

Summary - Agriculture provisions of the House's "American Clean Energy and Security Act of 2009"

On June 26, 2009, the Waxman-Markey Climate Change Bill, now named the American Clean Energy and Security Act of 2009 (H.R. 2454) ("ACES") narrowly passed the House after a compromise that included an amendment sponsored by agricultural interests. The Bill touts very lofty goals with respect to climate change and the reduction of greenhouse gases and has strong support from the Obama Administration. Some of the goals of the House version of the Bill include requiring electric utilities to utilize renewable energy sources to account for 20% of their electric demand; investing \$190 billion in new clean energy technologies such as carbon capture and sequestration, electric vehicles, and other energy efficient advances; mandating energy efficient building; reducing carbon emissions from major U.S. sources by 17% by 2020 and over 80% by 2050 compared to the 2005 levels.

The original Waxman-Markey Bill was amended by Rep. Collin Peterson of Minnesota by providing certain exemptions from the greenhouse gas emissions reduction requirement, the "cap" of "cap and trade," for agricultural and forestry services, and by adding other Agriculture-specific provisions. Under the amended bill, agriculture and forestry industries are exempted from being capped sectors and, rather, have an incentive based approach for reducing, avoiding, or sequestering greenhouse gases as evidenced in Section 331 of the Bill that adds section 788 to the Clean Air Act (CAA), as opposed to the more mandatory approach applicable to other industries.

Incentive Based Offset Program

The ACES Act provides for an agricultural producer credit for greenhouse gas emissions offsets titled "Offset Credit Program from Domestic Agricultural and Forestry Services" (the "Offset program"). As opposed to much of the ACES Act's programs, which will be governed by the EPA, the Department of Agriculture will handle the Offset program provisions.

The Secretary of Agriculture within one year after enactment must draft an initial list of eligible *offset practices* that must include specific greenhouse gas reducing land management techniques, conservation and addition of carbon stocks attributable to land use change and forestry activities, and manure management and disposal. After the initial list is established, the eligible *offset practices list* will be added to or revised every two years after notice and comment rulemaking. Due consideration will be given to already existing and "in use" offset practices to allow for a smooth transition for many in agriculture.

An offset project developer can only earn offset credits for a particular practice during a "crediting period", which is under the discretion of the Secretary and can be up to five years for agricultural sequestration, 20 years for forestry sequestration, and 10 years for other practices

that reduce greenhouse gas emissions. The crediting period can be renewed at least once and possibly more times at the discretion of the Secretary. The offset project developer must submit a PLAN to the Secretary that will include the designation of an offset project developer and a schedule of implementation of offset practices that will need to be approved by the Secretary.

The offset project developer must submit verification reports to the Secretary in order for the Secretary to determine how much greenhouse gas was reduced or avoided. In order to submit a verified report, the offset project developer must hire a certified third-party verifier (from a publicly accessible list provided by USDA) that will compile information on greenhouse gas reduction and avoidance and draft a report to be given to the offset project developer. After submission of the verified report, USDA will make a final determination of how much greenhouse gas was actually reduced or avoided. One offset credit will be given for each ton of carbon dioxide equivalent (shown by a table in section 311 of the ACES) that has been determined to be reduced, avoided or sequestered.

Under the offset program, producers who have previously participated in voluntary offset programs will be eligible to participate and earn offset credits for activities with continuing benefits. Practices that were started after 2001 and resulted in “additional” greenhouse gas reduction or avoidance based on Secretary-determined baselines will be available to earn offset credits under the new program.

Establishment of an Advisory Committee

The Bill also calls for the creation of a USDA Greenhouse Gas Emission Reduction and Sequestration Advisory Committee to assist the Secretary with technical and scientific advices in the formation of offset practice methodologies. The nine-person committee will provide the Secretary with necessary data and recommendations regarding offset practices, including during the time for additions and revisions as mandated by the statute, and will provide an annual status report to Congress. After January 1, 2017, and possibly earlier, the advisory committee will take on the additional role of providing scientific reviews every five years of the agricultural and forestry offset practices and providing recommendations on changes to methodologies, practices, procedures, or the overall program.

Biofuels: RFS and ILUC

The bill also suspends a provision from the 2007 Energy bill that created a penalty on Ethanol producers. The Renewable Fuel Standard (RFS) provisions of the 2007 Energy Bill charged international indirect land use changes (ILUC) greenhouse gas emissions against biofuels producers' eligibility for the RFS. The issue of ILUC will be passed to an independent panel to study, and the EPA and USDA will make a joint determination between 4 and 5 years after enactment of the law on how to deal with the RFS calculation concerning biofuels and ILUC.

Specific Exemption for Livestock in Catch-all

Despite the exemptions for agriculture in general, sectors of agriculture may be subject to a de facto cap under section 331 of the ACES that adds section 811 to the CAA. The EPA would be given the ability to promulgate performance standards and corresponding regulations on specific uncapped emissions producers who individually produced more than 10,000 tons of carbon dioxide equivalent and account for 20% of all uncapped greenhouse emissions when aggregated with other similar sources defined as "stationary sources" by Administrator of the EPA. Also those categories that account for at least 10% of the uncapped methane emissions in 2005 will be inventoried and subject to performance standards and regulations by the EPA. However sources that have enteric fermentation (or methane created from digestion) from ruminant animals are specifically exempted from these categories and associated performance standards.

The CAA defines the term "stationary source" as any building, structure, facility, or installation that emits or may emit any air pollutant. *See* 42 U.S.C. § 7411(a)(3). The Bill broadens the Administrator's ability to list source categories as it relaxes a CAA requirement and allows a listing *without* having to make a finding that the source category causes or contributes significantly to, air pollution, which may reasonably be anticipated to endanger public health or warfare. The EPA Administrator's determination of source categories is **not** subject to judicial review.

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