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**MEMORANDUM**

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TO: Bram Claeys, Massachusetts Department of Energy Resources

FROM: Christi Zaleski, Clinical Student, Emmett Environmental Law and Policy Clinic

CC: Wendy Jacobs and Shaun Goho

DATE: May 12, 2015

RE: Interstate Cooperation on a Regional Pellet Standard

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**I. QUESTIONS PRESENTED**

1. If the northeastern states wanted to cooperate to create a uniform regional standard for wood pellets, would the Compact Clause impose constraints on the forms that such cooperation could take?
2. What tools or processes can northeastern states use to create a regional standard for wood pellets?

**II. SHORT ANSWERS**

1. No—the Compact Clause does not impose significant constraints on state cooperation to achieve a uniform pellet standard.
2. The northeastern states would be best served by using MOUs, a model rule, and a third party standard to create a uniform regional pellet standard.

**III. DISCUSSION**

States routinely cooperate, both formally and informally, to achieve shared goals. This cooperation can take various forms. At one end of the spectrum, states may adopt formal interstate compacts that are approved by Congress and manifest a legally-binding contract among the states. At the other end, employees of state agencies may have personal relationships with their counterparts in other states through which states informally share information and disseminate best practices. The first part of this memorandum describes general legal issues related to interstate cooperation. The second part describes various forms of interstate cooperation along a spectrum from formal, binding compacts to informal, aspirational shared

goals. The third part draws lessons from examples of interstate cooperation and suggests particular tools and approaches for creating a regional pellet standard.

A. The Compact Clause Does Not Significantly Constrain the Northeastern States from Adopting a Uniform Wood Pellet Standard.

The Compact Clause of the Constitution states that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” U.S. Const. art. I, § 10, cl. 3. On its face, this clause seems to prohibit any formal state agreement that is not approved by Congress. However, the Supreme Court has clarified that the consent requirement applies only to agreements “directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.” *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893). In effect, the Court recognized that many agreements are purely matters of state concern and therefore held that such agreements do not require Congressional approval. In fact, under this deferential standard, the Supreme Court has never held an interstate agreement unconstitutional despite challenges to agreements that have had more transformative implications than a pellet standard would. *See, e.g., U. S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 452 (1978) (upholding the Multistate Tax Commission, which established a commission comprised of many states to promote uniformity among states’ tax codes, against a Compact Clause challenge). A multi-state pellet standard would be based on concerns about promoting local health and welfare, an issue squarely within the states’ traditional police power. Given that such a standard would not “tend to increase the political power of the states,” and would rather only help states promote local air quality, a regional pellet standard would not need congressional approval under the Compact Clause.

Moreover, Congress has expressed support for interstate cooperation to address air pollution in the Clean Air Act. Under the Compact Clause, Congress may either approve interstate compacts before the compact is adopted or after the fact.<sup>1</sup> In the Clean Air Act, Congress directed EPA to “encourage the making of agreements and compacts between States for the prevention and control of air pollution.” 42 U.S.C. § 7402(a). Although this provision does not explicitly approve any particular interstate compact, as required by the Compact Clause, it suggests that one goal of the Clean Air Act was to encourage such cooperation. This inference strongly supports the states’ right to cooperate in this realm without seeking approval from Congress.

B. The Northeastern States Have Used a Broad Spectrum of Approaches to Interstate Cooperation, Ranging from Formal/Binding to Informal/Aspirational.

States cooperate for a variety of reasons. Sometimes they cooperate to achieve goals that each state could not achieve on its own. In such cases, states may create multistate commissions to administer the programs. At other times, states cooperate because their goals are aligned or mutually inspired. In such cases, they may pass similar or identical laws because working together would be more effective than working independently. States may also cooperate to

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<sup>1</sup> *See* JOSEPH ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 53 (2nd ed. 2012).

create reciprocal arrangements whereby they share information or resources and expect information or resources in return.

The different aims of interstate cooperation have generated a broad spectrum of approaches to achieving that cooperation. On one end of the spectrum, states can engage in a treaty-like process to create formal interstate compacts that are then approved by Congress. On the other end, states cooperate informally to share information, resources, and inspiration about policy objectives. This section describes four different types of interstate cooperation along the spectrum of formal/binding agreements to informal/aspirational cooperation, illustrating each type with an example from the northeastern states' experience.

### *1. Formal Interstate Compacts, Approved by Congress*

Formal interstate compacts that have been approved by Congress function similarly to treaties between nations. Like treaties, interstate compacts require participation from the highest levels of government, and generally involve a long, slow negotiation process.<sup>2</sup> A typical process of interstate compact adoption and ratification occurs like this: First, representatives from cooperating states agree on the language for the compact; next the states must each ratify the compact through legislation; finally, the compact takes effect when a certain number of states ratify and Congress approves.<sup>3</sup> Once the compact has been ratified, it represents a legally binding contract between the states and may dictate how states are permitted to leave the compact.<sup>4</sup>

Traditionally, interstate compacts were used to settle boundary and resource disputes between states.<sup>5</sup> These kinds of agreements are relatively simple to administer because they do not require ongoing monitoring, enforcement, or modifications. Starting in the 1970s, the number of interstate compacts increased rapidly and changed in character.<sup>6</sup> Beginning in this period, interstate compacts became more complex, requiring the use of interstate commissions to administer them.<sup>7</sup> The Northeast Interstate Dairy Compact is an example of a formal interstate compact from the modern era that required ongoing administration by an independent commission.

#### *a. Example: Northeast Interstate Dairy Compact of 1996*

In the late 1980s and early 1990s, dairy farmers in the northeast struggled to survive as dairy prices fell below production costs.<sup>8</sup> In response, Massachusetts attempted to bolster its dairy industry by taxing milk dealers, who purchased two thirds of their milk from out-of-state

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<sup>2</sup> See *id.* at 44-49.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 49.

<sup>5</sup> National Center for Interstate Compacts, *Connections* 6 (2008), available at [http://www.csg.org/knowledgecenter/docs/interst/CONNECTIONS\\_Spring2008final\\_screen.pdf](http://www.csg.org/knowledgecenter/docs/interst/CONNECTIONS_Spring2008final_screen.pdf).

<sup>6</sup> See PAUL T. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 7 (1982).

<sup>7</sup> See *id.*

<sup>8</sup> See ZIMMERMAN, *supra* note 1, at 107.

dairy farms, and distributing the proceeds to in-state dairy farms. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188 (1994). In 1994, the Supreme Court ruled that this scheme, which effectively subsidized only in-state producers at the expense of out-of-state producers, violated the Dormant Commerce Clause and struck down the law. *Id.* at 205-07.

Having been thwarted in its individual effort, Massachusetts worked with other northeastern states to achieve the same ends.<sup>9</sup> In 1988, Vermont initiated a process to work with other northeastern states to set milk prices for the region. *See Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998). By 1993, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont had signed an agreement to create a commission that would set milk prices for the region. *See id.* The stated purpose of the compact was to ensure that dairy farming remained a viable industry in the Northeast.<sup>10</sup> Each state also passed implementing legislation, which would allow the compact to enter into force when it received Congressional approval. *See Milk Indus. Found. v. Glickman*, 132 F.3d at 1471. In 1996, Congress approved the interstate compact, allowing it to take effect. Pub.L. 104-127, Title I, § 147 (1996).

From the time the Compact was authorized by Congress, it was highly controversial.<sup>11</sup> As a result, Congress only authorized the Compact temporarily, requiring the states to seek reauthorization every few years.<sup>12</sup> Pub.L. 104-127, Title I, § 147 (1996). In 2001, Congress refused to re-authorize, effectively dissolving the Commission and the Compact. 7 U.S.C. § 7256.

## 2. *Formal Interstate Negotiation and Agreement*

In many cases states have entered into significant interstate agreements without the formal approval of Congress. Again, the Supreme Court has never struck down an interstate agreement on Compact Clause grounds, although some observers have suggested that certain formal interstate agreements may come close to a violation. *See, e.g., U.S. Steel Corp v. Multistate Tax Comm's*, 434 U.S. at 491 (White, J., dissenting). When states receive Congressional approval for their compacts, the compact becomes immutable, absent further Congressional action. States cannot adopt a version of the compact that is inconsistent with the language in Congress's authorization. However, when states enter into agreements that are not approved by Congress, the agreement is little more than a promise to pass implementing legislation which is identical or similar to the agreement. Frequently, implementing legislation may actually differ in important ways when states retain the ability to deviate. Therefore, although states may find it easier to adopt interstate agreements without the consent of Congress, they may be sacrificing uniformity in doing so.

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<sup>9</sup> *See* ZIMMERMAN, *supra* note 1, at 108.

<sup>10</sup> Northeast Dairy Compact Commission, *Purpose of the Compact*, <http://www.dairycompact.org/purpose.htm> (last visited Apr. 19, 2015).

<sup>11</sup> *See* ZIMMERMAN, *supra* note 1, at 109.

<sup>12</sup> *See id.*

The Regional Greenhouse Gas Initiative (“RGGI”) is an example of a formal interstate agreement in which states did not seek Congressional approval, and yet needed to pass uniform implementing legislation in order to make the agreement effective. RGGI was successful in getting states to pass largely uniform laws, despite its lack of Congressional approval.

a. Example: Regional Greenhouse Gas Initiative

In 2003, Governor George Pataki of New York invited the northeastern states to collaborate to develop a regional cap and trade program for greenhouse gases.<sup>13</sup> After years of negotiations, the governors of seven states signed a Memorandum of Understanding (“MOU”) establishing the basic contours of RGGI, which would create regional and state caps on greenhouse gas emissions that would increase in stringency over time.<sup>14</sup> Today, nine northeast and mid-Atlantic states have capped their greenhouse gas emissions and trade carbon credits through RGGI.<sup>15</sup>

The MOU established the principles the states would use to create the RGGI Model Rule, a 163-page document that details the legislative requirements for establishing a cap-and-trade program.<sup>16</sup> The MOU calls for the signatory states to complete drafting of the Model Rule within 90 days of the signing of the MOU, and for each state to adopt the model rule through its own legislative process by the end of 2008 in order to launch the program in 2009.<sup>17</sup> Although the states missed these deadlines, eventually all participating states passed implementing legislation that closely adhered to the model rule.

Among other things, the MOU also calls for the creation of a regional organization to assist the states in administering the program.<sup>18</sup> Pursuant to this provision, the signatory states created RGGI, Inc., a non-profit entity charged with providing states with a forum for discussion, offering technical assistance, and implementing the program pursuant to the goals established by the states.<sup>19</sup>

3. *Adoption of Uniform Laws through a Model Rule*

Both of the interstate agreements discussed above created a multistate structure to administer the program. The states needed to create such a structure either because they were legally barred from addressing the problem individually or because a single-state program would be too small to function effectively. Thus they adopted the Northeast Interstate Dairy Compact after Massachusetts was barred from supporting its dairy industry by the Supreme Court’s

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<sup>13</sup> Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1959 (2007).

<sup>14</sup> See Regional Greenhouse Gas Initiative, Memorandum of Understanding, (Dec. 20, 2005) [hereinafter RGGI MOU], available at [http://rggi.org/docs/mou\\_final\\_12\\_20\\_05.pdf](http://rggi.org/docs/mou_final_12_20_05.pdf).

<sup>15</sup> RGGI, *RGGI Inc.*, <http://www.rggi.org/rggi>.

<sup>16</sup> Regional Greenhouse Gas Initiative Model Rule, (Jan. 5, 2007) available at [https://www.rggi.org/docs/model\\_rule\\_corrected\\_1\\_5\\_07.pdf](https://www.rggi.org/docs/model_rule_corrected_1_5_07.pdf).

<sup>17</sup> RGGI MOU, *supra* note 14, at 6.

<sup>18</sup> See *id.* at 7.

<sup>19</sup> See *id.*; RGGI, *RGGI Inc.*, <http://www.rggi.org/rggi>.

dormant Commerce Clause ruling in *West Lynn Creamery*, 512 U.S. 186. As for RGGI, the states had to work together because a single state cap-and-trade program would likely have only minimal impact and success compared to a regional program. In these examples, the states could not act alone, so regional agreement was critical to any action. As a result, states adopted largely identical laws to create programs that operated uniformly.

However, in many situations, states can act alone, but nevertheless choose to cooperate in order to achieve shared goals more effectively as a region. In such cases, states do not absolutely rely on interstate cooperation to create a new law, but cooperation helps to achieve a policy objective more efficiently. For example, a regional standard may be less burdensome on the affected industry because it can comply with a single standard across the region rather than different ones in each state. One method of doing so is to work together to create a model rule, which each state then adopts and enforces independently. Such a process has the benefit of retaining much decision-making authority at the state level, but may have the downside of compromising regional uniformity.

#### a. Example: Outdoor Wood Boiler Standard

The Northeast's creation of a regional outdoor wood boiler ("OWB") standard provides an example of a standard that the states could have passed on their own, but instead chose to develop together. There are no federal emissions standards for OWBs, although they are a significant source of particulate matter emissions.<sup>20</sup> In the early 2000s, responding to emerging evidence that particulate matter emissions were a more serious threat to human health than previously understood, many northeastern states became interested in regulating OWBs.<sup>21</sup> Rather than each state acting alone, the northeastern states believed that it would be more effective to create a regional approach to OWB regulation based on existing federal air quality standards.<sup>22</sup>

In the early 2000s, states began negotiating in a process facilitated by the northeast regional air quality commission, NESCAUM.<sup>23</sup> NESCAUM also provided the states with technical assistance by assessing the feasibility and impact of different regulatory options, and drafted a model rule that reflected the agreement among the states and its own technical assessments.<sup>24</sup> Since NESCAUM released its model regulation in 2007, six northeastern states have adopted some version of it.<sup>25</sup> However, the states vary significantly in the extent to which

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<sup>20</sup> NESCAUM, Outdoor Wood Boiler Fact Sheet (Jan. 25, 2007), *available at* <http://www.nescaum.org/topics/outdoor-hydronic-heaters>.

<sup>21</sup> *See id.*

<sup>22</sup> NESCAUM, Outdoor Hydronic Heaters, <http://www.nescaum.org/topics/outdoor-hydronic-heaters>.

<sup>23</sup> NESCAUM, organized as a non-profit entity, is standing commission composed of the heads of northeastern air quality agencies that is devoted to promoting regional air quality. NESCAUM, *History*, <http://www.nescaum.org/about-us/history>. In addition to providing a forum for discussion, NESCAUM provides states with technical assistance and research on air quality issues. NESCAUM, *Overview*, <http://www.nescaum.org/about-us/overview>.

<sup>24</sup> *See generally* NESCAUM, *Outdoor Hydronic Heaters*, <http://www.nescaum.org/topics/outdoor-hydronic-heaters>.

<sup>25</sup> Massachusetts, Vermont, Maine, and New York regulate OWBs through agency rules, while the legislatures in New Hampshire and adopted new statutes to regulate the heaters. *See* 310 Mass. Code Regs. 7.26(52)(e); 16-3-100

they adhered to the language in the model rule. For example, Vermont has the most stringent emissions limitations, creating a two-step process of emissions reductions over time and going so far as to forbid the use of uncertified devices after 2018. By contrast, Connecticut's standard does not contain any emissions limitations whatsoever. *See* 16-3-100 Vt. Code R. § 5-204(c)(3)(ii); Conn. Gen. Stat. Ann. § 22a-174k(c).

#### 4. *Informal Cooperation*

The last scenario along the continuum from formal to informal cooperation is purely informal arrangements such as information sharing and mutual inspiration. States often cooperate informally in order to generate reciprocity. For example, police departments in neighboring states share information across borders about crimes possibly affecting both states, creating an expectation that such information will be shared by the other state whenever necessary. Although in most cases no formal mandate requires such information sharing, this is a widespread practice that is mutually beneficial.<sup>26</sup>

Informal cooperation can also be aspirational in nature. State policies and agencies can mutually inspire and inform each other about shared policy goals. In some cases, states actually come together to create aspirational agreements that have no legal effect but rather demonstrate an intent to work on a policy issue. In other cases, the states cooperate informally by looking to each other's policies and actions as inspiration for local action.

##### a. Example: Ocean Acidification Task Forces

In recent years, public awareness of the problem of ocean acidification, including its impacts on fisheries, has increased. To address this problem, Maryland and Maine passed legislation creating Ocean Acidification Task Forces to study local impacts of ocean acidification with a goal to curb local contributions.<sup>27</sup> Maine's Task Force has spurred the consideration of similar legislation in Rhode Island, Massachusetts, and New Hampshire.<sup>28</sup> While these states are not formally cooperating to produce shared legislation, counterparts at various state agencies share information and communicate goals in a way that influences policy in other states with shared concerns.<sup>29</sup>

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Vt. Code R. § 5-204(c)(3)(ii); Conn. Gen. Stat. Ann. § 22a-174k(c); 06-096 CMR Ch. 150, § 4; N.Y. Comp. Codes R. & Regs. tit. 6, § 247.4; N.H. Rev. Stat. Ann. § 125-R:4. Notably, all six states have adopted restrictions on fuel composition, requiring that operators use only "clean wood," "untreated natural wood," or "wood that is not chemically treated." *See id.*

<sup>26</sup> *See* ZIMMERMAN, *supra* note 1, at 165.

<sup>27</sup> Eric Schwab, *Ocean-Acidification: What You Need to Know*, OCEANBLOG (Oct. 22, 2014), <http://aqua.org/blog/2014/october/ocean-adification-what-you-need-to-know>.

<sup>28</sup> Patrick Whittle, *New England States Following a Model Set by Maine to Reduce Ocean Acidity*, PORTLAND PRESS HERALD, Mar. 29, 2015, *available at* <http://www.pressherald.com/2015/03/29/new-england-states-following-a-model-set-by-maine-to-reduce-ocean-acidity/>.

<sup>29</sup> *See id.*

C. In the Context of Wood Pellet Regulation, Northeast States Should Consider Using MOUs, Model Rules, and Third-Party Standards to Achieve a Uniform Regional Standard.

The northeastern states might be interested in collaborating to develop a stringent, uniform pellet standard that applies across the region. A stringent standard would ensure that pellet burning does not degrade regional air quality. A uniform standard would provide pellet producers with consistency and predictability across the region. In some ways, these stringency and uniformity goals are in tension, because as proposed standards become more stringent they may become more costly, creating difficulties in generating consensus.

This section proposes three different tools the northeast states may consider using to adopt a uniform pellet standard. These tools are focused on helping the states create uniformity as they pursue a stringent regional standard.

1. *MOUs and Model Rules*

There are two primary tools that states use to memorialize agreements about policy initiatives: MOUs and model rules. Both tools are available to northeastern states to create a regional pellet standard.

In connection with the Northeast Interstate Dairy Commission, RGGI, and the regional OWB standard, state governors signed an MOU to memorialize their agreement about the basic principles of the new policy. In many cases, MOUs are signed by governors; however, in some cases state agencies agree to pursue regional goals through MOUs signed by agency heads. The process of drafting and signing MOUs draws together decision makers who are equipped to negotiate about the principles and motivations behind a regional rule. While an MOU does not create any legal changes by itself, it is a potentially powerful tool to generate political momentum around one set of standards.

Although drafting MOUs may help create broad consensus, model rules also play an important role in crystallizing particular issues and ensuring greater uniformity. MOUs are often written at a high level of generality and may be aspirational in nature. By comparison, model rules are written with greater specificity and can serve as the basis for local laws and regulations.

In developing a regional pellet standard, northeastern states may consider using a process similar to the one that was undertaken to develop the OWB standard. In that process, states collaborated through the NESCAUM forum to agree on a single standard that could work in every state. Similarly, when the northeast states were developing RGGI, the states used a two-step process, first adopting the MOU, then adopting a model rule, which was implemented by the states under deadlines identified in the MOU. In the RGGI example, the MOU provided the broad framework around which states could agree at a high level, but states continued to negotiate for over a year to work out the particulars while drafting a Model Rule.

2. *Third-Party Standards*

As noted above, *see supra* at 6-7, one potential shortcoming of the model rule approach is that it does not mandate that states adopt uniform standards. Rather, each state remains free to



modify the model rule, as has been seen with the variable implementation of the OWB model rule. If states want to ensure uniformity in their standards, one tool to consider is the use of a third-party standard.

An example of states adopting a standard developed by a third party is when other states adopt California's automobile tailpipe emissions standards. Under the Clean Air Act, the federal government prohibits states from adopting automobile tailpipe emissions standards more stringent than the federal standards. 42 U.S.C. § 7543(a). The rationale behind this prohibition is to promote uniformity, because automobile manufacturers could not produce fifty different models of cars to comply with fifty different tailpipe standards established by fifty different states. Congress, however, grandfathered in California, which was the only state that had developed tailpipe emissions standards before the passage of the Clean Air Act in 1970. As a result, California is permitted to develop standards more stringent than the federal baseline. 42 U.S.C. § 7543(b). The federal government also allows other states to opt into California's standards. 42 U.S.C. § 7543(e)(2)(B). Under this program, states do not have discretion to change aspects of the California program they do not like; instead, they are forced to either adopt the California standards wholesale or retain the federal baseline standards.

A similar forcing mechanism would be available to northeastern states interested in creating a uniform pellet standard. The states could work with an independent third party certifying organization to develop a standard. State legislatures and agencies could then choose to opt into this third party standard by promulgating implementing rules and legislation. The difference between this approach and the OWB standard, for instance, is that the participating states would have to adopt as a whole the third party standard, rather than developing their own specifications based on a model rule. States might still differ in certain aspects of the program, for example in how the standard is enforced, but the pellet specifications would be uniform across all participating states. By ensuring uniform specifications, a third party standard could help reduce the burden of compliance on pellet producers.

States could work with a private certifying body such as Pellet Fuels Institute ("PFI") or ENPlus to develop a regional standard that would then be monitored by this group. For example, states could work with PFI to develop a standard more stringent than that organization's existing standards—a "PFI+ standard." Each state could then adopt implementing legislation requiring that any pellets purchased or sold in the region would bear the PFI+ label demonstrating compliance with the regional specifications. PFI would monitor individual pellet producers' compliance with the PFI+ standards, removing the label from non-compliant producers, and states could enforce the standard against in-state pellet importers, distributors, and operators, ensuring that only PFI+ pellets are sold in each participating state.

Although a third party standard may be useful in creating uniformity, some states may object to incorporating a private certification scheme into legislation. As an alternative to a private certification scheme, an individual state could create a certifying body that operates similarly to private schemes through a process of labeling and monitoring, but is still accountable to the government of that state. Other states could then tie their standards to that state's. Additionally, the states could collaborate to create a regional commission, similar to RGGI Inc., to provide technical assistance and monitoring of the regional standard. While these options

would be more costly to the states, they have the same benefits for uniformity as creating a regional standard that adheres to a private certification scheme.

#### **IV. CONCLUSION**

The Compact Clause does not prohibit the northeastern states from creating a regional pellet standard. These states can learn from their past experiences with interstate cooperation to understand the best way to approach developing a regional pellet standard. In particular, the northeast should consider using MOUs, model rules, and third party standards to ensure that the states adopt a pellet standard that is not only stringent, but also uniform in order to provide pellet producers with consistency across the region.