

THE ENVIRONMENTAL COUNSELOR

APRIL 2010 | NUMBER 260

BACKLASH: SENATE PROPOSALS TO TIGHTEN “BUY AMERICAN” REQUIREMENTS FOR RENEWABLE PROJECTS, LIMIT EPA’S GREENHOUSE GAS REGULATORY AUTHORITY*

By Brandon Barnes, Gregory K. Lawrence, and Holly Roth**

Recent Senate legislative proposals may make clean energy grant money contingent on restrictions to purchase domestic goods and labor, and could place a moratorium on the EPA’s authority to regulate greenhouse gases through the Clean Air Act.

The Senate has seen action in early March on two key proposals in the areas of clean energy and climate change.

AMERICAN RENEWABLE ENERGY JOBS ACT

On March 2, 2010, U.S. Senators Charles E. Schumer (D-NY), Bob Casey (D-PA), Sherrod Brown (D-OH) and Jon Tester (D-MT) requested that stimulus spending on a renewable energy program stop until rules are in place to ensure that the grantees of federal funding for these projects spend that money on domestic construction materials. The senators opined that some three-quarters of the \$2 billion spent on wind energy through the stimulus went to foreign companies. “A critical Recovery Act priority is investment in the domestic renewable and clean energy industry, not investment in foreign manufacturers,” the senators wrote in a letter to Treasury Secretary Timothy Geithner. The letter requested a moratorium on the distribution of § 1603 grant funding and award of any further grants until an amendment to the stimulus package passes. Section 1603 of the Recovery Act allocates 30% cash grants for energy property in lieu of federal tax credits.

The following day, the senators introduced legislation, called the American Renewable Energy Jobs Act, requiring that stimulus funds be given only to those clean energy projects that rely on materials manufactured in the United States and/or create a majority of jobs in the country.

ARTICLE REPRINT

Reprinted from the The Environmental Counselor. Copyright © 2010 Thomson Reuters. For more information about this publication please visit www.west.thomson.com

WEST®

BOARD OF ADVISORS

Bert Black

Diamond McCarthy Taylor Finley Bryant & Lee, L.L.P., Dallas, Texas

F. William Brownell

Hunton & Williams LLP, Washington, D.C.

Heidi Hughes Bumpers

Jones Day, Washington, D.C.

Scott P. DeVries

Nossaman Guthner Knox & Elliott LLP, San Francisco, California

Jeffrey C. Fort

Sonnenschein Nath & Rosenthal LLP, Chicago, Illinois

Robert W. Frantz

Tyco International, Princeton, New Jersey

Jeffrey M. Gaba

Gardere Wynne Sewell LLP, Dallas, Texas

Kevin A. Gaynor

Vinson & Elkins L.L.P., Washington, D.C.

Kenneth F. Gray

Pierce Atwood, Portland, Maine

Thomas C. Green

Sidley Austin Brown & Wood, Washington, D.C.

Michael L. Hardy

Thompson Hine LLP, Cleveland, Ohio

Jennifer L. Hernandez

Beveridge & Diamond, P.C., San Francisco, California

Michael L. Hickok

Case, Knowlson, Jordan & Wright LLP, Los Angeles, California

Robin R. Lunn

Mayer, Brown, Rowe & Maw LLP, Chicago, Illinois

Richard H. Mays

Environmental Legal Services, Little Rock, Arkansas

Kenneth C. Moore

Squire, Sanders & Dempsey L.L.P., Cleveland, Ohio

Randy M. Mott

Lane & Mittendorf, Washington, D.C.

Lawrence P. Postol

Seyfarth Shaw LLP, Washington, D.C.

D. Alan Rudlin

Hunton & Williams LLP, Richmond, Virginia

Philip R. Sellinger

Greenberg Traurig, LLP, Newark, New Jersey

Harvey M. Sheldon

Hinshaw & Culbertson LLP, Chicago, Illinois

Thomas M. Skove

Roetzel & Andress, Cleveland, Ohio

Richard G. Stoll

Foley & Lardner LLP, Washington, D.C.

Members of the Board of Adviser to THE ENVIRONMENTAL COUNSELOR call our attention to items they believe will be of interest to our subscribers. Unless specifically noted, no statement in this newsletter should be attributed to a specific adviser, and adviser's firm or company, or the Board of Advisers as a whole.

© 2010 Thomson Reuters. All rights reserved.

The Environmental Counselor (ISSN 1041-3863) is published monthly by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Subscription price \$663.00 annually. POSTMASTER: Send address changes to The Environmental Counselor, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

The bill would amend the American Recovery and Reinvestment Act, which released \$800 billion designed to jumpstart the U.S. economy. The new amendment would require the U.S. Departments of Energy and the Treasury to award stimulus grant funds only to clean energy projects that create or preserve jobs in the United States.

“Buy American” legislation intended to benefit the U.S. economy and employment through the use of U.S. government funds has been in place for decades with respect to U.S. government contracts. Because it is largely impossible for high technology or complex manufactured goods to be made exclusively in the United States, the Recovery Act's original limitation on construction projects was expanded to permit the acquisition of steel and manufactured goods from the United States' trading partners—which do not currently include China. The Recovery Act's “Buy American” provision did not apply to § 1603 projects and was directed to construction and construction materials used on public works. The American Renewable Energy Jobs Act proposes to expand the “Buy American” provision to include restrictions on all U.S. trading partners, and to extend the provision to private enterprises.

Senator Schumer has raised similar objections in the past. Last fall he protested that a \$1.5 billion Texas wind project would create 3,000 jobs in China but only 300 in the United States. The developers of the wind project responded by planning a wind turbine factory in the United States, which is projected to create 1,000 new jobs.

The Department of Energy, which administers the clean energy stimulus program, stated that suspending the clean energy grants program now would require immediate layoffs at U.S. manufacturing plants. In related news, the Department of Energy awarded another \$100 million in grants under its ARPA-E program this week, which represents the third round in the \$400 million initiative to accelerate innovative projects that could transform U.S. energy policy.

The Treasury has not commented on the proposed legislation, but has previously released responses to frequently asked questions that explicitly state that “Buy American” provisions do not apply to § 1603 grants.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

EPA'S GREENHOUSE GAS REGULATORY AUTHORITY

In an interesting development regarding climate change, Senator Jay Rockefeller (D-WV) introduced legislation on March 4, 2010, to place a two-year moratorium on the Environmental Protection Agency's (EPA's) authority to regulate carbon dioxide emissions from stationary sources such as factories and refineries.¹ Rockefeller's bill is one of several recent congressional efforts to limit the EPA's efforts to address climate change under the Clean Air Act (CAA).

Congressional efforts to curb the EPA's authority to regulate such emissions stem from the EPA's endangerment finding in December 2009, which stated that greenhouse gases endanger public health and the environment. The finding followed the 2007 Supreme Court of the United States decision that greenhouse gases satisfied the CAA definition of air pollutants. Upon issuance of the endangerment finding, the EPA found that it had the authority to finalize greenhouse gas emissions regulations under the CAA. The finding effectively indicates that the EPA will pursue a significant amount of new regulation affecting emissions from numerous industrial sources under the provisions of the CAA. See McDermott *On the Subject* "EPA Announces Final GHG Endangerment Finding."² In September 2009, the EPA also pushed forward with addressing climate change under its CAA authority by issuing final, mandatory greenhouse gas reporting rules and releasing proposed rules that would require certain stationary sources to obtain CAA construction and operating permits under the EPA's New Source Review. See McDermott *On the Subject* "EPA Finalizes GHG Reporting Rule, Proposes New GHG Permitting Requirements."³

"This legislation...[will give] Congress the time it needs to address an issue as complicated and expansive as our energy future. Congress, not the EPA, must be the ideal decision-maker on such a challenging issue,"

Rockefeller said. President Obama has repeatedly stated that Congress is the preferred authority to set mandatory, U.S.-wide limits on greenhouse gas emissions, but the EPA is poised to move forward with regulation in the absence of legislation passing this year.

While Republicans have made similar efforts to curb the EPA's regulations on climate change, Rockefeller's effort is significant because it may highlight growing dissent among Democrats over the prospect of EPA's efforts to address climate change without explicit congressional approval or legislation addressing greenhouse gas regulation.

ENDNOTES

- * © 2010 McDermott Will & Emery. All rights reserved. Reprinted with permission.
 - ** Brandon Barnes is an associate at the Washington, D.C. office of McDermott Will & Emery LLP. He may be reached at Bbarnes@mwe.com. Gregory K. Lawrence is a partner at the Boston office of McDermott Will & Emery LLP. He may be reached at glawrence@mwe.com. Holly Roth is a partner at the Washington, D.C. office of McDermott Will & Emery LLP. She may be reached at HRoth@mwe.com.
1. S. 3072.
 2. Editor's note: This article is available at http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/14d00df2-22a8-4786-a69d-f29934d3ecf2.cfm.
 3. Editor's note: This article is available at http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/cbd5f545-1532-44e9-804e-03ae-2562f49c.cfm.