



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

February 17, 2010

The Honorable Ben Ysursa  
Idaho Secretary of State  
**STATEHOUSE MAIL**

Re: Certificate of Review  
Proposed Initiative Relating to the Regulations and Policies Targeting  
Greenhouse Gas Emissions

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 18, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe in which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

### **BALLOT TITLES**

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative seeks to add a new chapter to Title 39 entitled "Regulations and Policies Targeting Greenhouse Gas Emissions." Essentially, the initiative prevents enactment of state and local laws, and enforcement of federal laws

and policies regarding greenhouse gas (GHG) emissions. The initiative raises numerous legal issues. The following reviews the three major areas of concern.

**A. The Initiative Conflicts with Governor Otter's Executive Order No. 2007-05, Issued May 16, 2007 as the Initiative Prohibits Addressing GHG Emissions while the Governor Specifically Ordered the Reduction of GHG Emissions**

The legislative intent embodied in proposed Idaho Code § 39-9001 states "that any state or regional program to implement a cap and trade system or any other program to address nontoxic greenhouse gas emissions be void and null in the state of Idaho . . . [and] . . . that absolutely no public policy designed to modify greenhouse gas emissions should be undertaken by any Idaho entity, particularly at taxpayer expense."

Proposed Idaho Code § 39-9002 states:

The state of Idaho as well as the regulatory agencies, counties, and municipal corporations established by Idaho law shall not:

1. Specifically tax or set penalties or fines tied to the production of nontoxic GHGs.
2. Limit the production of nontoxic GHGs.
3. Adopt or enforce a state or regional program to regulate the emission of GHGs.
4. Adopt regulatory disincentives specifically designed to modify GHG emissions.
5. Adopt any public policy specifically designed to modify GHG emissions.
6. Expend any resources under the Idaho's disposal including public funds to modify GHG emissions indirectly through public education efforts. Prohibited activities would include:
  - a. Advertising that carbon dioxide and other nontoxic GHGs need to be reduced.
  - b. Advertising the nontoxic GHGs are harmful to individuals or the environment.
  - c. Sponsor propaganda campaigns in public schools designed to convince students that GHGs are responsible for climate change.
  - d. Any other public education efforts designed to limit GHGs.

Executive Order No. 2007-05 states in pertinent part that:

1. The Director of the Environmental Quality shall take a leadership role to work with all state government departments and agencies and shall serve as the central point of contact for coordination and implementation of GHG reduction efforts and other associated activities.

2. The Director of the Environmental Quality shall develop a GHG emission inventory and provide recommendations to the Governor on how to reduce GHG emissions in Idaho, recognizing Idaho's interest in continued growth, economic development and energy security.

Thus, the initiative prohibits what Governor Otter specifically ordered – the reduction of GHG emissions.

**B. The Initiative Will Likely Conflict With the Idaho Legislature's Mandate Under Idaho Code § 39-118C of the Environmental Protection and Health Act Because If GHG Emissions Become a Regulated Pollutant Under the Clean Air Act (CAA), the State of Idaho Will Be Required to Implement the Associated Regulations to Maintain an Approved Title V Program.**

Idaho Code § 39-118C requires that the Department of Environmental Quality provide for an air quality operating permit program under title V of the federal CAA. The State of Idaho has a fully approved title V operating permit program. See 66 Fed. Reg. 50574 (October 4, 2001). A requirement for approval is:

that the permitting authority have adequate authority to issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter.

42 U.S.C. § 7661a(b)(5)(A). The United States Environmental Protection Agency (EPA) recently published a proposed rule “to tailor the major source applicability thresholds for GHG emissions under the prevention of significant deterioration and title V programs of the CAA and to set a PSD significant level for GHG emissions.” 74 Fed. Reg. 55292 (October 27, 2009). In so doing, EPA noted, “[t]his 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.” *Id.*

Consequently, at some point in the near future, GHG emissions will become a regulated pollutant subject to certain regulations and requirements. Idaho Code § 39-118C requires Idaho have the authority to adopt these requirements in order to maintain its title V program approval. The initiative conflicts with Idaho Code § 39-118C because it prohibits the regulation of GHG emissions that Idaho will be required to regulate to maintain its title V program.

**C. The Initiative Violates the Supremacy Clause of the United States Constitution as the State of Idaho Cannot Make Null and Void the Application of Federal Laws and Mandates on GHG Emissions Within the State of Idaho**

Proposed Idaho Code § 39-9003 states:

1. Any federal law, code, or mandate to the contrary of the provisions of this Chapter is null and void and of no force or effect in Idaho.
2. Any federal law designed to tax or set penalties or fines tied to the production of nontoxic greenhouse gases emitted in the state of Idaho is null and void and of no force or effect in Idaho.
3. The state of Idaho shall accept no money from the federal government or any other person that would require violating the prohibitions in Section 39-9002.
4. Any federal employee or agent of the federal government who actively attempts to enforce laws nullified by this Chapter or commits a violation pursuant to 39-9005 is subject to the penalties and prosecution described in Section 39-9006.

As discussed above, the federal government has proposed at least two rules to regulate GHG emissions. Article VI, clause 2 of the United States Constitution, establishes the Constitution, federal statutes, and U.S. treaties as “the supreme law of the land.” It states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof: and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

In Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007), the United States Supreme Court held that the Clean Air Act does give EPA the authority to regulate tailpipe emissions of GHGs. It directed EPA to review its contention that it has discretion in regulating carbon dioxide and other GHG emissions as its current rationale for not regulating was found to be inadequate. It held the agency must articulate a reasonable basis in order to avoid regulation. 549 U.S. at 534.

The Court also stated:

When a State enters the Union, it surrenders certain sovereign prerogatives . . . . These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the “emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42.U.S.C. § 7521(a)(1).

549 U.S. at 519-20.

On December 7, 2009, EPA issued its final "Endangerment and Cause or Contribute Findings for Greenhouse Gas under Section 202(a) of the Clean Air Act." As a result, Section 202(a) requires that EPA promulgate GHG emissions standards for motor vehicles. EPA has stated that it intends to issue such standards by March 2010. Additionally, as noted above, EPA's tailoring rule, proposed as a result of GHG emission regulation of motor vehicles, regulates GHG emissions from industrial sources.

Article VI, clause 2 of the United States Constitution prevents a state from declaring a federal law null and void. The judges in every state are bound by federal law. Therefore, proposed Idaho Code § 39-9003, which makes null and void federal GHG emission laws as they apply to Idaho, is unconstitutional as it violates the Supremacy Clause.

#### CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alana Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,



LAWRENCE G. WARDEN  
Attorney General

**Analysis by:**

LISA KRONBERG  
Deputy Attorney General