link is undeniable. Future economic success means that more energy will be needed. The Energy Information Administration estimates that US energy demand will need to increase by about 30 percent over the next 25 years. Certainly, growth in new energy alternatives will meet some of this need while conservation and efficiency will be essential as well. However, oil, natural gas, and coal will continue to be the primary sources of American energy. A GHG

regulatory program needs to recognize this reality. Equally significant, it needs to recognize that constraining the development of American resources will result in greater risk to US security – a consequence that is unacceptable in the current state of the world. For these reasons, we believe that the CAA is not an appropriate law to regulate GHG nor was it ever intended to be.

Nevertheless, EPA chose to follow the path of pulling GHG under the scope of the CAA. Now, it must deal with the consequences. This tailoring proposal demonstrates how serious those consequences can be.

At the heart of the issue EPA tries to address in the tailoring proposal is clear statutory language defining the size of stationary sources subject to regulation under the CAA PSD and Title V programs. EPA asks us to believe that it can ignore the fundamental structure of the CAA under two legal theories – "absurd results" and "administrative necessity". The tailoring proposal explanation tries to weave a path through these concepts, but the justifications are not compelling. They rely on stretching relatively narrow instances in cases where consequences fall on agencies without the agencies' complicity. Here, EPA's situation differs dramatically. In the instant case, EPA's actions create the consequences it must now address. While it is obvious that – if Congress had intended to address GHG under the CAA – Congress would not have set stationary source thresholds at 100 or 250 tons/year, the standard in the law is, in fact, what it is. Inescapably, one must conclude that Congress did not intend to regulate GHG under the CAA. But, despite pages of explanations about the disastrous consequences of the direct application of the CAA stationary source definitions to GHG, EPA concludes that the solution is to contort little used regulatory theories to save the agency from its own actions. While we believe that the application of the CAA thresholds to GHG sources would be disastrous, we cannot be comforted that EPA can sustain the thresholds described in the tailoring proposal based on the thin justification it presents.

However, we must also question why – even in light of the endangerment determination – EPA believes it must pursue the course it set forth in the tailoring proposal. An endangerment finding under Title II of the CAA does not necessarily translate into direct regulation of stationary sources. The PSD program may be more easily explainable. PSD does not relate to health based concerns. The PSD legislative history, in fact, is clearly built upon non-health based air quality issues. It specifically applies in areas that meet federal health based National Ambient Air Quality Standards (NAAQS). If EPA were to recognize this distinction, it could reasonably conclude that PSD stationary source permitting is not subject to action based on the GHG endangerment determination. Consideration of Title V applicability follows a similar path. All of the stationary sources subject to Title V permitting are triggered by other elements of the CAA that make determinations regarding the applicability of that section to the sources required to get permits. The Title II endangerment determination is not one of the processes that trigger Title V. This perception of the CAA is reflected in EPA's statement on the consequences of the endangerment determination. EPA states:

> Moreover, EPA does not believe that the impact of regulation under the CAA as a whole, let alone that which will result from this particular endangerment finding, will lead to the panoply of adverse consequences that commenters predict. EPA has the ability to fashion a reasonable and common-sense approach to address greenhouse gas emissions and

climate change. The Administrator thinks that EPA has and will continue to take a measured approach to address greenhouse gas emissions.

EPA would be far better positioned if it concluded that the PSD and Title V portions of the CAA are not triggered by the Title II endangerment determination than to follow the rationale of the tailoring proposal relying on tenuous legal theories of "absurd results" and "administrative necessity".

We further question EPA's sleight-of-hand approach on the regulatory costs of its actions. In the initial endangerment proposal, EPA argues that nothing the finding would result in new regulatory burdens for PSD stationary sources. In this tailoring proposal, it justifies its actions on the disastrous consequences of the program on stationary sources under the PSD and Title V programs because of the endangerment determination. It, in fact, argues that the tailoring proposal will alleviate the otherwise severe burdens that would be imposed. We believe that the nation deserves to understand the consequences of the endangerment determination if EPA concludes that its conclusion compels this broad expansion of these stationary source programs. As we have suggested earlier – and at least some at EPA seem to suggest as well – the Title II endangerment determination does not have to create the consequences set forth in the tailoring proposal. But, clearly, under the vast confusion that EPA has created by being on both sides of the issue, the nation needs to understand the consequences.

Similarly, we must question the agency's motives with regard to oil systems and natural gas systems that explore for and produce America's oil and natural gas. EPA argues that Congress never intended to extend the regulatory requirements to the statutory stationary source sizes in the CAA. While we agree for different reasons, we oppose efforts underway within EPA for both GHG emissions and criteria pollutants to effectively revise the definition of stationary sources for oil production and natural gas operations. When EPA proposed reporting requirements under the Mandatory Reporting for Greenhouse Gases rule, it suggested that it was evaluating different facility definitions for onshore petroleum and natural gas production. EPA stated in part:

> One approach we are considering for including onshore petroleum and natural gas production fugitive emissions in this reporting rule is to require corporations to report emissions from all onshore petroleum and natural gas production assets at the basin level. In such a case, all operators in a basin would have to report their fugitive emissions from their operations at the basin-level. For such a basin-level facility definition, we may propose reporting of only the major fugitive emissions sources; i.e., natural gas driven pneumatic valve and pump devices, well completion releases and flaring, well blowdowns, well workovers, crude oil and condensate storage tanks, dehydrator vent stacks, and reciprocating compressor rod packing. Under this scenario, we might suggest that all operators would be subject to reporting, perhaps exempting small businesses, as defined by the Small Business Administration.

So, while EPA argues that it needs to tailor the definition of stationary sources to reduce its burden in this proposal, elsewhere, it is devising artificial approaches to alter the definitions of stationary source facilities solely for petroleum production and natural gas operations to

increase the regulatory burden. Congress clearly spoke to the question of aggregating petroleum production and natural gas facilities under the CAA when it prohibited aggregation in the 1990 CAA Amendments. EPA should listen.

Conclusion

We appreciate the opportunity to provide these comments. The global climate debate remains a critical challenge for America. But, in this proposal EPA is desperately trying to unravel the overwhelming consequences of an ill-founded interpretation of the CAA. The CAA was never written with GHG emissions management as a part of its structure. EPA cannot twist the structure of the Act to create a sound regulatory approach. The options EPA presents would result in litigation that it will not be able to withstand; its legal rationale is too fragile. Instead, EPA needs to revisit the fundamental basis for including stationary sources within the consequences of its Title II endangerment determination. More than that, EPA owes the country a clear explanation of the costs its actions will impose. Finally, we cannot accept the idea that for other stationary sources, EPA seeks to reduce the regulatory burden while it devises plans to increase the burden on American oil and natural gas production.

We urge EPA to reject the use of the CAA as a GHG regulatory approach, to seek effective international agreements and to seek Congressional action on global climate policy that will provide America with the energy security and the industrial development it needs to provide for future jobs and economic growth.

If there are questions regarding these comments or if additional information is required, please feel free to contact me. Thank you for your time and consideration.

Westar Energy®

MARK A. SCHREIBER
Director, Government Affairs

Comments on Proposed EPA Regulations Before the Senate Natural Resources Committee February 25, 2010

Good morning Chairwoman McGinn and members of the committee. I would like to present a few brief comments about proposed EPA regulations and their potential impact on Westar Energy and the electric utility industry.

In previous hearings, the committee has heard from KDHE and others about a large number of proposed EPA regulations concerning air and water quality and waste management. Attached is a general implementation timeline of certain proposed regulations. Many of these seek to further reduce emissions from our power plants. Westar Energy is committed to environmental protection while keeping in mind that consumers ultimately bear costs for cleaner air and newer, better technologies. We recently completed the installation of scrubbers at our Jeffrey Energy Center. These scrubbers reduce our SOx emissions by 95%. I want to highlight a couple of the proposed regulations that would significantly impact our industry.

The first proposed regulation I want to highlight may be approved in the next several weeks. Coal combustion waste (CCW) regulations were promulgated after the failure of a coal ash storage pond dam at a TVA coal-fired power plant in Tennessee. As a result of this accident and a subsequent review, EPA has proposed regulations that would classify CCW as a hazardous waste. Hazardous wastes must be stored in a hazardous waste facility and cannot be used for beneficial purposes. Current regulations in Kansas prohibit all land disposal of hazardous waste, which means we would incur huge expense to transport all fly ash, bottom ash, and scrubber waste to out-of-state facilities. We have regularly sold our ash from Jeffrey Energy Center and Tecumseh Energy Center to contractors for use in making concrete, for such things as highways. Although EPA has said they may write the final regulations so CCW could be classified as hazardous waste if stored, but would be non-hazardous if used in some beneficial purposes (such as concrete), we believe contractors would avoid using ash due to future liability concerns.

Practically every state environmental department in this country, including KDHE, has objected to this proposed regulation, along with the National Governors Association and utilities. Yet EPA continues towards a new regulatory regime for CCW. The regulation is expected out in April.

The second proposed regulation is associated with section 316(b) of the Clean Water Act. Section 316(b) applies to the cooling water intake structures at power plants, paper mills, refineries, etc. that use once-through cooling systems. Once-through cooling systems intake a large volume of water, pass it through condensers then release it back into a body of water, such as a lake or river. The intake structures can entrain fish and other organisms. The ultimate impact is that these large facilities could be required to build cooling towers and abandon their existing once-through cooling systems. The cost for building a single cooling tower could be significant, which is another cost borne by our customers.

Thank you for allowing me to present these comments.

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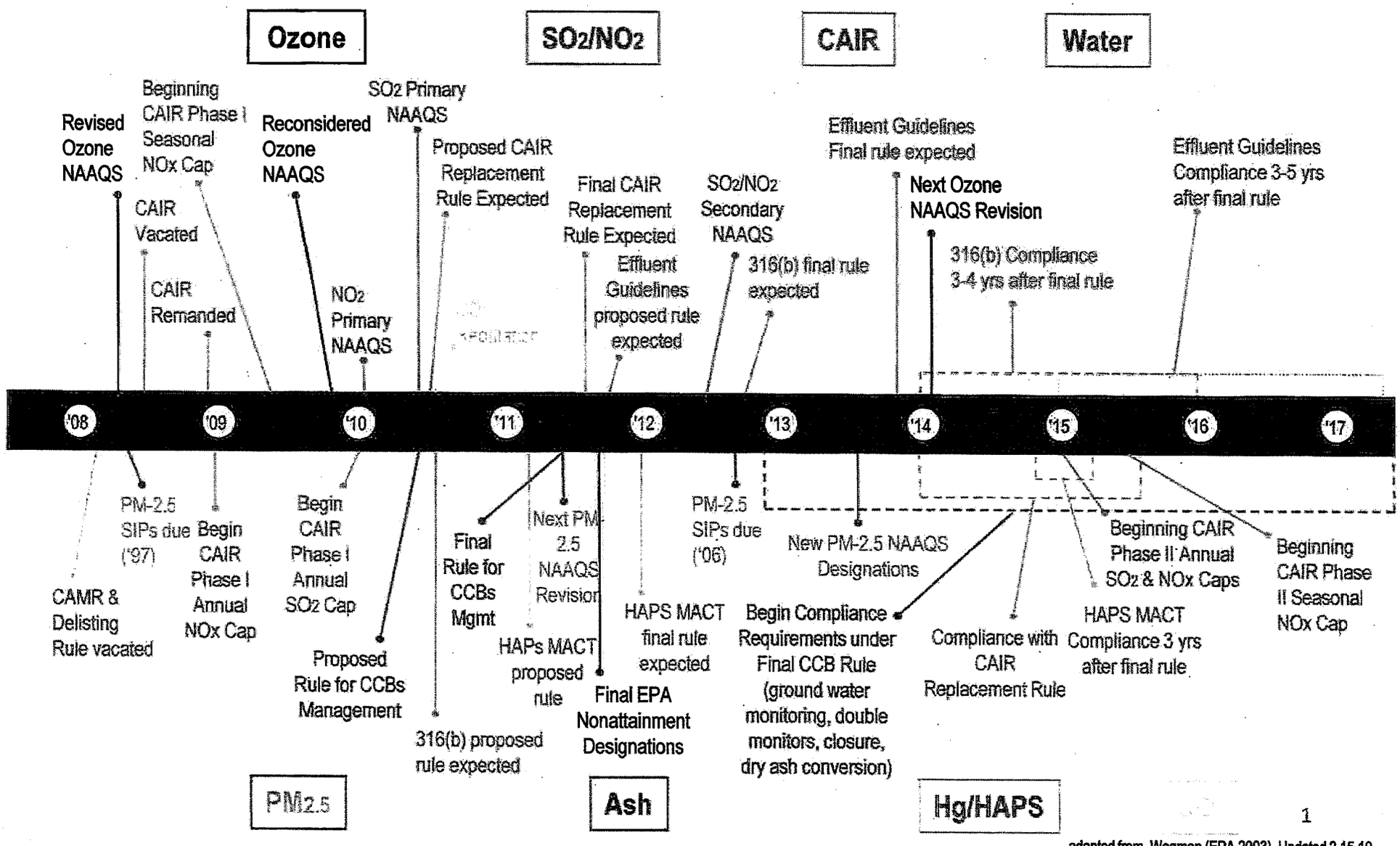
Possible Timeline for Environmental Regulatory Requirements for the Utility Industry



– adapted from Wegman (EPA 2003) Updated 2.15.10

GRAM	STATUTORY AREA	CITATION	DESCRIPTION	FEDERAL REGISTER CITATION	HYPERLINK	PROPOSED DATE	COMMENT PERIOD		EFFECTIVE DATE
							BEGAN	ENDS	
Air	National Ambient Air Quality Standards (NAAQS)	CAA, Section 109	Addresses six criteria pollutants: particulatematter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead						
	NAAQS Regulatory Actions								
		40 CFR Part 58	Lead NAAQS	74 FR 69050	http://www.epa.gov/air/lead/fr/20091230.pdf	12/30/2009	12/30/2009	2/16/2010	
		40 CFR Parts 50, 58	NO2 NAAQS	75 FR 6474 (final rule)	http://www.epa.gov/ttn/naaqs/standards/nox/fr/20100209.pdf				4/12/2010
		40 CFR Parts 50, 53, 58	SO2 NAAQS	74 FR 64810	http://www.epa.gov/air/sulfurdioxide/pdfs/20091208fr.pdf	12/8/2009	12/8/2010	2/8/2010	
		40 CFR Parts 50, 58	Ozone NAAQS	75 FR 2938	http://www.epa.gov/air/ozonepollution/fr/20100119.pdf	1/19/2010	1/19/2010	3/22/2010	
		40 CFR Part 50	Particulate Matter NAAQS	71 FR 61144 (final rule)	http://www.epa.gov/ttn/naaqs/standards/pm/data/fr20061017.pdf	10/17/2006			12/18/2006
Air	New Source Performance Standards (NSPS)	CAA, Section 111	Authorizes EPA to set and enforce performance standards for new stationary sources						
	NSPS Regulatory Actions								
		40 CFR Parts 60, 63, 85 et al.	Stationary Spark Ignition Engines and Equipment	73 FR 3568 (final rule)	http://www.epa.gov/ttn/atw/area/fr18ja08.pdf	1/18/2008			3/18/2008
		40 CFR Part 60	Petroleum Refineries	73 FR 55751 (final rule)	http://www.epa.gov/ttn/atw/nsps/petrefnsps/fr26se08.pdf	9/26/2008			6/24/2008 & 9/26/2008
		40 CFR Part 60	Nonmetallic Mineral Processing Plants	74 FR 19294 (final rule)	http://edocket.access.gpo.gov/2009/pdf/E9-9435.pdf	4/28/2009			4/28/2009
		40 CFR Part 60	Medical Waste Incinerators	74 FR 51367 (final rule)	http://www.epa.gov/ttn/atw/129/hmiwi/fr06oc09.pdf	10/6/2009			12/7/2009 & 4/6/2010

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Air	Hazardous Air Pollutants (MACT)	CAA, Section 112	Lists hazardous air pollutants						
	MACT Regulatory Actions								
		40 CFR Part 63	Oil and Natural Gas Processing	72 FR 26 (final rule)	http://www.epa.gov/ttn/atw/oilgas/fr03ja07.pdf	1/3/2007			1/3/2007
		40 CFR Part 63	Paint Stripping, Coatings, & Auto Body Refinishing	73 FR 1738 (final rule)	http://www.epa.gov/airtoxics/area/fr09ja08.pdf	1/9/2008			1/9/2008
		40 CFR Part 63	Gasoline Distribution and Dispensing Facilities	74 FR 66469	http://www.epa.gov/ttn/atw/area/fr15de09.pdf	12/15/2009	12/15/2009	2/16/2010	
		40 CFR Part 63	Reciprocating Internal Combustion Engines (new, reconstructed)		http://www.epa.gov/ttn/oarpg/t3/fr_notices/rice_neshap_021710.pdf	2/17/2010			
		40 CFR Part 63	Prepared Feeds Manufacturing	75 FR 522 (final rule)	http://www.epa.gov/airtoxics/area/fr05ja10.pdf	1/5/2010			1/5/2010
		40 CFR Part 63	Reciprocating Internal Combustion Engines (existing)	74 FR 9698	http://www.epa.gov/ttn/atw/rice/fr05mr09.pdf	3/5/2009	4/6/2009		
		40 CFR Part 60, 63	Portland Cement Manufacturing	74 FR 21136 & 27265	http://www.epa.gov/fedrgstr/EPA-AIR/2009/May/Day-06/a10206.pdf	5/6/2009	5/6/2009	7/6/2009	
Air	Greenhouse Gases	CAA, Section 202(a)	GHGs are air pollutants covered by the CAA, *Massachusetts v. EPA* (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride)						
	GHG Regulatory Actions								
		40 CFR Ch. I	Endangerment finding for mobile sources, includes six greenhouse gases	74 FR 66496 (final rule)	http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a6afdd	12/15/2009			1/14/2010
		40 CFR Parts 86, 87, 89 etal.	Mandatory Reporting Rule	74 FR 56260 (final rule)	http://edocket.access.gpo.gov/2009/pdf/E9-23315.pdf	10/30/2009			12/29/2009
		40 CFR Parts 51, 52, 70, 71	PSD and Title V GHG Tailoring Rule	74 FR 55292	http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a4c6ba	10/27/2009	10/27/2009	12/28/2009	

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Water	Clean Water Act								
	Regulatory Actions Under Consideration				http://yosemite.epa.gov/opei/RuleGate.nsf/content/index.html?opendocument				
		40 CFR Parts 122 et al	Criteria and Standards for Cooling Water Intake Structures						
		40 CFR Part 140	Best Management Practices for Recreational Boats						
		40 CFR Part 449	Effluent Guidelines, Limitations, & Standards for Airport Deicing						
		40 CFR Part 423	Steam Electric Effluent Limitations Guidelines						
		40 CFR Part 122	NPDES Permit Rules for New Dischargers						
		40 CFR Parts 123 et al	NPDES Electronic Reporting Rule						
		Not yet determined	Revised Stormwater Regulation (post-construction)						
		40 CFR Part 131	Florida Numeric Nutrient Criteria						
Water	Safe Drinking Water Act								
	Regulatory Actions Under Consideration				http://yosemite.epa.gov/opei/RuleGate.nsf/content/index.html?opendocument				
		40 CFR Parts 144-146	UIC Requirements for CO2 Geologic Sequestration Wells						
		40 CFR Part 141	Lead and Copper Long-Term Revisions						
		40 CFR Part 141	Total Coliform Rule Revisions						
		40 CFR Parts 280-281	UST Regulation Revisions						

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Water	National Pollutant Discharge Elimination System (NPDES)								
		40 CFR Part 450	Construction Site Stormwater Runoff Effluent Guidelines	74 FR 62996 (final rule)	http://www.epa.gov/guide/construction/#proposed	12/1/2009			2/1/2010
		40 CFR Parts 122, 123	Wet Weather Flows	70 FR 76013	http://cfpub.epa.gov/npdes/wetweather.cfm?program_id=0				
		40 CFR Parts 9, 122, 412	CAFO Final Rule	73 FR 70418	http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm	11/20/2008			12/22/2008
Water	Total Maximum Daily Load (TMDL)								
		CWA, Section 303(d)	Chesapeake Bay TMDL	74 FR 47792	http://www.epa.gov/chesapeakebaytmdl/	9/17/2009	9/17/2009	12/18/2009	
Waste	Resource Conservation & Recovery Act (RCRA)								
		Pre-proprosal	Standards for the Management of Coal Combustion Residuals		http://yosemite.epa.gov/opei/RuleGate.nsf/%28LookupRIN%29/2050-AE81				
		40 CFR Part 260 et al.	Cathode Ray Tube Disposal	71 FR 42928 (final rule)	http://www.epa.gov/osw/hazard/recycling/electron/	7/28/2006			1/29/2007