Ayres Law Group

Air & Energy Policy Alert

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Air & Energy Outlook 2011

Congress

The composition of the 112th Congress is very different from the last. In the House, Republicans gained a 242-193 majority by adding 63 seats. Republicans gained six seats in the Senate, for a total of 47 to Democrats' 53, making it much more difficult for Democrats to achieve the 60 votes necessary to overcome a filibuster threat on proposed legislation.

With a Republican-controlled House and weakened Democratic majority in the Senate, the new Congress is likely to be even more polarized than before. Many of the new members are relatively new to politics. In the House, Republicans replaced many moderate "Blue Dog" Democrats.

The new Republican majority in the House means that Republicans will chair the House Committees and thus control the legislative agenda. Congressman Fred Upton (R-MI) is now chairman of the House Energy and Commerce Committee. Congressman Ed Whitfield (R-KY) will head the new Energy and Power Subcommittee and Congressman John Shimkus (R-IL) will chair the new Environment and Economy Subcommittee. The House Appropriations Subcommittee on Interior, Environment, and Related Agencies, which has jurisdiction over EPA appropriations, will be chaired by Congressman Mike Simpson (R-ID).

The jurisdiction of the Energy and Power Subcommittee will include EPA oversight, examination of federal renewable electricity mandates, and funding for renewable energy and energy efficiency projects under the American Recovery and Reinvestment Act of 2009.

The Environment and Economy Subcommittee jurisdiction will include a focus on the EPA-proposed coal ash regulations and review of proposals to reform the Toxic Substances Control Act (TSCA).

Since Democrats retain the majority in the Senate, they will continue to decide what issues are taken up. Senator Boxer, who chairs the Environment Committee, has vowed she will oppose Republican attempts to weaken the Clean Air Act and will do all she can to advance measures to control global warming.

President Obama, of course, may veto any bill he does not like. The President's veto can be overcome, but only with a supermajority that seems unlikely for most issues.

Such a divided government is normally a recipe for gridlock, preventing any significant legislation. The biggest question in the Capitol these days is whether the sharply divided Congress and the President will be able to negotiate legislation successfully.

Climate issues are a case in point. Measures to limit or eliminate EPA's authority to regulate greenhouse gas emissions are high on the Republican priority list. Within the first two days of the Congressional session, three Representatives introduced bills to curb or revoke EPA's authority: Reps. Marsha Blackburn (R-TN) (H.R. 97), Shelley Moore (R-WV) (H.R. 199), and Ted Poe (R-TX) (H.R. 153). This week, three Senators have also introduced bills to delay or entirely eliminate EPA's climate authority: Sen. James Inhofe (R-OK) with House Energy and Commerce Committee Chairman Fred Upton (R-MI); Sen. John Barrasso (R-WY); and Sen. Jay Rockefeller (D-WV). The bills range from Rockefeller's proposal to delay EPA action on greenhouse gas emissions for two years to Barrasso's sweeping "discussion draft" prohibiting EPA from any future GHG regulation, as well as invalidating prior actions, including EPA's "endangerment finding," and severely restricting states' ability to limit GHG emissions under state law.

It appears that some form of a bill limiting EPA's authority could pass easily in the House, and might succeed in the Senate as well. But it remains to be seen whether President Obama would sign such a bill. His decision may be more difficult to make if the restrictions on EPA are tucked into an appropriations bill.

Another hot topic for the 112th Congress is a "clean energy standard" (CES) that would mandate that utilities generate a portion of power from sources with fewer greenhouse gas emissions than coal. A CES could include federal assistance for generation from renewable sources like wind and solar, and also from nuclear, coal with carbon capture and storage, and natural gas. Conventional coal-fired power would likely be the big loser. With support for coal strong in both houses of Congress, most think the chances of passage a CES are still very slim.

President Obama may have increased those chances when, in his State of the Union address, he proposed a CES that would double the amount of electricity from clean energy sources from 40% today to 80% by 2035. Clean energy sources under the proposal would include renewables and nuclear

EPA

National Ambient Air Quality Standards. The Clean Air Act requires EPA to review and revise, if appropriate, the primary (health-based) and secondary (welfare-based) air quality standards every five years. EPA is expected to review the standards for ozone, particulate matter, and carbon monoxide in 2011.

GHG "Tailoring Rule" and BACT Guidance. As of January 2, 2011, most permits issued under the Clean Air Act for large stationary sources are required to include the "best available control technology" (BACT) for greenhouse gas emissions. In most cases, the state issues the permit and must determine what BACT is for the source in question. In November, 2010, EPA published a guidance document intended to help states with their case-by-case BACT analyses. The guidance focused mainly on procedural issues but also offered two main examples of technologies states may want to consider in their BACT analyses: 1) energy efficiency and 2) carbon capture and geological sequestration for large stationary sources such as industrial manufacturing facilities and power plants. EPA is working on additional sources of guidance for states, such as a GHG Mitigation Technologies Database that will list potentially available technologies by sector.

New Source Performance Standards (NSPS). As part of settlement agreements in two federal court cases, EPA has agreed to propose NSPS for greenhouse gas emissions from new and modified electric generating units (EGUs) and refineries by July 26, 2011 and December 15, 2011, respectively. The standards must be completed by May 26, 2012 and November 15, 2012, respectively. EPA also agreed to issue emission guidelines for existing EGUs and refineries that would be subject to the new source performance standards if they were new facilities.

Transport Rule. In 2008 the U.S. Court of Appeals for the District of Columbia Circuit vacated the Clean Air Interstate Rule (CAIR). The Court ruled that the cap-and-trade plan, which was expected to significantly reduce sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions from power plants in 28 eastern states, failed to assure the reductions in emissions needed for attaining the NAAQS as required by the Clean Air Act, and that it illegally retired SO_2 allowances under the acid rain program. Last July, EPA proposed a replacement for CAIR that would set state emissions budgets, allow unlimited trading of allowances within a state, and provide limited interstate trading. A final rule is expected later this year.

MACT Standards for Boilers and EGUs. The Clean Air Act directs EPA to require the "maximum available control technology" (MACT) for major sources of "hazardous air pollutants." The U.S. Court of Appeals for the D.C. Circuit vacated EPA's 2004 standards for hazardous air pollutant emissions from industrial boilers, requiring EPA to revise the standards by January 16, 2011.

EPA requested a 15-month extension of that deadline to give the agency more time to review the nearly 5,000 comments it received on the proposed rule. The court agreed only to a one-month extension, imposing a February 21, 2011 deadline for EPA's final rule. Many are concerned that the proposed rule is too stringent, but without more time to review the comments, EPA may not be able to make many changes to the proposed rule.

EPA has announced it is working on proposing another MACT standard for mercury emissions from EGUs. The agency expects to issue a proposed rule in March 2011.

"Coal Combustion Residuals." On June 21, 2010, EPA proposed a change in the treatment of coal ash, or "coal combustion residuals." EPA offered two alternative proposals. One option would treat coal ash as a hazardous waste under the Resource Conservation and Recovery Act (RCRA) Subtitle C. The other option would treat coal ash as a non-hazardous waste under RCRA Subtitle D. Industries that use coal ash in products such as wall board and concrete argue that such a designation would unnecessarily drive up costs for their products, while environmentalists support the hazardous waste designation. A final rule deciding the issue is expected this year.

Cooling Water Regulations. As part of a litigation settlement agreement, EPA has announced it will propose technology standards for cooling water intake structures for existing facilities under Section 316(b) of the Clean Water Act. The proposed standards are expected by March 14, 2011. The final rule is expected by July 27, 2012. At issue is whether the large number of older EGUs with once-through cooling will be required to install cooling systems that cycle cooling water, drawing only limited make-up water from nearby water bodies.

Carbon Capture and Sequestration. EPA completed two rules related to CCS in December 2010. The first set requirements for geological sequestration of CO_2 and created a new class of injection well (Class VI) under the Underground Injection Control (UIC) Program administered by EPA under the Safe Drinking Water Act. EPA's second rule amends its greenhouse gas reporting program to require facilities carrying out geological sequestration to report the amount of CO_2 sequestered.

DOE

Carbon Capture and Sequestration. The Department of Energy recently published the third U.S. carbon storage atlas, which preliminarily estimates that the U.S. and Canada have available between 1,800 and 20,000 billion metric tons of CO_2 storage potential translating into 500 to 5,700 years of storage at current emission rates.

Energy Efficiency. Consumer tax credits for energy efficiency were extended into 2011 through the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 passed late last year, but at reduced levels back to those in effect in 2006 and 2007.

The Administration's budget proposes new funding for energy efficiency initiatives at the DOE, building off the Recovery Act's funding for energy efficiency programs. The proposal would more than double funding to date ($400 million) for the DOE's Advanced Research Projects Agency–Energy (ARPA-E) Program supporting basic energy research and technology development. Other areas to receive funding would include research and development for technologies to reduce energy use in buildings and advanced manufacturing for energy-related materials technology. The President's budget would also create three additional Energy Innovation Hubs facilitating collaboration among U.S. scientists, including one focused on energy efficiency in buildings.

FOR ADDITIONAL INFORMATION

The Ayres Law Group represents a broad array of clients in the public and private sectors in high-stakes clean air law and policy matters. ALG uses its extensive experience in the legislative, administrative, and federal judicial process to solve clients' problems. We closely monitor developments in Congress and the Executive Branch with respect to air pollution control, climate change, and energy. If you would like more information about how we can help your organization in any of these areas, please contact us at (202) 452-9200 or ayresr@ayreslawgroup.com.