



DEPARTMENT OF HEALTH
AND ENVIRONMENT

Kathleen Sebelius, Governor
Roderick L. Bremby, Secretary

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**Written Testimony of
Roderick L. Bremby
Secretary, Kansas Department of Health and Environment**

**House Select Committee on
Energy Independence and Global Warming
Hearing on “*Massachusetts v. U.S. EPA* Part II:
Implications of the Supreme Court Decision”**

Thursday, March 13, 2008

Mr. Chairman and members of the Committee, I am Roderick L. Bremby, Secretary of the Kansas Department of Health and Environment. I appreciate the opportunity to testify on the U.S. Supreme Court’s decision in *Massachusetts v. EPA*, No. 05-1120, slip op. (U.S., April 2, 2007), and how the decision related to my denial of the Sunflower Electric Power Corporation’s (Sunflower Electric) permit for the addition of two 700-megawatt coal-fired generators. I will also address the legal and policy implications of EPA’s failure to regulate greenhouse gas emissions.

The Kansas Department of Health and Environment (KDHE) is a cabinet-level administrative agency with the mission to improve the health of Kansans and the environmental condition of the state. This responsibility is exercised through the regulation of health and environmental entities in Kansas including childcare centers, food service businesses, hospitals, laboratories, feedlots, landfills, power plants, and various other industries with environmental impacts. The Kansas Department of Health and Environment also manages programs dedicated to providing disease surveillance and prevention efforts, bioterrorism planning, local and rural health assistance, health care and environmental protection information, and statewide health promotional campaigns.

In keeping with the agency mission and to secure its vision of “healthy Kansans living in safe and sustainable environments,” in October 2007 I

made the decision to deny the permit request of Sunflower Electric, which if granted, would have allowed the emission of an estimated 11 million tons of carbon dioxide (CO₂) annually.

Basis for the Sunflower Electric Permit Decision

The *Massachusetts v. EPA* decision was highly influential in the State of Kansas' decision to deny the petition of Sunflower Electric to construct a coal-fired power plant. The Supreme Court's finding that greenhouse gases are an air pollutant within the meaning of the federal Clean Air Act supports and confirms my own determination that CO₂ constitutes air pollution within the meaning of the Kansas Air Quality Act.

Under the Kansas Air Quality Act, the Secretary of the Kansas Department of Health and Environment has broad authority to protect the health of Kansas citizens and the environment. The process for obtaining an air quality permit includes a technical review of a permit application as well as a comment period to solicit input on the proposed permit from the public. Upon consideration of the permit record as a whole and pursuant to the legal authority of K.S.A. 65-3008a(b) and K.S.A. 65-3012, the decision was made to deny the permit. The former statute provides that a decision on an air quality permit may be affirmed, modified or reversed after the public hearing. The latter statute allows the Secretary to take such action as necessary to protect the health of persons or the environment, notwithstanding a permit applicant's compliance with all other existing provisions of the Kansas Air Quality Act. Action under K.S.A. 65-3012 requires information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment. Endangerment may be a threatened or potential harm as well as an actual harm.

The U.S. Supreme Court's decision in *Massachusetts v. EPA* was a key consideration in making the Sunflower Electric decision. The Court's recognition of the significant national and international information available on the deleterious impact of greenhouse gases on the environment, and its conclusion that the greenhouse gas, CO₂, meets the broad definition of air pollutant under the Clean Air Act provided support for the position I took that CO₂ also meets the similarly broad definition of air pollution under the Kansas Air Quality Act. The Court's decision, the Kansas Attorney General Opinion supporting my interpretation of K.S.A. 65-3012, the reports of the

International Panel on Climate Change, and the extensive administrative record - including comments submitted at the public hearings held in regard to the Sunflower Electric permit application - all contributed to my conclusion that the CO₂ emissions from the proposed Sunflower Electric expansion would constitute a substantial endangerment to the citizens of Kansas and our environment.

Effect of EPA's Failure to Regulate Greenhouse Gases

EPA's failure to determine one way or the other whether greenhouse gases "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" has impacted the State of Kansas' ability to enforce and maintain the authority stemming from state law to protect the public health and environment from actual, threatened or potential harm from air pollution.

Unless and until EPA acts, its failure to regulate greenhouse gases has significantly - and adversely - affected Kansans. The Kansas Legislature has recently passed a bill that will serve to tether greenhouse gas emission control in our state directly to what EPA will do ... or fail to do.

The "Sunflower Electric bill" (House Substitute for S.B. 327) provides that I, as Secretary of KDHE, may not promulgate any rule or regulation, or issue any order or take any other action under any provision of the Kansas Air Quality Act that is more "stringent, restrictive, or expansive" than required by the CAA or any rule or regulation adopted thereunder by EPA.

Governor Sebelius has expressed her intention to veto the Sunflower Electric bill, which passed with votes insufficient for an override, but that may change.

Until EPA takes action on regulating greenhouse gases, we in Kansas will be limited in our ability to aggressively address CO₂ emissions. Given the unambiguous requirement in the CAA that CO₂ emissions be regulated and reduced, it would make sense from both a human health and business perspective for EPA to issue its regulations as quickly as possible.

Impact of EPA Decision to Regulate GHG Emissions on Kansas Dispute

EPA's issuance of an endangerment finding or notice of any intent to promulgate federal regulations to control greenhouse gas emissions from stationary sources would further support my decision to regulate CO₂ emissions in Kansas, which was appealed to the Kansas Court of Appeals, the District Court of Finney County, Kansas, and the Office of Administrative Hearings of the State of Kansas. The Kansas Supreme Court has taken up the appeals filed in the Court of Appeals on its own motion, and the proceedings in the district court and office of administrative appeals are stayed, pending disposition of the appeals by the Supreme Court.

In denying Sunflower Electric's permit application, I found that its proposal to construct two new coal-fired power plant units poses a substantial endangerment to Kansans and our environment. That finding is well supported by the extensive administrative record, and I stand by it. EPA's issuance of an endangerment finding would support my determination, but is not necessary for it. Similarly, my authority to take action in regard to greenhouse gas emissions - and therefore deny Sunflower Electric's permit application - was based on the Kansas Air Quality Act. Therefore, EPA's notice of intent to regulate would support my exercising the authority granted to me by Kansas law, but is not necessary to it. However, EPA's decision to regulate GHG emissions would be critical to alleviating the so-called "regulatory uncertainty" and thus economic uncertainty I have been alleged to have created by denying the Sunflower Electric permit.

Conclusion

The most critical challenge facing the states is policy uncertainty at the federal level. In the absence of federal legislation or regulation in this area and with the potential for enactment of the legislation currently pending in Kansas, it would be impossible for Kansas to protect the health of its citizens and the environment from the effects of CO₂.

Thank you for the opportunity to present this testimony. I look forward to your questions.



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Prior to his January 2003 appointment by Governor Kathleen Sebelius, Secretary Bremby served as a research assistant professor at the University of Kansas and as associate director of the Work Group on Health Promotion and Community Development. His work involved providing technical assistance, evaluation support and community research for community health initiatives. Secretary Bremby has been a consultant for a variety of organizations including, community coalitions, advocacy organizations, local government agencies, and the U.S. Agency for International Development (Strengthening Democracy in Uganda).

Secretary Bremby served 10 years as the assistant city manager in Lawrence, KS, where he was responsible for overseeing the budgeting process, police, fire and medical, public works, water, sewer, finance, information systems, and parks and recreation departments.

Secretary Bremby holds a master's degree in public administration from the University of Kansas, where he completed an undergraduate degree in psychology and communication studies. He also completed postgraduate study at the Brookings Institution, The Lyndon B. Johnson School of Public Affairs, and an executive development course at The Center for Creative Leadership. Secretary Bremby is a Kansas Health Foundation Fellow and a graduate of Leadership Forth Worth, Leadership Lawrence, and Leadership Kansas.