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ENERGY AND ENVIRONMENT UPDATE

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Brief 111th Congress Review and 112th Congress Preview

At the beginning of the 111th Congress, an ambitious clean energy policy was one of the pillars of the Democrats' Congressional agenda. While the Recovery Act contained billions of dollars in investment and tax incentives for renewable energy and clean energy manufacturing, by the end of the Congress, the Senate was unable to enact a longer-term federal energy policy. The Senate did not pass a cap and trade program, nor was there sufficient support for a renewable electricity standard (RES). During intensive negotiations on the Lame Duck tax package, Congress did extend the 1603 Grants in Lieu of Tax Credits Program by one year, but the 48C Advanced Energy Manufacturing Tax Credit program was not expanded.

At a year-end press conference, President Obama acknowledged that energy reform remains a major piece of unfinished business, and he expressed willingness to work with Republicans. However, an influx of freshman Republicans hostile to the idea of climate change and skeptical of federal support for renewable energy may threaten new policies supporting clean energy innovation and efforts to reduce carbon emissions. Some proposals from last Congress will not be feasible in the new Congress: cap and trade is dead for the foreseeable future (according to one poll, 86% of Congressional Freshmen oppose climate change legislation), and a clean energy standard including nuclear and clean coal appears poised to replace RES proposals from the 111th Congress.

While the policy options will change to reflect the altered political landscape, a bipartisan consensus for energy reform in the abstract does exist. A key question yet to be answered is whether Congress decides to work on a comprehensive energy bill or instead pass piecemeal measures. Adding to the complexity of negotiations is that the administration will face increasing pressure from ascendant House Republicans who have vowed to conduct aggressive oversight of EPA regulatory efforts on greenhouse gas (GHG) emissions.

Several Republicans have laid down markers for collaboration with the Obama administration on proposals to reduce the amount of electricity utilities derived from fossil fuel sources. Senators Susan Collins (R-ME), Chuck Grassley (R-IA), and John Ensign (R-NV) signed onto a Democratic-backed RES proposal last fall that would require utilities to derive 15% of their power from renewable sources by 2021. Also last Congress, Senator Lindsey Graham (R-SC) released a draft proposal of a competing clean energy standard that would allow utilities to use renewables as well as nuclear power and clean coal technologies to meet a similar mandate. Energy Secretary Steven Chu recently asked lawmakers to think seriously about the idea, and Senator Lisa Murkowski (R-AK), who will remain Ranking Member of the Senate Energy and Natural Resources Committee in the 112th Congress, has also expressed support for a clean energy standard. Several Senate Democrats, including Energy Chairman Jeff Bingaman (D-NM), and Senator Mark Begich (D-AK), have begun to express guarded optimism about the possibility of a compromise on the proposal. For Senator Graham, who says the nation must quickly transition to clean technology, this might mark an opportunity to reinsert himself in the center of the energy debate following his sudden repudiation of the Kerry-Lieberman climate change bill.

Though on temporary hold following the beginning of what is sure to be extensive court battles this year, the EPA began to regulate greenhouse gas emissions under the Clean Air Act on January 2, 2011. Under the rule, industries that are large emitters of GHGs, and are planning to build new facilities or make major modifications to existing ones, must obtain air permits and implement energy efficiency measures or, where available, cost-effective technology to reduce their GHGs emissions.

The Recovery Act's allocation of \$6 billion to cover subsidy costs for the Department of Energy Section 1705 loan guarantee program made the program much more appealing to renewable energy applicants and effectively jumpstarted the program. The subsidy cost varies by project and is based on the probability of default and the amount of recovery by the government in the event of default. Previously, under the Section 1703 loan guarantee program authorized by the 2005 energy bill, applicants had to pay upfront the subsidy costs for the loan guarantee (nuclear and clean coal projects still must pay subsidy costs). To date, the Department of Energy's Loan Programs Office has committed support for 21 clean energy projects, 12 of which have closed, totaling nearly \$25 billion in loan guarantees and nearly \$40 billion in total project costs. However, Congress has rescinded several billion dollars from the 1705 loan guarantee program, leaving it with approximately \$2.5 billion for subsidy costs. Moreover, this Recovery Act program is slated to expire after September 30, 2011. Senate Majority Leader Harry Reid (D-NV) has promised to restore the rescinded subsidy cost funding to the program, but it looks increasingly unlikely that all \$3.5 billion will be restored. Instead, lawmakers have been trying to add a smaller level of appropriations to cover subsidy cost for the 1703 program, as it, unlike the 1705 program, does not expire in 2011. In fact, the omnibus appropriations bill proposed in the Senate in December would have provided \$406 million in subsidy costs for the 1703 program; it also would have provided additional guarantee authority to nuclear projects. The short-term continuing resolution that did pass provides no additional funding for subsidy costs, but efforts are already underway to provide funding for certain 1703 loan guarantees.

Some policymakers, including Senator Bingaman, would like to convert the loan guarantee program into an independent Clean Energy Deployment Administration or "green bank" that would support renewable energy industries with direct loans, loan guarantees, insurance, and other credit mechanisms. Such a proposal was included in the cap and trade legislation in the last Congress, and a revamped proposal may be included if comprehensive energy legislation is taken up in the 112th Congress.

Frustrated with the lack of progress in the 111th Congress, Senator Bingaman is likely to redouble his efforts in the 112th Congress to collaborate with Senator Olympia Snowe (R-ME) to advance fuel-saving provisions. In late September, Senators Bingaman and Snowe, a top Republican with the Finance Committee, introduced a bill known as the Advanced Energy Tax Incentives Act of 2010, which aimed to enhance energy efficiency, deploy renewable energy, and strengthen the country's manufacturing sector. Some provisions that were included in the bill and that may see additional attention in the 112th Congress include performance-based tax credits for whole-home retrofits; \$2.5 billion for 48C tax credits for advanced energy manufacturers or other similar 48C expansion; \$1 billion in energy efficiency tax credits for manufacturers to advance their competitiveness; a tax incentive for storage systems for wind and solar energy; a retooled tax credit for carbon capture and storage; and funding for natural gas vehicles.

In December 2010, Congress extended for one year the Volumetric Ethanol Excise Tax Credit (VEETC) at 45 cents per gallon and the ethanol tariff at 54 cents per gallon. The House was poised to reduce VEETC to 36 cents, and retaining the subsidy at 45 cents cost an extra \$1 billion that could have been spent on other clean energy technologies. Congress did not enact several policies that had been advocated by the advanced biofuels community, such as opening up the cellulosic production tax credit to algal fuels and allowing for the creation of an investment tax credit for advanced biorefineries. The ethanol tax credit faces opposition from several important members of Congress, and it is widely believed that this is the last year VEETC will exist in its current form. Going forward, biofuel tax credits may be reconfigured on a sliding scale based on the carbon intensity of the biofuel. The reauthorization of the Farm Bill in 2012 will be the major vehicle for biofuels policy, such as the cellulosic production tax credit and the renewable biomass definition.

The U.S. Department of Agriculture (USDA) is expected to announce a change to its 9003 biorefinery loan guarantee program to allow commercial bonds into the program. USDA also will announce three to four conditional loan guarantees for biorefinery projects. At least one biofuel project is also undergoing the final stages of negotiations for a conditional guarantee with the DOE.

The House will see significant change in the leadership affecting energy and environmental policy.

Representative Fred Upton (R-MI) is the new chair of the House Energy and Commerce Committee, replacing Congressman Henry Waxman (D-CA), who will become ranking member. Representative Joe Barton (R-TX) is chairman emeritus, and Representative Sue Myrick (R-NC) will serve as Vice Chairwoman. Congressmen Ed Whitfield (R-KY), John Shimkus (R-IL), and Mary Bono Mack (R-CA) will serve as chair of the Subcommittees on Energy and Power; Environment and Economy; and Commerce, Manufacturing and Trade, respectively.

In the House Natural Resources Committee, Congressman Doc Hastings (R-WA) will be the new chair, replacing Representative Nick Rahall (D-WV), and Congressman Ed Markey (D-MA) will serve as ranking member. The Chairman-elect announced December 29th the establishment of a Subcommittee on Indian and Alaska Native Affairs, taking over responsibilities previously handled by the full committee. Republican Representatives Doug Lamborn (CO), John Fleming (LA), Rob Bishop (UT), Tom McClintock (CA), and Don Young (AK) will chair the Energy and Mineral Resources; Insular Affairs, Oceans and Wildlife; National Parks, Forests and Public Lands; Water and Power; and Indian and Alaska Native Affairs Subcommittees, respectively.

With Republicans taking over the House and increasing oversight and investigations of the Obama Administration, it will fall to the Senate to outline a potential legislative compromise on energy and environmental policy. Senator Bingaman will continue as the chair of the Energy and Natural Resources Committee, and Lisa Murkowski will be ranking member. The two share a good working relationship. Other key individuals in the Senate include Majority Leader Harry Reid, who has shown particular interest in renewable energy and supporting natural gas-powered vehicles; Senator Lamar Alexander (R-TN), who has worked with Democrats on reducing industrial emissions and sees the potential for compromise on nuclear power and electric vehicles; Senators Joe Lieberman (I-CT) and John Kerry (D-MA), who led the effort on climate change legislation in the Senate in the 111th Congress; and Senator Bob Corker (R-TN), who has voiced skepticism about energy subsidies. As chair of the Senate Finance Committee, Senator Max Baucus (D-MT) will be a deciding factor in determining what happens to a variety of energy tax incentives that will expire at the end of 2011, and Senator Orin Hatch will be the new ranking minority member. Senate Environment and Public Works Committee leadership will remain the same with Senator Barbara Boxer (D-CA) chairing the committee and Senator James Inhofe (R-OK) serving as ranking member.

Congress

The House and Senate will convene the 112th Congress on January 5th.

Department of Energy

Twenty New Activities Excluded

The Department of Energy is scheduled to publish a proposed rule in the Federal Register January 3rd that would add 20 new categorical exclusions under the National Environmental Policy Act of 1969. The proposed rule would exclude activities ranging from stormwater runoff control to solar photovoltaic systems, to wind turbines to biomass power projects and other industrial activities from being required to submit lengthy environmental impact statements in order to receive development permits on federal land or in other circumstances requiring federal approval. Comments on the proposed rule will be accepted until February 17th.

Department of Interior

Wind Project Request for Interest (ROI) Issued

The Department of Interior published a notice December 29th issuing a request for interest in commercial wind projects off the coast of Massachusetts. The request is a preliminary step as the department plans to issue new leases on the outer continental shelf as part of its November Smart from the Start program.

Environmental Protection Agency

State GHG Regulation on Hold

Temporarily concluding rapid-fire court battles last week, the U.S. Court of Appeals for the District of Columbia Circuit ordered an emergency stay of the Environmental Protection Agency's interim final rule December 30th. The rule, set to take effect January 2nd, would have allowed the agency to takeover GHG permitting for new and modified sources in Texas, and the court decided to further consider the merits of the emergency motion for a stay. All states but Texas, including several that have sued the EPA in opposition of the plans, have agreed to work with the agency until the lawsuits are resolved. Earlier in the day, Texas Attorney General Greg Abbott filed a petition for review and the emergency motion asking the court to block implementation of the interim final rule, which was published December 30th. Under the rule, the agency would revoke its approval for part of the Texas Clean Air Act state implementation plan, enabling the agency to issue GHG permits in the state once permitting and control requirements for the emissions took effect January 2nd. The court's order directed the agency to file a response by January 6th. Incoming House Energy and Commerce Committee Chair Fred Upton reiterated his commitment last week to delaying the EPA from regulating GHGs under the Clean Air Act, a belief shared by many of his Republican colleagues in the House and Senate. Senator Jay Rockefeller (D-WV) also said last week that he hoped to return to discussion of his two-year delay of the rules early in the 112th Congress.

\$9.9 Million for BEACH Act Monitoring

The Environmental Protection Agency will publish a notice in the Federal Register January 3rd making available \$9.9 million in 2011 funds under the Beaches Environmental Assessment and Coastal Health Act to support microbiological monitoring and public notification programs for coastal recreational waters.

Federal Trade Commission

Light Bulb Labeling Postponed

The Federal Trade Commission proposed December 22nd to postpone until 2012 the effective date for a new labeling standard for light bulb packages designed to help consumers make more informed decisions about purchasing compact fluorescent bulbs. The commission is seeking public comment on delaying the effective date of the new packaging requirements by six months from July 19, 2011 to January 1, 2012.

Miscellaneous

Bird Safeguards Sought

The American Bird Conservancy released a statement December 29th calling on the federal government, including the Departments of Energy and Interior, to establish strong standards to prevent American bird deaths from wind energy development. The organization's statement comes amid government efforts to accelerate wind energy development to 20% of the nation's electricity by 2030.

Massachusetts GHG Plan Released

Massachusetts Secretary of Energy and Environmental Affairs Ian Bowles outlined a plan December 29th for the state to reduce greenhouse gases 25% below 1990 levels by 2020. The plan adopts the maximum reduction mandated by the state's 2008 Global Warming Solutions Act, which requires the state to achieve GHG reductions of between 10-25% by 2020 and 80% by 2050.

Japan Delays GHG Trading

The Cabinet of Japanese Prime Minister Naoto Kan decided December 28th to delay plans to introduce legislation in 2011 to establish a GHG emissions trading program. Though the decision came under industry pressure, government officials reaffirmed that the nation would strive to achieve a 25% GHG reduction by 2025 and 30% by 2030 compared with 1990 levels. The government also intends to proceed

forward with plans to introduce an environment tax in fiscal year 2011 and to expand a program requiring utilities to purchase surplus energy from solar production to include other renewable sources.

France Tightens Vehicle Standard

The French government announced December 26th a significant tightening of requirements under its Bonus-Malus program designed to encourage purchases of low emitting vehicles and discourage sales of higher-emitting vehicles. Less generous bonus terms took effect January 1, 2011. In just over three years, the costly program has produced a 12% reduction in average CO2 emissions from new vehicles and significantly reduced fuel consumption.

\$1.3 Billion for Japanese Development

The Japanese Ministry of Economy, Trade, and Industry announced a \$1.3 billion subsidy December 27th to fund the development of hybrid vehicles, batteries, and lighting via 153 private-sector business projects. Under the program, 142 companies will undertake 153 separate projects using up to \$181.9 million in government financing for a project.

Court Finds No Authority

A Montana district judge ruled December 12th that a Canadian developer of a high-voltage power line has no authority to condemn private property. The ruling could impact other developers of electric power projects that are trying to meet the demands of wind developers seeking greater transmission capacity.