

# TENASKA<sup>®</sup> VIRGINIA PARTNERS, L.P.

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April 9, 2018

Ms. Karen G. Sabasteanski  
Policy Analyst, Office of Regulatory Affairs  
Virginia Department of Environmental Quality  
1111 East Main Street, Suite 1400  
Richmond, VA 23218

Via e-mail to [ghg@deq.virginia.gov](mailto:ghg@deq.virginia.gov)

Re: Public Comments on the Following Proposed Regulation:  
Regulation for Emissions Trading [9 VAC 5 - 140] Part VII – CO<sub>2</sub> Budget Trading Program  
Reduce and Cap Carbon Dioxide from Fossil Fuel Fired Electric Power Generating Facilities

Dear Ms. Sabasteanski:

Tenaska Virginia Partners, L.P. (“Tenaska”) appreciates the opportunity to provide the following comments on the referenced proposed regulation (“Regulation”).

1. **Base Budget** – The proposed Regulation requests specific comment on whether the base budget (beginning in 2020) should be 33 or 34 million tons (the proposed 3% annual reduction thereafter would apply regardless). The VDEQ projects annual CO<sub>2</sub> emissions from covered facilities to be 36.8 million tons in 2019<sup>1</sup>. Under the 34 million ton alternative, a 7.6% reduction would be required in the first year of the program. If the more stringent 33 million base budget were used, a 10.3% reduction would be required. These are 2.5-3.5 times the proposed 3% annual cap decline in subsequent years. Therefore, Tenaska strongly suggests VDEQ consider a higher base budget, such as 35 million tons, in the event the 2019 emission projection is proven accurate (perhaps via a provision included in the final regulation). At the very minimum, 34 million tons should be used.
2. **Allowance Allocation Approach** – Tenaska continues to strongly favor the “Generation Updating” approach, whereby covered facilities are allocated allowances according to their respective historical annual net generation (MWh<sub>net</sub>) as compared to the total aggregate generation from covered facilities, averaged over the immediate three calendar years, updated annually (i.e., on a rolling three-year average). Tenaska believes this approach best meets the intent of the Regulation, in that it incentivizes, or rewards, more efficient units that emit less CO<sub>2</sub> per unit of power produced. Note RAP participants favored this option.<sup>2</sup>
3. **Long-term Contract Set-aside** – as presented several times during the Regulatory Advisory Panel meetings<sup>3</sup>, Tenaska’s Virginia Generating Station in Fluvanna County currently operates under a long-term contract or “tolling agreement” (“Agreement”) with a third party, whereby the third party procures the fuel and purchases the generated electricity. The term of the Agreement is twenty years and expires in May 2024. Under the terms of the Agreement, Tenaska believes it has the ability to pass through to its customer costs for things such as emissions allowances, whether they be for the Acid Rain Program, Cross State Air Pollution Rule, or any future carbon trading scheme. However, Tenaska’s customer has taken the position that Tenaska does not have such a pass through right. These costs are projected to be

<sup>1</sup> Power Sector Profile and Trends, VDEQ Presentation, RAP Mtg August 3, 2017

<sup>2</sup> RAP Mtg Notes, September 6, 2017, Attachment C (2<sup>nd</sup> table, item G)

<sup>3</sup> RAP Mtg Notes, August 31 and September 6, 2017, Attachment C (last table, item E)

\$2.30/MWh in 2020 and rising to \$3.78/MWh in 2031<sup>4</sup>, representing an increase of 14.6%-18.9% over the projected wholesale power price. To the extent Tenaska is required to purchase allowances and is unable to pass through those costs to its customer, it will be disadvantaged as compared with other generators that can either recoup those costs or that have no costs due to their location in another PJM state without a carbon pricing scheme (e.g., Pennsylvania and West Virginia).

Several current RGGI states<sup>5</sup> and every major proposed federal CO<sub>2</sub> cap and trade legislation<sup>6</sup> has recognized this predicament and provided various forms of relief, such as creating an allowance set-aside for free allocations or offering allowances at a reduced price (see attached excerpts). Tenaska requests VDEQ also recognize this and either create a set-aside (as is currently being proposed in the Regulation for DMME to fund energy efficiency projects) sufficient to cover net allowance obligations for LTC holders in the event it is needed or simply exempt long-term contract holders for the life of the applicable contracts. Tenaska believes the set-aside would be less disruptive to the program as it would alleviate units entering and exiting.

4. Scope – VDEQ has stated the purpose of the Regulation, in part, is as follows<sup>7</sup>:

*There is no denying the science and the real-world evidence that climate change threatens the Commonwealth of Virginia, from our homes and businesses to our critical military installations and ports. Rising storm surges and flooding could impact as many as 420,000 properties along Virginia's coast that would require \$92 billion of reconstruction costs.*

VDEQ stated CO<sub>2</sub> emissions from the units that would be covered by the Regulation comprise only ~30% of the state-wide total<sup>8</sup>. Further, the Regulation would require these emissions be reduced by 30% by 2030. This represents a total reduction in statewide CO<sub>2</sub> emissions of only ~9%. We encourage the VDEQ to expand the scope of the Regulation to include additional sources and/or seek meaningful reductions in other sectors of the economy (via alternative pathways), including mobile sources, if the dire consequences stated above are to be avoided. One such way to easily expand the scope is to remove the exemption in 9VAC5-140-6040(B) for units that generate electricity and heat “for the primary use of operation of the facility”. CO<sub>2</sub> emissions from such facilities are no less potentially harmful than those from units that generate electricity for off-site use. Neither the RGGI Model Rule nor the environment make such a distinction and neither should the VDEQ.

Please contact me at 402.938.1661 or lcarlson@tenaska.com should you have any questions or require additional information.

TENASKA VIRGINIA PARTNERS, L.P.

By: Tenaska Virginia, Inc., Its Managing General Partner



Larry G. Carlson, QEP  
Vice President, Environmental Affairs

Attachments

<sup>4</sup> Using projected RGGI allowance prices of \$5.52/ton & \$9.06/ton and firm power prices of \$37.78/MWh & \$47.92/MWh (all in 2015\$), ICF Modeling “VA Cap Policy with VA Assumptions” case

<sup>5</sup> New York [6 CRR-NY 242-5.3(d)] and Maryland [Title 26, Subtitle 9, Chapter 2, Regulation 7]

<sup>6</sup> Waxman-Markey (H.R. 2454), Dingell-Boucher, and Kerry-Boxer

<sup>7</sup> Town Hall Agency Background Document

<sup>8</sup> RAP Mtg, August 3, 2017

**(d) Long term contract set-aside allocation.**

The department shall allocate 1,500,000 tons to the long term contract set-aside account from the CO<sub>2</sub> Budget Trading Program annual adjusted budget set forth in section 242-5.2 of this Subpart, as applicable. The department shall administer the long term contract set-aside account in accordance with the following procedures.

- (1) The department will open and manage a general account for the long term contract set-aside account for each allocation year.
- (2) The sponsor for a long term contract hardship demonstration must establish a compliance account under subdivision 242-6.2 (a) of this Part. All submissions to the department required for the reward of allowances from the long term contract set-aside account under this section must be from the CO<sub>2</sub> authorized account representative for the compliance account, herein referred to as the LTC applicant.
- (3) The LTC applicant may submit a written request to the department for the reward of a specified number of CO<sub>2</sub> allowances in the long term contract set-aside account. This request must be submitted by the December 1st, immediately preceding the allocation year for which it is being made and must include information to assure, to the department's satisfaction, that:
  - (i) the long term contract was entered into prior to March 2006;
  - (ii) the LTC applicant's purchase of allowances at auction or in the secondary market leads to financial hardship, because the LTC applicant is unable to pass on the cost of CO<sub>2</sub> allowances to the purchasing party under the conditions of the long term contract; and
  - (iii) each CO<sub>2</sub> budget unit at the CO<sub>2</sub> budget source covered by the long term contract uses natural gas as its primary fuel, or the CO<sub>2</sub> budget source's emission rate is no higher than 1100 lbs/MWhr.

(4) The written request submitted pursuant to paragraph (3) of this subdivision shall contain, at a minimum, the following information:

- (i) a copy of the long term contract and explanation that the LTC applicant is unable to:
  - (a) pass the cost of allowances on to the purchasing party; or
  - (b) renegotiate the terms of the contract;
- (ii) financial statements from each of the previous five years that clearly demonstrate the revenues and expenses of the LTC applicant's budget source;
- (iii) fuel, total net output and emissions data from the previous three year period;
- (iv) the portion of emissions from the CO<sub>2</sub> budget unit or units covered by the long term contract during the upcoming year;
- (v) costs associated with the CO<sub>2</sub> Budget Trading Program compared to all other costs associated with the operation of the CO<sub>2</sub> budget unit or units; and
- (vi) a demonstration that the LTC applicant will suffer losses in excess of the value of allowances sought, supported by projected costs and revenues for the allocation year for which the LTC application pertains.

(5) Except as may be modified by paragraph (6) or (9) of this subdivision, the department will determine the number of CO<sub>2</sub> allowances to be allocated to each LTC applicant that the department determines meets the eligibility requirements of paragraph (3) of this subdivision, in accordance with the following procedures:

$$\text{LTC Allowances} = (((\text{LTCer}) \times (\text{TO}))/2000) - \text{RLTCA};$$

where:

"LTC Allowances" are the result of the calculation;

"LTCer" is the applicable emission rate

"TO" is total net output from the LTC facility;

"RLTCA" is the number of allowances remaining in an LTC applicant's compliance account

- (i) For the purposes of this subdivision, total net output shall be the greatest total net output experienced by the unit for any single calendar year among the three calendar years, for which data is submitted, proceeding the date by which the department must make the CO<sub>2</sub> allocations pursuant to this subdivision.

(ii) For the purposes of this subdivision, the LTCer will be the lesser of the actual emission rate included in the application and 1100 lbs/MW<sub>hr</sub>.

(iii) For the purposes of this subdivision, there will be no RLTC<sub>A</sub> for the first application, but for each subsequent application, the department will determine the RLTC<sub>A</sub> to be the difference between the allowances in the LTC applicant's compliance account and actual emissions for that allocation year.

(6) The number of CO<sub>2</sub> allowances to be allocated to an eligible LTC applicant, as determined pursuant to paragraph (5) of this subdivision, shall be discounted by the department as follows, if applicable:

(i) by the percentage of CO<sub>2</sub> allowance cost that the LTC applicant is able to pass on to the purchasing party; and

(ii) by the percentage of CO<sub>2</sub> emissions from the CO<sub>2</sub> budget source that are not covered by the long term contract.

(7) Allowances will be allocated to the LTC applicant's compliance account.

(8) Allowances allocated pursuant to this subdivision must only be used for compliance with the CO<sub>2</sub> budget emissions limitation for the source. The sale or transfer of allowances from the LTC applicant's compliance account will be considered a violation of this subdivision.

(9) If more than one LTC applicant requests the award of CO<sub>2</sub> allowances and the number of CO<sub>2</sub> allowances that are subject to the department approved requests exceeds the number of CO<sub>2</sub> allowances in the relevant long term contract set-side account, the department will award CO<sub>2</sub> allowances for those LTC applicants on a basis proportional to the number of CO<sub>2</sub> allowances requested by each LTC applicant.

(10) Flow back of undistributed CO<sub>2</sub> allowances from the long term contract set-aside account. After allocating allowances pursuant to this subdivision for an allocation year, the department will transfer any remaining CO<sub>2</sub> allowances from the long term contract set-aside account to the energy efficiency and clean energy technology account.

## **.07 Long Term Contract Set-aside Account.**

A. The Department shall administer the Long Term Contract Set-aside Account in accordance with the procedures of this regulation.

B. A long term contract applicant may purchase allowances from the Long Term Contract Set-aside Account through direct sale from the Department at the long term contract price if:

- (1) A long term contract with the applicant for the electrical output of its budget units has been in existence since January 1, 2001; and
- (2) The applicant is unable to recover the cost of purchasing allowances through electricity pricing or other mechanism.

C. To remain eligible to purchase allowances from the Long Term Contract Set-aside Account through direct sale from the Department, the applicant shall renegotiate the long term contract to include the cost of purchasing CO<sub>2</sub> allowances when the first opportunity to exercise any option in the existing contract occurs.

D. Each calendar year, the CO<sub>2</sub> authorized account representative for the compliance account, referred to in this subtitle as the LTC applicant, shall make all requests for purchase of allowances from the Long Term Contract Set-aside Account to the Department in writing by November 15 of each year.

E. If all the allowances are not sold from the Long Term Contract Set-aside Account by the end of the calendar year, the undistributed allowances shall remain in the account. On or before January 31 of the following year, the Department shall transfer from the Consumer Energy Efficiency Account the number of allowances needed to restore the balance of the Long Term Contract Set-aside Account to 1,600,000.

F. Allowances Available for Purchase by LTC Applicants.

(1) All allowances purchased by LTC applicants in accordance with §D of this regulation shall be maintained in the CO<sub>2</sub> budget source's compliance account and only used to demonstrate compliance for a control period.

(2) Allowances purchased by LTC applicants in accordance with §D of this regulation may not be resold.

G. The request shall include the following:

(1) A copy of the long term contract if it has not been provided to the Department previously, or if it has, a letter certifying that the contract has not changed; and

(2) A letter certifying that the LTC applicant is unable to recover the cost of allowances through electricity pricing or other mechanism.

H. Calculation of Long Term Contract Price.

(1) The Long Term Contract Price (LTCP) in calendar year 2013 shall be \$1.98.

(2) The LTCP in calendar year 2014 shall be \$2.00.

(3) For years subsequent to calendar year 2014, the LTCP shall be established as of the first day of each calendar year, and each calendar year thereafter, the LTCP shall be the LTCP from the previous calendar year multiplied by 1.025, rounded to the nearest whole cent.

## Calendar No. 97

111TH CONGRESS  
1ST SESSION

# H. R. 2454

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IN THE SENATE OF THE UNITED STATES

JULY 6, 2009

Received and read the first time

JULY 7, 2009

Read the second time and placed on the calendar

WAXMAN-MARKEY

## AN ACT

To create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “American Clean Energy and Security Act of 2009”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for  
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

Sec. 3. International participation.

1                   “(iii) an electric cooperative; or

2                   “(iv) an Indian tribe pursuant to trib-  
3                   al law.

4                   “(5) **LONG-TERM CONTRACT GENERATOR.**—The  
5                   term ‘long-term contract generator’ means a quali-  
6                   fying small power production facility, a qualifying  
7                   cogeneration facility ), **an independent power pro-**  
8                   **duction facility,** or a facility for the production of  
9                   electric energy for sale to others that is owned and  
10                  operated by an electric cooperative that is—

11                  “(A) a covered entity; and

12                  “(B) as of the date of enactment of this  
13                  title—

14                   “(i) **a facility with 1 or more sales or**  
15                   **tolling agreements executed before March**  
16                   **1, 2007, that govern the facility’s elec-**  
17                   **tricity sales and provide for sales at a price**  
18                   **(whether a fixed price or a price formula)**  
19                   **for electricity that does not allow for recov-**  
20                   **ery of the costs of compliance with the lim-**  
21                   **itation on greenhouse gas emissions under**  
22                   **this title, provided that such agreements**  
23                   **are not between entities that are affiliates**  
24                   **of one another; or**

1 term in section 371(7) of the Energy Policy and  
2 Conservation Act (42 U.S.C. 6341(7)).

3 “(b) ELECTRICITY LOCAL DISTRIBUTION COMPA-  
4 NIES.—

5 “(1) DISTRIBUTION OF ALLOWANCES.—Not  
6 later than September 30, 2011, and each calendar  
7 year thereafter through 2028, the Administrator  
8 shall distribute to electricity local distribution com-  
9 panies for the benefit of retail ratepayers the quan-  
10 tity of emission allowances allocated for the fol-  
11 lowing vintage year pursuant to section 782(a)(1).  
12 Notwithstanding the preceding sentence, the Admin-  
13 istrator shall withhold from distribution under this  
14 subsection a quantity of emission allowances equal to  
15 the lesser of 14.3 percent of the quantity of emission  
16 allowances allocated under section 782(a)(1) for the  
17 relevant vintage year, or 105 percent of the emission  
18 allowances for the relevant vintage year that the Ad-  
19 ministrator anticipates will be distributed to mer-  
20 chant coal units and to long-term contract genera-  
21 tors, respectively, under subsections (c) and (d). If  
22 not required by subsections (c) and (d) to distribute  
23 all of these reserved allowances, the Administrator  
24 shall distribute any remaining emission allowances

1           “(6) LIMITATION ON ALLOWANCES.—Notwith-  
2 standing paragraph (4) or (5), for each vintage year  
3 the Administrator shall distribute under this sub-  
4 section no more than 10 percent of the total quan-  
5 tity of emission allowances available for such vintage  
6 year for distribution to the electricity sector under  
7 section 782(a)(1). If the quantity of emission allow-  
8 ances that would otherwise be distributed pursuant  
9 to paragraph (4) or (5) for any vintage year would  
10 exceed such limit, the Administrator shall distribute  
11 10 percent of the total emission allowances available  
12 for distribution under section 782(a)(1) for such vin-  
13 tage year ratably among merchant coal generators  
14 based on the applicable formula under paragraph (4)  
15 or (5).

16           “(7) ELIGIBILITY.—The owner or operator of a  
17 merchant coal unit shall not be eligible to receive  
18 emission allowances under this subsection for any  
19 vintage year for which such owner or operator has  
20 elected to receive emission allowances for the same  
21 unit under subsection (d).

22           “(d) LONG-TERM CONTRACT GENERATORS.—

23           “(1) DISTRIBUTION.—Not later than March 1,  
24 2013, and each calendar year through 2030, the Ad-  
25 ministrator shall distribute to the owner or operator

1 of each long-term contract generator a quantity of  
2 emission allowances of the preceding vintage year  
3 that is equal to the sum of—

4 “(A) the number of tons of carbon dioxide  
5 emitted as a result of a qualifying electricity  
6 sales agreement referred to in subsection  
7 (a)(5)(B)(i); and

8 “(B) the incremental number of tons of  
9 carbon dioxide emitted solely as a result of a  
10 qualifying thermal sales agreement referred to  
11 in subsection (a)(5)(B)(ii), provided that in no  
12 event shall the Administrator distribute more  
13 than 1 emission allowance for the same ton of  
14 emissions.

15 “(2) LIMITATION ON ALLOWANCES.—Notwith-  
16 standing paragraph (1), for each vintage year the  
17 Administrator shall distribute under this subsection  
18 no more than 4.3 percent of the total quantity of  
19 emission allowances available for such vintage year  
20 for distribution to the electricity sector under section  
21 782(a)(1). If the quantity of emission allowances  
22 that would otherwise be distributed pursuant to  
23 paragraph (1) for any vintage year would exceed  
24 such limit, the Administrator shall distribute 4.3  
25 percent of the total emission allowances available for

1 distribution under section 782(a)(1) for such vintage  
2 year ratably among long-term contract generators  
3 based on paragraph (1).

4 “(3) ELIGIBILITY.—

5 “(A) FACILITY ELIGIBILITY.—The owner  
6 or operator of a facility shall cease to be eligible  
7 to receive emission allowances under this sub-  
8 section upon the earliest date on which the fa-  
9 cility no longer meets each and every element of  
10 the definition of a long-term contract generator  
11 under subsection (a)(5).

12 “(B) CONTRACT ELIGIBILITY.—The owner  
13 or operator of a facility shall cease to be eligible  
14 to receive emission allowances under this sub-  
15 section based on an electricity or thermal sales  
16 agreement referred to in subsection (a)(5)(B)  
17 upon the earliest date that such agreement—

18 “(i) expires;

19 “(ii) is terminated; or

20 “(iii) is amended in any way that  
21 changes the location of the facility, the  
22 price (whether a fixed price or price for-  
23 mula) for electricity or thermal energy sold  
24 under such agreement, the quantity of  
25 electricity or thermal energy sold under the

1 agreement, or the expiration or termi-  
2 nation date of the agreement.

3 “(4) DEMONSTRATION OF ELIGIBILITY.—To be  
4 eligible to receive allowance distributions under this  
5 subsection, the owner or operator of a long-term  
6 contract generator shall submit each of the following  
7 in writing to the Administrator within 180 days  
8 after the date of enactment of this title, and not  
9 later than September 30 of each vintage year for  
10 which such generator wishes to receive emission al-  
11 lowances:

12 “(A) A certificate of representation de-  
13 scribed in section 700(15).

14 “(B) An identification of each owner and  
15 each operator of the facility.

16 “(C) An identification of the units at the  
17 facility and the location of the facility.

18 “(D) A written certification by the des-  
19 ignated representative that the facility meets all  
20 the requirements of the definition of a long-  
21 term contract generator.

22 “(E) The expiration date of each quali-  
23 fying electricity or thermal sales agreement re-  
24 ferred to in subsection (a)(5)(B).

1           “(F) A copy of each qualifying electricity  
2           or thermal sales agreement referred to in sub-  
3           section (a)(5)(B).

4           “(5) NOTIFICATION.—Not later than 30 days  
5           after, in accordance with paragraph (3), a facility or  
6           an agreement ceases to meet the eligibility require-  
7           ments for distribution of emission allowances pursu-  
8           ant to this subsection, the designated representative  
9           of such facility shall notify the Administrator in  
10          writing when, and on what basis, such facility or  
11          agreement ceased to meet such requirements.

12          “(e) SMALL LDCs.—

13           “(1) DISTRIBUTION.—Not later than Sep-  
14          tember 30 of each calendar year from 2011 through  
15          2028, the Administrator shall, in accordance with  
16          this subsection, distribute emission allowances allo-  
17          cated pursuant to section 782(a)(2) for the following  
18          vintage year. Such allowances shall be distributed  
19          ratably among small LDCs based on historic emis-  
20          sions in accordance with the same measure of such  
21          emissions applied to each such small LDC for the  
22          relevant vintage year under subsection (b)(2) of this  
23          section.

[DISCUSSION DRAFT]

OCTOBER 7, 2008

110TH CONGRESS  
2D SESSION

**H. R.** \_\_\_\_\_

To [to be supplied]

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IN THE HOUSE OF REPRESENTATIVES

Mr. BOUCHER (for himself and Mr. DINGELL) introduced the following bill;  
which was referred to the Committee on \_\_\_\_\_

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**A BILL**

To [to be supplied]

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “\_\_\_\_\_ Act of 2008”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for  
7 this Act is as follows:

Sec. 1. Short title; table of contents.  
Sec. 2. Definitions.

**TITLE I—CAP AND TRADE PROGRAM**

Sec. 101. Amendment of Clean Air Act.

1 in this subsection, where all legal or equitable title to or  
2 interest in a covered entity, or other entity allocated allow-  
3 ances, is held by a single person, the certification shall  
4 state that all allowances received by the entity are deemed  
5 to be held for that person.

6 **“PART C—DISTRIBUTION OF EMISSION**  
7 **ALLOWANCES**

8 **“SEC. 721. ALLOCATIONS [OPTION A].**

【Note: This discussion draft contains 4 different op-  
tions for section 721】

9 “(a) IN GENERAL.—The Administrator shall allocate  
10 emission allowances with vintage years from 2012 through  
11 2025 as follows:

12 “(1) ELECTRICITY SECTOR.—

13 “(A) For vintage years 2012 and 2013,  
14 49.0 percent of the number of allowances pro-  
15 vided in Column A of the table in section  
16 711(e)(1) shall be allocated to the electricity  
17 sector pursuant to section 722(a).

18 “(B) For vintage years 2014 through  
19 2025, 42.0 percent of the number of allowances  
20 provided in Column A of the table in section  
21 711(e)(1) shall be allocated to the electricity  
22 sector pursuant to section 722(a).

23 “(2) INDUSTRIAL SECTOR.—

1 distribution utilities and merchant coal generators in  
2 accordance with paragraphs (1) and (2).

3 “(4) GENERATORS WITH LONG TERM PUBLIC  
4 POWER PURCHASE AGREEMENTS.—

5 “(A) DEFINITION.—For purposes of this  
6 subsection, the term ‘independent power pro-  
7 ducer’ means a qualifying small power produc-  
8 tion facility or a qualifying cogeneration facility  
9 (within the meaning of section 3(17)(C) or  
10 3(18)(B) of the Federal Power Act), an exempt  
11 wholesale generator (within the meaning of sec-  
12 tion 3(25) of the Federal Power Act), or a new  
13 independent power production facility (within  
14 the meaning of section 405 of this Act) which  
15 is—

16 “(i) a covered entity;

17 “(ii) as of the commencement of oper-  
18 ation, a facility consisting of one or more  
19 units with total installed net output capac-  
20 ity (in MWe) of no more than [130 per-  
21 cent] of the facility’s total planned net  
22 output capacity (in MWe); and

23 “(iii) as of the date of enactment of  
24 this title, a facility with a power sales  
25 agreement executed before January 1,

1           2007, that governs the facility's electricity  
2           sales, covers at least [50 percent] of the  
3           facility's total planned net output capacity  
4           (in MWe), and provides for sales at a price  
5           (whether a fixed price or a price formula)  
6           for electricity that does not allow for recov-  
7           ery of the costs of compliance with the lim-  
8           itation on greenhouse gas emissions under  
9           this title.

10           “(B) DISTRIBUTION.—Not later than April  
11           2 (or a later date established by the Adminis-  
12           trator) of 2013 and each calendar year through  
13           2026, the Administrator shall distribute to the  
14           owners and operators of independent power pro-  
15           ducers the number of emission allowances of  
16           that vintage year that are equal to the tons of  
17           carbon dioxide emitted as a result of the inde-  
18           pendent power purchase agreement referred to  
19           in subparagraph (A)(iii).

20           “(C) DURATION.—Notwithstanding sub-  
21           paragraph (A), an independent power producer  
22           shall cease to be eligible to receive allocations  
23           under this paragraph upon the earliest of the  
24           following dates:

1           “(i) The date when the facility no  
2 longer qualifies as a qualifying small power  
3 production facility or a qualifying cogen-  
4 eration facility (within the meaning of sec-  
5 tion 3(17)(C) or 3(18)(B) of the Federal  
6 Power Act), an exempt wholesale generator  
7 (within the meaning of section 3(25) of the  
8 Federal Power Act), or a new independent  
9 power production facility (within the mean-  
10 ing of section 405 of this Act).

11           “(ii) The date when the facility no  
12 longer meets the total installed net output  
13 capacity criterion required to be met as of  
14 the commencement of operation in the def-  
15 inition of independent power producer.

16           “(iii) The date when the power pur-  
17 chase agreement referred to in subpara-  
18 graph (A)(iii)—

19                   “(I) expires;

20                   “(II) is terminated; or

21                   “(III) is amended in any way  
22 that changes the location of the facil-  
23 ity, the price (whether a fixed price or  
24 price formula) for electricity sold  
25 under such agreement, the percentage

1 of the facility's total planned net out-  
2 put capacity (in MWe) that is covered  
3 by the price under the agreement, or  
4 the expiration or termination date of  
5 the agreement.

6 “(D) **ELIGIBILITY.**—To be eligible to re-  
7 ceive allowance distributions under this para-  
8 graph, an **independent power producer** shall  
9 submit each of the following in writing to the  
10 Administrator within 180 days after the date of  
11 enactment of this title:

12 “(i) A certificate of representation de-  
13 scribed in section 700(10).

14 “(ii) An identification of each owner  
15 and each operator of the facility.

16 “(iii) An identification of the units at  
17 the facility and the location of the facility.

18 “(iv) A written certification by the  
19 designated representative that the facility  
20 meets all the requirements of the definition  
21 of independent power producer.

22 “(v) The expiration date of the power  
23 sales agreement referred to in subpara-  
24 graph (A)(iii).

## Calendar No. 267

111<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 1733

[Report No. 111-121]

To create clean energy jobs, promote energy independence, reduce global warming pollution, and transition to a clean energy economy.

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### IN THE SENATE OF THE UNITED STATES

SEPTEMBER 30, 2009

Mr. KERRY (for himself, Mrs. BOXER, and Mr. KIRK) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

FEBRUARY 2, 2010

Reported by Mrs. BOXER, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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## A BILL

To create clean energy jobs, promote energy independence, reduce global warming pollution, and transition to a clean energy economy.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 ~~SECTION 1. SHORT TITLE; TABLE OF CONTENTS.~~

4 (a) ~~SHORT TITLE.~~—This Act may be cited as the

5 “~~Clean Energy Jobs and American Power Act~~”.

1           “(9) *INDEPENDENT POWER PRODUCTION FACIL-*  
2 *ITY.*—*The term ‘independent power production facil-*  
3 *ity’ means a facility—*

4                   “(A) *that is used for the generation of elec-*  
5 *tric energy, at least 80 percent of which is sold*  
6 *at wholesale; and*

7                   “(B) *the sales of the output of which are not*  
8 *subject to retail rate regulation or setting of re-*  
9 *tail rates by—*

10                           “(i) *a State regulatory authority;*

11                           “(ii) *a State or political subdivision*  
12 *thereof (or an agency or instrumentality of,*  
13 *or corporation wholly owned by, either of*  
14 *the foregoing);*

15                           “(iii) *an electric cooperative; or*

16                           “(iv) *an Indian tribe pursuant to trib-*  
17 *al law.*

18           “(10) *LONG-TERM CONTRACT GENERATOR.*—

19                   “(A) *IN GENERAL.*—*The term ‘long-term*  
20 *contract generator’ means a qualifying small*  
21 *power production facility, a qualifying cogenera-*  
22 *tion facility ), an independent power production*  
23 *facility, or a facility for the production of elec-*  
24 *tric energy for sale to others that is owned and*  
25 *operated by an electric cooperative that is—*

1           “(i) a covered entity; and

2           “(ii) as of the date of enactment of this

3 title—

4           “(I) a facility with 1 or more

5 sales or tolling agreements executed be-

6 fore March 1, 2007, that govern the fa-

7 cility’s electricity sales and provide for

8 sales at a price (whether a fixed price

9 or a price formula) for electricity that

10 does not allow for recovery of the costs

11 of compliance with the limitation on

12 greenhouse gas emissions under this

13 title, provided that such agreements are

14 not between entities that were affiliates

15 of one another at the time at which the

16 agreements were entered into; or

17           “(II) a facility consisting of 1 or

18 more cogeneration units that makes

19 useful thermal energy available to an

20 industrial or commercial process with

21 1 or more sales agreements executed be-

22 fore March 1, 2007, that govern the fa-

23 cility’s useful thermal energy sales and

24 provide for sales at a price (whether a

25 fixed price or price formula) for useful

1 given that term in section 3(17) of the Public Utility  
2 Regulatory Policies Act of 1978 (16 U.S.C. 2602(17)).

3 “(20) *USEFUL THERMAL ENERGY*.—The term  
4 ‘useful thermal energy’ has the meaning given that  
5 term in section 371(7) of the Energy Policy and Con-  
6 servation Act (42 U.S.C. 6341(7)).

7 “(b) *ELECTRICITY LOCAL DISTRIBUTION COMPA-*  
8 *NIES*.—

9 “(1) *DISTRIBUTION OF ALLOWANCES*.—The Ad-  
10 ministrator shall distribute to electricity local dis-  
11 tribution companies for the benefit of retail rate-  
12 payers the quantity of emission allowances allocated  
13 for the following vintage year pursuant to section  
14 771(a)(1)(A). Notwithstanding the preceding sentence,  
15 the Administrator shall withhold from distribution  
16 under this subsection a quantity of emission allow-  
17 ances equal to the lesser of 14.3 percent of the quan-  
18 tity of emission allowances allocated under section  
19 771(a)(1) for the relevant vintage year, or 105 percent  
20 of the emission allowances for the relevant vintage  
21 year that the Administrator anticipates will be dis-  
22 tributed to merchant coal units and to long-term con-  
23 tract generators, respectively, under subsections (c)  
24 and (d), on the condition that the Administrator shall  
25 be authorized to distribute future vintage year allow-

1     *the Administrator shall distribute under this sub-*  
2     *section no more than 10 percent of the total quantity*  
3     *of emission allowances available for such vintage year*  
4     *for distribution to the electricity sector under section*  
5     *771(a)(1). If the quantity of emission allowances that*  
6     *would otherwise be distributed pursuant to paragraph*  
7     *(4) or (5) for any vintage year would exceed such*  
8     *limit, the Administrator shall distribute 10 percent of*  
9     *the total emission allowances available for distribu-*  
10    *tion under section 771(a)(1) for such vintage year*  
11    *ratably among merchant coal generators based on the*  
12    *applicable formula under paragraph (4) or (5).*

13           “(7) *ELIGIBILITY.*—*The owner or operator of a*  
14    *merchant coal unit shall not be eligible to receive*  
15    *emission allowances under this subsection for any*  
16    *vintage year for which such owner or operator has*  
17    *elected to receive emission allowances for the same*  
18    *unit under subsection (d).*

19    “(d) *LONG-TERM CONTRACT GENERATORS.*—

20           “(1) *DISTRIBUTION.*—*Not later than March 1,*  
21    *2013, and each calendar year through 2030, the Ad-*  
22    *ministrator shall distribute to the owner or operator*  
23    *of each long-term contract generator a quantity of*  
24    *emission allowances of the preceding vintage year*  
25    *that is equal to the sum of—*

1           “(A) *the number of tons of carbon dioxide*  
2 *emitted as a result of a qualifying electricity*  
3 *sales agreement referred to in subsection*  
4 *(a)(10)(B)(i); and*

5           “(B) *the incremental number of tons of car-*  
6 *bon dioxide emitted solely as a result of a quali-*  
7 *fying thermal sales agreement referred to in sub-*  
8 *section (a)(10)(B)(ii), provided that in no event*  
9 *shall the Administrator distribute more than 1*  
10 *emission allowance for the same ton of emissions.*

11           “(2) *LIMITATION ON ALLOWANCES.—*

12           “(A) *IN GENERAL.—Notwithstanding para-*  
13 *graph (1), for each vintage year the Adminis-*  
14 *trator shall distribute under this subsection no*  
15 *more than 4.3 percent of the total quantity of*  
16 *emission allowances available for such vintage*  
17 *year for distribution to the electricity sector*  
18 *under section 771(a)(1).*

19           “(B) *FUTURE VINTAGE YEAR ALLOW-*  
20 *ANCES.—*

21           “(i) *IN GENERAL.—To the extent that*  
22 *any quantity of allowances that would oth-*  
23 *erwise be distributed pursuant to paragraph*  
24 *(1) would exceed 4.3 percent in any vintage*  
25 *year, the Administrator shall distribute fu-*

1           “(A) *FACILITY ELIGIBILITY.*—*The owner or*  
2           *operator of a facility shall cease to be eligible to*  
3           *receive emission allowances under this subsection*  
4           *upon the earliest date on which the facility no*  
5           *longer meets each and every element of the defi-*  
6           *inition of a long-term contract generator under*  
7           *subsection (a)(10).*

8           “(B) *CONTRACT ELIGIBILITY.*—*The owner*  
9           *or operator of a facility shall cease to be eligible*  
10           *to receive emission allowances under this sub-*  
11           *section based on an electricity or thermal sales*  
12           *agreement referred to in subsection (a)(10)(B)*  
13           *upon the earliest date that such agreement—*

14                   “(i) *expires;*

15                   “(ii) *is terminated; or*

16                   “(iii) *is amended in any way that*  
17                   *changes the location of the facility, the price*  
18                   *(whether a fixed price or price formula) for*  
19                   *electricity or thermal energy sold under*  
20                   *such agreement, the quantity of electricity*  
21                   *or thermal energy sold under the agreement,*  
22                   *or the expiration or termination date of the*  
23                   *agreement.*

24           “(4) *DEMONSTRATION OF ELIGIBILITY.*—*To be*  
25           *eligible to receive allowance distributions under this*