Statement
of the
U.S. Chamber of Commerce

ON:	JOINT CAUCUS HEARING ON "CAP AND TRADE: IMPACT ON JOBS IN THE WEST, AND THE NATION"
TO:	SENATE WESTERN CAUCUS, HOUSE WESTERN CAUCUS
BY:	WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY AND REGULATORY AFFAIRS
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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

BEFORE THE SENATE WESTERN CAUCUS AND HOUSE WESTERN CAUCUS

HEARING ON "CAP AND TRADE: IMPACT ON JOBS IN THE WEST, AND THE NATION"

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July 30, 2009

Good morning, Members of the Senate Western Caucus and House Western Caucus. My name is William L. Kovacs and I am Senior Vice President for Environment, Technology and Regulatory Affairs for the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today on H.R. 2454, the "American Clean Energy and Security Act of 2009" (ACES).

Before launching into the details of my testimony, I want to thank the members of this joint hearing for taking the time to shed light on the "less rosy" aspects of this bill. Too often the hearings held by the Congress on this issue have been heavy on bold pronouncements of hope and green jobs, while ignoring the actual text of the bill and the real impact many of its provisions will have.

As my testimony will show, the U.S. Chamber supports strong action on global climate change, but does not support ACES as it is currently drafted. ACES suffers from a number of critical flaws that could cause a significant amount of pain for American businesses while making little to no difference on global CO_2 concentrations. The Chamber also supports negotiation of a global accord that commits all major emitting nations to the reduction of greenhouse gas emissions as the best first step to tackling this global issue.

I. Overview of the Chamber's Position on Global Climate Change

The Chamber supports climate policies that lower emissions of greenhouse gases in the atmosphere, promote energy efficiency, and ensures the development and deployment of "green" energy technologies. The Chamber does not categorically support or oppose approaches such as cap and trade or carbon tax, but rather measures all climate legislation on a bill-by-bill basis against five core principles. Any legislation or regulation introduced must (1) preserve American jobs and competitiveness of U.S. industry; (2) provide an international solution that includes developing nations; (3) promote accelerated development and deployment of greenhouse gas reduction

technology; (4) reduce barriers to the development of climate-friendly energy sources; and (5) promote energy conservation and efficiency.

The Chamber opposed the main vehicle for addressing global climate change in the 110th Congress, the "Lieberman-Warner Climate Security Act." Lieberman-Warner fell short of virtually every one of the Chamber's five core principles. By any estimation it would have resulted in a staggering new set of costs and regulations for American taxpayers while making very little actual progress in reducing overall global greenhouse gas concentrations. Although the Chamber did not support Lieberman-Warner, over the years we have supported legislation that funds research, development and deployment of clean energy technologies and that promotes energy efficiency. While some may argue the technology approach is insufficient, the Chamber argues that the world can only reduce greenhouse gases emissions by developing the appropriate technologies that either capture these gases or produce reliable, affordable supplies of substitute energy. Congress is free to mandate virtually anything it chooses, but it should not mandate what technology cannot deliver.[1]

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[1] Congress has, sadly, built up a substantial resume of failed mandates in the energy field, including:

- **U.S. SYNTHETIC FUELS CORPORATION** – "Manhattan" type project envisaged; established in 1980 by the Synthetic Fuels Corporation Act to create a market for alternatives to imported fossil fuels; abolished 1985; was to partner with industry to create a market for domestically-produced synthetic liquid fuels; goal of producing 2 million barrels of liquid fuel/day within five years; cost billions; missed all benchmarks; cancelled by end of 1985.
- **NUCLEAR FUSION** – Congress initiated and passed The Magnetic Fusion Energy Engineering Act of 1980 (MFEE), which envisioned $20 billion for an "Apollo-like" project; hundreds of millions of dollars spent; none of the benchmarks of the legislation have ever been met.
- **PARTNERSHIP FOR A NEW GENERATION OF VEHICLES** – Initiated in 1993; goal: development of a commercially viable car having ultra-low emissions and average 80 miles per gallon — almost four times the 1993 national fleet average; timetable set required a production prototype by 2004; National Research Council (2001): "The Committee believes that no reasonable amount of funding would ensure [affordable] achievement of 80 Mpg;" public subsidy cost about $1.5 billion.
- **ENERGY POLICY ACT OF 2005 (EPACT 2005)** – Government mandated research, development and technology demonstrations - more than 60 provisions that specifically address new energy production and efficiency technologies; most were never properly funded.
- **NATIONAL TRANSMISSION CORRIDOR BACKSTOP AUTHORITY** – EPACT 2005 authorized the U.S. Federal Energy Regulatory Commission (FERC) to issue permits for the siting, construction or modification of transmission facilities in areas designated as national interest transmission corridors; FERC promulgated backstop siting authority regulations in 2006; U.S. Court of Appeals for the Fourth Circuit vacated the final rule in 2009.
- **ENERGY INDEPENDENCE & SECURITY ACT (2007) / ETHANOL PROGRAM** – Embodies characteristics of past programs for synfuels, fusion and the high mileage automobile (benchmarks, performance, timetable mandates); mandates technological progress according to a timetable with a goal of commercialization; as passed in late 2007 stipulates that by 2022 the U.S. will consume 36 billion gallons of ethanol annually, but this requires rapid commercialization of ethanol from cellulosic feedstocks — the technology exists, but is not cost competitive with conventional fossil fuel based resources and requires breakthroughs of the type that stymied previous alternative energy efforts.

The agenda set by President Obama and the leadership of this Congress calls for the United States to enact a domestic climate policy irrespective of (1) the Administration's ability to negotiate an international treaty with other nations, or (2) the state of the technology needed to address the reduction of greenhouse gases. The Chamber believes this reckless strategy could ultimately place our nation at a significant economic disadvantage to these other nations as worldwide greenhouse gas emissions into our atmosphere continue to increase. However, it is against this backdrop that we must analyze the ACES bill here today.

II. Analysis of the American Clean Energy and Security Act of 2009 (ACES)

ACES is much, much more than a cap and trade bill. It is a cap and trade program layered on top of an expansive new set of regulations and mandates. The Chamber's opposition to ACES is less about the philosophy of cap and trade than it is about specific flaws in the bill that, if enacted, would not operate to the economic and energy security of the United States. The following sections of my testimony will analyze these flaws.

Flaw #1: Takes Energy Out, Puts Less Back In

At its core, the fundamental problem with ACES is that it removes a significant amount of fossil-based energy from the economy without assuring that this energy void will be filled with enough renewable or alternative energy to keep America functioning. We know today that technologies that limit, sequester or otherwise eliminate CO_2 emissions from fossil fuels are neither affordable nor widely available (if even commercially deployable). However, we also know that fossil fuels are responsible for over 72 percent of our electricity.[2] Our only choice, then, if we are to seriously achieve what are the very aggressive emissions cuts required by this bill—17 percent below 2005 levels by 2020, 42 percent by 2030, 83 percent by 2050—is to move away from fossil fuels and toward "something else."

The problem is, replacing any substantial percentage of America's fossil-based energy with this "something else" will be extremely difficult, if not impossible. Twenty five percent of our electricity that does not currently come from fossil fuels comes from existing nuclear and hydropower.[3] Of the remaining 3 percent, wind energy provides 0.44 percent, geothermal energy 0.36 percent, and solar 0.01 percent.

To address this dilemma, ACES proposes a combined federal renewable electricity and energy efficiency standard (RES) of 20 percent. It is at this point that the

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- **2009 STIMULUS PACKAGE** – $60 billion for renewable energy. Other laws block implementation and Senators actively push to put land out of use; e.g., Feinstein to place 42,000 acres of Mojave Desert off limits to development. Adversely impacts 19 projects, all solar or wind. Similar activity in Nantucket Bay.

[2] http://www.epa.gov/cleanenergy/images/pie_chart_fuel_mix.gif.
[3] *Id.*

wheels truly begin to fall off the ACES bill. "Renewables," as defined by the bill, do not include low-emitting technologies such as nuclear energy or coal with carbon capture and sequestration. Renewables include hydropower, but only new capacity. In essence, the RES will require us to take the 2 percent of electricity currently generated from renewables and turn it into 15-20 percent over the course of 15 years—*an increase of up to 900 percent*.

Consider for a moment what this means. Two years ago, in a response to questions from the House Energy and Commerce Committee, the Chamber calculated what it would take to generate 10 percent of our electricity using wind, or solar, or biomass alone by 2020. A copy of this letter, described in further detail below, is attached to this testimony.

The Chamber concluded that if 10 percent of our electricity were to be met with wind alone by 2020, we would need to construct about 115,000 new 1-megawatt (MW) wind turbines. The total capital cost of constructing these 115,000 turbines would amount to roughly $138 billion, a figure that does not include operation and maintenance costs, which constitute 1.5 to 2 percent of the initial investment annually. 115,000 turbines of this size would occupy an area of about 18,000 square miles. In comparison, the combined area of Albemarle Sound, Delaware Bay, Pamlico Sound, Long Island Sound, Cape Cod Bay, Chesapeake Bay, Puget Sound, San Francisco Bay, Biscayne Bay, and Buzzards Bay is only 8,500 square miles. If the 115,000 1-MW wind turbines were placed in a straight line about 2,000 feet apart in the water,[4] they would have a total length of about 43,000 miles from end to end. This is nearly four times the length of the U.S. shoreline, and almost double the entire circumference of the earth![5]

Similarly, if 10 percent of our electricity were to be met with solar photovoltaics (PV) alone by 2020, we would need to put in place approximately 7.3 million 25 kilowatt (kW) PV units. The total capital cost of this investment would amount to almost $260 billion—a figure that does not include operation and maintenance costs, which constitute 1 percent of the initial investment annually.[6] However, technology constraints will again limit our deployment of 25 kW PV units, as most PV units placed on the rooftops of houses have a typical capacity of less than 10 kW. In this case, we would actually need 180 million 10 kW PV units (taking into account a 30 percent capacity factor) to generate 10 percent of our electricity from this resource alone.

Finally, if we were to generate 10 percent of our electricity from biomass alone by 2020, we would need to place either 918 100-MW biomass energy conversion units or 1,836 50-MW biomass energy conversion units nationwide.

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[4] This was the distance recommended for the turbines at the Cape Wind offshore wind farm.

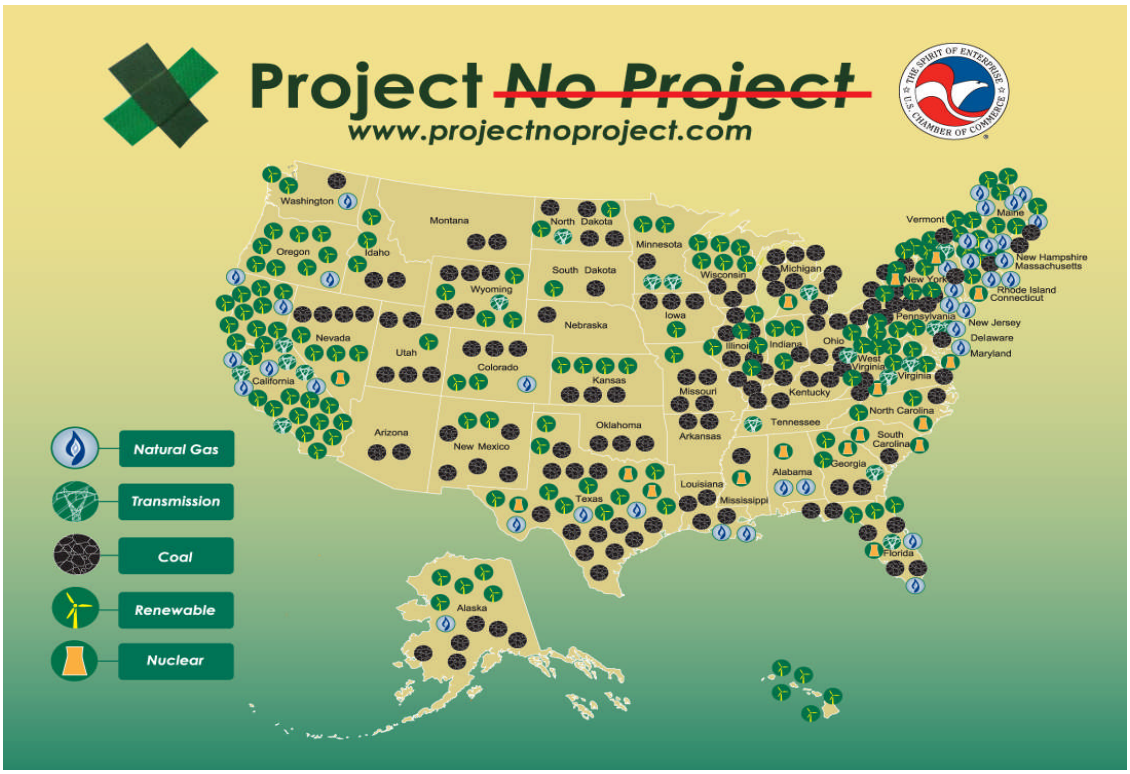
[5] Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service; *available at* http://www.teachervision.com/lesson-plans/lesson-725.html.

[6] California Energy Commission, "Economics of Owning and Operating DER Technologies", *available at* http://www.energy.ca.gov/distgen/economics/operation.html.

Hopefully, this exercise has brought into focus the tremendous amount of new electricity that will have to be brought online at a minimum to comply with just the RES portion of ACES. These calculations ignore the obvious: that the U.S. will need much greater amounts of energy to address a growing population and economy. Yet if ACES passes, some combination of the three of the aforementioned renewables options will have to be chosen by 2020, and the entire suite described above could be required by 2025. Even worse, the declining carbon cap in the ACES bill could require even more emissions-free energy than simply the 900 percent increase in renewables. Compounding the problem is the fact that wind and solar energy are intermittent technologies that must be supported by a baseload technology. If the nation is to truly reduce our use of fossil fuels, we need to promote nuclear energy and coal with carbon sequestration as baseload energy technologies, since they are the only proven technologies that produce little or no greenhouse gas emissions and can serve as a baseload energy supply in place of existing fossil fuel-fired power plants.

Logistically speaking, siting even a fraction of these new energy sources will be an almost impossible task. Beyond mandating that the technologies be deployed, the ACES bill does virtually nothing to ensure that any new, clean energy sources actually be brought online. What happens if we cannot meet these markers?

The U.S. Chamber recently launched *Project No Project*, an interactive website that serves as a repository for key energy infrastructure projects that are being thwarted at a time when our economy needs them most. The website can be viewed at http://www.projectnoproject.com. Of the 353 projects on the site that have been delayed or outright killed over the past few years, 145 of them are renewables. We have all heard the horror stories about Cape Wind—the Nantucket Bay offshore wind project could power 420,000 homes, but has been embroiled in 8 years of permitting delay—but you may not have heard about the Cascade Wind Project killed in Oregon, or the Tallahassee Renewable Energy Center biomass plant killed in Florida, or even small projects like Akeena Solar in California, who was sued when trying to install solar panels on its own roof. As the image below shows, virtually every state in the Union has experienced problems bringing energy projects online in recent years:

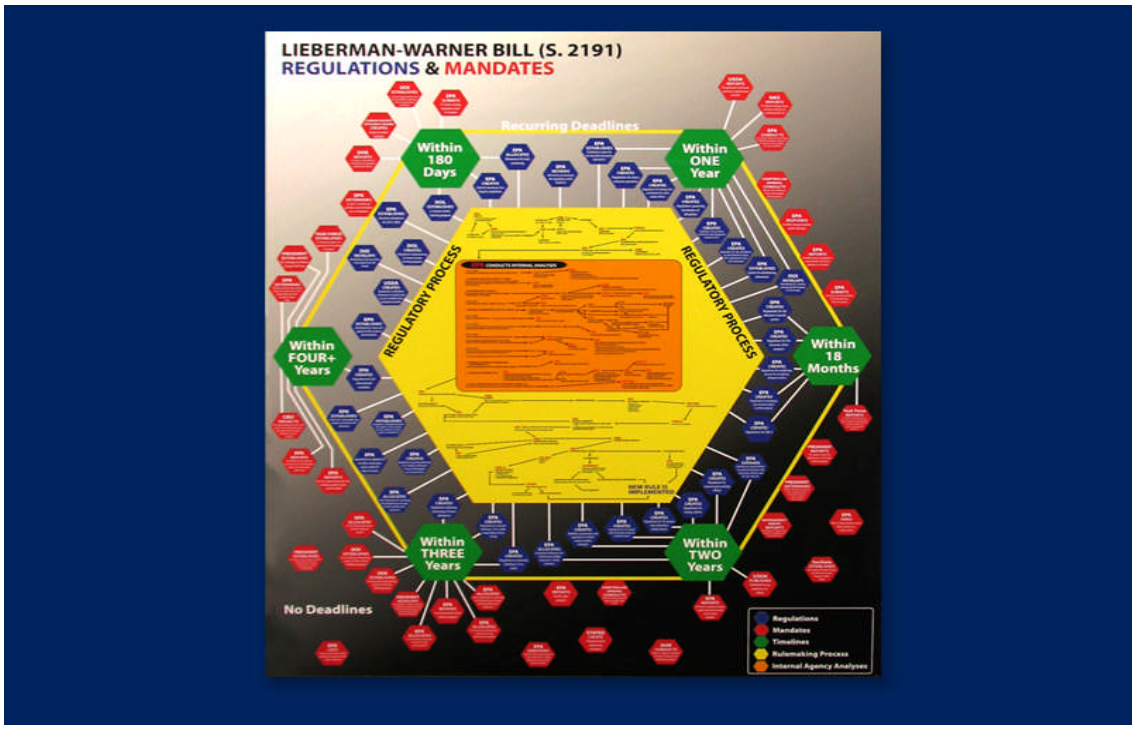


The problem will only get worse as businesses try, under the mandates of ACES, to site renewable and alternative energy sources and transmission lines in larger numbers. It is clear from *Project No Project* that many of the same groups that oppose new coal plants don't want a wind farm or renewable transmission line in their back yard either. In fact, California, the state that most forcefully argues for renewable energy mandates and federal climate legislation, is the state that has opposed the largest number of renewable projects.

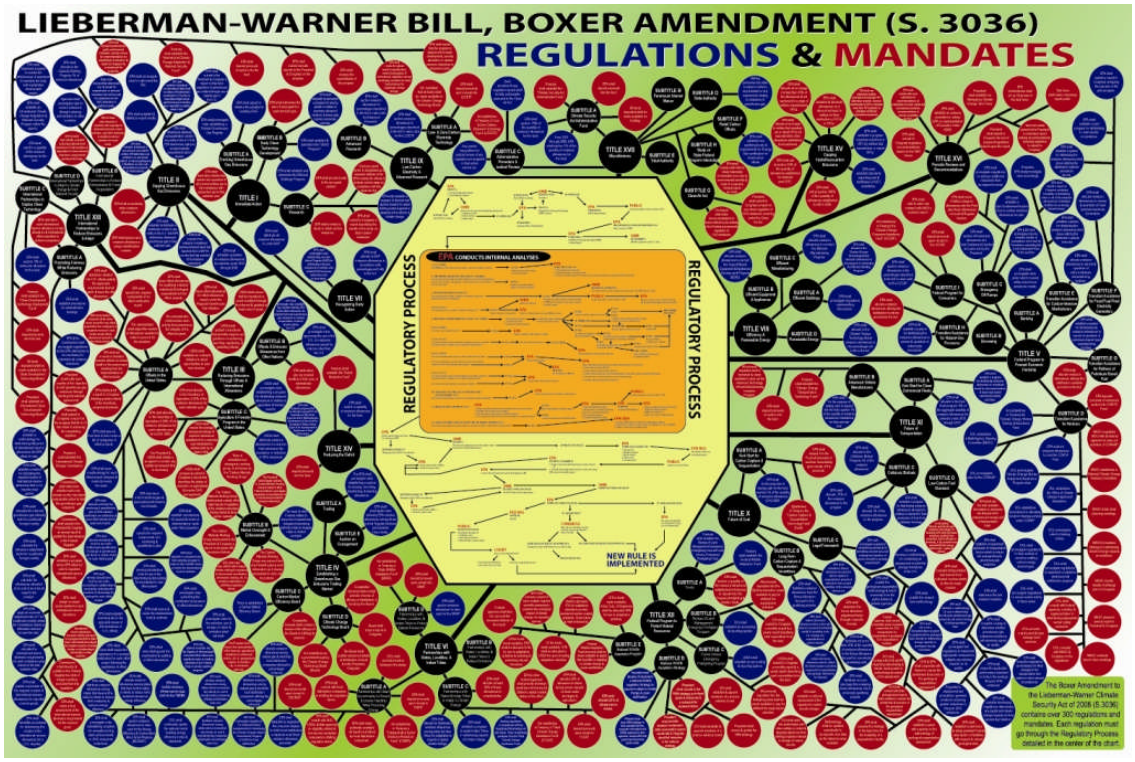
The ACES bill mandates the removal of fossil fuels from our economy, but there is no process in ACES to ensure there are replacement fuels to run our businesses, our cars and our homes. To replace these fuels, it only imposes more mandates. Until and unless the bill provides a reasonable mechanism for replacing the energy lost from its carbon caps with replacement energy—nuclear or clean coal or renewables or something else—the bill will remain fundamentally flawed.

Flaw #2: Creates a Regulatory Morass

Last year, the Chamber produced the following chart, which showed the roughly 90 regulations and mandates contained in the Committee-passed version of the Lieberman-Warner bill:

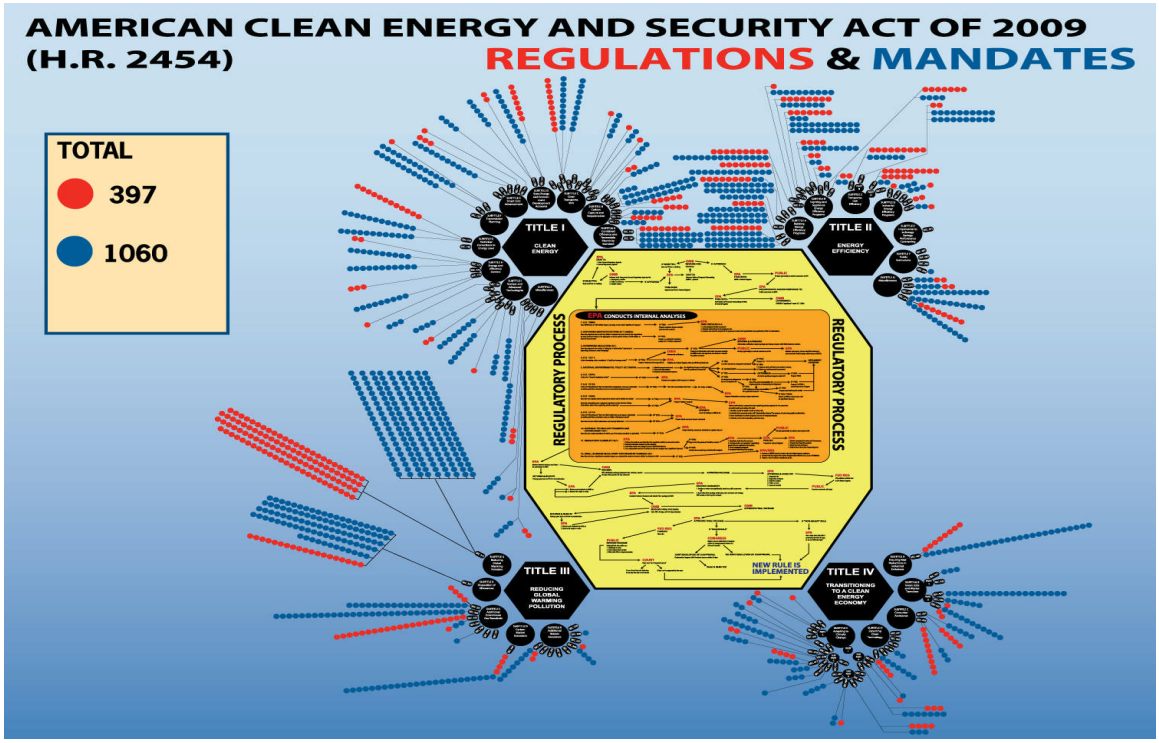


The Chamber subsequently updated the chart to display the 350 regulations and mandates contained in Sen. Boxer's amendment to that bill:



By any objective analysis, 350 regulations and mandates would have created an overwhelming new bureaucracy. After the Lieberman-Warner bill failed in the Senate, Congressional leadership acknowledged that the size and scope of the bill was a major reason for its downfall.

Fast-forward to the present day, and it appears the proponents of ACES have learned little from the lessons of Lieberman-Warner. If they had, they would not have drafted the 1500-page behemoth that is ACES, which contains over 1,500 new regulations and mandates:

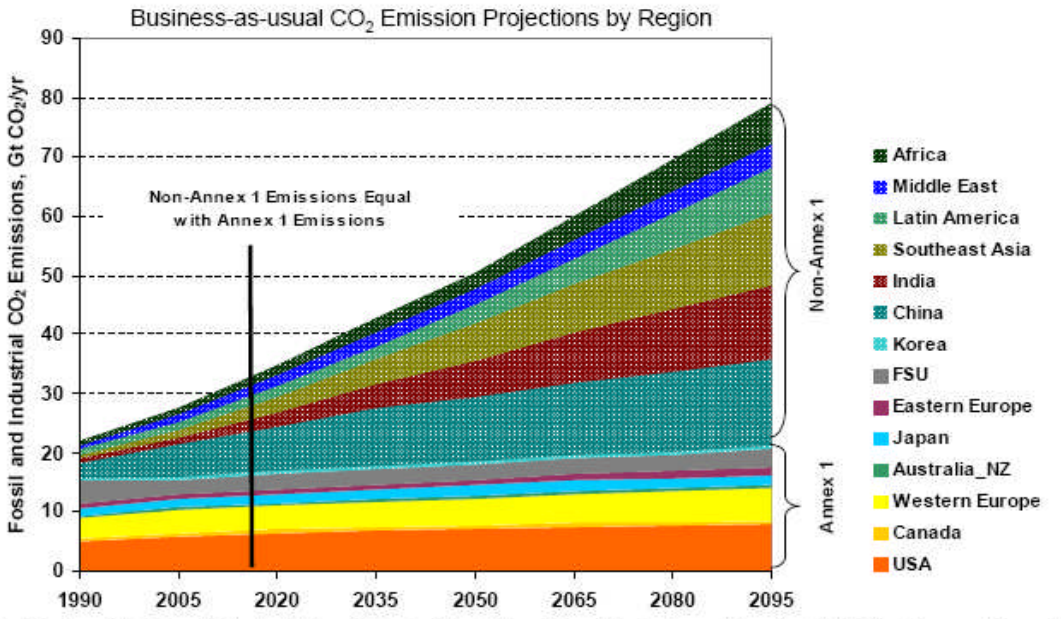


The creation of a huge new federal bureaucracy is neither cheap nor efficient, and the scope of ACES inspires little hope that the climate program created thereunder will run smoothly.

Flaw #3: Not International in Scope

The reality of global climate change is that it is a global issue that requires a global response. The vast majority—80 percent or more—of future emissions will come from developing countries, and they must be part of any solution. The U.S. has a great deal to lose, but very little to gain, from acting alone. Unconditional domestic legislation without an international agreement will remove any leverage U.S. negotiators possess in international climate change negotiations, and would put domestic industries at a competitive disadvantage.

Even if the U.S. were to eliminate all of its greenhouse gas emissions today, our CO_2 levels would not be zero, and CO_2 concentrations in the atmosphere would still increase.[7] The primary reason: although the U.S. would constrict its CO_2 emissions, very few other countries would be compelled (absent a binding international treaty) to do the same. The following chart, from the Battelle Memorial Institute, illustrates this point very well:



Data derived from *Global Energy Technology Strategy, Addressing Climate Change: Phase 2 Findings from an International Public-Private Sponsored Research Program*, Battelle Memorial Institute, 2007.

As this chart shows, business-as-usual CO_2 emissions from fossil and industrial sources in the United States remain relatively flat through the end of the century. Global business-as-usual CO_2 emissions increase roughly 2.7 times their present levels. If U.S. emissions were whittled down to zero by 2100, global emissions would *still* be about 2.5 times their present levels. Moreover, if the entire set of Kyoto Annex I "developed" countries eliminated their CO_2 emissions by the end of the century, developing nations' emissions would still be twice the size of the entire world's current emissions.

In terms of skyrocketing global greenhouse gas emissions, the United States will be a smaller and smaller contributor over the rest of the century. A domestic-only bill like ACES will undoubtedly make life more difficult on businesses and consumers in the United States, but will have little real impact on global CO_2 levels when all is said and done.

To ensure America's continued competitiveness in the global marketplace, Congress and the Obama administration must not act alone; the United States must reach out to the other nations of the world and "move together." Any new national climate change policy should therefore be conditional on an international agreement that requires

[7] *See, e.g.*, presentation entitled "CO_2 Stabilization in a Heterogeneous World," Leon Clarke, et al. (July 13, 2007), available at http://www.uschamber.com/issues/index/environment/climate_change.htm.

full international participation. To combat global climate change, world leaders must agree to a treaty that sets real—and realistic—enforceable targets for all nations, while allowing each nation the flexibility to meet these targets through whichever policy device it chooses. Under such a global system, the European Union can retain its Emissions Trading System, Japan can proceed with its preferred "sectoral approach," Brazil can focus on reducing emissions from deforestation and forest degradation, and still other nations can choose to implement their own cap and trade system, carbon tax, or other program. In the U.S., Congress and the Administration can figure out the best approach to addressing emissions without concern for leakage of jobs or trade wars because the entire world will be making contributions to eventually stabilizing greenhouse gas concentrations in the atmosphere.

As a new treaty is being negotiated, the Obama administration should continue with its aggressive corporate average fuel economy (CAFE) program, make robust investments in research, development and deployment of clean energy and energy efficiency technologies, and continue to implement the fuels and efficiency laws already on the books, such as the Energy Policy Act of 2005 (EPAct 2005) and Energy Independence and Security Act of 2007 (EISA). All of these measures will reduce emissions of greenhouse gases; after all, that should be the goal. Any new measures, whether legislative or regulatory, should be conditional on and consistent with a new international agreement. The Chamber's proposal is compatible with legislation that Congress has considered and overwhelmingly approved in the past, including the Byrd-Hagel resolution of 1997, and the Hagel-Pryor provisions of EPAct 2005.

The Chamber believes the new international approach should:

- Consider growing energy needs;
- Set realistic and achievable goals;
- Strike a balance between environmental protection, energy security, and economic growth;
- Ensure global participation, including binding commitments by emerging economies;
- Allow for diversified approaches;
- Ensure that mitigation actions by all parties are measurable, reportable, and verifiable;
- Recognize technology development and commerce as crucial prerequisites to achieving emission reductions;
- Protect intellectual property rights;
- Remove trade barriers to environmental goods and services; and
- Place the U.S. on an equal competitive footing with the rest of the world.

The Chamber is working closely with business groups from other nations to make sure that a new international climate change arrangement will make a real environmental difference without tanking the economy. At a meeting of international business groups from five continents in Copenhagen in February, and at the G8 business summit in Italy

in April, the international business community endorsed many of the same principles outlined above.

Flaw #4: Border Tariffs

The House-passed version of ACES includes tariffs on carbon-intensive imports. Such provisions should be rejected because they would likely be deemed to violate U.S. obligations as a member of the World Trade Organization and could spark a trade war. While the trigger dates for border measures in the bill are unclear, there is virtual certainty that after 2020 such border measures would be put in place. Absent a global agreement on greenhouse gas emissions, such a program would invite retaliation against U.S. exporters and make U.S. companies that rely on imports less competitive without any indication that emissions would be reduced. These provisions also violate the April 2, 2009 commitment of the United States and other G20 countries to "refrain from raising new barriers to investment or to trade in goods and services."

Flaw #5: Avenues for Lawsuit Abuse

A. Findings and Purpose

Section 701, the "Findings and Purpose" section of the cap and trade portion of ACES, makes such broad, aggressive statements regarding injuries from greenhouse gas emissions (e.g., anthropogenic emissions are causing bodily injury, disease, loss of life, property damage, etc.) that codification of these findings could be used to generate mass tort litigation. Because such litigation would be brought under state law, it is likely that judicial interpretations (and determinations) will be wildly inconsistent from state to state.

Many cases alleging tort liability arising from climate change have been unsuccessful for a variety of factors, such as an inability to prove causation or injury, to decipher specific standards of conduct, and to circumvent the notion that climate injury is a political question. If the Findings and Purposes language contained in Section 701 of this bill were codified, a plaintiff could easily argue that ACES satisfies each one of those open issues, and could ultimately obtain damages from greenhouse gas emitters of all sizes. If the purpose of ACES is to create a comprehensive management system for greenhouse gas emissions, why then leave such an opening to make greenhouse gases the "next asbestos" for the trial bar?

B. State Attorneys General

Dangerous provisions in ACES that could lead to widespread lawsuit abuse should be removed or mitigated. Section 213(i) of ACES would empower state attorneys general to enforce the labeling and energy conservation standards of the Energy Policy and Conservation Act ("EPCA").[8] Such suits can be brought against a variety of

[8] 42 U.S.C. § 6201 *et seq.*

manufacturers, including companies that make home appliances, lighting products, plumbing fixtures, and heating and air conditioning products.

Specifically, while the EPCA currently authorizes only the Federal Trade Commission to seek injunctive relief to restrain alleged violations of those standards,[9] ACES would amend that section of the EPCA to provide that injunctive relief may be sought by "the Commission or by the attorney general of a State in the name of the State . . . ."[10] This relief includes the power to "restrain . . . from distributing in commerce" any covered product that does not meet EPCA requirements. In effect, ACES would deputize non-federal officials with the authority to enforce federal law.

Moreover, under the venue provision of ACES § 213(i), any state attorney general is authorized to bring an enforcement action in any "district wherein any act, omission, or transaction constituting the violation occurred, or in such court of the district wherein the defendant is found or conducts business."[11] Thus, a company could face overlapping lawsuits from various attorneys general in multiple federal courts regarding the same alleged practice.

The fundamental problem that underlies the state attorney general enforcement provision is that it lacks critical safeguards against litigation abuse; it is therefore likely that the provision will result in significant, adverse consequences. More specifically, the state attorney general provision is likely lead to: (1) frivolous and unnecessary litigation, imposing substantial costs on both businesses and consumers; and (2) the distortion and undermining of federal environmental policy initiatives, as non-federal actors—whose incentives and limitations vary from those of their federal counterparts—take on a substantial role in enforcing the EPCA.

Section 213(i) carries a risk of fomenting frivolous litigation. There are a host of federal statutes and rules, such as federal ethics regulations, intended to ensure that federal actors do not use their public authority to further private political ends and to protect against the subversion of federal enforcement actions. These protections, however, do not extend to non-federal public actors charged with enforcing federal law; accordingly, state attorneys general may use their authority under the EPCA to serve personal ends—*e.g.*, by hiring outside counsel based not on merit, but as a reward for political support—without necessarily running afoul of legal restrictions. And given the recent scandals involving state attorneys general using their offices to reward campaign contributors,[12] it is possible that at least some state attorneys general operating under Section 213(i) will misuse their authority in such a fashion.

The likelihood of such misuse is exacerbated by the way the statute is currently drafted. In its current iteration, the bill would allow state AGs to sue over alleged EPCA

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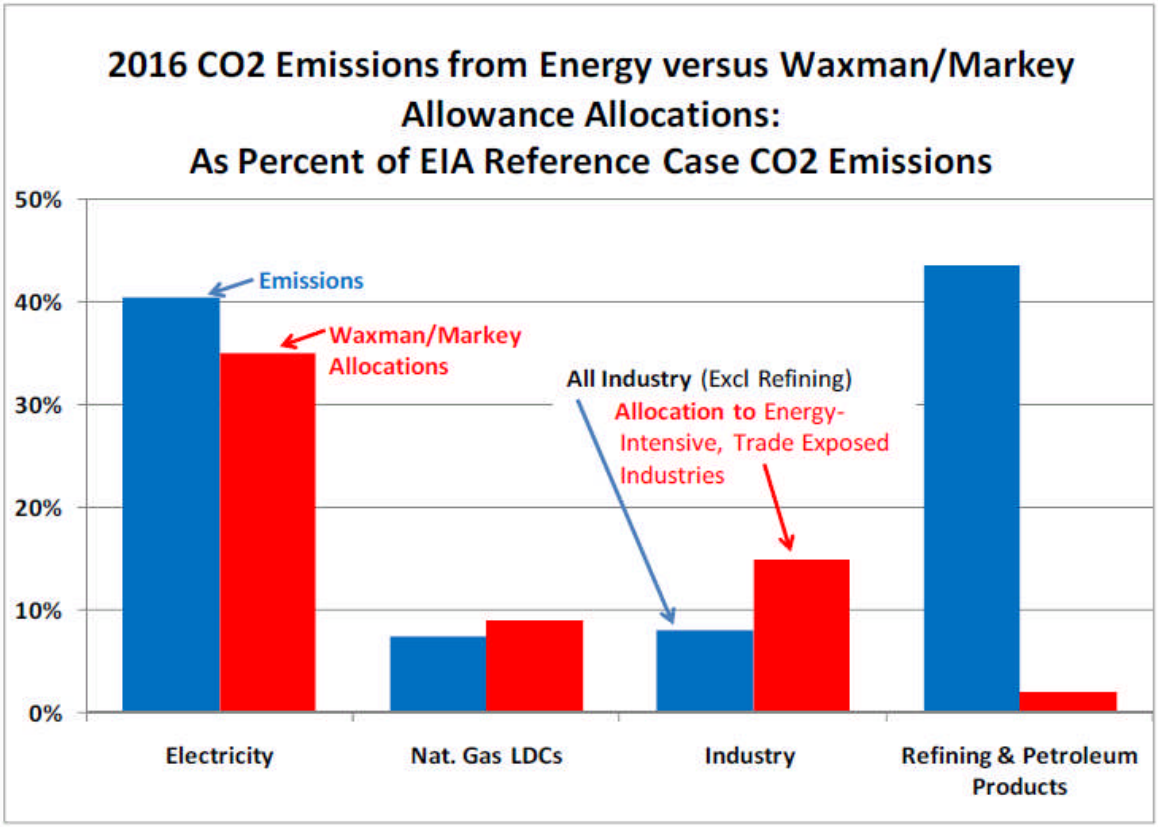
[9] *See* 42 U.S.C. § 6304(a).
[10] ACES § 213(i).
[11] *Id.*
[12] *See, e.g.*, "Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar," John Fund, *available at* www.instituteforlegalreform.com/get_ilr_doc.php?id=820.

violations occurring in other states that they claim affect their own states. The possibilities for suits against companies big and small—from lighting fixture manufacturers to large appliance-makers—in virtually every federal court in the country are endless. For example, the California AG could theoretically bring a suit for injunctive relief seeking to restrain product distribution against a New Jersey-based plumbing manufacturer in federal court in New Jersey, in coordination with private plaintiffs' attorneys in that state, alleging that its bathroom fixture labeling violates federal regulations under the EPCA. The lawsuit would theoretically benefit Californians who purchase that company's products, but the real beneficiaries would be the private attorneys in New Jersey (and every other state where these manufacturers are based) who could essentially pitch their services to 50 different state AGs.

Flaw #6: Impact on Oil Prices

This legislation must equitably allocate credits to the refinery sector. Oil refineries bear a compliance obligation under ACES for more than 40 percent of covered CO_2 emissions—refiners' own emissions plus the emissions generated when the fuels they refined are eventually burned by consumers—yet would receive only 2.25 percent of the allocations. The American Petroleum Institute illustrates the problem in the following chart:



Because oil refiners will be forced to pay for credits under ACES from the very start, the price of gas will rise significantly for consumers. In fact, the Congressional Budget

Office estimates that cost impacts by 2020 could be as much as $.77 per gallon for gasoline, $.83 per gallon for jet fuel, and $.88 per gallon for diesel fuel, all ultimately borne by the consumer.

Flaw #7: Where is Nuclear Power?

When ACES was first released in the House Energy and Commerce Committee, the word "nuclear" appeared only twice. It took an amendment by Rep. Dingell during committee markup to add the small section on nuclear energy currently contained in the bill. Still, there are few if any incentives for nuclear power in the bill, nor is nuclear part of the RES.

What is truly disingenuous about the general disapproval of nuclear power in ACES is that, in EPA's economic analysis of the bill, it assumes that nuclear energy will *increase* by 150 percent by 2050. (This is the main reason EPA's estimate of costs to consumers is low compared to other analyses.) This is a ludicrous assumption, given that a new nuclear power plant has not been constructed in the U.S. for 30 years, and that the bill does little to nothing to spur the deployment of new nuclear power plants.

There is no good reason for keeping nuclear energy, an emissions-free energy source, out of the RES. In May 2009, the Massachusetts Institute of Technology released a report titled *An Update of the MIT 2003 Future of Nuclear Power*, which concluded that policies that exclude nuclear and clean coal from an RES "confus[e] the objective of reducing carbon emissions with encouraging renewable energy in electricity generation." At this critical juncture in the debate over addressing climate change, common sense must prevail over baseless opposition from environmental groups on the issue of new nuclear power.

Flaw #8: Incomplete Clean Air Act Preemption Creates Regulatory Chaos

Businesses want regulatory certainty in a climate bill; by not preempting the Clean Air Act in full, ACES provides a great deal of regulatory *un*certainty.

ACES does not completely preempt the New Source Performance Standards (NSPS) program under Section 111 of the CAA. Section 111 requires EPA to publish regulations establishing federal standards of performance for new sources within certain categories determined by EPA. Currently, NSPS categories include boilers, landfills, petroleum refineries and turbines; there are 70 categories and sub-categories in all. A "standard of performance" is defined in pertinent part as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." This standard is better known as "best demonstrated technology."

Once EPA has established standards of performance, states are required to submit to the agency a procedure for implementing and enforcing such standards for new or modified sources located in the state. In addition, EPA must promulgate regulations setting forth procedures for state establishment of standards for *existing* sources.

ACES cuts out all "capped" emitters that emit over 25,000 tons of greenhouse gases, other than coal-fired power plants, from NSPS. (Coal-fired power plants have to cope with a specific new set of NSPS involving carbon capture and sequestration technology, as set forth in ACES.) However, all new and existing sources that emit between 10,000 and 25,000 tons of greenhouse gases per year *will* be covered by ACES, and will have to comply with NSPS. This means EPA will be required to issue plant-by-plant standards of performance for CO_2, and all the entities in the 10,000 to 25,000 ton range will have to install best demonstrated technologies as determined by EPA. This is a significant expense that appears to have become lost during the public debate on ACES.

Even more troubling, however, is the fact that ACES does not explicitly prohibit the development of NSPS for sources that emit *less* than 10,000 tons per year of greenhouse gases. This hands-off approach could result in the imposition, through something as simple as a lawsuit, of NSPS to a limitless number of source categories. Moreover, because EPA has now signaled its intent to find "endangerment" for greenhouse gases under the Clean Air Act, an environmental group intent on forcing NSPS for all stationary sources not explicitly preempted by ACES (i.e., anything and everything that emits less than 25,000 tons per year of CO_2) would have a much easier time doing so in the courts than in the past, as endangerment triggers NSPS. A lawsuit of this nature is a virtual certainty; for instance, the Center for Biological Diversity wrote in its 2008 comments on EPA's Advance Notice of Proposed Rulemaking that EPA must create NSPS for all source categories that are "major sources," meaning those that emit more than 250 tons of CO_2 per year.[13]

Moreover, ACES only preempts the imposition of National Ambient Air Quality Standards (NAAQS), New Source Review (NSR), and other programs for greenhouse gases to the extent GHGs relate to global climate change. However, ACES does not preempt application of those programs to GHGs to the extent that they contribute to something *unrelated to climate change*—such as ocean acidification. Environmental groups have confirmed that this is an avenue they plan to take.[14] If NAAQS, NSR and other programs were allowed to trigger for GHGs under the guise of protecting against ocean acidification, the protections intended by ACES would become moot, and 1-2 million U.S. businesses would be forced to deal with costly, burdensome permitting processes, installation of new equipment, and other Clean Air Act-related headaches.[15]

Flaw #9: Federal and State Disharmony

ACES addresses state and regional programs in two ways. First, it allows holders of emission allowances from the Regional Greenhouse Gas Initiative (RGGI) or the State of California to exchange these allowances for an equivalent set of allowances in the

[13] Comments of the Center for Biological Diversity on EPA's Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008), Docket ID No. EPA-HQ-OAR-2008-0318, at 32.

[14] The Center for Biological Diversity has already initiated litigation on the issue of ocean acidification, with the goal being to use existing laws to regulate greenhouse gases from a wide range of sources.

[15] *See, e.g.*, "A Regulatory Burden: The Compliance Dimension of Regulating CO2 as a Pollutant," *available at* www.uschamber.com/assets/env/regulatory_burden0809.pdf.

federal program. Second, it delays the implementation of any state or regional program for five years, until 2017. After that, the bill does not preempt state or regional programs.

Allowing a free exchange of allowances from existing state or regional programs to the federal program creates its own unique set of problems, particularly considering that the cost of RGGI credits have been in the range of $3 to $3.50 while credits in a federal program could range from $11 to $15 to $60 or even higher. Depending on the exchange rate of credits from RGGI to the ACES program, a RGGI participant could easily become very rich or very poor.

The larger problem, however, is the failure to preempt permanently state or regional climate programs. ACES does very little to preempt state programs other than delay their implementation for five years. Compliance with the federal cap-and-trade program set by ACES will undoubtedly be extraordinarily complicated for businesses, who will be forced to comply with hundreds of new regulations and mandates, amounting to layer upon layer of red tape. To tack on a state program, or a regional program, or both, is to make an already-cumbersome cost of compliance tantamount to an incentive to relocate a business to another state, or, worse yet, another country.

An additional concern is Section 334 of ACES, which expressly permits a state to require the surrender of federal emissions allowances as a means of demonstrating compliance with a state program. The cap and trade program set up by ACES establishes a "bucket" of allowances available annually to covered entities. Each year, the number of allowances in that bucket is reduced, with the intent being progressive emissions reductions over time. But Section 334 effectively allows a state like California to poke a hole in the bottom of that bucket and drain federal allowances out of the national program by forcing them to be surrendered by sources within the state. Indeed, the bill gives states the express authority to adjust the size of that hole without regard to any national allowance budget set by Congress. By draining and/or retiring these federal allowances to meet state mandates, the remaining credits in the federal system would spike upwards in price. The requirements of Section 334 could be imposed above and beyond the compliance requirements established by Congress under the federal program, including during the "five year moratorium period."

Flaw #10: Potentially Negative Impact on Jobs and the Economy

ACES is being sold as a "green energy and jobs" bill. In fact, it is rare to hear the words "climate change" or "global warming" anymore from the bill's proponents; their sales pitch is primarily about jobs and green energy. This game of "hide the ball" is potentially very misleading.

A May 2009 study released by the National Black Chamber of Commerce estimates annual drops in gross domestic product (GDP) of $170 billion in 2015, $350 billion in 2030, and $730 billion in 2050. More troubling is the effect on jobs, as the study concludes that 2.3 million to 3 million net jobs will be lost—a figure that accounts for all the "green" jobs created.

Further proof that ACES is a job killer can be found in Sections 425 and 426 of the bill, which together create a "Climate Change Worker Adjustment Assistance" program. This program essentially compensates workers in service industries who lose their jobs due to the impacts of ACES (in an amount up to 3 times their weekly pay or a one-time payment of $1500, plus optional relocation and job training reimbursement, plus partial health insurance continuation), and provides assistance and training to these workers to get "green" jobs. The obvious assumption being made by the drafters of this provision is that a wide range of workers will lose their jobs as a result of the bill. To those that claim ACES will not cause the loss of jobs, why then does the bill provide what is essentially unemployment assistance to those workers who do lose their jobs?

As this joint caucus is aware, cost estimates of ACES do vary widely. The House debate was marked by claims that the bill will cost "less than a postage stamp" per day. However, because all estimates of this bill's costs will come from economic models, a great deal depends on the assumptions made by the economist building the model itself. For instance, the U.S. Environmental Protection Agency (EPA) predicts that the bill will have relatively modest costs, but hidden in its analysis is the assumption that nuclear power will increase by 150 percent by 2050. There are 104 nuclear power plants in the U.S. today, and we have not built a new one in over 30 years, yet EPA seems to believe we will erect three to four per year in each of the next 40 years.

Flaw #11: Derivatives

The derivatives provisions in ACES, as written, would hinder the ability of companies to use over-the-counter (OTC) derivatives to manage risks associated with day-to-day operations. The scope of these provisions go beyond the establishment of an oversight structure for carbon derivatives, and extend to the broader OTC and exchange-traded markets. The importance of these markets and the potential impact on the economy command consideration within the context of financial regulatory reform. In that context, the Chamber would support an approach that strikes the right balance by promoting clearing for standardized contracts where appropriate, and enhancing the transparency of customized, OTC contracts through a reporting regime that gives regulators a market-wide view. This change would improve regulatory oversight of the OTC markets, while upholding the ability of companies to customize derivatives to effectively and efficiently manage risk.

In addition, Section 356 of Subtitle E of ACES would impose a user fee on transactions cleared through derivatives clearing organizations (DCO). This transaction tax would adversely impact liquidity on U.S. futures exchanges, because it would fall disproportionately upon the market makers who provide liquidity to the exchanges through the frequency and speed of their transactions. In addition, it would have negative competitive implications for the U.S. by driving trades to foreign or untaxed markets. Lastly, at a time when policymakers are trying to enhance transparency and encourage central clearing, this provision would create a strong disincentive to clearing through a DCO.

Flaw #12: Davis-Bacon Act

The Davis-Bacon Act in no way furthers the United States' ability to reduce climate emissions, and would result in diminished competition, shutting out many qualified minority, small, and non-union businesses from the entire market. Yet the entire ACES bill, and any money flowing out of it, will be subject to Davis-Bacon requirements. Applying the Davis-Bacon Act to programs in H.R. 2454 would increase costs to taxpayers, who would pay more to get less. The Davis-Bacon Act has been shown to increase public construction costs by anywhere from five to 38 percent above projected costs for the same project in the private sector.

Flaw #13: Other "Paraphernalia"

A great deal of ACES is language establishing standards for virtually everything we use to become more energy efficient. Energy efficiency is a good thing—that matter is not up for dispute. But the energy efficiency language in ACES is so specific, and so aggressive, that at times it crosses into absurdity.

For instance, ACES contains 22 pages of lighting efficiency standards, for such categories of lighting as:

- Underwater swimming pool lights;
- Portable luminaires designed for use at construction sites;
- Decorative gas lighting systems;
- Lights designed primarily for use in theme parks;
- Stage lights used in theaters; and
- Art work light fixtures.

ACES also requires DOE to establish a "best in class" status for the most energy efficient products (the top 10 percent most efficient models in the class); the label for these products will state "best in class." However, DOE must also offer incentives to retailers or distributors to sell these "best in class" products in lieu of other, non-best-in-class products. So, theoretically, if a customer walks into his or her local electronics store to buy a TV, the salesman has a financial incentive to sell one of the two "best in class" TVs instead of the 18 other TVs in the store. If the customer trades in an old TV in conjunction with the best in class sale, the salesman gets even more money from the government. Products covered by the provision are appliances, equipment and electronics.

It is one thing to create the best in class category and the label, but it is something else entirely to manipulate the sales of a product irrespective of consumer preference. And if the products differ in price (i.e., the best in class product is more expensive), even worse. It is certainly conceivable that the manufacturer of a best in class product will raise the price of that product, since it will have a dedicated sales force ready to sell its

product instead of its competitors' product, regardless of price, with a bonus from the federal government as the payoff. This is a very dangerous precedent.

ACES also gives the federal government power over local building codes. Specifically, it requires that by 2012 codes must require that new buildings be 30 percent more efficient than they would have been under current regulations. By 2016, that figure rises to 50 percent, with increases scheduled for years after that. With those targets in mind, the bill expects organizations that develop model codes for states and localities to fill in the details, creating a national code. If they don't, the bill commands the Energy Department to draft a national code itself. States, meanwhile, would have to adopt the national code or one that achieves the same efficiency targets. Those that refuse will see their codes overwritten automatically, and they will be docked federal funds and carbon allowances. The Energy Department also could enforce its code itself. Among other things, the policy would demonstrate the new leverage of allocation of allowances as a sort of carbon currency—leverage this bill would be giving to Congress to direct state behavior.

III. Conclusion

The slim margin of victory on ACES in the House should have been a signal to its drafters that they should go back to the drawing board. However, here we sit today, with the Senate wanting to move full speed ahead on a bill that will not, if passed, reduce concentrations of GHGs in the atmosphere, but will certainly make energy scarce and more expensive and balloon the EPA's bureaucracy. In fact, the only jobs it will create will be trial lawyers and bureaucrats. The Chamber remains committed to working with Congress to achieve meaningful climate change legislation that provides a stable and growing economy, and promotes the development of needed new sources of energy and technologies across a range of industries. ACES, as currently drafted, is not this legislation.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Attachment: Letter from R. Bruce Josten to Chairmen John Dingell and Rick Boucher, June 15, 2007.