

Senate Climate Legislation versus EPA Climate Regulation

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U.S. Senators John Kerry and Joe Lieberman announced their version of climate and energy legislation last week. The legislation, known as the American Power Act (APA), is the Senate's counterpart to Waxman-Markey's American Clean Energy and Security Act (ACESA), which the House passed last year. Both of these pieces of legislation include a cap-and-trade program for carbon emissions.

In addition to Kerry's and Lieberman's proposal, the EPA also released its final greenhouse gas permitting regulations under the auspices of the Clean Air Act. Although the APA rescinds the EPA's authority to regulate carbon emissions under the Clean Air Act, in the absence of any final legislation, the EPA is moving forward with regulating greenhouse gas emission sources.

Climate Legislation

The most significant provisions of the Senate proposal include:

- **Cap and trade:** Utilities would be subject to cap-and-trade beginning in 2012, but unlike ACESA, the APA postpones regulation of the broader economy until 2016. The bill would eventually cover thousands of sources emitting more than 25,000 metric tons of carbon dioxide equivalents per year.
- **Emissions Targets:** By 2020, capped entities must reduce carbon pollution to 17% below 2005 levels; by 2050, the reduction must be 80% below 2005 levels.
- **Carbon Pricing:** Carbon allowances will cost between \$12 and \$25 per ton. This price will increase by 3% and 5%, respectively, over inflation annually. In addition, the bill includes a strategic reserve of allowances that is intended to curb market volatility.
- **Allowances:** Approximately 75% of the emission allowances will initially be distributed for free to entities such as local utilities, trade-exposed energy intensive industries and organizations researching carbon capture and storage technologies. The remaining 25% will be auctioned off in the program's early years. Carbon allowances will be auctioned in a heavily regulated market that permits only regulated emitters to participate, with the exception of a few heavily regulated "liquidity providers." By 2035, the bill shifts to a full 100% auction of emission allowances.

The APA will use the bulk of the proceeds from the sale of allowances to provide rebates to some American consumers to offset the economic impact of putting a price on carbon. In addition, tariffs will protect domestic manufacturers from being undercut by foreign competition not subject to carbon regulation. States such as California and New York would not be permitted to operate their own cap-and-trade programs, but would get some federal dollars to offset their loss of income from auctioning carbon emission credits in their own programs.

In addition to the cap-and-trade program, the APA also creates incentives for the increased development of clean coal, natural gas, off-shore oil drilling and nuclear power. There are also financial incentives for the development of energy efficient innovations, clean natural gas vehicles and advanced cars and batteries.

The EPA will have authority over the pollution reduction program, including regulation of large sources of carbon emissions. However, if the APA passes, the EPA would lose its proclaimed authority under the Clean Air Act to regulate greenhouse gas emissions from stationary sources (see below).

EPA's Regulation of GHG Emissions

The EPA finalized its regulations under the Clean Air Act requiring major greenhouse gas emission sources to apply "Best Available Control Technology." The EPA announced on Friday that beginning January 2, 2011, a major source undergoing new construction or a major modification that is already subject to the Prevention of Significant Deterioration program for other pollutants must obtain a permit for greenhouse gas emissions if its potential greenhouse gas emissions exceed 75,000 tons per year. Starting in July of 2011, the permit requirement will apply to new or modified sources with the potential to emit 100,000 tons per year of greenhouse gases irrespective of the emission of other pollutants. This standard will be reduced to 50,000 tons per year in 2012.

Contact Us

If you have any questions regarding the American Power Act, the American Clean Energy and Security Act, or how these pieces of legislation may impact your business, please contact a member of Warner's Corporate Sustainability and Climate Group. If you have specific questions regarding greenhouse gas regulation under the Clean Air Act, please contact Steven Kohl, a partner in our Environmental Practice Group.