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Environmental Protection, Unfair Competition and the U.S.-Canada Free Trade Discussions*

by Van Carson**

On Thursday, March 19, 1987, President Reagan, possibly fearing an unfriendly reception in Canada in early April, once again promised to spend \$5 billion over the next five years for acid-rain research. The President said he will ask Congress for \$500 million a year which, after five years will total \$2.5 billion, one-half of the U.S. commitment. Presumably, the rest will come from industry but the Administration has not released any details on how those expenditures will be mandated.

President Reagan's March 19, 1987 pledge is presumably a direct response to the public outcry in Canada over the perceived change between March of 1986 and the President's budget message in early January, 1987. President Reagan, in a meeting last March in Washington with Canadian Prime Minister Mulroney, agreed to a 5-year, \$5 billion program aimed at developing technology to eliminate sulfur dioxide emissions. At the same time, President Reagan seemingly dropped his long time insistence that there is no conclusive scientific evidence linking sulfur dioxide emissions to acid-rain.

A plan of action developed in May, 1986 envisioned a \$5 billion, 5-year commercial demonstration program in the United States to be half public and half privately financed. As envisioned, the demonstration program was intended to develop "clean-coal" technology that was commercially usable and, in particular, could be retrofitted to existing coal-burning power plants. The January, 1987 budget proposal, however, included only \$199 million for the U.S. Department of Energy's Clean-Coal Technology program and \$88 million for other projects; included in this was \$55 million for the Environmental Protection Agency. Most of the proposed expenditures were already planned before the stepped-up program was agreed to in the spring of 1986. To make matters worse, Reagan's budget message to Congress seemed to renew doubts that acid-rain is even a problem, a stand many believed he had dropped in March of 1986.

On February 10, 1987, Interior Secretary Donald Hodel leaped into

* Editors Note: The following article was compiled from the transcript of a speech delivered at the Conference. It contains a number of quotations and assertions which the author attributes to specific individuals. These quotations and assertions have not been footnoted, but the source for each is in the list of reference materials shown at the end of the speech. Any questions about specific assertions may be addressed to the author in care of the *Journal*.

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the fray. In speaking with reporters, Hodel accused the Canadians of "doublespeak" in seeking tighter U.S. controls on acid-rain while trying to increase sales of electricity to the United States. Restrictions on coal-fire generation in this Country, he said, would "have the effect, whether it was their intention or not, of increasing the potential market for excess Canadian electricity to the U.S." The remarks drew a sharp response from Ambassador Allen Gotlieb. In a letter to Hodel, Gotlieb called the comments "misguided" and said he was "amazed that these views could be espoused by a cabinet secretary in President Reagan's Administration." In a response to Gotlieb, released on February 18, 1987, Hodel made clear that he did not intend to back down.

Hodel's heated charge that Canada is pushing U.S. acid-rain controls in order to sell its excess energy in the United States was disavowed by the White House on March 18, 1987. White House spokesman Marlin Fitzwater said that he does not share Hodel's analysis.

The 10 year old debate over acid-rain and the more recent charges of unfair competition with respect to Canadian power sales to the United States seems certain to impact Canada-U.S. relations in the 1980's, and in particular, may have an adverse impact on the current free trade discussions. In light of the recent controversies, acid-rain and power imports, I would like to examine the current acid-rain situation from the perspective of an environmental attorney, and to briefly review the current power import situation and future prospects.

ACID-RAIN: CONGRESS READY TO RESUME THE BATTLE

Acid-rain is one of those issues that divide the United States by region. Members of Congress from northeastern states argue that emissions from power plants and major industry in the midwest are destroying their lakes, streams, and forests. For the past several years, they have strongly favored controls which would heavily effect states like Illinois, Indiana, Ohio, Pennsylvania, Kentucky, and West Virginia. These states rely on coal as a chief source of energy and primary source of jobs. Not surprisingly, members from those states oppose acid-rain controls. House Energy Committee Chairman, John D. Dingell, D-Michigan, says that although acid-rain seems to have an enormous constituency, "its causes and its cure are at best at this time obscure, if not, in fact, unknown."

Senator Robert C. Byrd, D-West Virginia, has recently said there is no need for congress to mandate new emission controls on coal-burning facilities because government studies indicate that less than 1% of U.S. lakes are acidified and no western lakes are affected. Byrd has indicated that the bills before Congress asking for billions of dollars to curb emissions would lead to massive job disruption, worsen the U.S. trade deficit, and cause electricity rates to soar, "all in the name of dealing with a crisis that does not exist."

Acid-rain legislation obviously has some very powerful foes: Dingell whose Energy Committee has jurisdiction, and Byrd, the new Senate Majority Leader. If Byrd follows through with his threat to block a bill that would hurt his coal-mining constituents, as Majority Leader he would have little trouble accomplishing that result.

The Administration has sided with the opponents, insisting more study is needed. Lee M. Thomas, Administrator of the Environmental Protection Agency, has testified that EPA needs two to three years of additional research before deciding whether new emission controls are needed.

Action in The Senate:

The Senate Environment and Public Works Committee has favored acid-rain legislation for several years. The issue will be handled in the 100th Congress by a subcommittee on environmental protection headed by Senator George J. Mitchell, D-Maine. Maine is one of the states that allegedly suffers most from acid-rain and Mitchell has been a vocal supporter of acid-rain controls. Mitchell introduced a bill in the 99th Congress that was directed at the 31 states east of the Mississippi River. It required a 10-million ton annual reduction in sulfur dioxide emissions and a cap on nitrogen oxide emissions at 1980 levels. It contained no subsidy provisions to assist in the miner and utility displacement problems in the midwestern states.

This year, Mitchell introduced a new acid-rain bill that would reduce sulfur dioxide emissions by 12-million tons by 1996 and sets stringent standards on automobile emissions. The bill gives states more flexibility in meeting pollution standards than a similar bill introduced by Senator Stafford, R-Vermont, ranking republican on the Senate Environment Committee. Mitchell's bill also calls for limiting the sulfur content of diesel fuel to 0.05% and calls for a Treasury Department study on imposing additional trade tariffs based on Canada's or Mexico's sulfur emissions. Mitchell, who also serves on the Senate Finance Committee, said the competitive effects on environmental regulation in the U.S. will be examined during the course of debate on the trade deficit.

House of Representatives:

House proponents lead by Henry A. Waxman, D-California, hope to push an acid-rain bill through the 100th Congress. The legislation, if similar to that introduced in the 99th Congress, will require reductions in annual emissions, at power plants, smelters, and automobiles. Starting from a 1980 base of 23.2-million tons of sulfur dioxide and 20.3-million tons of nitrogen oxide, the earlier bill called for reductions of 9-million and 4-million tons, respectively. States would have had 11 years to meet the new levels. The earlier bill attempted to limit clean up costs by pro-

viding subsidy to states that would be hit hardest. Money for the subsidy was to be raised from a national tax on electricity.

The Congressional Office of Technology Assessment estimated that the sulfur dioxide controls alone would cost between \$3.8 billion and \$4.9 billion annually. Estimates by the Edison Electric Institute put annual costs at \$9.2 billion.

One of the problems that House supporters of acid-rain will encounter is keeping acid-rain out of entanglements with other air issues. Most environmental practitioners expect the Clean Air Act to be substantially overhauled in 1987. For example, the December, 1987 deadlines for meeting ozone levels in heavily populated areas (30 to 35 major urban areas) will be missed. This and issues of toxic air emissions will need to be addressed.

The Evidence of Damage:

Acid precipitation is caused by sulfur dioxide and nitrogen oxide emissions that are transported through the atmosphere, chemically changed and then returned as rain or snow. The National Academy of Sciences (NAS) believe it has found conclusive evidence that the burning of coal and other fossil fuels causes environmental damage. The report on acid-rain, described by NAS as the most comprehensive to date, blames coal-burning for acidified lakes and other adverse environmental effects. In March, EPA said as yet unreleased studies showed 300 lakes in the U.S. could be acidified by acid-rain in the next 50 years if nothing is done.

The coal industry, one of the strongest forces working against acid-rain controls, maintains there is no need for acid-rain legislation. The National Coal Association reports that sulfur dioxide emissions are decreasing because of existing controls and stricter standards for new plants.

The utilities argue that the Clean Air Act sufficiently limits emissions for now and that new clean-coal technologies are the ultimate answer to a cleaner environment. They also argue that the deadlines in the bills introduced to date would lock in the use of costly scrubbers and divert resources from more innovative clean-coal technologies.

The Canadian Position:

Canadian officials say that half of the sulfur dioxide that falls on Canada's eastern provinces is exported from the United States and that the cumulative effect has been devastating. Acid-rain, they contend, is causing serious environmental and economic damage in an area of more than one million square miles. Canada has initiated a program to cut its sulfur dioxide emissions in half, about two million tons, from 1980 levels by 1994.

What Canada is seeking from the United States is an agreement

which includes: agreement to a wet sulfate disposition no greater than 18lb/acre/yr in vulnerable areas as an environmental objective; significant emission reductions aimed at achieving the objection; and a bilateral mechanism to monitor progress and recommend changes to abatement programs.

From the Canadian perspective, the adequacy of any U.S. abatement program will be judged in terms of the extent to which that program, in concert with the Canadian program, achieves the 18 lb/acre/yr objective. Since a ton of emission reductions in the U.S. southwest would not materially advance Canadian objectives, most of their effort has been directed at the U.S. midwest.

The fate of acid-rain legislation in the United States, over and above the expenditures for development of clean-coal technology, would depend in great measure on the ability of the parties to compromise. Ohio, one of the midwestern states which will be most impacted by any acid-rain control legislation, says it is not trying to block acid-rain legislation. The opponents of acid-rain legislation also have to be concerned about continuing to try to totally block action which many observers believe to be an ultimate losing proposition. Many lobbyists agree that the utility and coal industry would be better served by working a compromise while Dingell and Byrd still have some degree of control in the House and Senate over acid-rain legislation.

CANADIAN POWER IMPORTS

For many years the flow of power between the United States and Canada was relatively balanced. However, since 1970 U.S. utilities have purchased increasing quantities of Canadian electricity. For the most part, imported electricity has been used to displace the output of U.S. utilities' existing oil- and gas-fired power plants. Net U.S. imports of Canadian electricity have grown from 2.4 million megawatt hours (mwh) in 1970, to 39.5 million mwh in 1984. Current sales agreements call for the trend to continue, with 44.7 million mwh scheduled for delivery in 1989. Under the power sales contracts, the price charged for imported power is generally set as a percentage (80% to 95%) of the purchasing utility's cost for domestic sources of electricity. The Canadian price advantage results from Canada's large hydroelectric resource base. Hydropower, which is produced at dams using falling water to generate electricity, is generally less expensive than other forms of power generation because of the lack of fuel costs. In addition, hydropower is ordinarily produced at facilities which were constructed, in whole or in part, with taxpayer funds.

Canada's vast hydroelectric resources are the predominant means of generating electricity in that Country and are the key to its ability to maintain the relatively low electricity prices that make imports increasingly attractive to U.S. utilities. Nearly 60% of Canada's capacity in the

provinces of Brunswick, Quebec, Ontario, and Manitoba is supplied through hydropower. According to recent reports, Manitoba and Quebec have extensive economically attractive hydroelectric potential that has not been developed.

Acid-rain legislation, at a cost of \$4 to \$9 billion dollars per year to consumers, would substantially widen the gap between the cost of Canadian hydropower and American fossil fuel generated power. As indicated above, existing Canadian imports have been principally used to offset higher priced oil and gas generated electricity. However, if the cost of coal generated electricity in the midwest increases dramatically, the advantages of imported power would be much greater.

At the present time, there are little or no U.S. constraints on purchasing Canadian power. What restraints there are result primarily from Executive Order 10485, which requires that construction of an electrical transmission line crossing the U.S. international border be licensed (Presidential Permit). The Department of Energy (DOE) is the federal agency currently responsible for issuing Presidential Permits.

The purpose of the Presidential Permit is to insure that the territorial integrity of the United States is protected. According to the DOE's interpretation, "territorial integrity" means that any connection linking the United States to a foreign country will have no adverse effects on the *physical* territory of the United States. The use of Presidential Permits began in the late 1930's, and as of October 1985, a total of 15 Permits were in effect.

In reviewing applications for Presidential Permits, DOE applies two criteria and receives input from the Departments of Defense and State to determine whether granting the permit will protect the territorial integrity of the United States and will be consistent with the public interest. The two criteria are an environmental impact evaluation and an assessment to determine whether the proposed transmission facility will adversely effect U.S. electrical power system facilities (a technical reliability assessment).

The environmental review is pursuant to the National Environmental Policy Act of 1969 (NEPA) and is limited to a review of the environmental impacts of the proposed transmission facility. Therefore, a deeper analysis of the impacts of displacing existing generating capacity in the United States and/or fossil fuel supplies is not made.

On the basis of information provided by the applicant, DOE's Office of Environmental Compliance determines what level of analysis needs to be done. The three levels of analysis are: (1) an immediate finding of no significant environmental impact; (2) an environmental assessment if it is unclear whether there is a significant environmental impact and more information and study needs to be done to make a decision; and (3) an environmental impact statement (EIS) when it is clear there is a definite

significant impact. Of 15 Permits issued since 1977, DOE has required an EIS in five cases, and has granted a permit in each of those.

DOE's technical reliability review of a proposed interconnection is rather straight forward, and is principally an engineering determination to ensure that inter-connected power systems remain within acceptable voltage, loading and stability limits during normal and emergency conditions. Again, there is no in-depth analysis of the impact on the U.S. utility's generating capacity, etc.

As indicated above, an addition to DOE's environmental and reliability reviews, DOE is required to obtain concurrence from the Secretaries of State and Defense before a permit is issued. DOE provides State with a description of the transmission facility and a description of any conditions of the permit, and DOE's recommendation for approval. State evaluates the information for foreign policy impacts, including overall trade relations, open access to each country's energy markets, and reduced trade barriers. To date, State has concurred with every DOE approval recommendation.

Defense evaluates the permit information provided for national security impacts. This generally requires concurrence from the particular service branch that may have a military installation located near the transmission facilities. To date, Defense has followed every DOE recommendation for permit approval.

Concerns related to U.S. dependency on electrical imports appear to focus on two issues: whether the level of imports represented by contracts is excessive in relation to domestically supplied power, and whether a foreign source will be reliable. Addressing the same issues, the General Accounting Office concluded that "we find that the level of imports represented by current purchase contracts will not exceed dependency levels considered acceptable by utilities." GAO concluded that concerns related to a U.S. utility's over reliance on Canadian electricity in terms of current contractual commitments appear to be unwarranted. Of course, this situation could change dramatically if the cost advantages of Canadian power were relatively more significant. At the present time, the percentages of power do not appear to be significant and there does not appear to be any reason for concern over dependency.

In light of the foregoing, it does not appear that the actual purchase commitments of imported power support Secretary Hodel's concern that the Canadian concern for acid-rain is motivated by a desire to sell more electricity to the United States. On the other hand, it does not appear that DOE and State have evaluated the true economic and environmental impacts of its permit granting process to allow the flow of more than \$1 billion of Canadian electrical power to the United States. Obviously, any further controversy between Canada and the United States over the acid-rain issue could result in a review process which would be more extensive and more time consuming. Such a review would further impact relations between Canada and the United States.

CONCLUSION

It is apparent that the current controversy over acid-rain, and resource utilization, including the import of Canadian hydroelectric power, will have a significant impact upon U.S.-Canadian relations in the immediate future.

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