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The Clean Energy Jobs and Oil Company Accountability Act of 2010 (S. 3663)

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Legislative Summaries

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The Clean Energy Jobs and Oil Company Accountability Act of 2010 (S. 3663)

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After Senate Democrats ended their efforts to pass the much debated cap-and-trade bill, Senate Majority Leader Harry Reid moved forward with a smaller bill to address the then-ongoing Deepwater Horizon disaster and offer other, more palatable clean energy propositions.[1] The end result was the Clean Energy Jobs and Oil Accountability Act of 2010.[2] The bill promotes the use of clean energy and energy efficiency programs, as well

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1. Darren Samuelsohn and Coral Davenport, *Dems Pull Plug on Climate Bill*, POLITICO, July 22nd, 2010, *available at* http://www.politico.com/news/stories/0710/40109.html (last visited Oct. 11, 2010) (on file with the Journal of Energy, Climate & the Environment); Cristina Silva, *Renewable Energy Touted at Nevada Policy 'Summit,'* THE ASSOCIATED PRESS, Sept. 7, 2010, *available at* http://abcnews.go.com/Business/wireStorey?id=11576767 (last visited Oct. 11, 2010) (on file with the Journal of Energy, Climate & the Environment).

2. Clean Energy Jobs and Oil Accountability Act of 2010, S. 3663, 111th Cong. [hereinafter Clean Energy] (2010).

as promulgating environmental and legal liability changes to increase oversight and regulation of the oil industry.

I. Division A—Oil Spill Response and Accountability

Title I modifies the legal liabilities of companies engaged in offshore drilling.[3] The bill removes the liability cap on responsible parties in an offshore drilling oil spill and retroactively removes the cap on any claims arising from events that occurred prior to the enactment of the bill, principally the Deepwater Horizon disaster.[4] The liability cap was previously set at $75 million.[5] The time that a victim of the oil spill must wait before filing claims is now cut from 90 days to 30 days.[6] The Act also directs the President to create a comprehensive response plan to guide the federal government's response to similar disasters in the future.[7]

Title II seeks to enhance the research and facilities of the federal government and strengthen its oil spill response capability.[8] The Act expands the duties of the Interagency Coordinating Committee on Oil Pollution Research and its member agencies to specifically include research and development of response capabilities targeted at extreme or harsh conditions on the outer Continental Shelf.[9] Congress created the Committee to coordinate a research and development program in cooperation with the oil industry and academic research institutions, among others.[10] The Committee's agency members are also directed to fund "research centers of excellence" that focus on developing technologies to respond to offshore oil spills.[11] Current funding levels for the program will be increased to reflect the new grant programs.[12]

Title III reforms the role of the Department of the Interior in managing natural resources located in the outer Continental Shelf.[13] Several new government bureaus will be created to handle the oversight, royalty payments, and regulatory management of oil and gas extraction from the outer Continental Shelf.[14]

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3. *Id.* § 102.
4. *Id.*
5. 33 U.S.C. § 2704(a)(3) (2009).
6. Clean Energy, *supra* note 2, § 103.
7. *Id.* § 104.
8. *Id.* § 202.
9. *Id.* §§ 203–205.
10. 33 U.S.C § 2761(a)(2) (2009).
11. Clean Energy, *supra* note 2, § 205(a)(7).
12. *Id.* § 205 (b)–(c).
13. *Id.* § 302.
14. *Id.* § 305.

When considering the grant of an offshore drilling lease, the agency must give equal consideration to economic and environmental concerns.[15] Any company that the Secretary of the Interior finds has "failed to meet the obligations of the responsible party" under the Oil Pollution Act of 1990 or has not met safety and environmental standards on other leases will be disqualified from bidding on new oil and gas drilling leases.[16] Before an underwater drilling lease is accepted, a potential lessee will have to present an exploration plan and an in-depth response plan for any potential blowouts.[17] The well system will also be reviewed by agency engineers to assure that all blowout technologies used are the best available.[18] Potential lessees must also submit a "safety and environmental plan" and ensure that two "environmental and safety managers" are present on the oilrig at all times.[19] Leases may be rejected for "exceptional" reasons, such as the likely probability of serious damage to marine life and coastal environments.[20]

The Secretary of the Interior must require that all new and existing drilling operations use the best available technologies in well operation and design.[21] The Secretary is also directed to research and publicly identify the best available technologies for well design, as well as to disseminate the best practices in safety and environmental concerns in energy and mineral resource exploration.[22]

Additionally, the Secretary will investigate any loss of control over the well and publicize the results.[23] Civil penalties for violations will be more than tripled to $75,000 per day, and criminal penalties drastically increased from $100,000 to $10 million.[24] The Act lowers the threshold for criminal liability in cases in which corporate officers or agents have ordered prohibited activity from "knowingly and willfully" to "with reckless disregard."[25]

Potential conflicts of interest will be minimized as no former Interior Department employee will be allowed to contact anyone in the Department regarding any matter currently before the Department for two years after their tenure at the Department ends.[26] Additionally, the former Department employees will be forbidden from taking jobs or payments for one year

15. *Id.* § 306(f).
16. *Id.* § 306(d).
17. *Id.* § 306(e).
18. *Id.* § 306(e)(3).
19. *Id.*
20. *Id.*
21. *Id.* § 306(h)(2).
22. *Id.*
23. *Id.* § 306(i).
24. *Id.* § 306(j).
25. *Id.*
26. *Id.* § 305(l).

after their tenure at the Department from any employer who had any interest pending before the Department one year before the employee's departure.[27]

The Act includes deepwater oil drilling under the Energy Department's Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Research Fund for the purposes of researching "safe and environmentally responsible" exploration and extraction of oil and gas.[28] The section, renamed "Safe Oil and Gas Production and Accident Prevention," had previously been applicable to only ultra-deepwater drilling.[29]

Title IV sets up revisions to the current environmental crimes regime. The U.S. Sentencing Commission will review and amend current sentencing guidelines for criminal offenses under the Federal Water Pollution Control Act to reflect the heightened severity with which Congress views the crimes.[30]

Title V, the "Fairness in Admiralty and Maritime Law," triples the liability of a vessel to three times the total value of the vessel and the pending freight.[31] In any maritime tort action, punitive damages will be assessed without regard to the amount of compensatory damages.[32] Plaintiffs in a wrongful death action where the death occurred on the high seas will be able to recover for pain and suffering, as well as any pecuniary losses.[33] Lawsuits concerning aviation accidents occurring on the high seas will also be able to be brought in admiralty as well as in law under this legislation.[34] Fishing vessels will be excluded from the foregoing clauses.[35]

Title VI improves the National Oceanic and Atmospheric Administration's (NOAA) ability to respond to oil spills.[36] NOAA will also monitor the long-term environmental effects of the Deepwater Horizon disaster in the Gulf of Mexico.[37] The Secretary of Commerce will be required to research and take action to improve the ability of the U.S. to respond to oil spills in Arctic waters.[38] The Coast Guard will also increase the frequency and thoroughness of inspections for safety and environmental soundness of all tankers that enter U.S. ports.[39] The Coast Guard is also

27. *Id.* § 305(l).
28. *Id.* § 309.
29. 42 U.S.C. 16372 (2009).
30. Clean Energy, *supra* note 2, § 402.
31. *Id.* § 502(a)(1).
32. *Id.* § 503(a).
33. *Id.* § 504(a).
34. *Id.* § 504(b).
35. *Id.* § 504(c).
36. *Id.* §§ 601–611.
37. *Id.* § 615.
38. *Id.* § 616.
39. *Id.* § 625.

directed to review current shipping channels, and, if necessary, reroute the channels away from ecologically or economically important waters.[40] The Act also raises the liability cap on the removal costs of tanker ships of all types.[41]

Title IX includes provisions that make it unlawful for anyone to cause any damage to a coral reef, subject to certain exceptions.[42] Persons or corporations found in violation of the Act will be liable for damages and response costs, as well as administrative and judicial penalties.[43] Liability is also extended to incidents where *in rem* jurisdiction is possible.[44] Interference with enforcement of the Act will be met with up to ten years in jail as well as fines of up to $1 million.[45]

II. Division B—Reducing Oil Consumption and Improving Energy Security

Aimed at reducing our nation's domestic oil dependence, Title XX creates a Natural Gas Vehicle and Infrastructure Development Program within the Department of Energy to promote the use of alternative transportation fuel, specifically natural gas.[46] Incentives to take part in this program include rebates for qualified owners who purchase qualified alternative fuel vehicles and a rebate of up to ninety percent of the incremental cost of an alternative fuel vehicle, and rebates are not taxable.[47] The Act instructs the Secretary of Energy to provide grants to refuelers who install natural gas refueling stations between 2011 and 2015 and to manufacturers for research, development, and demonstration projects on certain engine types.[48] The Secretary is also directed to promulgate a direct loan program for domestic manufacturers to aid in reequipping facilities to produce alternative fuel vehicles or any component part.[49] The Act provides $4.5 billion in total program funding.[50]

Title XXI creates the National Plug-in Electric Drive Vehicle Deployment Program, which aims to promote the deployment of plug-in electric drive vehicles and the successful integration of plus-gin electric drive vehicles into electric grids, as well as to increase consumer knowledge and acceptance of such vehicles.[51] The Energy Secretary is to

40. *Id.* § 627.
41. *Id.* § 630.
42. *Id.* § 906.
43. *Id.* § 907.
44. *Id.*
45. *Id.*
46. *Id.* § 2002(a).
47. *Id.* § 2003(b)–(c).
48. *Id.* § 2004(b).
49. *Id.* § 2005(a).
50. *Id.* § 2003(d)(1)–(e)(1).
51. *Id.* § 2111(b).

collect and disseminate data and technical assistance to State and local governments related to the successful deployment of plug-in electric drive vehicles.[52] The Secretary will also establish feasible national goals for market penetration, including the establishment of deployment communities from which information may be gathered related to better promotion of these vehicles and reduction of barriers to their deployment.[53] The subtitle provides grants for training electricians, engineers, mechanics, and inspectors.[54] Additionally, federal governmental agencies operating a fleet of twenty or more vehicles will be required to look into the feasibility of integrating plug-in electric drive vehicles.[55] The Act provides $500 million in funding for the program.[56]

Subtitle B, Research and Development, establishes a program to fund the development of advance batteries, component parts, infrastructure, and other technologies supporting plug-in electric drive vehicles and charging infrastructure.[57] A main focus of this research is to determine best practice for recycling batteries and other parts once exhausted.[58] The Act appropriates $1.535 billion to carry out the research under this section.[59] Furthermore, the Secretary is to establish the Advanced Batteries for Tomorrow Prize to award $10 million in cash to incentivize the research of a 500-mile vehicle battery.[60] Subtitle B also requires research of the raw materials needed for the manufacture of plug-in electric drive vehicles and the best resources for such materials.[61]

Subtitle C amends the Public Utility Regulatory Policies Act of 1978 to require all electric utilities to develop a plan investigating the potential impacts of electric drive vehicles on the generation, distribution infrastructure, and operation of the transmission grid in the service area.[62] The electric utility may waive the required study if it determines that it will not be impacted by deployment of electric drive vehicles within five years of this Act, but such waiver will be given at the sole discretion of the Secretary.[63]

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52. *Id.* § 2111(c).
53. *Id.* § 2111(a).
54. *Id.* § 2114(a)(1), (3).
55. *Id.* § 2115(b)–(c).
56. *Id.* § 2117(a)(1)–(b)(1).
57. *Id.* § 2121(a)(1).
58. *Id.* § 2121(d)(1).
59. *Id.* § 2121(e).
60. *Id.* § 2122.
61. *Id.* § 2123(a)(1)–(4).
62. *Id.* § 2131(a).
63. *Id.*

III. Division C—Clean Energy Jobs and Consumer Savings

Title XXX creates the "Home Star Retrofit Act of 2010."[64] The Silver Star Home Retrofit Program is described at length, including a listing of sixteen eligible energy- and water-saving measures that qualify for rebate and the value of each rebate, not to exceed $3,000 per home.[65] The Gold Star Home Retrofit Program, which applies to whole-home retrofits, is designed to award rebates by the percentage of energy savings.[66] Homeowners would be awarded $3,000 for a 20-percent reduction in whole-home energy consumption and $1,000 for each additional 5-percent reduction, with a set maximum rebate.[67] The Secretary is directed to create a database allowing rebate aggregators to submit claims for reimbursement, to create a website providing information on how to participate in the program, and to provide information to contractors relating to program requirements.[68]

Title XXX also implements a system whereby rebate aggregators would process applications and disburse approved rebates.[69] Quality assurance providers, independent agents, will assess contractors' qualifications and compliance with other program requirements.[70] A random sampling of homes renovated under the Home Star Retrofit Act is subject to third-party field verification by these quality assurance providers.[71] Additionally, all homeowners will be covered by a warranty for a one-year period, during which they may file a complaint with a quality assurance provider.[72] Any defects must be brought into compliance with the Act's quality standards within two weeks of notification.[73]

The Treasury is to provide $5 billion to fund the title.[74]

IV. Division D—Protecting the Environment

Title XL creates the "Land and Water Conservation Authorization and Funding Act of 2010."[75] The amendments provided herein make the authorization and funding of land and water conservation projects

64. *Id.* § 3001.
65. *Id.* § 3007.
66. *Id.* § 3008.
67. *Id.* § 3008(b).
68. *Id.* § 3003(b)(1)(A).
69. *Id.* § 3005(b).
70. *Id.* § 3006(a).
71. *Id.* §§ 3007(f)(3), 3008(d)(4).
72. *Id.* §§ 3007(g)(1), 3008(f)(1).
73. *Id.* §§ 3008(f)(4)(A), 3008(d)(5)(A).
74. *Id.* § 3016(a)(1).
75. *Id.* § 4001.

established under the Land and Water Conservation Fund Act of 1965 (1965 Act) consistent and reliable.[76] The Act makes $900 million available in each fiscal year between 2011 and 2015 to carry out the purpose of the 1965 Act.[77] After 2015, the amount allocated annually is then varied until the fiscal year of 2021, at which time the amount available is set at $500 million per year.[78]

Title XLI would create the "National Wildlife Refuge System Resources Protection Act of 2010,"[79] which generally provides that any person who destroys or damages any refuge system resource is liable to the United States for response costs and damages resulting from such destruction.[80] Any instrumentality causing such damage or loss will be liable *in rem* to the United States for response costs.[81]

Title XLII applies to the restoration of the Gulf Coast ecosystems, including coastal zones and areas of the outer Continental Shelf negatively impacted by the Deepwater Horizon blowout.[82] From fiscal years 2012 through 2021, $2.5 billion will be made available by the Oil Spill Liability Trust Fund to the Gulf Coast Ecosystem Restoration Task Force, in order to provide for the conservation, protection, the restoration of the Gulf Coast ecosystem.[83]

Title XLII amends Title III of the Emergency Planning and Community Right-to-Know Act of 1986[84] to require persons using hydraulic fracturing for oil or natural gas wells to disclose the chemicals used in each fracturing process, whether or not it is required by the state.[85]

V. Division E—Fiscal Responsibility

The Oil Spill Liability Trust Fund is established by the United States Treasury to cover removal costs and damages resulting from oil spills.[86] The primary source of funding comes from a tax on crude oil and petroleum products.[87] Division E increases the applicable Oil Spill Liability Trust

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76. *Id.* § 4002(a).
77. *Id.* § 4003(a)(1).
78. *Id.* § 4003(a)(2)–(4).
79. *Id.* § 4101.
80. *Id.* § 4103(a).
81. *Id.* § 4103(b).
82. *Id.* § 4201(a)(3).
83. *Id.* § 4201(b)(2)–(3).
84. Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001–11050 (2009).
85. Clean Energy, *supra* note 2, §4301(a).
86. I.R.C. § 9509.
87. I.R.C. § 4611(c)(2)(B).

Fund rate to 45 cents per barrel.[88] It also increases per incident disbursement limitations from $1 billion[89] to $5 billion.[90]

VI. Division F—Miscellaneous

The Act's budgetary affects are subject to the Statutory Pay-As-You-Go Act of 2010[91] which requires budget neutrality on new revenue and direct spending legislation.[92]

VII. Current Status

After the 2010 midterm elections, the Democrats lost their majority in the House and saw their majority in the Senate diminished.[93] The last action on this bill occurred on July 29th, 2010.[94] At this time, it seems unlikely that the bill will be passed into law.

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88. Clean Energy, *supra* note 2, § 5001(b).
89. I.R.C. § 9509(c)(2)(A).
90. Clean Energy, *supra* note 2, § 5001(c).
91. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8.
92. Clean Energy, *supra* note 2, § 6001.
93. Jeff Zeleny, *G.O.P. Captures House, but Not Senate*, N.Y. TIMES, Nov. 3rd, 2010, at A1,.
94. THOMAS Library of Congress, Bill Summary and Status, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S3663: (last visited March 16th, 2011).