

New Federal Initiatives Project

**American Power Act: Senators Kerry and
Lieberman Release “Discussion Draft” of
New Climate Change Bill**

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July 8, 2010



*The Federalist Society
for Law and Public Policy Studies*

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Introduction

On May 12th, 2010, Senators John Kerry and Joe Lieberman released a long awaited draft of their American Power Act (APA).¹ The legislation was originally planned to be issued as a bi-partisan measure, but those hopes disappeared when Senator Lindsey Graham withdrew his support to protest the decision by Senate leaders to give priority to immigration legislation over climate change legislation.² Observers assert that the lack of Republican support means that the measure stands little chance of enactment this year.³ Nevertheless, the purportedly bi-partisan approach taken in the bill may offer insights into any ultimately successful legislation.

The bill, which is being circulated as a “discussion draft” and has not been officially filed in the Senate, aims at achieving greater energy independence, driving US leadership in green energy technology creation and deployment, creating economic growth and US green energy related jobs, reducing pollution, and improving public health.⁴ Key to these efforts are the bill’s support for greater use of domestic nuclear energy, allowance of revenue sharing to encourage states to allow offshore continental drilling in certain areas, creation of a fund to drive carbon sequestration research and deployment, implementation of performance standards for coal-fired power plants built after 2009, and the creation of a Clean Energy Technology Fund.

The central features of the bill, however, are caps on greenhouse gas (“GHG”) emissions and the creation of a market to trade in GHG permits, a so-called “cap and trade” approach to dealing with climate change. The approach taken to cap and trade is not economy-wide as in other bills previously introduced⁵ but focused on those sectors of the economy that are responsible for the bulk of GHG emissions: power plants, transportation and heavy manufacturing (“covered entities”).

The unveiling of this draft legislation is just one of many recent developments in climate change law and policy. For a more comprehensive discussion of other recent developments, please refer to the NFIP paper by Jeffrey Clark on EPA’s Endangerment Rule published on April 24, 2010.⁶

Summary of Major Provisions

*Cap and Trade*⁷

The Administrator of the Environmental Protection Agency (EPA) would be the primary administrator of the GHG emissions caps, which the bill establishes as amendments to the Clean Air Act. GHGs regulated in the legislation include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons emitted as a byproduct, perfluorocarbons, and nitrogen trifluoride.⁸ EPA has the discretion to add additional pollutants to the list of GHGs in the future.⁹ The bill’s caps are projected by its authors to reduce US-based emissions of GHGs by 17% (from 2005 levels) by 2020, 42% by 2030 and 83% by 2050.¹⁰ The bill provides guidance to the Administrator, but allows for deviation to some extent based on EPA findings each year.

Once the Administrator determines the overall cap, the Administrator parcels allowances to those entities covered by the cap for the first few years as a transition to mitigate price shocks. The bill also provides various safeguards to protect against spiking emissions costs such as unlimited banking of emissions allowances (any unused allowances may be retained and used into the indefinite future) and one year of borrowing (an entity may emit using allowances it will receive next year).¹¹ Covered entities may also purchase allowances on the open market or sell unused ones without restriction.¹²

Nuclear Energy

With the proposal of the APA, there appears to be some degree of consensus on Capitol Hill that nuclear energy must play a key role in America's push to reduce GHG emissions. Senator Lamar Alexander has been promoting a proposal to facilitate the construction of 100 new nuclear power plants in the next 20 years.¹³ In February of 2010, President Obama announced more than \$8 billion in federal loan guarantees to support the construction of the nation's first new nuclear power plants in over 30 years.¹⁴

With this political backdrop, the APA would seek to promote a new renaissance in nuclear power. It would begin by combining the processes for obtaining permits to both construct and operate a nuclear power plant into a single, streamlined process, and reducing the number of issues that require an adjudicatory hearing by removing non-contested issues.¹⁵ Both of these measures would reduce the time and expense associated with licensing new nuclear units. The APA also calls on the Nuclear Regulatory Commission to identify and report on other barriers to creating new nuclear plants.¹⁶ The APA provides an enormous injection of funds into the Energy Department's loan Technology Program, increasing the funds in that program to \$54 billion.¹⁷ The bill also amends the Energy Policy Act of 2005, doubling the number of nuclear plants eligible for regulatory risk insurance.¹⁸

Supplementary measures designed to ease the way for nuclear energy include extending the suspension of duties on certain components used in nuclear facilities,¹⁹ accelerated depreciation for nuclear power construction,²⁰ investment tax credits,²¹ modification of existing tax provisions to allow their use in nuclear projects,²² the use of exempt bonds in public – private partnerships,²³ and federal grants.²⁴

Offshore Drilling

Currently, all states (except Alabama, Louisiana, Mississippi, and Texas²⁵) are prohibited from receiving revenues directly from offshore drilling. The APA would allow revenue sharing with certain coastal states and areas seaward of Alaska, providing those states with the incentives to allow continental oil and gas drilling off their coasts.²⁶ In the wake of the recent Deepwater Horizon oil drilling incident in the Gulf of Mexico, the bill also gives coastal states additional powers to impact oil drilling off their coasts, such as the ability to veto drilling plans "if the States would suffer significant adverse impacts in the event of an accident"²⁷ or opting out large portions of their coastal areas (up to 75 miles off the shore of the coastal state).²⁸

Coal Sequestration

A special funding program would be established for developing and deploying carbon capture, sequestration and conversion technologies.²⁹ The fund would be part of a larger effort to create a “National Strategy for Carbon Capture and Sequestration” by the EPA Administrator and the Secretaries of Energy, Interior and other agencies designated by the President. The Secretary of Energy would collect an assessment from electric utilities based on megawatts sold that derive from fossil-fuel based electricity, with a mandate to collect approximately \$2 billion from this assessment each fiscal year.³⁰

International Components

The APA contains a wide array of provisions with international implications. For example, the bill establishes criteria for the use of carbon allowances from foreign programs as part of the American cap and trade system,³¹ and discounts the value of international offsets so that it would take 1.25 international offsets to equal 1 domestic offset.³² In addition, Section 797 of the bill gives the President discretion to consider the impacts of an international agreement that, according to the summary on Senator Kerry’s website, would “substantially reduce the risk of climate change and the existence of one or more funds to address key international priorities in allocation decisions subject to specific constraints.”³³

There are also provisions aimed at promoting international reductions in industrial emissions,³⁴ and with respect to “international agreements,” Senator Kerry’s summary explains that “it is the policy of the United States to work proactively under the UNFCCC and in other forums to establish binding agreements committing all major-emitting countries to contribute equitably to the reduction of global greenhouse gas emissions.”³⁵ Moreover, Title V of the bill, entitled “International Climate Change Activities,” purports to “outline[] the policy of the United States with respect to the international impacts of global climate change and the important role supporting international efforts to address these impacts plays in protecting America’s national security, growing our economy, and reducing global pollution.”³⁶ The “Strategic Interagency Board on International Climate Investment” would be created to “assess, monitor and evaluate the progress and contributions of U.S. Government entities in supporting financing for international climate change activities.”³⁷ The bill also directs the federal government to work toward reducing deforestation in foreign countries.³⁸

Other Key Components

The bill contains provisions preempting state and local cap and trade programs,³⁹ establishes a technology fund for clean vehicles,⁴⁰ tax credits for natural gas vehicles,⁴¹ directs states and metropolitan authorities to develop strategies to meet GHG emission reduction targets for transportation,⁴² and assistance to offset higher costs for “working families.”⁴³ Important to union interests, the bill contains so-called “anti-leakage” provisions that seek to ensure that carbon emissions achieved in the U.S. do not result in increased emissions elsewhere.⁴⁴

Analysis

Review of the APA has been largely mixed in the days following release of the discussion draft. Some environmental groups have expressed disappointment with aspects of the bill, including NRDC's disapproval of the state preemption measures and the incentives for nuclear energy (although NRDC believes the bill provides a "strong foundation" for a final bill).⁴⁵ The Center for Biological Diversity went further in its criticism, calling the bill a "disaster" for climate change.⁴⁶ The National Petrochemical and Refiners Association has taken the view that the APA would be "destructive" to the American economy,⁴⁷ a sentiment echoed by the ranking member of the Senate Environment & Public Works Committee, Senator James Inhofe.⁴⁸ Others were quick to applaud the bill including the Edison Electric Institute, General Electric, Entergy Corporation, DuPont, Duke Energy, Shell Oil, and The Nature Conservancy, just to name a few.⁴⁹ The U.S. Chamber of Commerce reserved judgment until it could fully evaluate the draft bill.⁵⁰

Of course, this is not the first piece of climate change legislation to garner significant attention. In June of 2009, the House passed H.R. 2454, the "American Clean Energy and Security Act" (or "ACESA"), which is similar to the APA in many respects. For instance, the ACESA and the APA contain essentially the same schedule and targets for emissions reductions—17% and 83% reductions from 2005 levels by 2020 and 2050. Both bills would also preempt state limits on stationary sources of GHGs (although the ACESA would only preempt those state programs until 2017), and both bills would exclude GHG emissions from the Clean Air Act's PSD and Title V permitting programs.

However, the two bills differ in other important respects, including the treatment of transportation fuels and refined products and the schedules for distribution of emission allowances. There are also important differences in how the House and Senate versions would deal with offset credits. Moreover, while the ACESA has a renewable energy portfolio standard for utilities of 20% by 2020, the APA contains no such standard. And it's fair to say that the APA goes much further than the ACESA in promoting nuclear power.

As public discussion over the details of the Kerry-Lieberman draft bill gets underway, a number of important legal and policy issues are likely to receive attention, including (among other things):

1. Is "cap and trade" the right approach? Many argue that a "carbon tax" approach would be a more efficient and effective mechanism for reducing carbon emissions, without the creation of a new complex trading system that some might argue results in a hidden tax. Important questions will be raised about the potential for "gaming" the system, and the long-term viability of capping and pricing GHG emissions. Will the tax increases and attempts to offset those increases with a new system of tax credits be politically palatable given prevailing economic conditions?
2. Will the APA be able to achieve its ambitious GHG emission reduction targets?

3. Should Congress preempt the states on the issue of GHG emissions, and should Congress place a moratorium on EPA from regulating GHG emissions? Industry largely welcomes the APA's decision to preempt the states from, and remove EPA from the precipice of, regulating GHG emissions associated with stationary sources. But many environmental groups fear that states like California will lose their ability to push for more aggressive GHG emission reduction measures. Others note that, at least with respect to removal of GHG regulation from the Clean Air Act, there is still the risk that other federal statutory regimes, including the National Environmental Policy Act and the Endangered Species Act, can lead to additional restrictions on GHG emissions..
4. Does the APA place too much faith in coal sequestration and nuclear power? It is worth noting that the APA comes on the heels of other recent federal efforts to promote nuclear energy and to streamline the nuclear licensing process.
5. Will the coastal states endorse the APA's new provisions regarding oil drilling?
6. Does the APA sufficiently protect American economic interests, which would incur additional costs, from competition with foreign businesses that will not be subject to similar GHG emission reduction requirements?
7. Will the bill's provisions aimed at promoting international reductions in foreign countries, including expenditures of federal treasure to do so, be acceptable to a majority in Congress?
8. And many are still asking whether science currently supports the need for drastic reductions in man-made GHG emissions.

These and many other questions will be the subject of much discussion over the coming weeks and months as the Congress continues to seek a final compromise on energy and climate legislation.

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¹ The text can be viewed online at: <http://kerry.senate.gov/imo/media/doc/APAbill3.pdf>.

² <http://articles.latimes.com/2010/apr/28/nation/la-na-graham-20100428>

³ <http://www.nytimes.com/2010/05/08/us/politics/08climate.html?src=me>

⁴ APA, Section 2.

⁵ See, e.g., H.R. 2454 which passed the House of Representatives in June 2009.

⁶ http://www.fed-soc.org/publications/pubID.1854/pub_detail.asp.

⁷ For an interesting debate on the merits of a "cap and trade" system versus a "carbon tax" approach, please visit http://www.fed-soc.org/publications/pubid.1293/pub_detail.asp. Last year, The Federalist Society and The Vanderbilt Climate Change Research Network presented, "A

Conversation on Climate Change Policy: A Look Ahead at 2009," with Professor Michael Vandenberg, an advocate of comprehensive federal and international climate change regulation including a cap-and-trade system, and Professor Jonathan Adler, an advocate of a carbon tax system for addressing greenhouse gas emissions.

⁸ Sections 711-714.

⁹ *Id.*

¹⁰ Sections 701-705.

¹¹ Section 725.

¹² Section 724.

¹³ See *Blueprint for 100 Nuclear Power Plants in 20 Years*, available on Senator Alexander's website at

http://alexander.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=00c9027c-a5ef-4e81-9023-92377fa141e4&ContentType_id=778be7e0-0d5a-42b2-9352-09ed63cc4d66&Group_id=80d87631-7c25-4340-a97a-72ccdd8a658&MonthDisplay=7&YearDisplay=2009.

¹⁴ See <http://www.lgprogram.energy.gov/press/021610.pdf>.

¹⁵ Section 1105.

¹⁶ Section 1101.

¹⁷ Section 1102. For more information on the Energy Department's nuclear loan guarantee programs, please visit <http://www.lgprogram.energy.gov/>.

¹⁸ Section 1103.

¹⁹ Section 1111.

²⁰ Section 1121.

²¹ Section 1122.

²² Sections 1123-1124.

²³ Section 1125.

²⁴ Section 1126.

²⁵ A helpful summary of the Gulf of Mexico Energy Security Act of 2006, P.L. 109-432, which previously enacted revenue sharing provisions for Alabama, Louisiana, Mississippi and Texas, is available at <http://www.mms.gov/offshore/GOMESARRevenueSharing.htm>.

²⁶ Section 1202.

²⁷ Section 1201(b)(2)(F).

²⁸ Section 1204.

²⁹ Section 1412-1415.

³⁰ Section 1415.

³¹ Section 728.

³² Section 722.

³³ <http://kerry.senate.gov/imo/media/doc/APASectionbySection.pdf> (hereafter, the "Kerry Summary").

³⁴ Sections 775-777.

³⁵ Kerry Summary at 16.

³⁶ Kerry Summary at 19.

³⁷ Kerry Summary at 19.

³⁸ Section 5004.

³⁹ Section 2501.

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- ⁴⁰ Section 4111.
⁴¹ Section 4121.
⁴² Section 1711.
⁴³ Title III, Subtitle C
⁴⁴ Title IV, Subtitle A.
⁴⁵ <http://www.nrdc.org/media/2010/100512.asp>.
⁴⁶ <http://www.commondreams.org/newswire/2010/05/12>.
⁴⁷ <http://www.npra.org/newsRoom/?fa=viewCmsItem&title=Latest%20News&articleID=3700>.
⁴⁸ <http://www.ens-newswire.com/ens/may2010/2010-05-12-01.html>.
⁴⁹ <http://kerry.senate.gov/imo/media/doc/APAwhattheyaresaying.pdf>. A video and transcript for the unveiling of the APA is available at <http://www.c-spanvideo.org/program/293475-1>.
⁵⁰ http://www.uschamber.com/press/releases/2010/may/100512_power.htm.

Related Links:

S.1733: Clean Energy Jobs and American Power Act: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1733rs.txt.pdf

"EPA's Endangerment Rule" by Jeffrey Bossert Clark, April 26, 2010: http://www.fed-soc.org/publications/pubid.1854/pub_detail.asp

"Criminal Provision in the Cap and Trade Bill" by Joseph Ditkoff: