

# ALERT

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## Energy, Environmental and Utilities Group

News Concerning  
Recent Developments in Energy and Environmental Law



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## INDUSTRY

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### Atlantic City's Revel Casino Finalizes CHP Project

The new Revel Entertainment Casino and Hotel, scheduled to open next year in Atlantic City, N.J., will be partly powered by a cogeneration facility developed by ACR Energy Partners LLC. Cogeneration facilities (also known as combined heat and power, or CHP) capture the heat that is emitted during the generation of electricity and use it for heating purposes rather than letting it escape into the environment. The transactions that led to the finalization of the \$160 million project were structured by Ira Megdal, co-chair of Cozen O'Connor's energy, environment and public utility practice.

There were three main components to the deal. First, because ACR will own and maintain the CHP facility and sell back the energy to Revel, a lease agreement was required whereby ACR would lease real estate on the casino's premises from Revel. Second, there had to be an agreement for the construction of the CHP facility itself. Lastly, Cozen O'Connor structured an energy sales agreement that provided for the sale of thermal energy from ACR to Revel over a lengthy period of time.

This approach, where the business allows an energy company to own and operate the CHP facility, gives Revel the comfort of knowing that its long-term energy needs will be met during times of uncertainty in energy markets, without having to actually enter the business of energy development. ACR will fully maintain and operate the facility, allowing Revel to fully concentrate on its core competencies.

## GREEN BUILDING

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### REVIEW OF OKLAHOMA ENERGY-EFFICIENT TAX CREDITS

In 2005, Oklahoma created a [program](#) to encourage more energy-efficient home building by providing home builders with a tax credit of up to \$4,000 per home for meeting certain efficiency standards. Supporters of the tax credit claim that the construction of energy-efficient homes in Oklahoma doubled after the tax credit went into effect. However, the program was suspended in 2010 as part of a budget-balancing deal. It is scheduled to go back into effect on July 1, 2012.

The tax credit has raised two major concerns. First, it has the power to reduce state revenue collections. In the year prior to the program's suspension, Oklahoma lost approximately \$3.8 million it otherwise would have collected from home builders. Critics of the tax credit have claimed that tax payers will install energy-efficient features in their homes regardless of the incentive provided by the tax credit, and that the state program has only served to increase the profit margins of home builders.

Second, some in the Oklahoma state government have criticized the transferability of the tax credits. Large home builders with multiple projects may be able to earn more in tax credits under the program than they owe in state taxes. The program, as it is currently designed, allows those home builders to sell the tax credits to other entities, who in turn can use the tax credits to reduce their own state tax burden. Critics, however, claim that the program lacks appropriate controls and safeguards.

The program is now under review by Oklahoma's Task Force for the Study of State Tax Credits. The task force may seek to prevent the reinstatement of the tax credit as scheduled on July 1, 2012.

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### [NJ BPU Approves Water Submetering for Newly Constructed Residential Apartment Buildings](#)

On August 18, 2011, the New Jersey Board of Public Utilities (BPU) approved the use of water submetering in newly constructed residential apartment buildings. The issue of water submetering first appeared before BPU in 2004. Three petitions were submitted that year requesting water submetering in residential apartment buildings. While BPU dismissed each petition, it did so without prejudice, and BPU established a working group to examine residential water submetering.

This order regarding submetering applies only to water utilities within BPU's jurisdiction. Investor owned water and wastewater utilities, as well as municipally owned utilities (that provide service to 1,000 billed customers outside of the municipality's borders) fall under BPU's jurisdiction. County and regional water and wastewater utilities, as well as water utilities owned and operated by homeowner associations that have elected to be exempt from BPU's jurisdiction, are not affected by BPU's order.

Concerns that building inefficiencies and cross plumbing/wiring of older buildings could pose barriers to retrofitting buildings for water submetering have led to BPU's decision to limit this order to newly constructed buildings. The only way that a previously constructed building can qualify for water submetering is if the building in question is repurposed for residential use and all existing pipes, service lines, and other water infrastructure are completely replaced.

## ENERGY EFFICIENCY

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### [New Jersey's Draft Energy Master Plan Under Review](#)

[New Jersey's 2011 Draft Energy Master Plan](#) has come under criticism for calling for 22.5 percent of the state's electricity to be produced from renewable resources by 2021. Governor Corzine had previously called for a 30 percent goal while he was in office. While the Christie administration has called the Corzine goal unrealistic, supporters have claimed that Governor Christie's position will be detrimental to New Jersey's alternative energy sector. Sen. Bob Smith (D-Middlesex), chairman of the Senate Environment and Energy Committee, has announced that he is drafting a statute that would restore New Jersey's renewable goal to 30 percent. The 2011 Draft Energy Master Plan is currently undergoing public review in stakeholder meetings across the state.

### [Solar Installations Jump, But Market Drops on New Jersey SRECS](#)

The Solar Energy Industries Association recently announced that [New Jersey has overtaken California as the largest commercial solar market in the country](#). One of the primary drivers behind this growth in solar capacity has been the creation of solar renewable energy certificates (SRECs), which are awarded to solar customers every time their system generates 1,000 kWh of electricity. Power companies are required to purchase a specified number of SRECs from solar system owners. This marketplace has provided financing and an income stream for those wishing to install solar systems on their property.

However, the increase in New Jersey's solar capacity has overtaken the amount of credits that power companies are actually required to buy. As can be expected from the laws of supply and demand, this has led to the price of an SREC dropping from approximately \$600 to between \$150 and \$300. With more than 5,000 approved solar projects in the pipeline, the supply of SRECs on the market will likely increase even further.

While the New Jersey SREC program has been wildly successful in encouraging solar installations and has served as a model to other states, the New Jersey Legislature will have to consider changes to the SREC market, such as increasing the number of SRECs that power companies are mandated to purchase, if it hopes to boost SREC market prices.

On September 21, The New Jersey Board of Public Utilities (BPU) proposed a 15-year price schedule that the board hopes will provide some stability to the SREC market. The schedule sets the rates that suppliers would pay in solar alternative compliance payments (SACPs) if they fail to purchase SRECs. The schedule essentially places a ceiling on the SREC market.

## UTILITIES

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### New Mexico Supreme Court Invalidates Utility Surcharge to Recover Losses Caused by Energy Conservation

On August 3, 2011, the New Mexico Supreme Court invalidated a surcharge, approved by [New Mexico's Public Regulation Commission](#) (PRC), that would have allowed the state's electric utilities to recover a portion of their lost revenue caused by increased energy conservation. Under the PRC-approved surcharge, the utilities would have been allowed to collect one cent per kilowatt hour of electricity saved by New Mexico's energy efficiency programs. The surcharge was originally imposed to remove regulatory barriers to energy efficiency programs.

It is generally believed that to encourage utilities to fully participate in energy efficiency programs, states should offer some combination of financial incentives and enhanced utility ratemaking structures that allow utilities to recover a portion of their lost revenue due to increased energy efficiency. A report on aligning utility incentives with investments in energy efficiency can be found [here](#).

The court's [decision](#) to invalidate the surcharge was based on its belief that by "failing to inquire into any of the utilities' revenue requirements, nor any of the traditional elements of the ratemaking process," the PRC failed to adequately balance the interests of New Mexico's ratepayers and utility investors. The court found that the surcharge was "arbitrary and unlawful." The PRC's final order was vacated by the court and remanded to the PRC for reconsideration.

### FERC Transmission Rule Draws Criticism from States, Utilities, and Industry

On August 11, 2011, the Federal Energy Regulatory Commission (FERC) published a [final rule in the Federal Register](#) to amend the transmission planning and cost allocation requirements for public utilities. The rule, known as Order 1,000, outlines three basic requirements that all public utility transmission providers must adhere to when planning on a regional and interregional basis.

Order 1,000 mandates that public utility transmission providers participate in a regional planning process that satisfies grid planning principles; they must amend tariffs on local and regional planning to reflect transmission needs driven by public policy requirements in existing state or federal laws or regulations; and transmission providers in neighboring planning regions must coordinate their efforts to determine the most effective and cost-effective transmission planning solutions.

FERC's final rule, however, has drawn criticism from more than 60 states, utilities, and industry groups such as the National Association of Regulatory Utility Commissioners; SE utilities, which represents 11 southern utilities; The Coalition for Fair Transmission Policy; and the Edison Electric Institute. The groups have petitioned FERC to review the final rule and address the concerns presented. If FERC declines to reopen the matter, opponents of Order 1,000 have the option of filing an appeal, usually to the U.S. Circuit Court of Appeals for the district of Columbia, to reverse or remand the order.

## ENVIRONMENTAL

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### Obama Administration Withdraws Proposal to Tighten NAAQS

In a [letter](#) to EPA Administrator Lisa Jackson on September 2, 2011, Cass Sunstein, the administrator of the White House Office of Information and Regulatory Affairs (OIRA), instructed Jackson that the president no longer supported the EPA's proposed tightening of the National Ambient Air Quality Standards (NAAQS). The current ozone standard was set by President Bush in 2008 amid criticism from the environmental community, which advocated for a tighter standard. Republicans and major business/industry groups had publicly stated their view that an increased ozone standard would be a "job killer" and could cost between \$19 billion and \$90 billion, depending on how strict it would be.

### New Jersey Legislature Mulls Options Following State's Withdrawal from the RGGI

Governor Christie announced New Jersey's withdrawal from the Regional Greenhouse Gas Initiative (RGGI) in May 2011. Since that time, democrats in the New Jersey Legislature and other supporters of the program have attempted to prevent New Jersey from leaving the regional clean air pact. The Legislature's latest move failed, with Governor Christie's veto of a bill that would have prevented New Jersey's withdrawal.

An override of the governor's veto in the Legislature is unlikely. However, it has been reported that other legislative maneuvers are under consideration. Before New Jersey can pull out of the initiative, the Department of Environmental Protection (DEP) and the Board of Public Utilities (BPU) will need to promulgate regulations to implement the state's withdrawal. The Legislature may attempt to invalidate those rules by declaring them inconsistent with the Legislature's intention when it voted to enter RGGI in 2008. Additionally, environmental groups such as the Sierra Club and Environment New Jersey are considering judicial options to force the governor's hand.

## MARCELLUS SHALE

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### N.J. Issues One-Year Moratorium on Hydraulic Fracturing but Governor Christie Vetoes Permanent Ban

New Jersey Governor Christie announced a one-year moratorium on hydraulic fracturing in New Jersey, pending further research into the safety of the drilling process. However, during the same day, the governor vetoed a bill that would have permanently banned hydraulic fracturing in the state. While geologists do not believe that New Jersey has any significant natural gas reserves, Governor Christie's position on hydraulic fracturing may be more significant to the temporary ban that has been put in place in the Delaware River basin. New Jersey is one of five members of the Delaware River Basin Commission (DRBC), which oversees the watershed that supplies drinking water to much of the Philadelphia region. The DRBC has placed a temporary ban on hydraulic fracturing, but the commission is currently holding hearings on the issue and considering allowing drilling to proceed.

### West Virginia Imposes New Rules Governing Horizontal Well Development

On August 23, 2011, the West Virginia Department of Environmental Protection (DEP) announced [new emergency rules](#) governing the development of horizontal wells, which will impact operations in the state's Marcellus Shale region. DEP stated that, "The emergency rule is intended to help the DEP regulate the state's growing natural gas industry, which is benefitting from improved horizontal drilling techniques that allow operators to more easily access deep shale gas, such as that found in the Marcellus Shale."

The new rules require operators to submit erosion and sediment control plans, meet stricter water quality standards, and provide public notice 30 days prior to beginning new work. The emergency rules will be in place for 15 months.

### U.S. Geological Survey Report Reduces Marcellus Shale Gas Estimates

Only one month after the Department of Energy's Energy Information Agency (EIA) released a [report](#) projecting about 410 trillion cubic feet of undeveloped, recoverable gas in the Marcellus Shale region, the Department of Interior's U.S. Geological Survey (USGS) released an [assessment](#) that suggested that the Marcellus Shale's reserves were only at 43 trillion to 144 trillion cubic feet. Accurate estimates are important for drillers, regulators, and investors who must assess the potential profit and risks associated with drilling projects.

While the estimates of both federal agencies still place the Marcellus Shale's reserves well over a 2002 USGS estimate of 2 trillion cubic feet of recoverable gas, EIA has been criticized for failing to explain how its methodology differs from the USGS report's. EIA has announced that the August 2011 USGS report supersedes its own estimates released in July.