

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2009

PHILADELPHIA, MAY 21, 2009

An incisivemedia publication

ENVIRONMENTAL LAW

Democrats' Clean Energy Bill Could Have Far-Reaching Effects

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Special to the Legal

On May 15, Congressmen Henry Waxman, D-Calif., and Ed Markey, D-Mass., introduced in the House Energy and Commerce Committee a revised draft of H.R. 2454, the American Clean Energy and Security Act of 2009. Following its mark-up by the full committee, the act is likely to constitute the major energy legislation to be debated in this session of Congress.

The committee leadership released its draft, now 946 pages long, after much internal negotiation and compromise among the committee's Democrats. Because, if enacted, the act will have far-reaching effects on consumers and businesses, a review of its provisions is important for planning future actions and investments.

The legislation represents a multifaceted attack on greenhouse gas emissions and high energy consumption. Title I promotes clean energy development through various programs including a national combined energy efficiency and renewable electricity standard. Title II addresses energy efficiency through programs directed at buildings and public institutions, mobile sources, transportation and industrial sources.



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Title III consists of a program to reduce global warming through a cap and trade system and other means. Title IV contains transition provisions to reduce the economic effects of the cap and trade system on certain industries and consumers, and to assist in adapting to the health, natural resource and other effects of global warming. A brief review of significant provisions in the act follows.

CLEAN ENERGY

The Clean Energy program promotes development of renewable energy projects and reduction of electricity consumption. The act places federal law in line with the law of those states, including Pennsylvania, that have imposed renewable energy standards and electricity demand reduction requirements.

Each megawatt hour of electricity generated from a renewable energy

source creates a federal renewable energy credit, or REC. Qualified sources that will benefit financially by creating RECs include wind, solar energy, geothermal energy, renewable biomass and derived biogas and biofuels, qualified hydropower and marine or hydrokinetic sources. Other qualifying energy resources include landfill gas, wastewater treatment gas, coal mine methane and qualified waste-to-energy systems.

For the years 2012 through 2039, each retail electric supplier is required to submit to the Federal Energy Regulatory Commission (FERC) a quantity of RECs and demonstrated electricity savings equal to the supplier's target. The combined target for renewable energy supply and electricity savings is 6 percent for 2012 and escalates to 20 percent starting in 2020. Absent a petition from the governor of a state, at least three-quarters of the target must be met by supplying renewable energy. A retail electric supplier may make a payment of \$25 to the state in lieu of each REC or megawatt hour of electricity savings that it failed to deliver or achieve. States must use these funds to deploy renewable energy technologies or for energy efficiency measures.

FERC will establish standards for

determining whether electricity savings have been achieved as required. A certified third party must verify the savings. In addition, reports of savings achieved must be submitted to and reviewed by FERC or the states.

RECs are tradable and may be used in the year they are generated or saved for use in future years (i.e., they are bankable). To encourage deployment of rooftop and other small renewable energy sources, three RECs are granted for each megawatt hour of small scale (distributed) renewable generation. The value of these trebled credits helps make distributed renewable energy generation cost competitive with other sources of renewable energy.

Another part of the Clean Energy program charges the EPA with developing a strategy to address the barriers to commercial-scale deployment of a system designed to capture and sequester carbon dioxide created by burning fossil fuels. The EPA's approach must include the permitting of sequestration sites. Upon approval of two-thirds of the nation's fossil fuel-based electric utilities, the Carbon Storage Research Corp. will be established and funded by an assessment on distribution utilities. The corporation would perform research to accelerate the commercial availability of carbon dioxide capture and storage technologies. Emission allowances created by the cap and trade program would be distributed to eligible commercial projects. Regardless of the availability of viable capture and sequestration technologies, the act also establishes performance standards for new coal fired power plants that would require plants permitted between Jan. 1,

2009, and January 1, 2020, to achieve a 50 percent reduction in carbon dioxide emissions over time.

The act creates state energy and environment development, or SEED, accounts to be "funded" with emission allowances created by the cap and trade program and awarded to the states. The states may use these allowances to support renewable energy and energy efficiency programs in accordance with a plan for use to be developed by each state. The act also requires specified minimum percentages of SEED account funds to be distributed to local governments for

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implementation of programs established by the act including energy efficient building codes, retrofitting of buildings, energy labeling, grants for new renewable energy sources or electricity storage or other designated purposes.

The legislation establishes a "smart grid" program to reduce peak demand for electricity. Among its features are labeling of and rebates for appliances that are smart grid capable, formulating peak demand reduction goals and implementing those goals through demand reduction or contractual commitments.

ENERGY EFFICIENCY

Title II is of critical importance to

commercial and residential real estate developers and owners. It mandates establishment of energy efficiency building codes designed initially to achieve a 30 percent reduction in energy use. The secretary of energy will first look to recognized consensus-based code development organizations to publish code provisions sufficient to realize the energy reduction target. If the secretary finds these codes to be inadequate, he or she will develop a building code that is life-cycle cost justified and technically feasible.

Unless the states or local governments adopt the code selected or established by the secretary, and obtain his or her certification, the code will become applicable as a matter of federal law one year after it is established by the secretary. A building owner or developer violates the act if it knowingly conveys or allows occupancy of a building constructed out of compliance with the code. States are the primary enforcers of compliance, and become ineligible to receive certain emission allowances and lose certain federal funding if they do not fulfill their enforcement obligations. Federal enforcement is also prescribed.

While its new building code provisions address new construction, the act also establishes a retrofit program for existing buildings, known as the Retrofit for Energy and Environmental Performance, or REEP. The EPA will develop guidelines and standards for retrofitting existing commercial and residential buildings to achieve maximum cost effective energy efficiency improvements and significant improvements in water use and other environmental attributes. State or local governments will be responsible for adopting contractor and building

certification standards. SEED account support may be used to pay up to 50 percent of the retrofit costs for each building.

The act also creates consumer and business programs to improve energy efficiency including a lighting and appliance energy efficiency program, a best-in-class appliances deployment program (which includes bounties for retiring inefficient products and bonuses for selecting best-in-class products), revised transportation strategies (including public transportation), voluntary plant energy efficiency standards and incentives for electric generation facilities to recover thermal energy to generate additional electric energy or to sell.

CAP AND TRADE PROGRAM

The act seeks to control greenhouse gas emissions and global warming through a cap and trade program. The text of the act includes congressional findings that global warming resulting from combined anthropogenic greenhouse gas emissions poses a threat to national security, the economy, public health and the environment. The measure states that the United States should play a leadership role in addressing global warming and its adverse effects.

The legislation establishes a cap on greenhouse gas emissions from specified sources. In its first year the emissions cap is 90 percent of 2005 emissions, decreasing to a cap of 83 percent of 2005 emissions by 2020 and only 17 percent of 2005 levels by 2050.

The act designates carbon dioxide, methane, nitric oxide and certain other gases as “greenhouse gases,”

and provides a table for converting each gas to carbon dioxide equivalents based upon its relative contribution to global warming. Entities are required to monitor and submit data on their emissions and on their production and manufacture of fuels and industrial gases.

The EPA administrator will establish a quantity of emission allowances each year in a specified amount. Certain entities are allocated allowances and all entities may purchase allowances. The act prohibits a covered entity from emitting greenhouse gases in quantities exceeding the allowances it holds on April 1 of each year. Clean Air Act Title V permits will contain corresponding limitations. Penalties may be imposed on a source for violations.

Covered entities may use offset credits in lieu of emission allowances. Offsets include credits from deforestation reduction programs and other approved and verified projects that reduce, avoid or sequester emissions. Allowances and offset credits may be traded or banked. In addition, a covered entity may borrow from the succeeding five-years up to 15 percent of its compliance obligations for an 8 percent premium. Allowances may also be purchased from a strategic reserve of allowances to be sold by the EPA administrator at scheduled intervals.

Wary of how the economic burdens from the cap and trade regime will fall, the drafters provided for emission allowances to be distributed to protect consumers, assist industry in transition to clean energy and to encourage the deployment of clean energy and energy efficiency technologies. Specified

percentages of allowances are given to benefit electricity consumers, natural gas consumers and home heating oil and propane consumers, among others. Petroleum refineries are granted 2 percent of the allowances starting in 2014 and ending in 2026.

The act also establishes an emission allowance rebate program to specified industrial sectors and subsectors to compensate them for the direct and indirect compliance costs they will incur to comply with its pollution limits. Eligibility for rebates is dependent on an industrial sector’s energy or greenhouse gas intensity and its trade intensity. The president will continue the emission allowance rebate program for a sector when there is a risk of increased greenhouse gas emissions if the sector’s production were transferred to foreign countries on account of compliance costs in the United States.

The act constitutes a broad approach to reducing greenhouse gases, promoting renewable energy and decreasing energy consumption. The Republicans are promising to introduce hundreds of amendments. Regardless of the ultimate language that is enacted, the act is likely to have far-reaching consequences to our economy and our environment. •