

Chairmen Waxman and Markey Release Draft Climate Change and Clean Energy Legislation

On March 31, 2009, Rep. Henry Waxman (D-CA), Chairman of the House Committee on Energy and Commerce, and Rep. Edward Markey (D-MA), Chairman of the Subcommittee on Energy and Environment, unveiled a long-anticipated discussion draft of a comprehensive climate change and clean energy bill. The 648-page draft is entitled the “American Clean Energy and Security Act of 2009.” The Waxman-Markey draft borrows significantly from the recommendations of the U.S. Climate Action Partnership, as well as the Dingell-Boucher draft climate change bill released last October.¹ Key provisions are described below.

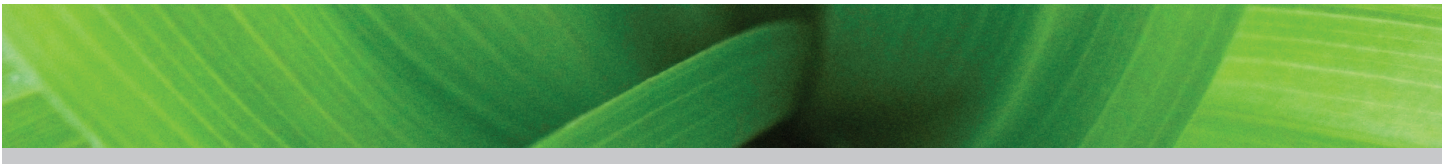
CAP-AND-TRADE PROGRAM

Targets: The proposal would establish an economy-wide cap-and-trade program for greenhouse gas (GHG) emissions. The program would take effect in 2012 with a cap 3% below the 2005 level of GHG emissions from covered sectors. The cap would decline thereafter to 20% below 2005 emissions by 2020 and 83% below 2005 emissions by 2050. The medium-term targets are comparable to those in the Lieberman-Warner bill, but more aggressive than those contemplated in the Dingell-Boucher draft. The 2020 target is also more aggressive than the 14% emission reduction target proposed by President Obama.

Coverage and Point of Regulation: The program’s coverage parallels that of the Dingell-Boucher draft, and would capture about 85% of U.S. GHG emissions. As a general matter, electricity generators and large industrial sources (emitting more than 25,000 tons CO₂-equivalent per year) are covered “downstream,” i.e., at the point of emissions. Refiners and other fossil-based liquid fuel producers and importers would be regulated on an “upstream” basis, as would producers and importers of fluorinated gases and other GHGs. Natural gas local distribution companies (LDCs) would turn in allowances for the emissions of their customers that are not regulated downstream. EPA could reduce emission thresholds for certain stationary sources, thereby bringing smaller facilities under the cap over time.

Allocation of Allowances: The Waxman-Markey draft leaves unanswered three of the most contentious aspects of any climate bill: what proportion of allowances would be auctioned versus freely distributed; how any allocated allowances would be distributed; and how auction proceeds would be distributed among programs and industries. However, several programs that would be financed by appropriations in the current draft—such as CCS commercialization incentives and the “rebate” system for trade-sensitive industries—could be modified in future versions of the legislation to receive allowance distributions.

¹ For a summary of the Dingell-Boucher discussion draft, see Van Ness Feldman, “Representatives Dingell and Boucher Release Discussion Draft of Climate Change Legislation” (Oct. 9, 2008), available at <http://www.vnf.com/assets/attachments/396.pdf>.



Offsets: The Waxman-Markey draft takes a restrictive approach to the use of offset credits, by discounting the value of those credits by 20% relative to emission allowances, and imposing a quantitative limit on a covered entity's use of offset credits (with sub-limits for domestic and international offsets). This limit would gradually increase over time according to a formula provided in the legislation.

Cost Mitigation Mechanisms: "Banking" of allowances for use in meeting future compliance obligations would be permitted without limit, as would "borrowing" of allowances one year in advance. Limited borrowing from two to five years in advance (with interest) would also be permitted. In order to mitigate the potential for high allowance prices, EPA periodically would auction extra allowances from a "strategic reserve." The minimum auction price would be fixed initially at a level that is twice the EPA-modeled allowance price for the program (therefore, reserve allowances would be acquired only if prices are significantly higher than projected). The strategic reserve would consist of a limited number of allowances borrowed from future year's caps, as well as offset credits generated by international forest carbon projects.

International Offset Credits and Allowances: EPA would have discretion to limit the ability of a covered to use international allowances for compliance. International offset credits would only be recognized if an appropriate bilateral or multilateral agreement with the host country exists. The draft encourages a shift to crediting for sector-wide emission reductions in developing countries. In addition, the draft provides offset credits for activities that reduce deforestation in developing countries, provided that activities reduce deforestation nationwide.

Competitive Impacts: The Waxman-Markey draft combines two mechanisms for mitigating the trade impacts of a cap-and-trade program. First, U.S. industries with a certain level of GHG intensity and exposure to international trade would receive "rebates" financed by appropriations, which would gradually phase-out after 2020. If that system fails to protect trade-sensitive industries, importers of certain goods would be required to submit "international reserve allowances" for GHG emissions attributable to those goods, as modeled after a similar program in the Dingell-Boucher discussion draft.

Market Oversight: The Federal Energy Regulatory Commission (FERC) would have responsibility for regulating the market for trading allowances and offset credits. Regulation of derivative contracts (such as futures and options) would also be required, but jurisdiction is left to the discretion of the President.

Preemption: The preemption provisions of the Waxman-Markey proposal are narrower than those in the Dingell-Boucher draft, prohibiting state and local governments from implementing cap-and-trade programs only between 2012 and 2017. States could still implement their own motor vehicle emission requirements and low-carbon fuel standards.

Coordination With Other Clean Air Act Provisions: EPA would be required to promulgate New Source Performance Standards (NSPS) for certain small stationary sources (not covered under the cap), but the draft would preclude the regulation of other larger GHG sources under other specified provisions of the Clean Air Act.



CLEAN ENERGY AND ENERGY EFFICIENCY PROVISIONS

Federal RES: Beginning in 2012, retail electricity suppliers would be required to comply with a federal renewable electricity mandate, set initially at 6% in 2012 and increasing to 25% in 2025. The program provides for tradable renewable energy credits, and allows utilities to pay a fee in lieu of submitting credits (equal to the lesser of \$50 per credit or twice the value of renewable energy credits over the previous year). The RES mandate could be reduced by one-fifth for utilities complying with the Federal Energy Efficiency Resource Standard.

Federal Energy Efficiency Resource Standard (EERS): Natural gas LDCs and electric distribution companies would be required to achieve minimum energy conservation targets. By 2020, cumulative electric savings would have to equal 15% of energy delivered and cumulative natural gas savings would equal 10% of energy delivered. Alternative compliance options include limited trading provisions and default payments.

Performance Standards for New Coal-Fired Power Plants: Coal-fired power plants receiving Clean Air Act permits after January 1, 2009 would have to meet a GHG emission standard of 1,100 pounds CO₂ per MW-h (approximately a 50% capture rate), declining to 800 pounds for plants permitted after January 1, 2020. Plants permitted between 2009 and 2015 would have a deferred deadline for compliance that depends on the commercial availability of carbon capture and sequestration.

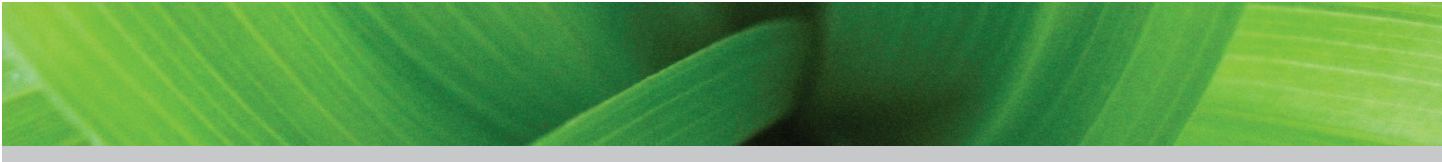
Carbon Capture & Sequestration: EPA would be directed to promulgate regulations for certifying and permitting geologic carbon sequestration sites. Utilities would be authorized to hold a referendum on whether to impose ratepayer fees to finance projects related to CCS. The proposal also authorizes per-ton subsidies of CO₂ sequestration, financed by appropriations, to support commercial-scale deployment of CCS technology at industrial facilities and electric generating units.

Fuel Economy and GHG Emission Standards: The Administration would be directed to harmonize California's vehicle GHG standards with any GHG standards set by EPA as well as Federal fuel economy standards, without preempting the California standards. EPA would also be required to regulate GHG emissions from heavy-duty vehicles, marine vessels, locomotives, and aircraft over the next few years.

Low Carbon Fuel Standard: EPA would be required to gradually reduce the average lifecycle GHG emissions of transportation fuels over the next two decades.

Transmission Planning: The draft provides for FERC to adopt national electricity grid planning principles, and facilitate coordination of regional transmission planning efforts.

New Efficiency Standards: The proposal contains extensive provisions strengthening efficiency standards for commercial and residential buildings; setting efficiency standards for lighting and various appliances; and incentivizing efficient consumer appliances.



LOOKING AHEAD

Chairmen Waxman and Markey announced plans to hold hearings following the upcoming Congressional recess. Chairman Markey plans to proceed to's Subcommittee mark up of the bill during the week of April 27, 2009, with full Committee mark-up expected to begin the week of May 11, 2009. Chairman Waxman has previously committed to reporting the bill out of committee by Memorial Day.

The Waxman-Markey proposal represents a unique legislative approach in that it combines the traditional elements of a cap-and-trade bill with many provisions that would normally appear in an energy bill. Despite support from House leadership, it remains to be seen whether the ambitious breadth of the draft will facilitate or complicate passage in the House.

FOR ADDITIONAL INFORMATION

Van Ness Feldman is currently preparing an extended analysis of the Waxman-Markey proposal. The firm closely monitors Congressional and executive developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Stephen Fotis, Doug Smith, Tom Roberts, or any member of the firm's Climate Change practice at (202) 298-1800.

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