Testimony of

Joshua Svaty

Member, Kansas House of Representatives

Farmer, rural Ellsworth County

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And Global Warming

A hearing on

The EPA's response to the Supreme Court's decision

Massachusetts v. EPA

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Thank you for the opportunity to testify before you today. I am Joshua Svaty, I live and farm in rural Ellsworth County, Kansas. In 2002 I successfully ran for the Kansas House of Representatives, district 108, and have been fortunate to continue serving in that capacity for the last six years. I am a senior member on the House Energy and Utilities Committee, I serve as the Ranking Minority Member of the House Agriculture and Natural Resources Committee, and I have also served as the Ranking Minority Member of the Joint Interim Committee on Energy and Natural Resources. In addition to my legislative duties, I also serve as a Governor's appointee on the Kansas Energy Council, a broad committee of public and private interests charged with crafting long-term energy policy for the state of Kansas. In that capacity I have served as the Chair of the Goals committee, and though I don't want to insult your intelligence I will point out the obvious; a committee that has a subcommittee to determine the full committee's goals is going to have trouble ever accomplishing much of anything.

I have been asked to deliver testimony broadly on the question of state policy in light of the EPA not setting a policy direction on Greenhouse Gas Emissions (GHGs). Specifically, I have been requested to provide my direct knowledge of legislative action in Kansas surrounding the recent decision by Kansas Department of Health and Environment (KDH&E) Secretary Bremby to deny in October of 2007 the air permits for two supercritical coal-fired generators located in Western Kansas. The questions posed to me are as follows:

1) Can you describe the current legislative developments in the Kansas State Legislature related to the Kansas Department of Health and Environment's denial of a petition to construct a coal-fired power plant submitted by Sunflower Electric?

2) Has EPA's failure to determine one way or the other whether GHG emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" impacted the State of Kansas' ability to enforce or maintain the

authority stemming from its state law to protect the public health and environment from actual, threatened, or potential harm from air pollution, and if so, how?

3) How would EPA's issuance of an endangerment finding or notice of any intent to promulgate federal regulations related to the control of greenhouse gas emissions from stationary sources impact the ongoing dispute surrounding the denial of Sunflower's permit?

My testimony will attempt to address all three of these questions. In brief, the Kansas House and Senate, after passing an agree to disagree in order to have action on a conference committee report that was not unanimously signed, have both passed Substitute for Senate Bill 327, the legislative response to the actions of Secretary Bremby in October of 2007. This legislation limits the Secretary's power by requiring him to consider only those substances currently regulated by EPA under the Federal Clean Air Act, and was passed by a veto-proof majority in the Senate but not in the House. After a thorough vetting by staff, it will be presented to the Governor most likely today or tomorrow, and the Governor has indicated that a veto is likely. Under Kansas law, legislation may sit on the Governor's desk for ten days, and should a veto occur on this measure an attempt to override is likely.

Background on the Kansas Legislature and Current Developments

Kansas has a citizen legislature. We meet ninety days a year, starting in early-January and running until early May. We are paid approximately 14,000 dollars a year with another few thousand dollars for lodging expenses incurred during the legislative session. This is probably similar to the state legislatures from your respective homes. The Kansas legislature, again bearing its duty like most other states, spends most of its time crafting policy for education and in more recent years has devoted much time addressing rapidly rising health care costs. We have also historically invested greatly into transportation and social services. In fact, in the last thirty years of the legislature there have only been two special sessions and both serve as indicators of the work that is typically central to the Kansas legislature: one special session, in the late eighties, was held to determine the upcoming decade-long comprehensive transportation plan, and the most recent was on school finance four years ago.

As a state, we have not, however, shied away from energy policy. Kansas has nationally recognized energy regulators and Utilities Committee Chairmen, and much of what the Utilities Committee has done in the past six years were intended to be progressive steps forward in an effort to position Kansas to be an energy leader among the states. We passed broad tax credits to encourage the development of new pipelines in the state; clean-coal and IGCC development in the state; and CWIP (construction while in progress) to allow investor-owned utilities to gain a

faster return when they are building certain new infrastructure in the state. While we all may have our own policy differences with some of the legislation, and while I certainly don't think we spent enough of our time talking about energy efficiency and conservation, I cannot fault my very qualified chairman of the House Energy and Utilities Committee for being inactive.

When the Kansas Attorney General gave the Secretary of Health and Environment the authority to deny the permit under K.S.A. 65-3012, the now infamous emergency provision, it set the stage for a debate on the Clean Air Act. When the permits were denied, initial responses from the supporters of the plants were that the Secretary abused his authority under K.S.A. 65-3012. Taken from a statement of legislative intent issued by members of the Kansas Senate upon passage of Sub for SB 327, "As a matter of fact, the Legislature has never intended K.S.A. 65-3012 to have any application in the air quality permitting process. Moreover, the Legislature has never intended to authorize the Secretary of Health and Environment to deny, modify or otherwise take adverse action on any air quality permit application based on anticipated emissions of any air contaminant or pollutant for which there are no established federal or state emission standards."

Unlike Congress, Kansas does not keep a Congressional Record. We have only skeletal committee minutes which make it difficult to ascertain legislative intent for something passed ten years ago, let alone forty-one. Kansas legislators should not be asked to determine the intent of a statute passed in 1967. Through due process, if legislative intent is a question for the court, then the court must make a determination. The Kansas Legislature, and I would suspect other legislatures, operates best when it can operate under the strong and living Federal acts and the necessary state statutes that accompany them. This is certainly true of the Federal Clean Air Act and its federal administrator, the Environmental Protection Agency (EPA).

The scenario existing in Kansas is one in which all roads of confusion lead to one source: the EPA. Though I cannot speak for Secretary Bremby and his decision to deny the air permits, from a legislative perspective the best course of action is one of caution because of the mixed signals coming from the Federal Government. Kansas already obtains 73 percent of its electric generation from conventional coal sources, and adding approximately eleven million tons of CO2 annually from the Holcomb expansion only gives Kansas a greater carbon footprint should the EPA or Congress ever move forward on controlling GHG emissions. This increased footprint makes efforts to reduce emissions or complying with new federal mandates more costly and burdensome on utility ratepayers.

Prior to this legislative session, four legislators, the House and Senate Utilities' committee chairs and ranking minority members, met to craft legislation with a two-fold purpose: one to help set direction for a comprehensive state energy plan and two to allow for the Sunflower Electric Cooperative Holcomb power plant expansion. In a bold move, the four legislators introduced groundbreaking legislation that would have placed an upper limit on carbon dioxide

emissions with a carbon tax on emissions above that level. This action was so roundly dispatched by the legislature that little has survived to the final bill that has reached the Governor's desk. Many legislators disliked the measure because it included both an emissions limit and a tax, others disliked the bill because the free limit (1520 tons per Megawatt hour) and the tax (three dollars per ton) did not go far enough. Furthermore, the bill contained a host of mitigation possibilities that amounted to a fait accompli for any company building a coal plant. I mention only one for effect – a company would be allowed one and a half times the amount of capacity for renewable energy on transmission lines built because of the plants. It is worth noting that nothing in the bill required wind power or other renewable energy sources to be constructed. This was a mitigation for simply having the capacity in place on lines that would have to be built anyhow.

As it stands now, the bill before the Governor contains some "green" elements, and their merit or lack thereof is not what I am here to discuss. The bill also continues to contain the one surviving element from the start – the language removing the KDH&E Secretary's authority to decide air permits. In particular,

> "The Secretary shall not in the exercise of powers and duties, except as provided below, promulgate any rule and regulation, or issue any order or take any other action under any provision of the Kansas air quality act or other provision of law, that is more stringent, restrictive or expansive than required by the federal clean air act, (42 U.S.C. 7401 *et seq.*) or any rule and regulation adopted by the United States environmental protection agency under the federal clean air act, as amended."

On the one hand, this language may be seen as a welcome acceptance of the EPA and its indecision regarding GHGs. However, perhaps the deeper interpretation demonstrates the necessity of an EPA that will act. The drafters of this language were intentionally waiting on the EPA to act. Those of us who did not support this language are also waiting for the EPA to act – to provide clarity and certainty. Regardless of where legislators, regulators, business, industry and citizens are on this issue, one thing is apparent – the EPA needs to act.

EPA and GHG emissions, authority of State law

It is no secret to members of this committee and the others testifying here today that *Massachusetts v. EPA* hinged on the plaintiff's ability to show an injury in fact. In Kansas, a debate about public health and welfare, especially welfare as it is statutorily defined, has either never taken place or has been so insignificant as to warrant little attention. In fact, the only testimony provided during the hearings on the bill pending in Kansas that came close to a discussion of public health and welfare was provided by a proponent of the bill. He was a private attorney that had worked previously for the EPA, and that previous arrangement suggested that he was an authority on what the EPA was going to do. In fact, (and I recognize

this as anecdotal, you may do with it as you please) I had to correct many of my fellow committee members because they were left with the impression that he was speaking for the EPA.

The issue in this particular case is that if the EPA does not determine one way or another the future of GHG emissions, and does not actively engage in the debate over whether or not GHGs endanger the public health and welfare, state-level debates similar to the one that occurring in Kansas are likely to become distractions to the central question of regulatory authority over issues that do in fact endanger the public health and welfare of citizens. As an example, the debate in Kansas has been only viscerally about the science of global warming and hardly at all on the impact on the public health and welfare. Few legislators spoke about the actual climate and weather effects of increased GHGs, and instead used the opportunity to speak about "regulatory certainty" in light of what they considered an arbitrary decision. The irony, in my opinion, is that in claiming regulatory certainty they were voting for a bill that removed the State of Kansas' ability to go above and beyond the federal government in air quality for the sake of its citizens. The regulatory authority so espoused by the proponents of the bill stemmed from the EPA, an administration that had been court-ordered to consider GHGs and was giving the state no indication of the direction it was going to take.

Contemporary court orders that reverse the action or inaction of the EPA (*New Jersey v. EPA)* continue to provide confusion for states when considered in light of the EPA position. Even the recent statements from the EPA denying California's right to apply standards higher than other states still gives states pause because the EPA makes strong allusions toward an endangerment finding. On the one hand, the EPA says that California cannot implement its standards for greenhouse gas emissions from cars. On the other hand, in making that case the EPA basically grants an endangerment finding. If that is the case, then what are we as states to believe? Our state authority is being given up in favor of a federal authority that is in my opinion less certain than what we have in Kansas. I do not mind following the authority of the federal government but even if what we have in Kansas right now is regulatory uncertainty we would be trading state uncertainty for federal uncertainty. With all due respect, I would rather trust the local government.

The strongest case to be made for direction from the EPA comes from a synthesis of these thoughts. As state legislatures we are by geography and design closer to our respective constituencies. When people want to see a change in the generation portfolio of their utilities, as many do now, they rightly come to their state and federal government to appeal for that change. As a regulated industry it is fitting and proper for government to have a role in this policy shift. Kansas, like other states, can legislate a shift in the generation portfolio, but only with an interesting twist: though as a legislature we do not have to wait for an injury-in-fact to mandate a shift in generation, we have understanding enough, even in a citizen legislature, to not mandate a generation shift without accepting the injury-in-fact. If as a state we acknowledge the harm from

GHGs, the logical way to address them is through regulation, which is problematic. For example, California can regulate air emissions and still attract industry by virtue of geography. Kansas, however, plays for industry among similar states on the high plains, and a state regulating carbon surrounded by states who do not is an economic death wish. Kansas has the political will and the legislative capability to begin exploring an expanded and diversified generation portfolio. The justification of this expansion, however, lies squarely at the federal level.

Endangerment Finding; Rules and Regulations

Had the EPA issued an endangerment finding or notice of intent to promulgate rules and regulations it would have and still could have a substantial effect on the debate in Kansas. When this issue arrived before the legislature, statements were made by House leadership that it was to be done at the earliest outset in the legislative process. Hearings on the bill were compressed into a week, leaving many citizens unable to testify, as a quick resolution to this complex situation was desired. It is understandable why a timely resolution was requested via the legislature as the Kansas Supreme Court, where a lawsuit is currently pending, will not grant a quick remedy. Meanwhile the strong march of public opposition continues to mount.

What has been lost in this issue was the democratic process. Citizens want to weigh in on the debate, but it has been pushed rapidly through the process. There can be many explanations for the rush, but there can be no denying that questions surrounding the EPA are central to the effort to move the legislation through as fast as possible. Though many Kansas legislators are not talking about endangerment findings for the public health and welfare, everyone is talking about the potential for movement on carbon at the federal level, and the energy and utility industry has a keen eye on the EPA. As with any good legislation, there are a host of reasons to take our time as it is being crafted. In fact, one of my stronger arguments was temperance and deliberate action once there was greater clarity and direction from the federal government. This is the free market after all – if the demand for power exists now it will exist next year, and as long as demand exists someone will step up with the financing to supply that power.

However, those of us that oppose the legislation were left with little strength in our argument to wait because we could not definitively say “The EPA will act soon, why don’t we wait until they make a determination?” Had the federal government provided us a hint of movement we would have been able to justify a slower, more methodical approach to crafting an energy policy around the Secretary’s decision. I betray my own bias for pointing out this problem in our process, but my argument could by applied to the cause of Sunflower Electric as well. Sunflower and anyone seeking redress through the legislative process will ultimately craft better public policy if the certainty from the federal level allows them to take their time through the legislative process at the state level.

Conclusions

Remarkably, though I have voted twice against a bill that would allow the two coal-fired power plants to be built in western Kansas, I am not against Sunflower Electric Cooperative constructing some amount of coal-fired generation at Holcomb for the baseload power needs of Kansans. I understand and appreciate the need to provide reliable, reasonably priced power to Kansas consumers and recognize that due to our state's generation mix, volatility in energy markets and lack of proven technology that coal-fired generation will help bridge us to the future. Though I look forward to the day when we can move from an extractive economy to a resilient energy economy, I understand the measured approach we must take. My chief concerns on this issue have stemmed from the manner in which this legislation has been pushed through the legislative process and the actual language contained in the bill. I am not long in tooth, nevertheless I have seen my share of political blitzkriegs and know that sometimes they are an inevitable part of the system. However, energy policy should warrant a full and deliberate debate which was not present on this matter. A patchwork bill has been hastily constructed and modified in an effort to obtain the votes necessary to override a gubernatorial veto. With any leadership from the EPA, this situation could have been avoided.

What is most pressing is the tremendous responsibility our Department of Health and Environment has in maintaining the safety and well-being of all the current and future citizens of the state of Kansas, as well as the abundance of natural resources present in our state. The language included in Sub for SB 327 is so strongly worded against KDHE that it is almost daring anyone to begin monitoring GHG emissions. It is my firmly held belief that this language would have been tempered by any sort of movement or endangerment finding on the part of the EPA.

States across our nation are engaged in similar debates, experiencing similar polarization, and further endangering our citizenry and potentially our climate. If EPA intends to act, sooner is better to give us all – utilities very much included – the regulatory certainty we crave. Until EPA does act, states will continue to experience this sort of race against the clock, with utilities seeking to site large coal plants prior to such action while citizens become ever more deeply divided, some crying foul on economic development terms, some crying foul on climate grounds, with citizen-legislators like myself stuck in the middle trying to make sense of the best course of action. Respectfully, I would plead with Congress and the EPA to make use of the science, the data, the public opinion measurement at your collective command, and act on behalf of all Americans, so that we can unite together to create a robust energy economy for the twenty-first century.